

IN THE HIGH COURT OF MADHYA PRADESH  
AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE SANJAY DWIVEDI

ON THE 09<sup>th</sup> OF JANUARY, 2024

WRIT PETITION NO. 29674 OF 2023

**BETWEEN:-**

RAJESH HENRY, S/O. SHRI HENRY MICHAEL, AGED ABOUT 53 YEARS, OCCUPATION-ADDITIONAL EXCISE COMMISSIONER, M.P., R/O. FLAT NO.1301, TOWER-A, TULSI TOWERS, TULSI NAGAR, BHOPAL, DISTRICT BHOPAL (M.P.)

...PETITIONER

*(BY SHRI VIPIN YADAV - ADVOCATE)*

**AND**

1. STATE OF MADHYA PRADESH THROUGH PRINCIPAL SECRETARY, COMMERCIAL TAX DEPARTMENT, VALLABH BHAWAN, BHOPAL (M.P.)
2. O.P. SHRIVASTAVA, EXCISE COMMISSIONER, MADHYA PRADESH, JOINT REVENUE BUILDING, 4TH FLOOR, NEEDAM ROAD, CHANDRAVADINI NAKA, DISTRICT GWALIOR (M.P.)
3. VIRENDRA SAXENA, ADDITIONAL EXCISE COMMISSIONER, BHOPAL (M.P.)

.....RESPONDENTS

*(RESPONDENT NO.1 BY SHRI AMIT SETH – DY. ADVOCATE GENERAL)*

*(RESPONDENT NO.2 BY SHRI SWAPNIL GANGULY – ADVOCATE)*

*(RESPONDENT NO.3 BY SHRI PUSHPENDRA YADAV - ADVOCATE)*

.....  
Reserved on : 04.01.2024

Pronounced on : 09.01.2024  
.....

*This petition having been heard and reserved for orders, coming on for pronouncement this day, the Court pronounced the following:*

**ORDER**

Since pleadings are complete and learned counsel for the parties are ready to argue the matter, therefore, on their joint request, it is heard finally.

2. This petition is under Article 226 of the Constitution of India questioning the validity of order dated 27.10.2023 (Annexure P/8) passed by the respondent No.1 shifting the petitioner from the post of State Level Flying Squad, Bhopal to the office of Excise Commissioner, Gwalior (Camp Bhopal) and in his place, respondent No.3 has been brought from the office of Excise Commissioner, Gwalior (Camp Bhopal). The impugned order has been assailed mainly on two counts: firstly that the impugned order passed by the respondent No.1 is without any competence and secondly, it is without jurisdiction, therefore, nullity and as such, liable to be quashed.

3. Counsel for the petitioner has submitted that the impugned order has been issued during the currency period of Model Code of Conduct because of election of Legislative Assembly. He has submitted that the said order can be issued only with the approval of Election Commission (for short, 'the Commission') but in the present case, letter was issued by the office of Chief Election Commissioner, Madhya Pradesh to the Additional Chief Secretary, State of M.P., Commercial Tax Department on 17.10.2023 (Annexure P/6) asking the authority to conduct an enquiry against the petitioner and submit a report before the Election Commissioner so as to remove the petitioner from the post of Incharge, State level Flying Squad, Bhopal. In pursuance to said letter, on 20.10.2023, a letter (Annexure P/7) was written by Dy. Secretary,

Commercial Tax Department, State of M.P. to the Excise Commissioner, Gwalior saying that a letter making a complaint against the petitioner has been received by the office and, therefore, it is requested to conduct an enquiry and submit a report in this regard. A copy of complaint was also annexed with the said letter.

4. Shri Vipin Yadav, learned counsel for the petitioner has submitted that the complaint was made from the office of Congress Committee on 10.10.2023 (Annexure P/5) to the Chief Election Commissioner, Election Commission of India, New Delhi alleging that petitioner has completed three years as Incharge State Level Flying Squad, Bhopal and Model Code of Conduct was in force with effect from 09.10.2023. As per the complaint, petitioner used to be an OSD of the then Excise Minister Shri Jagdish Dewda and, therefore, looking to his near relation with Shri Jagdish Dewda, who is contesting the election as a candidate of Bhartiya Janta Party from Mandsaur City, District Mandsaur and as the petitioner is holding the post of Incharge, State Level Flying Squad which has complete control of the State and as such, it is not expected that petitioner would work fairly and, therefore, to maintain transparency and reasonableness, he be removed from the said post and would be attached to the Head Office at Gwalior. He has submitted that instruction was issued by the Commission only for making an enquiry with respect to the complaint made by the office of Congress Committee and it is for the Commission to take appropriate action on the basis of the report but here in this case, neither any enquiry was conducted nor any report was submitted before the Election Commissioner but under the garb of letter dated 20.10.2023, the respondent No.1 itself acted upon and issued the impugned order transferring the petitioner and simultaneously, brought respondent No.3 in his place. He has submitted

that it is nothing but a complete *mala fide* exercise on behalf of the respondent No.2, who is the Excise Commissioner and respondent No.3 is his blue eyed boy and just to accommodate him on the post of the petitioner all this exercise has been done.

5. Counsel for the petitioner has further submitted that respondent No.2 acted *mala fidely* and without making any enquiry and submitting any report to the Commission got the impugned order issued shifting the petitioner and in his place, respondent No.3 has been posted. He has submitted that the order impugned is without jurisdiction for the reason that during the Model Code of Conduct, only the Commission can issue an order of transfer or shifting of an employee or some other officer, if so required, could be posted but that had to be done by the Election Commissioner only whereas here Election Commission has not acted upon and it is the respondent No.2 who has issued the order and shifted the petitioner from his post and brought respondent No.3 in his place. He has further submitted that the impugned order is a punitive order as it has been passed on a complaint made against the petitioner and, therefore, in view of law laid down by the Supreme Court in case of **Somesh Tiwari Vs. Union of India and Others** reported in **2009 AIR SCW 854**, the order is illegal and cannot be issued without giving any opportunity of hearing to the petitioner and, therefore, the impugned order in light of the law laid by the Supreme Court in case of Somesh Tiwari (**supra**) is liable to be quashed. He has further contended that even under the circumstances existing there was no occasion for shifting the respondent No.3 in place of petitioner but that exercise has been done only to accommodate him in place of petitioner and that too by respondent No.2 because respondent No.3 is his blue eyed boy. He has also submitted that in fact, the petitioner has nothing to do with the

conduct of election and his duties are not directly connected with the same and, therefore, the guidelines issued by the Commission shifting officers who have completed three years of service at one place will not be applicable in the present case.

6. Shri Amit Seth, learned counsel appearing for the respondent No.1/State has filed reply and submitted that the order passed by the respondent is well within its jurisdiction because in pursuance to the instructions issued by the Commission, action has been taken by the State Government in which it has found that petitioner has completed three years of service at the present place and, therefore, he has been shifted from that post and respondent No.3 is the other officer who can be posted in place of the petitioner because the post cannot be kept vacant, therefore, the posting of respondent No.3 was made in place of petitioner. He has submitted that the order passed by the State Government was immediately communicated to the Chief Election Commissioner and from the order itself, it is clear that copy of that order was communicated to the Commission and the Commission has given approval of the said order. He has submitted that under the existing circumstances, the Commission was also a necessary party which can come forward and say that approval on the action of the State after issuing the order impugned has been given by them or not but he has submitted that in absence of making proper party i.e. Commission, the petition suffers from non-joinder of necessary party and as such, the petition deserves to be dismissed. He has also submitted that even otherwise, as per Clause 19.2.1 of the Model Code of Conduct, no officer connected directly with elections shall be allowed to continue in the present place of posting if he/she has completed three years of service during last four years or would be completing three years on or

before the last date of the month in which the term of the House is going to expire. He has submitted that petitioner has completed three years of service and, therefore, his transfer is otherwise as per the guidelines issued by the Commission. He has also submitted that as per sub-clause(vi) of Clause 19.4.1, the State Government is competent to issue order of transfer.

7. Shri Seth, learned counsel for the respondent/State has also raised an objection with regard to maintainability of the petition. He has submitted that without raising any objection or making representation to any of the authorities, the petitioner has implemented the order of transfer and joined at the transferred place. Once the order has been complied with without there being any agitation, the cause of action does not survive with the petitioner to challenge the order of transfer after its execution and, therefore, the petition is liable to be dismissed on this ground also. He has further pointed out that shifting of petitioner is within the district, that too on administrative capacity. He has also denied that order of transfer has been issued with any *mala fide* intention whereas it has been issued on the basis of instructions issued by the Commission and the impugned order dated 27.10.2023 reveals the endorsement to Commission and till date the Commission has not objected about the said transfer order, therefore, it is clear that the impugned order is passed by the competent authority. He has further submitted that State has only two officers and, therefore, if the petitioner is transferred then respondent No.3 was the only option to take charge of the said post because that post cannot be kept vacant and as such, according to Shri Seth, there is nothing illegal committed by the authority while passing the impugned order and as such, petition is misconceived and deserves to be dismissed.

8. Shri Swapnil Ganguly, learned counsel appearing for the respondent No.2 has submitted that the allegation of *mala fide* against the respondent No.2 is without any substance. It is also denied by learned counsel that respondent No.3 is the blue eyed boy of respondent No.2 therefore, he has been adjusted. He has apprised this Court that respondent No.3 and petitioner both are the high rank officers of Excise Department and working on the post of Additional Commissioner and, therefore, both of them are equally important but on the basis of instructions issued by the Commission, the petitioner has been shifted and respondent No.3 has been adjusted in his place. He has also submitted that even otherwise when petitioner has completed three years period holding the post of Incharge State Level Flying Squad, his transfer cannot be said to be arbitrary and illegal because as per the Model Code of Conduct, he was holding the post which was directly connected with conduct of elections because he has to supervise the work of Excise Department and also sale of liquor which has important role in the elections and control over the supply of liquor is completely under the control of the flying squad, thus, the impugned order cannot be said to be illegal.

9. Shri Pushpendra Yadav, learned counsel appearing for the respondent No.3 has submitted that it is the State which has ample power to maintain the administration and if so required shift its employees from one place to another. He has submitted that the order impugned is in fact not an order of transfer but it is a local shifting, that too as per the instructions of the Commission and since the said order has already been implemented by the petitioner, therefore, at this stage, the impugned order cannot be set aside and its validity cannot be questioned by filing the instant petition.

**10.** In reply to the submissions made by learned counsel for the respondents, Shri Yadav, counsel for the petitioner has submitted that merely because the petitioner has implemented the order does not mean that validity of the same cannot be questioned. He has submitted that petitioner had no option but to comply the order otherwise any disciplinary action could have been taken against him and non compliance of the order could be resulted in the order of suspension. He, therefore, submitted that merely because before implementing the order, no challenge is made by the petitioner does not mean that the said order was acceptable to him. He has submitted that now election is over and position can be restored by the respondents because only to follow the guidelines of the Commission, impugned order had been issued and arrangement for shifting the petitioner had been made.

**11.** After hearing the rival contentions of learned counsel for the parties and on perusal of record, this Court is of the opinion that before entering into merit of the case and the grounds raised by the petitioner for setting aside the impugned order, it is appropriate to first deal with the objection raised by counsel for the respondent No.1 with regard to maintainability of the petition. However, I am of the opinion that since the impugned order has been assailed by the petitioner on the ground that the same is without any competence and jurisdiction, therefore, it is nullity. As per the settled principles of law, if any order is without jurisdiction, the same can be assailed at any point of time and, therefore, merely because petitioner has implemented the impugned order does not mean that he is precluded to challenge the impugned order. Had it been a case challenging the order on other count then situation would have been different and petition could be dismissed as not maintainable but since this Court is considering the ground of competency, therefore,



submission made by counsel for the respondent No.1 and objection raised by him, in my opinion, do not have any substance and the same are accordingly rejected.

**12.** As per counsel for the petitioner, although petitioner in the present petition has raised several grounds challenging the impugned order but I am not interested to deal with those grounds only for the reason that it is a local shifting from one place to another, though question of competency under the existing circumstances goes to the root of the matter and make the order invalid, therefore, this Court is entertaining the petition only on the ground as to whether the impugned order has been issued by the competent authority or not. Thus, on the basis of material available on record and submissions made by counsel for the parties, this Court is only considering the fact whether the impugned order has been issued by the competent authority or not.

**13.** Indisputably, a complaint was made on 10.10.2023(Annexure P/5) from the office of Congress Committee to the Chief Election Commissioner, National Election Commission, New Delhi about the petitioner saying that he is holding the post of Incharge State Level Flying Squad and Model Code of Conduct since imposed with effect from 09.10.2023 in the State of Madhya Pradesh and petitioner has been posted at Bhopal since 11.08.2020, completed almost three years and was also OSD of the then Excise Minister Shri Jagdish Dewda and because of his near relation with the said Minister, it is better to transfer him and be posted at Head Office, Gwalior. Although, the said letter has been addressed to the Chief Election Commissioner, National Election Commission and copy of the same was also given to the Chief Election Officer, State of M.P. However, in response to the aforesaid letter, the Dy. Chief Election Officer, M.P. issued a letter on 17.10.2023

(Annexure P/6) to the Additional Chief Secretary, State of M.P. Commercial Tax Department giving reference of the complaint made vide letter dated 10.10.2023 by the Congress Committee about shifting of petitioner from the post of State Level Flying Squad. The Department has been instructed in the following manner:-

‘उपरोक्त विषयांतर्गत संदर्भित शिकायत की प्रति संलग्न कर लेख है कि कृपया इस विषयक जांच कर प्रतिवेदन एवं कृत कार्यवाही से आवश्यक रूप से अवगत कराने का कष्ट करें।’

In response to the said instruction, the Department, i.e. Commercial Tax Department wrote a letter dated 20.10.2023 (Annexure P/7) to the Excise Commissioner, Gwalior along with a copy of the complaint dated 10.10.2023 (Annexure P/5) and thereafter the impugned order has been issued on 27.10.2023 transferring the petitioner to the Office of Excise Commissioner, Gwalior (Camp Bhopal) and in his place, the respondent No.3 has been posted.

**14.** As per counsel for the petitioner, although petitioner has alleged *mala fide* against the respondent No.2 saying that without taking any approval from the Commission and without submitting any report of enquiry as has been directed to be done, no report was submitted to the Commission though as per letter dated 17.10.2023, the Department has been directed to submit the said report without any fail. But even though nothing has been done and without taking any approval from the Commission, impugned order has been issued and according to him, order of shifting of petitioner is nothing but an exercise carried out by the incompetent authority only to accommodate respondent No.3 in place of the petitioner because the complaint made against the petitioner not only seeks shifting of petitioner but his shifting has also been asked to a specific place i.e. Office of Excise Commissioner, Gwalior (Camp

Bhopal) and by the impugned order, same thing has been done. The petitioner has filed a document i.e. Model Code of Conduct in which clause 19.4 deals with ‘**Ban on Transfers of Officials Connected with Election**’.

**15.** In the present case, the respondents have taken a stand that the duty of petitioner was connected with the election and, therefore, his case of transfer falls within sub-clause (vi) of Clause 19.4.1 of Model Code of Conduct which provides as under:-

“(vi) In those cases where transfer of an officer is considered necessary on account of administrative exigencies, the State Government may, with full justification, approach the Election Commissioner for prior clearance.”

and submitted that after issuing the order of transfer, a copy of that order has been forwarded to the Chief Election Officer, M.P. as is clear from the endorsement contained in the impugned order (Annexure P/8) and, therefore, according to the learned counsel for the respondent/State, there was no objection ever raised by the Commission and according to him it is only the Commission which can come forward and say whether this recommendation has been made to them or not but the Commission according to him is not made a party and as such, petition can be dismissed on this ground of non-joinder of necessary party.

**16.** Considering the specific clause which deals with the order of transfer and the manner in which it could be issued, it is clear that if any transfer order of an officer is required to be issued then it is directed that the State Government may approach the Commission for **prior clearance**. If sub-clauses (vii) and (viii) of Clause 19.4.1 of Model Code of Conduct are taken note of then it is clear that by way of Model Code of Conduct, ban has been imposed not only on appointment or promotion in the Government/Public Undertakings but also on transfer

of government officers. Sub-clauses (vii) and (viii) of the aforesaid clause are relevant which reads as under:-

“(vii) No appointments or promotions in Government/Public Undertakings shall be made during this period, without prior clearance of the Election Commission.

(viii) This ban shall be effective till the completion of the election process.”

However, if Model Code of Conduct deals with the ban or needs prior clearance before issuing the order of transfer and without taking the same if any order of transfer is issued, the said order can be considered to be an order passed by the authority without any competence and jurisdiction.

**17.** From the discussion made hereinabove, it is clear that it is not an order passed by the Commission recommending the State to transfer the petitioner but the Commission only issued instructions to ascertain the fact of complaint and submit the report or apprise it about the factual aspect as has been narrated in the complaint and thereafter further instruction was required to be issued by the Commission for necessary action of transfer of petitioner and as such, it is the prerogative of the Commission to act upon the complaint on the basis of the report, if any, is submitted by the State Government.

**18.** Admittedly, no report has been submitted but presuming by the State authority that instruction has been issued by the Commission to transfer the petitioner, impugned order has been issued. In my opinion, the said presumption of the State authority was without any foundation and in fact misconceived. In my opinion, when Model Code of Conduct is in force and ban is imposed then it is obvious that any authority during the currency of Model Code of Conduct cannot exercise the normal power of transfer or appointment without prior approval of the

Commission. The Election Commission is a constitutional body vested with the power as per the Constitution of India and by virtue of provision of Article 324(1) and (6) of the Constitution of India, certain duties have been assigned to the Commission so as to hold free and fair election. The guidelines issued by the Commission as Model Code of Conduct cannot be considered to be the general guidelines but having statutory force and adherence of the said guidelines is obligatory for the State authorities. During the currency period of Model Code of Conduct, any order in respect of an officer connected with the election cannot be passed by the State authority without prior approval of the Commission otherwise the very purpose of forming the Model Code of Conduct and its enforcement would frustrate the very object of Constitution of the Commission. Although, as per counsel for the respondent/State, sending a copy of the order to the Commission and not objected by the Commission would otherwise mean that the said action of the State has been approved by the Commission, but I am not convinced with the said submission for the reason that post approval is not material and was not the requirement of provisions of Model Code of Conduct whereas it is the **prior clearance** from the Commission. Even otherwise, there is nothing produced by the State showing that the Commission has granted any post approval to the action of the State. If that is there, it was for the State to produce the same.

**19.** Similar issue came before the Division Bench of the Allahabad High Court in the case of **R.K. Mittal Vs. State of UP and another** reported in **2004 SCC OnLine All 1772**. The question which has been dealt by the Allahabad High Court in the aforesaid case is as under:-

‘5. However, in the peculiar facts and circumstances of the case, petition raises substantial question of law as to whether the Code issued by the Election Commission has a statutory force and even if it does not,

it requires strict adherence by the State authorities and if State authorities violate the same, whether the Court should enforce the Code issued by the Commission.’

Dealing with the said question, the Allahabad High Court has observed as under:

‘7. Relative issues in respect of the power of the Election Commission for holding the election has been considered time and again by the Hon'ble Supreme Court.

8. In *Mohinder Singh Gill v. Chief Election Commissioner, New Delhi*, (1978) 1 SCC 405 : AIR 1978 SC 851, a Constitution Bench of the Supreme Court held that as the Election Commission has complete power of superintendence, it has a power to issue directions for the purpose of holding the election. The Court observed as under:—

“2(a) The Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. This responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances.

(b) Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection with election, the Commission, shall act in conformity with, not in violation of, such provisions but where such law is silent Article 324 is a reservoir of power to act for, the avowed purpose of, not divorced from pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice insofar as conformance to such canons can reasonably and realistically be required of it as fairplay-in-action in a most important area of the constitutional order, viz. Election.

.....  
 .....It is incomprehensible that a person or body can discharge any functions without exercising powers. Powers and duties are integrated with function..... Article 324(1) is thus couched wide terms. Power in any democratic set up, as is the pattern of our polity, is to be exercised in accordance with law.”

9. In *Election Commission of India v. All India Anna Dravida Munetra Kazahagam*, 1994 Supp (2) SCC 689, the Hon'ble Apex Court held that the directions issued by the Election Commission require strict adherence and Commission was held to have competence even of restricting the hours of using loudspeakers fitted on vehicles for electioneering purposes. Their Lordships explained the scope of Model Code of Conduct issued by the Election Commission observing that it is

issued considering public good and it cannot be said to be unrelated or the powers of the Election Commission under Article 324 and the directions issued by the Election Commission should not be interfered ordinarily.

**10.** In *Kanhiya Lal Omar v. R.K. Trivedi*, (1985) 4 SCC 628 : AIR 1986 SC 111, the Hon'ble Apex Court had an opportunity to examine the scope of Article 324 of the Constitution of India read with the Conduct of Election Rules, 1961. The Court held that every direction issued by the Commission cannot be put at par to statutory rule but it requires strict adherence. The Court observed as under:—

“While construing the expression ‘superintendence, direction and control’ in Article 324(1), one has to remember that every norm which lays down a rule of conduct cannot possibly be elevated to the position of legislation or delegated legislation. There are some authorities or persons in certain areas who may be sources of rules of conduct and who at the same time cannot be equated to authorities or persons who can make law, in the strict sense in which it is understood in jurisprudence. A direction may mean an order issued to a particular individual or a precept which many may have to follow. It may be a specific or a general order. One has also to remember that the source or power in this case is the Constitution, the highest law of the land, which is the repository and source of all legal powers and any power granted by the Constitution for a specific purpose should be construed liberally so that the object for which the power is granted is effectively achieved. Viewed from this angle it cannot be said that any of the provisions of the Symbols Orders suffers from want of authority on the part of the Commission, which has issued it.”

**11.** In *Election Commission of India v. State Bank of India Staff Association Local Head Office Unit, Patna*, 1995 Supp (2) SCC 13 : AIR 1995 SC 1078, the issue was agitated before the Hon'ble Supreme Court as to whether the Election Commission had a power to issue a direction to send the employees of the State Bank of India for election purpose. Interpreting the various provisions of the Statute, particularly, Act, 1950 and 1951, the Hon'ble Supreme Court held that as the employees of the State Bank of India were not the employees of the Union of India and that of the State, they could not be directed to be involved in the election process. However, the Court observed as under:—

“We assume that the powers of the Election Commission under Article 324 are plenary. Therefore, the Election Commission may issue any direction in the matter of conduct of elections.... Therefore, on a request by the Election Commission the services of those Government servants who are appointed to public services and posts under the Central or State Governments will have to be made available for the purpose of election. When the Constitution came into force the services of these officers were readily available. Of course, there were also local authorities

and the services of the employees of the local authorities were also available. That is why Section 159 of the 1951 Act provides that on request from the Regional Commissioner or the Chief Electoral Officer of the State, the local authority of the State shall make available to any Returning Officer such staff as may be necessary to carry out the duties in connection with an election.”

**12.** To overcome the difficulty by the interpretation of the statutory provisions of the Hon'ble Supreme Court in the case of State Bank of India (supra), the provisions of Section 159 of the Act, 1951 stood amended with effect from 23rd December, 1997 and by the amendment, the employees of the local authorities. Universities, Government Companies and public undertakings could also be involved in the election process.

**13.** In Common Cause (A Registered Society) v. Union of India, (1996) 2 SCC 752 : AIR 1996 SC 3081, the Court held that the Constitution had made the comprehensive provisions under Article 324 of the Constitution enabling the commission to superintend and control over the conduct of election and to issue any direction in connection with the election.

**14.** In Union of India v. Association for Democratic Reforms, (2002) 5 SCC 294 the Hon'ble Supreme Court reiterated the same view observing as under:—

“It is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction by the executive, for whatever reason, the judicial must step in, in exercise of its constitutional obligations to provide a solution till such time the legislature acts to perform its role by enacting proper legislation to cover the field.”

**15.** The Court further observed as under:—

“The jurisdiction of the Election Commission is wide enough to include all powers necessary for smooth conduct of elections and the word “elections” is used in a wide sense to include the entire process of election which consists of several stages and embraces many steps..... In case where law is silent, Article 324 is a reservoir of power to act for the avowed purpose of having free and fair election.”

**16.** In view of the above, it can be summarised that the instruction issued by the Election Commission, though executive in nature, as is issued in performance of a legal and sovereign function and looking to the purpose for which the powers are conferred the mandate issued by the Election Commission is binding upon the State. Moreso, once the State Government adopts the Code, it is not open for its instrumentalities to violate the same as it would amount to colourable exercise of power or it would be arbitrary and unreasonable not to act in consonance with the directions issued by the Commission. (Vide Dr. Amarjit Singh Ahluwalia



v. The State of Punjab, (1975) 3 SCC 503 : AIR 1975 SC 984) : [1975 (1) SLR 171 (SC)].

**17.** In *Lalji Shukla v. Election Commission of India*, New Delhi, (2002) 1 UPLBEC 550 a Division Bench of this Court has taken similar view observing that the powers to issue Code by the Election Commission has been drawn from the provisions of Article 324 of the Constitution, thus, the State or its instrumentalities are under obligation to observe the same.

**18.** The Code itself provides for exceptions in case, State or its instrumentalities feel difficulty and it is necessary in administrative exigency to transfer a person who can be involved in election process after issuance of the Code of Conduct by the Election Commission. Clause 7 of the Code dated 29th February, 2004 reads as under:—

“In those cases where transfer of an officer is absolutely necessary on account of administrative exigencies, the concerned State Government may with full justification approach the Commission for prior clearance.”

**19.** Even for those persons where the orders of transfer have been passed but could not be implemented, the Code provided vide Clause 5 that it shall not be implemented without permission of the Commission. The said Clause reads as under:—

“The transfer orders issued in respect of the above categories of officers prior to the date of announcement but not implemented till date should not be given effect to without obtaining specific permission from the Commissioner in this regard.”

**20.** Thus, the Code is to be observed but in order to facilitate the function of the State, certain exceptions have been carved out in the Code itself and State Government can implement the transfer orders etc. after taking prior clearance from the Commission.

**21.** The Code does not relate to every employee of the State Government. It is concerned only with those persons who can be involved in election process as Clause 4 of the Code reads as under:—

“The Commission directs that there shall be a total ban on the transfer of all officers/officials connected with the conduct of the elections. These include but are not restricted to:—

(i) The Chief Election Officer and Additional/Joint/Deputy/Chief Electoral Officers;

(ii) Divisional Commissioners;

(iii) The District Election Officers, Returning Officers, Assistant Returning Officers and other Revenue Officers connected with the Conduct of Elections:—

(iv) Officers of the Police Department connected with the management of elections like range IGs and DIGs. Senior Superintendents of Police and Superintendents of Police., Sub-divisional level Police Officers like Deputy Superintendents of Police and other Police Officers who are deputed to the

Commission under Section 28A of the Representation of the People Act, 1951”.

**22.** Thus, it is apparent from the aforesaid clause that the list mentioned therein is not exhaustive, it is rather illustrative and it is for the State Government to consider and for the Election Commission to examine as whose services are required in the election for the reason that after amendment in Section 159 of the Act, 1951, the services of the employees of the Government Companies, Public Undertakings and local bodies can be involved in the election process.

**23.** Transfer of the employees whose services are required in the electioneering process, may be restrained/regulated by the Election Commission in order to conduct the election free and fair, for the reason that a political party in power, may post the officers of its liking at a particular place for a definite purpose of some unlawful gain in the election and in order to curb such a situation possibility, it may be necessary for the Election Commission to issue such kind of direction, and once such a direction is issued, it requires strict adherence. It is not that every direction issued by the Commission requires observance religiously but where the direction is being issued to ensure free and fair election, all other authorities are under obligation to give strict adherence to the same.

**24.** If the instant case is examined in the light of the aforesaid settled legal proposition, the order impugned had been passed on 28.2.2004 but it came to the knowledge of the petitioner employee for the first time on 3rd March, 2004, therefore, the question of implementation/execution of the transfer order dated 28.2.2004 could not have arisen prior to the issuance of the Code of Conduct on 29th February, 2004. Thus, the transfer order cannot be given effect to without seeking clearance of the Election Commission as provided under Clause 5 of the said Code. In case it is necessary for the State Government in administrative exigency that the petitioner's services are required at a different place, the State must approach the Election Commission for clearance of such transfer before it can be given effect to.

**25.** Therefore, it is necessary for the State Government to take prior clearance as to whether services of the Executive Engineer in the department of local bodies (Nagar Nigam) are required in the election process and, if yes, whether the Election Commission is willing to give its clearance for transfer in a particular case. In case, their services are not required in the election and it is clarified by the Election Commission, the transfer order shall be given effect to and the petitioner is directed to join at the transfer place. Since the case at the order was before clearance from the Election Commission, thus, in view of the above, petition succeeds and is allowed. The impugned transfer order shall not be given effect to without seeking clearance of the Election Commission.’

**20.** From the aforesaid enunciation of law of Division Bench, it is clear that the guidelines issued by way of Model Code of Conduct has a statutory force and it requires strict adherence. In my opinion and as discussed hereinabove, it is apparent that the impugned order has not been issued adherent to the requirement of Clauses of Model Code of Conduct and there was no **prior clearance** of Commission in the present case and as such, the impugned order dated 27.10.2023 (Annexure P/8) being without any jurisdiction, not sustainable in the eyes of law and therefore, it is hereby quashed.

**21.** Thus, the petition is **allowed**.

**(SANJAY DWIVEDI)**  
**JUDGE**