

## CHAPTER XXIV

### REFERENCES BY THE PRESIDENT AND THE GOVERNORS

*The Law.* The Election Commission has to perform an important function under article 103 and article 192 of the Constitution. If any question arises as to whether a member of a Legislature has become subject to any of the disqualifications mentioned in articles 102(1) or 191(1), the question is referred to the President or the Governor, as the case may be, who obtains the opinion of the Election Commission on the question and decides it in accordance with such opinion.

Before it can give a considered opinion in such a reference, the Commission naturally requires further relevant materials besides the bare averments made by the person who raised the question. Neither the Constitution nor the Representation of the People Act, prescribes the procedure to be followed by the Commission in this regard. While the Commission has been charged with the responsibility of tendering a binding opinion on the question of the disqualification of a member of the legislature, it has not been vested with any legal powers which would enable it to hold an adequate enquiry into the issues involved. The allegations made in every such case are of serious consequence to the parties concerned and often involve questions of great public importance. It is very desirable therefore that before coming to a considered opinion on the question referred to it the Commission should be in a position to hold an exhaustive enquiry into the matter in the presence of the parties. As the Commission has not been empowered by law to summon witnesses, examine them on oath or call for documents from the custody of Government or of any private persons, it feels ineffective and helpless unless the parties and the witnesses cited willingly co-operate with it and produce all relevant oral and documentary evidence. Unfortunately, such willing co-operation is not always available. In the absence of the necessary legal powers, the Commission had to content itself in every such enquiry with sending letters of request for the production of documents which appeared to be relevant to the enquiry and for the appearance of witnesses whom the parties desired to examine. There were occasions when a person failed or even refused to appear as a witness before the Commission or to produce a document which had been called for. In one instance, a State Government declined to produce some documents which were in its official custody on the ground that they were confidential in nature. This is an extremely unsatisfactory state of affairs. The Commission should not be placed in the very

invidious position of having to discharge an onerous constitutional responsibility without being given the necessary legal powers which would enable it to do so satisfactorily.

The Commission accordingly recommends that the law should be amended so as to give it the necessary legal powers—

- (i) to compel the production of documents and the attendance of witnesses, and
- (ii) if necessary, to have the evidence of witnesses recorded on commission by an officer of the Commission or by some other person nominated by it,

in connection with every enquiry relating to a reference made to it by the President or a Governor under article 103 or 192 of the Constitution, respectively.

18 such references were received by the Commission up to the 31st July, 1958. In some cases it appeared that the correct legal position had not been properly appreciated by the petitioners and their allegations were based on grounds of disqualification which had already been in existence before the member concerned had been elected. According to the decision of the Supreme Court in the case of Saka Venkata Rao (2 ELR 499), every such pre-existing disqualification is totally irrelevant for the purpose of articles 102 and 191 of the Constitution.

The nature of the references.

In one instance, the member in question had already been removed from the membership of the Legislature by an order of court. The Commission did not enter into the merits of the case for obvious reasons.

In a few instances, the petitioners failed to appear before the Commission in support of their petitions. This did not, however, absolve the Commission of its constitutional duty of holding an enquiry into the question raised and tendering its opinion on the reference made to it.

In one case, an interesting objection was taken on the point of jurisdiction. It was urged that if an enquiry is necessary to ascertain the facts, the Commission had no jurisdiction to hold such enquiry and that the enquiry should be held by some other person or authority appointed by the President or the Governor. It was further urged that the Commission was to give its opinion on the basis of the facts so elicited. The objection was overruled by the Commission on the ground that it was not a mere legal advisor nor was it obliged to accept whatever facts an outside authority might consider to have been proved. It is quite conceivable that the findings of fact made by any other person or authority might be considered by the Commission to be incomplete, inconclusive or incorrect. The intention of the provision of the Constitution cannot be to tie the hands of the Commission by any set of facts found in advance by some other person or authority. There is no provision in law specifically

debaring the Election Commission from itself holding an enquiry into the facts of a case referred to it. The Commission decided accordingly that its power to hold an enquiry in such a case is impliedly inherent. As the Governor or the President is required to accept the opinion of the Commission, it is the Commission which is, by implication, the appropriate enquiring authority and has to take the necessary steps to ascertain all the relevant facts and circumstances. It has to give its decisive opinion which can be arrived at only after collecting, considering and analysing the material facts of the case and the law that is applicable to such facts. The Commission's constitutional duty and responsibility cannot be adequately or satisfactorily discharged unless it is free to hold such enquiry as it considers necessary before arriving at a fair and well-considered opinion. In every such reference therefore, the Commission has itself held such enquiry as was practicable before it tendered its opinion to the Governor or the President.

Most of the references raised the question of alleged disqualifications under sections 7(d) or 7(e) of the Representation of the People Act, 1951. In one case the subject matter of the enquiry was whether a member still retained his partnership in a grain business which had dealings with the Government while the question raised in another was whether the member was still a partner of a press which printed the electoral rolls or, in a third case, partner of a firm which had entered into a contract with the State Government for publishing Government-sponsored text books. In some other cases again, the Commission was called upon to interpret whether a Deputy Minister of a State who is apparently unprotected in terms by articles 102 (1)(a) or 102(2) or 191(1)(a) or 191(2) of the Constitution could be said to be holding an office of profit under the State Government. In the latter category of cases, appropriate and timely legislation would have altogether avoided the reference. In one case, the question was raised whether appointment of a member of a Legislative Assembly as an Honorary Project Executive Officer under the State's Community Project Scheme entailed her disqualification. The question was answered in the negative. In another case a member of a Legislative Assembly entered into a contract with the State Government in connection with the execution of a road project under the "drought scheme" of the State. The Commission held that the member had incurred a disqualification on the finding that the prospect of making any financial gain out of the contract was not a condition precedent for rendering the contract a disqualification and that even the opportunity the member obtained by the contract to nurse his constituency and to favour his supporters in the execution of the contract constituted a sufficient consideration.