Supreme Court of India
Election Commission Of India & ... vs Dr. Subramanian Swamy & Another on 23 April, 1996
Equivalent citations: 1996 AIR 1810, 1996 SCC (4) 104
Author: A A.M.
Bench: Ahmadi A.M. (Cj)

PETITIONER:
ELECTION COMMISSION OF INDIA & ANOTHER

Vs.

RESPONDENT:
DR. SUBRAMANIAN SWAMY & ANOTHER

DATE OF JUDGMENT: 23/04/1996

BENCH:
AHMADI A.M. (CJ)
BENCH:
AHMADI A.M. (CJ)
SINGH N.P. (J)
KIRPAL B.N. (J)

CITATION:
1996 AIR 1810 1996 SCC (4) 104
JT 1996 (4) 463 1996 SCALE (3)734

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T AHMADI, CJI.

This is an appeal preferred by the Election Commission of India and Shri T.N. Seshan, the Chief Election Commissioner, (when the former was a single-member commission) against the decision of the Division Bench of the High Court of Madras dated 15.11.1993 by which, reversing the view taken by the learned single Judge of the High Court dated 2.7.1993, it held that in view of the promulgation of Ordinance (Ordinance No.32 of 1993) the doctrine of necessity was no more attracted and applicable in the facts and circumstances of the case. The question raised in this appeal arises in the backdrop of the following facts:

Ms. J. Jayalalitha was elected to the Legislative Assembly of Tamil Nadu on or, the AIADMK ticket in the General Elections held in June 1991 and on being elected as the leader of the party she was

sworn-in as the Chief Minister of the State. On 2.10.1992, Dr. Subramanian Swamy preferred a petition to the State Governor under Article 192 of the Constitution of India alleging that the Chief Minister had incurred a disqualification of being a member of the Legislative Assembly of the State, in that, she being a partner in the partnership firm run in the name and style of Messrs Jaya Publications had entered into a contract with the State Government and which contract was subsisting on the date of the petition, in view of sub-clause (e) of clause (1) of Article 191 of the Constitution read with Section 9A of the Representation of the People Act, 1951 (hereinafter called 'the R.P. Act'). It would be advantageous to reproduce the said two provisions at this stage:

"191(1) A person Shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of 9 State-

(a) .....

(b) .....

(c) .....

(d) .....

(e) if he is so disqualified by or under any law made by Parliament.

Explanation--- For the purposes of this clause, a person shall not be deemed to hold an office of profit under the government of India of the Government of any state specified in the first Schedule by reason only that he is Minister either for the Union or for such State."

"9A. Disqualification of Government contracts, etc. - A person shall be disqualified if, and for so long as, there subsists a contract entered into by him in the course of his trade or business with the appropriate Government for the supply of goods to, or for the execution of any works undertaken by, that Government.

Explanation--For the purposes of this section, where a contract has been fully performed by the person by whom it has been entered into with 'the appropriate Government, the contract shall be deemed not to subsist by reason only of the fact that the Government has not performed its part of the contract either wholly or in part."

Since the Governor did not forward the petition to the Election Commission, Dr. Swamy moved a Writ Petition No.942 of 1992 against the Governor for a direction that he forthwith forward the same to the Election Commission as required by Article 192(2) of the Constitution for its opinion. While the said writ petition was pending in the High Court, the Governor forwarded the petition to the Election Commission on 27.3.1943 for its opinion. Thereupon M,. J.Jayalalitha moved two Writ Petitions Nos.6094 and 6095 of 1993, the first for a writ of prohibition against Shri Seshan not to deal with the petition forwarded to him by the Governor as she had a reasonable apprehension that he was biased in favour of Dr.Swamy and the second for a declaration that she had not incurred the

disqualification as alleged by Dr.Swamy.

Both these writ petitions came up for disposal before a learned Single Judge of the High Court. He allowed the first writ petition holding that the evidence placed on record clearly established that Ms. J.Jayalalitha's apprehension that Shri Seshan may not be able to take an impartial view because of his strong bias in favour of Dr.Swamy could not be said to be misplaced or unreasonable and it would be just, fair and proper to issue a writ of prohibition directing Shri Seshan to refrain from expressing any opinion on Dr.Swamy's petition alleging disqualification, since at the relevant time the Election Commission was a one-member body. On the plea based on the doctrine of necessity, the learned Judge observed that while the principle of natural justice may have to yield in favour of the doctrine of necessity, it was not obligatory to invoke the said doctrine in all cases, in particular in the case on hand, since it was permissible under Article 324 of the Constitution to appoint an additional Election Commissioner, who, if appointed, would constitute an alternative forum for dealing with the matter. So far as the second writ petition is concerned, while the learned Single Judge held that the decision on the issue raised by Dr. Swamy lay within the exclusives domain of the Governor, he opined that Ms. J.Jayalalitha had not incurred the alleged disqualification. Therefore, while dismissing the second writ petition, he virtually allowed it, in that, the Governor while taking a decision under Article 192(2) would feel inhibited by the said decision.

Dr.Swamy filed two Special leave Petitions Nos.10189-90 of 1993 in this Court under 'Article 136 of the Constitution questioning the correctness of the view taken by the learned Single Judge in the said two petitions. This Court, however, did not entertain the said two petitions and by its order dated 20.8.1993 directed the petitioner to move the Division Bench in appeal. Consequently Dr.Swamy preferred an appeal, being Writ Appeal No.956 of 1993, in the High Court of Madras.

At this stage we may notice one development. The President of India promulgated an Ordinance (No.32 of 1993) entitled the Chief Election Commissioner and other Election Commissioners (Condition of Service) Amendment Ordinance, 1993 which was published in the Gazette of India on 1.10.1993. (This Ordinance was converted into an Act (Act No.4 of 1994) with the same title on 4.1.1994). Sections 9 and 10 introduced in the Chief Election Commissioner and other Election Commissioners (Conditions of Service) Act, 1991 (hereinafter called 'the 1999 Act') provided as under:

> "9. The business of the Election Commission shall be transacted in accordance with the provisions of this Act."
>
> 10.(1) The Election Commission may, by unanimous decision, regulate the procedure for transaction of its business as also allocation of its business amongst the Chief Election Commissioner and other Election Commissioners.
>
> (2) Save as provided in sub-section (1), all business of the Election Commission shall, as far as possible, be transacted unanimously.

> (3) Subject to the provisions of sub- section (2), if the chief Election Commissioner and other Election commissioners differ in opinion on any matter, such matter shall be decided according to the opinion of the majority."

It may be mentioned that the provisions in the Act. were the same as in the Ordinance.

The Division Bench of the Madras High Court which heard the appeal raised three points for determination namely, (i) whether the learned Judge was justified in examining if Ms. J. Jayalalitha had incurred the disqualification set out in Article 191(1) of the constitution read with Section 9A, R.P.. Act, (ii) whether the doctrine basis and (iii) whether the doctrine of necessarily stood attracted after the enactment of ordinance No.32 of thereof. The Decision bench by its judgment and order dated 15311.1993 held that the question whether Ms. J.Jayalalitha had of had not incurred the disqualification read with Section 9A of the R.P. Act ought to have been left for decision by the Election Commission under Article 192(2) of the Constitution and the learned Single Judge should not have gone into it as it felt within the exclusive domain of the Election Commission. On the second question the Division Bench held that on the facts and in the circumstances of the case Ms.J.Jayalalitha would be justified in entertaining a reasonable apprehension of bias or atleast the likelihood of bias on the part of Shri Seshan in favour of Dr.Swamy and consequently a reasonable doubt that she would not get a fair hearing from Shri Seshan. Insofar as the third point is concerned, the Division Bench held that in view of the appointment of two Election Commissioner after the promulgation of the Ordinance and in view of Sections 9 and 10 extracted earlier, the doctrine of necessity cannot be applied since the decision could be taken by the Election Commission if need be by majority. On this line of reasoning, on the question of relief to be granted, the Division Bench allowed the Writ Appeal and modified 'he order in writ petition No. 6094 of 1993 by giving the following direction:

> "A writ of prohibition is issued to the first respondent (Mr. T.N. Seshan) from in any manner dealing with, hearing, adjudicating upon or disposing of the memorandum dated 2.10.1992 filed by the second respondent (Dr. Subramanian Swamy) and forwarded by the Governor of Tamil Nadu to the first respondent. We make it clear that it is open to the Election Commission, While regulating the procedure for transaction of its business or allocation of its business to allot it to by one of the other two members or to both, as it deems necessary and proper."

However, insofar as Writ Petition No. 4095 of 1993 is concerned, Division Bench allowed the Writ Appeal and set aside the order and decision of the learned Single Judge and dismissed Writ Petition No.4095 of 1993. The Election Commission of India as well as Shri T.N. Seshan felt aggrieved by the decision of the Division Bench in the appeal arising out of Writ Petition No.6094 of 1993 extracted earlier. This Court granted Special Leave to Appeal and hence we have before us this Civil Appeal No.504 of 1994. So in this appeal this Court is called upon to decide the limited question regarding the participation of Shri Seshan in decision-making having regard to the allegation of bias made against him.

We have extracted the relevant part of Article 191(1) of the Constitution. That article plainly says that a person shall be disqualified for being a member of the Legislative Assembly of the State if he is disqualified by or under any law made by Parliament. Section 9A of the R.P. Act provides that a person shall be disqualified if there subsists a contract entered into by him in the course of his trade or business with the appropriate government for the supply of goods to, or for the execution of any work undertaken by that government. The duration of the disqualification is limited, namely, so long as the contract subsists. The allegation of Dr.Swami is that Ms. J.Jayalilitha being a partner of the firm carrying on business in the State of Tamil Nadu under the name and style of 'Jaya Publications' had incurred the disqualification since that firm had a subsisting contract with the State Government which was a business enterprise to make profit. According to Dr. Swamy she has incurred the disqualification under Section 9A of the R.P. Act, which being a law made by Parliament, attracts the application of Article 191(1)(e) of the Constitution. Article 192(1) provides that if any question arises as to whether a member of a House of the Legislature has become subject to any disqualification mentioned in Article 191(1), of the Constitution shall be referred for the decision of the Governor whose decision 'shall be final'. Thus it is the Governor who has, to take a decision and such decision is made final. Then we turn to clause (2) of Article 192 which reads as under :

> "192(2) - Before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion."

It is clear from the use of the wards shall obtain' the opinion of the Election Commission, that it is obligatory to obtain the opinion of the Election Commission and the further stipulation that the Governor "shall act" according to such opinion leaves no room for doubt that the Governor is bound to act according to that opinion. The position in law is well settled by this Court's decision in Brundaban v. Election Commission (1965) 3SCR 53 where in this court held that it is the obligation of the Governor to take decision in accordance with the opinion of the Election Commission. It is thus clear on conjoint reading of the two clause of article 192 that once a question of the type mentioned in the first clause is referred to the governor, meaning thereby is raised before the Governor, the Governor, meaning thereby is raised before the Governor, the Governor and the Gover alone must decide it but this decision must be taken after obtaining the opinion of the Election Commission and the decision which is made file is that decision which the Governor has taken in accordance with the opinion of Election Commission. In effect and substance the decision of the Governor must dependent of the opinion of the Election Commission and none else, not even the council of Ministers. Thus the opinion of the election Commission is decisive since the final order would be based solely on that opinion.

The same view came to be expressed in the case of Election Commission of India v. N.G. Ranga, (1979) 1 SCR 210, while interpreting Article 103 (2), that instead of the Government in Article 192(2), here the decision has to be made by the President. So also the language of Articles 192 (1) and 103(1) is identical except for the same change. The Constitution Bench of this Court reiterated that the President was hound to seek and obtain the opinion of the Election Commission and only thereafter decide the issue in accordance therewith. In other words, it is the Election Commission's opinion which is decisive.

Having realised that the opinion of the Election Commission is a sine-qua-non for the Governor or the President, as the case may be, to give a decision on the question whether or not the concerned member of the House of the Legislature of the State or either House of Parliament has incurred a disqualification, the next question is, can the Election Commission take a decision if one of its members is disqualification. from participating in the decision-making? Article 324(1) of the Constitution invests in the Election Commission the function of superintendence, direction and control of elections and clause (2) of that Article provides that the Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix. Thus, Article 324(2) envisages a multi- member Election Commission with the Chief Election Commissioner as its Chairman, [see Article 324(3)]. In the instant case, to begin with the Election Commission was a single-member body with Shri Seshan as the Chief Election Commissioner when the learned Single Judge devided the write petition on 2.7.1993. On the question of Ms. J.Jayalalitha entertaining a reasonable apprehension of bias, the learned Judge, on a scrutiny of the facts and circumstances of the case, came to the conclusion that having regard to the close association of Dr. Swamy with Shri Seshan, besides the fact that Dr. Swamy's wife was the lawyer of Shri Seshan in the suit filed by him at Bombay, the apprehension of bias was real and not imaginary and if Shri Seshan has to take a decision on Dr. Swamy's complaint, the decision may not be impartial and will atleast not be seen to be impartial and therefore the learned Single Judge restrained him from deciding the issue and communicating the same to the Governor. However, on the application of the doctrine of necessity, the learned Judge held that since Article 324(2) of the Constitution permitted appointment of one or more Election commissioners, it was not necessary to invoke the doctrine of necessity and allow Shri Seshan to make a decision, the apprehension of bias, notwithstanding. The Division Bench of the High Court has upheld the view of the learned Single Judge on the question of existence of circumstances which go to show that the' apprehension of bias entertained by Ms. J. Jayalalitha was reasonable and the possibility of her not getting an impartial hearing and decision was real and not imaginary merely an excuse trotted out to avoid a decision on the issue of her disqualification. Thus, there is a concurrent finding of fact that having regard to the close and intimate relationship between Dr. Swamy and Shri T.N. Seshan, apart from the fact that the former's wife is the latter's lawyer in the rupees one crore damages suit filed by him in Bombay, the apprehension of bias in the mind of Ms. J.Jayalalitha cannot be said to be misplaced and her fear that she may not get justice if the decision is taken by Shri Seshan cannot be brushed aside as imaginary. Shri Sanghl, the learned counsel for Shri Seshan, very frankly stated that his client is not in the least keen to participate in the decision- making in view of the findings recorded by the learned Single Judge as well as the Division Bench of the High Court but he contested the litigation because in his view he cannot excuse himself from the process of decision-making. He contended that when the matter was before the learned Single Judge, he had invoked the doctrine of necessity as he honesely believed that he was duty bound to decide the issue referred to him and if he refused to do so he would be failing tn discharge his constitutional obligation. This is not to say, contended Shri Sanghi, that he admitted that allegation of bias made against his client hut merely to emphasise that he was under a constitutional obligation to decide the issue and communicate his opinion to the Governor to enable him to discharge his function under Article 192(2) of the Constitution. Shri Sanghi further contended that even after the Election Commission was converted into a multi- member body with effect from 1.10.1993, on which date the other two Election Commissioners came to be appointed, the position in law remained unaltered

because the Constitution does not conceive of an Election Commission without a Chief Election Commissioner. According to him, the structure of Articles 324(2) and 324(3) and the use of the word 'and' after the words 'Chief Election Commissioner' and the word 'other' preceding the words 'Election Commissioners' leaves no room for doubt that the Constitution-makers visualised the existence of the Chief Election Commissioner at all times and safeguarded the said office by providing for the removal of the incumbent occupying the said office in the same manner as a Judge of the Supreme Court. Shri Sanghi reiterated that assuming without admitting that the finding of bias is correct, Shri Seshan was not at all anxious to participate in the decision-making process if lt is not obligatory under the extant constitutional scheme on his part to participate in the decision-making. Stated in a nutshell the line of reasoning adopted by Shri Sanghi is that the decision of the 'Election Commission' is a 'must' for the Governor to decide the issue; the constitution of the Election Commission under the scheme of Article 324 of the Constitution clearly is that it must comprise the Chief- Election Commissioner as its Chairman if it is a multi- member body , other words there cannot be a properly constituted Election Commission without its Chairman and hence his participation in the decision-making cannot be excused and must be permitted on the doctrine of necessity. Thus, according to Shri Sanghi, the constitution of a multi-member Election Commission and the insertion of Section 9 and 10 in the 1991 Act would make no difference because they do not speak of exclusion of the Chief Election Commissioner from the decision-making process. These provisions merely set out the procedure to be followed in the event of a difference of opinion.

On the other hand, the learned Counsel for Ms. J. Jayalalitha reiterated the contention of bias on the ground that the facts on record revealed that there was unity and identity of interest between Dr. Swamy, his wife and Shri Seshan since it was established beyond any manner of doubt that they had developed family friendship which went beyond mere professional relationship and it would be embarrassing both for Shri Seshan and Ms. J. Jayalalitha if the former sat in judgment over the complaint of disqualification made by Dr. Swamy. It was further pointed out that after the learned Single Judge repelled the contention based on the doctrine of necessity, Shri Seshan did not prefer any appeal against the said decision but has now preferred, the pleasant appeal on that the realizing that the Election Commission has been converted into a multi-member body and the view taken by the learned Single Judge would be translated into a reality if the two Election Commissioners decide the issue of disqualification arising before the Election Commission. There can be no doubt, contended counsel, that the function which the Election Commission is expected to perform under Article 192(2) of the Constitution can be said to be quasi-judicial in character and once it is shown that the apprehension of bias is reasonable and genuine, the participation of the Chief Election Commissioner in the decision-making process would be in breach of the principles of natural justice and unless it is shown that there is no alternative but for him to sit in judgment, the rule of natural justice must prevail because justice must not only be done but must also appear to be done. It was, therefore, submitted by counsel that the doctrine of necessity can have no play because in the case of a multi-member body, the person, be he the Chief Election Commissioner or an Election Commissioner, against whom the charge of bias is established ought to excuse himself from the proceedings so that the decision taken is not rendered vulnerable and the apprehension of prejudice is totally removed. In short, Ms. J. Jayalalitha supports the decision of both the learned Single Judge and the Division Bench on the question of bias and applicability of the doctrine of necessity.

We must at once state that we have carefully examined the facts and circumstances laid on record in support of the finding of bias recorded by the learned Single Judge as well as the Division Bench and in our view the said finding is unassailable. Conscious of the fact that Shri Seshan is occupying a high constitutional office we have given our anxious consideration to this aspect of the matter. While we are inclined to think that Shri Seshan as a high constitutional functionary may not carry any grudge or malice against Ms. J.Jayalalitha, there can be no doubt that his close association with Dr. Swamy's family and the professional relationship with his wife who is representing him in the suit at Bombay and the other circumstances, all of which have been summarized in paragraph 39 of the Division Bench judgment, are sufficient to raise a reasonable apprehension in the mind of Ms. J.Jayalalitha that he may be biased in favour of Dr. Suamy even if he does not entertain any ill-will towards her. Realizing this, Shri Sanghi submitted that his client is not at all anxious to participate in deciding the issue referred to the Election Commission unless it is in the constitutional scheme imperative for him to do so. He further stated that if this court comes to the conclusion that without his participation the other two election. Commissioners can decide the issue, his client will recuse himself. That takes us to, the question whether Shri Seshan is bound to participate in expressing his view on the issue referred for the opinion of the Election Commission?

It is true that Article 192(2) of the Constitution expects that the Governor 'shall obtain' the opinion of 'the Election Commission' and 'shall act' according to such opinion in giving his decision on the question of disqualification raised before him. Obtaining the opinion of the Election Commission is, therefore, imperative. It is equally imperative for the Governor to act according to such opinion. Thus, the opinion of the Election Commission is decisive of the decision to be taken by the Governor. obviously, the Election. Commission referred to in Article 192(2) of the Constitution would he the one appointed under Article 324(2) of the Constitution. This Article in terms provides that the Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners as the President may fix from time to time. Therefore, the Chief Election Commissioner is a must whether it is a single-member- or multi-member body. In the case of a multi-member body, Article 324(3) expects him to act as the Chairman of that body. Section 146 of the R.P. Act cutlines the procedure to be followed in deciding the question arising under Article 192. That procedure is the one a civil court follows in deciding matters brought before it. Section 9A was introduced in the R.P. Act to empower the Election Commission to delegate some of its functions to the Secretary or Deputy Election Commissioner, subject to such direction as the Election Commission may choose to give. But it was pointed out that only routine matters can be delegated under this provision.

At this stage it may be advantageous to refer to certain other provisions which have a bearing on the point under consideration. Article 124(1) of the Constitution provides that there shall be a Supreme Court of India consisting of the Chief Justice of India and such number of other judges as may from time to time be prescribed. Article 214 provides that every State shall have a High Court and as provided by Article 216 every High Court shall consist of a Chief Justice and such other Judges as may be considered necessary to appoint. Similarly, Article 324(2) and (3) provide that the Election Commissioner shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix. When the Election Commission is a multi- member body, the Chief Election Commissioner will act as its Chairman. These provisions,

therefore, provide for the constitution of the Supreme Court, High courts and the Election Commission. In the case of the first two, it is well-settled that they need not sit en banc and can transact business in benches. Is there any distinguishing feature in the case of the Election Commission to take the view that it must sit en banc or not at all? In other words, can it be said that the provisions of the Constitution make it imperative for the Chief Election Commissioner to participate in each and every decision that the Election Commission is required to make under the Constitution?

True it is that under Article 192 if any question arises in regard to disqualification referred to in Article 191(1), the question has to be referred to the Election Commission for its opinion and the Governor has to give his decision in accordance with that opinion. Article 324(2) provides for the constitution of Election Commission; if it is a single-member body it will comprise of the Chief Election Commissioner only, if it is a multi-member body he will be joined by the other Election Commissioner(s). In the case of a single-member body, if the Governor seeks his opinion, he perhaps can invoke the doctrine of necessity but that question which arose before the learned Single Judge is no more germane because during the pendency of the appeal two more Election Commissioners were appointed making it a multi-member body. Shri Sanghi's reading of the aforesaid constitutional provisions is that since the opinion has to he of 'the Election Commission', it must be of all those who constitute that body or not at all. This in our view is a narrow reading of the said provisions. If Shri Sanghi is right it must necessarily follow that ail decisions taken by the Election Commission must be unanimous and majority decisions would be of no avail. More or less the same line of reasoning was canvassed before this Court in T.N. Seshan v. The Union of India (1995) 4 SCC 611, but without suecess. In that case this Court held that the scheme of Article 324 is that there shall be a permanent body to be called the Election Commission, which shall discharge public functions, essentially administrative in character but at times even adjudicative and legislative. It was further pointed out that the Constitution-makers preferred to remain silent as to the manner in which the Election Commission will 'cransact its business presumably because they thought it unnecessary and perhaps even improper to provide for the same having regard to the level of personnel it had in mind to man the Commission. Naturally they depended on the sagacity and the wisdom of the Chief Election Commissioner and his colleagues. That, however, does not mean that the Parliament could not enact Sections 9 and 10 introduced by the amending Ordinance/Act. The submission that the said two provisions were inconsistent with the scheme of Article 324 was rejected. Implied in this contention was the submission that in the case of multi-member Election Commission decisions have to be taken by one voice or not at all and any provision which introduces the concept of decision by majority must be held to be inconsistent with the scheme of Article 394. Rejecting this contention this Court held that Parliament was competent to enact Sections 9 and 10 introduced by the amending Ordinance/Act and there was nothing in the scheme of Article 324 to conclude that decision by majority would be an illegality. In that case this Court quoted with approval, the following principle found in footnote 6 at page 657 of Halsbury's Law of England, 4th Edition (Re-issue), Volume 7(1):

> "The principle has long beer, established that the will of a Corporation or body can only be expressed by the whole or a majority of its members, and the act of a majority is regarded as the act of the whole."

The same principle was reiterated in Grindley . Baker 126 ER 875, 879 and 882. It is, therefore, obvious that after the decision of the Constitution Bench reiteration of the same argument, albeit in a different shade, can be of no avail to the appellant.

The next question then is if the Chief Election Commissioner, for reason of possible bias, is disqualified from expressing an opinion, how should the Election Commission conduct itself? As pointed out earlier Shri Sanghi, the learned counsel for the appellant, has very frankly and with his usual fairness stated that the Chief Election Commissioner preferred this appeal only because he genuinely believed that the scheme of Article 324 did not conceive of a decision by majority, but if the Court comes to the conclusion that a decision can be reached without the Chief Election Commissioner participating in decision-making in the special circumstances of the case, the latter is not at all keen or anxious to hear and adjudicate upon the matter at issue before the Election Commission. We are quite conscious of the high office the Chief Election Commissioner occupies. Ordinarily we would be loath to uphold the submission of bias but having regard to the wide ramification the opinion of the Election Commissioner would have on the future of Ms. J.Jayalalitha, we think that the opinion, whatever it be, should not be vulnerable. The participation of the Chief Election Commissioner in the backdrop of the findings recorded by the learned Single Judge as well as the Division Bench of the High Court would certainly permit an argument of prejudice, should the opinion be adverse to Ms. J.Jayalalitha. Therefore, apart from the legal aspect, even prudence demands that the Chief Election Commissioner should recuse himself from expressing any opinion in the matter. However, the situation is not so simple, it is indeed complex, in that, what would happen if the two Election Commissioners do not agree and there is a conflict of opinion between them? That would lead to a stalemate situation and the Governor would find it difficult to take a decision based on any such opinion. In such a situation, can the doctrine of necessity be invoked in favour of the Chief Election Commissioner?

We must have a clear conception of the doctrine. It is well settled that the law permits certain things to be done as a matter of necessity which it would otherwise not countenance on the touchstone of judicial propriety. Stated differently, the doctrine of necessity makes it imperative for the authority to decide and considerations of judicial propriety must yield. It is often invoked in cases of bias where there is no other authority or Judge to decide the issue. If the doctrine of necessity is not allowed full play in certain unavoidable situations, it would impede the course of justice itself and the defaulting party would benefit therefrom. Take the case of a certain taxing statute which taxes certain perquisites allowed to Judges. If the validity of such a provision is challenged who but the members of the judiciary must decide it. If all the Judges are disqualified on the plea that striking down of such a legislation would benefit them, a stalemate situation may develop. In such cases the doctrine of necessity comes into play. If the choice is between allowing biased person to act or to stifle the action altogether, the choice must fall in favour of the former as it is the only way to promote decision-making. In the present case also if the two Election Commissioners are able to reach a unanimous decision, there is no need for the Chief. Election Commissioner to participate, if not the doctrine of necessity may have to be he invoked.

We think that is the only alternative in such a situation. We are, therefore. of the opinion that the proper course to follow is that the Chief Election Commissioner should call a meeting of the

selection Commission to adjudicate on the issue of disqualification of Ms. J.Jayalalitha on the groands alleged by Dr.Swamy. After callinq the meeting he should act as the Chairman but then he may recuse himself by announcing that he would not participate in the formation of opinion. If the two Election Commissioners reach a unanimous opinion, the Chief Election Commissioner will have the opinion communicited to the Governor. If the two Election Commissioners do not reach a unanimous decision in the Matter of expressing their opinion on the issue referred to the Election Commission, it would be necessary for the Chief Election Commissioner to express his opinion on the doctrine of necessity. We think that in the special circumstanees of this case this course of action would he the most dppropriate one to follow beause if the two Election Commissioners do not agree, we have no doubt that the doctrine of necessity would compel the Chief Election Commissioner to express his views so that the majority opinion could be communicated to the Governor to enable him to take a decision in accordance therewith as required by Article 192(1) of the Constitution.

In the result, while we largely agree with the view expressed by the Division Bench, we modify the order of the Division Bench of the High Court to the aforementioned limited extent regarding the procedure to be followed by the Election Commission in reaching a decision and communicating its opinion to the Governor to enable the latter to decide the issue in accordanee with the opinion. The appeal will stand disposed of accordingly. In the facts and circumstances of the case we make no order as to costs.