
(2000) 08 KL CK 0030

In the High Court Of Kerala

Case No : O.P. No's. 12120 and 12776, 12803 and 13102 etc. etc. of 2000

V. Kunhabdulla and Another

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 03-08-2000

Acts Referred:

Arbitration Act, 1940 — Section 16

Constitution of India, 1950 — Article 14, 226, 243

Kerala Panchayat Raj Act, 1994 — Section 10, 10(1), 10(2), 10A

Citation : AIR 2000 Ker 376 : (2000) 3 ILR (Ker) 692

Hon'ble Judges : K.A. Mohamed Shafi, J; K. Narayana Kurup, J

Bench : Division Bench

Advocate : Ramaprasad Unni, T.P. Gopinath, Saiby Jose Kidangoor and P. Rajkumar and K. Ramakumar, for the Appellant; A.G., M.K. Damodaran, N. Nandakumara Menon and M. Sasindran, for the Respondent

Final Decision : Allowed

Judgement

Narayana Kurup, J.—The dispute highlighted in this batch of writ petitions which have been referred to us by a learned single Judge relates to the de novo delimitation of wards in the various Grama Panchayats in the State by the State Election Commission (for short "Election Commission") in the purported exercise of his power u/s 10A of the Kerala Panchayat Raj Act (for short "the Act") in flagrant violation of his own guidelines and well settled principles of law resulting in upsetting the delimitation of wards ordered by the District Collector -- who is the delegate of the Election Commission -- after an elaborate exercise of local inspection, publication of preliminary notification, final notification, hearing of affected parties etc. Petitioners allege that the Election Commission has done so with the mala fide intention of dancing to the tune of the political parties in power which amounts to gerrymandering and which is objectionable in law. It is, therefore, prayed that the orders of delimitation passed by the Election Commission u/s 10A of the Act be quashed as utterly mala fide, totally introducing new boundaries which are not there at all. In some cases prayers

have been made to grant a declaration that Section 10A of the Act is arbitrary, unreasonable and confers ungulded power on the Election Commission and is therefore liable to be declared as unconstitutional.

2. We may first deal with the latter category of cases in which the vires of Section 10A of the Act are under challenge.

3. We heard learned counsel for the petitioners, learned Advocate-General Mr. M.K. Damodaran and Mr. N. Nandakumara Menon, learned counsel for the Election Commission.

4. The main thrust of the contention of the learned counsel for the petitioner is that Section 10A of the Act introduced by Act 13/ 2000 in as much as it confers power on the Election Commission to review any order passed by the Government or the Authorities Officer is inconsistent with the provisions of the Act, arbitrary, and violative of the principles of natural justice offending Article 14 of the Constitution of India, and since orders passed u/s 10A of the Act is beyond scrutiny by a Court of Law barring judicial review, it is violative of the basic structure of the Constitution and the Rule of Law entrenched therein. Per contra, it is contended by the State and the Election Commission that in the light of Article 243(o) of the Constitution of India the validity of Section 10A of the Act as added by Act 13/ 2000 shall not be called in question in any Court of Law which operates as a complete bar to judicial review and as such the writ petitions are not maintainable, the orders passed by the Election Commission will have force of law" when published in the Gazette and in that view the same will be "law" for the purpose of Article 243(o) of the Constitution and as such beyond challenge before any Court of Law and powers of delimitation exercised by the Election Commission is a legislative function to which principles of natural justice will not apply, and in any case, the power of review vested in Election Commission u/s 10A of the Act is unlimited and in that sense no shackles can be placed on the Election Commission to pass any order as it deems fit while exercising the power of review u/s 10A.

5. The first contention of the respondents as already noticed is based on Article 243(o) of the Constitution which ousts the jurisdiction of the Courts in electoral matters and in particular Article 243(o)(a) by which the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 243(k) shall not be called in question in any Court. In other words, there is a bar of judicial review of the validity of any law relating to delimitation of constituencies or the allotment of seats to such constituencies made or purporting to be made under Article 243(k) of the Constitution. Under Article 243(k)(1) of the Constitution 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, and under Sub-section (4) thereof subject to the provisions of the 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. On an anxious consideration of the aforesaid contention of the learned counsel we are not impressed by the same for the following reasons : Article 243(o)(a) which bars the jurisdiction of any Court to consider the validity of any law relating to delimitation of constituencies or the allotment of seats to such constituencies will not get attracted where sweeping changes are made by the Election Commission to the delimitation order duly passed and published by the District Collector after hearing objections etc., under the guise of the power of review conferred on him u/s 10A of the Act when the whole election process is yet to begin and there is ample time left to undo the harm done by the former. In such a situation, this Court can exercise jurisdiction under Article 226 of the Constitution at least for the limited purpose of testing the constitutional validity of the provision (Section 10A) under which the Election Commission has passed the impugned orders varying the original order of the District Collector without going into the merits of the order itself. The whole object of division of every panchayat into constituencies (wards) u/s 10 of the Act is to ensure that every citizen should get a fair representation to the Grama Panchayat. The result of any election under a majority system depends in fact not only on the way people vote but on the way their votes are distributed among the constituencies/wards. It is, therefore, impermissible for the Election Commission to re-distribute the wards u/s 10A of the Act so as to give an unfair advantage to the party in power to gain control over the local bodies, State of Madhya Pradesh and Others Vs. Devilal, Paragraph 16). This is precisely what is focussed in these cases as is clear from the averments made in this batch of writ petitions as already observed. On the facts disclosed and upon perusal of files produced before us we have reasons to believe that the attempt of the Election Commission is to gerrymander the division of wards in such a way as to materially affect the constitution of the Panchayat resulting in undue advantage to one party in colourable exercise of its power u/s 10A of the Act. Therefore, where an election is slated to be held after subjecting the constituencies to "gerrymander it could not be said that a petition under Article 226 of the Constitution is not maintainable. In Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, the Hon"ble Supreme Court after posing the question as to whether Article 329(b)" of the Constitution (which is in pari materia with Article 243(o)(b) is a blanket ban on all manner of questions which may have impact on the ultimate result of the election arising between the notification by the President calling for the election and the declaration of the result by the Returning Officer and after considering its earlier decision in the case of N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, held that the plenary bar of Article 329(b) rests on two principles : (1) The peremptory urgency of prompt engineering of the whole election process without intermediate interruptions by way of legal proceedings challenging the steps and stages in between the commencement and the conclusion. (2) The provision of a special jurisdiction (Article 329(b) is similar to Article 243(o)(b)) which can be invoked by an aggrieved party at the end of the election excludes other form, the right and

remedy being creatures of statute and controlled by the Constitution. This position had already received the imprimatur of the Supreme Court in *Durga Shankar Mehta Vs. Thakur Raghuraj Singh and Others*, way back in 1954 wherein the apex Court supplemented the same by holding that once Election Tribunal has decided, the prohibition is extinguished and the Supreme Court's overall power to interfere under Article 136 springs into action. In *Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others*, the apex Court upheld the rule in *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others*, excluding any proceeding including one under Article 226, during the on going process of election, understood in the comprehensive sense of notification down to declaration. Beyond the declaration comes the election petition and beyond the decision of the Election Tribunal the ban of Article 329(b) does not bind. From the aforesaid decisions it is clear that the bar 1. 329. Bar to interference by courts in electoral matters--Notwithstanding anything in this Constitution xx xx (b) no election to either house of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature of jurisdiction of the Courts arises between the notification by the competent authority calling for the election and the declaration of the results by the Returning Officer. A free and fair election based on universal adult franchise is the basic, the regulatory procedures are the specifics. The Act read with relevant provisions of the Constitution constitute the package of electoral law governing elections to the Grama Panchayats. The conduct of elections is in the hands of the Election Commission who is vested with vast powers in that regard. However, this power is not unbridled. Judicial review will still be permissible over the statutory body exercising its functions affecting public law rights. (*Digvijay Mote v. Union of India*, (1993) 4 SCC 175 : (AIR 1993 SCW 2895 Para 9). We may, at this stage, usefully quote *Judicial Remedies in Public Law*-Clive Lewis, Page 70 :

"The term "public law" has, in the past, been used in at least two senses. First, it may refer to the substantive principles of public law governing the exercise of public law powers, and which form the grounds for alleging that a public body is acting unlawfully. These are the similar *Wednesbury* principles. A public law "right" in this sense could be described as right to ensure that a public body acts lawfully in exercising its public law powers. The rights could be described in relation to the individual heads of challenge, for example, the right to ensure that natural justice is observed, or to ensure that the decision is based on relevant not irrelevant considerations, or is taken for a purpose authorised by statute, or is not *Wednesbury* unreasonable. Secondly, "public law" may refer to the remedies that an individual may obtain to negative an unlawful exercise of power. These are essentially remedies used to set aside unlawful decisions, or prevent the doing of unlawful acts, or compel the performance of public duties. These remedies now include the prerogative remedies of *certiorari*, *mandamus* and *prohibito*, and the ordinary remedies of declarations and injunctions when

used for a public law purpose involving the supervisory Jurisdiction of the Courts over public bodies,"

Again at page 122 it is stated :

"Statute may impose a duty on a public body to act in certain circumstances and may grant corresponding rights to an Individual. There may still be the question of whether or not the circumstances exist or the individual has demonstrated his eligibility. That question may be matter for the public body to determine. If the public body makes some error of law or other public law Wrong in coming to its, determination, the Court may quash the determination."

In the light of the foregoing discussion and under the facts and circumstances brought to our notice, we are of opinion that the bar created under Articl 243(o) (a) of the Constitution will not be attracted in a case where the action of the Election Commission is found to affect the very purity and probity of election cutting at the very root of the democratic process in gross violation of public law rights. In such a situation a petition under Article 226 of the Constitution will be certainly maintainable especially before the election process is set in motion.

6. It was then contended that since the Election Commission is neither a Court or Tribunal jurisdiction under Article 226 stands excluded. Here again, we find the argument untenable. We will now examine the question as to whether the Election Commission is a Tribunal or Court. It is common knowledge in legal parlance that all Tribunals are not Courts, though all Courts are Tribunals. The word "Courts" is used to designate those Tribunals which are set up in an organised State for the Administration of Justice. By Administration of Justice is meant the exercise of judicial power of the State to maintain and uphold "rights" and to punish "wrongs". Whenever there is an infringement of a right or an injury the Courts are there to restore the vinculum juris which is disturbed. (See Harinagar Sugar Mills Ltd. Vs. Shyam Sundar Jhunjhunwala and Others, . In that case Hidayatullah, J. said :

"By "Courts" is meant Courts of civil judicature and by "tribunals", those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controverles. This is undoubtedly one of the attributes of the State and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. Broadly speaking, certain special matters go before Tribunals, and the residue goes before the ordinary Courts of civil judicature. Their procedures may differ, but the functions are not essentially different. What distinguishes them has never been successfully established. Lord Stamp said that the real distinction is that the Courts have "an air of detachment". But this is more a matter of age and tradition and is not of the essence. Many Tribunals, in recent years, have acquitted themselves so well and with such detachment as to make this test Insufficient."

in our opinion the more appropriate test will be to consider whether there is a

"lis" -- an affirmation by one party and denial by another. When the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a Tribunal, though it does not have all the trappings of a Court. In *Associated Cement Companies Ltd. Vs. P.N. Sharma and Another*, at page 1606) the Supreme Court said :

"..... The main and the basic test, however. Is whether the adjudicating power which a particular authority is empowered to exercise, has been conferred on it by a statute and can be described as a part of the State's inherent power exercised in discharging its judicial function. Applying this test, there can be no doubt that the power which the State Government exercises under Rule 6(5) and Rule 6(6) is part of the State's judicial power..... There is, in that sense, a "lis"; there is affirmation by one party and denial by another, and the dispute necessarily Involves the rights and obligations of the parties to it. The order which the State Government ultimately passes is described as its decision and it is made final and binding."

By applying these well known and accepted tests of what constitutes a Tribunal, the speaker or the Chairman, acting under paragraph 6(1) of the Tenth Schedule of the Constitution has been held to be a Tribunal. In *Shri Kihota Hollohon Vs. Mr. Zachilhu and others*, the Supreme Court held that the Speaker while exercising powers and discharging functions under the Tenth Schedule acts as Tribunal adjudicating rights and obligations under the Tenth Schedule and his decisions in that capacity are amenable to judicial review. It was also held that the concept of statutory finality embodied in paragraph 6(1) does not detract from or abrogate judicial review under Articles 136, 226 and 227 of the Constitution in so far as infirmities based on violations of constitutional mandates, mala fides, non-compliance with Rules of Natural Justice and perversity are concerned. Therefore, the question relating to the jurisdiction of the High Court to entertain writ petitions challenging the orders of the Speaker now stands concluded by the aforesaid judgment of the Supreme Court in *Shri Kihota Hollohon Vs. Mr. Zachilhu and others*, wherein the provisions of Paragraph 7 of the Tenth Schedule" which bars jurisdiction of Courts in respect of any matter connected with the disqualification of a member of a House under the Schedule have been held to be unconstitutional and it has been held that the Speakerwhile passing an order in exercise of his powers under sub-paragraph (1) of paragraph 6 of the Tenth Schedule functions as a Tribunal" and the order passed by him is subject to judicial review under Articles 32, 136, 226 and 227 of the Constitution. That apart, we have to remind ourselves that in the case of superior Court of Record like the High Court it is for the Court to consider whether any matter falls within Its Jurisdiction or not. Unlike a Court of limited jurisdiction the superior Court is entitled to determine for itself questions about its own jurisdiction. (See in this connection Special Reference No, 1 of 1964 In the matter of: Under Article 143 of the Constitution of India, at page 789). We feel that in a situation like the present one, absence of judicial review will create a constitutional despot beyond

the pale of accountability: a "Frankenstein's monster" who may manipulate the system into elected despotism. There cannot be any dispute that, the power conferred upon the Election Commission under the Constitution and the Act is very wide and do not contain any limitation. But the said power being a constitutional and public law power is amenable to Judicial review on certain limited grounds and the narrow area in which the exercise of power by the Election Commission could be subjected to Judicial review included the grounds where the decision is perverse or mala fide or based on wholly extraneous and Irrelevant grounds and is therefore no decision at all. Of course, the power exercised by the Election Commission u/s 10A is indeed a very drastic power and the order passed by the Election Commission under the said provision is made final and conclusive and cannot be assailed on any ground. But this immunity from attack cannot apply where the challenge is not, that the satisfaction is improper or unjustified but that there is no satisfaction at all, in such a case, it is not satisfaction arrived by the Election Commission which is challenged but the existence of the satisfaction-itself (See in this connection S.R. Bommai and others Vs. Union of India and others etc. etc.,), We may wind up the discussion on this aspect by observing that the power vested in the High Court to exercise judicial superintendence over the decisions of all Courts, Tribunals and public bodies exercising public law powers within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Court divested of all other judicial functions apart from that of Constitutional interpretation, is equally to be avoided. The power of judicial review is basic Structure of the Constitution (of). (See L. Chandra Kumar Vs. Union of India and others, . Therefore, we have no hesitation in repelling the contention of the respondents that the jurisdiction of the High Court is excluded by virtue of the bar created under Article 243(o) of the Constitution of India and to hold that the power of Judicial review being a basic structure of the Constitution is very much available to see that the Election Commission has acted within the contours of the Constitution and the Law.

7. We may now proceed to consider the second limb of the contention of the respondents, viz. that an order passed by the Election Commission will have force of "law" when published in the Gazette and in that view the same be "law" for the purpose of Article 243(c) of the Constitution and as such beyond challenge before any Court of Law. Much reliance was placed on the decision of the Supreme Court in Meghraj Kothari Vs. Delimitation Commission and Others, wherein it was held that an order made by the Delimitation Commission u/s 9 and published as a notification u/s 10(1) of the Delimitation Commission Act, 1962 was a "law" relating to delimitations under Article 327 and could not be questioned in any Court because of the express provisions of Article 329(a). Having considered the aforesaid decision we are afraid the same will be of no assistance to the respondents in advancing their case before us. Of course, it is true that Section 10(1) of the Delimitation Act, 1962 provides that "upon publication in the Gazette of India every such order shall have the force of law

and shall not be called in question in any Court of Law. However, in the Act what is provided u/s 10(3) is that the order made by the Authorised Officer shall not be called in question in any Court of Law. u/s 10A or u/s 10(3) of the Act nothing is provided to the effect that the order will have force of law after it is published in the gazette. The decision in Meghraj Kothari Vs. Delimitation Commission and Others, is clearly distinguishable since the provision considered therein is Section 10(2) of the Delimitation Commission Act, 1962 which expressly provided that the delimitation order when published in the gazette shall have the force of law. In paragraph 16 of the judgment it was, therefore, held that an order u/s 8 or 9 and published u/s 10(1) would not be saved merely because of the use of the expression "shall not be called in question in any Court." But if by the publication of the order in the Gazette of India it is to be treated a law made under Article 327, Article 329 would prevent any investigation by any Court of law. However, as there is no provision in Section 10A that the order passed by the Election Commission will have force of law when published in the Gazette, the same will not be law for the purpose of Article 243(o) and therefore a writ petition preferred under Article 226 will be perfectly maintainable. The reliance placed by the respondents on Meghraj Kothari Vs. Delimitation Commission and Others, is therefore thoroughly misplaced. That apart it stands to reason that the order of delimitation passed by the District Collector after undertaking a lengthy exercise, thereby exhausting the power relating to delimitation should enjoy complete immunity from being called in question in any Court of Law (vide Section 10(3) of the Act)³ much less by a lesser authority like Election Commission whose only power is to rectify errors apparent on the face of the record (vide. Section 11 of the Act) and not to sit in judgment over the order of the Collector like an appellate or revisional authority. Section 10(3) thus gives finality to the order passed by the Collector u/s 10(1) which cannot be touched subsequently by the Election Commission (except to correct errors apparent on the face of the record as enjoined u/s 11 of the Act)⁴ under the purported exercise of the power to review conferred u/s 10A added by Act 13/2000. An order passed u/s 10A does not enjoy a similar protection provided for an order passed u/s 10(1) of the Act. No finality is attached to the order passed by the Election Commission u/s 10A and no bar is provided so as to prevent a challenge of the order under Article 226. The net result therefore, is that the bar under Article 243(o) of the Constitution is not attracted to the facts of the present case. In this context it is pertinent, to note that the bar under Article 243(o) necessarily pre-supposes the existence of a valid law. If the law is vulnerable to attack under the Constitution being offensive to Article 14 and similar provisions of the Constitution such law cannot claim immunity from judicial review under Article 243(o)(a).

8. That takes us to the third contention, viz. the power of delimitation is a legislative function to which principles of natural justice will not apply and therefore the orders passed by the Election Commission is not liable to be nullified on the ground of infraction of the principles of natural justice. In other

words, the Election Commission in the exercise of its power under the Act is not subject to the Rules of natural justice any more than is legislature itself. According to the respondents, the rules of natural justice are not applicable to legislative action plenary or subordinate. Therefore, the question that falls for consideration is what is the nature of the function exercised by the Election Commission under the Act. Relying on the expression "conduct of elections" occurring in Article 324 of the Constitution it was submitted that the Election Commission is a purely legislative body. The aforesaid contention was considered by the Supreme Court in *Shri Sadiq Ali and Another Vs. The Election Commission of India, New Delhi and Others*, where the Court observed that the power under Article 324 is conditioned by the Rules made by the Central Government for the conduct of all elections and the words "conduct of elections" would not make the Commission a purely legislative body. Learned counsel for the respondents also cited the decision of the Supreme Court in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, in support of their contention that the functions exercised by the Election Commission are legislative in character. On a perusal of the aforesaid decision we find that the said case nowhere lays down that the Commission possesses plenary powers -- both executive and legislative-- in the guise of conduct of elections. Analysing the scope of the powers of the Election Commission under Article 324. Krishna Iyer, J. speaking for the Court observed that no one an imperium in imperio in our constitutional order and that it is reasonable to hold that the Commissioner cannot defy the law armed with Article 324. Likewise it has been held that his functions are subject to the norms of fairness and he cannot act *arbitrarily*. The Court observed that unchecked power is alien to our system. The Court went on to observe that Article 324 operates in areas left unoccupied by the legislation and the words "superintendence, direction and control" and as well as "conduct of all elections" are the broadest terms. The observation of the Supreme Court furnished a complete answer to the arguments of the respondents as it has been clearly held that Article 324 (which corresponds to Article 243k dealing with elections to panchayats) would operate only in areas left unoccupied by legislation, even if the widest possible connotation is given to the language of Article 324. In *T.N. Seshan v. Union of India* (1995) 4 SCC 611: (AIR 1995 SC 3341) the Constitution Bench of the Supreme Court while considering the nature of functions of the Election Commission ruled that it discharges public functions which are administrative as well as quasi-judicial barring certain adjudicative and legislative functions. The Election Commission has to lay down certain policies, decide on certain administrative matters of importance as distinguished from routine matters of administration and also adjudicate certain disputes. viz. disputes relating to allotment of symbols etc. Therefore, besides administrative function it may be called upon to perform quasi-Judicial duties and undertake occasionally subordinate legislative making functions as well. But that will not make it an essentially legislative body discharging legislative functions. Its predominant functions are essentially administrative. According to Kenneth Culp Davis :

"What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity."

Similar views have been echoed by Chief Justice Burger and Bernard Schwartz. Nobody will dispute that the order of the Election Commission will operate upon individuals of the constituency in their individual capacity. In fact it has been ruled by the apex Court in *State of U.P. and others etc. Vs. Pradhan Sangh Kshettra Samiti and others etc.*, at 1530 that the change in the areas of the local bodies results in civil consequences affecting individuals entitling them to a fair hearing in conformity with the principles of natural Justice. In the light of the aforesaid discussion by no stretch of Imagination can it be said that the power of de-limitation exercised by the Election Commission is essentially a legislative function to which principles of natural justice will not apply. Accordingly, we repeal the contention of the respondents based on natural justice and hold that the function of the Election Commission in the matter of de-limitation is adjudicative--and not legislative--to which principles of natural justice will apply.

9. Finally we shall consider the vires of Section 10A of the Act. u/s 10A the Election Commission may, suo motu or on application review any order issued u/s 10 and pass such order as it deems fit. Therefore, going by the very phraseology of the section there can be no doubt that it confers wide powers on the Election Commission to review any orders passed by the Government or the Authorised Officer u/s 10 of the Act. Section 10(1) of the Act confers power on the Government or an authorised officer authorised by them --here the District Collector -- to divide every Panchayat into as many constituencies as there are seats and fix the boundaries of such constituencies. Section 10(1)(b) confers power on the Government to determine the constituency or constituencies which shall be reserved for the Scheduled Castes or the Scheduled Tribes and for women. Section 10(2) of the Act lays down the modalities for inviting objections and suggestions in relation to the proposals which are published in regard to matters mentioned in Sub-section (1). De-limitation of wards and demarcation of constituencies, is, therefore, conceived as a process involving the members of the public as such, conferring a right on them to object to any proposal and to make suggestions regarding the manner in which the wards will have to be demarcated and constituencies located and determined. The orders so passed by the Government or the Authorised Officer u/s 10(2)(d) is also made statutorily beyond any challenge in any Court of law. (Vide Section 10(3) which provides that an order "made by the Government or the Authorised Officer under this Section shall not be called in question in any Court of Law." supra). Section 10A confers power on the Election Commission to review any order passed u/s 10(2) of the Act by the Government or the officer authorised and to pass such order as he deems fit? Significantly, Section 10A does not contain any provision similar to that contained in Section 10(2)(a), (b) and (c) of the Act. The Election

Commission can, therefore, proceed to upset a carefully drawn out plan demarcating the boundaries and de-limiting the constituencies in any Panchayat after undergoing the whole gamut of the process prescribed in Sub-section (2) of Section 10 of the Act. Section 10A does not oblige the Election Commission to publish the proposals in regard to the matters mentioned in Sub-section (1) of Section 10 with a notice specifying the date on or after which the proposals will be considered by it. It does not mandate the Election Commission to invite objections and suggestions with respect to the proposals before it. It does not require the Election Commission to publish in the Gazette and in any two local news papers the fact of publication of the proposals. Again, it does not oblige the Election Commission to consider any objections and suggestions that might have been received by it. In short, whereas Section 10 contemplates a process which adheres to the principles of reasonableness and fairness and considerations of the objections and suggestions which could be made by the members of the public, who will be affected by the demaraction of wards and de-limitation of constituencies, Section 10A confers arbitrary and unbridled power on the Election Commission to upset any carefully laid out order which has been brought into existence after thoroughly undergoing the process mentioned in Sub-section (2) of Section 10 of the Act without even notice to any member of the public who will be affected thereby. It is in this context that, therefore, Section 10A of the Act especially when juxtaposed with the modalities prescribed in Sub-section (2) of Section 10 of the Act contemplates conferral of arbitrary power on the Commission which is violative of Article 14 of the Constitution of India. Even giving the benefit of presumption of constitutionality of any provision, Section 10A will be violative of Article 14 of the Constitution because it does not prescribe the modalities which will have to be followed by the Election Commission while considering any application for review of any order that is passed u/s 10(2). The process u/s 10(2) which is carefully and meticulously followed by the authorised officer could be upset in one stroke and the Election Commission can substitute its own order u/s 10A, as has been done here, for the order which has been passed by the Government or the authorised officer u/s 10(2)(d) without assigning any reason whatsoever for the changes effected. In fact, we find the orders passed by the Election Commission u/s 10A are stereotyped. Files do not disclose that any effective hearing is given to the aggrieved parties. No reasons are stated in the order passed in review. In fact there is no obligation for the Election Commission to state reasons nor to give an opportunity of being heard to the affected parties. Everything depends upon the whim and fancy of the Election Commission. Another aspect we notice is that Section 10 of the Act puts the order passed u/s 10(2) of the Act on a high pedestal as making it beyond challenge in any Court of Law. (Vide Section 10(3) noted supra). At the same time, conferring review power on the Election Commission to pass any order as it thinks fit in relation to any final order that is passed u/s 10(2)(d) of the Act without prescribing the guidelines as to the manner of exercise of power under conferment of an arbitrary and uncanalised power violatiive of Article 14 of the Constitution. Conferral of arbitrary power

cannot be Justified by subjecting its exercise to "guidelines" devised by the repository of the power himself in the absence of statutory guidelines vesting of such unguided and unbridled power cannot be held to be valid merely because the power is to be exercised by a high official. Be it remembered that every power has legal limits and unchecked power is fraught with tyrannical potential and is frowned upon by Courts and the Election Commission is no exception.

10. Inconsistency and the anomaly brought about by the introduction of Section 10A read with Section 10(3) of the Act is apparent. Where Section 10(3) of the Act states that an order passed u/s 10(2) of the Act by the Government or by the authorised officer is beyond any challenge in any Court of Law, Section 10A confers power on the Election Commission to interfere with such final orders which are beyond the scrutiny of a Court of Law and to substitute Its order with the order passed u/s 10(2)(d). When once an order has been passed by the authorised officer we are of opinion that it would not be safe to confer on the Election Commission the power of review in respect of the said order without imposing any limitation whatsoever on the exercise of such power. Even when a Court is conferred the power of review such power can be exercised ordinarily under the well known limitations as are found in Order 47 of the Code of Civil Procedure. Similarly u/s 16 of the Arbitration Act, 1940 the power to remit an award to the Arbitrator can be exercised by a Civil-Court only under the circumstances specified in that section. Section 10A of the Act with which we are concerned imposes no such limitation whatsoever. Therefore, we are satisfied that an arbitrary power is conferred on the Election Commission which again is violative of the basic structure of the Constitution of India.

11. Section 10-A in our considered opinion suffers from another legal infirmity. Section 10(1) confers power on the State Election Commission itself or an authorised officer to effect delimitation of wards. Therefore, the repository of power u/s 10 is the State Election Commission who has to effect the delimitation. By statutory mandate that power can be delegated to an authorised officer, herein the District Collector. Ext. P1 guidelines have been prescribed by the State Election Commission to have a smooth and proper exercise of power by the District Collector and the Election Commission is conferred with full power to rectify the defects on the orders passed by the District Collector. Having delegated this power to the District Collector, the Election Commission cannot be conferred with a power of review of orders passed by an authorised officer except rectification of apparent errors. The power of review can be conferred only on the authority exercising original power and the authorised officer being delegate of the State Election Commission there cannot be a power of review for the State Election Commission over the orders passed by the authorised officer. Thus Section 10-A is unreasonable and arbitrary for this reason and is unworkable also. As the above provision does not prescribe any procedure, the same is totally unreasonable in nature. For this reason also it is violative of Article 14 of the Constitution of India.

12. We find from a perusal of the files produced before us that in all cases where orders of delimitation have been passed by the District Collector objections were invited from the members of the public and the objections so made were considered by him. Local inspections were also conducted and the ground realities were assessed and ultimately order was passed demarcating the wards and delimiting the constituencies. On the contrary, what the Election Commission did was to vary the original order passed by the District Collector by passing orders u/s 10-A without affording sufficient opportunity to the affected parties to project their case. The original order was passed by the District Collector after hearing the affected members of the public. The public had a right to be heard and entitled to give suggestions regarding the demarcation of wards and delimitation of constituencies. The public also had a right to sustain the order passed by the District Collector and any variation of the order passed by the District Collector without giving notice to the members of the public as such who are affected thereof has again resulted in arbitrary exercise of power which is vitiated and liable to be struck down. The Election Commission has not chosen to follow any procedure on the lines mentioned in Section 10(21) of the Act. On the contrary, he has passed orders substantially varying the original order passed by the District Collector u/s 10(2)(d). As already noticed, the orders passed by the Election Commission are stereo-typed, laconic and non-speaking.

No reason at all is seen mentioned in the impugned order as to why he has interfered with the orders passed by the District Collector, This is arbitrariness to the core rendering Section 10-A liable to be declared as unconstitutional. Any arbitrary action, whether in the nature of a legislative or administrative or quasi-judicial exercise of power is liable to attract the prohibition of Article 14 of the Constitution. (Vide Constitution Bench decision in *M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others*, at page 1295. paragraph 46). As stated in *E.P. Royappa Vs. State of Tamil Nadu and Another*, "equality and arbitrariness are sworn enemies: one belongs to the rule of law in a republic while the other to the whim and caprice of an absolute monarch". Unguided and unrestricted power is affected by the vice of discrimination : *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, at pp. 630,632. The principle of equality enshrined in Article 14 must guide every State action whether it be legislative, executive, or quasi-judicial. : *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, at page 1642; *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, and *T. Barai Vs. Henry Ah Hoe and Another*, In *State of U.P. and Others Vs. Renuagar Power Co. and Others*, , *Mukharji, J.* as he then states that the exercise of power whether legislative or administrative will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary. Similarly, if the power has been exercised on a non-consideration or non-application of mind to relevant factors the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will

stand vitiated. The true position therefore, is that any act of the repository of power, whether legislative or administrative or quasi-judicial is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of law of the land or it is so arbitrary or unreasonable that no fair-minded authority ever have made it. It is disturbing to note that Section 10-A does not provide any guidelines to the Election Commission in the exercise of his power u/s 10-A. Therefore, the provision (Section 10-A) cannot be upheld in the absence of necessary statutory guidelines for the exercise of the power conferred on the Election Commission especially having regard to the fact that the proceedings before the District Collector is definitely in the nature of quasi-judicial proceeding where parties have adequate opportunity to state their respective cases, to lead evidence and make all their submissions. The power conferred u/s 10-A is an absolute power. If such a power is conceded to the Election Commission it would be open to him to interfere with any order passed by the District Collector delimiting the constituencies. In this connection it is useful to refer to the following observations made by a Constitution Bench of the Supreme Court in *P. Sambamurthy v. State of Andhra Pradesh* AIR 1987 SC 663, in which the validity of Clause (5) of Article 371(d) of the Constitution of India which conferred power on the Government of Andhra Pradesh to modify or annul any order passed by the Administrative Tribunal constituted under that Article, arose for consideration. While striking down Clause (5) of Article 371(d) of the Constitution of India the Apex Court observed thus (at pages 666-667) :

"It is obvious from what we have stated above that this power of modifying or annulling an order of the Administrative Tribunal conferred on the State Government under the proviso to Clause (5) is violative of the rule of law which is clearly a basic and essential feature of the Constitution. It is a basic principle of the rule of law that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but must also be in accordance with law and the power of judicial review is conferred by the Constitution with a view to ensuring that the law is observed and there is compliance with the requirement of law on the part of the executive and other authorities. It is through the power of judicial review conferred on an independent institutional authority such as the High Court that the rule of law is maintained and every organ of the State is kept within the limits of the law. Now if the exercise of the power of judicial review can be set at naught by the State Government by overriding the decision given against it, it would sound the death-knell of the rule of law. The rule of law would cease to have any meaning because then it would be open to the State Government to defy the law and yet to get away with it. The proviso to Clause (5) of Article 371(d) is therefore clearly violative of the basic structure doctrine."

We hasten to add that even though the decision of the District Collector in the present case cannot be equated with the decision of the Administrative Tribunal constituted under Article 371(d) of the Constitution of India in all respects, the danger of entrusting unguided and uncontrolled power on the Election

Commission can very well be perceived particularly where the de-limitation order of the District Collector may not be to the liking of the powers-that-be. In our considered opinion there must be sufficient guidelines or indications available in the statute itself as to the circumstances in which the power can be invoked. Under our constitutional set-up nobody is above law.

However, wide and unlimited the power of review be. It cannot run riot: for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course. All public power including constitutional power shall never be exercisable arbitrarily or mala fide and, ordinarily, guide-lines for fair and equal execution are guarantors of the valid play of power. We take it that these axioms are valid in our constitutional set-up.