

## I N D E X

Sl. No.	Particulars of Document	Page no. of part to which it belongs		Remarks
		Part I (contents of paper book)	Part II (contents of file alone)	
(i)	(ii)	(iii)	(iv)	(v)
1.	Court Fee			
2.	Office Report on Limitation	A	A	
3.	Listing Proforma	A1-A3	A1-A3	
4.	Cover Page of Paper Book		A4	
5.	Index of Record of Proceedings		A5	
6.	Limitation Report prepared by the Registry		A6	
7.	Defect List		A7	
8.	Note Sheet		NS1 to	
9.	Synopsis and List of Dates	B - I		
10.	impugned judgment and Common order dated 29.05.2020 passed by the High Court of Andhra Pradesh at Amaravati in WP. No.8163 of 2020	1-		
11.	Special Leave Petition with affidavit			
12.	Annexure P-1			

13.	Annexure P-2			
14.	I.A.No. of 2020 An application for exemption from filing the certified copy of the impugned judgment and order.			
15.	F/M			
16.	V/A			

A

IN THE SUPREME COURT OF INDIA  
[CIVIL APPELLATE JURISDICTION]

SPECIAL LEAVE PETITION (C) NO. OF 2020

IN THE MATTER OF:

The State of Andhra Pradesh .. Petitioner  
Versus  
Dr.Ramesh Kumar, IAS & Ors. .. Respondents

OFFICE REPORT ON LIMITATION

1. The Petition is/are within time.
2. The Petition is barred by time and there is delay of \_\_\_\_\_ days in filing the same against order dated 29.05.2020 and petition for condonation of \_\_\_\_\_ days of delay has been filed.
3. There is delay of \_\_\_\_\_ days in refiling the petition and petition for condonation of \_\_\_\_\_ days delay in refiling has been filed.

BRANCH OFFICER

New Delhi  
Dated: -01.06.2020

PROFORMA FOR FIRST LISTING  
IN THE SUPREME COURT OF INDIA

SECTION:-

The case pertains to (Please tick/check the correct box):-		
(a).	Central Act: (Title)	NA
(b).	Section	NA
(c).	Central Rule: (Title)	NA
(d).	Rule No (s)	NA
(e).	State Act: (Title)	NA
(f).	Section:-	NA
(g).	State Rule: (Title)	NA
(h).	Rule No (s):	NA
(i).	Impugned Interim order: (Date)	NA
(j).	Impugned Common order/Decree:(Date)	29.05.2020
(k).	High court: (Name)	High Court of Andhra Pradesh at Amaravati
(l).	Names of judges	Hon. Chief Justice J.K. Maheshwari & Hon. Justice M. Satyanarayanan Murthy
(m)	Tribunal/Authority: (Name)	NA
1.	Nature of matter (Civil/ Criminal)	Civil

2.	(a).	Petitioner name	The State of Andhra Pradesh
	(b).	E-mail ID:	NA
	(c).	Mobile phone number	NA
3.	(a).	Respondent name	Dr.Ramesh Kumar, IAS & Ors.
	(b).	E-mail ID:	NA
	(c).	Mobile phone	NA
4.	(a).	Main category classification:	18-Civil Matters
	(b).	Sub classification	1807 –others
5.	Not to be listed before		NA
6.	a)	Similar disposed of matter with citation, if any, & case details	No similar disposal of matter.
	b)	Similar pending matter with case details	No similar matter pending.
7.	Criminal matters:-		
	(a).	Whether accused/convict has surrendered:	Yes <input type="checkbox"/>
	(b).	FIR No.	NA
		Date:	NA
	(c).	Police station	NA
	(d).	Sentence Awarded	NA
	(e).	Period of sentence undergone	NA

		including period of declaration/ custody		
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8.	Land acquisition matters:		
	(a)	Date of section 4 notification	NA
	(b)	Date of section 6 notification	NA
	(c)	Date of section 17 notification	NA
9.	Tax matters: State the tax effect:		
10.	Special Category		NA
	(first petitioner/ appellant only):		NA
	(a).	Senior citizen >65 years	NA
	(b).	SC/ST	NA
	(c).	Woman/child	NA
	(d).	Disable	NA
	(e).	Legal Aid case	Yes
	(f).	In custody	Yes
11.	Vehicle number		NA
	(in case of motor accident claim mater):		NA

FILED BY:  
MAHFOOZ A NAZKI  
ADVOCATE FOR THE PETITIONER  
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Filed on: 01.06.2020

IN THE SUPREME COURT OF INDIA

[CIVIL APPELLATE JURISDICTION]

SPECIAL LEAVE PETITION (C) NO. OF 2020

(WITH PRAYER FOR INTERIM RELIEF)

(Arising out of the impugned judgment and Common order dated 29.05.2020 passed by the High Court of Andhra Pradesh at Amaravati in WP. No.8163 of 2020)

IN THE MATTER OF:

The State of Andhra Pradesh

.. Petitioner

Versus

Dr.Ramesh Kumar, IAS & Ors.

.. Respondents

With

I.A.No. of 2020

AN APPLICATION FOR EXEMPTION FROM FILING THE CERTIFIED COPY  
OF THE IMPUGNED JUDGMENT AND ORDER.

PAPER BOOK

(For Index Kindly See Inside)

ADVOCATE FOR PETITIONERS: MAHFOOZ A NAZKI



## SYNOPSIS

The present Special Leave Petition is being preferred against the Judgment dated 29.05.2020 passed by the Hon'ble High Court of Andhra Pradesh at Amaravati whereby the Hon'ble High Court has struck down certain amendments made to the Andhra Pradesh Panchayat Raj Act, 1994 (*'APPR Act'*) and has further quashed certain consequential government orders. By way of the said amendment/government orders, the following changes had been brought about:

1. Only a retired High Court Judge (being a trained judicial mind) could be appointed as the State Election Commissioner (*'SEC'*). Prior to the amendment, the post could be held by a retired bureaucrat;
2. The term of the SEC which was earlier for a period of 5 years was reduced to three years;
3. The term of the existing SEC was brought to an end;
4. A new SEC was appointed.

The aforesaid changes were necessitated, *inter alia*, for the purpose of bringing in transparency and efficiency in the functioning of the State Election Commission and criticism of the Hon'ble High Court at the scheme of affairs and an inordinate delay in conducting the local body elections.

However, the said amendment/consequential notifications have been struck, down by the Hon'ble High Court, *inter alia*, on the following *stated* grounds:

1. That the State does not have the power to appoint an SEC under Articles 243K and 243ZA of the Constitution of India and that such power of appointment is vested in the Governor *personally*.
2. That a Tenure of the SEC, being a fixed tenure, confers a vested right on the SEC and that such tenure cannot be curtailed.
3. Reducing the term of the SEC to three years amounts to retrospective legislation and a perusal of the amendment does not reveal that the legislature intended the amendment to be retrospective.
4. That a three year term is, *ipso facto*, arbitrary and violative of Article 14.

It is most respectfully submitted that none of the aforesaid reasons are tenable for the reasons stated hereunder.

I. **Governor is to exercise power necessarily under the aid and advice of the Council of Ministers**

It is most respectfully submitted that it is settled law that a Governor exercises his formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well-

known exceptional situations. In this regard, reference may be made to the celebrated judgment of this Hon'ble Court in *Samsher Singh v. State of Punjab*, (1974) I ILLJ 465 SC wherein a seven judge bench of this Hon'ble Court has held as under:

*"154. We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various articles shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well-known exceptional situations. Without being dogmatic or exhaustive, these situations relate to (a) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House, (b) the dismissal of a Government which has lost its majority in the House; but refuses to quit office; (c) the dissolution of the House where an appeal to the country is necessitous, although in this area the head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step."*

A bare perusal of the nature of exceptions mentioned in the aforesaid judgment (even though they are not exhaustive) would reveal that the appointment of an Election Commissioner can, by no stretch of imagination, fall thereunder. The Constitutional Scheme, including Articles 243K and 243ZA, would clearly reveal that the power of appointing the Chief Election Commissioner is necessarily to be exercised by the Governor upon aid and advice of the Council of Ministers and not otherwise. The findings of the Hon'ble Court that the appointment of the Election Commissioner is to be at the personal discretion of the Governor is therefore *ex facie* unsustainable.

**II. State has the power to fix the tenure of the State Election Commissioner.**

Articles 243K and 243 ZA, empower the State Legislature to provide for **the conditions of serviceandtenure of office** of the State Election Commissioner. Under the said Articles, the Parliament has made a clear distinction between '*Conditions of Service*' and '*Tenure of Office*' of the SEC. After consciously drawing such distinction, the Parliament categorically forbade making of any changes to 'conditions of service' of the State Election Commissioner to his detriment. It is, however, important to note that no such protection has been accorded to '*Tenure of Office*'. Thus, the SEC does not have

a vested right of 'tenure' of appointment. The findings of the Hon'ble High Court in this regard are therefore erroneous and are thus liable to be set aside.

### **III. The Finding in relation to retrospectivity is unsustainable**

It is settled law that a statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing [*See State Bank's Staff Union (Madras Circle) v. Union of India and Ors., (2005) 7 SCC 584*]. The findings of the Hon'ble High Court that the legislation was retrospective merely because it resulted in cessation of the term of the EC is therefore clearly erroneous and is thus liable to be set aside.

### **IV. Contrary Findings**

A perusal of the aforesaid would reveal that one of the grounds for striking down the impugned amendment as also the appointment of the new incumbent— is that the power of appointment is stated to be that of the Governor and not of the State. In this regard, it may be noted that even the previous SEC was appointed on the recommendation of the then Government. If the finding of the High Court in relation to the power of appointment is correct, the appointment of the previous SEC would be equally vitiated on that ground. However, even while ruling (*albeit*

wrongly) that the power of appointment of the SEC is that of the Governor in his *personal* discretion and striking down the appointment of the new incumbent on that ground, the High Court has surprisingly directed the reinstatement of the previous SEC even though his appointment admittedly suffers from the same alleged vice. It is therefore clear that the impugned judgment is self-contradictory and is thus liable to be set aside.

Besides a perusal of the judgment, in totality, would reveal that the same is based upon certain statements ascribed, *inter alia*, to the Hon'ble Chief Minister. When the said statements were sought to be relied upon by the writ petitioners and council of ministers were served notice by the court through CS, the chief secretary stated that in the facts of the case, each Minister has to be issued notice. However, no notice was issued to Ministers. In fact, in one of the petitions, the Chief Minister was made party. However, no notice was issued. Governor's office was also made party. Again, no notice was issued. The court, during the hearing repeatedly indicated that the case would not be decided on such issues since they would not have any bearing on the legality of the case. Yet, the Hon'ble has proceeded to base its judgment on the aforesaid premise. The judgment is therefore erroneous and is thus liable to be set aside on this ground alone.

Hence this Special Leave Petition.

**LIST OF DATES**

1994	<p>Pursuant to the 73<sup>rd</sup> and 74<sup>th</sup> amendments to the Constitution of India whereupon Article 243K was introduced, the State of Andhra Pradesh enacted Section 200 of the Andhra Pradesh Panchayat Raj Act, 1994. In terms of this provision (which came to be substituted by the impugned amendment):</p> <ul style="list-style-type: none"> <li>• The Governor, on recommendation of the Government was to appoint the State Election Commissioner (<i>'SEC'</i>);</li> <li>• Only a person who was holding, or had held the rank of Principle Secretary to the Government could be appointed as the SEC.</li> </ul>
30.12.1994	<p>Andhra Pradesh Panchayat Raj (Conditions of Service of the State Election Commissioner) Rules, 1994 came to be notified. As per these Rules the term of the would be for a period of five years. The status of the Election Commissioner was to be that of a High Court Judge.</p>
15.03.2000	<p>Revised Andhra Pradesh Panchayat Raj (Conditions of Service of the State Election Commissioner) Rules, 2000 (<i>'2000 Rules'</i>) came to be notified. Considering that the Election Commissioner had the status of a High Court</p>

	<p>judge, every time an amendment was made in the conditions of services applicable to a High Court Judge, a corresponding amendment was necessitated in the Rules.</p> <p>By way of 2000 Rules, it was provided that the any amendment made in the conditions of services applicable to a High Court Judge would <i>ipso facto</i> apply to the Election Commissioner.</p>
30.01.2016	<p>The State of Andhra Pradesh appointed the Respondent No. 1 as the Chief Election Commissioner in exercise of powers under Article 243K of the of the Constitution of India read with Section 200 (2) of the Andhra Pradesh Panchayat Raj Act, 1994 (<i>'APPR Act'</i>). The term of appointment was for five years.</p>
2018	<p>The term of local bodies expired pursuant to elections conducted in the year 2013. Instead of conducting elections in accordance with the constitutional mandate, 'Special Officers' were appointed to man the local bodies.</p>
23.10.2018	<p>The Hon'ble High Court, in W.P 32346 of 2018 expressed its displeasure on non-holding of elections and appointment of special officers instead.</p>
2019	<p>PIL Nos. 141/2019 and 153 of 2019 came to be filed before the Hon'ble High Court seeking directions to</p>

	<p>conduct elections to local bodies.</p> <p>The State as well as the State Election Commission filed their respective counter affidavits expressing their desire to conduct the elections.</p>
2019-2020	<p>Taking note of various practices that were adversely affecting the election process, the State of Andhra Pradesh initiated various reforms. One such reform included issuance of the Ordinance No.2 of 2020 dated 20.02.2020 whereby the definition of the term '<i>corrupt practices</i>' was expanded. Additionally, by way of this amendment, automatic cessation of office upon conviction for corrupt practices was provided for.</p>
2019-2020	<p>A series of litigation relating to the question of reservation to be provided for in the local body elections culminated in the Judgment dated whereby the Hon'ble High Court was pleased to rule that reservations could not be more than 50%.</p>
07.03.2020	<p>Notification was issued by the SEC for conduct of elections to MPTCs and ZPTC.</p>
15.03.2020	<p>Notification was issued by the SEC directing postponement of elections on account of Covid -19. The</p>

	SEC also directed that the Model Code of Conduct would continue to remain in force even though the elections were indefinitely postponed.
16.03.2020	Aggrieved by the non-consultation by the SEC with the State Government before postponing the elections even while extending the Code of Conduct, the Petitioner was constrained to approach the Hon'ble Supreme Court by way of Writ Petition (C) No.437 of 2020.
18.03.2020	<p>This Hon'ble court disposed of Writ Petition (C) No.437 of 2020 directing as under:</p> <ol style="list-style-type: none"> <li>1. A post decisional consultation in regard to the remainder of the process of election;</li> <li>2. Continuing of development activities already undertaken;</li> <li>3. Re-imposition of Model Code of Conduct 4 weeks prior to the election date;</li> <li>4. SEC's permission to be sought for initiating any fresh programme.</li> <li>5. State not to be prevented from taking necessary steps to prevent the spread of corona;</li> </ol>
18.03.2020	Within hours of judgment passed by the Hon'ble Supreme

	<p>Court, media channels started circulation of a letter written by the SEC to the Home Minister requesting for enhancement of security due to an alleged threat to life by the members of the ruling party.</p>
20.3.2020	<p>The State Election Commissioner issued a press note informing that he has shifted from Amaravati to Hyderabad and would discharge the functions as State Election Commissioner from his residence at Hyderabad.</p>
20.3.2020 & 24.3.2020	<p>The Chief Secretary of the State of Andhra Pradesh addressed two letters to the Central Government rebutting the contentions raised by the then State Election Commission in the letter dated 18.3.2020. It was also informed that the State was exploring the possibility of requesting for completion of the process of elections either under the aegis of the Election Commission of India or through a multi member team of officers.</p>
10.04.2020	<p>The State of Andhra Pradesh, towards its intention of conducting electoral reforms and bringing in fair play enacted an Ordinance being Ordinance No.5 of 2020 to amend the "Andhra Pradesh Panchayat Raj Act". The following amendments were carried out:</p>

	<p>1. That only a retired High Court Judge (being a trained judicial mind) could be appointed as the State Election Commissioner. Prior to the amendment, the post could be held by a retired bureaucrat of the rank of Principle Secretary;</p> <p>2. The term of the SEC which was earlier for a period of 5 years was reduced to three years;</p> <p>In furtherance of the amendment, G.O Ms.618 dated 10.04.2020 also came to be issued whereby it was noted that the tenure the then State Election Commissioner had elapsed in view of the amendments carried out in the legislation.</p>
11.04.2020	<p>G.O. Ms. 619 came to be issued by the State government - Petitioner appointing Justice. Kanagaraj, Retired Judge of Madras as State Election Commissioner for a tenure of 3 years from the date of assuming of office.</p>
11.04.2020	<p>Aggrieved by this amendment and appointment of new State Election Commissioner, the Writ Petition No.8163 of 2020 came to be filed by the Respondent challenging the validity of the ordinance as well as appointment of the new Election Commissioner. A further prayer was made for</p>

	<p>reinstatement as State Election Commissioner. Additionally, a host of PILs and writ Petitions also came to be filed challenging the Ordinance and the consequential actions.</p>
17.04.2020	<p>The State filed a detailed counter affidavit refuting the averments made in the said writ petitions.</p>
29.05.2020	<p>The Hon'ble High Court vide common order dated 29.05.2020 was pleased to allow the aforesaid writ petitions. Consequently, Ordinance No.5 of 2020 dated 10.04.2020, G.O.Ms. 617 and 618 of 2020 also came to be set aside. The Hon'ble Court further directed the State Government to re-instate the then State Election Commissioner.</p>
	<p>Hence Special Leave Petition.</p>



IN THE SUPREME COURT OF INDIA  
[CIVIL APPELLATE JURISDICTION]  
SPECIAL LEAVE PETITION (C) NO. OF 2020  
(WITH PRAYER FOR INTERIM RELIEF)

(Arising out of the impugned judgment and Common order dated 29.05.2020 passed by the High Court of Andhra Pradesh at Amaravati in WP. No.8163 of 2020)

BETWEEN

Position of the parties

In the High  
Court

In this  
Hon'ble Court

The State of Andhra Pradesh,  
rep. by its Principal Secretary to  
Government, General  
Administration Department,  
A.P.Secretariat ,  
Velagapudi, Guntur District  
Andhra Pradesh

Respondent  
No.1

Petitioner

Versus

1. Dr.N Ramesh Kumar, IAS,  
S/o Late Ravindranath Chowdary,  
Aged about 64 years, Occ:  
Government Service,  
R/o Plot No.59, Street No.3,  
Prashashan Nagar, Jubilee Hills,  
Hyderabad.

Petitioner

Contesting  
Respondent  
No.1

- |  |                            |   |
|--|----------------------------|---|
| <p>2. The State of Andhra Pradesh, rep by its Principal Secretary to Government, Panchayatraj&amp; Rural Development (E&amp;R) Department, A.P.Secretariat, Velagapudi, Guntur District, Andhra Pradesh.</p> | <p>Respondent<br/>No.2</p> | <p>Porforma<br/>Respondent<br/>No.2</p> |
| <p>3. The A.P. State Election Commission, Rep. by its Secretary, 1<sup>st</sup>Floor, New HOD's Building, Indira Gandhi Municipal Stadium, M.G. Road, Vijayawada, Andhra Pradesh – 520010.</p>               | <p>Respondent<br/>No.3</p> | <p>Proforma<br/>Respondent<br/>No.3</p> |
| <p>4. Sri Justice V. Kanagaraj, Retired Judge, High Court of Madras, No.104, Supreme enclave, Tower-10, Mayur Vihar Phase-1, New Delhi – 110091.</p>   | <p>Respondent<br/>No.4</p> | <p>Proforma<br/>Respondent<br/>No.4</p> |
| <p>5. Dr. Srinivasa Rao Gochipata S/o. YesiyyaGochipata, Aged 45 years, Occ: Advocate, H.No.24-139/2, Nambur Post, Pedakakani Mandal, Guntur District-522508.</p>  | <p>Respondent<br/>No5</p>  | <p>Proforma<br/>Respondent<br/>No.5</p> |
| <p>To,<br/><br/>The Hon'ble Chief Justice of India</p>   |                            |   |

and his companion justices of the  
Hon'ble Supreme Court of India

The humble Petition of the above named  
Petitioner:

**MOST RESPECTFULLY SHOWETH:**

1. That the Petitioner files the present Special Leave Petition against the impugned judgment and Common order dated 29.05.2020 passed by the High Court of Andhra Pradesh at Amaravati in WP. No.8163 of 2020, whereby, the Hon'ble High Court has set aside Ordinance No.5 of 2020 dated 10.04.2020, G.O.Ms. 617 and 618 of 2020. The Hon'ble Court further directed the State Government to re-instate the previous State Election Commissioner.

2. QUESTIONS OF LAW:

That the present S.L.P. involves the following substantial questions of law for kind consideration by this Hon'ble Court:

A. Whether the power to appoint a Chief Election Commissioner (*'CEC'*) under Articles 243K and 243ZA of the Constitution of India is vested in the Governor *personally* or is to be exercised upon and in accordance with the advice of their Ministers?

- B. Whether the finding of the High Court that the power of appointment of a CEC under Articles 243K and 243ZA of the Constitution of India is vested in the Governor *personally* is violative of law laid down by seven judges of this Hon'ble Court in *Samsher Singh v. State of Punjab*, (1974) 1 LLJ 465 SC
- C. Whether there exists a distinction between the terms 'Tenure' and 'Conditions of Service' as envisaged under Articles 243K and 243ZA of the Constitution of India.? If so, to what effect.
- D. Whether the High Court was right in directing re-instatement of the previous SEC even while holding (*albeit* erroneously) the basis of such appointment (being recommendation by the Council of Ministers) to be violative of constitutional mandate?
- E. Whether without issuance notices to the persons concerned or framing an issue on the same, the court could have relied

on the same and whether the said approach is violative of principles of natural justice?

- F. Whether statements alleged to be made by persons associated with the Government can be made basis of striking down a legislation that is lawfully enacted, especially when no notice is issued to such persons – despite being parties.
  
- G. Whether 'Tenure' can be termed as a 'Condition of Service' in the context of Articles 243K and 243ZA of the Constitution of India?
  
- H. Whether the finding of the Hon'ble High Court that because the Andhra Pradesh Government Business Rules and Secretariat Instructions framed under Article 163 of the Constitution of India do not specifically enlist 'Appointment of the Election Commissioner' as one of the matters to be placed before the Council, the natural inference would be that the power of appointment is of the Governor in his personal discretion - is perverse?

- I. Whether the finding of the Hon'ble High Court (on the basis of the report of the Task Force Committee dated 14.10.2011) that in all cases, the tenure of the State Election Commissioner must be 5 years is sustainable?
- J. What is the meaning and scope of the term 'colorable legislation'?
- K. Whether a legislation can be termed retrospective merely because it resulted in cessation of the term of the EC? And whether the said finding of the High Court is contrary to the settled law that a statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing [*See State Bank's Staff Union (Madras Circle) v. Union of India and Ors., (2005) 7 SCC 584*]?
- L. Whether Section 6 of the General Clauses Act and Section 8 and 18 of the Andhra Pradesh General Clauses Act can be

made applicable where a '*different intention*[as envisaged under the said provisions] is clearly evident from the perusal of the legislation concerned?

- M. Whether the observation of the High Court that failure to specifically refer to the constitutional provision in the appointment notification of Justice V Kanagaraj vitiates the notification is sustainable?
- N. Whether the finding of the High Court that the matter pertaining to appointment of the SEC does not come within the ambit of Entry 5 of List II is erroneous and unsustainable?
- O. What is the ambit of the term 'fraud' in the context of legislation?
- P. Whether each communication/notification issued in the name of the Governor is required to be personally signed by him?
- Q. Whether the Hon'ble High Court was right in equating the term 'removal' to 'shortening of tenure' in the context of

Articles 243K and 243ZA of the Constitution of India?

- R. Whether the age of a person who has been appointed pursuant to the powers conferred upon the State under a legislation can be a ground for striking down the legislation itself?
- S. Whether the finding of the High Court that the existing EC had a vested right to continue till the end of 5 years is in the teeth of the language of Articles 243K and 243ZA which confer power upon the State to provide for tenure of the EC?
- T. Whether the Hon'ble High Court erred in entertaining Public Interest Litigations and writ petitions on behalf of parties other than the incumbent in view of the fact that (i) The dispute was a service matter and was not a matter of public interest; (ii) When the aggrieved person himself approached the Hon'ble Court, entertainment of other writ petitions/public interest litigations was wholly misconceived; (iii) the petitioners in the said writ petitions had no *locus standi* to approach the court; and that the petitions therefore

amounted to abuse of process of law?

**3. DECLARATION IN TERMS OF RULE 2(2):**

The Petitioner states that no other petition seeking leave to Appeal has been filed by him against the impugned judgment and Common order dated 29.05.2020 passed by the High Court of Andhra Pradesh at Amaravati in WP. No.8163 of 2020.

**4. DECLARATION IN TERMS OF RULE 4:**

The annexures P-1 to P-\_\_ produced along with the Special Leave Petition are true copies of the pleadings/documents which formed part of the records of the case in the Court/Tribunal below against whose order the leave to appeal is sought for in this Petition.

**5. GROUNDS**

A. BECAUSE the impugned judgment proceeds on a complete misreading of Articles 243K and 243ZA of the Constitution of India to hold that the power of appointment of the State Election Commissioner is vested in the Governor *personally*. It is settled that a Governor exercises his formal constitutional powers only

upon and in accordance with the advice of their Ministers save in a few well-known exceptional situations. In this regard, reference may be made to the celebrated judgment of this Hon'ble Court in ***Samsher Singh v. State of Punjab***, (1974) 1 LLJ 465 SC wherein a seven judge bench of this Hon'ble Court has held as under:

*"154. We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various articles shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well-known exceptional situations. Without being dogmatic or exhaustive, these situations relate to (a) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House, (b) the dismissal of a Government which has lost its majority in the House; but refuses to quit office; (c) the dissolution of the House where an appeal to the country is necessitous, although in this area the head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step."*

- B. A bare perusal of the nature of exceptions mentioned in the aforesaid judgment (even though they are not exhaustive) would

reveal that the appointment of an Election Commissioner can, by no stretch of imagination, fall thereunder. The Constitutional Scheme, including Articles 243K and 243ZA, would clearly reveal that the power of appointing the Chief Election Commissioner is necessarily to be exercised by the Governor upon aid and advice of the Council of Ministers and not otherwise. The findings of the Hon'ble Court that the appointment of the Election Commissioner is to be at the personal discretion of the Governor is therefore *ex facie* unsustainable.

- C. Because the Hon'ble High Court grossly erred in not appreciating the distinction between 'Tenure' and Conditions of Service as encapsulated in Articles 243K and 243ZA of the Constitution of India. For ease of reference one of such Articles (which are identically worded) may, to the extent relevant, be reproduced as under:

*243K. Elections to the Panchayats 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.*

- D. It is most respectfully submitted that a bare perusal of Article 243K (2) would reveal that Parliament has made a clear distinction between '*Conditions of Service*' and '*Tenure of Office*'. Further, after drawing such distinction, the Parliament categorically forbade making of any changes to 'conditions of service' of the State Election Commissioner to his detriment. It is, however, important to note that no such protection was accorded to '*Tenure of Office*'. Thus the failure of the Hon'ble High Court to appreciate this vital distinction vitiates the whole judgment and renders it liable to be set aside.

E. BECAUSE the Hon'ble High Court erred in drawing an artificial distinction between the nature of the power of the President to appoint a Chief Election Commissioner under Article 324 (2) of the Constitution of India vis-à-vis the power of the Governor to appoint an Election Commissioner in exercise of powers conferred under Articles 243K and 243ZA. A bare perusal of the said provisions would reveal that the powers are identical in nature. The Constitution makes no difference, whatsoever, in conferring such powers. The distinction thus carved out by the Hon'ble High Court is not only artificial but against the basic constitutional mandate.

F. Because the reading of Article 163 (1) of the Constitution of India by the Hon'ble High Court is perverse. Article 163 (1), to the extent it is relevant, reads as under:

*'(1) There shall be a council of Ministers with the chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this constitution required to exercise his functions or any of them in his discretion'*

G. The Hon'ble has erred in not appreciating that no provision of the Constitution empowers the Governor to appoint an Election Commissioner *'in his discretion'*. Such power is therefore

necessarily to be exercised on the aid and advise of the Council of Ministers.

- H. Because the impugned judgment is self-contradictory. One of the grounds for striking down the impugned amendment as also the appointment of the new incumbent— is that the power of appointment is stated to be that of the Governor and not or the State. In this regard, it may be noted that even the previous SEC was appointed on the recommendation of the then Government. If the finding of the High Court in relation to the power of appointment is correct, the appointment of the previous SEC would be equally vitiated on that ground. However, even while ruling (*albeit* wrongly) that the power of appointment of the SEC is that of the Governor in his *personal* discretion and striking down the appointment of the new incumbent on that ground, the High Court has surprisingly directed the reinstatement of the previous SEC even though his appointment admittedly suffers from the same alleged vice. It is therefore clear that the impugned judgment is self-contradictory and is thus liable to be set aside.

- I. Because the Impugned judgment is based on irrelevant

considerations. It is pertinent to note that a perusal of the judgment, in totality, would reveal that the same is based upon certain statements ascribed, *inter alia*, to the Hon'ble Chief Minister. When the said statements were sought to be relied upon by the writ petitioners and council of ministers were served notice by the court through Chief Secretary, the Chief Secretary stated that in the facts of the case, each Minister has to be issued notice. However, no notice was issued to Ministers. In fact, in one of the petitions, the Chief Minister was made party. However, no notice was issued. Governor's office was also made party. Again, no notice was issued. The court, during the hearing repeatedly indicated that the case would not be decided on such issues since they would not have any bearing on the legality of the case. Yet, the Hon'ble has proceeded to base its judgment on the aforesaid premise. The judgment is therefore erroneous and is thus liable to be set aside on this ground alone.

- J. Because the reliance placed by the Hon'ble High Court on judgments of this Hon'ble Court to come to a conclusion that 'Tenure' is a 'Condition of Service' ignores the vital distinction that has constitutionally been made between the two insofar as the

State Election Commissioners are concerned. It is most respectfully submitted that the law which has not been laid down in the context of Articles 243K and 243ZA cannot be made applicable to the present situation where the wording of the provision is completely different. The Hon'ble High Court has gravely erred in not appreciating this fact.

K. BECAUSE the finding of the Hon'ble High Court that because the Andhra Pradesh Government Business Rules and Secretariat Instructions framed under Article 163 of the Constitution of India do not specifically enlist 'Appointment of the Election Commissioner' as one of the matters to be placed before the Council, the natural inference would be that the power of appointment is of the Governor in his personal discretion - is perverse. In this regard, it may be mentioned that it is settled law that merely because the rules are silent on a particular aspect would not mean that the executive is prohibited from exercising such power. It is settled law that *'in a written Constitution like ours the executive power may be such as is given to the executive or is implied, ancillary or inherent. It must include all powers that may be needed to carry into effect the aims and objects of the*

*Constitution. It must mean more than merely executing the laws - carrying on or supervision of the general administration of the State is an executive function of the State. Rai Sahib Ram JawayaKapur And Ors. vs The State Of Punjab AIR 1955 SC 549.*

- L. Without prejudice to the aforesaid, it is submitted that in any event Rule 9 (10), 9 (17), 9 (18) and 9 (28) are wide enough for tracing such power. The Hon'ble High Court gravely erred in not considering the same.
  
- M. Because the reliance placed by the Hon'ble High Court on the report of the Task Force Committee dated 14.10.2011 to come to a conclusion that in all cases, the tenure of the State Election Commissioner must be 5 years is grossly misconceived. The said report is merely a recommendation and has no binding value. Besides, the specification of the term of an Election Commissioner is a power that has exclusively been conferred upon the State Government under Articles 243K and 243ZA. Placing reliance upon a Task Force Report to obliterate a constitutional power of the State is grossly misconceived.

- N. Because, the finding of the Hon'ble High Court that *'there is no justification to specify three (3) year tenure of the SEC in the name of electoral reforms giving allurements of enhancement of further three (3) years on the recommendation of the Government'* is devoid of any legal basis. The term of three year has been prescribed in due exercise of the powers conferred upon the State under the constitutional mandate. Merely because a committee has recommended a longer term would have no bearing, whatsoever, on the validity of the exercise of such power.
- O. Because the reference by the High Court to the various statements ascribed, *inter alia*, to the Hon'ble Chief Minister and making such statements one of the basis for striking down the amendment is *ex facie* erroneous. It is settled law that a decision, if taken by a Competent Authority in accordance with law, cannot per se be regarded as mala fide merely because mala fide has been ascribed so long as the decision has been taken in accordance with law [*Union of India v. KannadaparaSanghatanegalaOkkura and Kannadigara and Ors. 2002 (10) SCC 226*]. The impugned judgment is liable to be set aside on this ground alone.

- P. Because the finding of the High Court that the legislation was brought in for an oblique motive is erroneous and without any basis.
- Q. Because the Hon'ble High Court erred in not appreciating that colorable legislation would not mean tainted with bad faith or evil motive but is an expression to mean define the act of a legislature wearing a cloak of competence where none exists.
- R. Because the High Court grossly erred in labelling the impugned legislation as a '*narcissist ordinance*' and making such a belief the basis of striking down the impugned amendment.
- S. Because, the finding of the Hon'ble High Court - that Sub-Section (5) of Section 200 of the Andhra Pradesh Panchayat Raj Act is arbitrary - merely because it states that '*any person appointed as State Election Commissioner and holding office as such shall cease to hold office*' is completely erroneous. The fact of the matter is that the tenure of the Election Commissioner was reduced to Three (3) years by way of the impugned legislation. This provision was made applicable even to the existing

appointees. As a natural corollary, the term of the existing Election Commissioner came to an end. Section 200 (5) was therefore only clarificatory.

- T. Because the Hon'ble High Court erred in not appreciating that the legislation was not retrospective merely because it resulted in cessation of the term of the EC. It is settled law that a statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing [*See State Bank's Staff Union (Madras Circle) v. Union of India and Ors., (2005) 7 SCC 584*]. The findings of the Hon'ble High Court in this regard are therefore clearly erroneous and are thus liable to be set aside.
- U. BECAUSE the reliance placed by the Hon'ble High Court on Section 6 of the General Clauses Act and Section 8 and 18 of the Andhra Pradesh General Clauses Act is wholly misconceived. A bare perusal of the said provisions would reveal that the same would not be applicable where a '*different intention*' appears from the perusal of the legislation. In the present case, the intention of the legislation was absolutely clear – the tenure was reduced to 3

years and the it was declared that the incumbent holding office would cease to hold the same. There was, thus, no scope for application of Section 6 of the General Clauses Act. The impugned judgment is therefore liable to be set aside on this ground alone.

V. Because the observation of the Hon'ble High Court that *'the definition of the State Election Commissioner under APPR Act is fallacious'* - since it fails to refer to the source of appointment to be the Constitution of India- is grossly misconceived. A bare perusal of the legislation would reveal that the State Election Commissioner is, in fact, appointed in exercise of powers conferred on the State under the provisions of the Constitution. It is most respectfully submitted that the findings of the Hon'ble High Court do violence to the language and scheme of the constitution/APPR Act.

W. Because the observation of the High Court that failure to specifically refer to the constitutional provision in the appointment notification of Justice V Kanagaraj vitiates the notification is grossly erroneous. It is settled law that mere failure to refer to a particular provision/enabling provision would not vitiate the

Notification so long as the power to issue such notification exists. In the present case, such power clearly vests with the Governor (upon the aid and advise of the Council of Ministers). Therefore, the finding of the Hon'ble High Court in this regard is clearly erroneous.

- X. Because the finding of the High Court that the matter pertaining to appointment of the SEC shall not come within the ambit of Entry 5 of List II is grossly erroneous. A perusal of Articles 243K and 243ZA read with Entry 5 of List 2 would clearly reveal that the power of appointment of the SEC is that of the State Government.
- Y. Because the findings of the High Court that the State legislature does not have the competence to provide for qualification of a State Election Commissioner are in the teeth of Articles 243K and 243ZA of the Constitution of India which categorically confer such power on the State.
- Z. Because the finding of the High Court that even though the State legislature has the competence to specify the tenure of office of SEC, *the specific amendment brought to the APPCR Act is illegal'*

is completely fallacious. The said finding is not supported by any justifiable reason and is therefore liable to be set aside.

AA. Because the finding of the High Court that the impugned amendments are fraud on power is completely without any basis. It is most respectfully submitted that the amendments were brought in in due exercise of Constitutional and Statutory powers. The labelling of exercise of such power as 'fraud' is ex facie erroneous and without any basis.

AB. Because the reference by the High Court, to the time of movement of files would have no bearing, whatsoever, on the legality of the exercise of power. A bare perusal of such findings/references would reveal that the legislation has been struck down on extraneous grounds.

AC. Because the undue reliance placed by the Hon'ble High Court on the fact that the G.O.MS 618 PR & RD Dept dated 10.04.2020 was not signed by the Governor is grossly misconceived. It is settled law that under the Constitutional scheme, even though orders are issued in the name of the Governor (being the executive head),

they are rarely signed by him personally. So being the case, making non signing of an executive order (which is passed consequent upon an amendment being notified) to strike down the amendment itself is grossly misconceived.

AD. Because the Hon'ble High Court failed to appreciate the background in which the Ordinance came to be issued. The Ordinance was necessitated in view of the State's desire to bring in electoral reforms, *inter alia*, for the following reasons:

- a. Repeated expression of displeasure by Courts in failure of the Commission to conduct elections in time;
- b. Bring in transparency by providing that the Commission be headed by trained judicial mind - a retired High Court Judge.

AE. Because the Hon'ble High Court erred in holding that there was no occasion to enact an ordinance. As demonstrated above, the State had sufficient reasons to bring in the ordinance towards its desire to usher in electoral reforms.

AF. Because the Hon'ble High Court erred in equating the term 'removal' to shortening the tenure. A bare perusal of Articles 243K

and 243ZA of the Constitution of India would reveal that the aforesaid terms are completely distinct. Cessation of office as a result of shortening of the tenure, would, by no stretch of imagination amount to 'removal' within the meaning of the aforesaid provisions.

AG. Because the Hon'ble High Court grossly erred in making a reference to the age of Justice Kanagaraj and making it one of the factors to strike down the amendment. At the outset, it is most respectfully submitted that the age of a person who has been appointed pursuant to the powers conferred upon the State under a legislation cannot, by any stretch of imagination, be a ground for striking down the legislation itself. In any event, the High Court ought to have refrained from making such comments. To the contrary, it ought to have appreciated the vast experience of the incumbent.

AH. Because the observation of the High Court that the State had not maintained 'constitutional morality' is completely without any basis and is erroneous. The said findings are not supported by any sustainable reasons.

- AI. Because the observation of the High Court that the ordinance was brought in only to single out the existing SEC is grossly erroneous and without any basis. The amendment, as demonstrated, was brought in to bring in electoral reforms. The fact that the present incumbent's term came to an end as a result thereof would not imply that the ordinance was brought in only to single him out.
- AJ. Because the finding of the High Court that the existing EC had a vested right to continue till the end of 5 years is in the teeth of the language of Articles 243K and 243ZA which confer power upon the State to provide for tenure of the EC. As demonstrated above, such provisions do not bar reduction of the tenure even though change in conditions of service to the detriment of the incumbent is prohibited.
- AK. The Hon'ble High Court erred in entertaining Public Interest Litigations and writ petitions on behalf of parties other than the incumbent in view of the fact that (i) The dispute was a service matter and was not a matter of public interest; (ii) When the aggrieved person himself approached the Hon'ble Court,

entertainment of other writ petitions/public interest litigations was wholly misconceived; (iii) the petitioners in the said writ petitions had no *locus standi* to approach the court; and that the petitions therefore amounted to abuse of process of law.

AL. The Petitioner craves liberty of this Hon'ble Court to raise further grounds at a subsequent state and/or during the course of arguments.

6. GROUNDS FOR INTERIM RELIEF.

I. That the impugned judgment is self-contradictory. One of the grounds for striking down the impugned amendment as also the appointment of the new incumbent— is that the power of appointment is stated to be that of the Governor and not or the State. In this regard, it may be noted that even the previous SEC was appointed on the recommendation of the then Government. If the finding of the High Court in relation to the power of appointment is correct, the appointment of the previous SEC would be equally vitiated on that ground. However, even while ruling (*albeit* wrongly) that the power of appointment of the SEC is that of the Governor in his *personal* discretion and striking down

the appointment of the new incumbent on that ground, the High Court has surprisingly directed the reinstatement of the previous SEC even though his appointment admittedly suffers from the same alleged vice. It is therefore clear that the impugned judgment is self-contradictory and is thus liable to be set aside.

- II. That the Impugned judgment is based on irrelevant considerations. It is pertinent to note that a perusal of the judgment, in totality, would reveal that the same is based upon certain statements ascribed, *inter alia*, to the Hon'ble Chief Minister. When the said statements were sought to be relied upon by the writ petitioners and council of ministers were served notice by the court through Chief Secretary, the Chief Secretary stated that in the facts of the case, each Minister has to be issued notice. However, no notice was issued to Ministers. In fact, in one of the petitions, the Chief Minister was made party. However, no notice was issued. Governor's office was also made party. Again, no notice was issued. The court, during the hearing repeatedly indicated that the case would not be decided on such issues since they would not have any bearing on the legality of the case. Yet, the Hon'ble has proceeded to base its judgment on the aforesaid premise. The

judgment is therefore erroneous and is thus liable to be set aside on this ground alone.

**7. MAIN PRAYER:**

It is most respectfully prayed that this Hon'ble Court may graciously be pleased to:

- a) grant Special Leave to Appeal against the impugned judgment and Common order dated 29.05.2020 passed by the High Court of Andhra Pradesh at Amaravati in WP. No.8163 of 2020; and/or
- b) pass such other/further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.

**8. PRAYER FOR INTERIM RELIEF**

- a) Grant *ad-interim ex-parte* stay of the operation and effect of impugned judgment and Common order dated 29.05.2020 passed by the High Court of Andhra Pradesh at Amaravati in WP. No.8163 of 2020.
- b) pass such order or other orders as this Hon'ble Court may deem fit in the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS THE PETITIONER AS IN  
DUTYBOUND SHALL EVER PRAY.

DRAWN AND FILED BY

(MAHFOOZ A NAZKI )  
ADVOCATE FOR THE PETITONER

DRAWN ON:  
FILED ON

IN THE SUPREME COURT OF INDIA  
[CIVIL APPELLATE JURISDICTION]

SPECIAL LEAVE PETITION (C) NO. OF 2020

IN THE MATTER OF:

The State of Andhra Pradesh .. Petitioner  
Versus  
Dr.Ramesh Kumar, IAS & Ors. .. Respondents

CERTIFICATE

Certified that the Special Leave Petition is confined only to the pleadings before the Hon'ble Court whose order is challenged and the other documents relied upon in those proceedings. No additional facts, documents or grounds have been taken therein or relied upon in the Special Leave Petition. It is further certified that the copies of the annexures attached to the Special Leave Petition are necessary to answer the question of law raised in the Petition or to make out grounds urged in the Special Leave Petition for consideration of this Hon'ble Court. This certificate is given on the basis of the instructions given by the Petitioner/person authorized by the Petitioner whose affidavit is filed in support of the Special Leave Petition.

Filed by

Filed on:01.06.2020

**MAHFOOZ A NAZKI**  
Advocate for the Petitioner



3. That the certified copy of the impugned order has been applied but is not readily available. The matter is of urgent nature and need urgent filing so the same is being filed without certified copy.

### PRAYER

In the above circumstances it is therefore most respectfully prayed that this Hon'ble Court may pleased to:

- (a). Exempt the petitioner from filing the certified copy of impugned judgment and Common order dated 29.05.2020 passed by the High Court of Andhra Pradesh at Amaravati in WP. No.8163 of 2020; and/or
- (b) Pass such other order or orders as this Hon'ble Court would deem fit and proper in the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS THE PETITIONER, AS IN DUTY  
BOUND, SHALL EVERY PRAY.

Filed by

Filed on:

MAHFOOZ A NAZKI  
Advocate for the Petitioner