LANDMARK JUDGEMENTS ON ELECTION LAW

(A Compilation of important Judgements of
the Supreme Court of India and High Courts
and Opinion tendered by the Election Commission)

VOLUME IV

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B.B. TANDON

CHIEF ELECTION COMMISSIONER
OF INDIA

FOREWORD

A well-evolved electoral system is the hallmark of a matured democracy. Better understanding of Electoral Law on the part of all stakeholders augurs well for healthy democratic credentials of any nation. Judicial pronouncements concerning the electoral law while offering guidance for the future course provide an insight into the very process of strengthening of democracy itself.

Election management in India has always been a challenging task and election managers need to keep themselves abreast of all developments concerning electoral laws.

Having realised this, the Election Commission of India has already published the landmark judgements passed by the Supreme Court of India, High Courts and opinions/orders of the Commission on various electoral issues in three volumes. The current one is an apt addition and it covers judgements/orders from the year 2000 onwards.

The Election Commission's initiative in documenting such historic judicial pronouncements received an enthusiastic response from electoral managers and legal practitioners. I am sure that the present volume will also be equally well received.

New Delhi
17th June, 2006

(B.B. Tandon)
Chief Election Commissioner of India

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SUPREME COURT OF INDIA

A. Nos. 1-2 in & Petition(s) for Special Leave to Appeal (Civil) CC2824-2825/2001

From the Judgement and Order dated 10.04.2001 in WP 3346/01 and 1945 of 2001 of the High Court of Judicature for Madras

All India Anna Dravida Munnetra Kazhagam ..... Petitioner(s)

Versus

Chief Election Commissioner & Anr. ..... Respondent(s)

With Application(s) for permission to file SLP (With Office Report)

Date of Order : 23.04.2001

Coram : ● **Hon'ble Mr. Justice B. N. Kirpal**
● **Hon'ble Mrs. Justice Ruma Pal**

SUMMARY OF THE CASE

Validity of Section 61(A) of the R.P. Act, 1951, as challenged in A.C. Jose Vs. Sivan Pillai and others 1984 (3) SCR 74, was questioned in the petiton but the Supreme Court held that High Court of Madras was right to uphold the validity of said section. It also observed that Articles 326 and 327 cannot be so interpreted as to enable the taking away the jurisdiction or to abridge the powers of the Election Commission under Act 324.

The SLP was dismissed.

O R D E R

Permission to file S.L.N. is granted.

We have heard the learned counsel for the petitioner. We do not understand the impugned judgement to mean that the law declared in A.C. Jose vs. Sivan Pillai & Ors. 1984 (3) SCR 74, is incorrect. The observations made in the impugned judgement are clear. Articles 326 and 327 cannot be so interpreted as to enable the taking away the jurisdiction or to abridge the powers of the Election Commission under Article 324.

A.C. Jose's case does not apply to the facts of the present case for the simple reason that in A.C. Jose's case, it was by an Executive order that Electronic Voting Machines were sought to be used which was not permissible being contrary to the Rules. Now that Section 61A has been inserted in the Representation of the People Act, 1951, in 1989, the aforesaid decision cannot be of any assistance to the petitioner.

While considering the validity of the said Section we are in agreement with the decision of the High Court that the said Section is valid. The Special Leave petitions are dismissed.

Sd/-
(S. L. GOYAL)
Court Master

Kalyani.

SUPREME COURT OF INDIA

Civil Appeal No. 7178 of 2001

Union of India ..... Appellant

Versus

Association for Democratic Reforms & Another ..... Respondents

With

Writ Petition (C) No. 294 of 2001

People's Union for Civil Liberties (PUCI) & Another ..... Petitioners

Versus

Union of India & Another ..... Respondents

Date of Order : 02.05.2002

SUMMARY OF THE CASE

The Association for Democratic Reforms had filed a writ petition No 7257 of 1994 before High Court of Delhi for direction to implement the recommendations made by Law Commission in its 170th report and to make necessary changes under Rule 4 of Conduct of Elections Rules, 1961 regarding debarring a candidate from contesting election if charges have been framed against him/her by a Court in respect of certain offences and necessity for candidate to furnish details of criminal cases, if any, pending against him. It also suggested that true and correct statement of assets owned by the candidate should also be disclosed. The petitioners pointed out nexus between criminals and candidates as highlighted in Vohra Committee report. The petitioners sought direction from High Court to Election Commission to seek above information amending Forms 2A & 2E required at the time of filing nomination by candidates.

The High Court observed that it is for Parliament to amend R. P. Act, 1951 but Election Commission should secure above said information for voters. The High Court's order was challenged by Union of India with a plea that High Court should have directed petitioner to approach Parliament for necessary changes.

The PUCL also filed petition No. 294/2001 under article 32 of Constitution of India for above mentioned guidelines under Article 141 of Constitution of India.

The issue before Hon'ble Supreme Court was whether Election Commission is empowered to issue directions as ordered by High Court and whether a citizen has right to get relevant information about prospective candidates. The Supreme Court held that High Court has ample jurisdiction under Article 32 read with Articles 141 and 142 of Constitution of India to issue necessary direction to executive to subserve public interest, to fill the void in absence of suitable legislation. The Supreme Court relied upon Vineet Narain and Others Vs. Union of India and Another (1998, SCC 226).

J U D G E M E N T

Shah, J.

Short but important question involved in these matters is - in a nation wedded to republican and democratic form of government, where election as a Member of Parliament or as a Member of Legislative Assembly is of utmost importance for governance of the country, whether, before casting votes, voters have a right to know relevant particulars of their candidates? Further connected question is — whether the High Court had jurisdiction to issue directions, as stated below, in a writ petition filed under Article 226 of the Constitution of India?

Before dealing with the aforesaid questions, we would refer to the brief facts as alleged by the Petitioner-Association for Democratic Reforms in Writ Petition

No. 7257 of 1999 filed before the High Court of Delhi for direction to implement the recommendations made by the Law Commission in its 170th Report and to make necessary changes under Rule 4 of the Conduct of Election Rules, 1961. It has been pointed out that Law Commission of India had, at the request of Government of India, undertaken comprehensive study of the measures required to expedite hearing of election petitions and to have a thorough review of the Representation of the People Act, 1951 (hereinafter referred to as "the Act") so as to make the electoral process more fair, transparent and equitable and to reduce the distortions and evils that have crept into the Indian electoral system and to identify the areas where the legal provisions required strengthening and improvement. It is pointed out that Law Commission has made recommendation for debarring a candidate from contesting an election if charges have been framed against him by a Court in respect of certain offences and necessity for a candidate seeking to contest election to furnish details regarding criminal cases, if any, pending against him. It has also suggested that true and correct statement of assets owned by the candidate, his/her spouse and dependant relations should also be disclosed. Petitioner has also referred Para 6.2 of the report of the Vohra Committee of the Government of India, Ministry of Home Affairs, which reads as follows :-

> "6.2 Like the Director CBI, the DIB has also stated that there has been a rapid spread and growth of criminal gangs, armed senas, drug Mafias, smuggling gang drug peddlers and economic lobbies in the country which have, over the years, developed an extensive network of contacts with the bureaucrats/Government functionaries at the local levels, politicians, media persons and strategically located individuals in the non-State sector. Some of these Syndicates also have international linkages, including the foreign intelligence agencies. In this context the DIB has given the following examples :-
>
> (i) In certain States like Bihar, Haryana and UP, these gangs enjoy the patronage of local level politicians, cutting across party lines

and the protection of Governmental functionaries. Some political leaders become the leaders of these gangs, armed senas and over the years get themselves elected to local bodies, State Assemblies and the national Parliament. Resultantly, such elements have acquired considerable political clout seriously jeopardising the smooth functioning of the administration and the safety of life and property of the common man causing a sense of despair and alienation among the people;

(ii) The big smuggling Syndicates having international linkages have spread into and infected the various economic and financial activities, including havala transactions, circulation of black money and operations of a vicious parallel economy causing serious damage to the economic fibre of the country. These syndicates have acquired substantial financial and muscle power and social respectability and have successfully corrupted the Government machinery at all levels and yield enough influence to make the task of Investigating and Prosecuting agencies extremely difficult, even the members of the Judicial system have not escaped the embrace of the Mafia;

(iii) Certain elements of the Mafia have shifted to narcotics, drugs and weapon smuggling and established narco-terrorism networks specially in the States of J&K, Punjab, Gujarat and Maharashtra. The cost of contesting elections has thrown the politician into the lap of these elements and led to a grave compromise by officials of the preventive/detective systems. The virus has spread to almost all the centres in the country, the coastal and the border States have been particularly affected;

(iv) The Bombay bomb blast case and the communal riots in Surat and Ahmedabad have demonstrated how the India underworld has

> been exploited by the Pak ISI and the latter's network in UAE to cause sabotage subversion and communal tension in various parts of the country. The investigations into the Bombay Bomb blast cases have revealed expensive linkages of the underworld in the various governmental agencies, political circles, business sector and the film world."

It is also contended that despite the Reports of the Law Commission and Vohra Committee, successive governments have failed to take any action and — therefore, petition was filed for implementation of the aid reports and for a direction to the Election Commission to make mandatory for every candidate to provide information by amending Form 2-A to 2-E prescribed under the Conduct of Election Rules, 1961. After hearing the parties, the High Court by judgement and order dated 2nd November, 2000, held that it is the function of the Parliament to make necessary amendments in the Representation of the People Act, 1951 or the Election Rules and, therefore, Court cannot pass any order, as prayed, for amending the Act or the Rules.

However, the Court considered - whether or not an elector, a citizen of the country has a fundamental right to receive the information regarding the criminal activities of a candidate to the Lok Sabha or Legislative Assembly for making an estimate for himself - as to whether the person who is contesting the election has a background making him worthy of his vote, by peeping into the past of the candidate. After considering the relevant submissions and the reports as well as the say of Election Commission, the High Court held that for making a right choice, it is essential that the past of the candidate should not be kept in the dark as it is not in the interest of the democracy and well being of the country. The Court directed the Election Commission to secure to voters the following information pertaining to each of the candidates contesting election to the Parliament and to the State Legislature and the parties they represent :-

(1) Whether the candidate is accused of any offence(s) punishable with imprisonment? If so, the details thereof.

(2) Assets possessed by a candidate, his or her spouse and dependant relations?

(3) Facts giving insight to candidate's competence, capacity and suitability for acting as parliamentarian or legislator including details of his/her educational qualifications.

(4) Information which the election commission considers necessary for judging the capacity and capability of the political party fielding the candidate for election to Parliament or the State Legislature.

That order is challenged by Union of India by filing the present appeal.

On behalf of Indian National Congress I.A. No. 2 of 2001 is also filed for impleadment/intervention in the appeal filed by the Union of India by *inter alia* contending that the High Court ought to have directed the writ petitioners to approach the Parliament for appropriate amendments to the Act instead of directing the Election Commission of India to implement the same. I.A. for intervention is granted.

Further, People's Union for Civil Liberties (PUCL) has filed Writ Petition No. 294 of 2001 under Article 32 of the Constitution praying that writ, order or direction be issued to the respondents - (a) to bring in such measures which provide for declaration of assets by the candidate for the elections and for such mandatory declaration every year during the tenure as an elected representative as MP/MLA; (b) to bring in such measures which provide for declaration by the candidate contesting election whether any charge in respect of any offence has been framed against him/her; and (c) to frame such guidelines under Article 141 of the Constitution – by taking into consideration 170th Report of Law Commission of India.

SUBMISSIONS :

We have heard the learned counsel for the parties at length, Mr. Harish N. Salve, learned Solicitor General appearing for Union of India submitted that till suitable amendments are made in the Act and Rules thereunder, the High Court should not have given any direction to the Election Commission. He referred to various Sections of the Act and submitted that Section 8 provides for disqualification on conviction for certain offences and Section 8A provides for disqualification on ground of corrupt practices. Section 32 provides nomination of candidate for election if he is qualified to be chosen to fill that seat under the provisions of the Constitution and the Act or under the provisions of the Government of Union Territories Act, 1963. Thereafter, elaborate procedure is prescribed for presentation of nomination paper and requirements for a valid nomination. Finally, Section 36 provides for scrutiny of nominations and empowers the returning officer to reject any nomination on the following grounds :

(a) that on the date fixed for the scrutiny of nominations the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely -

Articles 84, 102, 173 and 191.

Part II of this Act and sections 4 and 14 of the Government of Union Territories Act, 1963 (20 of 1963); or

(b) that there has been a failure to comply with any of the provisions of Section 33 or Section 34; or

(c) that the signature of the candidate or the proposer on the nomination paper is not genuine.

It is his submission that it is for the political parties to decide whether such amendments should be brought and carried out in the Act and the Rules. He further submitted that as the Act or the Rules nowhere disqualify a candidate for nondisclosure of the assets or pending charge in a criminal case and, therefore, directions given by the High Court would be of no consequence and such directions ought not to have been issued.

Supplementing the aforesaid submission, Mr. Ashwini Kumar, learned senior counsel appearing on behalf of intervenor - Indian National Congress submitted that the Constituent Assembly had discussed and negatived requirement of educational qualification and possession of the assets to contest election. For that purpose, he referred to the Debates in the Constituent Assembly. He submitted that 3/4th of the population is illiterate and providing education as a qualification for contesting election was not accepted by the Constituent Assembly. Similarly, prescribing of property qualification for the candidates to contest election was also negatived by the Constituent Assembly. He, therefore, submitted that furnishing of information regarding assets and educational qualification of a candidate is not at all relevant for contesting election and even for casting votes. Voters are not influenced by the educational qualification or by possession of wealth by a contesting candidate. It is his say that the party whom he represents is interested in purity of election and wants to stop entry of criminals in politics or its criminalisation but it is for the Parliament to decide the said question. It is submitted that the delicate balance is required to be maintained with regard to the jurisdiction of the Parliament and that of Courts and once the Parliament has not amended the Act or the Rules despite the recommendation made by the Law Commission or the report submitted by the Vohra Committee, there was no question of giving any direction by the High Court to the Election Commission.

Mr. K.K. Venugopal, learned senior counsel appearing on behalf of Election Commission exhaustively referred to the counter affidavit filed on behalf of Election Commission. At this stage, we would refer to some part from the said affidavit. It

is stated that issue of 'persons with criminal background' contesting election has been engaging the attention of the Election Commission of India for quite some time; even Parliament in the debates on 50 years of independence and the resolution passed in its Special Session in August, 1997 had shown a great concern about the increasing criminalisation of politics; it is widely believed that there is criminal nexus between the political parties and anti-social elements which is leading to criminalisation of politics; the criminals themselves are now joining election fray and often even getting elected in the process. Some of them have even adorned ministerial berths, and, thus, **law breakers have become law makers.** The Commission has suggested that candidate should be required to furnish information in respect of —

(a) all cases in which he has been convicted of any offence and punished with any kind of imprisonment or amount of fine, and whether any appeal or application for review is pending in respect of any such cases of conviction, and

(b) all pending cases in which he is involved before any court of law in any offence, punishable with imprisonment for two years or more, and where the appropriate court has on prima facie satisfaction framed the charges against him for proceeding with the trial.

For declaration of assets, it has been suggested by the Election Commission that candidate should be asked to disclose his assets, all immovable and movable properties which would include cash, bank balances, fixed deposits and other savings such as shares, stocks, debentures etc. Candidate also should be directed to disclose for voters' information, not only his assets but his liabilities like overdues to public financial institutions and government dues and charges on his/her properties.

For other directions issued by the High Court, it has been pointed out that it

is for the political parties to project the capacity and capability of a candidate and that directions issued by the High Court are required to be set aside. Finally, the Election Commission has suggested as under :-

> "**I.** Each candidate for election to Parliament or a State Legislature should submit, along with his nomination paper, a duly sworn affidavit, for the truth of which he is liable, as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his candidature :—
>
> (i) whether the candidate is convicted of any offence in any case in the past, and punished with imprisonment or fine; if so, the details thereof, together with the details of any pending appeals or applications for revision in any such cases of conviction;
>
> (ii) whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charges have been framed against him by the competent court of law, if so, the details thereof, together with the details of any pending appeals or applications for revision in respect of the charges framed in any such cases;
>
> (iii) whether the candidate is an income tax and/or wealth tax assessee and has been paying his tax(es) and filing his return regularly, wherever he is liable, and if so, the financial year for which the last income tax/wealth tax return has been filed;
>
> (iv) the liabilities of the candidate, his/her spouse and minor children; that is to say, over-dues to any public financial institutions, any government dues, and charges on his/her properties;
>
> (v) the educational qualifications of the candidate.

II. The information by each candidate in respect of all the foregoing aspects shall be furnished by the candidate in a format to be prescribed by the Election Commission and shall be supported by a duly sworn affidavit, making him responsible for the correctness of the information so furnished and liable for any false statement.

III. The information so furnished by each candidate in the prescribed format and supported by a duly sworn affidavit shall be disseminated by the Election Commission, through the respective Returning Officers, by displaying the same on the notice board of the Returning Officer and making the copies thereof available freely and liberally to all other contesting candidates and the representatives of the print and electronic media.

If any rival candidate furnishes information to the contrary, by means of a duly sworn affidavit, then such affidavit of the rival candidate may also be disseminated alongwith the affidavit of the candidate concerned.

The court may lawn down that it would be mandatory for each candidate for election to Parliament or State Legislature, to file along with his nomination paper, the aforesaid duly sworn affidavit, furnishing therein the information on the aspects detailed above and that the nomination paper of such a candidate who fails or refuges to file the required affidavit or files an incomplete affidavit shall be deemed to be an incomplete nomination paper within the meaning of section 33(1) of the Representation of the People Act, 1951 and shall suffer consequences according to law.

The aforesaid suggestions made by the Election Commission would certainly mean that except certain modifications, Election Commission virtually supports the directions issued by the High Court and that candidates must be directed to furnish necessary information with regard to pending criminal cases as well as assets

and educational qualification.

Mr. Rajinder Sachhar, learned senior counsel appearing on behalf of the petitioners relied upon the decision rendered by this Court in ***Vineet Narain and Others v. Union of India and Another*** [(1998) 1 SCC 226] and submitted that considering the widespread illiteracy of the voters, and at the same time their overall culture and character, if they are well-informed about the candidates contesting election as M.P. or M.L.A., they would be in a position to decide independently to cast their votes in favour of a candidate, who, according to them, is much more efficient to discharge his functions as M.P. or M.L.A. He, therefore, submitted that presuming that the High Court has no jurisdiction to pass orders to fill in the gaps, this Court can do so by exercising its powers under Article 142 which have the effect of law.

In ***Vineet Narain's case (Supra),*** this Court dealt with the writ petitions under Article 32 of the Constitution of India brought in public interest wherein allegation was against the Central Bureau of Investigation (CBI) of inertia in matters where accusation made was against high dignitaries. Primary question considered was - whether it was within the domain of judicial review and it could be an effective instrument for activating the investigating process which is under the control of the executive? While discussing the powers of this Court, it was observed :

> "The powers conferred on this Court by the Constitution are ample to remedy this defect and to ensure enforcement of the concept of equality. There are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of Article 141 and there is mandate to all authorities to act in aid of the orders of this Court as provided in Article 144 of the Constitution. In a catena of decisions of this Court, this power has been recognised and exercised, if need be, by issuing necessary directions to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role."
>
> [Emphasis supplied]

In paragraph 51, the Court pointed out previous precedents for exercise of such power :

> "In exercise of the powers of this Court under Article 32 read with Article 142, guidelines and directions have been issued in a large number of cases and a brief reference to a few of them is sufficient. In *Erach Sam Kanga v. Union of India* [W.P. No. 2632 of 1978 decided on 20.3.1979] the Constitution Bench laid down certain guidelines relating to the Emigration Act. In *Lakshmi Kant Pandey v. Union of India* [(1984) 2 SCC 244] (In re. Foreign Adoption), guidelines for adoption of minor children by foreigners were laid down. Similarly in ***State of W.B. v. Sampat Lal [(1985) 1 SCC 317], K. Veeraswami v. Union of India*** [(1991) 3 SCC 655] *Union Carbide Corporation v. Union of India* [(1991) 4 SCC 584, ***Delhi Judicial Service Association v. State of Gujarat (Nadiad Case)*** [(1991) 4 SCC 406], ***Delhi Development Authority v. Skipper Construction Co. (P) Ltd.*** [(1996) 4 SCC 622] and ***Dinesh Trivedi, M.P. v. Union of India*** [(1997) 4 SCC 306] guidelines were laid down having the effect of law, requiring rigid compliance. In ***Supreme Court Advocates-on-Record Association v. Union of India IInd Judges case*** [(1993) 4 SCC 441], a nine-Judge Bench laid down guidelines and norms for the appointment and transfer of Judges which are being rigidly followed in the matter of appointments of High Court and Supreme Court Judges and transfer of High Court Judges. More recently in ***Vishaka v. State of Rajasthan*** [(1997) 6 SCC 241] elaborate guidelines have been laid down for observance in workplaces relating to sexual harassment of working women. In ***Vishaka*** (supra) it was said (SCC pp. 249-50), para 11).
>
> "11. The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in

the Beijing Statement of Principles of the Independence of Judiciary in the LAWASIA region. These principles were accepted by the Chief Justices of Asia and the Pacific at Beijing in 1995 (As amended at Manila, 28th August, 1997) as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are :

"Objective of the Judiciary:

10. The objectives and functions of the Judiciary include the following:

(a) to ensure that all persons are able to live securely under the rule of law;

(b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

(c) to administer the law impartially among persons and between persons and the State."

Thus, an exercise of this kind by the court is now a well-settled practice which has taken firm roots in our constitutional jurisprudence. This exercise is essential to fill the void in the absence of suitable legislation to cover the field."

Ms. Kamini Jaiswal, learned counsel appearing on behalf of respondents in support of the decision rendered by the High Court referred to the decision in *Kihoto Hollohan v. Zachillhu and Others* [1992 Supp (2) SCC 651] wherein while considering the validity of the Tenth Schedule of the Constitution, the Court observed "democracy is a part of the basic structure of our Constitution; and rule of law, and free and fair elections are basic features of democracy. One of the

postulates of free and fair elections is provisions for resolution of election disputes as also adjudication of disputes relating to subsequent disqualifications by an independent authority". She, therefore, contended that for free and fair elections and for survival of democracy, entire history, background and the antecedents of the candidate are required to be disclosed to the voters so that they can judiciously decide in whose favour they should vote; otherwise, there would not be true reflection of electoral mandate. For interpreting Article 324, she submitted that this provision outlines broad and general principles giving power to the Election Commission and it should be interpreted in a broad perspective as held by this Court in various decisions.

In these matters, questions requiring consideration are -

1. Whether Election Commission is empowered to issue directions as ordered by the High Court?

2. Whether a voter - a citizen of this country - has right to get relevant information, such as, assets, qualification and involvement in offence for being educated and informed for judging the suitability of a candidate contesting election as MP or MLA?

For deciding the aforesaid questions, we would proceed on the following accepted legal position.

At the outset, we would say that it is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for the Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules.

However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the Authority implementing the same has constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted.

Further, it is to be stated that - (a) one of the basic structure of our Constitution is 'republican and democratic form of government'; (b) the election to the House of People and the Legislative Assembly is on the basis of adults suffrage, that is to say, every person who is citizen of India and who is not less than 18 years of age on such date as may be fixed in that behalf by or under any Law made by the appropriate Legislature and is not otherwise disqualified under the Constitution or any law on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election (Article 326) and (c) holding of any asset (immovable or movable) or any educational qualification is not the eligibility criteria to contest election; and (d) under Article 324, the superintendence, direction and control of the 'conduct of all elections' to Parliament and to the Legislature of every State vests in Election Commission. The phrase 'conduct of elections' is held to be of wide amptitude which would include power to make all necessary provisions for conducting free and fair elections.

Question No. 1

Whether Election Commission is empowered to issue directions as ordered by the High Court?

For health of democracy and fair election, whether the disclosure of assets by a candidate, his/her qualification and particulars regarding involvement in criminal cases are necessary for informing voters, may be illiterate, so that they can decide intelligently, whom to vote? In our opinion, the decision of even illiterate voter, if properly educated and informed about the contesting candidate, would be based on his own relevant criteria of selecting a candidate. In democracy, periodical elections are conducted for having efficient governance for the country and for the benefit of citizens - voters. In a democratic form of government, voters are of utmost importance. They have right to elect or re-elect on the basis of the antecedents and past performance of the candidate. He has choice of deciding whether holding of educational qualification or holding of property is relevant for electing or re-electing

a person to be his representative. Voters has to decide whether he should cast vote in favour of a candidate who is involved in criminal case. For maintaining purity of elections and healthy democracy, voters are required to be educated and well informed about the contesting candidates. Such information would include assets held by the candidate, his qualification including educational qualification and antecedents of his life including whether he was involved in a criminal case and if the case is decided - its result, if pending - whether charge is framed or cognizance is taken by the Court? There is no necessity of suppressing the relevant facts from the voters.

The Constitution Bench of this Court in *Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi* [(1978) 1 SCC 405] while dealing with a contention that Election Commission has no power to cancel the election and direct re-poll, referred to the pervasive philosophy of democratic elections which Sir Winston Churchill vivified in matchless word :-

> "At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper - no amount of rhetoric of voluminous discussion can possibly diminish the overwhelming importance of the point.
>
> If we may add, the little large Indian shall not be hijacked from the course of free and fair elections by mob muscle methods or subtle perversion of discretion by men 'dressed in little, brief authority'. For 'be you ever so high, the law is above you'.
>
> The moral may be stated with telling terseness in the words of William Pit: 'Where laws end, tyranny begins'. Embracing both these mandates and emphasizing their combined effect is the elemental law and politics of Power best expressed by Benjamin Disraeli [Vivian Grey, BK VI Ch. 7].

I repeat . . . that all power is a trust that we are accountable for its exercise - that, from the people and for the people, all springs, and all must exist."

Further, the Court in (para 23) observed thus :-

"Democracy is government by the people. It is a continual participative operation, not a cataclysmic periodic exercise. The little man, in his multitude, marking his vote at the poll does a social audit of his Parliament plus political choice of this proxy. Although the full flower of participative Government rarely blossoms, the minimum credential of popular government is appeal to the people after every term for a renewal of confidence. So we have adult franchise and general elections as constitutional compulsions. The right of election is the very essence of the constitution' (Janius). It needs little argument to hold that the heart of the Parliamentary system is free and fair elections periodically held, based on adult franchise, although social and economic democracy may demand much more."

Thereafter, the Court dealt with the scope of Article 324 and observed (in para 39) thus :-

"... Article 324, in our view, operates in areas left unoccupied by legislation and the words 'superintendence, direction and control, as well as 'conduct of all elections', are the broadest terms ..."

The Court further held:

"Our conclusion on this limb of the contention is that Article 324 is wide enough to supplement the powers under the Act, as here, but subject to the several conditions on its exercise we have set out."

The Court also held (in para 77) thus :-

"We have been told that wherever the Parliament has intended a hearing it has said so in the Act and the rules and inferentially where it has not specificated it is otiose. There is no such sequitur. The silence of a statute has no exclusionary effect except where it flows from necessary implication. Article 324 vests a wide power and where some direct consequence on candidate emanates from its exercise we must read this functional obligation."

In concluding portion of paragraph 92, the Court *inter alia* observed thus :-

"1(b) Election, in this context, has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate.

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 elections, 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..."

In concurring judgement, Goswami, J. with regard to Article 324 observed (in para 113) thus :-

> "...Since the conduct of all elections to the various legislative bodies and to the offices of the President and the Vice-President is vested under Article 324 (1) in the Election Commission, the framers of the Constitution took care to leaving scope for exercise of residuary power by the Commission, in its own right, as a creature of the Constitution, in the infinite variety of situations that may emerge from time to time in such a large democracy as ours. Every contingency could not be foreseen, or anticipated with precision. That is why there is no hedging in Article 324. The Commission may be required to cope with some situation which may not be provided for in the enacted laws and the rules."
>
> [Emphasis supplied]

The aforesaid decision of the Constitution Bench unreservedly lays down that in democracy the little man - voter has overwhelming importance on the point and the little-large Indian (voter) should not be hijacked from the course of free and fair elections by subtle perversion of discretion of casting votes. In a continual participative operation of periodical election, the voter does a social audit of his candidate and for such audit he must be well informed about the past of his candidate. Further, Article 324 operates in areas left unoccupied by legislation and the words 'superintendence, direction and control' as well as 'conduct of all elections' are the broadest terms. The silence of statute has no exclusionary effect except where it flows from necessary implication. Therefore, in our view, it would be difficult to accept the contention raised by Mr. Salve, learned Solicitor General and Mr. Ashwini Kumar, learned senior counsel appearing on behalf of Intervenor that if there is no provision in the Act or the Rules, the High Court ought not to have issued such directions to the Election Commission. It is settled that the power of the Commission is plenary in character in exercise thereof. In a statutory provisions

or rules, it is known that every contingency could not be foreseen or anticipated with precision, therefore, Commission can cope with situation where the field is unoccupied by issuing necessary orders.

Further, this Court in ***Kanhiya Lal Omar v. R.K. Trivedi and others*** [(1985) 4 SCC 628] dealt with the Constitutional validity of the Election Symbols (Reservation and Allotment) Order, 1968 which was issued by the Election Commission in its plenary exercise of power under Article 324 of the Constitution read with Rules 5 and 10 of the Conduct of Election Rules, 1961. The challenge was on the ground that Symbols Order which is legislative in character could not be issued by the Commission because the Commission is not entrusted by law the power to issue such an order regarding the specification, reservation and allotment of symbol that may be chosen by the candidates at elections in parliamentary and Assembly constituencies. It was urged that Article 324 of the Constitution which vests the power of superintendence, direction and control of all elections to Parliament and to the Legislature of a State in the Commission cannot be construed as conferring the power on the Commission to issue the Symbols. The Court negatived the said contention and pertinently observed that "the word 'elections' in Article 324 is used in a wide sense so as to include the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the result of the process. India is a country which consists of millions of voters. Although they are quite conscious of their duties politically, unfortunately, a large percentage of them are still illiterate." The Court in paragraph 16 held :-

> **"16.** Even if for any reason, it is held that any of the provisions contained in the Symbols Order are not traceable to the Act or the Rules, *the power of the Commission under Article 324(1) of the Constitution which is plenary in character can encompass all such provisions*. Article 324 of the Constitution operates in areas left unoccupied by legislation and the words 'superintendence', 'direction' and 'control' as well as

"conduct of all elections" are the broadest terms which would include the power to make all such provisions. {See *Mohinder Singh Gill v. Chief Election Commissioner,* New Delhi [(1978) 1 SCC 405] and *A.C. Jose v. Sivan Pillai* [(1984) 2 SCC 656]}.

The Court further observed :-

> ". . . 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 grey 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 of 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 Order suffers from want of authority on the part of the Commission, which has issued it."

Thereafter, this Court in ***Common Cause (A registered society) v. Union of India and Others*** [(1996) 2 SCC 752] dealt with election expenses incurred by political parties and submission of return and the scope of Article 324 of the Constitution, where it was contended that cumulative effect of the three statutory provisions, namely, Section 293-A of the Companies Act, 1956, Section 13-A of the Income Tax Act, 1961 and Section 77 of the Representation of the People Act, 1951, is to bring transparency in the election funding and people of India must know

the source of expenditure incurred by the political parties and by the candidates in the process of election. It was contended that election in the country are fought with the help of money power which is gathered from black sources and once elected to power, it becomes easy to collect tons of black money, which is used for retaining power and for re-election and that this vicious circle has totally polluted the basic democracy in the country. The Court held that purity of election is fundamental to democracy and the Commission can ask the candidates about the expenditure incurred by the candidates and by a political party and for this purpose. The Court also held :-

> ". . . The political parties in their quest for power spend more than one thousand crore of rupees on the General Election (Parliament alone), yet nobody accounts for the bulk of the money so spent and there is no accountability anywhere. Nobody discloses the source of the money. There are no proper accounts and no audit. From where does the money come nobody knows. In a democracy where rule of law prevails this type of naked display of black money, by violating the mandatory provisions of law, cannot be permitted."

Thereafter, the Court observed that under Article 324, the Commission can issue suitable directions to maintain the purity of election and in particular to bring transparency in the process of election. The Court also held (paragraph 26) thus:-

> "Superintendence and control over the conduct of election by the Election Commission include the scrutiny of all expenses incurred by a political party, a candidate or any other association or body of persons or by any individual in the course of the election. The expression "Conduct of election" is wide enough to include in its sweep, the power to issue directions – in the process of the conduct of an election – to the effect that the political parties shall submit to the Election Commission, for its scrutiny, the details of the expenditure incurred or authorised by the parties in connection with the election of their respective candidates."

The Court further observed that Constitution has made comprehensive provision under Article 324 to take care of surprise situations and it operates in areas left unoccupied by legislation.

Question No. 2

Right to know about the candidates contesting elections.

Now we would refer to various decisions of this Court dealing with citizens' right to know which is derived from the concept of 'freedom of speech and expression'. The people of the country have a right to know every public act, everything that is done in a public way by the public functionaries. MPs or MLAs are undoubtedly public functionaries. Public education is essential for functioning of the process of popular government and to assist the discovery of truth and strengthening the capacity of an individual in participating in decision making process. The decision making process of a voter would include his right to know about public functionaries who are required to be elected by him.

In ***State of Uttar Pradesh v. Raj Narain and Others*** [(1975) 4 SCC 428], the Constitution Bench considered a question - whether privilege can be claimed by the Government of Uttar Pradesh under Section 123 of the Evidence Act in respect of what has been described for the sake of brevity to be the Blue Book summoned from the Government of Uttar Pradesh and certain documents summoned from the Superintendent of Police, Rae Bareli, Uttar Pradesh? The Court observed that "the right to know which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security". The Court pertinently observed as under :-

> "In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but

few secrets. *The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries.* They are entitled to know the particulars of every public transaction in all its bearing . . . "

In ***Indian Express Newspapers (Bombay) Private Ltd. and Others etc. v. Union of India and others*** [(1985) 1 SCC 641], this Court dealt with the validity of customs duty on the newsprint in context of Article 19(1)(a). The Court observed (in para 32) thus :

> "The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic country cannot make responsible judgments....."

The Court further referred (in para 35) the following observations made by this Court in ***Romesh Thappar v. State of Madras*** (1950 SCR 594) :-

> "... (The freedom) lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible. A freedom of such amplitude might involve risks of abuse ... (But) "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits".

Again in paragraph 68, the Court observed :-

> "...*The public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves.*" (Per Lord Simon of Glaisdale in ***Attorney-General v. Times Newspapers Ltd.*** (1973) 3 All ER 54). Freedom of expression,

> as learned writers have observed, has four broad social purposes to serve: (i) It helps an individual to attain self-fulfillment, (ii) it assists in the discovery of truth, (iii) it strengthens the capacity of an individual in participating in decision-making and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know. Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of people in the administration ...."

From the afore-quoted paragraph, it can be deduced that the members of a democratic society should be sufficiently informed so that they may influence intelligently the decisions which may affect themselves and this would include their decision of casting votes in favour of a particular candidate. If there is a disclosure by a candidate as sought for then it would strengthen the voters in taking appropriate decision of casting their votes.

In ***Secretary, Ministry of Information and Broadcasting, Government of India and Others.*** *Cricket Association of Bengal and Others* [(1995) 2 SCC 161], this Court considered the question of right to telecast sports event and after considering various decisions, the Court referred to Article 10 of the European Convention on Human Rights which inter alia states as follows (para 36):

> "10.1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

Thereafter, the Court summarised the law on the freedom of speech and expression under Article 19(1)(a) as restricted by Article 19(2) thus :-

"The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-fulfillment. It enables people to contribute to debate on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts....."

The Court dealt with the right of telecast and [in paragraph 75] held thus :-

"In a team event such as cricket, football, hockey etc. there is both individual and collective expression. It may be true that what is protected by Article 19(1)(a) is an expression of thought and feeling and not of the physical or intellectual prowess or skill. It is also true that a person desiring to telecast sports events when he is not himself a participant in the game, does not seek to exercise his right of self-expression. However, *the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained.* The former is the right of the telecaster and the latter that of the viewers. The right to telecast sporting event will therefore also include the right to educate and inform the present and the prospective sportsmen interested in the particular game and also to inform and entertain the lovers of the game. Hence, when a telecaster desires to telecast a sporting event, it is incorrect to say that the free-speech element is absent from his right."

The Court thereafter (in paragraph 82) held :-

"*True democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country.* The right to participate in the affairs of the country is meaningless unless the citizens are well

> informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and noninformation all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolised either by a partisan central authority or by private individuals or oligarchic organisations. This is particularly so in a country like ours where about 65 per cent of the population is illiterate and hardly 1-$^{1}/_{2}$ percent of the population has an access to the print media which is not subject to precensorship."

The Court also observed - "a successful democracy posits an 'aware' citizenry."

If right to telecast and right to view to sport games and right to impart such information is considered to be part and parcel of Article 19(1)(a), we fail to understand why the right of a citizen voter - a little man - to know about the antecedents of his candidate cannot be held to be a fundamental right under Article 19(1)(a)? In our view, democracy cannot survive without free and fair election, without free and fairly informed voters. Votes cast by uninformed voters in favour of X or Y candidate would be meaningless. As stated in the aforesaid passage, one-sided information, disinformation, misinformation and non-information all equally create an uninformed citizenry which makes democracy a farce. Therefore, casting of a vote by misinformed and non-informed voter or a voter having one-sided information only is bound to affect the democracy seriously. Freedom of speech and expression includes right to impart and receive information which includes freedom to hold opinions. Entertainment is implied in freedom of 'speech and expression' and there is no reason to hold that freedom of speech and expression would not cover right to get material information with regard to a candidate who is contesting election for a post which is of utmost importance in the democracy.

In ***Dinesh Trivedi, M.P. and Others v. Uniion of India and Others*** [(1997) 4 SCC 306], the Court dealt with a petition for disclosure of a report submitted by a Committee established by the Union of India on 9th July 1993 which was chaired by erstwhile Home Secretary Shri N.N. Vohra which subsequently came to be popularly known as Vohra Committee. During July 1995, a known political activist Naina Sahni was murdered and one of the persons arrested happened to be an active politician who had held important political posts and newspaper report published a series of articles on the criminalisation of politics within the country and the growing links between political leaders and mafia members. The attention of the masses was drawn towards the existence of the Vohra Committee Report. It was suspected that the contents of the Report were such that the Union Government was reluctant to make it public.

In the said case, the Court dealt with citizen's rights to freedom of information and observed "in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seek to formulate sound policies of governance aimed at their welfare". The Court also observed "democracy expects openness and openness is concomitant of a free society and the sunlight is a best disinfectant".

Mr. Ashwini Kumar, learned senior counsel appearing on behalf of the intervenor submitted that the aforesaid observations are with regard to citizen's right to know about the affairs of the Government but this would not mean that citizens have a right to know the personal affairs of MPs or MLAs. In our view, this submission is totally misconceived. There is no question of knowing personal affairs of MPs or MLAs. The limited information is - whether the person who is contesting election is involved in any criminal case and if involved what is the result? Further there are widespread allegations of corruption against the persons holding post and power. In such a situation, question is not of knowing personal affairs but to have openness in democracy for attempting to cure cancerous growth of corruption by few rays of light. Hence, citizens who elect MPs or MLAs are entitled to know

that their representative has not misconducted himself in collecting wealth after being elected. This information could be easily gathered only if prior to election, the assets of such person are disclosed. For this purpose, learned counsel Mr. Murlidhar referred to the practice followed in the United States and the form which is required to be filled in by a candidate for Senate which provides that such candidate is required to disclose all his assets and that of his spouse and dependants. The form is required to be re-filled every year. Penalties are also prescribed which include removal from ballot.

Learned counsel Mrs. Kamini Jaiswal referred to All India Service (Conduct) Rules, 1968 and pointed out that a member of All India Service is required to disclose his/her assets including that of spouse and the dependant children. She referred to Rule 16 of the said Rules, which provides for declaration of movable, immovable and valuable property by a person who becomes Member of the Service. Relevant part of Rule 16 is as under :-

> "**16. (1)** Every person shall, where such person is a member of the Service at the commencement of these rules, before such date after such commencement as may be specified by the Government in this behalf, or, where such person becomes a member of the Service after commencement, on his first appointment to the Service submits a return of his assets and liabilities in such form as may be prescribed by the Government giving the full particulars regarding :-
>
> (a) the immovable property owned by him, or inherited or acquired by him or held by him on lease or mortgage, either in his own name or in the name of any member of his family or in the name of any other person,
>
> (b) shares, debentures, postal Cumulative Time Deposits and cash including bank deposits inherited by him or similarly owned, acquired or held by him;

(c) other movable property inherited by him or similarly owned, acquired or held by him; and

(d) debts and other liabilities incurred by him directly or indirectly".

Such officer is also required to submit an annual return giving full particulars regarding the immovable and movable property inherited by him or owned or acquired or held by him on lease or mortgage either in his own name or in the name of any member of his family or in the name of any other person.

It is also submitted that even the Gazetted Officers in all government services are required to disclose their assets and thereafter to furnish details of any acquisition of property annually. In our view, it is rightly submitted that in a democratic form of government, MP or MLA is having higher status and duty to the public. In ***P.V. Narasimha Rao v. State (CBI/SPE)*** [(1998) 4 SCC 626), the Court *inter alia* considered whether Member of Parliament is a public servant? The Court [in para 162] held thus :-

> "A public servant is "any person who holds an office by virtue of which he is authorised or required to perform any public duty". Not only, therefore, must the person hold an office but he must be authorised or required by virtue of that office to perform a public duty. Public duty is defined by Section 2(b) of the said Act to mean "a duty in the discharge of which the State, the public or that community at large has an interest". In a democratic form of government it is the Member of Parliament or a State Legislature who represents the people of his constituency in the highest lawmaking bodies at the Centre and the State respectively. Not only is he the representative of the people in the process of making the laws that will regulate their society, he is their representative in deciding how the funds of the Centre and the State shall be spent and in exercising control over the executive. It is difficult to conceive of a

duty more public than this or of a duty in which the State, the public and the community at large would have greater interest....."

The aforesaid underlined portion highlights the important status of MP or State Legislature.

Finally, in our view this Court would have ample power to direct the Commission to fill the void, in absence of suitable legislation, covering the field and the voters are required to be well-informed and educated about contesting candidates so that they can elect proper candidate by their own assessment. 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 judiciary 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. The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. Therefore, if the candidate is directed to declare his/her spouse/s and dependants' assets immovable, movable and valuable articles it would have its own effect. This Court in ***Vishaka v. State of Rajasthan*** [(1997) 6 SCC 241] dealt with incident of sexual harassment of a woman at work place which resulted in violation of fundamental right of gender equality and the right to life and liberty and laid down that in absence of legislation, it must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of independence of Judiciary in the LAWASIA region. The decision has laid down the guidelines and prescribed the norms to be strictly observed in all work places until suitable legislation is enacted to occupy the field. In the present case also, there is no legislation or rules providing for giving necessary information to the voters. As stated earlier, this case was relied upon in *Vineet Narain's case (supra)* where the Court has issued necessary guidelines to the CBI and the Central Vigilance Commission (CVC) as there was no legislation covering the said field to ensure proper implementation of rule of law.

To sum up the legal and constitutional position which emerges from the aforesaid discussion, it can be stated that :-

1. 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.

2. The limitation on plenary character of power is when the Parliament or State Legislature has made a valid law relating to or in connection with elections, the Commission is required to act in conformity with the said provisions. 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. Constitution has taken care of leaving scope for exercise of residuary power by the Commission in its own right as a creature of the Constitution in the infinite variety of situations that may emerge from time to time in a large democracy, as every contingency could not be foreseen or anticipated by the enacted laws or the rules. By issuing necessary directions, Commission can fill the vacuum till there is legislation on the subject. In ***Kanhiya Lal Omar's case****,* the Court construed the expressions "superintendence, direction and control" in Article 324(1) and held that a direction may mean an order issued to a particular individual or a precept which may have to follow and it may be a specific or a general order and such phrase should be construed liberally empowering the election commission to issue such orders.

3. The word "elections" includes the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the process of choosing a candidate. Fair election contemplates disclosure by the candidate of his past including the assets held by him so as to give a proper choice to the candidate according to his thinking and opinion. As stated earlier, in ***Common Cause case*** *(supra),* the Court dealt with a contention that elections in the country are fought with the

help of money power which is gathered from black sources and once elected to power, it becomes easy to collect tons of black money, which is used for retaining power and for re-election. If on affidavit a candidate is required to disclose the assets held by him at the time of election, voter can decide whether he could be re-elected even in case where he has collected tons of money.

Presuming, as contended by the learned senior counsel Mr. Ashwini Kumar, that this condition may not be much effective for breaking a vicious circle which has polluted the basic democracy in the country as the amount would be unaccounted. May be true, still this would have its own effect as a step-in-aid and voters may not elect law-breakers as law-makers and some flowers of democracy may blossom.

4. To maintain the purity of elections and in particular to bring transparency in the process of election, the Commission can ask the candidates about the expenditure incurred by the political parties and this transparency in the process of election would include transparency of a candidate who seeks election or re-election. In a democracy, the electoral process has a strategic role. The little man of this country would have basic elementary right to know full particulars of a candidate who is to represent him in Parliament where laws to bind his liberty and property may be enacted.

5. The right to get information in democracy is recognised all throughout and it is natural right flowing from the concept of democracy. At this stage, we would refer to Article 19(1) and (2) of the International Covenant of Civil and Political Rights which is as under :-

> "(1) Everyone shall have the right to hold opinions without interference.
>
> (2) Everyone shall have the right to freedom of expression; *this right shall include freedom to seek, receive and impart information and ideas of all kinds*, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

6. Cumulative reading of plethora of decisions of this Court as referred to, it is clear that if the field meant for legislature and executive is left unoccupied detrimental to the public interest, this Court would have ample jurisdiction under Article 32 read with Articles 141 and 142 of the Constitution to issue necessary directions to the Executive to subserve public interest.

7. Under our Constitution, Article 19(1)(a) provides for freedom of speech and expression. Voters' speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is must. Voter's (little man - citizen's) right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of democracy. The little man may think over before making his choice of electing law breakers as law makers.

In this view of the matter, it cannot be said that the directions issued by the High Court are unjustified or beyond its jurisdiction. However, considering the submissions made by the learned counsel for the parties at the time of hearing of this matter, the said directions are modified as stated below.

The Election Commission is directed to call for information on affidavit by issuing necessary order in exercise of its power under Article 324 of the Constitution of India from each candidate seeking election to Parliament or a State Legislature as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his/her candidature :-

(1) Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past - if any, whether he is punished with imprisonment or fine?

(2) Prior to six months of filing of nomination, whether the candidate is accused in any pending case, of any offence punishable with

imprisonment for two years or more, and in which charge is framed or cognizance is taken by the Court of Law. If so, the details thereof.

(3) The assets (immovable, movable, bank balances etc.) of a candidate and of his/her spouse and that of dependants.

(4) Liabilities, if any, particularly whether there are any over dues of any public financial institution or Government dues.

(5) The educational qualifications of the candidate.

It is to be stated that the Election Commission has from time to time issued instructions/orders to meet with the situation where the field is unoccupied by the legislation. Hence, the norms and modalities to carry out and give effect to the aforesaid directions should be drawn up properly by the Election Commission as early as possible and in any case within two months.

In the result, Civil Appeal No. 7178 of 2001 is partly allowed and the directions issued by the High Court are modified as stated above. Appeal stands disposed of accordingly.

Writ Petition (C) No. 294 of 2001 is allowed to the aforesaid extent.

There shall be no order as to costs.

Sd/-
..... J.
(M.B. SHAH)

Sd/-
..... J.
(BISHESHWAR PRASAD SINGH)

Sd/-
..... J.
(H. K. SEMA)

New Delhi
May 2, 2002

SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal Nos. 3320-21/2001

Indian National Congress (I) ..... Appellant(s)

– Versus –

Institute of Social Welfare & Ors. ..... Respondent(s)

(With C.A. Nos. 3322-3323/2001, Contempt Petition © Nos. 334-335/2000 in C.A. Nos. 3320-3321/2001 and C.A. Nos. 3324 and 3325/2001)

Date of Order : 10.05.2002

SUMMARY OF THE CASE

In the writ petitions filed before the High Court it was alleged that despite the law having declared by Supreme Court that calling of a bundh is un-Constitutional, political parties in Kerala state continue to call bundh under the name and cover of hartal and so sought to deregister CPM for said violation. The petitioners prayed for enforcement of decision in the case of CPI (M) Vs Bharat Kumar & Others (AIR 1998) SC 184. The petitioners also submitted that the Election Commission did not take any action in this behalf to deregister the parties.

The Court held that there is no express provision in law which empowers the Election Commission to deregister any party on the ground of violation of the Constitution of India except for certain exceptional cases where party is found to have obtained registration by fraud, a case arises out of sub-section (9) of Section 29A of R.P. Act, 1951 or a party is declared unlawful.

While ruling, the Supreme Court observed the plea that Section 21 of General Clauses Act, 1897 does not apply to the Commission as its functions are

quasi-judiciary & not legislative or executive and hence the Commission has no power to deregister a party though it has power to register it.

J U D G E M E N T

V. N. KHARE, J.

The foremost question that arises in this group of appeals is whether the Election Commission of India under Section 29A of the Representation of the People Act, 1951 (hereinafter referred to as the 'Act') has power to deregister or cancel the registration of a political party on the ground that it has called for hartal by force, intimidation or coercion and thereby violated the provisions of the Constitution of India.

The aforesaid question has arisen out of the directions issued by the High Court of Kerala on the writ petitions filed for enforcement of decision in the case of Communist Party of India (Marxist) vs. Bharat Kumar & Ors. AIR (1998) SC 184 wherein it was held that "there is a distinction between 'bundh' and 'hartal'. A call for a bundh involves coercion of others into towing the lines of those who called for the bundh and that the act was unconstitutional, since it violated the rights and liberty of other citizens guaranteed under the Constitution".

In the writ petitions filed before the High Court it was alleged that despite the law having been declared by the Supreme Court that calling of a bundh is unconstitutional, the political parties in the State of Kerala continued to call bundh under the name and cover of hartal. It was prayed that direction be issued to the government of Kerala for taking appropriate measures to give effect to the declaration of law by the Supreme Court in the case of Communist Party of India (Supra). The High Court from time to time issued orders and in compliance thereof, the Chief Secretary as well as Director General of Police issued necessary orders, but such directions proved ineffective and the political parties continued to give call for bundh in the name of hartal. It was also alleged that some of the writ

petitioners submitted representations to the Election Commission of India for taking necessary proceedings against the registered political parties for de-registration as they had contravened the provisions of the Constitution, but no action has been taken by the Election Commission in that regard. In one of the writ petitions, one of the reliefs sought for with which we are concerned in this group of appeals, was to issue a direction to the Election Commission of India to take action against the registered political parties for violation of their undertaking that they will abide by the Constitution. In nutshell, the case of the writ petitioners before the High Court was that by holding a hartal and enforcing it by force, threat and coercion, there is the performance of an unconstitutional act and one of the clear and definite ways of preventing such unconstitutional activity on the part of political parties registered under the Representation of the People Act is to take steps for their de-registration on the ground of violation of the Constitution of India.

In the said writ petitions, the Communist Party of India (Marxist) filed counter affidavit and stated therein that they did not give call for a bundh and, in fact, the call given by them was for a hartal. It is also stated therein that at the call for hartal, it was optional for every citizen either to open or close their shops and in fact there was only an appeal to public to join the hartal and further there was no element of compulsion in the appeal and, therefore, the Communist Party of India (Marxist) did not violate either the provisions of the Constitution or decision rendered by the Supreme Court in the case of **Communist Party of India vs. Bharat Kumar** (supra). Indian National Congress (I) also filed a counter affidavit submitting that the call for hartal given by them was not a bundh. It was also stated therein that giving a call for hartal was a part freedom of speech and expression protected under Article 19(1)(a) of the Constitution and it was merely a device to elicit the support of the people towards their specific issues highlighted by political parties, organization and also to inform and educate the public regarding specific problems affecting their day to day life. It was also stated that the State can take preventive measures in case there is any violence or interference of constitutional or legal rights of the citizens.

The Election Commission of India also filed its return and stated therein that it does not have power to de-register or cancel a the registration of a political party under Section 29A of the Act. It was also stated by the Election Commission that similar matter arose before it in a petition filed by Shri Arjun Singh and others seeking de-registration of the Bharatiya Janata Party as a political party and also freezing of its reserved symbol 'LOTUS' and the Election Commission of India by its order dated 19.2.92 rejected the petition after having found that it does not have power under Section 29A of the Act to de-register a registered political party. It was also brought to the notice of the High Court that the decision of the Election Commission of the India was also tested by filling a special leave petition before the Supreme Court, but the same was dismissed on 28.8.92. In that view of the matter, no direction can be issued by the High Court to the Election Commission of India to take any proceeding for de-registration of a registered political party for having violated the constitutional provisions.

The High Court was of the view that mere giving a call for a hartal or advocating of it as understood in the strict sense cannot be held to be illegal in the context of the decision in Communist Party of India vs. Bharat Kumar (Supra). However, the moment a hartal seeks to impinge the right of others it ceases to be hartal in a real sense of the freedom and really turns out a violent demonstration affecting the rights of others and such an act has to be curtailed at the instance of other citizens whose rights are affected by such an illegal act. The High Court, as a matter of fact, found that what was called a hartal was not what was strictly meant by that term, but a form of a bundh involving intimidation and coercion of those who do not want to respond to the call or participate in it. The High Court after having found that the political parties have contravened the constitutional provisions of guaranteed freedom to the citizens, they are liable to be appropriately dealt with. In that context, the High Court was of the view that although Section 29A of the Act expressly does not empower the Election Commission of India to de-register a registered political party for having contravened the provisions of the Constitution, but on application of Section 21 of the General Clauses Act, the

Election Commission of India has power on a complaint filed with it, to initiate proceedings for de-registration against a political party for having violated the constitutional provisions and after giving opportunity to such political parties, if it is found that they have committed breach of the provisions of the Constitution, the Election Commission of India has power to de-register or cancel the registration of such political parties. The High Court distinguished the summary dismissal of the special leave petition No. 8738/1992 filed by Shri Arjun Singh against Bharatiya Janata Party and another by the apex Court on 28.8.92 on the ground that dismissal of a special leave petition without any reason is not binding as it does not lay down law within the meaning of Art. 141 of the Constitution.

In the aforesaid view of the matter, the High Court while allowing the writ petitions passed the following orders:

"i. We declare that the enforcement of a hartal call by force, intimidation, physical or mental and coercion would amount to an unconstitutional act and party or a hartal has no right to enforce it by resorting to force or intimation.

ii. We direct the State, Chief Secretary to the State, Director General of Police and all the administrative authorities and police officers in the State to implement strictly the directives issued by the directions given by the Director General of Police dated 4.2.1999 and set out fully in the earlier part of this judgment.

iii. We issue a writ of mandamus to the Election Commission to entertain complaints, if made, of violation of Section 29A (5) of the Representation of the People Act, 1951 by any of the registered political parties or associations, and after a fair hearing, to take a decision thereon for de-registration or cancellation of registration of that party or organization, if it is warranted by the circumstances of the case.

iv. We issue a writ of mandamus directing the Election Commission to consider and dispose of in accordance with law, the Representation Ext. P9 in o.p. 20641 or 1998, after giving all the affected parties an opportunity of being heard.

v. We direct the state of Kerala, the Chief Secretary to the Government, the Director General of Police and all other officers of the State to take all necessary steps at all necessary times, to give effect to this judgement.

vi. We direct the State, District Collectors, all other officers of the State and Corporations owned or controlled by the State to take immediate and prompt action for recovery of damages in cases where pursuant to a call for hartal, public property or property belonging to the corporation is damaged or destroyed, from the perpetrators of the acts leading to destruction / damage and those who have issued the call for hartal."

It is against the aforesaid decision of the High Court these appeals have been filed by way of separate special leave petitions.

We have heard Shri Ashwani Kumar, learned senior counsel appearing for the Indian National Congress (I), Shri Soli J. Sorabjee, learned Attorney General appearing for the Union of India, Shri S. Muralidhar, learned counsel, appearing for Election Commission of India, Shri Rajeev Dhavan, learned senior counsel and Shri B.K. Pal, learned counsel appearing for Communist Party of India (Marxist) and Communist Party of India, respectively, and Shri L Nageswara Rao, learned senior counsel appearing for the writ petitioners respondents.

Shri Soli J. Sorabjee, learned Attorney General and other leaned counsel for the appellants appearing in other connected civil appeals stated that these appeals are pressed only against direction Nos. (iii) and (iv) given by the High Court to the Election Commission of India.

Learned counsel appearing for the appellants, inter alia, argued -

- that there being no express provision in the Act to cancel the registration of a political party under Section 29A of the Act, and as such no proceedings can be taken by the Election Commission of India against a political party for having violated the provisions of the Constitution;

- that the Election Commission of India while exercising the power to register a political party under Section 29A of the Act acts quasi-judicially and once a political party is registered, no power of review having been conferred on the Election Commission of India, the Election Commission has no power to de-register a political party for having violated the provisions of the Constitution or committed breach of undertaking given to the Election Commission at the time of its registration;

- and that the view taken by the High Court that since the Election Commission has power to register a political party under Section 29A of the Act, it is equally empowered to revoke or rescind the order of registration on application of Section 21 of the General Clauses Act is erroneous.

Learned counsel appearing for the respondent supported the judgment of the High Court and argued that the appeals deserve dismissal.

Before we advert to the arguments raised by learned counsel for the parties it is necessary to refer to relevant provisions of the Act and rules framed thereunder and the provisions of the Election Symbols (Reservation and Allotment) Order, 1968 (hereinafter referred to as the 'Symbols Order') framed by the Election Commission in exercise of its power under Article 324 of the Constitution to find out whether the Election Commission has power to de-register a registered political party.

By the Representation of the People (Amendment) Act, 1988 (1 of 1989), Section 29A was inserted in the Act. The Statement of Objects and Reasons appended to the Bill which was introduced in the Parliament and subsequently was converted into an Act, runs as under:

> "At present, there is no statutory definition of political party in the Election Law. The recognition of a political party and the allotment of symbols for each party are presently regulated under the Election Symbols (Reservation and Allotment) Order, 1968. It is felt that the Election Law should define political party and lay down procedure for its registration. It is also felt that the political parties should be required to include a specific provision in the memorandum or rules and regulations governing their functioning that they would fully be committed to and abide by the principles enshrined in the preamble to the Constitution".

Before Section 29A of the Act came into force, the political parties were registered under the Election (Reservation and Allotment) Symbols Order 1968 (hereinafter referred to as the (Symbols Order) read with Rules 5 and 10 of the Conduct of Election Rules. Paragraph 3 of the Symbols Order as it existed prior to coming into force Section 29A of the Act, runs as under:

> **"3. Registration with the Commission of associations and bodies as political parties for the purpose of this order** – (1) Any association or body of individual citizens of India calling itself a political party and intending to avail itself of the provisions of this Order shall make an application to the Commission for its registration as a political party for the purpose of this Order.
>
> (2) Such application shall be made-
>
> (a) if the association or body is in existence at the commencement of this Order, within sixty days next following such commencement;

(b) if the association or body is formed after the commencement of this Order, within sixty days next following the date of its formation;

Provided that no such application for registration shall be necessary on the part of any political party which immediately before the commencement of this Order is either a multi-state party or a recognized party other than a multi-state and every such party shall be deemed to be registered with the Commission as a political party for the purposes of this Order.

(3) Every application under sub-paragraph (1) shall be signed by the chief executive officer of the association or body (whether such chief executive officer is known as Secretary or by any other designation) and either presented to a Secretary to the Commission or sent to such Secretary by registered post.

(4) Every such application shall contain the following particulars, namely:-

(a) the name of the association or body;

(b) the State in which its head office is situated;

(c) the address to which letters and other communications meant for it should be sent;

(d) the names of its president, secretary and all other office-bearers;

(e) the numerical strength of its members, and if there are categories of its members, the numerical strength in each category;

(f) whether it has any local units; if so, at what levels (such as district level, thana or block level, village level, and the like);

(g) the political principles on which it is based;

(h) the policies, aims and objects it pursues or seeks to pursue;

(i) its programs, functions and activities for the purpose of carrying out its political principles, policies, aims and objects;

(j) its relationship with the electros and popular support it enjoys, and tangible proof, if any, of such relationship and support;

(k) whether it is represented by any member or members in the House of the People or any State Legislative Assembly, if so, the number of such member or members;

(l) any other particulars which the association or body make like to mention.

(5) The Commission may call for such other particulars as it may deem fit from the association or body.

(6) After considering all the particulars as aforesaid in its possession and any other necessary and relevant factors and after giving the representatives of the association or body reasonable opportunity of being heard, the Commission shall decide either to register the association or body as a political party for the purposes of this Order, or not so to register it; and the Commission shall communicate its decision to the association or body.

(7) The decision of the Commission shall be final;

(8) After an association or body has been registered as a political party as aforesaid, any change in its name, head office, office-bearers, address or political principles, policies, aims and objects and any change in any other material matters shall be communicated to the Commission without delay."

Section 29A of the Act runs as under:

"29A Registration with the Election Commission of associations and bodies as political parties –

(1) Any association or body of individual citizens of India calling itself a political party and intending to avail itself of provisions of this Part shall make an application to the Election Commission for its registration as a political party for the purposes of this Act.

(2) Every such application shall be made-

(a) if the association or body is in existence at the commencement of the Representation of the People (Amendment) Act, 1988, (1 of 1989), within sixty days next following such commencement:

(b) if the association or body is formed after such commencement, within thirty days next following the date of its formation :

(3) Every application under sub-section (1) shall be signed by the chief executive officer of the association or body (whether such chief executive officer is known as Secretary or by any other designation) and presented to the Secretary to the Commission or sent to such Secretary by registered post.

(4) Every such application shall contain the following particulars, namely:-

(a) the name of the association or body

(b) the State in which its head office is situated;

(c) the address to which letters and other communications meant for it should be sent;

(d) the names of its president, secretary, treasurer and other office-bearers;

(e) the numerical strength of its members, and if there are categories of its members, the numerical strength in each category;

(f) whether it has any local units; if so, at what levels;

(g) whether it is represented by any member or members in either House of Parliament or of any State Legislature; if so, the number of such member or members.

(5) The application under sub-section (1) shall be accompanied by a copy of the memorandum or rules and regulations of the association or body, by whatever name called, and such memorandum or rules and regulations shall contain a specific provision that the association or body shall bear true faith and allegiance to the Constitution of India as by law established, and to the principles of socialism, secularism and democracy, and would uphold the sovereignty, unity and integrity of India.

(6) The Commission may call for such other particulars as it may deem fit from the association or body.

(7) After considering all the particulars as aforesaid in its possession and any other necessary and relevant factors and after giving the representatives of the association or body reasonable opportunity of being heard, the Commission shall decide either to register the association or body as a political party for the purposes of this Part, or not so to register it; and the Commission shall communicate its decision to the association or body:

Provided that no association or body shall be registered as a political party under this sub-section unless the memorandum or rules

and regulations of such association or body conform to the provisions of sub-section (5).

(8) The decision of the Commission shall be final;

(9) After an association or body has been registered as a political party as aforesaid, any change in its name, head office, office-bearers, address or in any other material matters shall be communicated to the Commission without delay."

A conjoint reading of Section 29A and paragraph 3 of the Symbols Order as it existed prior to enforcement of Section 29A of the Act shows that there were only two significant changes and other provisions remained the same. The First change is reflected in sub-section (5) of Section 29A of the Act which provides that the application for registration shall be accompanied by a copy of memorandum or rules and regulations of the political party seeking registration under the Act and such memorandum or rules and regulations shall contain a specific provision that such a political party shall bear true faith and allegiance to the Constitution of India, as by law established and to the principles of socialism, secularism and democracy and would uphold the sovereignty, unity and integrity of India. The Second change is reflected in sub-section (4) of Section 29A of the Act which embodied in it, the provisions of different clauses of sub-paragraph (4) of paragraph 3 of the Symbols Order.

After Section 29A of the Act came into force, paragraph 3 of the Symbols Order stood amended inasmuch as the definition of a political party in paragraph 2(1) (4) of the Symbols Order was also amended. Earlier, under paragraph 3 of the Symbols Order, a political party was defined as a registered party. After Section 29A was inserted in the Act, the definition of a political party in the Symbols Order was amended to the effect that the political party means a party registered with the Election Commission under Section 29A of the Act. Consequently, paragraph 3 of the Symbols Order was also amended to the extent it prescribed additional

information which a political party was required to furnish to the Election Commission along with an application for registration. Now such additional information the Election Commission is authorized to call for under sub-section (6) of Section 29A of the Act. A perusal of un-amended paragraph 3 of the Symbols Order shows that it did not provide for de-registration of a political party registered under the Symbols Order. Nor any such provision was made after the Symbols Order was amended after Section 29A was inserted in the Act. Further, neither the provisions of Section 29A of the Act nor the rules framed there under provide for de-registration or cancellation of registration of a political party. We are, therefore, of the view that neither under the Symbols Order nor under Section 29A of the Act, the Election Commission has been conferred with any express power to de-register a political party registered under Section 29A of the Act on the ground that it has either violated the provisions of the Constitution or any provision of undertaking given before the Election Commission at the time of its registration.

The question then arises whether, in the absence of an express power in the Act, the Election Commission is empowered to de-register a registered political party. Learned Attorney General, appearing for the Union of India urged that the Election Commission while exercising its power under Section 29A of the Act, acts quasi-judicially and in absence of any express power of review having been conferred on the Election Commission, the Election Commission has no power to de-register a political party. According to learned Attorney General, excepting in three circumstances when the Election Commission could not be deprived of the power to deregister a party are – (a) when the Election Commission finds that the party has secured registration by playing fraud on the Commission, (b) when a political party itself informs the Commission in pursuance of Section 29A (9) that it has changed its constitution so as to abrogate the provision therein conforming to the provisions of Section 29A(5) or does not believe in the provisions of the Constitution, rejecting the very basis on which it secured registration as a registration political party and (c) any like ground where no enquiry is called for on the part of Election Commission, the Commission has no power to de-register a

political party. Learned Attorney General further argued that in a situation where a complaint is made to the Election Commission and it is required to make an inquiry that a particular registered political party has committed breach of the undertaking given before the Election Commission or has violated the provisions of the Constitution, the election Commission has neither any power to make any inquiry into such a complaint nor de-register such a political party.

Whereas, Shri L. Nageshwara Rao, learned counsel appearing for respondent No. 1 urged that the discharge of function by the Election Commission under Section 29A of the Act cannot be termed as quasi-judicial function, in the absence of a *lis* – a proposition and apposition between the two contending parties which the statutory authority is required to decide. According to him, unless there is a *lis* or two contending parties before the Election Commission, the function assigned to the Election Commission under Section 29A is an administrative in nature. His further argument is that where exercise of an administrative function manifests one of the attributes of quasi-judicial function, such a discharge of function is not quasi-judicial. Learned counsel referred to a passage from **Wade & Forsyth's Administrative Law** and relied upon decisions in Province of Bombay vs. Kusaldas S. Advani & Ors. (1950) SCR 621, Shri Radeyshyam Khare & Anr. vs. The State of Madhya Pradesh & Ors**.** (1959) SCR 1440, T.N. Seshan, Chief Election Commissioner of India etc. vs. Union of India & Ors. (1995) 4 SCC 611 and State of H.P. vs. Raja Mahendra Pal & Ors. (1999) 4 SCC 43 in support of his argument.

On the argument of parties, the question that arises for our consideration is, whether the Election Commission, in exercise of its powers under 29A of the Act, acts administratively or quasi-judicial. We shall first advert to the argument raised by learned counsel for the respondent to the effect that in the absence of any *lis* or contest between the two contending parties before the Election Commission under Section 29A of the Act, the function discharged by it is administrative in nature and not a quasi-judicial one. The dictionary meaning of

the word quasi is 'not exactly' and it is just in between a judicial and administrative function. It is true, in many cases, the statutory authorities were held to be quasi-judicial authorities and decisions rendered by them were regarded as quasi judicial, where there were contest between the two contending parties and the statutory authority was required to adjudicate upon the rights of the parties. In Cooper vs. Wilson (1937) 2 KB 309, it is stated that "the definition of a quasi-judicial decision clearly suggests that there must be two or more contending parties and an outside authority to decide those disputes". In view of the aforesaid statement of law, where there are two or more parties contesting each other's claim and the statutory authority is required to adjudicate the rival claims between the parties, such a statutory authority was held to be quasi-judicial and decision rendered by it as a quasi-judicial order. Thus, where there is a *lis* or two contesting parties making rival claims and the statutory authority under the statutory provision is required to decide such a dispute, in the absence of any other attributes of a quasi-judicial authority, such a statutory authority is quasi-judicial authority.

But there are cases where there is no *lis* or two contending parties before a statutory authority yet such a statutory authority has been held to be quasi-judicial and decision rendered by it as quasi-judicial decision when such a statutory authority is required to act judicially. In Queen vs. Dublin Corporation (1878)2 Ir. R. 371, it was held thus:

> "In this connection the term judicial does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for purpose of this question, a judicial act seems to be an act done by competent authority upon consideration of facts and circumstances and imposing liability or affecting the rights. And if there be a body empowered by law to enquire into facts, makes estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequence would be judicial acts."

Atkin L.J. as he then was, in Rex vs. Electricity Commissioners – (1924) 1 KB 171 stated that when any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, such body of persons is a quasi-judicial body and decision given by them is a quasi-judicial decision. In the said decision, there was no contest or *lis* between the two contending parties before the Commissioner. The Commissioner, after making an enquiry and hearing the objections was required to pass order. In nutshell, what was held in the aforesaid decision was, where a statutory authority is empowered to take a decision which affects the rights of persons and such an authority under the relevant law required to make an enquiry and hear the parties, such authority is quasi-judicial and decision rendered by it is a quasi-judicial act.

In Province of Bombay vs. Kusaldas S. Advani & Ors. (supra), it was held thus:

> "(i) that if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a lis and prima facie and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act; and
>
> (ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially.

> In other words, while the presence of two parties besides the deciding authority will prima facie and in the absence of any other factor impose upon the authority the duty to act judicially, the absence of two such parties is not decisive in taking the act of the authority out of the category of quasi-judicial act if the authority is nevertheless required by the statute to act judicially."

The legal principles laying down when an act of a statutory authority would be a quasi-judicial act, which emerge from the aforestated decisions are these:

> Where(a) a statutory authority empowered under a statute to do any act (b) which would prejudicially affect the subject (c) although there is no *lis* or two contending parties and the contest is between the authority and the subject and (d) the statutory authority is required to act judicially under the statute, the decision of the said authority is quasi-judicial.

Applying the aforesaid principle, we are of the view that the presence of a *lis* or contest between the contending parties before a statutory authority, in the absence of any other attributes of a quasi-judicial authority is sufficient to hold that such a statutory authority is quasi-judicial authority. However, in the absence of a *lis* before a statutory authority, the authority would be quasi-judicial authority if it is required to act judicially.

Coming to the second argument of learned counsel for the respondent, it is true that mere presence of one or two attributes of quasi-judicial authority would not make an administrative act as quasi-judicial act. In some case, an administrative authority may determine question of fact before arriving at a decision which may affect the right of an appellant but such a decision would not be quasi-judicial act. It is different thing that in some cases fair-play may demand affording of an opportunity to the claimant whose right is going to be affected by the act of the administrative authority, still such an administrative authority would not be quasi-judicial authority.

What distinguishes an administrative act from quasi-judicial act is, in the case of quasi-judicial functions under the relevant law the statutory authority is required to act judicially. In other words, where law requires that an authority before arriving at decision must make an enquiry, such a requirement of law makes the authority a quasi-judicial authority.

Learned counsel for the respondent then contended that a quasi-judicial function is an administrative function which the law requires to be exercised in some respects as if it were judicial and in that view of the matter, the function discharged by the Election Commission under Section 29A of the Act is totally administrative in nature. Learned counsel in support of his argument relied upon the following passage from Wade & Forsyth's Administrative Law:

> "A quasi-judicial function is an administrative function which the law requires to be exercised in some respects as if it were judicial. A typical example is a minister deciding whether or not to confirm a compulsory purchase order or to allow a planning appeal after a public inquiry. The decision itself is administrative, dictated by policy and expediency. But the procedure is subject to the principles of natural justice, which require the minister to act fairly towards the objections and not (for example) to take fresh evidence without disclosing it to them. A quasi-judicial decision is therefore an administrative decision which is subject to some measure of judicial procedure."

We do not find any merit in the submission. At the outset, it must be borne in mind that another test which distinguishes administrative function required to act according to the rules, whereas the authority which acts administratively is dictated by the policy and expediency. In the present case, the Election Commission is not required to register a political party in accordance with any policy or expediency but strictly in accordance with the statutory provisions. The afore-quoted passage from Administrative Law by Wad & Forsyth is wholly inapplicable

to the present case. Rather, it goes against the argument of learned counsel for the respondent. The afore-quoted passage shows that where an authority whose decision is dictated by policy and expediency exercises administratively although it may be exercising functions in some respects as if it were judicial, which is not the case here.

We shall now examine Section 29A of the Act in the light of the principles of law referred to above. Section 29A deals with the registration of a political party for the purposes of the Representation of the People Act. Sub-Section (1) of Section 29A of the Act provides who can make an application for registration as a political party. Sub-sections (2) and (3) of the said Section lay down making an application to the Commission. Sub-sections (4) and (5) of the said Section provide for contents of the application. Sub-section (7) of Section 29 provides that the Election Commission after considering all the particulars in its possession and any other necessary and relevant factors and after giving the representatives of the association reasonable opportunity of being heard shall decide either to register the association or body as a political party or not so to register it and thereupon the Commission is required to communicate its decision to the political party. Further, sub-section (8) of Section 29A attaches finality to the decision of the Commission.

From the aforesaid provisions, it is manifest that the Commission is required to consider the matter, to give opportunity to the representative of political party and after making enquiry and further enquiry arrive at the decision whether to register a political party or not. In view of the requirement of law that the Commission is to give decision only after making an enquiry, wherein an opportunity of hearing is to be given to the representatives of the political party, we are of the view that the Election Commission under Section 29A is required to act judicially and in that view of the matter the act of the Commission is quasi-judicial.

This matter may be examined from another angle. If the directions of the High Court for considering the complaint of the respondent that some of the

appellants / political parties are not functioning in conformity with the provisions of Section 29A is to be implemented, the result will be that a detailed enquiry has to be conducted where evidence may have to be adduced to substantiate or deny the allegations against the parties. Thus, a *lis* would arise. Then there would be two contending parties opposed to each other and the Commission has to decide the matter of de-registration of a political party. In such a situation the proceedings before the Commission would partake the character of quasi-judicial proceeding. De-registration of a political party is a serious matter as it involves divesting of the party of a statutory status of a registered political party. We are, therefore, of the view that unless there is express power of review conferred upon the Election Commission, the Commission has no power to entertain or enquire into the complaint for de-registering a political party for having violated the Constitutional provisions.

However, there are three exceptions where the Commission can review its order registering a political party. One is where a political party obtained its registration by playing fraud on the Commission, secondly it arises out of sub-section (9) of Section 29A of the Act and thirdly, any like ground where no enquiry is called for on the part of the Election Commission, for example, where the political party concerned is declared unlawful by the Central Government under the provision of the Unlawful Activities (Prevention) Act, 1967 or any other similar law.

Coming to the first exception, it is almost settled law that fraud vitiates any act or order passed by any quasi-judicial authority even if no power of review is conferred upon it. In fact, fraud vitiates all actions. In Smith vs. East Ellos Rural Distt. Council – (1956) I All E.R. 855, it was stated that the effect of fraud would normally be to vitiate all acts and order. In Indian Bank vs. Satyam Fibres (India) Pvt. Ltd. – (1995) 5 SCC 550, it was held that a power to cancel/recall an order which has been obtained by forgery or fraud applies not only to courts of law, but also statutory tribunals which do not have power of review. Thus, fraud or forgery practised by a political party while obtaining a registration, if comes to the notice

of the Election Commission, it is open to the Commission to de-register such a political party.

The second exception is where a political party changes its nomenclature of association, rules and regulation abrogating the provisions therein conforming to the provisions of Section 29A (5) or intimating the Commission that it has ceased to have faith and allegiance to the Constitution of India or to the principles of socialism, secularism and democracy, or it would not uphold the sovereignty, unity and integrity of India so as to comply the provisions of Section 29A (5). In such cases, the very substratum on which the party obtained registration is knocked of and the Commission in its ancillary power can undo the registration of a political party. Similar case is in respect of any like ground where no enquiry is called for on the part of the Commission. In this category of cases, the case would be where a registered political party is declared unlawful by the Central Government under the provisions of Unlawful Activities (Prevention) Act, 1967 or any other similar law. In such cases, power of the Commission to cancel the registration of a political party is sustainable on the settled legal principle that when a statutory authority is conferred with a power, all incidental and ancillary powers to effectuate such power are within the conferment of the power, although not expressly conferred. But such an ancillary and incidental power of the Commission is not an implied power of revocation. The ancillary and incidental power of the Commission cannot be extended to a case where a registered political party admits that it has faith in the Constitution and principles of socialism, secularism and democracy, but some people repudiate such admission and call for an enquiry by the Election Commission. Reason being, an incidental and ancillary power of a statutory authority is not the substitute of an express power of review.

Now, coming to the decisions relied upon by the learned counsel for the respondent, we are of the view that none of the decisions relied upon a.e. of any assistance to argument of learned counsel for the respondent. The decision of this Court in Province of Bombay vs. Kusaldas Advani (supra) has been dealt with by us in the foregoing paragraph and is of no help to the case of the respondent.

In the case of Radhey Shyam Khare vs. State of M.P. (supra), the State Government issued an order on the ground of expediency and policy and, therefore, it was held that the impugned order is an administrative in nature. In T.N. Seshan vs. Union of India (supra), it was held that the Election Commission besides administrative function is required to perform quasi-judicial duties and undertakes subordinate legislation making functions as well. This decision also is of no help to the case of the respondent. In the case of State of H.P. vs. Raja Mahendra Pal (supra), this Court found that Price Committee appointed by the government was not constituted under any statutory or plenary administrative power and, therefore, did not discharge any quasi-judicial function. This decision again is of no assistance to the case of the respondent.

It was next urged by the learned counsel for the appellants that the view taken by the High Court that by virtue of application of provisions of Section 21 of the General Clauses Act, 1897 the Commission has power to de-register a political party if it is found having violated the undertaking given before the Election Commission, is erroneous. According to him, once it is held that the Commission while exercising its powers under Section 29A of the Act acts quasi-judicially and an order registering a political party is a quasi-judicial order, the provision of Section 21 of the General Clauses of Act has no application. We find merit in the submission.

We have already extensively examined the matter and found that Parliament consciously had not chosen to confer any power on the Election Commission to de-register a political party on the premise it has contravened the provisions of sub-section (5) of Section 29A. The question which arises for our consideration is whether in the absence of any express or implied power, the Election Commission is empowered to cancel the registration of a political party on the strength of the provisions of Section 21 of the General Clauses Act. Section 21 of the General Clauses Act runs as under:

> "21. Power to issue, to include power to add to amend, vary or rescind, notification, orders, rules or bye-laws. Where by any central

> Act or regulation, a power to issue notifications, orders, rules or bye-laws is conferred then that power includes a power exercisable in the like manner and subject to the like sanction, and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued."

On perusal of Section 21 of the General Clauses Act, we find that the expression 'order' employed in Section 21 shows that such an order must be in the nature of notification, rules and bye-laws etc. The order which can be modified or rescinded on the application of Section 21 has to be either executive or legislative in nature. But the order which the Commission is required to pass under Section 29A is neither a legislative nor an executive order but is a quasi-judicial order. We have already examined this aspect of the mater in the foregoing paragraph and held that the functions exercisable by the Commission under Section 29A is essentially a quasi-judicial in nature and order passed thereunder is a quasi-judicial order. In that view of the matter, the provisions of Section 21 of the General Clauses Act cannot be invoked to confer powers of de-registration/ cancellation of registration after enquiry by the Election Commission. We, therefore, hold that Section 21 of the General Clauses Act has no application where a statutory authority is required to act quasi-judicially.

It may be noted that the Parliament deliberately omitted to vest the Election Commission of India with the power to de-register a political party for non-compliance with the conditions for the grant of such registration. This may be for the reason that under the Constitution the Election Commission of India is required to function independently and ensure free and fair elections. An enquiry into non-compliance with the conditions for the grant of registration might involve the Commission in matters of a political nature and could mean monitoring by the Commission of the political activities, programmes and ideologies of political parties. This position gets strengthened by the fact that on 30th June, 1994 the Representation of the People (Second Amendment) Bill, 1994 was introduced in

the Lok Sabha proposing to introduce Section 29-B whereunder a complaint to be made to the High Court within whose jurisdiction the main office of a political party is situated for cancelling the registration of the party on the ground that it bears a religious name or that its memorandum or rules and regulations no longer conforming the provisions of Section 29-A (5) or that the activities are not in accordance with the said memorandum or rules and regulations. However, this bill lapsed on the dissolution of the Lok Sabha in 1996, (See p.507 of "How India Votes: Election Laws, Practice and Procedure" by V.S. Rama Devi and S.K. Mendiratta).

To sum up, what we have held in the foregoing paragraph are as under:

1. That there being no express provision in the Act or in the Symbol Order to cancel the registration of a political party, and as such no proceeding for de-registration can be taken by the Election Commission against a political party for having violated the terms of Section 29A(5) of the Act on the complaint of the respondent.

2. The Election Commission while exercising its power to register a political party under Section 29A of the Act, acts quasi-judicially and decision rendered by it is a quasi-judicial order and once a political party is registered, no power of review having conferred on the Election Commission, it has no power to review the order registering a political party for having violated the provisions of the Constitution or for having committed breach of undertaking given to the Election Commission at the time of registration.

3. However, there are exceptions to the principle stated in paragraph 2 above where the Election Commission is not deprived of its power to cancel the registration. The exceptions are these-

(a) where a political party has obtained registration by practicing fraud or forgery;

(b) where a registered political party amends its nomenclature of association, rules and regulations abrogating therein conforming to the provisions of Section 29A(5) of the Act or intimating the Election Commission that it has ceased to have faith and allegiance to the Constitution of India or to the principles of socialism, secularism and democracy or it would not uphold the sovereignty, unity and integrity of India so as to comply the provisions of Section 29A(5) of the Act; and

(c) any like ground where no enquiry is called for on the part of the Commission.

4. The provisions of Section 21 of the General Clauses Act cannot be extended to the quasi-judicial authority. Since the Election Commission while exercising its power under Section 29A of the Act acts quasi-judicially, the provisions of Section 21 of the General Clauses Act has no application.

For the aforesaid reasons, the appeals deserve to be allowed in part. Consequently, direction Nos. (iii) and (iv) of the impugned judgment are set aside. The appeals are allowed in part. The contempt petitions are rejected. There shall be no order as to costs.

Sd/-
..... J.
(V. N. KHARE)

Sd/-
..... J.
(ASHOK BHAN)

New Delhi
10th May, 2002

SUPREME COURT OF INDIA
ADVISORY JURISDICTION

IN THE MATTER OF SPECIAL REFERENCE NO. 1 OF 2002
(Under Article 143(1) of the Constitution of India)

Date of Order : 28.10.2002

SUMMARY OF THE CASE

The term of the Gujarat Legislative Assembly constituted in March, 1998 was to expire on 18-03-2003. On 19-07-2002 the Governor of Gujarat dissolved the Legislative Assembly. The last sitting of the dissolved Assembly was held on 3rd April, 2002. The ruling party requested the Commission for conducting fresh General Election urgently so that the new Legislative Assembly would be able to have its first meeting on 06-10-2002 (the date of expiry of six months from the last sitting of the dissolved Legislative Assembly). Immediately after dissolution, the Election Commission of India took steps for holding fresh elections for constituting a new Legislative Assembly and also visited Gujarat. However, the Election Commission by its order dated 16-08-2002 while acknowledging that Article 174(1) is mandatory and applicable to an Assembly which is dissolved and further that the elections for constituting new Legislative Assembly must be held within six months of the last session of the dissolved Assembly, was of the view that it was not in a position to conduct elections before 3rd October, 2002 but would be in a position to conduct elections in the month of November/December, 2002. Certain other political parties, public spirited citizens and organizations urged the Election Commission not to hold the general election to the Gujarat Legislative Assembly but to wait for some time until the people who were affected by the communal riots and violence returned to their houses from the various relief camps where they were staying. The Commission was also of the view that the Legislative Assembly should meet at least every six months as contemplated by Article 174(1) of the Constitution even when it has been dissolved and in case it was not feasible, that would mean that the Government of the State cannot be carried on in

accordance with the provisions of the Constitution within the meaning of Article 356(1) of the Constitution and the President of India would step in and declare a state of emergency. After the receipt of report of the Commission, the Presidential reference was made under Article 143(1) on the following three questions to the Supreme Court of India:

(i) Is Article 174 subject to the decision of the Election Commission of India under Article 324 as to the schedule of elections of the Assembly?

(ii) Can the Election Commission of India frame a schedule for the elections to an Assembly on the premise that a resort to Article 356 by the President would remedy any infraction of the mandate of Article 174?

(iii) Is the Election Commission of India under a duty to carry out the mandate of Article 174 of the Constitution, by drawing upon all requisite resources of the Union and the State to ensure free and fair elections?

The Supreme Court appreciating the action of the Election Commission in scheduling the election in such a way that the first session of the next Assembly meets within a period of six months of the last sitting of the dissolved Assembly, took a view this by itself is no reason to interpret that Article 174 would apply to a dissolved Assembly and that frequency of meeting as provided under Article 174 would apply to a live Assembly. The Supreme Court of India gave its opinion on Question (i) that Article 174 and Article 324 operate in different fields. Article 174 does not apply to dissolved Assemblies but relates to existing and functional Assemblies. The question of one yielding to the other does not arise. As regards Question (ii) it opined that since Article 174(1) is inapplicable to a dissolved Legislative Assembly, there is no infraction of the mandate of Article 174(1) in preparing a schedule for elections to an Assembly by the Election Commission. Hence the question of Article 356 on the infraction of the provisions of Article 174

loses much of its substance and, Article 356 is not applicable. On Question (iii) the Supreme Court of India gave the opinion that the Election Commission is under a constitutional duty to conduct the election at the earliest on completion of the term of the Legislative Assembly on dissolution or otherwise. If there is any impediment in conducting free and fair elections as per schedule envisaged by the Commission, it can draw upon all the requisite resources of Union and State within its command to ensure free and fair elections, though Article 174 has no application in discharge of such constitutional obligation by the Election Commission.

O P I N I O N

V. N. KHARE, J.

The dissolved Legislative Assembly of the State of Gujarat was constituted in March 1998 and its five-year term was to expire on 18.3.2003. On 19.7.2002, on the advice of the Chief Minister, the Governor of Gujarat dissolved the Legislative Assembly. The last sitting of the dissolved Legislative Assembly was held on 3rd April, 2002. Immediately after dissolution of the Assembly, the Election Commission of India took steps for holding fresh elections for constituting the new Legislative Assembly. However, the Election Commission by its order dated 16th August, 2002 while acknowledging that Article 174(1) is mandatory and applicable to an Assembly which is dissolved and further that the elections for constituting new Legislative Assembly must be held within six months of the last session of the dissolved Assembly, was of the view that it was not in a position to conduct elections before 3rd of October, 2002 which was the last date of expiry of six months from last sitting of the dissolved Legislative Assembly. It is in this context the President of India in exercise of powers conferred upon him by virtue of clause (1) of Article 143 of the Constitution of India referred three questions for the opinion of the Supreme Court by his order dated 19th August, 2002 which run as under :

> "WHEREAS the Legislative Assembly of the State of Gujarat was dissolved on July 19, 2002 before the expiration of its normal duration on March 18, 2003.

AND WHEREAS Article 174(1) of the Constitution provides that six months shall not intervene between the last sitting of the Legislative Assembly in one session and the date appointed for its first sitting in the next Session;

AND WHEREAS the Election Commission has also noted that the mandate of Article 174 would require that the Assembly should meet every six months even after the dissolution of the House, and that the Election Commission has all along been consistent that normally a Legislative Assembly should meet at least every six months as contemplated by Article 174, even where it has been dissolved;

AND WHEREAS under section 15 of the Representation of the People Act, 1951, for the purpose of holding general elections on the expiry of the duration of the Legislative Assembly or its dissolution, the Governor shall, by notification, call upon all Assembly Constituencies in the State to elect members on such date or date as may be recommended by the Election Commission of India;

AND WHEREAS the last sitting of the Legislative Assembly of the State of Gujarat was held on 3rd April, 2002, and as such the newly constituted Legislative Assembly should sit on or before 3rd October, 2002;

AND WHEREAS the Election Commission of India by its order No. 464/GJ-LA/2002 dated August 16, 2002 has not recommended any date for holding general election for constituting a new Legislative Assembly for the State of Gujarat and observed that the Commission will consider framing a suitable schedule for the general election to the State Assembly in November-December 2002. Copy of the said order is annexed hereto;

AND WHEREAS owing to the aforesaid decision of the Election Commission of India, a new Legislative Assembly cannot come into existence so as to meet within the stipulated period of six months as provided under Article 174(1) of the Constitution of India;

AND WHEREAS the Election Commission has held that the non-observance of the provisions of Article 174(1) in the present situation would mean that the Government of the State cannot be carried in accordance with the provisions of the Constitution within the meaning of Article 356(1) of the Constitution and the President would then step in;

AND WHEREAS doubts have arisen with regard to the Constitutional validity of the said order of the Election Commission of India as the order of the Election Commission which would result in a non-compliance with the mandatory requirement envisaged under Article 174(1) of the Constitution under which not more than six months shall intervene between two sittings of the State Legislature;

AND WHEREAS in view of what has been hereinbefore stated, it appears to me that the questions of law hereinafter set out have arisen which are of a such nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court of India;

NOW, THEREFORE, in exercise of the powers conferred upon me under clause (1) of Article 143 of the Constitution, I, A.P.J. Abdul Kalam, President of India, hereby refer the following questions to the Supreme Court of India for consideration and report thereon, namely:-

(i) Is Article 174 subject to the decision of the Election Commission of India under Article 324 as to the schedule of elections of the Assembly?

(ii) Can the Election Commission of India frame a schedule for the elections to an Assembly on the premise that any infraction of the mandate of Article 174 would be remedied by a resort to Article 356 by the President?

(iii) Is the Election Commission of India under a duty to carry out the mandate of Article 174 of the Constitution, by drawing upon all the requisite resources of the Union and the State to ensure free and fair elections?"

Much before the matter was taken up for hearing it was made clear by the Bench hearing the reference that it would neither answer the reference in the context of the election in Gujarat nor look into the questions of facts arising out of the order of the Election Commission and shall confine its opinion only on questions of law referred to it.

When this reference was taken up objections were taken by learned counsel appearing for the Election Commission[1], several national political parties and counsel for various States that this reference need not be answered and it requires to be returned unanswered, inter alia, on the grounds :

(a) that, the reference raises issues already decided or determined by earlier Supreme Court judgments regarding the plenary and all encompassing powers of the Election Commission to deal with all aspects of an election under Articles 324-329;

(b) that, if the Supreme Court considers the said question again, it would convert advisory Article 143 jurisdiction into an appellate jurisdiction, which is impermissible;

(c) that, if Article 174 were to override Article 324, question No. 3 is unnecessary. Also, if question No. 1 is answered in the affirmative,

1. Shri K.K. Venugopal, Sr. Counsel

question No. 3 is automatically answered. In any event, the last part of question No. 3 raises a question to the effect as to whether the Election Commission is obliged to ensure free and fair elections, the answer to which is axiomatic, obvious and completely unnecessary to be answered in a Presidential Reference;

(d) that, since question No. 2 cannot stand in the abstract, it also ought not to be gone into and deserves to be sent back unanswered;

(e) that, no undertaking has been furnished by the Union of India that they would be bound by the advice of this Court and, therefore, the reference need not be answered;

(f) that, the reference proceeds on the flawed legal premise that Article 174 applies to the holding of periodic elections and mandates the Election Commission to hold elections within the six-month period from the last session of dissolved Legislative Assembly and, therefore, this Court should return the reference unanswered; and

(g) that, the reference is a disguised challenge to the order of the Election Commission dated 16th August, 2002 which is inappropriate in a reference under Article 143.

In support of the aforesaid propositions learned counsel relied upon the following decisions : (1) In re : **Cauvery Water Disputes Tribunal** - (1993) Suppl. 1 SCC 96; (2) In re: **Keshav Singh, Special Reference No. 1 of 1964** - (1965) 1 SCR 413; (3) In re : **The Special Courts Bill, 1978, Spl. Ref. No. 1 of 1978** - (1979) 1 SCC 380; (4) In re: **Appointment of Judges Case, Special Reference No. 1 of 1998** - (1998) 7 SCC 739; (5) The Ahmedabad St. Xavier's College Society & Anr. vs. State of Gujarat & Ors. - (1974) 1 SCC 717; (6) In re: **Presidential Poll, Special Reference No. 1 of 1974** - (1974) 2 SCC 33; (7) In re: **The Kerala Education Bill, 1957 - (1959)**

SCR 995; and (8) ***Dr. M. Ismail Faruqui & Ors. vs. Union of India & Ors.*** - (1994) 6 SCC 360.

In re: **The Kerala Education Bill, 1957** (supra), it was urged that since the Bill introduced in the Legislative Assembly has been referred to under Article 143 and the same having not received legislative sanction the reference need not be answered. Dealing with the said argument this Court held that under Article 143, the Supreme Court is required to advise the President not only as to any question which has arisen but also as to a question which is likely to arise in future.

In re: **Special Court Bill, 1978** (supra), it was held that it was not necessary that the question on which the opinion of the Supreme Court is sought must have arisen actually. It is competent for the President to make a reference at an anterior stage, namely, at the stage when the President is satisfied that the question is likely to arise - Chandrachud, CJ at pg. 400, para 20 held that:

> "20. Article 143(1) is couched in broad terms which provide that any question of law or fact may be referred by the President for the consideration of the Supreme Court if it appears to him that such a question has arisen or is likely to arise and if the question is of such a nature and of such public importance that it is expedient to obtain the opinion of the Court upon it. Though questions of fact have not been referred to this Court in any of the six references made under Article 143(1), that Article empowers the President to make a reference even on questions of fact provided the other conditions of the Article are satisfied. It is not necessary that the question on which the opinion of the Supreme Court is sought must have arisen actually. It is competent to the President to make a reference under Article 143(1) at an anterior stage, namely, at the stage when the President is satisfied that the question is likely to arise. The

satisfaction whether the question has arisen or is likely to arise and whether it is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, is a matter essentially for the President to decide. The plain duty and function of the Supreme Court under Article 143(1) of the Constitution is to consider the question on which the President has made the reference and report to the President its opinion, provided of course the question is capable of being pronounced upon and falls within the power of the court to decide. If, by reason of the manner in which the question is framed or for any other appropriate reason the court considers it not proper or possible to answer the question it would be entitled to return the reference by pointing out the impediments in answering it. The right of this Court to decline to answer a reference does not flow merely out of the different phraseology used in clauses (1) and (2) of Article 143, in the sense that clause (1) provides that the Court "may" report to the President its opinion on the question referred to it, while clause (2) provides that the Court "shall" report to the President its opinion on the question. Even in matters arising under clause (2), though that question does not arise in this reference, the Court may be justified in returning the reference unanswered if it finds for a valid reason that the question is incapable of being answered. With these preliminary observations we will consider the contentions set forth above."

In re: **Keshav Singh, Special Reference No. 1 of 1964,** (supra) 413, Gajendragadkar, CJ speaking for the Court stated that the words of Article 143(1) are wide enough to empower the President to forward to this Court for its advisory opinion any question of law or fact which has arisen or is likely to arise, provided it appears to the President that such a question is of such a nature or of such public importance that it is expedient to obtain the opinion of the Court upon it.

In re: **Allocation of Lands and Buildings,** 1943 FCR 20, Gwyer, CJ stated "we felt some doubt whether any useful purpose would be served by giving of an opinion under Section 213 of the Government of India Act. The terms of that section do not impose an obligation on the Court, though we should always be unwilling to decline to accept a reference except for good reason: and two difficulties presented themselves. First, it seemed that questions of title might sooner or later be involved, if the Government whose contentions found favour with the Court desired to dispose of some of the lands in question to private individuals and plainly no advisory opinion would furnish a good root of title such as might spring from a declaration of this Court in proceedings taken under Section 204(1) of the Act by one government against the other."

In re: **Levy of Estate Duty, 1944 FCR 317**, it was held that Section 213 of the Government of India Act empowers the Governor General to make a reference when questions of law are "likely to arise".

From the aforesaid decisions it is clear that this Court is well within its jurisdiction to answer/advise the President in a reference made under Article 143(1) of the Constitution of India if the questions referred are likely to arise in future or such questions are of public importance or there is no decision of this Court which has already decided the question referred.

In the present case what we find is that one of the questions is as to whether Article 174(1) prescribes any period of limitation for holding fresh election for constituting Legislative Assembly in the event of premature dissolution of earlier Legislative Assembly. The recitals contained in the Presidential reference manifestly demonstrate that the reference arises out of the order of the Election Commission dated 16th August, 2002. In the said order the Election Commission has admitted that under Article 174(1) six

months should not intervene between one Assembly and the other even though there is dissolution of the Assembly. The reference proceeds upon the premise that as per order of the Election Commission, a new Legislative Assembly cannot come into existence within the stipulated period of six months as provided under Art. 174(1) of the Constitution on the assessment of conditions prevailing in the State. Further, a doubt has arisen with regard to the application of Article 356 in the order of the Election Commission. In view of the decision in Re: **Presidential Poll**, 1974(2) SCC p.33 holding that in the domain of advisory jurisdiction under Article 143(1) this Court cannot go into the disputed question of facts, we have already declined to go into the facts arising out of the order of the Election Commission. But the legal premise on which order was passed raises questions of public importance and these questions are likely to arise in future. The questions whether Article 174(1) is mandatory and would apply to a dissolved Assembly, that, whether in extraordinary circumstances Article 174(1) must yield to Art. 324, and that the non-observance of Article 174 would mean that the government of a State cannot be carried on in accordance with the provisions of the Constitution and in that event Art. 356 would step in, are not only likely to arise in future but are of public importance. It is not disputed that there is no decision of this Court directly on the questions referred and further a doubt has arisen in the mind of the President of India as regards the interpretation of Art 174(1) of the Constitution. Under such circumstances, it is imperative that this reference must be answered. We, therefore, overrule the objections raised and proceed to answer the Reference.

Question No. 1

Is Article 174 subject to decision of the Election Commission of India under Article 324 as to the schedule of election of the Assembly?

In an effort that aforesaid question be answered in the negative it was,

inter alia, urged on behalf of the Union of India[2], one of the national political parties[3] and one of the States[4] :

(a) that, the provision in Article 174(1) of the Constitution that six months shall not intervene between the last sitting of one session and the date appointed for its first meeting of the next session is mandatory in nature and it applies when the Governor either prorogues either of the Houses or dissolves the Legislative Assembly;

(b) that, Article 174(2) empowers the Governor to prorogue or dissolve the Legislative Assembly and Article 174(1) does not make any exception in respect of the interregnum irrespective of whether the Governor has prorogued the House or dissolved the Legislative Assembly under Article 174(2);

(c) that, on the correct interpretation of Art. 174, the mandate of Article 174(1) is applicable to the dissolved Assembly also. Such an interpretation would be in the defence of a democracy and, therefore, as and when an Assembly is prematurely dissolved, the Election Commission has to fix its calendar for holding fresh election within the time mandated under Article 174(1);

(d) that, alternatively, it was argued that in a situation where mandate under Article 174(1) cannot be complied with, it does not mean that the mandate is directory in nature; and

(e) that, the holding of election immediately after dissolution of the Assembly is also necessary in view of the sanction which is required to be taken with regard to Money Bills by the Legislative Assembly.

S/Shri 2. Harish N. Salve, Solicitor General of India, 3. Arun Jaitley, Senior Counsel, 4. Kirit N. Rawal, Addl. Solicitor General

The contentions advanced on behalf of the other national political parties[5,10,14], political parties[18] as well as other States[6,7,8,9,11,12,13,15,16,17] is that Article 174(1) is neither applicable to the dissolved Assembly nor does it provide any period of limitation of six months for holding fresh election in the event of a premature dissolution of the Legislative Assembly. According to learned counsel appearing for these parties, there is no provision either in the Constitution or in the Representation of the People Act which provides an outer limit for holding election for constituting the new Legislative Assembly or the new House of the People, as the case may be, in the event of their premature dissolution.

On the argument of learned counsel for the parties, the first question that arises for consideration is whether Article 174(1) is applicable to a dissolved Assembly?

A plain reading of Article 174 shows that it stipulates that six months shall not intervene between the last sitting in one session and the date appointed for its first sitting in the next session. It does not provide for any period of limitation for holding fresh election in the event a Legislative Assembly is prematurely dissolved. It is true that after commencement of the Constitution, the practice has been that whenever either Parliament or Legislative Assembly were prematurely dissolved, the election for constituting fresh Assembly or Parliament, as the case may be, were held within six months from the date of the last sitting of the dissolved Parliament or Assembly. It appears that the Election Commission's interpretation of Article 174 that fresh elections for constituting Assembly are required to be held within six months from the date of the last sitting of the last session was very much influenced by the prevailing practice followed by the Election Commission since enforcement of the Constitution. At no point of time any doubt had arisen as to whether the interval

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S/Shri 5. Kapil Sibbal, 6. K.R. Parasaran, 7. Ram Jethmalani, 8. P.P. Rao, 9. Milon Banerji, 10. Rajeev Dhawan, 11. Ashwani Kumar, 12. M.C. Bhandare, 13. Devendra Dwivedi, 14. P.N. Puri, 15. A.M. Singhvi, 16. Gopal Subramaniam, 17. V. Bahuguna, 18. A. Sharan - all senior counsels.

of six months between the last sitting of one session and the first sitting of the next session of the Assembly under Article 174(1) provides a period of limitation for holding fresh election to constitute new Assembly by the Election Commission in the event of a premature dissolution of Assembly. Since the question has arisen in this Reference and also in view of the fact that Article 174 on its plain reading does not show that it provides a period of limitation for holding fresh election after the premature dissolution of the Assembly, it is necessary to interpret the said provision by applying accepted rules of interpretations.

One of the known methods to discern the intention behind enacting a provision of the Constitution and also to interpret the same is to look into the Historical Legislative Development, Constituent Assembly Debates or any document preceding the enactment of the Constitutional provision.

In **His Holiness Kesavananda Bharati Sripadagalvaru etc**. **v. State of Kerala & Anr. etc.** (1973) 4 SCC 225, it was held that Constituent Assembly debates although not conclusive, yet show the intention of the framers of the Constitution in enacting provisions of the Constitution and the Constituent Assembly Debates can throw light in ascertaining the intention behind such provisions.

In **R.S. Nayak vs. A.R. Antulay** - (1984) 2 SCR 495, it was held that reports of the Commission which preceded the enactment of a legislation, reports of Joint Parliament Commission, report of a Commission set up for collecting information leading to the enactment are permissible external aid to construction of the provisions of the Constitution. If the basic purpose underlying construction of legislation is to ascertain the real intention of the Parliament, why should the aids which Parliament availed of such as report of a Special Commission preceding the enactment, existing state of Law, the environment necessitating enactment of legislation, and the object sought to be achieved, be denied to the Court whose function is primarily to give effect

to the real intention of the Parliament in enacting the legislation. Such denial would deprive the Court of a substantial and illuminating aid to construction of the provisions of the Constitution. The modern approach has to a considerable extent eroded the exclusionary rule in England.

Since it is permissible to look into the pre-existing law, Historical Legislative Developments, and Constituent Assembly Debates, we will look into them for interpreting the provisions of the Constitution.

Historical Legislative Developments

Government of India Act, 1915 & Government of India Act, 1919

Part VI of Government of India Act 1915 dealt with the Indian Legislatures containing provisions dealing with Indian and governor's provinces legislatures. Section 63D dealt with Indian Legislature while Section 72B dealt with the Legislature of Governor's provinces. Sections 63D(1) and Sec. 72B(1) run as under:

> **"Sec. 63D(1) : Every Council of State shall continue for five years and every Legislative Assembly for three years from its first meeting: Provided that:**
>
> (a) either Chamber of the Legislature may be sooner dissolved by the Governor General; and
>
> (b) any such period may be extended by the Governor General, if in special circumstances he so think fit; and
>
> (c) after the dissolution of either Chamber the Governor General shall appoint a date not more than six months or, with the sanction of the Secretary of the State, not more than nine months from the date of dissolution for the next session of that Chamber".

Sec. 72B(1) : Every Governor's legislative council shall continue for three years from its first meeting : Provided that :

(a) the Council may be sooner dissolved by the Governor; and

(b) the said period may be extended by the Governor for a period not exceeding one year, by notification in the official gazette of the province, if in special circumstances (to be specified in the notification) he so think fit; and

(c) **after the dissolution of the Council the Governor shall appoint a date not more than six months or, with the sanction of the Secretary of the State, not more than nine months from the date of dissolution for the next session of the Council.**

After repeal of Government of India Act 1915, Government of India Act 1919 came into force. Section 8 of the Government of India Act 1919 provided for sittings of Legislative Council in provinces. Section 8 read as follows:

"Sec. 8(1) : Every Governor's legislative council shall continue for three years from its first meeting : Provided that :

(a) the Council may be sooner dissolved by the Governor; and

(b) the said period may be extended by the Governor for a period not exceeding one year, by notification in the official gazette of the province, if in special circumstances (to be specified in the notification) he so think fit; and

(c) **after the dissolution of the Council the Governor shall appoint a date not more than six months or, with the sanction of the Secretary of the State, not more than nine months from the date of dissolution for the next session of the Council".**

Similarly, Section 21 provided for the sittings of the Indian legislature. Section 21 runs as under :

> **"Sec. 21(1) : Every Council of State shall continue for five years and every Legislative Assembly for three years from its first meeting : Provided that:**
>
> (a) either Chamber of the Legislature may be sooner dissolved by the Governor General; and
>
> (b) any such period may be extended by the Governor General, if in special circumstances he so think fit; and
>
> (c) **after the dissolution of either Chamber the Governor General shall appoint a date not more than six months or, with the sanction of the Secretary of the State, not more than nine months from the date of dissolution for the next session of that Chamber.**

A combined reading of Sections 63D(1) & 72B(1) of Government of India Act 1915 and Sections 8(1) and 21(1) of Government of India Act 1919 shows that the Governor General could also either dissolve the Council of State or the Legislative Assembly sooner than its stipulated period or extend the period of their functioning. Further, it was mandated that after the dissolution of either Chamber, the Governor General shall appoint a date not more than six months or with the sanction of the Secretary of the State, not more than nine months from the date of dissolution, for the next session of that Chamber. Similarly, the Governor of the province could also either dissolve the Legislative Council sooner than its stipulated period or extend the period of its functioning. Further, the Governor was duty bound after the dissolution of the legislative council to appoint a date not more than six months, or with the sanction of the Secretary of the State, not more than nine months from the date of dissolution for the next session of legislative council.

It is noteworthy that these powers of the Governor General and the Governor of the province were similar to the powers exercised by the British monarch historically under British conventions. The mandate to the Governor General and the Governor to fix the date for the next session of the new chamber or the legislative council respectively was based on the British conventions whereunder the monarch fixes a date for next session of the House of Commons after its dissolution. Further the power of Governor General to extend the period of Legislative Council or to prematurely dissolve it was also based on British conventions.

Government of India Act, 1935

The Government of India Act, 1919 was repealed by the Government of India Act, 1935. Section 19(1) provided for the sittings of the Federal Legislature. Section 19(1) runs as under :

> **Sec. 19(1) : The Chambers of the Federal Legislature shall be summoned to meet once at least in every year, and twelve months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session."**

Similarly, Section 62(1) of the Act provided for sittings of Provincial Legislature, Section 62(1) runs thus :

> "**Sec. 62(1) : The Chamber or Chambers of each Provincial Legislature shall be summoned to meet once at least in every year, and twelve months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session".**

We find that under the Government of India Act, 1935, there was a complete departure from the provisions contained in the Government of India

Act, 1915 and Government of India Act, 1919 as regards the powers and responsibilities of the Governor General and the Governors of the Provinces to extend the period of the chambers or fix a date for the next session of the new chamber. By the aforesaid provisions, not only were the powers to extend the life of the chambers of the Federal Legislature and the Provincial Legislatures done away with, but the British Convention to fix a date for the next session of the new chamber was also given up. These were the departures from the previous Acts. It may also be noted that under the Government of India Act, 1935, statutory provisions were made in respect of the conduct of elections. Under Schedule V Para 20 of the Government of India Act, 1935, the Governor General was empowered to make rules for carrying out the provisions of the Vth and VIth Schedule. Para 20 as a whole related to matters concerning elections, and Clause (iii) particularly pertained to conduct of elections. Similarly, Schedule VI of the Government of India Act, 1935 contained provisions with respect to electoral rolls and franchise. Such provisions are not found in either the Government of India Act, 1915 or the Government of India Act, 1919. Thus, we see that statutory provisions have come in for the first time and conduct of elections has been entrusted in the hands of the executive. Since the power to fix the calendar for holding elections was given in the hand of executive, therefore, the provisions for fixing a date of next session of new legislature in The Government of India Act of 1915 and 1919 was given up in the 1935 Act. This shows that elections in India were no longer based on the British conventions.

Under the Constitution of India, 1950, even these provisions have been departed from. While under the Government of India Act, 1935, the conduct of elections was vested in an executive authority, under the Constitution of India, a Constitutional authority was created under Art. 324 for the superintendence, direction and conduct of elections. This body, called the Election Commission, is totally independent and impartial, and is free from any interference of the executive. This is a very noticeable difference between

the Constitution of India and the Government of India Act, 1935 in respect of matters concerning elections for constituting the House of the People or the Legislative Assembly. It may be noted that Arts. 85(1) and 174(1) which were physically borrowed from Government of India Act, 1935 were only for the purposes of providing the frequencies of sessions of existing Houses of Parliament and State Legislature, and they do not relate to dissolved Houses.

Constituent Assembly Debates with regard to Articles 85 & 174 of the Constitution

Draft Articles 69 and 153 correspond to Article 85 and Article 174 of the Constitution respectively. Article 69 dealt with the Parliament and Article 153 dealt with State Legislative Assembly. When the aforesaid two draft Articles were placed before the Constituent Assembly for discussion, there was not much debate on Draft Article 153. But there was a lot of discussion when Draft Article 69 was placed before the Constituent Assembly. Draft Articles 69 and 153 run as under :

> "69(1) : The Houses of Parliament, shall be summoned to meet twice at least in every year, and six months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session.
>
> (2) Subject to the provisions of this Article, the President may from time to time -
>
> (a) summon the Houses or either House of Parliament to meet at such time and place as he thinks fit;
>
> (b) prorogue the Houses;
>
> (c) dissolve the House of the People.

153(1) : The House or Houses of the Legislature of the State shall be summoned to meet twice at least in every year, and six months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session.

(2) Subject to the provisions of this Article, the Governor may from time to time -

(a) summon the Houses or either House to meet at such time and place as he thinks fit;

(b) prorogue the House or Houses;

(c) dissolve the Legislative Assembly.

(3) The functions of the Governor under sub-clauses (a) and (c) of clause (2) of this Article shall be exercised by him in his discretion".

On 18.5.1949, when Draft Article 69 came up for discussion, there was a proposal to change the intervening period between the two sessions of the Houses of Parliament from six months to three months so as to ensure that the Parliament has more time to look into the problems faced by the people of the country. Prof K.T. Shah - one of the members of the Constituent Assembly, while moving an amendment to the Draft Article 69, as it then stood, said that the Draft Article was based on other considerations prevailing during the British times, when the legislative work was not much and the House used to be summoned only for obtaining financial sanction. Shri H.V. Kamath while intervening in the debate emphasized on the need to have frequent sessions of the Houses of Parliament. He suggested that the Houses should meet at least thrice in each year. He pointed out that in the United States of America and the United Kingdom, the Legislatures sat for eight to nine months in a year as a result of which they were able to effectively discharged their parliamentary duties and responsibilities. He also emphasized that the period

of business of transactions provided in the Federal or State Legislatures under the Government of India Act, 1935 were very short as there was not much business to be transacted then by those Legislatures. He also reiterated that the Houses of Parliament should sit more frequently so that the interests of the country are thoroughly debated upon and business is not rushed through. Prof. K.T. Shah was very much concerned about the regular sitting of the Parliament and, therefore he moved an amendment 1478 which read as follows :

"at the end of Art. 69(2)(c), the following proviso is to be added :

Provided that if any time the President does not summon as provided for in this Constitution for more than three months the House of the People or either House of Parliament at any time after the dissolution of the House of the People, or during the currency of the lifetime of the House of the People for a period of more than 90 days, the Speaker of the House of the People or the Chairman of the Council of States may summon each his respective House which shall then be deemed to have been validly summoned and entitled to deal with any business placed or coming before it".

Further, Prof. K.T. Shah also moved amendment No. 1483, which provided for insertion of Cl. (3) after Art. 69(2), and a proviso thereto, which is very relevant. Clause (3) runs as under :

> "(3) : If any time the President is unable or unwilling to summon Parliament for more than three months after the prorogation or dissolution of the House of the People and there is in the opinion of the Prime Minister a National Emergency he shall request the Speaker and the Chairman of the Council of States to summon both Houses of Parliament, and place before it such business as may be necessary to cope with the National Emergency. Any business done in either House of Parliament thus called together shall be deemed

to have been validly transacted, and shall be valid and binding as any Act, Resolution or Order of Parliament, passed in the normal course.

Provided further that if at any time the President is unable or unwilling to summon Parliament for a period of more than three months or 90 days after prorogation or dissolution of the House of the People, and the Prime Minister is also unable or unwilling to make the request aforesaid, the Chairman of either Houses of Parliament thus called together shall be deemed to be validly convened and entitled to deal with any business places before it.

Dr. B.R. Ambedkar, while replying to the aforesaid proposed amendment, highlighted that after the Constitution comes into force, no executive could afford to show a callous attitude towards the legislature, which was not the situation before as the legislature was summoned only to pass revenue demands. Since there was no possibility of the executive showing a callous attitude towards the legislature, this would take care of the fear voiced by some members that no efforts to go beyond the minimum mandatory sittings of the Houses of Parliament would be made. He further dwelled on the fact that the clause provided for minimum mandatory sittings in a year so that if the need arose, the Parliament could sit more often and if more frequent sessions were made mandatory, the sessions could be so frequent and lengthy that members would grow tired.

From the aforesaid debates, it is very much manifest that Articles 85 and Article 174 were enacted on the pattern of Sections 19(1) and 62(1) of the Government of India Act, 1935 respectively which dealt with the frequency of sessions of the existing Legislative Assembly and were not intended to provide any period of limitation for holding elections for constituting new House of the People or Legislative Assembly in the event of their premature dissolution. Further, the suggestions to reduce the intervening period between the two sessions to three months from six months so that Parliament could sit for

longer duration to transact the business shows that it was intended for existing House of Parliament and not dissolved ones, as a dissolved House cannot sit and transact legislative business at all.

It is interesting to note that during the debate Prof. K.T. Shah suggested amendment Nos. 1478 and 1483, quoted above, which specifically contemplated the possibility of a dissolved House of the People and convening of the Council of States in an emergency session by the President or the Speaker if the circumstances so necessitated. Even these amendments were not accepted. This shows that Draft Article 69 was visualized in the context of a scenario applicable only to a living and functional House and that the stipulation of six months intervening period between the two sessions is inapplicable to a dissolved House.

Moreover, it may be noticed that if the suggestion put forth during the course of the debate that the Houses of Parliament should sit for eight to nine months in a year was accepted, it would not have given sufficient time for holding fresh elections in the event of premature dissolution of either Parliament or Legislative Assembly and it would also have led to a breach of Constitutional provisions. This also sows that what is contained in Article 174(1) is meant only for an existing and functional House. In a further scenario, if the suggestion during the debate for reducing the intervening period from six months to three months were accepted, it would mean that after premature dissolution of the Houses of People or the Legislative Assembly, fresh elections have to be held so that the House of People or Legislative Assembly could hold their first sitting within three months from the date of last sitting of the dissolved Parliament or Legislative Assembly, as the case may be. This would also have not allowed sufficient time for holding election for constituting either House of People or a Legislative Assembly. This shows that the intention of the framers of the Constitution was that the provisions contained in Article 174 were meant for a living and existing Legislative Assembly and not to a dissolved Legislative Assembly.

Debates during the Constitution First Amendment Bill regarding amendment of Article 85 and Article 174

The original Articles 85 and 174 as they stood prior to first Constitution Amendment and after the Amendment read as follows :

Article	Original Articles in the Constitution	As amended by Constitution (Amendment) Act, 1951
Article 85 Sessions of Parliament Prorogation & Dissolution.	(1) The Houses of Parliament shall be summoned to meet twice at least in every year, and six months shall not intervene betrween their last sitting in one session and the date appointed for their first sitting in the next session. (2) Subject to the provisions of cl.(1), the President may from time to time - (a) Summon the Houses or either House to meet at such time & place as he thinks fit; (b) Prorogue the Houses; (c) Dissolve the House of the People	(1) The President shall from time to time summon each House of Parliament to meet at such time and place as he thinks fit, but six months shall not intervene between its lat sitting in one session and the date appointed for its first sitting in the next session. (2) The President may from time to time - (a) Prorogue the Houses of either House (b) Dissolve the House of the People
Article 174 Sessions of the State Legislature Prorogation & Dissolution	(1) The House or Houses of the State shall be summoned to meet twice at least in every year, and six months shall not intervene between their last sitting in one Session and the date appointed for their first sitting in the next session. (2) Subject to the provisions of cl. (1), the Governor may from time to time - (a) Summon the House or either House to meet at such time and place as he thinks fit; (b) Prorogue the House or Houses	(1) The Governor shall from time to time summon the House or each House to the Legislature of the State to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session. (2) The Governor may from time to time - (a) Prorogue the House or either House; (b) Dissolve Legislative Assembly.

The aforesaid original Articles show that what was mandated was that the Houses of Parliament and State Legislature were required to meet at least twice in a year and six months shall not intervene between the last sitting in one session and the date appointed for their first sitting in the next session. This resulted in absurdity, if it was found that the session then had been going on continuously for 12 months, technically it could have been contended that the Parliament had not met twice in that year at all as there must be prorogation in order that there may be new session and, therefore, the original Article 174(1) resulted in contradictions. In order to remove the said absurdity, the First Amendment Bill for amendment of Articles 85 and 174 was moved. While introducing the First Amendment Bill, Pt. Jawahar Lal Nehru stated thus:

> "..... one of the Articles mentions that the House shall meet at least twice every year and the President shall address it. Now a possible interpretation of that is that this House has not met at all this year. It is an extraordinary position considering that this time this House has laboured more than probably at any time in the previous history of this or the preceding Parliament in this country. We have been practically sitting with an interval round about Xmas since November and we are likely to carry on and yet it may be held by some acute interpreters that we have not met at all this year strictly in terms of the Constitution because we started meeting November and we have not met again - it has not been prorogued - the President has not addressed the Parliament this year. Put in the extreme way, suppose this House met for the full year without break except short breaks, it worked for 12 months, then it may be said under the strict letter of the law that it has not met all this year. Of course that Article was meant not to come in the way of our work but to come in the way of our leisure. It was indeed meant and it must meet at least twice a year and there should not be more than six months' interval

> between the meetings. It did not want any government of the day to simply sit tight without the House meeting.".
>
> (emphasis mine)

While intervening in the debate, Dr. B.R. Ambedkar stated thus:

> "..... due to the word summon, the result is that although Parliament may sit for the whose year adjoining from time to time, it is still capable of being said that Parliament has been summoned only once and not twice. There must be prorogation in order that there may be a new session. It is felt that this difficulty should be removed and consequently the first part of it has been deleted. The provision that new session shall be called within six months is retained."
>
> (emphasis mine)

Even other members of the Parliament who participated in the debate with regard to the proposed amendment of Article 85 and Article 174 were concerned only with the current session and working of the existing House of the People. The proceedings of the debate further show that the entire debate revolved around prorogation and summoning. There was no discussion as regards dissolution or Constitution of the House at all and the amendment was sought to remove the absurdity which has crept into the original Articles 85 and 174. For the reasons we are of the view that Art. 174(1) is inapplicable to a dissolved Assembly.

Textually

The question at hand may be examined from another angle. As noticed earlier, the language employed in Article 85 and Article 174 is plain and simple and it does not contemplate an interval of six months between the last sitting in one session and the date appointed for its first sitting in the next session of

the new Assembly after premature dissolution of Assembly. Yet we will examine Article 174 textually also.

Article 174 shows that the expression 'date appointed for its first sitting in the next session' in Article 174(1) cannot possibly refer to either an event after the dissolution of the House or an event of a new Legislative Assembly meeting for the first time after getting freshly elected. When there is a session of the new Legislative Assembly after elections, the new Assembly will sit in its "first session" and not in the "next session". The expression 'after each general election' has been employed in other parts of the Constitution and one such provision is Article 176. The absence of such phraseology 'after each general election' in Article 174 is a clear indication that the said Article does not apply to a dissolved Assembly or to a freshly elected Assembly. Further, Article 174(1) uses expressions i.e. 'its last sitting in one session', 'first sitting in the next session'. None of these expressions suggest that the sitting and the session would include an altogether different Assembly i.e. a previous Assembly which has been dissolved and its successor Assembly that has come into being after elections. Again, Article 174 also employs the word 'summon' and not 'constitute'. Article 174 empowers the Governor to summon an Assembly which can only be an existing Assembly. The Constitution of an Assembly can only be under Sec. 73 of the Representation of the People Act, 1951 and the requirement of Art. 188 of the Constitution suggests that the Assembly comes into existence even before its first sitting commences.

Again, Article 174 contemplates a session, i.e. sitting of an existing Assembly and not a new Assembly after dissolution and this can be appreciated from the expression 'its last sitting in one session and its first sitting in the next session'. Further, the marginal note 'sessions' occurring in Articles 85 and 174 is an unambiguous term and refers to an existing Assembly which a Governor can summon. When the term 'session or sessions' is used, it is employed in the context of a particular Assembly or a particular House of

the People and not the legislative body whose life is terminated after dissolution. Dissolution ends the life of legislature and brings an end to all business. The entire chain of sittings and sessions gets broken and there is no next session or the first sitting of the next session after the House itself has ceased to exist. Dissolution of Legislative Assembly ends the representative capacity of legislators and terminates the responsibility of the Cabinet to the members of the Lok Sabha or the Legislative Assembly, as the case may be.

The act of summoning, sitting, adjourning, proroguing or dissolving of the Legislature is necessarily referable to an Assembly in praesenti i.e. an existing, functional legislature and has nothing to do with the Legislative Assembly which is not in existence. It is well understood that a dissolved House is incapable of being summoned or prorogued and in this view of the matter also Article 174(1) has no application to a dissolved Legislative Assembly, as nothing survives after dissolution.

Conceptually

Yet, Article 174 may be examined conceptually. Conceptually, Article 174 deals with a live legislature. The purpose and object of the said provision is to ensure that an existing legislature meets at least every six months, as it is only an existing legislature that can be prorogued or dissolved. Thus Article 174 which is a complete code in itself deals only with a live legislature.

Article 174(1) shows that it does not provide that its stipulation is applicable to a dissolved legislature as well. Further, Article 174 does not specify that interregnum of six months period stipulated between the two sessions would also apply to a new legislature vis-a-vis an outgoing legislature. If such be the case, then there was no need to insert the proviso to Article 172(1) and insertion of the said proviso is rendered meaningless and superfluous.

Further, if Article 174 is held to be applicable to a dissolved House as well, it would mean that Article 174(2) is controlled by Article 174(1) inasmuch as the power has to be exercised under Article 174(2) in conformity with Article 174(1). Moreover, if the House is dissolved in 5th month of the last session, the election will have to be held within one month so as to comply with the requirement of Article 174(1) which would not have been the intention of the framers of the Constitution.

Yet, there is another aspect which shows that Article 174(1) is inapplicable to a dissolved Legislative Assembly. It cannot be disputed that each Legislative Assembly after Constitution is unique and distinct from the previous one and no part of the dissolved House is carried forward to a new Legislative Assembly. Therefore, Article 174(1) does not link the last session of the dissolved House with the newly formed one.

The distinction between frequency of sessions and periodicity of the elections

A perusal of Articles 172 and 174 would show that there is a distinction between the frequency of meetings of an existing Assembly and periodicity of elections in respect of a dissolved Assembly which are governed by the aforesaid provisions.

As far as frequency of meetings of Assembly is concerned, the six months rule is mandatory, while as far as periodicity of election is concerned, there is no six months rule either expressly or impliedly in Article 174. Therefore, it cannot be held that Article 174 is applicable to dissolved House and also provides for period of limitation within which the Election Commission is required to hold fresh election for constituting the new Legislative Assembly.

Whether, under the British Parliamentary practice a proclamation which on the one hand dissolves an existing Parliament and on the other fixes

a date of next session of new Parliament is embodied in Article 174 of the Constitution.

It was also urged on behalf of the Union of India[2] that Indian Constitution is enacted on pattern of Westminster system of parliamentary democracy and, therefore, election has to be held within the stipulated time following the British conventions as reflected in Article 174(1) of the Constitution. It was urged that since the Parliament was a single entity with the responsibility to debate matters affecting public interest on a continuous basis, it was most appropriate that long gaps were not there between its sessions.

Learned counsel[2] relied upon certain passages from several books in support of his contention which run as under :

> **Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament 21st Edn.** : " 'A Parliament' in the sense of a parliamentary period, is a period not exceeding five years which may be regarded as a cycle beginning and ending with a proclamation. Such a proclamation on the one hand dissolves an existing Parliament, and on the other, orders the issue of writs for the election of a new Parliament and appoints the day and place for its meeting. This period, of course, contains an interregnum between the dissolution of a Parliament and the meeting of its successor during which there is no Parliament in existence; but the principle of unbroken continuity of Parliament is for all practical purposes secured by the fact that the same proclamation which dissolves a Parliament provides for the election and meeting of a new Parliament. A session is the period of time between the meeting of a Parliament, whether after a prorogation or a dissolution, and its prorogation."

JAG Griffith and Michael Ryle, Parliament: Functions, Practice and Procedures, 1989 : "A Parliament is summoned by the Sovereign to meet after each general election and the duration of a Parliament is from that first meeting until Parliament is dissolved by the Sovereign, prior to the next general election.

The continuity of Parliament is today secured by including in the same proclamation the dissolution of one Parliament, the order for the issuing of writs for the election of a new Parliament and the summoning of that Parliament on a specified date at Westminster. Under Sec. 21(3) of the Representation of People Act, 1918, the interval between the date of the proclamation and the meeting of Parliament must be not less than 20 days, although this period can be further extended by proclamation. During this interval the general election is held."

Passage relied upon by the learned counsel are extremely inappropriate in the Indian context for holding elections for constituting either House of the People or the Legislative Assembly. As is clear from the passages themselves, under British Parliamentary system, it is the exclusive right of the Monarch to dissolve the Parliament and the Monarch by the same proclamation also provides for the election and meeting of its successor, which is not the case under the Indian Constitution. Under the Indian Constitution, the power has been entrusted to the Election Commission under Article 324 to conduct, supervise, control and direction and, therefore, the British convention cannot be pressed into service. In our democratic system, the Election Commission is the only authority to conduct and fix dates for fresh elections for constituting new House of People or Legislative Assembly, as the case may be. However, it is true that in the year 2000, Electoral Commission has been constituted in England by the Political Parties, Elections and Referendums Act, 2000, but the conventions sought to be relied upon are prior to the year 2000 and the

Election Commission also does not have the power to fix dates for holding elections for constituting the House of Commons. Therefore, the British conventions cannot be said to be reflected in Article 174. Yet another reason why the British convention for fixing a date for newly constituted Parliament cannot be applied in India is that under British Parliamentary system, there is a continuity of Parliament, whereas in India once the Parliament gets dissolved, all the business which is to be transacted comes to an end and the House of People cannot be revived.

Is there any difference between the British Parliamentary practice and Parliamentary practice under the Indian Constitution as regards Prorogation, Adjournment and Dissolution?

In this context, learned counsel appearing for the Union of India also relied upon the following passages - from Erskine May, Parliamentary Practice, 20th Edn. as regards Prorogation, Adjournment and Dissolution under British conventions and argued that the session is the period of time between the meeting of a Parliament whether after prorogation or dissolution. According to learned counsel there is continuity in the Parliament and it forms an unbroken chain. In substance the argument is that consequences of prorogation or dissolution of a House is the same and therefore, Art. 174(1) is applicable to new Legislative Assembly after dissolution.

Prorogation

The effect of a prorogation is once to terminate all the current business of Parliament. Not only are the sittings of the parliament at an end, but all proceedings pending at the time are quashed, except impeachments by the Commons, and appeals before the House of Lords. Every bill must therefore be renewed after a prorogation, as if it had never been introduced.

Adjournment

> Adjournment is solely in the power of each House respectively: though the pleasure of the Crown has occasionally been signified in person, by message, commission or proclamation, that both Houses should adjourn; and in some cases such adjournments have scarcely differed from prorogations. But although no instance has occurred where the House has refused to adjourn, the communication may be disregarded.

Dissolution

> The Queen may also close the existence of Parliament by a dissolution, but is not entirely free to define the duration of the Parliament. Parliament is usually dissolved by a proclamation under great seal, after having been prorogued to a certain day, but such a proclamation has been issued at a time when both Houses stood adjourned. This proclamation is issued by the Queen, with the advice of her Privy Council; and announces that the Queen has given orders to the Lord Chancellor of Great Britain and the Secretary of State for Northern Ireland to issue out writs in due form, and according to law, for calling a new Parliament; and the writs are to be returnable in due course of law.

The aforesaid passages relied upon by learned counsel[2] are wholly inapplicable in the context of Indian Constitution. Under Art. 85(2) when the President on the advice of the Prime Minister prorogues the House, there is termination of a session of the House and this is called prorogation. When the House is prorogued all the pending proceedings of the House are not quashed and pending Bills do not lapse. The prorogation of the House may take place at any time either after the adjournment of the House or even while the House is sitting. An adjournment of the House contemplates postponement

of the sitting or proceedings of either House to reassemble on another specified date. During currency of a session the House may be adjourned for a day or more than a day. Adjournment of the House is also sine die. When a house is adjourned, pending proceedings or Bills do not lapse. So far as, the dissolution of either House of the People or State Legislative Assembly is concerned, the same takes place on expiration of the period of five years from the date appointed for its First meeting or under Art. 85(2) or Art. 174(2). It is only an existing or functional Lok Sabha or Legislative Assembly which is capable of being dissolved. A dissolution brings an end to the life of the House of the People or State Legislative Assembly and the same cannot be revived by the President. When dissolution of House of the People or State Legislative Assembly takes place all pending proceedings stand terminated and pending Bill lapses and such proceedings and Bills are not carried over to the new House of the People or State Legislative Assembly when they are constituted after fresh elections.

From the afore-mentioned passages relied upon, it is apparent that there is a difference in the British parliamentary practice and the Indian practice under the Indian Constitution as regard dissolution and prorogation. Under Indian Constitution dissolution brings a legislative body to an end and terminates its life. Prorogation, on the other hand, only terminates a session and does not preclude another session, unless it is coincident with the end of a legislative term. In other words, prorogation, unlike dissolution, dos not affect the life of the legislative body which may continue from the last session until brought to an end by dissolution. This is the difference in the meaning of prorogation and dissolution. In so far as the effects following from prorogation and dissolution on pending legislative business are concerned, in England, prorogation puts an end to all pending business in the Parliament, whereas in India, this is not the case. Under Articles 107 and 196, there is a specific provision that mere prorogation will not lead to lapsing of Bills pending at that point of time. It is only on dissolution that the pending Bills lapse under Articles

107(5) and 196(5) of the Constitution. Thus, we see that there is practically no difference in the effects following prorogation and dissolution in England, which difference is specifically contemplated under the India Constitution. In England, dissolution does not bring with it any special or additional consequences apart from those that attend upon prorogation. Therefore, the British convention with respect to summoning, proroguing and dissolution of the House of Commons is also of not much relevance in the Indian context.

From the above, the irresistible conclusion is that Article 174(1) is neither applicable to a dissolved House nor does it provide for any period for holding election for constituting fresh Legislative Assembly.

Whether the expression "the House" is permanent body and is different than the House of People or the Legislative Assembly under Articles 85 and 174 of the Constitution?

It was then urged on behalf of the Union[2] that under Article 174 what is dissolved is an Assembly while what is prorogued is a House. Even when an Assembly is dissolved, the House continues to be in existence. The Speaker continues under Art. 94 in the case of the House of the People under Art. 179 in the case of the State Legislative Assembly till the new House of the People or the Assembly is constituted. On that premise, it was further urged that the fresh elections for constituting new Legislative Assembly has to be held within six months from the last session of the dissolved Assembly.

At first glance, the argument appeared to be very attractive, but after going deeper into the matter we do not find any substance for the reasons stated hereinafter.

Drafting the text of a Statute or a Constitution is not just an art but is a skill. It is not disputed that a good legislation is that the text of which is plain, simple, unambiguous, precise and there is no repetition of words or usage of superfluous language. The skill of a draftsman in the context of drafting a

Statute or the Constitution lies in brevity and employment of appropriate phraseology wherein superfluous words or repetitive words are avoided. It appears that the aforesaid principle was kept in mind while drafting the Government of India Act, 1915, the Government of India Act, 1919, and the Government of India Act 1935. The draftsman of the Constitution of India has taken care to maintain brevity and the phraseology used is such that there is no ambiguity while making provisions for the Constitutional institutions in the provisions of the Constitution.

In this background, wherever the Constitution makers wanted to confer power, duties or functions or wanted to make similar provisions both for Council of States as well as House of the People or to the State, Legislative Council and the Legislative Assembly, they have referred both the institutions under Part V Chapter II and Part VI Chapter III of the Constitution as 'two Houses', 'each House', 'either House' & 'both Houses'. On the other hand, the Constitution makers, when they wanted to confer powers, functions and duties or to make provisions exclusively either for House of the People or Council of States, they have referred the said institutions either as Council of States or House of the People. Similarly, in States when the Constitution makers wanted to confer power, functions, duties or wanted to make similar provisions both for the Legislative Council and the Legislative Assembly, they referred both the institutions as 'Houses', 'either House', 'both Houses', 'each House' and where there was no Legislative Council, and power was to give exclusively to Legislative Assembly, it is referred as Legislative Assembly. The aforesaid pattern of drafting has been borrowed from Government of India Acts, 1915, 1919 and 1935 which we shall notice hereinafter.

Section 63 of Government of India Act, 1915 provided that Indian Legislature shall consist of the Governor General and two Chambers viz. Council of State and Legislative Assembly. Section 63D(1)(a) provided that either Chamber of the Legislature may be summoned/dissolved by the

Governor General. The expression 'Chamber' here is analogous to the expression 'House'. Under Section 63D(1)(c) of the Act, after the dissolution of either Chamber, the Governor General was required to appoint a date not more than six months or with the sanction of the Secretary of the State not more than nine months after the date of dissolution for the next session of the Chamber. Since both the "Chambers" were subject to dissolution, therefore, under Section 63D(1)(c) both the Council of States and Legislative Assembly have been referred as 'either Chamber', and not as 'Council of States or Legislative Assembly'. This shows that the expressions "either Chamber" are referable to Council of States as well as Legislative Assembly. Under Government of India Act, 1919 again, the Indian Legislature consisted of the Governor General and two Chambers viz., Council of States and the Legislative Assembly. Under Section 21(1)(a) of the Act, "either Chamber" of the Legislature could be dissolved by the Governor General and under Section 21(1)(c) it was provided that after dissolution of either Chamber, the Governor General shall appoint a date not more than six months or with the sanction of the Secretary of the State not more than nine months after the date of dissolution, the next session. This provision is in *pari materia* with Section 63D of Government of India Act, 1915. In this case also, we find that since both the Chambers viz., Council of State and Legislative Assembly were subjected to dissolution, therefore, in Section 21(1)(c) the Council of State or Legislative Assembly both were referred to as 'either Chamber' and not as Council of State or Legislative Assembly.

Section 18 of Government of India Act, 1935 provided that the Federal Legislature was to consist of His Majesty represented by Governor General and two Chambers to be known respectively as 'Council of State' and 'Federal Assembly'. Under sub-section (4) of Section 18 of the 1935 Act, the Council of State was made a permanent body not subject to dissolution, but as many as 1/3rd members thereof shall retire in every third year, in accordance with the provisions in that behalf contained in the First Schedule. Sub-section (2)

of Section 19 of the Government of India Act, 1935 which is similar to Article 85 of the Constitution of India, provided that the Governor General may in his discretion summon the Chambers or either Chamber to meet at such time as he deems fit, prorogue the Chamber and dissolve the Federal Assembly. In this case, the dissolution is not of Chambers, but of the Federal Assembly for the simple reason that Council of State was made a permanent body not subject to dissolution and, therefore, the Federal Assembly which was subjected to dissolution has been specifically referred in the Section.

In Government of India Act, 1935, there was a provincial legislature and under Section 60 of the Act, it was provided that there shall provincial legislature which shall consist of His Majesty represented by the Governor and in the provinces of Madras, Bombay and Bengal and United Provinces Bihar and Assam there shall be two Chambers and in other provinces one Chamber. In Sub-section (2) thereof, it was further provided that where there are two Chambers of the Provincial Legislature, they shall be known as Legislative Council and Legislative Assembly and where there is one Chamber the same will be known as Legislative Assembly. Sub-section (3) of Section 61 provided that every Legislative Council shall be a permanent body not subject to dissolution. Sub-section (2) of Section 62 of the Act provided that Governor may in his discretion from time to time summon the Chambers or either Chamber, prorogue the Chamber or Chambers and dissolve the Legislative Assembly. This provision in *pari materia* with Art. 174 of the Constitution of India. In this case also, it is very much clear that since Legislative Council has been made a permanent body and the Legislative Assembly was subjected to dissolution, therefore, the expression 'Chamber' has not been employed for the Legislative Assembly, but expressly Legislative Assembly has been mentioned.

Coming to the Constitution of India, Article 85 is in *pari materia* with Section 19 of the Government of India Act, 1935. Similarly Article 174 is in *pari materia* with Section 62 of Government of India Act, 1935. Article 79 of

Constitution of India provides that there shall be a Parliament for the Union which shall consist of President and two Houses respectively to be known as Council of States and House of People. Article 83 provides that the Council of States shall not be subject to dissolution. Article 85 provides that the President may, from time to time, prorogue the Houses or either House and dissolve the House of People. Here again, since Council of states is a permanent body and not liable to dissolution, therefore, instead of using the expression 'either House', the expression 'House of People' has been employed, the same being liable to dissolution. The same thing holds for the State Legislature under Art. 168, Art. 172 and Art. 174 of the Constitution.

From the aforesaid provisions, it is clear that the expressions "Houses", "both Houses" and "either House" and "the House" are used synonymously with the institutions known as Council of States and House of the People and are interchangeable expressions.

The matter may also be examined from another angle. Under Article 86, the President is empowered to specially address either House of Parliament or both Houses assembled together. Similarly, under Article 87, the President is empowered to address both Houses of Parliament assembled together. Under Article 88, every Minister and Attorney General has a right to speak or take part in the proceedings of either House. Article 98 provides that each House of Parliament shall have a Secretariat Staff and under clause (2) thereof, the Parliament is empowered to make law for regulating the appointment and conditions of services of persons appointed to the Secretariat staff of either House of Parliament. Article 99 provides that every member of either House of Parliament shall, before taking his seat, make and subscribe before the President, or some person appointed in that behalf by him an oath or affirmation according to the form set out for the purpose in the Third Schedule. Article 100 provides that all questions at any sitting of either House or joint sitting of the Houses shall be determined by a majority of votes of the

members present and voting, other than the Speaker or person acting as Chairman or Speaker. Article 101 provides that no person shall be a member of both Houses of Parliament. Similarly, Article 102 uses the expression 'either House of Parliament'. Article 103 again uses the expression 'either House of Parliament'. Articles 104, 106 and 107 also use the expression 'either House of Parliament'. This shows that the Constitution framers, wherever they wanted to make similar provisions for both Council of States and House of the People, have used the expressions "House", "either House", "both Houses", "Houses" only for the purpose of maintaining brevity and to avoid using Council of States and House of the People again and again.

Analogous provisions are found in the provisions dealing with the State Legislature under Part VI Chapter III of the Constitution. Article 168 provides that for every State, there shall be a Legislature which shall consist of the Governor and in the States of Bihar, Maharashtra, Karnataka and Uttar Pradesh two Houses and in other States one House. Sub-clause (2) thereof further provides that where there are two Houses, one shall be known as the Legislative Council and the other as the Legislative Assembly, and where there is only one House it shall be known as Legislative Assembly. Sub-clause (2) of Article 172 provides that the Legislative Council of a State is permanent body which is not subject to dissolution. Under Article 174(1), the Governor is empowered to summon the House or each House of Legislature of the State to meet at such time and place as he deems fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session. Under Clause (2) of Article 174 the Governor has power to prorogue the House or either House and dissolve the Legislative Assembly. Here again, we find that since Legislative Council is a permanent body, it cannot be dissolved and therefore, the expression 'Houses' does not find place in Clause (2)(b) of Art. 174.

Similarly, in the case of State Legislature, there are provisions where the Constitution makers have used the expression 'either House' 'both Houses' and 'Houses of Legislature' wherever they intended to apply similar provisions to both the Legislative Council as well as Legislative Assembly.

Article 175 empowers the Governor to address 'both the Houses assembled together' and his power to send messages to 'Houses of Legislature' of the State. Article 176 provides for a special address by the Governor to both the 'Houses' assembled together. Article 177 speaks of the rights of ministers and Advocate General to speak in and take part in the proceedings of 'both Houses'. Article 187 dealing with Secretariat of the State Legislature uses the expressions, 'the House', 'each House', 'common to both Houses' and 'Houses'. The head note of Article 189 reads: "voting in House, power of Houses". Article 190 also refers to 'both Houses'. Article 196, uses the expressions 'either House', 'both Houses', and 'Houses' while referring to both the Legislative Assembly and Legislative Council. Similarly, Article 197(2) also provides for passage of a Bill by the 'Houses of the Legislature' of the State. Article 202 and Article 209 also use the expression 'Houses' while referring to both the Legislative Assembly and Legislative Council.

These provisions may be contrasted with Articles 169, 170, 171, 178, 179, 180, 181, 182, 183, 184, 185 and Article 186 which deal exclusively either with the Legislative Council or the Legislative Assembly. Similarly, Articles 197 and 198 also mention Legislative Assembly and Legislative Council separately. Thus, the Constitution makers have specifically referred to Legislative Assembly and the Legislative Council wherever there was a need to do so. Moreover, Articles 188, 191 and 193 while dealing with the respective matters specified therein mention both Legislative Assembly or Legislative council separately. Since the Constitution was being drafted for the entire country and not for a particular State, the Constitution framers thought it fit to specify the

Legislative Assembly or Legislative Council separately to avoid confusion in States having just the Legislative Assembly and not the Legislative Council.

It may be noted here that there is a difference in phraseology used in Arts. 99 and 188, which deal with oath or affirmation of members. Arts. 103 and 191, which deal with disqualification of members and Arts. 104 and 193 which deal with penalty for sitting and voting before making oath or affirmation or when not qualified or disqualified. Articles 99, 103 and 104 employ the expression 'either House' while Arts. 188, 191 and 193 mention "Legislative Assembly or Legislative Council". This difference in phraseology can be explained on the basis of the fact that there are many states where there is no Legislative Council, and therefore, in this context, use of the expression "either House" in Arts. 188, 191 and 193 could have been misleading.

From the aforesaid provisions, it is manifest that there is no distinction between the 'House' and 'Legislative Assembly'. Wherever the Constitution makers wanted to make similar provisions for Legislative Council as well as Legislative Assembly, both together have been referred to as Houses and wherever the Constitution makers wanted to make a provisions exclusively for the Legislative Assembly, it has been referred to as Legislative Assembly. For the aforesaid reasons our conclusion is that the expressions "The House" or "either House" in clause (2) of Art. 174 of the Constitution and Legislative Assembly are synonymous and are interchangeable expressions. The use of expression "the House" denotes the skill of Draftsman using appropriate phraseology in the text of the Constitution of India. Further the employment of expressions "the House" or "either House" do not refer to different bodies other than the Legislative Assembly or the legislative Council, as the case may be, and have no further significance.

2.(a) Is there any period of limitation provided under the Constitution of India or Representation of the People Act for holding fresh election

for constituting new Legislative Assembly in the event of premature dissolution of a Legislative Assembly?

In this context, we have looked into the provisions of the Constitution of India, but we do not find any provision expressly providing for any period of limitation for constituting a fresh Legislative Assembly on the premature dissolution of the previous Legislative Assembly. On our interpretation of Article 174(1), we have already held that it does not provide for any period of limitation for holding elections within six months from the date of last sitting of the session of the dissolved Assembly. Section 15 of the Representation of the People Act, 1951 provides that general election is required to be held for the purpose of constituting a new Legislative Assembly on the expiration of duration of the existing Assembly or on its dissolution. Sub-section (2) thereof provides that for constituting new Legislative Assembly, the Governor shall by notification, on such date or dates, as may be recommended by the Election Commission, call upon all Assembly constituencies in the State to elect members in accordance with the provisions of the Act, rules and orders made thereunder. The proviso to sub-section (2) of Section 15 of the Act provides that where an election is held otherwise than on the dissolution of the existing Legislative Assembly, no such notification shall be issued at any time earlier than six months prior to the dates on which the duration of that Assembly would expire under the provision of clause (1) of Article 172.

The aforesaid provisions also do not provide for any period of limitation for holding elections for constituting new Legislative Assembly in the event of premature dissolution of an existing Legislative Assembly, excepting that election process can be set in motion by issuing a notification six months prior to the date on which the normal duration of the Assembly expires. Thus, the question arises as to whether the Constitution framers have omitted by oversight to provide any such period for holding election for constituting new Assembly in an event of premature dissolution or it was purposely not provided

for in the Constitution. For that purpose, we must look into the legislative developments and the Constitutional debates preceding the enactment of Constitution of India.

As earlier noticed, Sections 63D and 72B(1) of the Government of India Act, 1915 and Sections 8(1) and 21(1) of the Government of India Act, 1919 empowered the Governor General in case of Indian Legislature and the Governor in case of Provincial Legislature to dissolve either chambers sooner than their stipulated period and appoint a date, nor more than six months or, with the sanction of the Secretary of the State, not more than nine months from the date of dissolution for the next session of that Chamber. Thus the statutes themselves provided a period of limitation within which elections were to be held for constituting the new Chamber. The power of the Governor General to fix a date for the next chamber was similar to the powers exercised by the British Monarch historically under the British conventions.

However, in Government of India Act, 1935, the period of limitation fixed for holding election for constituting Legislative Council and Legislative Assembly were dispensed with and under Schedule V, Para 20 to the Government of India Act, 1935, the Governor General was empowered to make rules for carrying out the provisions of the Vth and VIth Schedule. Para 20 thereof as a whole, related to matters consisting of elections and clause (3) particularly pertains to conduct of elections. Similarly, Schedule VI of Government of India Act, 1935 contained provisions with respect to electoral roll and franchise. Thus, the conduct of election was entrusted to the Executive and the Executive was empowered to fix the date or dates for holding elections for constituting Federal Legislature as well as Provincial Legislature.

When the question, who would conduct the elections under Indian Constitution was debated upon before the Constituent Assembly, concerns were expressed by the members of the Constituent Assembly in entrusting the same in the hands of the Executive and, in fact, there was unanimity among

the members that an independent Constitutional Authority be set up for superintendence, direction, control and the conduct of elections to Parliament and Legislature of every State. In this connection, Dr. B.R. Ambedkar stated before the Constituent Assembly thus :

> "But the House affirmed without any kind of dissent that in the interest of purity and freedom of elections to the legislative bodies, it was of the utmost importance that they should be freed from any kind of interference from the executive of the day. In pursuance of the decision of the House, the Drafting Committee removed this question from the category of Fundamental Rights and put it in a separate part containing Article 289, 290 and so on. Therefore, so far as the fundamental question is concerned that the election machinery should be outside the control of the executive Government, there has been no dispute. What Article 289 does is to carry out that part of the decision of the Constituent Assembly. It transfers the superintendence, direction and control of the preparation of the electoral rolls and of all elections to Parliament and the Legislatures of States to a body outside the executive to be called the Election Commission."

It is in light of the aforesaid discussion, Article 324 was enacted and the superintendence, direction, control and conduct of election was no more left in the hands of the Executive but was entrusted to an autonomous Constitutional Authority, i.e. the Election Commission. It appears that since the entire matter relating to the elections was entrusted to the Election Commission, it was found to be a matter of no consequence to provide any period of limitation for holding fresh election for constituting new Legislative Assembly in the event of premature dissolution. This was deliberate and conscious decision. However, care was taken not to leave the entire matter in the hands of the Election Commission and, therefore, under Article 327 read

with Entry 72 of List I of VIIth Schedule of the Constitution, Parliament was given power subject to the provisions of the Constitution to make provisions with respect to matters relating to or in connection with the election of either House or Parliament or State Legislature, as the case may be, including preparation of electoral roll. For the States also, under Article 328 read with Entry 37 of List II, the Legislature was empowered to make provisions subject to the provisions of the Constitution with respect to matters relating to or in connection with election of either House of Parliament or State Legislature, including preparation of electoral roll. Thus, the Parliament was empowered to make law as regards matters relating to conduct of election of either Parliament or State Legislature, without affecting the plenary powers of the Election Commission. In this view of the matter, the general power of superintendence, direction, control and conduct of election although vested in the Election Commission under Article 324(1), yet is subject to any law either made by the Parliament or State Legislature, as the case may be which is also subject to the provisions of the Constitution. The word 'election' has been interpreted to include all the steps necessary for holding election. In ***M.S. Gill vs. Chief Election Commissioner*** *(supra),* - (1984) 2 SCC 656 and **Kanhiya Lal Omar vs. R.K. Trivedi and others** (1985) 4 SCC 628, it has been consistently held that Article 324 operates in the area left unoccupied by legislation and the words 'superintendence', 'control', 'direction' as well as 'conduct of all elections' are the broadest of the terms. Therefore, it is no more in doubt that the power of superintendence, direction and control are subject to law made by either Parliament or by the State Legislature, as the case may provided the same does not encroach upon the plenary powers of the Election Commission under Article 324.

We find that the Representation of the People Act, 1951 also has not provided any period of limitation for holding election for constituting fresh Assembly election in the event of premature dissolution of former Assembly. In this context, concerns were expressed by learned counsel for one of the

national political parties and one of the States that in the absence of any period provided either in the Constitution or in the Representation of the People Act, the Election Commission may not hold election at all and in that event it would be the end of democracy. It is no doubt true that democracy is a part of the basic structure of the Constitution and periodical, free and fair election is substratum of democracy. If there is no free and fair periodic election, it is end of democracy and the same was recognized in *M.S. Gill vs. Chief Election Commissioner* - (1978) 1 SCC 404 thus :

> "A free and fair election based on universal adult franchise is the basic, the regulatory procedures vis-a-vis the repositories of functions and distribution of legislative, executive and judicative roles in the total scheme, directed towards the holding of free elections, are the specifics. The super authority is the Election Commission, the kingpin is the returning officer, the minions are the presiding officers in the polling stations and the electoral engineering is in conformity with the elaborate legislative provision."

Similar concern was raised in the case of *A.C. Jose vs. Sivan Pillai and Others* - (1984) 2 SCC 656. In that case, it was argued that if the Commission is armed with unlimited arbitrary powers and if it happens that the persons manning the Commission shares or is wedded to a particular ideology, he could by giving odd directions cause a political havoc or bring about a Constitutional crisis, setting at naught the integrity and independence of the electoral process, so important and indispensable to the democratic system. Similar apprehension was also voiced in M.S. Gill vs. Chief Election Commissioner *(supra).* The aforesaid concern was met by this Court by observing that in case such a situation ever arises, the Judiciary which is a watchdog to see that Constitutional provisions are upheld would step in and that is enough safeguard for preserving democracy in the country.

However, we are of the view that the employment of words "on an expiration" occurring in Sections 14 and 15 of the Representation of the People

Act, 1951 respectively show that Election Commission is required to take steps for holding election immediately on expiration of the term of the Assembly or its dissolution, although no period has been provided for. Yet, there is another indication in Sections 14 and 15 of the Representation of the People Act that the election process can be set in motion by issuing of notification prior to the expiry of six months of the normal term of the House of People or Legislative Assembly. Clause (1) of Article 172 provides that while promulgation of emergency is in operation, the Parliament by law can extend the duration of the Legislative Assembly not exceeding one year at a time and this period shall not, in any case, extend beyond a period of six months after promulgation has ceased to operate. Further, under Articles 123 and 213, the life of an ordinance promulgated either by the President or by the Governor, as the case may be, is six months and repeated promulgation of ordinance after six months has not been welcomed by this Court. Again, under Articles 109, 110 and 111 and analogous Articles for State Assembly, Money Bill has to be passed by the House of People or by the Legislative Assembly. The aforesaid provisions do indicate that on the premature dissolution of Legislative Assembly, the Election Commission is required to initiate immediate steps for holding election for constituting Legislative Assembly on the first occasion and in any case within six months from the date of premature dissolution of the Legislative Assembly.

2(b) Is there any limitation on the powers of the Election Commission to frame schedule for the purpose of holding election for constituting Legislative Assembly?

So far as the framing of the schedule or calendar for election of the Legislative Assembly is concerned, the same is in the exclusive domain of the Election Commission, which is not subject to any law framed by the Parliament. The Parliament is empowered to frame law as regards conduct of elections but conducting elections is the sole responsibility of the Election Commission. As a matter of law, the plenary powers of the Election

Commission can not be taken away by law framed by Parliament. If Parliament makes any such law, it would repugnant to Article 324. Holding periodic, free and fair elections by the Election Commission are part of the basic structure and the same was reiterated in Indira Nehru Gandhi vs. Raj Narain - (1975) Suppl. 1 SCC 1 which run as under :

> "198. This Court in the case of *Kesavananda Bharati (supra)* held by majority that the power of amendment of the Constitution contained in Article 368 does not permit altering the basic structure of the Constitution. All the seven Judges who constituted the majority were also agreed that democratic set-up was part of the basic structure of the Construction. Democracy postulates that there should be periodical elections, so that people may be in a position either to re-elect the old representatives or, if they choose, to change the representatives and elect in their place other representatives. Democracy further contemplates that the elections should be free and fair so that the voters may be in a position to vote for candidates of their choice. Democracy can indeed function only upon the faith that elections are free and fair and not rigged and manipulated, that they are effective instruments of ascertaining popular will both in realty and form and are not mere rituals calculated to generate illusion of defence to mass opinion ....."

The same is also evident from Sections 14 and 15 of the Representation of People Act, 1951 which provide that the President or the Governor shall fix the date or dates for holding elections on the recommendation of the Election Commission. It is, therefore, manifest that fixing schedule for elections either for the House of People or Legislative Assembly is in the exclusive domain of the Election Commission.

(3) Application of Article 356

It appears that the interpretation of Art. 174(1) of the Constitution by the Election Commission in its order was mainly influenced by the past practice

adopted by the Election Commission holding elections for constituting fresh Legislative Assembly within six months of the last sitting of the dissolved House. It also appears that the gratuitous advice of application of Art. 356 by the Election Commission in its order was in all its sincerity, although now on our interpretation of Article 174(1), we find that it was misplaced. However, the Election Commission in its written submission has stated thus:

> "The decision, contained in the Election Commission's order dated 16.8.2002, was taken without reference to Article 356. However, it was merely pointed out that there need be no apprehension that there would be a constitutional impasse as Article 356 could provide a solution in such a situation".

In that view of the matter and the view we have taken in regard to the interpretation of Art. 174(1), there is no need to go further into the question of application of Art. 356 in the context of the order of the Election Commission out of which the Reference arises.

As a result of the aforesaid discussion, our conclusions are as follows:

(a) The Reference made by the President of India under Article 143(1) arises out of the order of the Election Commission dated 19.8.2002 and the questions raised therein are of public importance and are likely to arise in future. Further, there being no decision by this Court on the questions raised and a doubt having arisen in the mind of the President in regard to the interpretation of Article 174(1) of the Constitution, the Reference is required to be answered.

(b) Article 174(1) of the Constitution relates to an existing, live and functional Legislative Assembly and not to a dissolved Assembly.

(c) The provision in Article 174(1) that six months shall not intervene between its last sitting in one session and the date appointed for its sitting in the next session is mandatory and relates to the frequencies of the sessions of a live and existing Legislative

Assembly and does not provide for any period of limitation for holding fresh elections for constituting Legislative Assembly on premature dissolution of the Assembly.

(d) The expressions "the House", "either House" is synonymous with Legislative Assembly or Legislative Council and they do not refer to different bodies other than the Legislative Assembly or the Legislative Council, as the case may be.

(e) Neither under the Constitution nor under the Representation of the People Act, any period of limitation has been prescribed for holding election for constituting Legislative Assembly after premature dissolution of the existing one. However, in view of the scheme of the Constitution and the Representation of the People Act, the elections should be held within six months for constituting Legislative Assembly from the date of dissolution of the Legislative Assembly.

(f) Under the Constitution, the power to frame the calendar or schedule for elections for constituting Legislative Assembly is within the exclusive domain of the Election Commission and such a power is not subject to any law either made by Parliament or State Legislature.

(g) In view of the affidavit filed by the Election Commission during hearing of the Reference, the question regarding the application of Article 356 is not required to be gone into.

In accordance with the foregoing opinion, we report on the questions referred as follows :

Question No. (i) :

This question proceeds on the assumption that Article 174(1) is also applicable to a dissolved Legislative Assembly. We have found that the

provision of Article 174(1) of the Constitution which stipulates that six months shall not intervene between the last sitting in one session and the date appointed for its first sitting in the next session is mandatory in nature and relates to an existing and functional Legislative Assembly and not to a dissolved Assembly whose life has come to an end and ceased to exist. Further, Article 174(1) neither relates to elections nor does it provide any outer limit for holding elections for constituting Legislative Assembly. The superintendence, direction and control of the preparation of electoral roll and conduct of holding elections for constituting Legislative Assembly is in the exclusive domain of the Election Commission under Article 324 of the Constitution. In that view of the matter, Article 174(1) and Article 324 operate on different fields and neither Article 174(1) is subject to Article 324 nor Article 324 is subject to Article 174(1) of the Constitution.

Question No. (ii) :

This question also proceeds on the assumptions that Article 174(1) is also applicable to a dissolved House. On our interpretation of Article 174(1), we have earlier reported that the said Article is inapplicable to a dissolved Legislative Assembly. Consequently, there is no infraction of the mandate of Article 174(1) in preparing a schedule for elections to an Assembly by the Election Commission. The Election Commission in its written submissions stated thus:

> "The decision, contained in the Election Commission's order dated 16.8.2002, was taken without reference to Article 356. However, it was merely pointed out that there need be no apprehension that there would be a constitutional impasse as Article 356 could provide a solution in such a situation".

In that view of the matter, the question of applicability of Article 356 on the infraction of the provisions of Article 174 loses much of its substance and, therefore, application of Article 356 is not required to be gone into.

Question No. (iii) :

Again, this question proceeds on the assumption that the provisions of Article 174(1) also apply to a dissolved Assembly. In view of our answer to question No. (i), we have already reported that Article 174(1) neither applies to a prematurely dissolved Legislative Assembly nor does it deal with elections and, therefore, the question that the Election Commission is required to carry out the mandate of Article 174(1) of the Constitution does not arise. Under Article 324, it is the duty and responsibility of the Election Commission to hold free and fair elections at the earliest. No efforts should be spared by the Election Commission to hold timely elections. Ordinarily, law and order or public disorder should not be occasion for postponing the elections and it would be the duty and responsibility of all concern to render all assistance, cooperation and aid to the Election Commission for holding free and fair elections.

The Reference is answered accordingly.

Sd/-
..... C.J.I.

Sd/-
..... J.
(V. N. KHARE)

Sd/-
..... J.
(ASHOK BHAN)

New Delhi
28th October, 2002

SUPREME COURT OF INDIA
ADVISORY JURISDICTION

IN THE MATTER OF SPECIAL REFERENCE NO. 1 OF 2002
(Under Article 143(1) of the Constitution of India)

O P I N I O N

BALAKRISHNAN, J.

I had the advantage of reading the Opinion in draft of my learned brothers V.N. Khare and Arijit Pasayat, J.J. and I fully concur with the opinion expressed by them regarding interpretation of Article 174 and the consequential answers to the reference made by the President of India, and I would like to add the following:

The Legislative Assembly of Gujarat was dissolved by the Governor of Gujarat on 19th July, 2002 in exercise of the powers conferred on him under Article 174(2)(b) of the Constitution. The full term of the Legislative Assembly would be expiring on 18th March, 2003. After the dissolution of the Assembly, the ruling party in the State of Gujarat requested the Election Commission for conducting fresh General Election urgently so that the new Legislative Assembly would be able to have its first session before 6th October, 2002. The ruling party of the State of Gujarat made this demand on the basis of the premise that under Article 174(1) of the Constitution, there shall not be more than six months' period in between the last session of the dissolved assembly and the first meeting of the next session of the Assembly to be newly constituted. Certain other political parties, public-spirited citizens and organisations urged the Election Commission not to hold the general election to the Gujarat State Legislative Assembly but to wait for some more time until the people who were affected by the communal riots and violence returned to their houses from the various relief camps where they were staying.

In the last week of February 2002 an unfortunate incident took place at the railway station in Godhara in Gujarat in which a railway compartment was set on fire and several people who were occupants of that compartment died of burning. After this incident a spate of communal violence erupted in various parts of Gujarat and curfew was clamped in many cities of the State of Gujarat. Many people who had been the victims of such riots were put in the relief camps. Election Commission, which was requested to conduct the election, visited Gujarat and in the Order passed by the Election Commission on 16th August, 2002, the following observations were made:

1. The Commission was of the opinion that Article 174(1) of the Constitution was applicable even in respect of dissolved Assemblies and in the Order it is stated that the Commission has, in the past, been taking the view that the six months mentioned in Article 174(1) of the Constitution applies not only to a Legislative Assembly in existence but also to dissolved assembly and elections to constitute a new Legislative Assembly have always been held within such time so as to enable the new Assembly to meet within the period of six months from the last sitting of the last session of the dissolved Assembly.

2. The Commission was of the opinion that any other view on the interpretation of Article 174(1) of the Constitution may lead to extensive gaps between two Houses of a Legislative Assembly and the abuse of democracy, there being no provision in the Constitution or in any law in force prescribing a period during which an election to be held to constitute a new Legislative Assembly on the dissolution of the previous house.

3. The Commission further observed that Article 174(1) of the Constitution cannot be read in isolation and it has to be read alongwith other relevant provisions of the Constitution, particularly

> article 324 of the Constitution and this Article being not subject to the provisions of any other Article of the Constitution including Article 174(1), vests the superintendence, direction and control, inter alia, of the preparation of electoral rolls for, and conduct of, elections to Parliament and State Legislature in the Election Commission. The Commission further observed that free and fair election based on universal adult franchise being the basic feature of the Constitution the same cannot be held in view of the prevailing situation in Gujarat. The Commission was of the view that there was large scale movement and migration of electors due to communal riots and violence and they had not returned to their homes and they would not be able to go to the polling station to cast their votes and the electoral rolls had to be revised.

Therefore, the Election Commission came to the conclusion that it was not in a position to conduct free and fair election immediately after the dissolution of the Assembly and after the electoral roll is revised, the commission would be in a position to conduct election to the General Assembly in the month of November/December 2002.

The Commission was also of the view that Legislative Assembly should meet at least every six months as contemplated by Article 174(1) of the Constitution even when it has been dissolved and in case it was not feasible, that would mean that the Government of the State cannot be carried on in accordance with the provisions of the Constitution within the meaning of Article 356(1) of the Constitution and the President would step in and declare a state of emergency.

After the receipt of the report of the Election Commission, the Presidential Reference was made under Article 143(1) of the Constitution of India and the Order of Reference proceeded on the assumption that the mandate of the Constitution under Article 174(1) is that six months shall not intervene between

the last sitting of the previous session and the date appointed for the first sitting in the next session and the Election Commission has all along been consistent that, normally, a Legislative Assembly should meet at least every six months as contemplated by Article 174(1) of the Constitution, even where it has been dissolved, and the Order of the Election Commission of India dated August 16, 2002 had not recommended any date for holding general election for constituting a new Legislative Assembly for the State of Gujarat. The new Legislative Assembly cannot come into existence so as to meet within the stipulated period of six months as provided under Article 174(1) of the Constitution of India. The following observation of the Election Commission was also noted in the Reference :

> "AND WHEREAS the Election Commission has held that the non-observance of the provisions of article 174(1) in the present situation would mean that the Government of the State cannot be carried in accordance with the provisions of the Constitution within the meaning of Article 356 (1) of the Constitution and the President would then step in;
>
> AND WHEREAS doubts have arisen with regard to the constitutional validity of the said order of the Election Commission of India as the order of the Election Commission which would result in a non-compliance with the mandatory requirement envisaged under article 174(1) of the Constitution under which not more than six months shall intervene between two sittings of the State Legislature;
>
> AND WHEREAS in view of what has been hereinbefore stated, it appears to me that the questions of law hereinafter set out have arisen which are of such a nature and o f such public importance that it is expedient to obtain the opinion of the Supreme Court of India."

The following three questions were referred to the Supreme Court of India for consideration:

(i) Is article 174 subject to the decision of the Election Commission of India under article 324 as to the schedule of elections of the Assembly?

(ii) Can the Election Commission of India frame a schedule for the elections to an Assembly on the premise that any infraction of the mandate of article 174 would be remedied by a resort to article 356 by the President?

(iii) Is the Election Commission of India under a duty to carry out the mandate of article 174 of the Constitution, by drawing upon all requisite resources of the Union and the State to ensure free and fair elections?

After the receipt of the reference, notices were issued to all the States and all the recognized national political parties. On behalf of the Union of India, Solicitor General Shri Harish N. Salve appeared and raised the following contentions. It was contended on behalf of the Union of India that Article 174 is applicable even to dissolved assemblies and since there is no time limit at all for conducting fresh election, it would hypothetically lead to a situation of Council of Ministers continuing perennially after the dissolution of assembly, which, in turn, would lead to a breakdown of the Constitutional democracy. It was argued that there is no question of Article 174, or Article 85, or Article 75 or Article 164 coming in conflict with Article 324 and these provisions operate in different fields and the power of superintendence, direction and control of elections vested with the Election Commission should be exercised in the manner which would be consistent with the Constitutional Scheme of representative government. It is submitted that the Election Commission must use all the requisite resources of Union and the State to ensure free and fair

election. It was further argued that the power under Article 356 is utterly irrelevant for ascertaining the constitutional mandate for holding elections and this power is highly discretionary and is to be exercised where there is a breakdown of the constitutional machinery. The executive government has no legal authority to compel the holding of elections – not even Parliament can, by resolution, legally compel the Election Commission to fix a particular schedule for the elections. By the same token, the Election Commission cannot recommend – or even proceed upon the premise of imposition of President's Rule, which would require executive action ratified by Parliament.

Shri Arun Jaitley, Sr. Advocate, appearing on behalf of the Bharatiya Janata Party contended that the view of the Election Commission that Article 174 is subject to Article 324 of the Constitution is wholly erroneous and contrary to the constitutional mandate. It was further submitted that Article 324 does not enable election Commission to exercise untrammeled powers and the Commission must exercise power either of the Constitution or the law under Article 327 and 328. It was also argued that even when the Assembly is dissolved, the House continue to exist and, therefore, Article 174 is applicable even to dissolved assemblies. A reference was made to the Parliamentary practice in various other countries including Britain.

Shri Kapil Sibal, Sr. Advocate appearing on behalf of the Indian National Congress contained that Article 174 has no application to dissolved Assembly. However, he submitted that on dissolution of an Assembly, it is the duty of the Election Commission to conduct the election immediately and every step shall be taken to see that the new Legislative Assembly met for its first session at the earliest. However, it was submitted that Election Commission is the supreme authority, which should take a decision as to when a free and fair election can be held. Article 324 of the Constitution gives vast power to the Election Commission to decide the question as to when the election shall be held and if the Election Commission fails to carry out the constitutional mandate

for any other extraneous reason, such decision can be challenged under judicial review. According to the counsel, any other interpretation of these constitutional provisions would lead to a situation where the Election Commission would be forced to conduct election when it is not possible to conduct a free and fair election and that would be against the constitutional spirit of a democratic government. It was submitted that as the Reference was based on the wrong assumption of the constitutional provisions, it need not be answered by this Court.

Shri Ram Jethmalani. Sr. Advocate appearing on behalf of the State of Bihar submitted that Article 174 applied to an assembly whose personality / identity is not interrupted or altered by premature dissolution or expiry of its period of duration. Free and fair elections being a basic feature of a democratic and Republican Constitution, Article 174 will have to yield to Article 324. It was further submitted that Article 356 does not include the power to suspend the operation of Article 174. It was also submitted that Article 174 imposes a mandate only on the Governor of the State and is not concerned with the Election Commission.

Shri Rajeev Dhavan, Sr Advocate appearing on behalf of the Communist Party of India (Marxist) also supported the contention raised by the counsel who appeared for Indian National Congress and contended that Article 174 is not applicable to dissolved Assembly. Similar contentions were raised by counsel for other political parties and counsel who appeared for various States.

Shri K.K Venugopal, Sr. Advocate appearing on behalf of the election Commission submitted that Article 174 has no application to dissolved Assemblies. It was submitted that free and fair election is the basic feature of the Constitution and the power of superintendence, direction and control of election vests with the Election Commission. It was further submitted that as the Reference has been made on the wrong premise, this Court need not

answer the same. It was also submitted that the Election Commission has been trying its best to conduct election at the earliest even under very adverse circumstances and for the past 50 years Election Commission earned a good reputation as a free and independent body, which has conducted elections to various State Legislatures and the House of the People.

We are greatly beholden to other Senior lawyers, M/s. K. Parasaran, P.P. Rao, Milon Banerjee, M.C. Bhandare, Ashwani Kumar, P.N. Puri, A. Sharan, Devendra N. Dwivedi, A.M. Singhvi, Gopal Subramaniam and Vijay Bahuguna, who had made very enlightening arguments on various vexed legal questions involved in this case.

The first and foremost question that arises for consideration is whether Article 174 is applicable in respect of a dissolved Assembly. The next question that arises for consideration is the interplay of Article 147 and Article 324 of the Constitution. Incidentally, a question also may arise whether the Election commission can postpone the election indefinitely on one pretext or the other and create a situation where there is a breakdown of democratic form of Government. Article 174 of the Constitution reads thus:

> "174. Sessions of the State Legislature, prorogation and dissolution – (1) The Governor shall from time to time summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session
>
> (2) The Governor may from time to time -
>
> (a) prorogue the House or either House;
>
> (b) dissolve the Legislative Assembly".

Article 324 of the Constitution reads as under:

> 324. Superintendence, direction and control of elections to be vested in an Election Commission -
>
> (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission).
>
> (2) …….
>
> (3) …….
>
> (4) …….
>
> (5) …….
>
> (6) …….".

Section 8 of the Constitution (First Amendment) Act, 1951 amended Article 174 of the Constitution. The amended Article requires the Governor to summon the House or each house of the Legislature of the State and this Article mandates that six months shall not intervene between the last sitting of one session and the date appointed for the first sitting of the next session. The sole object of Article 174(1) is to ensure accountability of executive to the people through their elected representatives. Article 164(2) states that the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State. In a democratic form of Government the responsibility of the government is to the people of the country and the Members of the Legislative Assembly represent the people of the state and the council of Ministers shall be collectively responsible to the Legislative Assembly. Therefore, frequency of the meeting of the Legislative Assembly is necessary,

otherwise, there will not be any check and balance to the actions of the executive government. The Solicitor General contended that Article 174 would apply even to a dissolved assembly because the House as such is not dissolved and it was pointed out that when the British Parliament is dissolved, notice to summon the next session of the Parliament is simultaneously issued. On that basis, it was contended that Article 174 is even applicable to a dissolved Assembly. We do not find much force in this contention. The plain meaning of the words used in Article 174 itself would show that Article 174 has no application to a dissolved Assembly. The words 'six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session" occurring in Article 174 clearly indicate that the interregnum between the two sessions shall not be six months and that is applicable only in respect of a live Assembly. Once the Assembly is dissolved, Article 174 has no application.

Of course, in the Report of the election Commission it is stated that that Commission has all along been taking the view that once the Assembly is dissolved it would take all possible steps to see that the first sitting of the last sitting of the dissolved Assembly. This is to very healthy convention which is being followed since the adoption of our Constitution and we must appreciate the action of the Election Commission in scheduling the election in such a way that the first session of the next Assembly meets within the period of six months of the last sitting of the dissolved Assembly. But that by itself is no reason to interpret that Article 174 would apply to a dissolved Assembly. Frequency of meeting as provided under Article 174 would apply to an Assembly which is in esse at that time.

Therefore, a question may arise that if Article 174 is not applicable to a dissolved Assembly, can the Election Commission postpone election for indefinite period so as to defeat the democratic form of Government? Is there any mandate in the Constitution or in the Representation of People Act, 1951

prescribing time to conduct the election ? Obviously, neither the Constitution nor the Representative of People Act, 1951 prescribes any time limit for the conduct of election after the term of the Assembly is over either by premature dissolution or otherwise. Proviso to Section 15(2) of the Representation of People Act, 1951 states that where a general election is held otherwise than on dissolution of the existing House of the People, no notification for election shall be issued at any time earlier than six months prior to the date on which the duration of that House would expire under the provisions of Clause (2) of Article 83. Once there is dissolution of the Assembly, the election Commission shall take immediate steps to conduct the election and see that the new Assembly is formed at the earliest point of time. A democratic form of Government would survive only if there are elected representatives to rule the country. Any delay on the part of the election Commission is very crucial and it is the Constitutional duty of the election Commission to take steps immediately on dissolution of the Assembly. Article 324 of the Constitution gives vast powers to the Election Commission and time and again this Court has pointed out the extent of powers and duty vested with the Election Commission. It was argued by various counsel appearing on behalf of the various political parties as to what would be the position of the election commission would indefinitely postpone the election under some pretext or the other. So, the question posed was : ***'Quis custodiet ipsos custodes'*** – who will guard the guards themselves?

The Election Commission is vested with the power to decide the election schedule. It can act only in accordance with the Constitutional provisions. The election process for electing the new Legislative Assembly should start immediately on the dissolution of the Assembly. There may be cases where the electoral roll may not be up-to-date and in such case the Election Commission is well within its power to update the electoral roll and the time taken for such updating of the electoral roll shall be reasonable time. Ordinarily, the Election Commission would also require time for notification, calling of

nomination and such other procedure that are required for the proper conduct of election. There may be situation where the Election Commission may not be in a position to conduct free & fair election because of certain natural calamities. Even under such situation the Election Commission shall endeavour to conduct election at the earliest making use of all the resources within its command. Ample powers are given to the Election Commission to coordinate all actions with the help of various departments of the Government including military and para-military forces. When an Assembly is dissolved by the Governor on the advice of the Chief Minister, naturally, the Chief Minister or his political party seeks fresh mandate from the electorate. The duty of the Election Commission is to conduct fresh election and see that a democratically elected Government is installed at the earliest and any decision by the Election Commission, which is intended to defeat this very avowed object of forming an elected Government can certainly be challenged before the Court if the decision taken by the election commission is perverse, unreasonable or for extraneous reasons and if the decision of the Election Commission is vitiated by any of these grounds the Court can give appropriate direction for the conduct of the election.

The next point that arises for consideration to form an opinion regarding the questions referred to this Court is as to the application of Article 356 of the Constitution. Reference to Article 356 was incidentally made by the Election Commission to point out that if Article 174 cannot be complied with the possible alternative is to invoke Article 356 and declare a state of emergency. I do not think that the solution suggested by the Election Commission is appropriate or justified. Article 356 has no application under any of these situations. It is an independent power to be exercised very rarely and this power is hedged in ever by so many Constitutional limitations. In view of the above discussion, the three questions made in the Reference can be answered in the following manner.

(I) Is Article 174 subject to the decision of the Election Commission of India under Article 324 as to the schedule of elections of the Assembly?

Article 174 and Article 324 operate in different fields. Article 174 does not apply to dissolved Assemblies. The schedule of the election of the Assembly is to be fixed having regard to the urgency of the situation that a democratically elected Government be installed at the earliest and the process of election shall start immediately on the dissolution of the Assembly. Though the ultimate authority to decide as to when a free and fair election can be conducted is Election Commission, such decisions shall be just and reasonable and arrived at having regard to all relevant circumstance. Any decision to postpone election on unreasonable grounds is anathema to democratic form of government and it is subject to judicial review on traditionally accepted grounds.

(II) Can the Election Commission of India frame a schedule for the elections to an Assembly on the premise that any infraction of the mandate of Article 174 would be remedied by a resort to Article 356 by the President?

The framing of schedule for election for the new Legislative Assembly shall start immediately on dissolution of the Assembly and the Election Commission shall endeavour to see that the new Legislative Assembly meets at least within a period of six months of the dissolution. Article 356 regarding declaration of state of emergency in the State has no relevance to the fixation of the election schedule.

(III) Is the Election Commission of India under a duty to carry out the mandate of Article 174 of the Constitution, by drawing upon all the requisite resources of the Union and the State to ensure free and fair elections?

The Election Commission is under a constitutional duty to conduct the election at the earliest on completion of the term of the Legislative Assembly on dissolution or otherwise. If there is any impediment in conducting free and

fair election as per the schedule envisaged by the Election Commission, it can draw upon all the requisite resources of Union and State within its command to ensure free and fair election, though Article 174 has no application in the discharge of such constitutional obligation by the Election Commission. It is the duty of the Election Commission to see that the election is done in a free and fair manner to keep the democratic form of Government vibrant and active.

Sd/-

..... J.

(K.G. BALAKRISHNAN)

New Delhi
October 28, 2002

SUPREME COURT OF INDIA
ADVISORY JURISDICTION

SPECIAL REFERENCE NO. 1 OF 2002
(Under Article 143(1) of the Constitution of India)

O P I N I O N

Arijit Pasayat, J.

Free, fair and periodic elections are the part of the basic structure of the Constitution of India, 1950 (in short the 'Constitution'). In a democracy the little man-voter – has overwhelming importance and cannot be hijacked from the course of free and fair elections.

'Democracy' and 'free and fair election' are inseparable twins. There is almost an insevereable umbilical cord joining them. The little man's ballot and not the bullet of those who want to capture power (starting with booth capturing) is the heartbeat of democracy. Path of the little man to the polling booth should be free and unhindered, and his freedom to elect a candidate of his choice is the foundation of a free and fair election.

The message relates to the pervasive philosophy of democratic elections which Sir Winston Churchill vivified in matchless words:

"At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper – no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point."

If we may add, the little, large Indian shall not be hijacked from the course of free and fair elections by mob muscle methods, or subtle perversion of discretion by men 'dressed in little, brief authority'. For 'be you ever so high,

the law is above you'.

The moral may be stated with telling terseness in the words of William Pitt: 'Where laws end, tyranny begins'. Embracing both these mandates and emphasizing their combined effect is the elemental law and politics of power best expressed by Benjamin Disraeli :

"I repeat… that all power is trust… that we are accountant for its exercise – that, from the people and for the people, all springs, and all must exist.

At the threshold : why the Reference was made, and in what background.

The Gujarat Legislative Assembly met on 3rd April 2002 and thereafter was dissolved on 19th July, 2002. Election Commission passed an order on 16th August, 2002 holding that free and fair elections was not possible in Gujarat, even thought Article 174 of the Constitution mandatory provides that the time gap between two sittings of the House should not exceed six months. In that context, the Election Commission held that Article 324 postulates "free and fair election" and when it is not possible to hold it, the provisions contained in Article 174 have to yield. That gave rise to doubts and the President of India has made reference to this Court under Article 143(1) of the Constitution, basically on that core issue and three questions have been referred. First question specifically refers to Article 174 and Article 324. The Election Commission observed that even if the period prescribed under Article 174 cannot be adhered to, the situation can be met by imposition of President's Rule by Article 356 of the Constitution. The Reference (including the preambles) and relevant portion of Election Commission's order so far as relevant for the Reference read as follows:

Presidential Address:

WHEREAS the Legislative Assembly of the State of Gujarat was dissolved on July 19, 2002 before the expiration of its normal duration on March 18, 2003;

AND WHEREAS Article 174(1) of the Constitution provides that six months shall not intervene between the last sitting of the Legislative Assembly in one session and the date appointed for its first sitting in the next Session;

AND WHERAS the Election Commission has also noted that the mandate of Article 174 would require that the Assembly should meet every six months even after the dissolution of the House and that the Election Commission has all along been consistent that normally a Legislative Assembly should meet at least every six months as contemplated by Article 174, even where it has been dissolved;

AND WHEREAS under Section 15 of the Representation of the People Act, 1951, for the purpose of holding general elections on the expiry of the duration of the Legislative Assembly or its dissolution, the Governor shall, by notification, call upon all Assembly Constituencies in the State to elect members on such date or dates as may be recommended by the Election Commission of India;

AND WHEREAS the last sitting of the Legislative Assembly of the State of Gujarat was held on 3rd April, 2002, and as such the newly constituted Legislative Assembly should sit on or before 3rd October, 2002;

AND WHEREAS the Election Commission of India by its order No. 464/GJ-LA/2002 dated August 16, 2002 has not recommended any date for holding general election for constituting a new Legislative Assembly for the State of Gujarat and observed that the Commission will consider framing a suitable schedule for the general election to the State Assembly in November-December 2002. Copy of the said order is annexed hereto;

AND WHEREAS owing to the aforesaid decision of the Election Commission of India, a new Legislative Assembly cannot come into existence so as to meet within the stipulated period of six months as provided under Article 174(1) of the Constitution of India;

AND WHEREAS the Election Commission has held that the non-observance of the provisions of Article 174(1) in the present situation would mean that the Government of the State cannot be carried in accordance with the provisions of the Constitution within the meaning of Article 356(1) of the Constitution and the President would then step in;

AND WHEREAS doubts have arisen with regard to the constitutional validity of the said order of the Election Commission of India as the order of the Election Commission which would result in a non-compliance with the mandatory requirement envisaged under Article 174(1) of the Constitution under which not more than six months shall intervene between two sittings of the State Legislature;

AND WHEREAS in view of what has been hereinbefore stated, it appears to me that the questions of law hereinafter set out have arisen which are of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court of India;

NOW, THEREFORE, in exercise of the powers conferred upon me under Clause (1) of Article 143 of the Constitution, I, A.P.J. Abdul Kalam, President of India, hereby refer the following questions to the Supreme Court of India for consideration and report thereon, namely:-

(i) Is Article 174 subject to the decision of the Election Commission of India under Article 324 as to the schedule of elections of the Assembly?

(ii) Can the Election Commission of India frame a schedule for the elections to an Assembly on the premise that any infraction of the mandate of Article 174 would be remedied by a resort to Article 356 by the President?

(iii) Is the Election Commission of India under a duty to carry out the mandate of Article 174 of the Constitution, by drawing upon all the

requisite resources of the Union and the State to ensure free and fair elections?

Order of the Election Commission (Relevant Portions)

1. The term of the Legislative Assembly of the State of Gujarat was normally due to expire, in terms of Article 172(1) of the Constitution, on the 18th March, 2003. Keeping that in view, the Commission had been planning to hold the next general election in the State for constituting a new Legislative Assembly in the early part of the year 2003, along with the general elections to the Legislative Assemblies of Himachal Pradesh, Meghalaya, Nagaland and Tripura whose terms are also normally due to expire in the month of March, 2003.

2. The Legislative Assembly of the State of Gujarat was, however, dissolved prematurely by the Governor of Gujarat on the 19th July, 2002 in exercise of his powers under Article 174(2)(b) of the Constitution. On such premature dissolution of the State Legislative Assembly, a demand is being made, particularly by the Bharatiya Janta Party and a few other smaller parties and NGOs, that the general election to constitute the new Legislative Assembly be urgently held by the Commission so as to enable the new Legislative Assembly so constituted to meet for its first session before 6th October 2002. In support of such demand, they are citing Article 174(1) of the Constitution which provides that 'the Governor shall, from time to time, summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session'. The last session of the dissolved Legislative Assembly of Gujarat was prorogued on 6th April, 2002 and it is contended that the first session of the new Legislative Assembly should be held before 6th October, 2002 and, therefore, it is mandatory for the Commission to hold the election well before 6th October, 2002. They also claim that the situation in the State of Gujarat is quite normal and conductive to the holding of free and fair elections, as is

evident from the facts that the panchayat elections in large areas were successfully conducted in April 2002, that HSC, SSC examinations were held peacefully and that various religious festivals like the Rath Yatra had passed off without any untoward incident.

* * * * *

4 The Commission has carefully examined the provisions of Article 174(1) of the Constitution. It has also considered other relevant provisions in the Constitution having a bearing on functioning of the Legislative Assemblies and the conduct of elections to constitute them. The Commission has, in the past, been taking the view that the six months in Article 174(1) of the Constitution applies not only to a Legislative Assembly in existence but also to elections to constitute the new Assembly on the dissolution of the previous Assembly and in all past cases, like the recent dissolution of the Goa Legislative Assembly, on 27th February 2002, wherever any Assembly has been dissolved prematurely by the Governor under Article 174(2)(b) of the constitution (and where the President has not taken over the Administration of the State under Article 356 of the Constitution on the dissolution of the Assembly), elections to constitute a new Legislative Assembly have always been held in such time as have enabled the new Assembly to meet within the period of six months from the last date of the last session of the dissolved Assembly. Similar action has been taken by the Commission wherever the House of the People has been prematurely dissolved by the President under Article 85(2)(b) of the Constitution — for example, the dissolution of the House of the People in 1999, 1998 and earlier in 1991, 1979, and 1971- so that new House of the People could meet within the period of six months from the last sitting of the dissolved House.

5. Thus, the Commission has all along been consistent that normally, a Legislative Assembly should meet at least every six months as contemplated by Article 174(1) of the Constitution, even when it has been dissolved (except

where President's Rule has been imposed in the State under Article 356 of the Constitution). The Commission sees no convincing / justifiable reason to take a different view in the present case. In fact, any other view on the interpretation of Article 174(1) of the Constitution might lead to extensive gaps between two Houses of a Legislative Assembly and the abuse of democracy, there being no provision in the constitution or in any law in force prescribing a period during which an election is to be held to constitute a new Legislative Assembly on the dissolution of the previous House. This will be contrary to the basic scheme of the Constitution which prescribes that there shall be a State Legislative Assembly (Article 168) and the Council of Ministers shall be collectively responsible to that Assembly [Article 164(2)] and that if a minister is not a member of the Assembly for a consecutive six months period, he shall cease to be a minister [Article 164(4)]. A more alarming situation may arise with Parliament where Article 85(1) of the Constitution makes identical provisions relating to the holding of sessions of the House of the People. Any view that the House of the People need not meet every six months and the elections be indefinitely postponed after one House has been dissolved, would not only be destructive of the whole Parliamentary system so assiduously built in our Constitution but also be abhorrent to every section of the Indian Polity and citizenry.

6. The commission is also fortified in its above interpretation by the view taken by the President and Parliament on the provisions of Article 174(1) whenever there was an imposition of President's Rule in a State under Article 356 of the Constitution. Whenever the Legislative Assembly of any State has been dissolved in the past by the President under Article 356 of the Constitution, the provisions of Article 174(1) have invariably been expressly suspended in the Proclamation issued by the President under that Article and approved by Parliament during the operation of that Proclamation (See for example, the latest Proclamation dated 10th February, 1999 issued by the President dissolving the Goa Legislative Assembly and imposing President's

Rule in that State). If article 174(1) has no application after an Assembly has been dissolved, as is being contended by one set of representations, there is no question of the suspension of that provision after the dissolution of the Assembly by the said Proclamation.

* * * * *

8. There is, to the Commission's knowledge, no authoritative pronouncement of the Supreme Court or of the any High Court on this aspect of the issue. But the most plausible view that appears to the Commission in that Article 174(1) of the Constitution envisages that normally, the Legislative Assembly of a State should meet every six months even after the dissolution of one House.

9. The next question for consideration of the Commission is whether the Commision is obliged whatever may be the circumstances to hold the general election within the period remaining out of six months from the date of the last sitting of the dissolved Assembly. The Commission does not accept this view. Article 174(1) of the Constitution cannot be read in isolation and it has to be read along with other relevant provisions of the Constitution, particularly Article 324 of the Constitution. Article 324, which is not subject to the provisions of any other Article of the Constitution including Article 174(1), vests the superintendence, direction and control, inter alia, of the preparation of electoral rolls for, and conduct of, elections to Parliament and State Legislatures in the Election Commission. Elections, in the context of democratic institutions, mean free and fair elections and not merely a ritual to be gone through periodically. In the words of the Constitution Bench of the Supreme Court in T.N. Seshan v. Union of India and Ors. [(1995) 4 SCC 61]:

> 'Democracy being the basic feature of our constitutional set up, there can be no two opinions that free and fair elections to our Legislative bodies alone would guarantee the growth of a healthy

> democracy in the country. In order to ensure the purity of election process it was thought by our Constitution-makers that the responsibility to hold free and fair election in the country should be entrusted to an independent body which would be insulated from political and/or executive interference.'

Again, the Constitution Bench of the Supreme Court observed in the famous Keshavanand Bharati v. State of Kerala (AIR 1973 SC 1461) that 'Free, fair, fearless and impartial elections are the guarantee of a democratic polity.' Likewise, the Supreme Court repeatedly underscored the importance of free and fair elections in the case of Mohinder Singh Gill v. Chief Election Commissioner and Others (AIR 1978 SC 851), Kanhiya Lal Omar v. R.K. Trivedi (AIR 1986 SC 111) and a catena of other decisions. In the case of Mohinder Singh Gill (supra), the Supreme Court observed:

> 'The free and faire election based on universal adult franchise is the basic ... it needs little argument to hold that the heart of the Parliamentary system is free and fair election periodically held, based on adult franchise and that social and economic democracy may demand much more.'

Similar sentiments of the Supreme Court laying stress on free and fair elections to the legislative bodies have found echo in every other decision of the Supreme Court on elections.

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11. Thus, the Constitutional mandate given to the Election Commission under Article 324 of the Constitution is to hold free and fair elections to the legislative bodies. And, in the Commission's considered view, if a free and fair election cannot be held to a legislative body at a given point of time because of the extraordinary circumstances then prevailing, Article 174 of the Constitution must yield to Article 324 in the interest of genuine democracy and purity of

elections. Further, in the Commission's considered view, such interpretation of the provisions of Articles 174(1) and 324 would not create a situation which is not contemplated or envisaged under the constitution and which cannot be met thereunder. The non-observance of the provisions of Article 174(1) in the aforesaid eventuality would mean that the Government of the State cannot be carried on in accordance with the provisions of the Constitution within the meaning of Article 356(1) of the Constitution and the President would then step in.

* * * * *

61. After completion of this exercise to correct the electoral rolls and bringing them as up-to-date as possible and creation of conditions conducive for free and faire elections in the State, the Commission will consider framing a suitable schedule for the general election to the State Assembly in November – December 2002.

It may be noted here that the Election Commission in the written submissions filed and the submissions made before us has stated that the observations regarding imposition of President rule were not made in the context of Article 356 of the Constitution, which shall deal in detail infra. The third question relates to the exercise of power in the context of Article 174.

When the Reference was taken up for hearing we made it clear to the parties that the correctness of factual conclusions arrived at by Election Commission in its order shall not be considered by us. Only legal issues and the foundations therefore i.e. as recorded in the order were to be analysed. We also pointed out to learned counsel for the parties that while considering a Reference there is no adversarial lis involved. We record our appreciation that learned counsel appearing for the parties have placed their submissions as amicus curiae, though there was divergence in approach.

It was argued by some of the learned counsel that the Reference need not be answered because the questions do not arise out of the order of the Election Commission though the Preamble is based on the same. It is not imperative for the Court to answer the Reference and even if any doubt is entertained, that cannot be on hypothetical premises and answers which are self-evident and/or issues settled by this Court by its decisions need not be answered. It was submitted that the questions which are inherently incapable of being answered should not be answered. The Reference was as described by some of the learned counsel to be inappropriate and defective. It was submitted that the Reference is potentially political and seeking judicial review though disguised as a Reference. Per contra, submissions were made by some of the learned counsels who have submitted that the questions are of great national interest, and there is no political overtone and in order to avoid controversies in future and to have the law settled, the Reference has been made.

The questions referred are intrinsically linked with the conclusions of the Election Commissioner and are clearly relatable to it. The scope and ambit of reference under Article 143(1) has been examined by this Court in several cases. In some cases, this Court had declined to answer References on the ground that political issues are involved or that the Court does not act in exercise of appellate jurisdiction while dealing with a Reference. It will be proper to take note of few decisions on this aspect where References were not answered on the ground that they are potentially political or that the Advisory Jurisdiction is not appellate in character [See Dr. M. Ismail Faruqui and Ors. *v.* Union of India and Ors. (1994 (6) SCC 360) and in the matter of Cauvery Water Disputes Tribunal (1993) Supp 1 SCC 96(II)]

The Federal Court in Re The Allocation of Lands and Buildings in a Chief Commissioner's Province (AIR 1943 FC 13) a Reference under Section 213(1) of the Government of India Act which is similar to Article 143 said that though

the terms of that section do not impose an obligation on the Court, the Court should be unwilling to accept a Reference except for good reasons. This Court accepted the Reference for reasons which appeared to be of constitutional importance as well as in public interest.

In Re Kerala Education Bill (AIR 1958 SC 956-1959 SCR 995) Das, C.J. referred to the Reference in Re The Allocation of Lands and Buildings (supra) and the Reference in Re Levy of Estate Duty (AIR 1944 FC 73) and the observations in both the cases that the Reference should not be declined excepting for good reasons. This Court accepted the Reference on the questions of law arising or likely to arise. Das, C.J. in Re Kerala Education Bill (supra) said that it is for the President to determine what questions should be referred and if he does not have any serious "doubt" on the provisions, it is not for any party to say that doubts arise out of them. In short, parties appearing in the Reference cannot go behind the order of the Reference and present new questions by raising doubts. (See in Re: Presidential Poll 1974 (2) SCC 33)

This Court is bound by the recitals in the order of Reference. Under Article 145(1) we accept the statements of fact set out in the Reference. The truth or otherwise of the facts cannot be enquired or gone into nor can Court go into the question of bona fides or otherwise of the authority making the Reference. This Court cannot go behind the recital. This Court cannot go into disputed questions of fact in its advisory jurisdiction under Article 143(1).

The correct approach according to us has been laid down by a 7 Judge Bench in Special Reference No.1 of 1964 [commonly known as Keshav Singh Contempt Case] (1965) 1 SCR 413. After culling out the core issues (as seen at page 439) from the questions set out at pages 429, 430 at page 440 it was observed as follows:

> "Though the ultimate solution of the problem posed by the questions before us would thus lie within a very narrow compass, it

is necessary to deal with some wider aspects of the problem which incidentally arise and the decision of which will assist us in rendering our answers to the questions framed in the present Reference".

(Underlined for emphasis)

It would be appropriate to take note of certain pivotal provisions in the Constitution; Representation Peoples' Act, 1951 (in short 'R.P. Act, 1951) and the Government of India Act, 1935 (in short 'Government Act')

Article 172: Duration of State Legislature – (1) Every Legislative Assembly of every State, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the Assembly:

Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

(2) The Legislative Council of a State shall not be subject to dissolution, but a nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

Article 174: Sessions of the State Legislature, prorogation and dissolution – (1) The Governor shall from time to time summon the House or each House of the Legislature of the State to meet as such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.

(2) The Governor may from time to time—

(a) prorogue the House or either House;

(b) dissolve the Legislative Assembly

Article 324: Superintendence, direction and control of elections to be vested in an Election Commission – (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission).

(2) 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 and the appointment of the Chief Election Commissioner and the other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.

(3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission.

(4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by Clause (1).

(5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine:

Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the

Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment:

Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from the office except on the recommendation of the Chief Election Commissioner.

(6) The President, or the Governor of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commissioner by Clause (1).

Article 327: Power of Parliament to make provision with respect to elections to Legislatures — Subject to the provisions of this Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

Article356: Provisions in case of failure of constitutional machinery in States- (1) If the President, on receipt of report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may be Proclamation-

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State;

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament.

(c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State:

Provided that nothing in this clause shall authorize the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) Every Proclamation under this Article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament.

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People is dissolved or the dissolution of the House of the People takes place during the period of two months referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(4) A Proclamation so approved shall, unless revoked, cease to operate on

the expiration of a period of six months from the date of issue of the Proclamation.

Provided that if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which under this clause it would otherwise have ceased to operate, but no such Proclamation shall in any case remain in force for more than three years;

Provided further that if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States, but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People.

Provided also that in the case of the Proclamation issued under clause (1) on the 11th day of May, 1987 with respect to the State of Punjab, the reference in the first proviso to this clause to "three years" shall be construed as a reference to five years.

(5) Notwithstanding anything contained in clause (4), a resolution with respect to the continuance in force of a Proclamation approved under clause (3) for any period beyond the expiration of one year from the date of issue of such proclamation shall not be passed by either House of Parliament unless—

(a) a Proclamation of Emergency is in operation, in the whole India or, as the case may be, in the whole or any part of the State, at

the time of the passing of such resolution, and

(b) the Election Commission certifies that the continuance in force of the Proclamation approved under clause (3) during the period specified in such resolution is necessary on account of difficulties in holding general elections to the Legislative Assembly of the State concerned:

Provided that nothing in this clause shall apply to the Proclamation issued under clause (1) on the 11th day of May, 1987 with respect to the State of Punjab.

Representation of People Act, 1951

Section 14: Notification for general election to the House of the People – (1) A general election shall be held for the purpose of constituting a new House of the People on the expiration of the duration of the existing House or on its dissolution.

(2) For the said purpose the President shall, by one or more notifications published in the Gazette of India on such date or dates as may be recommended by the Election Commission, call upon all parliamentary constituencies to elect members in accordance with the provisions of this Act and of the rules and orders made thereunder:

Provided that where a general election is held otherwise than on the dissolution of the existing House of the People, no such notification shall be issued at any time earlier than six months prior to the date on which the duration of that House would expire under the provisions of clause (2) of Article 83.

Section 15: Notification for general election to a State Legislative Assembly - (1) a general election shall be held for the purpose of constituting a new Legislative Assembly on the expiration of the duration of the existing Assembly or on its dissolution.

(2) For the said purpose the Governor or the Administrator as the case may be shall, by one or more notifications published in the Official Gazette of the State on such date or dates as may be recommended by the Election Commission, call upon all Assembly constituencies in the State to elect members in accordance with the provisions of this Act and of the rules and orders made thereunder:

Provided that where a general election is held otherwise than on the dissolution of existing Legislative Assembly no such notification shall be issued at any time earlier than six months prior to the date on which the duration of that Assembly would expire under the provisions of clause (1) of Article 172 or under the provisions of the Section 5 of the Government of Union Territories Act, 1963, as the case may be.

Section 30: Appointment of dates for nomination etc.– As soon as the notification calling upon a constituency to elect a member or members is issued, the Election Commission shall, by notification in the Official Gazette, appoint—

(a) The date of publication of the first mentioned notification or, if that day is a public holiday the last date for making nominations, which shall be the seventh day after holiday, the next succeeding day which is not public holiday.

(b) The date for the scrutiny of nomination, which shall be, the day immediately following the last day for making nominations or, if that day is a public holiday, the next succeeding day which is not a public holiday;

(c) The last date for the withdrawal of candidature, which shall be the second day after the date for the scrutiny of nominations or, if that day is a public holiday, the next succeeding day which is not a public holiday.

(d) The date or dates on which a poll shall, if necessary, be taken which or the first of which shall be a date not earlier than the fourteenth day after the last date for the withdrawal of candidature; and

(e) The date before which the election shall be completed.

Section 73: Publication of results of general elections to the House of the People and the State Legislative Assemblies and of names of persons nominated thereto — Where a general election is held for the purpose of constituting a new House of the People or a new State Legislative Assembly, there shall be notified by the Election Commission in the Official Gazette, as soon as may be, after the results of the elections in all the constituencies other than those in which the poll could not be taken for any reason on the date originally fixed under Clause (d) of Section 30 or for which the time for completion of the election has been extended under the provisions of Section 153 have been declared by the returning officer under the provisions of section 53 or, as the case may be, Section 66, the names of the members elected for those constituencies and upon the issue of such notification that Hose or Assembly shall be deemed to be duly constituted:

Provided that the issue of such notification shall not be deemed-

(a) to preclude-

(i) the taking of the poll and the completion of the election in any Parliamentary or Assembly constituency or constituencies in which the poll could not be taken for any reason on the date originally fixed under clause (d) of Section 30; or

(ii) the completion of the election in any Parliamentary or Assembly constituency or constituencies for which time has been extended under the provisions of Section 153; or

(b) to affect the duration of the House of the People or the State Legislative Assembly, if any functioning immediately before the issue of the said notification.

Government of India Act, 1935:

18. Constitution of the Federal Legislature – (1) There shall be a Federal Legislature which shall consist of His Majesty, represented by the Governor General, and two Chambers, to be known respectively as the Council of State and the House of Assembly (in this Act referred to as "the Federal Assembly")

(2) The Council of State shall consist of one hundred and fifty-six representatives of British India and not more than one hundred and four representatives of the Indian States, and the Federal Assembly shall consist of two hundred and fifty representatives of British India and not more than one hundred and twenty-five representatives of the Indian States:

(3) The said representatives shall be chosen in accordance with the provisions in that behalf contained in the First Schedule to this Act.

(4) The Council of State shall be a permanent body not subject to dissolution, but as near as may be one-third of the members thereof shall retire in every third year in accordance with the provisions in that behalf contained in the said First Schedule.

(5) Every Federal Assembly, unless sooner dissolved, shall continue for five years from the date appointed for their first meeting and no longer, and the expiration of the said period of five years shall operate as a dissolution of the Assembly.

19. Sessions of the legislature, propagation and dissolution - (1) The Chambers of the Federal Legislature shall be summoned to meet once at least in every year, and twelve months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session.

2. Subject to the provisions of this section, the Governor-General may in his discretion from time to time—

(a) Summon the Chambers or either Chamber to meet at such time and place as he thinks fit;

(b) prorogue the Chambers;

(c) dissolve the Federal Assembly

3. The Chambers shall be summoned to meet for their first session on a day not later than such day as may be specified in that behalf in His Majesty's Proclamation establishing the Federation.

In the aforesaid background it would be expedient to render answers to the questions framed in the Reference.

The judicial aspect to these triple questions alone can attract judicial jurisdiction. However, even if we confine ourselves to legal problematic, eschewing the political overtones, the words of Justice Holmes will haunt the Court: "We are quite here, but it is the quite of a storm center". The judicature must, however, be illumined in its approach by a legal – sociological guideline and a principle-pragmatic insight in resolving with jural tools and techniques. 'the various crises of human affairs' as they reach the forensic stage and seek dispute-resolution in terms of the rule of law. Justice Cardozo felicitously set the perspective:

> The great generalities of the Constitution have a content and significance that vary from age to age.

Chief Justice Hidayatullah perceptively articulated the insight:

> One must, of course, take note of the synthesized authoritative content or the moral meaning of the underlying principle of the

> prescriptions of law, but not ignore the historic evolution of the law itself or how it was connected in its changing moods with social requirements of a particular age.

The old Articles of the suprema lex meet new challenges of life, the old legal pillars suffer new stresses. So we have to adopt the law and develop its latent capabilities if novel situations, as here, are encountered. That is why in the reasoning we have adopted and the perspective we have projected, not literal nor lexical but liberal and visional is our interpretation of the Articles of the Constitution and the provisions of Act. Lord Denning's words are instructive:

> "Law does not stand still. It moves continually. Once this is recognized, then the task of the Judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time. He must not be a mere mechanic a mere working mason, laying brick on brick, without thought to the overall design. He must be an architect – thinking of the structure as a whole building for society a system of law which is strong, durable and just. It is on his work that civilized society itself depends.

The constitutional scheme with regard to the holding of the elections to Parliament and the State Legislatures is quite clear. First, the Constitution has provided for the establishment of a high power body to be in charge of the elections to Parliament and the State Legislatures and of elections to the offices of President and Vice-President. That body is the Commission. Article 324 of the Constitution contains detailed provision regarding the constitution of the Commission and its general power. The superintendence, direction and control of the conduct of elections referred to in Article 324(1) of the Constitution are entrusted to the Commission. The words 'superintendence', 'direction' and 'control' are wide enough to include all powers necessary for the smooth conduct of elections. It is, however, seen that Parliament has been vested with the power to make law under Article 327 of the Constitution read

with Entry 72 of List I of the Seventh Schedule to the Constitution with respect to all matters relating to the elections to either House of Parliament or to the House or either House of the legislature of a State subject to the provisions of the Constitution. Subject to the provisions of the Constitution and any law made in that behalf by Parliament, the Legislature of a State may under Article 328 read with Entry 37 of the List II of the Seventh Schedule to the Constitution make law relating to the elections to the House or Houses of Legislature of that State. The general powers of superintendence, direction and control of the elections vested in the Commission under Article 324(1) naturally are subject to any law made either under Article 327 or under Article 328 of the Constitution. The word 'election' in Article 324 is used in a wide sense so as to include the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the result of the process. Article 324 of the Constitution operates in area left unoccupied by legislation and the words 'superintendence', 'direction' and 'control' as well as 'conduct of all elections' are the broadest terms which would include the power to make all such provisions. [See Mohinder Singh Gill v. Chief Election Commissioner New Delhi 1978 (1) SCC 405, A.C. Jose v. Sivan Pillai 1984 (2) SCC 656 and Kanhiya Lal Omar v. R.K. Trivedi and Ors. 1985 (4) SCC 628]

Before the scheme of the Constitution is examined in some detail it is necessary to give the pattern which was followed in framing it. The Constituent Assembly was unfettered by any previous commitment in evolving a constitutional pattern "suitable to the genius and requirements of the Indian people as a whole". The Assembly had before it the experience of the working of the Government Act several features of which could be accepted for the new Constitution. Our Constitution borrowed a great deal from the Constitutions of other countries, e.g. United Kingdom, Canada, Australia, Ireland, United States of America and Switzerland. The Constitution being supreme all the organs and bodies owe their existence to it. None can claim superiority over

the other and each of them has to function within the four-corners of the constitutional provisions. The Preamble embodies the great purposes, objectives and the policy underlying its provisions apart from the basic character of the State which was to come into existence, i.e. a Sovereign Democratic Republic. It is the executive that has the main responsibility for formulating the governmental policy by "transmitting it into law" whenever necessary. "The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State". With regard to the civil services and the position of the judiciary the British model has been adopted in as much as the appointment of Judges both of the Supreme Court of India and the High Courts of the States is kept free from political controversies. Their independence has been assured. But the doctrine of parliamentary sovereignty as it obtains in England does not prevail here except to the extent provided by the Constitution. The entire scheme of the Constitution is such that it ensures the sovereignty and integrity of the country as a Republic and the democratic way of life by parliamentary institutions based on free and fair elections. These aspects have been highlighted in Kesavananda Bharati's case (supra).

Democracy is a basic feature of the Constitution. Whether any particular brand or system of government by itself, has this attribute of a basic feature, as long as the essential characteristics that entitle a system of government to be called democratic are otherwise satisfied is not necessary to be gone into. Election conducted at regular, prescribed intervals is essential to the democratic system envisaged in the Constitution. So is the need to protect and sustain the purity of the electoral process. That may take within it the quality, efficacy and adequacy of the machinery for resolution of electoral disputes.

The first question essentially relates to the interplay between two Articles i.e. Article 174 and Article 324 of the Constitution. A bare reading of the aforesaid two Articles makes it clear that they operate in different fields. Article 174 appears in Chapter III of Part VI of the Constitution relating to State Legislature. The parallel provision, so far as the Union is concerned, is contained in Article 85 in Chapter II of Part V of the Constitution. Chapter III of Part VI with which we are presently concerned deals with State Legislature. Article 168 provides that for every State there shall be a Legislature which shall consist of the Governor and in four States with two Houses and in other States one House of the State. Where there are two Houses of the Legislatures of a State, one is known as a Legislative Council and other is Legislative Assembly and when there is only one House, it is known as the Legislative Assembly. Article 172 provides for the duration of State Legislatures. Article 174 deals with sessions of the State Legislatures, prorogation and dissolution. Under clause (1), the Governor is required to summon the House or each House of the Legislature of the State from time to time to meet at such time and place as he thinks fit. It further provides that six months shall not intervene between its last sitting of one session of the House and the date appointed for its first sitting in the next session of the House. The requirement relating to the meeting within the prescribed time period is the crucial issue in the reference. Clause (2) deals with power of the Governor to (a) prorogue the House or either House or (b) dissolve the Legislative Assembly. Almost in similar language are couched Articles 83 and 85. As has been rightly contended by some of the learned counsel, Articles 174 does not deal with elections. On the contrary, the occasion for holding of elections to be conducted by the Election Commission arise only after dissolution of the House. It is the stand of the Union of India, the Election Commission and some of the parties that the Election Commission is duty bound to ensure meeting of the House within the time indicated in Article 174 (1). According to them, the urgency and desirability involved in calling the meeting of the House cannot be frustrated by postponing elections. Thus, according to them, the Election Commission

has to ensure that the elections are held in time, so that the State Legislature can meet within the prescribed time period. On the other hand, learned counsel for some of the other parties have submitted that the period of six months does not operate in respect of the dissolved Assemblies. Election Commissioner under the Constitution is required to hold "free and fair election" and election which is not free and fair is, sham or manipulated, and no election at all. Article 174 according to them relates to the live assembly and not assembly which on dissolution has suffered civil death. It has been pointed out by them that no time period is prescribed for holding the elections after dissolution either in the Constitution or Representation of Peoples' Act, 1950 (in short R.P. Act 1950) and R.P. Act 1951'. The stand of the Union of India, the Election Commission and some of the parties is that in the scheme of the Constitution and the laws framed under Article 327, it is impossible to conceive that elections can be deferred indefinitely. According to them, the fact that elections constitute basic structure of the Constitution, the care taker Ministry is not the answer and not even imposition of President's Rule. According to them, President Rule can be imposed only if the enumerated circumstances exist and not otherwise. Imposition of President's Rule has to be ratified by both the Houses of Parliament. It is further submitted that Election Commissioner has to ensure holding of elections and not holding up the elections, and effort should be to take necessary assistance from the Centre and the States, if necessary, to hold the elections and that is why the third question has been referred. With reference to the languages used in Article 174 that is "between its last sitting in one session and the date appointed for its first sitting in the next session", it is pointed out that the House does not get dissolved, it is only the Legislative Assembly which gets dissolved. Therefore, the Election Commissioner is duty bound to see that Article 324 is exercised in such a manner that prescription under Article 174 is not diluted or rendered ineffective.

So far as Chapter III of Part VI is concerned, like Chapter III of Part V,

difference is made between the Legislature, the Legislative Assembly and the House of the People, as the case may be Article 79 says that there shall be a Parliament for the Union which shall consist of the President and the two Houses to be known respectively as the Council of States and the House of the People. As indicated above, in almost identical language is couched, Article 168, Clause (1) of which provides that for every State there shall be a Legislature which shall consist of the Governor etc. It was submitted by some of the learned counsels that the House is known as Legislative Assembly so far as the States are concerned and so far as the Parliament is concerned, two Houses are known as Legislative Council and the Legislative Assembly. According to them, it is only the nomenclature and that on the dissolution of the Legislative Assembly or the House of the People, as the case may be, there is no House in existence. This plea though attractive is not tenable. The question of holding elections by the Election Commissioner to meet the dead line fixed under Article 174, some times becomes impossible of being performed. In a hypothetical case if the House of People or the Legislative Assembly is dissolved a month before the expiry of the six months period, it becomes a practical impossibility to hold the election to meet the dead line. There may be several cases where acts of God intervene, rendering holding of election impossible even though a time schedule has been fixed. In such cases, even if the elections are held after six months period they do not become invalid. The Election Commission in such cases cannot be asked to perform the impossible. There lies the answer to the question whether Article 174 has mandatory attributes.

The House of the People or the Legislature is a permanent body. On dissolution of the House of the People or the Legislative Assembly, the House does not cease to be in existence. Dissolution in its broadest sense means decomposition, disintegration, undoing a bond. In a broad sense – the Constitutional – it implies the dismissal of an Assembly or the House of the People. Dissolution is an act of the Executive which dismisses the legislative

body and starts the process through exercise of franchise by the little men who are the supreme arbitrators of the State to put the new legislative body in place. The natural dissolution is on expiry of period fixed under the Constitution, and other mode of dissolution is by an act of the Executive. It is the lawful act of the Executive that prematurely dissolution ends the life of the Legislature. We are not concerned whether such an act of the Executive can be subject to judicial review which is another matter.

The exercise of the right of the Executive to dissolve the House of the People or the Legislative Assembly pre-supposes certain conditions i.e. (i) the existence of a representative body which is the object of dissolution and (ii) the act of the Executive which implies a separate and distinct state organ vested with the power of dissolve (iii) the consequential summoning of a new House of People or Legislative Assembly after the election is held by the Election Commission and the result notified after its conclusion.

The State organ vested with the right to dissolve Parliament must express its will to do so in a manner which accords with the Constitution, and the relevant laws. The primary consequence of dissolution is that House of People or the Legislative Assembly, as the case may be, legally ceases to exist and cannot perform its legislative functions. Such pre-mature interruption of the life of the House of the People or the Legislative Assembly as the case may be, amongst others factors affects it as a body as well as its individual members likewise its work is also abruptly ended, subject to prescribed exclusions, if any. Any further meeting of the ex-members has to be considered an ordinary meeting of citizens, and not an official session of the Legislative Assembly or House of People in the legislative capacity.

When the House meets after the results of election are notified and notification has been issued under the relevant law, it becomes a live body after it is duly constituted. The constituents of the body may have been changed but the constitutional body which is permanent one becomes alive

again. Therefore, the submission that under Article 174(1) time period fixed does not apply to dissolved Legislative Assembly has substance.

Dissolution brings a legislative body to an end. It essentially terminates the life of such body and is followed by a constitution of new body (a Legislative Assembly or a House of People, as the case may be). Prorogation on the other hand relates to termination of a session and thus preclude another session, unless it coincides with end of the legislative term. The basic difference is that prorogation unlike dissolution does not affect a legislative body's life which may continue from session to session, until brought to an end of dissolution. Dissolution draws the final curtain upon the House. Once the House is dissolved it becomes irrevocable. There is no power to recall the order of dissolution and / or revive the previous House. Consequently effect of dissolution is absolute and irrevocable. It has been described by some learned authors that dissolution "passes a sponge over the parliamentary slate". The effect of dissolution is in essence termination of current business of the legislative body, its sittings and sessions. There is a cessation of chain of sessions, sittings and for a dissolved legislative body and there cannot be any next session or its first sitting. With the election of legislative body a new Chapter comes into operation. Till that is done, the sine qua non of responsible government i.e. accountability is non-existent. Consequentially, the time stipulation is non-existent. Any other interpretation would render use of the word "its" in relation to "last sitting in one session" and "first sitting in the next session" without significance.

In providing key to the meaning of any word or expression the context in which it is said has significance. Colour and content emanating from context may permit sense being preferred to mere meaning depending on what is sought to be achieved and what is sought to be prevented by the legislative scheme surrounding the expression. It is a settled principle that in interpreting the statute the words used therein cannot be read in isolation. Their colour

and content are derived from their context and, therefore, every word in a statute must be examined in its context by the word 'context'. It means in its widest sense as including not only other enacting provisions of the same statute but its preamble, the existing state of the law, other statutes in pari materia and the mischief which the statues intended to remedy. While making such interpretation the roots of the past the foliage of the Present and the seeds of the future cannot be lost sight of Judicial interpretation should not be imprisoned in verbalism and words lose their thrust when read in vacuo. Context would quite often provide the key to the meaning of the word and the sense it should carry. Its setting would give colour to it and provide a cue to the intention of the Legislature in using it. A word is not a crystal, transparent and unchanged; it is the skin of living thought and may very greatly in colour and content according to the circumstances and the time in which the same is used as was observed by Holmes, J in Towne v. Eisner [(1917) 245 US 418m 425].

The following passage from Statutory Interpretation by Justice G.P. Singh (Eighth Edition 2001 atpp. 81-82) is an appropriate guide to the case at hand:

> "No word", says Professor H.A. Smith "has an absolute meaning, for no words can be defined in vacuo, or without reference to some context". According to Sutherland there is a "basic fallacy" in saying "that words have meaning in and of themselves", and "reference to the abstract meaning of words", states Craies, "if there be any such thing is of little value in interpreting matutes"… in determining the meaning of any word or phases in a statute the first question to be asked is "what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the Legislature, that it is proper to look for some

> other possible meaning of the word or phrase". The context, as already seen, in the construction of statutes, means the statute as a whole, the previous state of the law, other statutes in pari material the general scope of the statute and the mischief that was intended to remedy".

The judicial function of the Court in interpreting the Constitution thus becomes anti nomi. It calls for a plea upon a continuity of members found in the instrument and for meeting the domain needs and aspirations of the present. A constitutional court like this Court is a nice balance of jurisdiction and it declares the law as contained in the Constitution but in doing so it rightly reflects that the Constitution is a living and organic thing which of all instruments has the greatest claim to be construed broadly and liberally. [See M/s Goodyear India Ltd v. State of Haryana and Anr. (AIR 1990 SC 781) and Synthetics and Chemicals Ltd. v. State of U.P. and Ors. (AIR 1990 SC 1927).

In the interpretation of a constitutional document words are but the frame work of concepts and concepts may change more than words themselves. The significance of the change of the concepts themselves is vital and the constitutional issues are not sovled by a mere appeal to the meaning of words without an acceptance of the line of their growth. It is aptly said that the intention of the Constitution is rather to outline principels than to engrave details. (See R.C. Poudyal v. Union of India and Ors. (AIR 1993 SC 1804)

In Purushothaman Nambudiri v. The State of Kerala (1962 Supp (1) SCR 753), a Constitution Bench of this Court observed as follows:

> "Dissolution of Parliament is sometimes described as 'a civil death of Parliament'. IIbert, in his work on 'Parliament', has observed that 'prorogation means the end of a session (not of a Parliament)';
>
> "in any case, there is no continuity in the personality of the Assembly where the life of one Assembly comes to an end and another Assembly is in due course elected."

It will be also clear from the Constituent Assembly Debates (vis-à-vis Article 153 – presently Article 174) that the stress was on frequent meetings of long durations of live Legislative Assembly.

In May's Parliamentary Practice, the following paragraph reinforces the view:

> "A session is the period of time between the meeting of a Parliament, whether after the prorogation or dissolution, and its prorogation. During the course of a session, either House may adjourn itself of its own motion to such as it pleases. The period between the prorogation of Parliament and its reassembly in a new session is termed as 'recess': while the period between the adjournment of either House and the resumption of its sitting is generally called an 'adjournment'.
>
> A prorogation terminates a session; an adjournment is an interruption in the course of one and the same session."

There is a direct decision of the Kerala High Court in K.K. Aboo v. Union of India (AIR 1965 Kerala 229) on the point. It was inter alia observed as follows:

> "A Legislature can be summoned to meet only if it is in esse at the time. A dissolved Legislature is incapable of being summoned to meet under Article 174 of the Constitution. The question therefore is not whether the Legislature should or could have been summoned to meet, but whether its dissolution ordered by the President, is constitutionally valid."

The view is well founded.

The position gets further clear that one looks at the original Article 174 which was amended in 1951. The un-amended Article 174 reads

as follows:

> "174(1) The House or Houses of the Legislature of the State shall be summoned to meet twice at least in every year, and six months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session.
>
> (2) Subject to the provisions of clause (1), the Governor may from time to time–
>
> (a) summon the House or either House to meet at such time and place as he thinks fit;
>
> (b) prorogue the House or Houses."

Having reached the conclusion that Article 174 in terms does not apply to dissolved Assembly (similar in the case of Article 85 in case of House of People), the other question that survives consideration is that can there be a time limit fixed for holding the elections in such cases? It has been emphatically submitted by some of the learned counsel that the Constitution does not provide for any time of limitation, nor does the R.P. Act.

Can it be said that the framers of the Constitution intended that in case of life of the elected body comes to an end on expiry of the fixed duration, a time limit for holding elections is imperative, while in the case of a pre-mature dissolution it does not so?

Sections 14 and 15 of R.P. Act, 1951 deal with notification for general election to the House of the People and the State Legislative Assemblies respectively. It is clearly stipulated that notification for holding the election cannot be issued at any time earlier than 6 months prior to the date on which the duration of the House will expire under provisions of clause (2) of Article 83 or under clause (1) of Article 172 respectively. The obvious purpose is that

the President or the Governor, as the case may be, to call upon the electorate to elect members in accordance with the provisions of the Rules, Act and the orders made thereunder on such dates as may be recommended by the Election Commission. The dates are to be so fixed that they are not much prior to the expiry of the duration. Here also, the underlying object is that the elected members are to continue for the full term. It has been fairly accepted by learned counsel for the parties who submitted that there is no time limit fixed that there should always be a responsible Government. Over Constitution establishes a democratic republic as is indicated in the Preamble to the Constitution itself and Cabinet system of Government is generally known as the responsible government. We may notice here that in a democracy the sovereign powers vest collectively to the three limbs i.e. the executive, legislatures and the judiciary. Section 14 of the R.P. Act, 1951 mandates that general elections shall be held for the purpose of constituting the new House of People on the expiry of the duration of the existing House or on its dissolution. Similar is in the case of Legislative Assembly in the background of Section 15. When the election is to be held on the expiry of the fixed term, the Election Commissioner knows the date in advance and can accordingly fix up schedule of the election. The problem arises when there is a pre-mature dissolution. In that case, the Election Commissioner becomes aware only after the dissolution takes place. He cannot, therefore, fix up any schedule in advance in such a case. The consequential fall out of not holding election for a long time is the functioning of a caretaker government which is contrary to the principles of responsible Government. The caretaker government is not the solution to deferring elections for unduly long periods.

As noted above, due to unforeseen contingencies it may become impossible to constitute new House of People or the Legislative Assembly. Deferring an election is an exception to the requirement that elections should be held as early as practicable. The requirement of summoning the House has inbuilt in it; the existence of a House capable of being summoned.

Therefore even in the case of pre-mature dissolution, effort of the Election Commission should be to hold elections in time so that a responsible government is in office. At the cost of repetition it may be indicated that where free and fair election is not possible to be held, there may be inevitable delay. But reasons for deferring elections should be relatable to acts of God and normally not acts of man. Myriad reasons may be there for not holding elections.

In determining the question whether a provision is mandatory or directory, the subject matter, the importance of the provisions, the relation of the provision to the general object intended to be secured by the Act will decide whether the provision is directory or mandatory. It is the duty of the courts to get the real intention of the legislature by carefully attending the whole scope of the provision to be construed. The key to the opening of every law is the reason and spirit of the law, it is the animus impotentia, the intention of the law maker expressed in the law itself, taken as a whole". (See Bratt v. Bratt (1826) 3 Addams 210 at p 216)

The necessity for completing the election expeditiously is enjoined by the Constitution in public and State interest to see that the governance of the country is not paralysed.

The impossibility of holding the election is not a factor against the Election Commission. The maxim of law impotentia exusat legem is intimately connected with another maxim of law lex non cogit ad impossibilia. Impotentia excusat legem is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him." Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over

which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance of the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See Broom's Legal Maxims 10th Edition at pp. 1962-63 and Craies on Statute Law 6th Ed. P. 268). These aspects were highlighted by this Court in Special Reference 1 of 1974 (1975 (1) SCR 504). Situations may be created by interested persons to see that elections do not take place and the caretaker government continue in office. This certainly would be against the scheme of the Constitution and the basic structure to that extent shall be corroded.

A responsible Government provides for a healthy functioning. The democracy has to be contrasted with a caretaker government which is ad hoc in all its context and which is not required to take any policy decision. A piquant situation may arise when a Cabinet of Ministers being sure that it will loose the vote of confidence, calls for a dissolution a few days before the expiry of the six months' period in terms in Article 174 knowing fully well that the elections cannot be held immediately continues as the care taker government. Let us take another hypothetical case, where free and fair elections are not possible and caretaker government continues in office because of man made situations. Here the Election Commissioner has a duty to lift the veil, see the design and make all possible efforts to hold the elections so that a responsible government takes place in office. Question then arises as to how a impasse can be avoided when an Assembly or the House of People is dissolved and election can be held immediately so that six months' period is not given a go by, between the last sitting of the dissolved one and the first sitting of the duly constituted subsequent one. One of the solutions can be that an emergent session which is usually described as 'lame duck' session can be convened, and immediately thereafter the dissolution can be notified. In such a situation, the Election Commissioner gets sufficient time to hold the election subject of

course to the paramount consideration that it is free and fair one; thereby enabling functioning of the next session of the duly constituted elected body to meet within six months from the date of dissolution. For practical purposes the six months' period then would being from the date of dissolution.

Free and fair election is the sine qua non of democracy. The scheme of the Constitution makes it clear that two distinct Constitutional authorities deal with election and calling of session. It has been pointed out to us that as a matter of practice the elections are completed within a period of six months from the date of dissolution, on completing the prescribed tenure or on pre-mature dissolution except when for inevitable reasons there is a delay. The Election Commissioner is a high constitutional authority charged with the duty of ensuring free and fair elections and the purity of electoral process. To effectuate the constitutional objective and purpose it is to draw upon all incidental and ancillary powers. Six months' period applicable to elections held on expiry of the prescribed term would be imperatively applicable to elections held after pre-mature dissolution. This is course would be subject to such rare exceptional cases occasioned on account of facts situation (like acts of God) which make holding of elections impossible. But man made situation intended to defer holding of elections should be sternly dealt with and should not normally be a ground for deferring elections beyond six months period, starting point of which would be the date of dissolution. As was observed in Digvijay Mote v. Union of India and Ors. (1993(4) SCC 175), timely election which is not free and fair subverts democracy and frustrates the ultimate responsibility to assess objectively whether free and fair election is possible. Any man made attempt to obstruct free and fair election is antithesis to democratic norms and should be overcome by garnering resources from the intended sources and by holding the elections within the six months' period."

Reference was made to Article 164(4) of the Constitution to contend that six months' period for holding election is in built in Article 174. It has to be

noted that as observed by this Court in S.R. Chaudhuri v. State of Punjab and Ors. (2001 (7) SCC 126) the provisions is not really concerned with holding of elections and primarily relates to a requirement to get elected within the time prescribed. The said provision contemplates a situation where a Minister in a Legislature in existence has to be elected, it does not deal with a non-existing House and in this background, there is nothing to do with Article 174.

The second question has really lost its sting because of the submissions made before this Court on behalf of the Election Commission.

So far as applicability of Article 356 is concerned, though in the order the Election Commission has specifically dealt with the possibility of applying that situation, in the written submissions and the arguments made before this Court the view was given a go by; and in our view rightly. Mere non-compliance of Article 174 so far as the time period is concerned, does not automatically bring in Article 356. It is made clear that the order of the Election Commissioner is the foundation and not what is stated subsequently by way of an affidavit or submissions to clarify. But in view of the concession, which according to us is well founded, we need not go into the question in detail. It was submitted by some of the learned counsel that the Election Commission's order otherwise makes out a case for applying Article 356. We are not concerned with those as the Reference only related to application of Article 356 when the requirement of Article 174 is not met. In K.N. Rajgopal v. Thiru M. Karunanidhi (1972 (4) SCC 733), a Constitution Bench of this Court inter alia, observed as follows:

> "……Article 356 of the Constitution makes provisions in case of failure of constitutional machinery in the State. But when an Assembly is dissolved there is no failure of constitutional machinery within Article 356".

A similar observation was made by one of us (Hon'ble V.N. Khare, J. as His Lordship was then) in Arun Kumar Rai Chaudhury v. Union of India (AIR 1992 Allahabad 1). His Lordship succinctly stated the position as follows:

> "This question came up for consideration before Supreme Court in the case of U.N.R. Rao v. Indira Gandhi [(1971) 2 SCC 63] and Thiru K.N. Rai Gopal v. M. Karuna Nidhi [(1972) 4 SCC 733] The Supreme Court while interpreting Arts. 74 and 75 as well as Arts. 163 and 164 of the Constitution held that even if the House is dissolved, the Council of Ministers continues. These decisions squarely cover the case before us. Following these decisions we hold that after the Governor of the State of U.P. dissolved the Legislative Assembly and directions were issued for holding fresh poll for constituting the Legislative Assembly, the Council of Ministers continues. Further there being no failure of constitutional machinery within the meaning of Article 356 of the Constitution, the contention that the President of India ought to have promulgated President Rule in the State for carrying on the function of the Government must be rejected."

Situations when Article 356 can be resorted to have been illuminatingly highlighted in S.R. Bommai v. Union of India (1994 (3) SCC 1). The following observations very aptly summarized the position.

> "…..Article 356 is an emergency provision though, it is true, it is qualitatively different from the emergency contemplated by Article 352, or for that matter, from the financial emergency contemplated by Article 360. Undoubtedly, breakdown of the Constitutional machinery in a State does give rise to a situation of emergency. Emergency means a situation which is not normal, a situation which calls for urgent remedial action. Article 356 confers a power to be exercised by the President in exceptional circumstances to

> discharge the obligation cast upon him by Article 355. It is a measure to protect and preserve the Constitution, consistent with his oath. He is as much bound to exercise this power in a situation contemplated by Article 356 as he is bound not to use it where such a situation has not really arisen."

It has been further observed:

> "…..He has to exercise his powers with the aid and advice of the Council of Ministers with the Chief Minister at its head (Article 163). He takes the oath, prescribed by Article 159, to preserve, protect and defend the Constitution and the laws to the best of his ability. It is this obligation which requires him to report to the President the commissions and omissions of the Government of his State which according to him are creating or have created a situation where the Government of the State cannot be carried on in accordance with the provisions of the Constitution. In fact, it would be a case of his reporting against his own Government but this may be a case of his wearing two hats. One as the head of the State Government and the other as the holder of an independent constitutional office whose duty it is to preserve, protect and defend the Constitution (See Shamsher Singh v. State of Punjab 1974 (2) SCC 831 at p. 849). Since he cannot himself take any action of the nature contemplated by Article 356(1), he reports the matter to the President and it is for the President to be satisfied – whether on the basis of the said report or on the basis of any other information which he may receive otherwise – that situation of the nature contemplated by Article 356(1) has arisen…."

The third question is to be considered in the background of what has been observed supra about scope and ambit of Article 174. It does not relate to holding of elections. Therefore, the question of seeking control or State

assistance does not arise. However, the Election Commission and the Governments (Central and / or State) have well – defined roles to play to ensure free and fair election. The parameters have been laid down by this Court in several cases e.g. Election Commission of India v. State of Haryana (1984 (3) SCR 554). Election Commission of India v. Union of India and Ors. (1995 supp (3) SCC 643), Election Commission of India v. State of T.N. and Ors. (1995 supp (3) SCC 379). Some of the relevant observations need to be noticed.

In Tamil Nadu's case (supra) it was observed.

> "The Election Commission of India is a high constitutional authority charged with the function and the duty of ensuring free and fair elections and of the purity of the electoral process. It has all the incidental and ancillary powers to effectuate the constitutional objective and purpose. The plenitude of the Commission's powers corresponds to the high constitutional functions it has to discharge. In an exercise of the magnitude involved in ensuring free and fair elections in the vastness of our country, there are bound to be differences of perception as to the law and order situation in any particular constituency at any given time and as to the remedial requirements. Then again, there may be intrinsic limitations on the resources of the Central Government to meet in full the demands of the Election Commission. There may again be honest differences of opinion in the assessment of the magnitude of the security machinery. There must, in the very nature of the complexities and imponderables inherent in such situations, be a harmonious functioning of the Election Commission and the Government both State and Central. If there are mutually irreconcilable viewpoints, there must be a mechanism to resolve them. The assessment of the Election Commission as to the state of law and order and the

> nature and adequacy of the machinery to deal with situations so as to ensure free and fair elections must, prima facie, prevail. But, there may be limitations of resources. Situation of this kind should be resolved by mutual discussion and should not be blown up into public confrontations. This is not good for a healthy democracy. The Election Commission of India and the Union Government should find a mutually acceptable coordinating machinery for resolution of these differences."

To sum up, answers to the questions set out in the Reference are as follows:

1. The provisions of Article 174 are mandatory in character so far as the time period between two sessions is concerned in respect of live Assemblies and not dissolved Assemblies Article 174 and Article 324 operate in different fields. Article 174 does not deal with elections which is the primary function of the Election Commission under Article 324. Therefore, the question of one yielding to the other does not arise. There is scope of harmonizing both in a manner indicated supra

2. Article 174 is not relatable to a dissolved Assembly. Similar is the position under Article 85 vis-à-vis House of People. Merely because the time schedule fixed under Article 174 cannot be adhered to that per se cannot be the ground for bringing into operation Article 356.

3. As Article 174 does not deal with election, the question of Election Commissioner taking the aid, assistance or co-operation of the Center or the State Governments or to draw upon their resources to hold the election does not arise. On the contrary for effective operation of Article 324 the Election Commission can do so to ensure holding of free and fair election. The question whether free and fair election is possible to be held or not has to be objectively assessed by the Election Commission by taking into consideration all relevant

aspects. Efforts should be to hold the election and not to defer holding of election.

Sd/-

..... J.

(ARIJIT PASAYAT)

New Delhi
October 28, 2002

SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 490 OF 2002

People's Union for Civil Liberites (PUCL) & another ..... Petitioners

Vs.

Union of India and another ..... Respondents

WITH

WRIT PETITION (CIVIL) NO. 509 OF 2002

Lok Satta and Others ..... Petitioners

Vs.

Union of India ..... Respondent

AND

WRIT PETITION (CIVIL) NO. 515 OF 2002

Association for Democratic Reforms ..... Petitioner

Vs.

Union of India and another ..... Respondents

Date of Order : 13.03.2003

SUMMARY OF THE CASE

Three writ petitions under Article 32 of the Constitution of India were filed challenging the validity of the Representation of People (Amendment) Ordinance, 2002. During the pendency of petitions, the Ordinance was repealed and the

Representation of the People (3rd amendment) Act, 2002 was notified. Section 33A of amended Act provides that a candidate shall furnish certain information mentioned therein. Section 33B (ibid) provides that candidate to furnish information only under the Act and the Rules made thereunder. It was contended that some of the directions which were issued by Supreme Court in *Association for Democratic Reforms* case have been incorporated in amended Act but with regard to remaining directions, it has been provided therein that no candidate shall be liable to disclose or furnish any such information in respect of his election which is not required to be disclosed or furnished under the Act and Rules made thereunder. Therefore the provisions of Section 33B (ibid) were challenged.

The Court held that :

(a) Legislature is entitled to change the law with retrospective effect which forms the basis of a judicial decision but this exercise of power is subject to constitutional provision, therefore, it cannot enact a law which is violative of fundamental right.

(b) Amended Act does not wholly cover the directions issued by the Court. On the contrary, it provides that candidate would not be bound to furnish certain information as directed by the Supreme Court.

(c) The judgement rendered in Association for Democratic Reforms has attained finality and therefore there is no question of interpreting constitutional provision.

(d) Right to vote would be meaningless unless the citizens are well informed about the antecedents of a candidate. The amended law is deficient in ensuring free and fair elections.

(e) The attempt of the Court should be to expand the reach and ambit of the fundamental rights by process of judicial interpretation and it has been done by this Court consistently.

In result, section 33-B of the Amended Act held to be illegal, null and void and petitions disposed of accordingly.

[The petitions were heard by the bench consisting of 3 judges. Each Judge has passed the separate Orders, but mainly concurred on the finding as mentioned above].

J U D G E M E N T

Shah. J.

These writ petitions under Article 32 of the Constitution of India have been filed challenging the validity of the Representation of the People (Amendment) Ordinance, 2002 (No.4 of 2002) ("Ordinance" for short) promulgated by the President of India on 24th August, 2002.

There was an era when a powerful or a rich or a strong or a dacoit aged more than 60 years married a beautiful young girl despite her resistance. Except to weep, she had no choice of selecting her male. To a large extent, such situation does not prevail today. Now, young persons are selecting mates of their choice after verifying full details thereof. Should we not have such a situation in selecting a candidate contesting elections? In a vibrant democracy — is it not required that a little voter should know bio-data of his/her would be Rulers, Law-makers or Destiny-makers of the Nation?

Is there any necessity of keeping in dark the voters that their candidate was involved in criminal cases of murder, dacoity or rape, or has acquired the wealth by unjustified means? May be that he is acquitted because Investigating Officer failed to unearth the truth or because the witnesses turned hostile. In some cases, apprehending danger to their life, witnesses fail to reveal what was seen by them.

Is there any necessity of permitting candidates or his supporters to use unaccounted money during elections? If assets are declared, would it not amount to having some control on unaccounted election expenditure?

It is equally true that right step in that direction is taken by amending the Representation of the People Act, 1951 (hereinafter referred to as 'the Act') on the basis of judgement rendered by this Court in Union of India v. Association for Democratic Reforms [(2002) 5 SCC 294]. Still however, question to be decided is – whether it is in accordance with what has been declared in the said judgment?

After concluding hearing of the arguments on 23rd October, 2002 the matter was reserved for pronouncement of judgment. Before the judgement could be pronounced, the Ordinance was repealed and on 28th December 2002, the representation of the people (3rd Amendment) Act, 2002 ("Amended Act" for short) was notified to come into force with retrospective effect. Thereafter, an amendment application was moved before us challenging the validity of Section 33B of the Amendment Act which was granted because there is no change in the cause of action nor in the wording of Section 33B of the 'Amended Act' validity of which is under challenge. At the request of learned counsel for the respondent-Union of India, time to file additional counter was granted and the matter was further heard on 31st January, 2003.

It is apparent that there is no change in the wording (even full stop or coma) of Sections 33A and 33B of the Ordinance and Sections 33A and 33B of the Amended Act. The said Sections read as under –

> **"33A. Right to information** — (1) A candidate shall, apart from any information, which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub-section (1) of section 33, also furnish the information as to whether -
>
> (i) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction;

(ii) he has been convicted of an offence other than any offence referred to in sub-section (1) or sub-section (2), or covered in sub-section (3), of section 8 and sentenced to imprisonment for one year or more.

(2) The candidate or his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub-section (1) or section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form verifying the information specified in sub-section(1).

(3) The returning officer shall as soon as may be after the furnishing of information to him under sub-section (1), display the aforesaid information by affixing a copy of the affidavit, delivered under sub-section (2) at a conspicuous place at this office for the information of the electors relating to a constituency for which the nomination paper is delivered."

33B. Candidate to furnish information only under the Act and the rules.— Notwithstanding anything contained in any judgement, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this act or the rules made thereunder."

For the directions, which were issued in *Association for Democratic Reforms* (supra), it is contended that some of them are incorporated by the statutory provisions but with regard to remaining directions it has been provided therein that no candidate shall be liable to disclose or furnish any such information in respect of his election which is not required to be disclosed or furnished under the Act or the Rules made thereunder despite the directions issued by this Court. Therefore, the aforesaid Section 33B is under challenge.

At the outset, we would state that such exercise of power by the Legislature giving similar directions was undertaken in the past and this Court in unequivocal words declared that the Legislature in this country has not power to ask the instrumentalities of the state to disobey or disregard the decisions given by the Courts. For this, we would quote some observations on the settled legal position having direct bearing on the question involved in these matters: —

A. Dealing with the validity of Bombay Provincial Municipal Corporation (Gujarat Amendment and Validating Provisions) Ordinance 1969, this Court in ***The Municipal Corporation of the City of Ahmedabad and another*** v. ***The New shrock Spg. And Wvg. Co. Ltd.*** [(1970) 2 SCC 280] observed thus:-

> "7. ***This is a strange provision.*** Prime facie that provision appears to command the Corporation to refuse to refund the amount illegally collected despite the orders of this Court and the High Court. The State of Gujarat was not well advised in introducing this provision. That provision attempts to make a direct inroad into the judicial powers of the State. The Legislatures under our Constitution have within the prescribed limits, powers to make laws prospectively as well as retrospectively. ***By exercise of those powers, the Legislature can remove the basis of a decision rendered by a competent court thereby rendering that decision ineffective. But no Legislature in this country has power to ask the instrumentalities of the State to disobey or disregard the decisions given by courts....***"

Further, Khanna, J. in ***Smt. Indira Nehru Gandhi v. Shri Raj Narain*** [1975 Supp. SCC1] succinetly and without any ambiguity observed thus:-

> **"190.** A declaration that an order made by a court of ***law is void is normally part of the judicial function and is not a legislative function.*** Although there is in the Constitution of India no rigid

separation of powers, by and large the spheres of judicial function and ***legislative function have been demarcated and it is not permissible for the Legislature to encroach upon the judicial sphere. It has accordingly been held that a Legislature while it is entitled to change with retrospective effect the law which formed the basis of the judicial decision, it is not permissible to the Legislature to declare the judgement of the court to be void or not binding.***

It is also settled law that the Legislature may remove the defect which is the cause for invalidating the law by the Court by appropriate legislation if it has power over the subject matter and competence to do so under the Constitution.

B. Secondly, we would reiterate that the primary duty of the Judiciary is to uphold the Constitution and the laws without fear or favour, without being biased by political ideology or economic theory. Interpretation should be in consonance with the Constitutional provisions, which envisage a republic democracy. Survival of democracy depends upon free and fair election. It is true that the elections are fought by political parties, yet election would be a farce if the voters are unaware of antecedent of candidates contesting elections. Their decision to vote either in favour of 'A' or 'B' candidate would be without any basis. Such election would be neither free nor fair.

For this purpose, we would refer to the observations made by Khanna, J. in ***His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and another [(1973) 4 SCC 255],*** which read thus—

"That all constitutional interpretations have political consequences should not obliterate the fact that the decision has to be arrived at in the clam and dispassionate atmosphere of the court room, that judges in order to give legitimacy to their decision have to keep aloof from the din and controversy of politics and that the fluctuating fortunes of rival political parties can have for them only academic interest. ***Their primary duty is to uphold the***

> ***Constitution and the law without fear or favour and in doing so, they cannot allow any political ideology or economic theory, which may have caught their fancy, to colour the decision."***

C. It is also equally, settled law that the Court should not shirk its duty from performing its function merely because it has political thicket. Following observations (of Bhagwati, J., as he then was) made in ***State of Rajasthan*** v. ***Union of India*** [(1977) 3 SCC 592] were referred to and relied upon by this Court in ***B.R. Kapur*** v. ***State of Tamil Nadu*** [(2001) 7 SCC 231]:

> **"53.** But merely because the question has a political complexion, that by itself is no ground why the court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination. Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political… ***So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so.*** It is necessary to assert the clearest possible terms, particularly in the context of recent history, that the constitution is suprema lex, the paramount law of land, and there is no department or branch of Government above or beyond it."

SUBMISSIONS :-

It is contended by learned Senior Counsel Mr. Rajinder Sachar and Mr. P.P. Rao for the petitioners that the Section 33B is, on the face of it, arbitrary and unjustifiable. It is their contention that the aforesaid section is on the face of it void as a law cannot be passed which violates abridges the fundamental rights of the citizens/voters, declared and recognized by this Court. It is submitted that without exercise of the right to know the relevant antecedents of the candidate. It will not be possible to have free and fair elections. Therefore, the impugned Section violates the very basic features of the constitution, namely, republic democracy. For having free and fair elections, anywhere in the territory of this country, it is necessary to

give effect to the voters' fundamental right as declared by this Court in the above judgment.

It has been contended that, in our country, at present about 700 legislators and 25 to 30 Members of Parliament are having criminal record. It is also contended that almost all political parties declare that persons having criminal record should not be given tickets, yet for one or other reason. Political parties under some compulsion give tickets to some persons having criminal records and some persons having no criminal records get support from criminals. It is contended by learned senior counsel Mr. Sachar that by issuing the Ordinance, the Government has arrogated to itself the power to decide unilaterally for nullifying the decision rendered by this Court without considering whatever it can pass legislation which abridges fundamental right guaranteed under Article 19(1)(a). It is his submission that the Ordinance is issued and thereafter the Act is amended because it appears that the Government is interested in having uninformed ignorant voters.

Contra, learned Solicitor General Mr. Kirit N Raval and learned senior counsel Mr. Arun Jaitely appearing on behalf of the intervenor, with vehemence, submitted that the aforesaid Ordinance / Amended Act is in consonance with the judgment rendered by this Court and the vacuum pointed out by the said judgement is filled in by the enactment. It is also contended by learned senior counsel Mr. Jaitley that voters' right to know the antecedents of the candidate is not part of the fundamental rights, but it is a derivative fundamental right on the basis of interpretation of Article 19(1)(a) given by this Court. It is submitted that the Ordinance / Amended Act is in public interest and, therefore, it cannot be held to be illegal or void. In support of their contentions, learned counsel for the parties have referred to various decisions rendered by this Court.

WHETHER ORDINANCE/AMENDED ACT COVERS THE DIRECTIONS ISSUED BY THIS COURT:

Before dealing with the rival submissions, we would refer to the following directions (para 48) given by this court in ***Association for Democratic Rights case*** (supra):

> "The Election Commission is directed to call for information on affidavit by issuing necessary order in exercise of its power under

Article 324 of the Constitution of India from each candidate seeking election to Parliament or a State Legislature as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his/her candidature:-

(1) Whether the candidate is convicted / acquitted / discharged of any criminal offence in the past — if any, whether he is punished with imprisonment or fine?

(2) Prior to six months of filing of nomination, whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more and in which charge is framed or cognizance is taken by the Court of law. If so, the details thereof?

(3) The assets (immovable, movable, bank balance etc.) of a candidate and of his / her spouse and that of dependants.

(4) Liabilities, if any, particularly whether there are any over dues of any public financial institution or Government dues.

(5) The educational qualifications of the candidate."

The learned counsel for the respondent submitted that the directions issued by this Court are, to a large extent, implemented by... the aforesaid Amended Act. It is true that some part of the directions issued by this Court are implemented. Comparative Chart on the basis of Judgment and Ordinance would make the position clear:-

Subject	**Discussion in Judgement dt. 2.5.2002**	**Provisions under Impugned Ordinance/Amended Act**
Past Criminal Record	**Para 48(1)** All past convictions/acquittals/ discharges, whether punished with imprisonment or fine.	**S. 33A(1)(ii)** Conviction of any offence (except S.8 offence) and sentenced to imprisonment of one year or more. No such declaration in case of acquittals or discharge. (S.8 offences to be disclosed in nomination paper itself).

Pending Criminal Cases	**Para 48(2)** Prior to six months of filing of nomination, whether the candidate has been accused of any criminal offence punishable with imprisonment of two years or more,and charge framed or cognizance taken.	**S.33A(1)(i)** Any case in which the candidate has been accused of any criminal offence punishable with imprisonment of two years or more, and charge framed.
Assets and Liabilities	**Para 48(3)** Assets of candidate (contesting the elections) spouse and dependants.	**S.75A** No such declaration by a candidate who is contesting election. After election, elected candidate is required to furnish information relating to him as well as his spouse and dependent children's assets to the Speaker of the House of People.
	Para 48(4) Liabilities, particularly to Government and public financial institutions.	No provision is made for the candidate contesting election. However, after election, Section 75A(1)(ii) & (iii) provides for elected candidate.
Educational Qualfiications	**Para 48(5)** To be declared.	No provision.
Breach of Provisions	No direction regarding consequences of non-compliance.	**S. 125A** Creates an offence punishable by imprisonment for six months or fine for failure to furnish affidavit in accordance with S.33A, as well as for falsity or concealment in affidavit or nomination paper. **S.75A(5)** Wilful contravention of Rules regarding asset disclosure may be treated as breach of privilege of the House.

From the aforesaid chart, it is clear that a candidate is not required to disclose (a) the cases in which he is acquitted or discharged of criminal offence(s); (b) his assets and liabilities; and (c) his educational qualification. With regard to assets, it is sought to be contended that under the Act the candidate would be required to disclose the same to the Speaker after being elected. It is also contended that once the person is acquitted or discharged of any criminal offence, there is no necessity of disclosing the same to the voters.

FINALITY OF THE JUDGEMENT

Firstly, it is to be made clear that the judgement rendered by this Court in ***Association for Democratic Reforms*** (Supra) has attained finality. The voters' right to know the antecedents of the candidates is based on interpretation of Article 19(1) (a) which provides that all citizens of this country would have fundamental right to "freedom of speech and expression" and this phrase is construed to include fundamental right to know relevant antecedents of the candidate contesting the elections.

Further, even though we are not required to justify the directions issued in the aforesaid judgement, to make it abundantly clear that it is not ipse dixit and is based on sound foundation, it can be stated thus—

- Democratic Republic is part of the basic structure of the Constitution.

- For this, free and fair periodical elections based on adult franchise are must.

- For having unpolluted healthy democracy, citizens – voters should be well-informed.

So, the foundation of a healthy democracy is to have well-informed citizens-voters. The reason to have right of information with regard to the antecedents of

the candidate is that voter can judge and decide in whose favour he should cast his vote. It is voter's discretion whether to vote in favour of an illiterate or literate candidate. It is his choice whether to elect a candidate against whom criminal cases for serious or non-serious charges were filed but is acquitted or discharged. He is to consider whether his candidate may or may not have sufficient assets so that he may not be tempted to indulge in unjustified means for accumulating wealth. For assets or liability, the voter may exercise his discretion in favour of a candidate whose liability is minimum and/or there are no over-dues of public financial institution or government dues. From this information, it would be, to some extent, easy to verify whether unaccounted money is utilized for contesting election and whether a candidate is contesting election for getting rich or after being elected to what extent he became richer. Exposure to public scrutiny is one of the known means for getting clean and less polluted persons to govern the country. A little man — a citizen — a voter is the master of his vote. He must have necessary information so that he can intelligently decide in favour of a candidate who satisfies his criterion of being elected as M.P. or M.L.A. On occasions, it is stated that we are not having such intelligent voters. This is no excuse. This would be belittling a little citizen/ voter. He himself may be illiterate but still he would have guts to decide in whose favour he should cast his vote. In any case, for having free and fair election and not to convert democracy into a mobocracy and or a farce, information to voters is the necessity.

Further, in context of Section 8 of the act, the Law Commission in its Report submitted in 1999 observed as under:-

> "5.1 The Law Commission had proposed that in respect of offences provided in sub-section (1) [(except the offence mentioned in clause (b) of sub-section (1)], a mere framing of charge should serve as a disqualification. This provision was sought to be made in addition to existing provisions which provides for disqualification arising on account of conviction. ***The reason for this proposal was that most of the offences mentioned in sub-section (1)***

are either election offences or serious offences affecting the society and that the persons committing these offences are mostly persons having political clout and influence. Very often these elements are supported by unsocial persons or group of persons, with the result that no independent witness is prepared to come forward to depose against such persons. In such a situation, it is proving extremely difficult to obtain conviction of these persons. ***It was suggested that inasmuch as charges were framed by a court*** on the basis of the material placed before it by the ***prosecution including the material disclosed by the charge-sheet, providing for disqualification on the ground of framing of the charge-sheet would be neither unjust nor unreasonable or arbitrary."***

The Law Commission also observed:-

6.3.1 There has been mounting corruption in all walks of public life. ***People are generally lured to enter politics or contest elections for getting rich overnight. Before allowing people to enter public life the public has a right to know the antecedents of such persons.*** The existing conditions in which people can freely enter the political arena without demur, especially without the electorate knowing about any details of the assets possessed by the candidate are far from satisfactory. ***It is essential by law to provide that a candidate seeking election shall furnish the details of all his assets (movable/immovable) possessed by him/her, wife-husband, dependant relations, duly supported by an affidavit.***

6.3.2 Further, in view of recommendations of the Law Commission for debarring a candidate from contesting an election if charges have been framed against him by a Court in respect of offences

mentioned in the proposed section 8-B of the Act, it is also necessary for a candidate seeking to contest election to furnish details regarding criminal case, if any, pending against him, including a copy of the FIR complaint and any order made by the concerned court.

6.3.3 In order to achieve the aforesaid objectives, it is essential to insert a new section 4-A, after the existing section 4 of the Representation of the People Act, 1951, as follows—

> "4-A. Qualification for membership of the House of the People, the Council of States, Legislature Assembly of a State or Legislative Council.
>
> A person shall not be qualified to file his nomination for contesting any election for a seat in the House of the People, the Council of States Legislature Assembly or Legislative Council of a State unless he or she files—
>
> (a) a declaration of all his assets (movable/immovable) possessed by him/her, his/her spouse and dependant relations, duly supported by an affidavit, and
>
> (b) a declaration as to whether any charge in respect of any offence referred to in section 8B has been framed against him by any Criminal Court."

It is to be stated that similar views are expressed in the report submitted in March 2002 by the **National Commission to Review the Working of the Constitution** appointed by the Union Government for reviewing the working of the Constitution. Relevant recommendations are as under:-

Successes and Failures

4.4 During the last half-a-century, there have been thirteen general elections to Lok Sabha and a much large number to various State Legislative Assembles. We

can take legitimate pride in that these have been successful and generally acknowledged to be free and fair. ***But, the experience has also brought to fore many distortions, some very serious, generating a deep concern in many quarters. There are constant reference to the unhealthy role of money power, muscle power and mafia power and to criminalisation, corruption, communilism and casteism.***

4.12 Criminalisation

4.12.2 The Commission recommends that the Representation of the people Act be amended to provide that ***any person charged with any offence punishable with imprisonment for a maximum term of five years or more, should be disqualified for being chosen as, or for being, a member of Parliament or Legislature of a State on the expiry of a period of one year from the date the charges were framed against him by the Court in that offence and unless cleared during that one year period,*** he shall continue to remain so disqualified till the conclusion of the trial for that offence. In case a person is convicted of any offence by a court of law and sentenced to imprisonment for six months or more the bar should apply during the period under which the convicted person is undergoing the sentence and for a further period of six years after the completion of the period of the sentence. If any candidate violates this provision, he should be disqualified. Also, if a party puts up such a candidate with knowledge of his antecedents, it should be derecognised and deregistered.

4.12.3 Any person convicted for any heinous crime like murder, rape, smuggling, dacoity etc. should be permanently debarred from contesting for any political office.

4.12.8 The Commission feels that the proposed provision laying down that a person charged with an offence punishable with imprisonment which may extend to five years or more should be disqualified from contesting elections after the expiry of a period of one year from the date the charges were framed in a Court of law should equally be applicable to sitting members of Parliament and State Legislatures as to any other such person.

4.14 High Cost of Elections and Abuse of Money Power.

4.14.1 One of the most critical problems in the matter of electoral reforms is the hard reality that for contesting an election one needs large amounts of money. The limits of expenditure prescribed are meaningless and almost never adhered to. ***As a result, it becomes difficult for the good and the honest to enter legislatures. It also creates a high degree of compulsion for corruption in the political arena.*** This has progressively polluted the entire system. Corruption, because it erodes performance, becomes one of the leading reasons for non-performance and compromised governance in the country. ***The sources of some of the election funds are believed to be unaccounted criminal money in return for protection, unaccounted funds from business groups who expect a high return on this investment, kickbacks or commissions on contracts etc.*** No matter how we look at it, citizens are directly affected because apart from compromised governance, the huge money spent on elections pushes up the cost of everything in the country. It also leads to unbridled corruption and the consequences of wide spread corruption are even more serious than many imagine. Electoral compulsions for funds become the foundation of the whole super structure of corruption.

4.14.3 Transparency in the context of election means both the sources of finance as well as their utilization as are listed out in an audited statement. If the candidates are required to list the sources of their income, this can be checked back by the income tax authorities. ***The Commission recommends that the political parties as well as individual candidates be made subject to a proper statutory audit of the amounts they spend. These accounts should be monitored through a system of checking and cross-checking through the income-tax returns filed by the candidates, parties and their well-wishes. At the end of the election each candidate should submit on audited statement of expenses under specific heads.*** The EC should devise specific formats for filing such statements so that fudging of accounts becomes difficult. Also, the audit

should not only be mandatory but it should be enforced by the Election Commission.

Any violation or misreporting should be dealt with strongly.

4.14.4 ***The Commission recommends that every candidate at the time of election must declare his assets and liabilites along with those of his close relatives. Every holder of a political position must declare his assets and liabilities along with those of his close relations annually. Law should define the term 'close relatives'.***

4.14.6 ***All candidates should be required under law to declare their assets and liabilities by an affidavit and the details so given by them should be made public.*** Further, as a follow up action, the particulars of the assets and liabilities so given should be audited by a special authority created specifically under law for the purpose. ***Again, the legislators should be required under law to submit their returns about their liabilities every year and a final statement in this regard at the end of their term of office.***

Candidates owning Government Dues

4.23 ***It is recommended that all candidates should be required to clear government dues before their candidatures are accepted.*** This pertains to payment of taxes and bills and unauthorized occupation of accommodation and availing of telephones and other government facilities to which they are no longer entitled. The fact that matters regarding Government dues in respect of the candidate are pending before a Court of Law should be no excuse.

Mr. P.P. Rao, learned senior counsel has drawn our attention to the *'Ethics Manual for Members, Officers and Employees of the U.S. House of Representatives,'* which *inter alia* provides as under—

> ***'Financial interests and investments of Members and employees, as well as those of candidates for the House of***

Representatives, may present conflicts of interest with official duties. Members and employees need not, however, divest themselves of assets upon assuming their positions, nor must Members disqualify themselves from voting on issues that generally affect their personal financial interest. Instead, public financial disclosure provides a means of monitoring and deterring conflicts.

All Members, officers, and employees are prohibited from improperly using their official positions for personal gain. Members officers, candidates, and certain employees must file annual Financial Disclosure Statements, summarizing financial information concerning themselves, their spouses, and dependent children. Such statements must indicate outside compensation, holdings and business transactions, generally for the calendar year preceding the filing date.

Who Must File

The following individuals must file Financial Disclosure Statements:-

- Members of the House of Representatives;

- Candidates for the House of Representatives;

When to File

Candidates who raise or spend more than $5,000 for their campaigns must file within 30 days of doing so, or by May 15, whichever is later, but in any event at least 30 days prior to the elections in which they run.

Termination reports must be filed within 30 days of leaving government employment by members, officers, and employees who file Financial Disclosure Statements.

POLICIES UNDERLYING DISCLOSURE

Members, officers, and certain employees must annually disclose personal financial interests, including investments, income and liabilities. ***Financial disclosure provisions were enacted to monitor and to deter possible conflicts of interest due to outside financial holdings.*** Proposals for divestiture of potentially conflicting assets and mandatory disqualification of Members from voting rejected as impractical or unreasonable. ***Such disqualification could result in the disenfranchisement of a member's entire constituency on particular issue.*** A member may often have a community of interests with his constituency, may arguably have been elected because of and to serve these common interests, and thus would be ineffective in representing the real interests of his constituents if he were disqualified from voting on issues touching those matters of mutual concern. In rare instances, the House Rule on abstaining from voting may apply where a direct personal interest in a matter exists.

At the other extreme, a conflict of interest becomes corruption when an official uses his position of influence to enhance his personal financial interests. Between these extremes are those ambiguous circumstances which may create a real or potential conflict of interest. The problem is identifying those instances in which an official allows his personal economic interests to impair his independence of judgment in the conduct of his public duties.

The House has required public financial disclosure by rule since 1968 and by statute since 1978.

SPECIFIC DISCLOSURE REQUIREMENTS

The Ethics in Government Act of 1978 mandated annual financial disclosure by all senior Federal personnel, including all Members and some employees of the House. The Ethics Reform Act of 1989 totally revamped these provisions and condensed what had been different requirements for each branch into one uniform title covering the entire Federal Government. Financial Disclosure Statements must

indicate outside compensation, holdings, and business transactions, generally for the calendar year preceding the filing date. In all instances, filers may disclose addition information or explanation at their discretion."

At this stage. it would be worth-while to note some observations made by the Committee on State Funding of Elections headed by Shri Indrajit Gupta as Chairman and others, which submitted its report in 1998. In the concluding portion, It has mentioned as under :

"CONCLUSION :-

1. Before concluding, the Committee cannot help expressing its considered view that its recommendations being limited in nature and confined to only one of the aspects of the electoral reforms may bring about only some cosmetic changes in the electoral sphere. ***What is needed, however, is an immediate overhauling of the electoral process whereby elections are freed from evil influence of all vitiating factors, particularly, criminalisation of politics. It goes without saying that money power and muscle power go together to vitiate the electoral process and it is their combined effect which is sullying the purity of electoral contests and effecting free and fair elections.*** Meaningful electoral reforms in other spheres of electoral activity are also urgently needed if the present recommendations of the committee are to serve intended useful purpose."

From the aforesaid reports of the law Commission, National Commission to Review the working of the Constitution, Conclusion drawn in the report of Shri Indrajit Gupta and Ethics Manual applicable in an advance democratic country, it is apparent that for saving the democracy from the evil influence of criminalisation of politics, for saving the election from muscle and money power, for having true democracy and for controlling corruption in politics, the candidate contesting the

election should be asked to disclose his antecedents including assets and liabilities. Thereafter, it is for the voters to decide in whose favour he should cast his vote.

Further, we would state that this Court has construed 'freedom of speech and expression' in various decisions and on basis of tests laid therein, directions were issued. In short, this aspect is discussed in paragraphs 31, 32 and 33 of our earlier judgment which read as under:-

> ***"31. In state of Uttar Pradesh v. Raj Narain and others*** [(1975) 4 SCC 428], the Constitution Bench considered a question — whether privilege can be claimed by the Government of Uttar Pradesh under Section 123 of the Evidence Act in respect of what has been described for the sake of brevity to be the Blue Book summoned from the Government of Uttar Pradesh and certain documents summoned from the Superintendent of Police. Rae Bareli, Uttar Pradesh? The Court observed that "the right to know which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security". The Court pertinently observed as under :—
>
> > "In a Government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. *The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries.* They are entitled to know the particulars of every public transaction in all its bearing…"
>
> 32. ***In Indian Express Newspapers (Bombay) Private Ltd. and others etc. v. Union of India and others*** [(1985) 1 SCC 641], this Court dealt with the validity of customs duty on the newsprint in

context of Article 19(1)(a). The Court observed (in para 32) thus:

> "The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic country cannot make responsible judgements…"

33. The Court further referred (in para 35) to the following observations made by this Court in ***Romesh Thappar v. State of Madras*** (1950 SCR 594):-

> "……(The freedom) lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible. A freedom of such amplitude might involve risks of abuse… (But) "it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding the proper fruits".

Again in paragraph 68, the Court observed:-

> "…..*The public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves* (per Lord Simon of Glaisdale in ***Attorney-General v. Times Newspapers Ltd.*** (1973) 3 All ER 54). Freedom of expression, as learned writers have observed, has four broad social purpose to serve: (i) it helps an individual to attain self-fulfillment, (ii) it assists in the discovery of truth, (iii) ***it strengthens the capacity of an individual in participating in decision-making*** and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. ***All members of society should be able to form their own beliefs***

> and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know. ***Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of people in the administration…"***

Even with regard to telecasting of events such as cricket. Football and hockey etc., this Court in ***secretary, Ministry of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal*** [(1995) 2 SCC 161] held that "the right to freedom of speech and expression also includes right to educate, to inform and to entertain and also the right to be educated, informed and entertained." The Court further held as under:-

> "82. *True democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country.* ***The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, nuisinformation and non-information all equally create an uninformed citizenry which makes democracy of farce when medium of information is monopolised either by a partisan Central Authority or by private individuals or oligarchic organizations.*** This is particularly so in a country like ours where about 65 per cent of the population is illiterate and hardly 1 ½ per cent of the population has an access to the print media which is not subject to precensorship…."

The aforesaid passage leaves no doubt that right to participate by casting vote at the time of election would be meaningless unless the voters are well informed about all sides of the issues, in respect of which they are called upon to express their views by casting their votes. Disinformation, misinformation, non-

information all equally create an uninformed citizenry which would finally make democracy a mobocracy and farce. On this aspect, no further discussion is required. However, we would narrate some observations made by ***Bhagwati, J.*** (as he then was) in ***S.P. Gupta v. Union of India*** [1981] Supp. SCC 87] while dealing with the contention of right to secrecy that — *"There can be little doubt that exposure to public gaze and scrutiny is one of the surest means of achieving a clean and healthy administration."* Further, it has been explicitly and lucidly held thus:-

> 64. "Now it is obvious from the Constitution that we have adopted a democratic form of Government. Where a society has chosen to accept democracy as its credal faith, it is elementary that the citizens ought to know what their government is doing. ***The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic Government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government.*** It is only if people know how government is functioning that they can fulfill the role which democracy assigns to them and make democracy a really effective participatory democracy. "Knowledge" and James Madison, "will forever govern ignorance and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of obtaining it, is but a prologue to a force or tragedy or perhaps both." The citizens' right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic State. And that is why the demand for openness in the government is increasingly growing in different parts of the world.

> 65. The demand for openness in the government is based principally on two reasons. It is now widely accepted that democracy does not consist merely in people exercising their franchise once in five years to choose their rules and, once the vote is cast, then retiring in passivity and not taking any interest in the government. Today it is common ground that democracy has a more positive content and its orchestration has to be continuous and pervasive. ***This means inter alia the people should not only cast intelligent and rational votes but should also exercise sound judgment on the conduct of the government and the merits of public policies. So that democracy does not remain merely sporadic exercise in voting but becomes a continuous process of government — an attitude and habit of mind, but his important role people can fulfil in a democracy only if it is an open government where there is full access to information in regard to the functioning of he government."***

It was further observed

> "67. …..The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a)… The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest. It is in the context of this background that we must proceed to interpret Section 123 of the India Evidence Act."

From the aforesaid discussion it can be held that it is expected by all concerned and as has been laid down by various decisions of this Court that for survival of true democracy, the voter must be aware of the antecedents of his

candidate. Voter has to caste intelligent and rational vote according to his own criteria. A well informed voter is the foundation of democratic structure. That information to a voter, who is the citizen of this country, is one facet of the fundamental right under Article 19(1)(a).

ARTICLE 145(3) OF THE CONSTITUTION OF INDIA

Mr. Arun Jaitely, learned Senior Counsel and Mr. Kirit N. Raval, learned Solicitor General submitted that the question involved in these petitions is a substantial question of law as to the interpretation of the Constitution and, therefore, the matter may be referred to a Bench consisting of Five Judges.

In our view, this contention is totally misconceived. Article 19(1)(a) is interpreted in numerous judgements rendered by this Court. After considering various decisions and following tests laid therein, this Court in ***Association for Democratic Reforms (supra)*** arrived at the conclusion that for survival of the democracy, right of the voter to know antecedents of a candidate would be part and parcel of his fundamental right. It would be the basis for free and fair election which is a basic structure of the Constitution. Therefore, the question relating to interpretation of Article 19(1)(a) is concluded and there is no other question which requires interpretation of Constitution.

Dealing with the similar contention, Five Judge Bench of this Court in ***State of Jammu & Kashmir and others v. Thakur Ganga Singh and another*** [(1960) 2 SCR 346] succinctly held thus:-

> "What does interpretation of a provision mean? Interpretation is the method by which the true sense or the meaning of the word is understood. The question of interpretation can arise only if two or more possible constructions are sought to be placed on a provision—one party suggesting one construction and the other a different one. But where the parties agree on the true interpretation of a provision or do not raise any question in respect thereof, it is not

possible to hold that the case involves any question of law as to the interpretation of the Constitution. On an interpretation of Art. 14, a series of decisions of this Court evolved the doctrine of classification. As we have pointed out, at no stage of the proceedings either the correctness of the interpretation of the Art. 14 or the principles governing the doctrine of classification have been questioned by either of the parties. Indeed accepting the said doctrine, the appellants contended that there was a valid classification under the rule while the respondents argued contra. The learned Additional Solicitor General contended, for the first time, before us that the appeal raised a new facet of the doctrine of equality, namely, whether an artificial person and a natural person have equal attributes within the meaning of the equality clause, and, therefore, the case involves a question of interpretation of the Constitution. This argument, if we may say so, involves the same contention in a different grab. If analysed, the argument only comes to this: as an artificial person and a natural person have different attributes, the classification made between them is valid. ***This argument does not suggest a new interpretation of Art 14 of the Constitution, but only attempts to bring the rule within the doctrine of Classfication.*** We, therefore, hold that the question raised in this case does not involve any question of law as to the interpretation of the Constitution."

The aforesaid judgement is referred to and relied upon in ***Sardar Sardul Singh Caveeshar v. State of Maharashtra*** [(1964) 2 SCR 378].

From the judgement rendered by this Court in ***Association for Democratic Reforms (supra)***, it is apparent that no such contention was raised by the learned Solicitor General, who appeared in appeal filed on behalf of the Union of India that question involved in that mater was required to be decided by five-Judge Bench, as provided under Article 145(3) of the Constitution. The question raised before

us has been finally decided and no other substantial question of law regarding the interpretation of the Constitution survives. Hence, the matter is not required to be referred Five-Judge Bench.

WHETHER IMPUGNED SECTION 33-B CAN BE CONSIDERED AS VALIDATING PROVISION:—

The learned counsel for the respondent submitted that by the impugend legislation, most of the directions issued by the Court are complied with and vacuum pointed out is filled in by the legislation. It is their contention that the Legislature did not think it fit that the remaining information as directed by this Court is required to be given by a contesting candidate.

This submission is, on the face of it, against well settled legal position. In a number of decisions rendered by this Court, similar submission is negatived. The legislature has not power to review the decision and set it at naught except by removing the defect which is the cause pointed out by the decision rendered by the Court. If this is permitted it would sound the death knell of the rule of law as observed by this Court in various decisions. In ***P. Sambamurthy v. State of A.P.*** [(1987) 1 SCC 363] this Court observed:—

> "4. ….. it is a basic principle of the rule of law that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but must also be in accordance with law, and the power of judicial review is conferred by the Constitution with a view to ensuring that the law is observed and there is compliance with the requirement of law on the part of the executive and other authorities. It is through the power of judicial review conferred on an independent institutional authority such as the High Court that the rule of law is maintained and every organ of the State is kept within the limits of the law. ***Now if the exercise of the power of judicial review can be set at naught by the State***

Government by overriding the decision given against it, it would sound the death-knell of the rule of law. The rule of law would cease to have any meaning, because then it would be open to the State Government to defy the law and yet to get away with it. The provisio to clause (5) of Article 371-D is, therefore, clearly violative of the basic structure doctrine."

In **Re*. Cauveri Water Disputes Tribunal*** [1993 Supp. (1) SCC 96(II)] the Court referred to and relied upon the decision in ***P. Sambamurthy (supra).*** In that case, the Court dealt with the validity of the Karnataka Cauvery basin Irrigation Protection Ordinance, 1991 issued by the Government of Karnataka giving overriding effect that notwithstanding anything contained in any order, report or decision of any Court or Tribunal except the final decision under the provisions of sub-Section (2) of Section 5 read with Section 6 of the Inter-State Water Disputes Act, 1956 shall have any effect and held that the Ordinance in question which seeks directly to nullify the order of the Tribunal impinges on the judicial power of the State and is, therefore, ultra, vires. After referring to the earlier decisions, the Court observed thus:—

"74…..it would be unfair to adopt legislative procedure to undo a settlement which had become the basis of a decision of the high Court. ***Even if legislation can remove the basis of a decision, it has to do it by alteration of general rights of a class but not by simply excluding the specific settlement which had been held to be valid and enforceable*** by a High Court. ***The object of the Act was in effect to take away the force of the judgement*** of the High Court. The rights under the judgement would be said to arise independently of Article 19 of the Constitution.

76. The principle which emerges from these authorities is that the legislature can change the basis on which a decision is given by the Court and thus change the law in general, which will affect a

class of persons and events at large. It cannot, however, set aside an individual decision inter parties and affect their rights and liabilities alone. ***Such an act on the part of the legislature amounts to exercising the judicial power of the State and to functioning as an appellate court or tribunal."***

Further, in ***The Municipal Corporation of the City of Ahmedabad and another etc. etc. v. The New Shrock Spg. And wvg. Co. Ltd. etc. etc.*** [(1970) 2 SCC 280] this court (in para 7) held thus:—

"…..But no Legislature in this country has power to ask the instrumentalities of the State to disobey or disregard the decisions given by courts. The limits of the power of Legislatures to interfere with the directions issued by courts were considered by several decisions of this Court. ***In Shri Prithvi Cotton Mills Ltd. and Another v. The Broach Borough Municipality and others [(1969) 2 SCC 283] our present Chief Justice speaking for the Constitution Bench of the Court observed:***

"Before we examine Section 3 to find out whether it is effective in its purpose or not we may say a few words about validating statutes in general. When a Legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition of course, is that the Legislature must possess the power to impose the tax for, if it does not, the action must ever remain ineffective and illegal. ***Granted Legislative competence, it is not sufficient to declare merely that the decision of the court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not posses or exercise. A***

> ***court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.*** Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute of the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometime this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law.

In ***Mahal Chand Sethia v. State of West Bengal*** [Crl. A. No. 75 of 1969, decided on 10.09.1969] Mitter, J. speaking for the Court stated the legal position in these words:

> "The argument of counsel for the appellant was that although it was open to the State legislature by an Act and the Governor by an Ordinance to amend the West Bengal Criminal Law Amendment (special courts) Act, 1949, ***it was incompetent for either of them to validate an order of transfer which had already been quashed*** by the issue of a writ of certiorari by the High Court and the order of transfer being virtually dead, could not be resuscitated by the Governor or the Legislature and the validating measures could not touch any adjudication by Court.
>
> ***…….A court of law can pronounce upon the validity of any law and declare the same to be null and void if it was beyond the Legislative competence of the Legislature or if it infringed***

the rights enshined in Part III of the Constitution. Needless to add it can strike down or declare invalid any Act or direction of a State Government which is not authorized by law. The position of a Legislature is however different. It cannot declare any decision of a court of law to be void or of not effect."

For the purpose of deciding these petitions, the principles emerging from various decisions rendered by this Court from time to time can inter alia be summarised thus:–

— the legislature can change the basis on which a decision is rendered by this Court and change the law in general. However, this power can be exercised subject to Constitutional provision, particularly, legislative competence and if it is violative of fundamental rights enshrined in Part-III of the Constitution, such law would be void as provided under Article 13 of the Constitution. Legislature also cannot declare any decision of a Court of law to be void or of no effect.

As stated above, this Court has held that Article 19(1)(a) which provides for freedom of speech and expression would cover in its fold right of the voter to know specified antecedents of a candidate, who is contesting election. Once it is held that voter has a fundamental right to know antecedents of his candidate, that fundamental right under Article 19(1)(a) could be abridged by passing such legislation only as provided under Article 19(2) which provides as under:

"19, Protection of certain rights regarding freedom of speech, etc.—(2) Nothing in sub-clause(a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the

State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

So legislative competence to interfere with a fundamental right enshrined in Article 19(1)(a) is limited as provided under Article 19(2).

Learned counsel for the respondents have not pointed out how the impugned legislation could be justified or save under Article 19(2).

DERIVATIVE FUNDAMENTAL RIGHT

Learned senior counsel Mr. Jaitley developed an ingenious submission that as there is no specific fundamental right of the voter to know antecedents of a candidate, the declaration by this Court of such fundamental right can be held to be derivative. Therefore, it is open to the Legislature to nullify it by appropriate legislation.

In our view, this submission requires to be rejected as there is no such concept of derivative fundamental rights. Firstly, it should be properly understood that the fundamental rights enshrined in the Constitution such as, right to equality and freedoms have no fixed contents. From time to time, this Court has filled in the skeleton with soul and blood and made it vibrant. Since last more than 50 yeas, this Court has interpreted Articles 14, 19 and 21 and given meaning and colour so that nation can have a truly republic democratic society. This cannot be undone by such an Ordinance/Amended Act. For this, we would refer to the discussion by Mohan, J. in ***Unni Krishnan, J.P. and others v. State of Andhra Pradesh and others*** [1993], 1 SCC 645], while considering the ambit of Article 21, he succinctly placed it thus:—

"25. In *Kesavananada Bharati v. State of Kerala* [(1973) 4 SCC 225], Mathew J stated therein that the ***fundamental rights themselves have no fixed content, most of them are empty vessels into***

which each generation must pour its content in the light of its experience. It is relevant in this context to remember that in building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to directive principles.

26. In *Pathumma v. State of Kerala* [(1978) 2 SCC 1], it has been stated that:

> ***"The attempt of the court should be to expand the reach and ambit of the fundamental rights rather than*** *accentuate their meaning and content by process of judicial construction…* ***Personal liberty in article 21 is of the widest amplitude."***

27. In this connection, it is worthwhile to recall what was said of the American Constitution in Missouri v. Holland [252 US 416, 433]:

> "When we are dealing with words that also are constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."

Thereafter, the Court pointed out that several unremunerated rights fall within the ambit of Article 21 since personal liberty is of widest amplitude and categorized them (in para 30) thus:—

"(1) The right to go abroad. Satwant Singh Sawhney v. D. Ramarathnam, A.P.O. New Dehli [(1967) 3 SCR 525]

(2) The right to privacy, Gobind v. State of M.P. [(1975) 2 SCC 148]. In this case reliance was placed on the American decision in Griswold v. Connecticut [381 US 479, 510].

(3) The right against solitary confinement. Sunil Batra v. Delhi Administration [(1978) 4 SCC 494, 545].

(4) The right against bar fetters, Charles Sobraj v. Supdt. Central Jail [(1978) 4 SCC 104].

(5) The right to legal aid M.H. Hoskot v. State of Maharashra [(1978) 3 SCC 544].

(6) The right to speedy trial. Hussainara Khatoon v. Home Secretary, State of Bihar [(1980) 1 SCC 81].

(7) The right against handcuffing, Prem Shankar Shukla v. Delhi Administration [(1980) 3 SCC 526].

(8) The right against delayed execution, T.V. Vatheeswaran v. State of T.N. [(1983) 2 SCC 68].

(9) The right against custodial violence. Sheela Barse v. State of Maharashtra [(1983) 2 SCC 96].

(10) The right against public hanging, A.G. of India v. Lachma Devi [1989 Supp (1) SCC 264].

(11) Doctor's assistance, Paramanand Katra v. Union of India [(1989) 4 SCC 286].

(12) Shelter, Shantistar Builders v. N.K. Totame [(1990) 1 SCC 52]."

Further, learned senior counsle Mr. Sachhar referred to the following decisions of this Court giving meaning to the phrase "freedom of speech and expression":—

"(1) Romesh Thappar v. State of Madras [AIR 1950 SC 124]

Freedom of speech and expression includes freedom of

propagation of ideas which is ensured by freedom of circulation. [Head note (ii)]

(2) Brij Bhushan and Another v. The State of Delhi [AIR 1950 SC 129]

Pre-censorship of a journal is restriction on the liberty of press.

(3) Handard Dawarkhana and Another etc. v. Union of India [AIR 1960 SC 554]

Advertisements meant for propagation of ideas or furtherance of literature or human thought is a part of Freedom of Speech and Expression.

4. Sakal Papers (P) Ltd. and others etc. v. Union of India [AIR 1962 SC 305]

Freedom of Speech and Expression carries with it the right to publish and circulate one's ideas, opinions and views.

5. Bennett Coleman and Co. and Ors. etc. v. Union of India and others [1972 (2) SCC 788]

Freedom of Press means right of citizens to speak, publish and express their views as well as right of people to read. (Para 45)

6. Indian Express Newspapers (Bombay) (P.) Ltd. and others v. Union of India and others [1985 (1) SCC 641]

"Freedom of expression, as learned writers have observed, has four broad social purposes to serve: (I) it helps an individual to attain self fulfillment, (ii) it assists in the discovery of truth, (iii) it strengthens the capacity of an individual in participating in decision – making and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change."

7. Odyseey Communications P. Ltd. v. Lokvidayan Sanghatana and others [1988(3) SCC 410]

   Freedom of Speech and Expression includes right of citizens to exhibit film on doordarshan.

8. S. Rangarajan v. P. Jagjivan Ram and others [1989 (2) SCC 574]

   Freedom of Speech and Expression means the right to express one's opinion by words of mouth, writing, printing, picture or in any other manner. It would thus include the freedom of communication and the right to propagate or publish opinions.

9. LIC v. Mannubhai D. Shah [1992(3) SCC 637]

   Freedom of speech and expression is a natural right which a human being acquires by birth. It is, therefore, a basic human right (Art 19 of Universal Declaration of Human Rights relied on). Every citizen, therefore, has a right to air his or her views through the printing and / or electronics media or through any communication method.

10. Secy. Ministry of information and Broadcasting Govt of India and Others v. Cricket Association of Bengal and Others [1995 (2) SCC 161]

    "The right to freedom of speech and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an 'aware' citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgement on all issues touching them."

11. S.P. Gupta v. Union of India and Another [1981] Suppl. SCC 87 at 273]

    Right to know is implicit in right of free speech and expression. Disclosure of information regarding functioning of the government must be the rule.

12. State of U.P. v Raj Narain and others [1975 (4) SCC 428]

    Freedom of speech and expression includes the right to know every public act, everything that is done in a public way, by their public functionaries.

13. Dinesh Trivedi, MP and others v. Union of India and others [(1997) 4 SCC 306]

    Freedom of speech and expression includes right of the citizens of know about the affairs of the Government."

There are many other judgements which are not required to be reiterated in this judgement. All these developments of law giving meaning to freedom of speech and expression or personal liberty are not required to be re-considered nor there could be legislation so as to nullify such interpretation except as provided under the exceptions to Fundamental Rights.

Learned counsel for the respondents relied upon R. Rajagopal alias R.R. Gopal and another v. State of T.N. and others [(1994) 6 SCC 632] and submitted that in the said case the Court observed that right ot privacy is not enumerated as fundamental right in our Constitution but has been inferred from Article 21. In that case, reliance was placed on Kharak Singh v. State of UP [(1994) 1 SCR 332], Gobind v. State of M.P. [(1975) 2 SCC 148] and other decisions of English and American Courts and thereafter, the Court held that petitioners have a right to publish what they alleged to be a life story/autobiography of Auto Shankar insofar

as it appears from the public records, even without his consent or authorisation. But if they go beyond that and publish his life story, they may be invading his right to privacy for the consequences in accordance with law. For this purpose, the Court held that a citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent—whether truthful or otherwise and whether laudatory or critical. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy. The Court also pointed out an exception namely:—

> "This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being published in press/media.

From the aforesaid observations leaned Solicitor General Mr. Raval and learned senior counsel Mr. Jaitley contended that rights which are derivatives would be subject to reasonable restriction. Secondly, it was sought to be contended that by insisting for declaration of assets of a candidate, right to privacy is affected. In our view, the aforesaid decision nowhere supports the said contention. This Court only considered – to what extent a citizen would have right to privacy under Article 21. The court itself has carved out the exceptions and restrictions on absolute right of privacy. Further, by declaration of a fact which is a matter of public record that a candidate was involved in various criminal cases, there is no question of infringement of any right of privacy. Similarly, with regard to the declaration of assets also, a person having assets or income is normally required to disclose the same under the Income Tax Act or such similar fiscal legislation. Not only this, but once

a person becomes a candidate to acquire public office, such declaration would not affect his right of privacy. This is the necessity of the day because of statutory provisions of controlling wide spread corrupt practices as repeatedly pointed out by all concerned including various reports of Law Commission and other Committees as stated above.

Even the Prime Minister of India in one of his Speeches has observed to the same effect. This has been reproduced in B.R. Kapur's case (supra) by Pattanaik, J. (as he then was) (in para 74) as under—

> ".....Mr. Diwan in course of his arguments had raised some submissions on the subject —"Criminalisation of Politics" and participation of criminals in the electoral process as candidates and in that connection, he had brought to our notice the order of the Election Commission of India dated 28.8.1997.... — "Whither Accountability", published in the Pioneer. Shri Atal Behari Vajpayee had called for a national debate on all the possible alternatives for systematic changes to cleanse our democratic governing system of its present mess. He has expressed his dissatisfaction that neither Parliament nor the State Vidhan Sabhas are doing, win any degree of competence or commitment, what they are primarily meant to do: legislative function. According to him, barring exceptions, those who get elected to these democratic institutions are neither trained, formally or informally, in law making nor do they seem to have at inclination to develop the necessary knowledge and competence in their profession. He has further indicated that those individuals in society who are generally interested in serving the electorate and performing legislative functions are finding it increasingly difficult to succeed in today's electoral system and the electoral system has been almost totally subverted by more power, muscle power, and vote bank considerations of castes and communities. Shri Vajpayee

also had indicated that the corruption in the governing structures, has therefore, corroded the very core of elective democracy. According to him, the certainty of scope of corruption in the governing structure has heightened opportunism and unscrupulousness among political parties, causing them to marry and divorce one another at will, seek opportunistic alliances and coalitions often without the popular mandate. Yet they capture and survive in power due to inherent systematic flows. He further stated that casteism, corruption and politicisation have eroded the integrity and efficacy of our civil service structure also. The manifestos, policies, programmes of the political parties have lost meaning in the present system of governance due to lack of accountability."

Further, this Court while dealing with the election expenses observed in Common Cause v. Union of India and others [(1996) 2 SCC 752] observed thus:—

"18....Flags go up, walls are painted and hundreds of thousands of loudspeakers play out the loud exhortations and extravagant promises. VIPs and VVIPs come and go, some of them in helicopters and air-taxies. The political parties in their quest for power spend more than one thousand crore of rupees on the General Election (Parliament alone), yet nobody accounts for the bulk of the money so spent and there is no accountability anywhere. Nobody discloses the source of the money. There are no proper accounts and no audit. From where does the money come nobody know. In a democracy where rule of law prevails this type of naked display of black money, by violating the mandatory provisions of law, cannot be permitted."

To combat this naked display of unaccounted / black money by the candidate, declaration of assets is likely to have check of violation of the provisions of the Act and other relevant Acts including Income Tax Act.

Further, the doctrine of the Parliamentary sovereignty as it obtains in England does not prevails here except to the extent and in the fields provided by the Constitution. The entire scheme of the Constitution is such that it ensures the sovereignty and integrity of the country as a Republic and the democratic way of life by parliamentary institutions based on free and fair elections.

In *P.V. Narasimba Rao v. State* (CBI/SPE) [(1998) 4 SCC 626] this court observed thus —

> "47…Parliamentary democracy is part of the basic structure of the Constitution. It is settled law that in interpreting the constitutional provision the Court should adopt a construction which strengthens the foundational features and basic structure of the Constitution. [See Sub-Committee on Judicial Accountability v. Union of India [(1991) 4 SCC 699]."

In *C. Narayanaswamy v. C.K. Jaffer Sharief and others* [1994 Supp. (3) SCC 170] the Court observed (in para 22) thus—

> "….If the call for "purity of elections" is not to be reduced to a lip service or a slogan, then the persons investing funds, in furtherance of the prospect of the election of a candidate must be identified and located. The candidate should not be allowed to plead ignorance about the persons who have made contributions and investments for the success of the candidate concerned at the election. But this has to be taken care of by Parliament.

In *T.N. Seshan, CEC of India v. Union of India and others* [(1995) 4 SCC 611], this Court observed thus —

> "10. The Preamble of our Constitution proclaims that we are a Democratic Republic Democracy being the basic feature of our constitutional set-up, there can be no two opinions that free and fair

elections to our legislative bodies alone would guarantee the growth of a healthy democracy in the country."

As observed in *Kesavananda Bharati's case (supra)*, the fundamental rights themselves have no fixed content and it is also to be stated that the attempt of the Court should be to expand the reach and ambit of the fundamental rights. The Constitution is required to be kept young energetic and alive. In this view of the matter, the contention raised by the learned counsel for the respondents, that as the phrase 'freedom of speech and expression' is given the meaning to include citizens' right to know the antecedents of the candidates contesting election of MP or MLA, such rights could be set at naught by legislature, requires to be rejected.

Right to Vote is Statutory Right:—

Learned counsel for the respondents vehemently submitted that right to elect or to be elected is pure and simple statutory right and in the absence of a statutory provision neither citizen has a right to elect nor has he a right to be elected because such right is neither fundamental right nor a common law right. It is, therefore, submitted that it cannot be held that a voter has any fundamental right of knowing the antecedents/assets of a candidate contesting the election. Learned Solicitor General Mr. Raval also submitted that on the basis of the decision rendered by this Court, the Act is amended by the impugned Ordinance Amendment Act. However, for the directions which are left out, the presumption would be - it is deliberate omission on the part of Legislature and, therefore, there is no question of it being violative of Article 19(1)(a). He submitted that law pertaining to election depends upon statutory provisions. For this purpose, he referred to the decision in *N.P. Punnuswami v. Returning Officer* [1952 SCR 218], *G.N. Narayanswami v. G. Punnerselvam and others* [(1972) 3 SCC 717] and *C. Narayanaswamy v. C.K. Jaffer Sharief and others* [1994 Supp. (3) SCC 170].

There cannot be any dispute that the right to vote or stand as a candidate for election and decision with regard to violation of election law is not a civil right

but is a creature of statute or special law and would be subject to the limitations envisaged therein. It is for the Legislature to examine and provide provisions relating to validity of election and the jurisdiction of the Court would be limited in accordance with such law which creates such Election Tribunal.

In the case of *N.P. Punnuswami (supra)*, a person whose nomination paper was rejected, filed a writ of certiorari, which was dismissed on the ground that it had no jurisdiction to interfere with the order of the Returning Officer by reason of Article 329(b) of the Constitution.

In case of *G.N. Narayanswami (supra)*, this Court was dealing with the election petition wherein the issue which was required to be decided was whether the respondent was not qualified to stand for election to the Graduates constituency on all or any of the grounds set out by the petitioner in paragraphs 7 to 9 of the election petition. The Court referred to Article 171 and thereafter observed that the term 'electorate' used in Article 171(3)(a)(b)(c) has neither been defined by the Constitution nor in any enactment by Parliament. The Court thereafter referred to the definition of 'elector' given in Section 2(1) (a) of the RP Act and held that considering the language as well as the legislative history of Articles 171 and 173 of the Constitution and Section 6 of the RP Act, there could be a presumption of deliberate omission of the qualification that the representative of the Graduates should also be a graduate.

Similarly, in *C. Narayanaswamy's case (supra),* the Court was dealing with the validity of an election of a candidate on the ground of alleged corrupt practice as provided under Section 123 (1) (A) of the Act and in that context the Court held that right of a person to question the validity of an election is dependent on a conditions prescribed in the different Sections of the Act and the Rules framed thereunder. The Court thereafter held that as the Act does not provide that any expenditure incurred by a political party or by any other association or body of persons or any individual other than the candidate or his election agent, it shall not be deemed to be expenditure in connection with the election or authorized by

a candidate or his election agent for the purpose of sub-section (1) of Section 77 read with Rule 90.

Learned counsel further referred to the decisions in Jyoti Basu & ors. V. Debi Ghosal & Ors. [(1982) 1 SCC 691] wherein similar observations are made by this Court while deciding election petition:

> "8. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. ..... Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. ..... We have already referred to the Scheme of the Act. We have noticed the necessity to rid ourselves of notions based on Common Law or Equity. We see that we must seek an answer to the question within the four corners of the statute. What does the Act say?

It has to be stated that in an election petition challenging the validity of election, rights of the parties are governed by the statutory provisions for setting aside the election but this would not mean that a citizen who has right to be a voter and elect his representative in the Lok Sabha or Legislative Assembly has no fundamental right. Such a voter who is otherwise eligible to cast vote to elect his representative has statutory right under the Act to be a voter and has also a fundamental right as enshrined in Chapter – III. Merely because a citizen is a voter or has a right to elect his representative as per the Act, his fundamental rights could not be abridged, controlled or restricted by statutory provisions except as

permissible under the Constitution. If any statutory provision abridges fundamental right, that statutory provision would be void. It also requires to be well understood that democracy based on adult franchise is part of the basic structure of the Constitution. The right of adult to take part in election process either as a voter or a candidate could be restricted by a valid law which does not offend Constitutional provisions. Hence, the aforesaid judgments have no bearing on the question whether a citizen who is a voter has fundamental right to know antecedents of his candidate. It cannot be held that as there is deliberate omission in law, the right of the voter to know antecedents of the candidates, which is his fundamental right under Article 19(1)(a), is taken away.

Mr. Raval, learned Solicitor General submitted that an enactment can not be struck down on the ground that Court thinks it unjustified. Members of Parliament or the Legislature are representatives of the people and are supposed to know and be aware of what is good and bad for people. The Court can not sit in the judgment over their wisdom. He relied upon the decision rendered by this Court in Dr. P. Nalla Thampy Terah v. Union of India & Ors. [1985 Suppl. SCC 189], wherein the Court considered the validity of Section 77(1) of the Act and referred to report of the Santhanam Committee on Prevention of Corruption, which says (para 10) :

> "The public belief in the prevalence of corruption at high political levels has been strengthened by the manner in which funds are collected by political parties, especially at the time of elections. Such suspicions attach not only to the ruling party but to all parties, as often the opposition can also support private vested interests as well as members of the Government party. It is, therefore, essential that the conduct of political parties should be regulated in this matter by strict principles in relation to collection of funds and electioneering. It has to be frankly recognized that political parties cannot be run and elections cannot be fought without large funds.

But these funds should come openly from the supporters of sympathizers of the parties concerned."

The Court also referred to various decisions and thereafter held thus:-

"13. We have referred to this large data in order to show that the influence of big money on the election process is regarded universally as an evil of great magnitude. But then, the question which we, as Judges, have to consider is whether the provision contained in Explanation 1 suffers from any constitutional infirmity and, particularly, whether it violates Article 14. On that question we find it difficult, reluctantly though, to accept the contention that Explanation I offends against the right to equality. Under that provision, (i) a political party or (ii) any other association or body of persons or (iii) any individual other than the candidate or his election agent can incur expenses, without any limitation whatsoever in connection with the election of a candidate. Such expenses are not deemed to be expenditure in connection with the election, incurred or authorized by the candidate or by his election agent for the purposes of Section 77(1)."

Learned Solicitor General heavily reiled upon paragraph 19, wherein the Court observed thus:-

"The petitioner is not unjustified in criticizing the provision contained in Explanation I as diluting the principle of free and fair elections, which is the cornerstone of any democratic polity. But it is not for us to lay down policies in matters pertaining to elections. If the provisions of the law violate the Constitution, they have to be struck down. We cannot, however, negate a law on the ground that we do not approve of the policy which underlies it."

From the aforesaid discussion it is apparent that the Court in that case was dealing with the validity of the Explanation-I and was deciding whether it suffered from any Constitutional infirmity, particularly, whether it was violative of Article 14. The question of Article 19(1)(a) was not required to be considered and the Court had not even touched it. At the same time, there cannot be any dispute that if the provisions of the law violate the Constitutional provisions, they have to be struck down and that is what is required to be done in the present case. It is made clear that no provision is nullified on the ground that the Court does not approve the underlaying the policy of the enactment.

As against this Mr. Sachar learned senior counsel rightly referred to a decision rendered by this court in Bennett Coleman & Co. & Ors. v Union of India & Ors. [(1972) 2 SCC 788], where similar contentions were raised and negatived while imposing restrictions by Newspaper control Order. The Court's relevant discussion is as under:-

> "31. Article 19(1)(a) provides that all citizens shall have the right to freedom of speech and expression, Article 19(2) states that nothing in sub-clause(a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State; friendly relationship with foreign States, public, order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence. Although Article 19(1)(a) does not mention the freedom of the Press, it is the settled view of this Court that freedom of speech and expression includes freedom of the Press and circulation.
>
> 32. In the Express Newspapers case (supra) it is said that there can be no doubt that liberty of the Press is an essential part of the freedom of speech and expression guaranteed by Article 19(1)(a).

The Press has the right of free propagation and free circulation without any previous restraint on publication. If a law were to single out the Press fro laying down prohibitive burdens on it that would restrict the circulation, penalise its freedom of choice as to personnel, prevent newspapers from being started and compet the press to Government aid. This would violate Article 19(1)(a) and would fall outside the protection afforded by Article 19(2).

33. In Sakal Papers case (supra) it is said that the freedom of speech and expression guaranteed by Article 19(1) gives a citizen the right to propagate and publish his ideas to disseminate them, to circulate them either by words of mouth or by writing. This right extends not merely to the matter it is entitled to circulate but also to the volume of circulation. In Sakel Papers case (supra) the Newspaper (Price and Page) Act, 1956 empowered the Government to regulate the prices of newspapers in relation to their pages and sizes and to regulate the allocation of space for advertisement matter. The Government fixed the maximum number of pages that might be published by a newspaper according to the price charged. The Government prescribed the number of supplements that would be issued. This Court held that the Act and the Order placed restraints on the freedom of the press to circulate. This Court also held that the freedom of speech could not be restricted for the purpose of regulating the commercial aspects of activities of the newspapers."

The Court also dealt with the contention that newsprint policy does not directly deal with the fundamental right mentioned in Article 19(1)(a). It was also contended that regulatory statutes which do not control the content of speech but incidentally limit the ventured exercise are not regarded as a type of law. Any incidental limitation or incidental restriction on freedom of speech is permissible as the same is essential to the furtherance of important governmental interest in regulating

speech and freedom. The Court negatived the said contention and in para 39 held thus :-

> "39. Mr. Palkhivala said that the tests of pith and substance of the subject-matter and of direct and incidental effect of the legislation are relevant to questions of legislative competence but they are irrelevant to the question of infringement of fundamental rights. In our view this is a sound and correct approach to interpretation of legislative measures and State action in relation to fundamental rights. The true test is whether the effect of the impugned action is to take away or abridge fundamental rights. If it be assumed that the direct object of the law or action has to be direct abridgement of the right of free speech by the impugned law or action it is to be related to the directness of effect and not to the directness of the subject matter of the impeached law or action. The action may have a direct effect on a fundamental right although its direct subject-matter may be different."

The Court observed in Paragraph 80 at page 823 :-

> "…. The faith in the popular Government rests on the old dictum, "let the people have the truth and the freedom to discuss it and all will go well." The liberty of the press remains an "Art of the Covenant" in every democracy."

Further, the freedom of speech and expression, as has been held repeatedly, is basic to and indivisible from a democratic polity. It includes right to impart and receive information. [Secretary, Ministry of Information & Broadcasting (supra)]. Restriction to the said right could be only as provided in Article 19(2). This aspect is also discussed in paragraph 151 (page 270) thus:

> "Article 19(1)(a) declares that al citizens shall have the right of freedom of speech and expression. Clause (2) of Article 19 at the

same time, provides that nothing in sub-clause (i) of clause (1) shall affect the operation of any existing law or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with the foreign States. Public order, decency or morality or in relation to contempt of court, defamation or incitement of an offence. The grounds upon which reasonable restrictions can be placed upon the freedom of speech and expression are designed firstly to ensure that the said right is not exercised in such a manner as to threaten the sovereignty and integrity of India, security of the State, friendly relations with the foreign States Public order, decency or morality. Similarly, the said right cannot be so exercised as to amount to contempt of court, defamation or incitement of an offence. Existing laws providing such restrictions are saved and the State free to make laws in future imposing such restriction. The grounds aforesaid are conceived in the interest ensuring and maintaining conditions in which the said right can meaningfully and peacefully be exercised to the citizens of this country."

Hence, in our view, right of a voter to know bio-data of a candidate is the foundation of democracy. The old dictum – let the people have the truth and the freedom to discuss it and all will go well with the government – should prevail.

The true test for deciding the validity of the Act is – whether it takes away or abridges fundamental rights of the citizens? If there is direct abridgment of fundamental right of freedom of speech and expression, the law would be invalid.

Before parting with the case, there is one aspect which is to be dealt with. After the judgment in Association for Democratic Reforms case, the Election Commission gave certain directions in implementation of the judgment by its Order

No. 3/ER/2002/JS-II/Vol-III dated 28th June, 2002. In the course of arguments, learned Solicitor General as well as learned senior counsel appearing for the intervenor (BJP) pointed out that direction No. 1 is beyond the competence of the Election Commission and moreover, it is not necessary to give effect to the judgment of this Court. The said direction reads as follows:-

> "Furnishing of any wrong or incomplete information or suppression of any material information by any candidate in or from the said affidavit may also result in the rejection of his nomination paper where such wrong or incomplete information or suppression of material information is considered by the returning officer to be a defeat of substantial character, apart from inviting penal consequences under the Indian Penal Code for furnishing wrong information to a public servant or suppression of material facts before him.
>
> Provided that only such information shall be considered to be wrong or incomplete or amounting to suppression of material information as is capable of easy verification by the returning officer by reference to documentary proof adduced before him in the summary inquiry conducted by him at the time of scrutiny of nominations under section 36(2) of the Representation of the People Act, 1951 and only the information so verified shall be taken into account by him for further consideration of the question whether the same is a defect of substantial character."

While no exception can be taken to the insistence of affidavit with regard to the matters specified in the judgment in Association for Democratic Reforms case, the direction to reject the nomination paper for furnishing wrong information or concealing material information and providing for a summary enquiry at the time of scrutiny of the nominations, cannot be justified. In the case of assets and liabilities, it would be very difficult for the returning officer to consider the truth or

otherwise of the details furnished with reference to the 'documentary proof'. Very often, in such matters the documentary proof may not be clinching and the candidate concerned may be handicapped to rebut the allegation then and there. If sufficient time is provided, he may be able to produce proof to contradict the objector's version. It is true that the aforesaid directions issued by the Election Commission is not under challenge but at the same time prima facie it appears that the Election Commission is required to revise its instructions in the light of directions issued in Association for Democratic Reforms case (supra) and as provided under the Representation of the People Act and its 3rd Amendment.

Finally, after the amendment application was granted, following additional contentions were raised :-

1. Notice should be issued to the Attorney General as vires of the Act is challenged.

2. Parliament in its wisdom and after due deliberation has amended the Act and has also incorporated the directions issued by this Court in its earlier judgment in Association for Democratic Reforms (supra) including the direction for declaration of assets and liabilities of every elected candidate for a House of Parliament. They are also required to declare assets of their spouse and dependent children.

The contention that notice is required to be issued to the Attorney General as vires of the Act is challenged is of no substance because 'Union of India' is party respondent and on its behalf learned Solicitor General is appearing before the Court. He was forcefully raised the contentions which were required to be raised at the time of hearing of the matter. So service of notice to learned Attorney General would be nothing but empty formality and the contention is raised for the sake of raising such contention.

Further, we have also reproduced certain recommendations of the National Commission to Review the Working of the Cosntituion in the earlier paragraphs and have also relied upon the same. In the report, the Commission has recommended that any person charged with any offence punishable with imprisonment for a maximum term of five year or more, should be disqualified for being chosen as, or for being, a member of Parliament or Legislature of a State on the expiry of a period of one year from the date the charges were framed against him by the Court in that offence. The Commission has also recommended that every candidate at the time of election must declare his assets and liabilities along with those of his close relatives and all candidates should be required under law to declare their assets and liabilities by an affidavit and the details so given by them should be made public. Again, the legislators should be required under law to submit their returns about their liabilities every year and a final statement in this regard at the end of their term of office. Many such other recommendations are reproduced in earlier paragraphs.

With regard to the second contention, it has already been dealt with in previous paragraphs.

What emerges from the above discussion can be summarized thus:-

(A) The legislature can remove the basis of a decision rendered by a competent Court thereby rendering that decision ineffective but the legislature has no power to ask the instrumentalities of the State to disobey or disregard the decisions given by the Court. A declaration that an order made by a Court of law is void is normally a part of the judicial function. Legislature cannot declare that decision rendered by the Court is not binding or is of no effect.

It is true that legislature is entitled to change the law with retrospective effect which forms the basis of a judicial decision. This exercise of power is subject to constitutional provision,

therefore, it cannot enact a law which is violative of fundamental right.

(B) Section 33-B which provides that notwithstanding anything contained in the judgment of any Court or directions issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information in respect of his election which is not required to be disclosed or furnished under the Act or the Rules made thereunder, is on the face of it beyond the legislative competence, as this Court has held that vote has a fundamental right under Article 19(1)(a) to know the antecedents of a candidate for various reasons recorded in the earlier judgment as well as in this judgment.

Amended Act does not wholly cover the directions issued by this Court. On the contrary, it provides that candidate would not be bound to furnish certain information as directed by this Court.

(C) The judgment rendered by this Court in Association for Democratic Reforms (supra) has attained finality, therefore, there is no question of interpreting constitutional provision which calls for reference under Article 145(3).

(D) The contention that as there is no specific fundamental right conferred on a voter by any statutory provision to know the antecedents of a candidate, the directions given by this Court are against the statutory provisions are, on the face of it, without any substance. In an election petition challenging the validity of an election of a particular candidate, the statutory provisions would govern respective rights of the parties. However, voters' fundamental right to know antecedents of a candidate is independent of statutory rights under the election law. A voter is first citizen of this country and apart from statutory rights, he is

having fundamental rights conferred by the Constitution. Members of a democratic society should be sufficiently informed so that they may cast their votes intelligently in favour of persons who are to govern them. Right to vote would be meaningless unless the citizens are well informed about the antecedents of a candidate. There can be little doubt that exposure to public gaze and scrutiny is one of the surest means to cleanse our democratic governing system and to have competent legislatures.

(E) It is established that fundamental rights themselves have no fixed content, most of them are empty vessels into which each generation must pour its content in the light of its experience. The attempt of the Court should be to expand the reach and ambit of the fundamental rights by process of judicial interpretation. During last more than half a decade, it has been so done by this Court consistently. There cannot be any distinction between the fundamental rights mentioned in Chapter-III of the Constitution and the declaration of such rights on the basis of the judgements rendered by this Court.

In the result, Section 33-B of the Amended Act is held to be illegal, null and void. However, this judgement would not have any retrospective effect but would be prospective. Writ petitions stand disposed of accordingly.

Sd/-

..... J.

(M. B.SHAH)

New Delhi,
March 13, 2003.

SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 490 OF 2002 ETC.

People's Union for Civil Liberites (PUCL) & another ..... Petitioners

Vs.

Union of India and another ..... Respondents

WITH

WRIT PETITION NOS. 509/2002 & 515/2002

J U D G E M E N T

DHARMADHIKARI J.

I have carefully gone through the well considered separate opinions of Brothers MB Shah J. and P.V. Reddi JJ. Both the learned judges have come to a common conclusion that Section 33B inserted in the Representation of People Act, 1951 by Amendment ordinance 4 of 2002, which on repeal is succeeded by 3rd Amendment Act of 2002, is liable to be declared invalid being violative of Article 19(1)(a) of the Constitution.

I am in respectful agreement with the above conclusion reached in common by both the learned brothers. I would, however, like to supplement the above conclusion.

The reports of the advisory Commission set up one after the other by the Government to which a reference has been made by Brother Shah J., highlight the present political scenario where money-power and muscle-power have

substantially polluted and perverted the democratic processes in India. To control the ill-effects of money-power and muscle-power the Commissions recommend that election system should be overhauled and drastically changed lest democracy would become a teasing illusion to common citizens of this country. Not only a half-hearted attempt in the direction of reform of the election system is to be taken, as has been done by the present legislation by amending some provisions of the Act here and there, but a much improved election system is required to be evolved to make the election process both transparent and accountable so that influence of tainted money and physical force of criminals do not make democracy a farce – Citizen's fundamental 'right of information' should be recognized and fully effectuated. This freedom of a citizen to participate and choose a candidate at an election is distinct from exercise of his right as a voter which is to be regulated by statutory law on the election like the R.P. Act.

Making of law for election reform is undoubtedly a subject exclusively of legislature. Based on the decision of this Court in the case of Association for Democratic Reforms (supra) and the directions made therein to the Election Commission, the Amendment Act under consideration has made an attempt to fill the void in law but the void has not been filled fully and does not satisfy the requirement for exercise of fundamental freedom of citizen to participate in election as a well informed voter.

Democracy based on 'Free and fair elections' is considered as basic feature of the Constitution in the case of Keshvanand Bharati (supra). Lack of adequate legislative will to fill the vacuum in law for reforming the election process in accordance with the law declared by this Court in the case of Association for Democratic Reforms (supra), obligates this Court as an important organ in constitutional process to intervene.

In my opinion, this Court is obliged by the Constitution to intervene because the legislative field, even after the passing of the Ordinance and the Amendment Act, leaves a vacuum. This court in the case of Association for Democratic

Reforms (supra) has determined the ambit of fundamental 'right of information' to a voter. The law, as it stands today after amendment, is deficient in ensuring 'free and fair elections'. This Court has, therefore, found it necessary to strike down Section 33B of the Amendment Act so as to revive the law declared by this Court in the case of Association for Democratic Reforms (supra).

With these words, I agree with conclusions (A) to (E) in the opinion of Brother Shah J. and conclusion Nos. (1), (2), (4), (5), (6), (7) & (9) in the opinion of Brother P.V. Reddi J.

With utmost respect, I am unable to agree with conclusion Nos. (3) & (8) in the opinion of Brother P.V. Reddy J., as on those aspects, I have expressed my respectful agreement with Brother Shah J.

Sd/-

..... J.

(D. M. DHARMADHIKARI)

New Delhi,
March 13, 2003.

SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 490 OF 2002

People's Union of Civil Liberites (P.U.C.L.) & Anr. ..... Petitioners

Versus

Union of India & Anr. ..... Respondents

WITH

WRIT PETITION (CIVIL) NO. 509/2002

AND

WRIT PETITION (CIVIL) NO. 515 OF 2002

J U D G E M E N T

P. VENKATARAMA REDDI. J.

The width and amplitude of the right to information about the candidates contesting elections to the Parliament or State Legislature in the context of the citizen's right to vote broadly falls for consideration in these writ petitions under Article 32 of the Constitution. While I respectfully agree with the conclusion that Section 33 (B) of the Representation of the People Act, 1951 does to pass the test of constitutionality, I have come across a limited area of disagreement on certain aspects, especially pertaining to the extent of disclosures that could be insisted upon by the Court in the light of legislation on the subject. Moreover, the importance and intricacies of the subject-matter and the virgin ground trodden by this Court in Union of India Vs. Association for Democratic Reforms (2002) 5 SCC 294] to bring the right to information of the voter within the sweep of Article 19(1) (a) has impelled me to elucidate and clarify certain crucial aspects. Hence, this separate opinion.

I. (1). Freedom of expression and right to information

In the Constitution of our democratic Republic, among the fundamental freedoms, freedom of speech and expression shines radiantly in the firmament of Part III. We must take legitimate pride that this cherished freedom has grown from strength to strength in the post independent era. It has been constantly nourished and shaped to new dimensions in tune with the contemporary needs by the Constitutional Courts. Barring a few aberrations, the Executive Government and the Political Parties too have not lagged behind in safeguarding this valuable right which is the insignia of democratic culture of a nation. Nurtured by this right, Press and electronic media have emerged as powerful instruments to mould the public opinion and to educate, entertain and enlighten the public.

Freedom of speech and expression, just as equality clause and the guarantee of life and liberty has been very broadly construed by this Court right from 1950s. It has been variously described as a 'basic human right', 'a natural right' and the like. It embraces within its scope the freedom of propagation and inter-change of ideas, dissemination of information which would help formation of one's opinion and viewpoint and debates on matters of public concern. The importance which our Constitution-makers wanted to attach to this freedom is evident from the fact that reasonable restrictions on that right could be placed by law only on the limited grounds specified in Article 19(2), not to speak of inherent limitations of the right.

In due course of time, several species of rights unenumerated in Article 19(1)(a) have branched off from the genus of the Article through the process of interpretation by this apex Court. One such right is the 'right to information'. Perhaps, the first decision which has adverted to this right is State of U.P. Vs. Raj Narain [(1975) 4 SCC 428]. 'The right to know', it was observed by Mathew, J. "which is derived from the concept of freedom of speech, though not absolute is a factor which should make one wary, when secrecy is claimed for

transactions which can, at any rate, have no repercussion on public security'. It was said very aptly –

> "In a Government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries."

The next milestone which showed the way for concretizing this right is the decision in S.P. Gupta Vs. Union of India [(1981) Suppl. SCC Page 87] in which this Court dealt with the issue of High Court Judges' transfer. Bhagwati, J. observed –

> "The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of the Government must be the rule and secrecy an exception…"

Peoples' right to know about governmental affairs was emphasized in the following words:

> "No democratic Government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only when people know how Government is functioning that they can fulfill the role which democracy assigns to them and make democracy a really effective participatory democracy."

These two decisions have recognized that the right of the citizens to obtain information on matters relating to public acts flows from the fundamental right enshrined in Article 19(1)(a). The pertinent observations made by the learned

Judges in these two cases were in the context of the question whether the privilege under Section 123 of the Evidence Act could be claimed by the State in respect of the Blue Book in the first case i.e., Raj Narain's case (supra) and the file throwing light on the consultation process wih the Chief Justice, in the second case. Though the scope and ambit of Article 19(1)(a) vis-à-vis the right to information did not directly arise for consideration in those two landmark decisions, the observations quoted supra have certain amount of relevance in evaluating the nature and character of the right.

Then, we have the decision in Dinesh Trivedi Vs. Union of India [(1997) 4 SCC 306]. This Court was confronted with the issue whether background papers and investigatory reports which were referred to in Vohra Committee's Report could be compelled to be made public. The following observations of Ahmadi, C.J. are quite pertinent:-

> "In modern Constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognized limitations; it is, by no means, absolute."

The proposition expressed by Mathew, J. in Raj Narain's Case (Supra) was quoted with approval.

The next decision which deserves reference is the case of Secretary, Ministry of I & B vs. Cricket Association of Bengal [(1995) 2 SCC Page 161]. Has an organizer or producer of any event a right to get the event telecast through an agency of his choice whether national or foreign? That was the primary question decided in that case. It was highlighted that the right to impart and receive information is a part of the fundamental right under Article 19(1)(a) of the Constitution. On this point, Sawant, J. had this to say at Paragraph 75 -

> "The right to impart and receive information is a species of the right of freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. However, this right to have an access to telecasting has limitations on account of the use of the public property….."

Jeevan Reddy J. spoke more or less in the same voice:

> "The right of free speech and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an 'aware' citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgment on all issues touching them."

A conspectus of these cases would reveal that the right to receive and impart information was considered in the context of privilege pleaded by the State in relation to confidential documents relating to public affairs and the freedom of electronic media in broadcasting / telecasting certain events.

I. (2). Right to information in the context of voter's right to know the details of contesting candidates and the right of the media and others to enlighten the voter.

For the first time in Union India Vs. Association for Democratic Reforms' case (supra), which is the forerunner to the present controversy, the right to know about the candidate standing for election has been brought within the sweep of Article 19(1)(a). There can be no doubt that by doing so, a new dimension has been given to the right embodied in Article 19(1)(a) through a creative approach

dictated by the need to improve and refine the political process of election. In carving out this right, the Court had not traversed a beaten track but took a fresh path. It must be noted that the right to information evolved by this court in the said case is qualitatively different from the right to get information about public affairs or the right to receive information through the Press and electronic media, though to a certain extent, there may be overlapping. The right to information of the voter / citizen is sought to be enforced against an individual who intends to become a public figure and the information relates to his personal matter. Secondly that right cannot materialize without State's intervention. The State or its instrumentality has to compel a subject to make the information available to public, by means of legislation or orders having the force of law. With respect, I am unable to share the view that it stands on the same footing as right to telecast and the right to view the sports and games or other items of entertainment through television (vide observations at Paragraph 38 of Association for Democratic Reforms case). One more observation at Paragraph 30 to the effect that "the decision making process of a voter would include his right to know about public functionaries who are required to be elected by him" needs explanation. Till a candidate gets elected and enters the House, it would not be appropriate to refer to him as a public functionary. Therefore, the right to know about a public act done by a public functionary to which we find reference in Raj Narain's case (supra) is not the same thing as the right to know about the antecedents of the candidate contesting for the election. Nevertheless, the conclusion reached by the Court that the voter has such a right and that the right falls within the realm of freedom of speech and expression guaranteed by Article 19(1)(a) can be justified on good and substantial grounds. To this aspect, I will advert a little later. Before that, I would like to say that it would have been in the fitness of the things if the case [U.O.I. vs. Association for Democratic Reforms] was referred to the Constution Bench as per the mandate of Article 145(3) for the reason that a new dimension has been added to the concept of freedom of expression so as to bring within its ambit a new species of right to information. Apparently, no such request was made at the hearing and all parties invited the decision of three

Judge Bench. The law has been laid down therein elevating the right to secure information about a contesting candidate to the position of a fundamental right. That decision has been duly taken note of by the Parliament and acted upon by the Election Commission. It has attained finality. At this stage, it would not be appropriate to set the clock back and refer to matter to Constitution Bench to test the correctness of the view taken in that case. I agree with my learned brother Shah, J. in this respect. However, I would prefer to give reasons of my own – may not be very different from what the learned Judge had expressed, to demonstrate that the proposition laid down by this Court rests on a firm constitutional basis.

I shall now proceed to elucidate as to how the right to know the details about the contesting candidate should be regarded as a part of the freedom of expression guaranteed by Article 19(1)(a). This issue has to be viewed from more than one angle – from the point of view of the voter, the public viz., representatives of Press, organizations such as the petitioners which are interested in taking up public issues and thirdly from the point of view of the persons seeking election to the legislative bodies.

The trite saying that 'democracy is for the people, of the people and by the people' has to be remembered for over. In a democratic republic, it is the will of the people that is paramount and becomes the basis of the authority of the Government. The will is expressed in periodic elections based on universal adult suffrage held by means of secret ballot. It is through the ballot that the voter expresses his choice or preference for a candidate. "Voting is formal expression of will or opinion by the person entitled to exercise the right on the subject or issue", as observed by this court in Lily Thomas Vs. Speaker, Lok Sabha [(1993) 4 SSC 234] quoting from Black's Law Dictionary. The citizens of the country are enabled to take part in the Government through their chosen representatives. In a Parliamentary democracy like ours, the Government of the day is responsible to the people through their elected representatives. The elected representative

acts or is supposed to act as a live link between the people and the Government. The peoples' representatives fill the role of law-makers and custodians of Government. People look to them for ventilation and redressal of their grievances. They are the focal point of the will and authority of the people at large. The moment they put in papers for contesting the election, they are subjected to public gaze and public scrutiny. The character, strength and weakness of the candidate is widely debated. Nothing is therefore more important for sustenance of democratic polity than the voter making an intelligent and rational choice of his or her representative. For this, the voter should be in a position to effectively formulate his/her opinion and to ultimately express that opinion through ballot by casting the vote. The concomitant of the right to vote which is the basic postulate of democracy is thus two fold: first, formulation of opinion about the candidates and second, the expression of choice by casting the vote in favour of the preferred candidate at the polling booth. The first step is complementary to the other. Many a voter will be handicapped in formulating the opinion and making a proper choice of the candidate unless the essential information regarding the candidate is available. The voter / citizen should have at least the basic information about the contesting candidate, such as his involvement in serious criminal offences. To scuttle the flow of information – relevant and essential would affect the electorate's ability to evaluate the candidate. Not only that, the information relating to the candidates will pave the way for public debate on the merits and demerits of the candidates. When once there is public disclosure of the relevant details concerning the candidates, the Press, as a media of mass communication and voluntary organizations vigilant enough to channel the public opinion on right lines will be able to disseminate the information and thereby enlighten and alert the public at large regarding the adverse antecedents of a candidate. It will go a long way in promoting the freedom of speech and expression. That goal would be accomplished in two ways. It will help the voter who is interested in seeking and receiving information about the candidate to form an opinion according to his or her conscience and best of judgment and secondly it will facilitate the Press and voluntary

organizations in imparting information on a matter of vital public concern. An informed voter – whether he acquires information directly by keeping track of disclosures or through the Press and other channels of communication, will be able to fulfill his responsibility in a more satisfactory manner. An enlightened and informed citizenry would undoubtedly enhance democratic values. Thus the availability of proper and relevant information about the candidate fosters and promotes the freedom of speech and expression both from the point of view of imparting and receiving the information. In turn, it would lead to the preservation of the integrity of electoral process which is so essential for the growth of democracy. Thought I do not go to the extent of remarking that the election will be a farce if the candidates' antecedents are not known to the voters, I would say that such information will certainly be conducive to fairness in election process and integrity in public life. The disclosure of information would facilitate and augment the freedom of expression both from the point of view of the voter as well as the media through which the information is publicized and openly debated.

The problem can be approached from another angle. As observed by this Court in Association from Democratic Reforms' case (supra), a voter 'speaks out or expresses by casting vote'. Freedom of expression, as contemplated by Article 19(1)(a) which is many respects overlaps and coincides with freedom of speech, has manifold meanings. It need not and ought not to be confined to expressing something in words orally or in writing. The act of manifesting by action or language is one of the meanings given in Ramanatha Iyer's Law Lexicon (edited by Justice Y.V. Chandrachud). Even a manifestation of an emotion, feeling etc., without words would amount to expression. The example given in Collin's Dictionary of English Language (1983 reprint) is: "tears are an expression of grief", is quite apposite. Another shade of meaning is : "a look on the face that indicates mood or emotion; eg: a joyful expression". Communication of emotion and display of talent through music, painting etc., is also a sort of expression. Having regard to the comprehensive meaning of phrase 'expression',

voting can be legitimately regarded as a form of expression. Ballot is the instrument by which the voter expresses his choice between candidates or in respect to propositions; and his 'vote' is his choice or election, as expressed by his ballot (vide 'A Dictionary of Modern Legal Usage', 2nd Edition, by Garner Bryan A). "Opinion expressed, resolution or decision carried, by voting" is one of the meanings given to the expression 'vote' in the New Oxford Illustrated Dictionary. It is well settled and it needs no emphasis that the fundamental right of freedom of speech and expression should be broadly construed and it has been so construed all these years. In the light of this, the dictum of the Court that the voter "speaks out or expresses by casting a vote" is apt and well founded. I would only reiterate and say that freedom of voting by expressing preference for a candidate is nothing but freedom of expressing oneself in relation to a matter of prime concern to the country and the voter himself.

I. (3) Right to vote is a Constitutional right though not a fundamental right but right to make choice by means of ballot is part of freedom of expression.

The right to vote for the candidate of one's choice is of the essence of democratic polity. This right is recognized by our Constitution and it is given effect to in specific form by the Representation of the People Act. The Constituent Assembly debates reveal that the idea to treat the voting right as a fundamental right was dropped; nevertheless, it was decided to provide for it elsewhere in the Constitution. This move found its expression in Article 326 which enjoins that "the elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less then 21 years of age, and is not otherwise disqualified under the Constitution or law on the ground of non-residence, unsoundness of mind, crime, corrupt or illegal practice-shall be entitled to be registered as voter at such election" (Now 18 years). However, case after case starting from Ponnuswami's case [(1952) SCR 218) characterized it

as a statutory right. "The right to vote or stand as a candidate for election", it was observed in Ponnuswami's case "is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it." It was further elaborated in the following words:

> "Strictly speaking, it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it."

In Jyoti Basu vs. Debi Ghosal [1982 (3) SCR 318] this Court again pointed out in no uncertain terms that: "a right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple a statutory right." With great reverence to the eminent Judges, I would like to clarify that the right to vote, if not a fundamental right, is certainly a constitutional right. The right originates from the Constitution and in accordance with the constitutional mandate contained in Article 326, the right has been shaped by the statute, namely, R.P. Act. That, in my understanding is the correct legal position as regards the nature of the right to vote in elections to the House of people and Legislative Assemblies. It is not very accurate to describe it as a statutory right, pure and simple. Even with this clarification, the argument of the learned Solicitor General that the right to vote not being a fundamental right, the information which at best facilitates meaningful exercise of that right cannot be read as an integral part of any fundamental right, remains to be squarely met. Here, a distinction has to be drawn between the conferment of the right to vote on fulfillment of requisite criteria and the culmination of that right in the final act of expressing choice towards a particular candidate by means of ballot. Though the initial right cannot be placed on the pedestal of a fundamental right, but, at the stage when the voter goes to the polling booth and casts his vote, his freedom to express arises. The casting of vote in favour of

one or the other candidate tantamounts to expression of his opinion and preference and that final stage in the exercise of voting right marks the accomplishment of freedom of expression of the voter. That is where Article 19(1)(a) is attracted. Freedom of voting as distinct from right to vote is thus a species of freedom of expression and therefore carries with it the auxiliary and complementary rights such as right to secure information about the candidate which are conducive to the freedom. None of the decisions of this Court wherein the proposition that the right to vote is a pure and simple statutory right was declared and reiterated, considered the question whether the citizen's freedom of expression is or is not involved when a citizen entitled to vote casts his vote in favour of one or the other candidate. The issues that arose in Ponnuswami's case and various cases cited by the learned Solicitor-General fall broadly within the realm of procedural or remedial aspects of challenging the election or the nomination of a candidate. None of these decisions, in my view, go counter to the proposition accepted by us that the fundamental right of freedom of expression sets in when a voter actually casts his vote. I, therefore, find no merit in the submission made by the learned Solicitor General that these writ petiions have to be referred to a larger bench in view of the apparent conflict. As already stated, the factual matrix and legal issues involved in those cases were different and the view, we are taking, does not go counter to the actual ratio of the said decisions rendered by the eminent Judges of this Court.

Reliance has been placed by the learned Solicitor General on the Constitution Bench decision in Jamuna Prasad Vs. Lachhi Ram [(1995) 1 SCR Page 608].That was a case of special appeal to this Court against the decision of an Election Tribunal. Apart from assailing the finding of the Tribunal on the aspect of 'corrupt practice', Section 123 (5) and 124 (5) (as they stood then) of the R.P. Act were challenged as ultra vires Article 19(1)(a). The former provision declared the character assassination of a candidate as a major corrupt practice and the latter provision made an appeal to vote on the ground of caste a minor corrupt practice. The contention that these provisions impinged on the freedom

of speech and expression was unhesitatingly rejected. The court observed that those provision did not stop a man from speaking. They merely prescribed conditions which must be observed if a citizen wanted to enter the Parliament. It was further observed that the right to stand as a candidate and contest an election is a special right created by the statute and can only be exercised on the conditions laid down by the statute. In that context, the Court made an observation that the fundamental right chapter had no bearing on the right to contest the election which is created by the statute and the appellant had no fundamental right to be elected as a member of Parliament. If a person wants to get elected, he must observe the rules laid down by law. So holding, those Sections were held to be intra vires. I do not think that this decision which dealt with the contesting candidate's rights and obligations has any bearing on the freedom of expression of the voter and the public in general in the cotext of elections. The remark that the fundamental right chapter has no bearing on a right like this created by statute' cannot be divorced form the context in which it was made.

The learned senior counsel appearing for one of the interveners (BJP) has advanced the contention that if the right to information is culled out from Article 19(1)(a) and read as an integral part of that right, it is fraught with dangerous consequences inasmuch as the grounds of reasonable restrictions which could be imposed are by far limited and therefore, the Government may be constrained to part with certain sensitive informations which would not be in public interest to disclose. This raises the larger question whether apart from the heads of restriction envisaged by sub-Article (2) of Article 19, certain inherent limitations should not be read into the Article, if it becomes necessary to do so in national or societal interest. The discussion on this aspect finds its echo in the separate opinion of Jeevan Reddy, J. in Cricket Association's case (supra). The learned Judge was of the view that the freedom of speech and expression cannot be so exercised as to endanger the interest of the nation or the interest of the society, even if the expression 'national interest' or 'public interest' has not been used in

Article 19(2). It was pointed out that such implied limitation has been read into the first amendment of the U.S. Constitution which guarantees the freedom of speech and expression in unqualified terms.

The following observations of the U.S. Supreme Court in Giltow vs. New York [(1924) 69 L.Ed. 1138] are very relevant in this context :

> "It is a fundamental principle, long established, that the freedom of speech and of the Press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridle licence that gives immunity for every possible use of language, and prevents the punishment of those who abuse this freedom."

Whenever the rare situations of the kind anticipated by the learned counsel arise, the Constitution and the Courts are not helpless in checking the misuse and abuse of the freedom. Such a check need not necessarily be found strictly within the confines of Article 19(2).

II. Sections 33-A & 33-B of the Representation of People (3rd Amendment) Act, 2002 – whether Section 33-A by itself effectively secures the voter's / citizen's right to information - whether Section 33-B is unconstitutional?

II. (1) Section 33-A & 33-B of the Representation of People (3rd Amendment) Act:

Now I turn my attention to the discussion of core question, that is to say, whether the impugned legislation falls foul of Article 19(1)(a) for limiting the area of disclosure and whether the Parliament acted beyond its competence in deviating from the directives given by this Court to the Election Commission in Democratic Reforms Association case. By virtue of the Representation of the

People (Amendment) Act, 2002 the only information which a prospective contestation is required to furnish apart from the information which he is obliged to disclose under the existing provisions is the information on two points : (I) Whether he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed and; (ii) Whether he has been convicted of an offence (other than the offence referred to in sub-Sections (1) to (3) of Section 8) and sentenced to imprisonment for one year or more. On other points spelt out in this Court's judgment, the candidate is not liable to furnish any information and that is so, notwithstanding anything contained in any judgment or order of a Court OR any direction, order or instruction issued by the Election Commission. Omission to furnish the information as per the mandate of Section 33B and furnishing false information in that behalf is made punishable. That is the sum and substance of the two provisions namely, Section 33A and 33B.

The plain effect of the embargo contained in Section 33B is to nullify substantially the directives issued by the Election commission pursuant to the judgment of this Court. At present, the instructions issued by the Election Commission could only operate in respect of the items specified in Section 33A and nothing more. It is for this reason that Section 33B has been challenged as ultra vires the Constitution both on the ground that it affects the fundamental right of the voter / citizen to get adequate information about the candidate and that the Parliament is incompetent to nullify the judgment of this Court. I shall briefly notice the rival contentions on this crucial issue.

II. (2) Contentions :

Petitioners' contention is that the legislation on the subject of disclosure of particulars of candidates should adopt in entirely the directives issued by this Court to the Election Commission in the pre-ordinance period. Any dilution or deviation of those norms or directives would necessarily violate the fundamental right guaranteed by Article 19(1)(a) as interpreted by this court and therefore the

law, as enacted by Parliament, infringes the said guarantee. This contention has apparently been accepted by my learned brother M.B. Shah, J. The other view point presented on behalf of Union of India and one of the Interveners is that the freedom of legislature in identifying and evolving the specific areas in which such information should be made public cannot be curtailed by reference to the ad hoc directives given by this Court in pre-ordinance period and the legislative wisdom of Parliament, especially in election matters, cannot be questioned. This is the position even if the right to know about the candidate is concerned to be part of Article 19(1)(a). It is for the Parliament to decide to what extent and how far the information should be made available. In any case, it is submitted that the Court's verdict has been duly taken note of by Parliament and certain provisions have been made to promote the right of information vis-à-vis the contesting candidates. Section 33B is only apart of this exercise and it does not go counter to Article 19(1)(a) even though the scope of public disclosures has been limited to one important aspect only.

II (3) Broad points for consideration

A liberal but not a constricted approach in the matter of disclosure of information in relation to candidates seeking election is no doubt a desideratum. The wholesale adoption of the Court's diktats on the various items of information while enacting the legislation would have received public approbation and would have been welcomed by public. It would have been in tune with the recommendations of various Commissions and even the statements made by eminent and responsible political personalities. However, the fact remains that the Parliament in its discretion did not go the whole hog, but chose to limiting the scope of mandated disclosures to one only of the important aspects highlighted in the judgment. The question remains to be considered whether in doing so, the Parliament out-stepped its limits and enacted a law in violation of the guarantee enshrined in Article 19(1)(a) of the Constitution. The allied question is whether the Parliament has no option but to scrupulously adopt the directives given by this Court to the Election Commission. Is it open to the Parliament to

Independently view the issue and formulate the parameters and contents of disclosure, though it has the effect of of diluting or diminishing the scope of disclosures which, in the perception of the Court, were desirable? In consideration these questions of far reaching importance from the Constitutional angle, it is necessary to have a clear idea of the ratio and implications of this Court's Judgment in the Association for Democratic Reforms case.

II. (4) Analysis of the judgment in Association for Democratic Reforms case – whether and how far the directives given therein have impact on the Parliamentary legislation – Approach of Court in testing the legislation.

The first proposition laid down by this Court in the said case is that a citizen / voter has the right to know about the antecedents of the contesting candidate and the right is a part of the fundamental right under Article 19(1)(a). In this context, M.B. Shah, J observed that –

> "… Voter's speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote."

It was then pointed out that the information about the candidate to be selected is essential as it would be conducive to transparency and purity in the process of election. The next question considered was how best to enforce that right. The Court having noticed that there was void in the filed in the sense that it was not covered by any legislative provision, gave directions to the Election Commission to fill the vacuum by requiring the candidate to furnish information on the specified aspects while filling the nomination paper. Five items of information which the Election Commission should cal for from the prospective candidates were spelt out by the Court. Two of them relate to criminal background of the candidate and pendency of criminal cases against him. Points 3 & 4 relate to assets and liabilities of the candidate and his / her family. The last one is about th educational qualifications of the candidate. The legal basis and

the justification for issuing such directives to the Commission has been stated thus (vide paragraphs 19 & 20):

> "19. At the outset, we would say that it is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules.
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> * * * * *
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> 20. However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted."

Again, at paragraph 49 it was emphasized -

> "It is to be stated that the Election Commission has from time to time issued instructions/orders to meet with the situation where the field is unoccupied by the legislation. Hence, the norms and modalities to carry out and give effect to the aforesaid directions should be drawn up properly by the Election Commission as early as possible."

Thus, the Court was conscious of the fact that the Election Commission could act in the matter only so long as the field is not covered by legislation. The Court also felt that the vacuum or void should be suitably filled so that the right to information concerning a candidate would soon become a reality. In other words, till the Parliament applied its mind and came forward with appropriate legislation to give effect to the right available to a voter-citizen, the Court felt that the said goal has to be translated into action through the media of

Election Commission, which is endowed with 'residuary power' to regulate the election process in the best interests of the electorate. Instead of leaving it to the Commission and with a view to give quietus to the possible controversies that might arise, the Court considered it expedient to spell out five points (broadly falling into three categories) on which the information has to be called for from the contesting candidate. In the very nature of things, the directives given by the Court were intended to operate only till the law was made by legislature and in that sense 'pro tempore' in nature. The five directives cannot be considered to be rigid theorems—inflexible and immutable, but only reflect the perception and tentative thinking of the Court at a point of time when the legislature did not address itself to the question.

When the Parliament, in the aftermath of the verdict of this Court, deliberated and thought it fit to secure the right to information to a citzen ony to a limited extent (having a bearing on criminal antecedents), a fresh look has to be necessarily taken by the Court and the validity of the law made has to be tested on a clean slate. It must be remembered that the right to get information which is a corollary to the fundamental right to free speech and expression has no fixed connotation. Its contours and parameters cannot be precisely defined and the Court in my understanding, never meant to do so. It is often a matter of perception and approach. How far to go and where to stop? These are the questions to be pondered over by the Legislature and the Constitutional Court called upon to decide the question of validity of legislation. For instance, many voters/citizens may like to have more complete information—a sort of bio-data of the candidate starting from his school days such as his academic career, the properties which he had before and after entering into politics, the details of his income and tax payments for the last one decade and sources of acquisition of his and his family's wealth. Can it be said that all such information which will no doubt enable the voter and public to have a comprehensive idea of the contesting candidate, should be disclosed by a prospective candidate and that the failure to provide for it by law would infringe

the fundamental right under Article 19(1)(a)? The preponderance of view would be that it is not reasonable to compel a candidate to make disclosures affecting his privacy to that extent in the guise of effectuating the right to information. A line has to be drawn somewhere. While there cannot be a lip service to the valuable right to information, it should not be stretched too far. At the same time, the essence and substratum of the right has to be preserved and promoted, when once it is brought within the fold of fundamental right. A balanced but not a rigid approach, is needed in identifying and defining the parameters of the right which the voter/citizen has. The standards to be applied to disclosures vis-a-vis public affairs and governance AND the disclosures relating to personal life and bio-data of a candidate cannot be the same. The measure or yardstick will be somewhat different. It should not be forgotten that the candidates' right to privacy is one of the many factors that could be kept in view, though that right is always subject to overriding public interest. In my view, the points of disclosure spelt out by this Court in the Association for Democratic Reforms case should serve as broad indicators or parameters in enacting the legislation for the purpose of securing the right to information about the candidate. The paradigms set by the Court, though pro tempore in nature as clarified supra, are entitled to due weight. If the legislature in utter disregard of the indicators enunciated by this Court proceeds to make a legislation providing only for a semblance or pittance of information or omits to provide for disclosure on certain essential points, the law would then fall to pass the muster for Article 19(1)(a). Though certain amount of deviation from the aspects of disclosure spelt out by this Court is not impermissible, a substantial departure cannot be countenanced. The legislative provision should be such as to promote the right to information to a reasonable extent, if not to the fullest extent on details of concern to the voters and citizens at large. While enacting the legislation, the legislature has to ensure that the fundamental right to know about the candidate is reasonably secured and information which is crucial, by any objective standards, is not denied. It for the Constitutional Court in exercise of its judicial review power to judge whether the areas of disclosure

carved out by the Legislatuer are reasonably adequate to safeguard the citizens' right to information. The Court has to take a holistic view and adopt a balanced approach, keeping in view the twin principles that the citizens right to information to know about the personal details of a candidate is not an unlimited right and that at any rate, it has no fixed concept and the legislature has freedom to choose between two reasonable alternatives. It is not a proper approach to test the validity of legislation only from the standpoint whether the legislation implicity and word to word gives effect to the directives issued by the Court as an ad hoc measure when the field was unoccupied by legislation. Once legislation is made, this Court has to make an independent assessment in the process of evaluating whether the items of information statutorily ordained are reasonably adequate to secure the right of information to the voter so as to facilities him to form a fairly clear opinion on the merits and demerits of the candidates. In embarking on this exercise, as already stated, this Court's directives on the points of disclosure even if they be tentative or ad hoc in nature, cannot be brushed aside, but should be given due weight. But, I reiterate that the shape of legislation need not be solely controlled by the directives issued to the Election Commission to meet an ad hoc situation. As I said earlier, the right to information cannot be placed in straight jacket formulae and the perceptions regarding the extent and amplitude of this right are bound to vary.

III. Section 33-B is unconstitutional

III. (1). The right to information cannot be frozen and stagnated.

In my view, the Constitutional validity of Section 33B has to be judged from the above angle and perspective. Considered in that light, I agree with the conclusion of M.B. Shah, J. that Section 33B does not pass the test of Constitutionality. The reasons are more than one. Firstly, when the right to secure information about a contesting candidate is recognized as an integral part of fundamental right as it ought to be, it follows that its ambit, amplitude and

parameters cannot be chained and circumscribed for all time to come by declaring that no information, other than that specifically laid down in the Act, should be required to be given. When the legislation delimiting the areas of disclosure was enacted, it may be that the Parliament felt that the disclosure on other aspects was not necessary for the time being. Assuming that the guarantee of right to information is not violated by making a departure from the paradigms set by the Court, it is not open to the Parliament to stop all further disclosures concerning the candidate in future. In other words, a blanket ban on dissemination of information other than that spelt out in the enactment, irrespective of need of the hour and the future exigencies and expedients is, in my view, impermissible. It must be remembered that the concept of freedom of speech and expression does not remain static. The felt necessities of the times coupled with experiences drawn from the past may give rise to the need to insist on additional information on the aspects not provided for by law. New situations and march of events may demand the flow of additional facets of information. The right to information should be allowed to grow rather than being frozen and stagnated; but the mandate of Section 33B prefaced by the non obstante clause impedes the flow of such information conducive to the freedom of expression. In the face of the prohibition under Section 33B, the Election Commission which is entrusted with the function of monitoring and supervising the election process will have to sit back with a sense of helplessness inspite of the pressing need for insisting on additional information. Even the Court may at times feel handicapped in taking necessary remedial steps to enforce the right to information. In may view, the legislative injunction curtailing the nature of information to be furnished by the contesting candidates only to the specific matters provided for by the legislation and nothing more would emasculate the fundamental right to freedom of expression of which the right to information is a part. The very objective of recognizing the right to information as part of the fundamental right under Article 19(1))a) in order to ensure free and fair elections would be frustrated if the ban prescribed by Section 33B is taken to its logical effect.

III. (2) Impugned legislation fails to effectuate right to information on certain vital aspects.

The second reason why Section 33B should be condemned is that by blocking the ambit of disclosures only to what has been specifically provided for by the amendment, the Parliament failed to give effect to one of the vital aspects of information, viz., disclosure of assets and liabilities and thus failed in substantial measure to give effect to the right to information as a part of the freedom of expression. The right to information which is now provided for by the legislature no doubt relates to one of the essential points but in ignoring the other essential aspect relating to assets and liabilities as discussed hereinafter, the Parliament has unduly restricted the ambit of information which the citizens should have and thereby impinged on the guarantee enshrined in Article 19(1)(a).

III. (3) How far the principle that the Legislature cannot encroach upon the judicial sphere applies.

It is a settled principle of constitutional jurisprudence that the only way to render a judicial decision in effective is to enact a valid law by way of amendment or otherwise fundamentally altering the basis of the judgment either prospectively or retrospectively. The legislature cannot overrule or supersede a judgment of the Court without lawfully removing the defect or infirmity pointed out by the Court because it is obvious that the legislature cannot trench on the judicial power vested in the Courts. Relying on this principle, it is contended that the decision of apex Constitutional Court cannot be set at naught to the manner in which it has been done by the impugned legislation. As a sequel, it is further contended that the question of altering the basis of judgment or curing the defect does not arise in the instant case as the Parliament cannot pass a law in curtailment or fundamental right recognized, amplified and enforced by this Court.

The contention that the fundamental basis of the decision in Association for Democratic Reforms case has not at all been altered by the Parliament, does

not appeal to me. I have discussed at length the real scope and ratio of the judgment and the nature and character of directives given by this Court to the Election Commission. As observed earlier, those directions are protempore in nature when there was vacuum in the field. When once the Parliament stepped in and passed the legislation providing for right of information, may be on certain limited aspects, the void must be deemed to have been filled up and the judgment works itself out, though the proposition laid down and observations made in the context of Article 19(1)(a) on the need to secure information to the citizens will hold good. Now the new legislation has to be tested on the touchstone of Article 19(1)(a). Of course, in doing so, the decision of this Court should be given due weight and there cannot be marked departure from the items of information considered essential by this Court to effectuate the fundamental right to information. Viewed in this light, it must be held that the Parliament did not by law provide for disclosure of information on certain crucial points such as assets and liabilities and at the same time, placed an embargo on calling for further information by enacting Section 33B. That is where Section 33B of the impugned amendment Act does not pass the muster of Article 19(1)(a), as interpreted by this Court.

IV. Right to information with reference to specific aspects:

I shall now discuss the specifics of the problem. With a view to promote the right to information, this Court gave certain directives to the Election Commission which, as I have already clarified, were ad hoc in nature. The Election Commission was directed to call for details from the contesting candidates broadly on three points, namely, (I) criminal record (ii) assets and liabilities and (iii) educational qualification. The third amendment to R.P. Act which was preceded by an Ordinance provided for disclosure of information. How far the third amendment to the Representation of the People Act, 2002 safeguards the right of information which is a part of the guaranteed right under Article 19(1)(a), is the question to be considered now with specific reference to each of

the three points spelt out in the judgment of this Court in Association for Democratic Reforms case.

IV. (1) Criminal background and pending criminal cases against candidates—Section 33-A of the R.P. (3rd Amendment) Act.

As regards the first aspect, namely criminal record, the directives in Association for Democratic Reforms case are two fold: "(I) whether the candidate is convicted/acquitted/discharged of any criminal case in the past — if any, whether he is punished with imprisonment or fine and (ii) prior to six months of filing of nomination, whether the candidate is an accused in any pending case of any offence punishable with imprisonment for two years or more and in which charge is framed or cognizance is taken by the Court of law." As regards the second directive, the Parliament has substantially proceeded on the same lines and made it obligatory to the candidate to furnish information as to whether he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the competent Court. However, the case in which cognizance has been taken but charge has not been framed is not covered by Clause (i) of Section 33A(i). The Parliament having taken the right step of compelling disclosure of the pendency of cases relating to major offences, there is no good reason why it failed to provide for the disclosure of the cases of the same nature of which cognizance has been taken by the Court. It is common knowledge that no account of variety of reasons such as the delaying tactics of one or the other accused and inadequacies of prosecuting machinery, framing of formal charges get delayed considerably, especially in serious cases where committal procedure has to be gone through. On that account, the voter/citizen shall not be denied information regarding cognizance taken by the Court of an offence punishable with imprisonment for two years or more. The citizen's right to information, when once it is recognized to be part of the fundamental right under Article 19(1)(a), cannot be truncated in the manner in which it has been done. Clause (I) of Section 33(A)(I) therefore falls short of the avowed goal to effectuate the right of information on a vital aspect. Cases in

which cognizance has been taken should therefore be comprehended within the area of information accessible to the voters/citizens, in addition to what is provided for in Clause (i) of Section 33A.

Coming to Clause (ii) of Section 33A(i), the Parliament broadly followed the pattern shown by the Court itself. This Court thought it fit to draw by a line between major/serious offences and minor/non-serious offences while giving direction No.2(vide Para 48). If so, the legislative thinking that this distinction should also hold good in regard to past cases cannot be faulted on the ground that the said clause fails to provide adequate information about the candidate. If the Parliament felt that the convictions and sentences of the long past related to petty/non serious offences need not be made available to electorate, it cannot be definitely said that the valuable right to information becomes a causality. Very often, such offences by and large may not involve moral turpitude. It is not uncommon, as one of the learned senior counsel pointed out that the political personalities are prosecuted for politically related activities such as holding demonstrations and visited with the punishment of fine or short imprisonment. Information regarding such instances may not be of real importance to the electorate in judging the worth of the relative merits of the candidates. At any rate, it is a matter of perception and balancing of various factors, as observed supra. The legislative judgment cannot be faulted merely for the reason that the pro tempore directions of this Court have not been scrupulously followed. As regards acquittals, it is reasonable to take the view that such information will not be of much relevance inasmuch as acquittal prima facie implies that the accused is not connected with the crime or the prosecution has no legs to stand. It is not reasonable to expect that from the factum of prosecution resulting in the acquittal, the voters / citizens would be able to judge the candidate better. On the other hand such information in general has the potential to send misleading signals about the honesty and integrity of the candidate.

I am therefore of the view that as regards past criminal record, what the Parliament has provided for is fairly adequate.

One more aspect which needs a brief comment is the exclusion of offerces referred to in sub-Sections (1) and (2) of Section 8 of the R.P. Act, 1951. Section 8 deals with disqualification on conviction for certain offences. Those offences are of serious nature from the point of view of national and societal interest. Even the existing provisions, viz., Rule 4A inserted by Conduct of Elections (Amendment) Rules, 2002 make a provision for disclosure of such offences in the nomination form. Hence, such offences have been excluded from the ambit of Clause (ii) of Section 33A.

IV. (2) Assets and liabilities

Disclosure of assets and liabilities is another thorny issue. If the right to information is to be meaningful and if it is to serve its avowed purpose, I am of the considered view that the candidate entering the electoral contest should be required to disclose the assets and liabilities (barring articles of household use). A member of Parliament or State Legislature is an elected representative occupying high public office and at the same time, he is a 'public servant' within the meaning of Prevention of Corruption Act as ruled by this Court in the case of P.V. Narasimha Rao Vs. State [(1998) 4 SCC 626]. They are the repositories of public trust. They have public duties to perform. It is borne out by experience that by virtue of the office they hold there is a real potential for misuse. The public awareness of financial position of the candidate will go a long way in forming an opinion whether the candidate, after election to the office had amassed wealth either in his own name or in the name of family members viz., spouse and dependent children. At the time when the candidate seeks re-election, the citizens/voters can have a comparative idea of the assets before and after the election so as to assess whether the high public office had possible been used for self-aggrandizement. Incidentally, the disclosure will serve as a check against misuse of power for making quick money-a malady which nobody can deny, has been pervading the political spectrum of our democratic nation. As regards liabilities, the disclosure will enable the voter to know, inter alia, whether the candidate has outstanding dues payable to public financial institutions or the

Government. Such information has a relevant bearing on the antecedents and the propensities of the candidate in his dealings with public money. 'Assets and liabilities' is one of the important aspects to which extensive reference has been made in Association for Democratic Reforms case. The Court did consider it, after an elaborate discussion, as a vital piece of information as far as the voter is concerned. But, unfortunately, the observations made by this Court in this regard have been given a short shrift by the Parliament with little realization that they have significant bearing on the right to get information from the contesting candidates and such information is necessary to give effect to the freedom of expression.

As regards the purpose of disclosure of assets and liabilities, I would like to make it clear that it is not meant to evaluate whether the candidate is financially sound or has sufficient money to spend in the election. Poor or rich are alike entitled to contest the election. Every citizen has equal accessibility in public arena. If the information is meant to mobilize public opinion in favour of an affluent/financially sound candidate, the tenet of socialistic democracy and the concept of equality so firmly embedded in our Constitution will be distorted. I cannot also share the view that this information on assets would enable the public to verify whether unaccounted money played a part in contesting the election. So long as the Explanation-I to Section 77 of R.P. Act, 1951 stands and the contributions can legitimately come from any source, it is not possible for a citizen/voter to cause a verification to be made on those lines. In my opinion, the real purposes of seeking information in regard to assets and liabilities are those which I adverted to in the preceding paragraph. It may serve other purposes also, but, I have confined myself to the relevancy of such disclosure vis-à-vis right to information only.

It has been contended with much force that the right to information made available to the voters/citizens by judicial interpretation has to be balanced with the right of privacy of the spouse of the contesting candidate and any insistence on the disclosure of assets and liabilities of the spouse invades his/her right to

privacy which is implied in Article 21. After giving anxious consideration to this argument, I am unable to uphold the same. In this context, I would like to recall the apt words of Mathew J, in Gobind Vs. State of M.P. [(1975) 2 SCC 148]. While analyzing the right to privacy as an ingredient or Article 21, it was observed:

> "There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an *important countervailing interest is shown to be superior".* (emphasis supplied).

It was then said succinctly:

> "If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test. Then the question would be whether a State interest is of such paramount importance as would justify an infringement of the right."

It was further explained —

> "Privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values." By calling upon the contesting candidate to disclose the assets and liabilities of his/her spouse, the fundamental right to information of a voter / citizen is thereby promoted. When there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it serves larger public interest. The right to know about the candidate who intends to become a public figure and a representative of the people would not be effective and real if only truncated information of

the assets and liabilities is given. It cannot be denied that the family relationship and social order in our country is such that the husband and wife look to the properties held by them as belonging to the family for all practical purposes, though in the eye of law the properties may distinctly belong to each of them. By and large, there exists a sort of unity of interest in the properties held by spouses. The property being kept in the name of the spouse benami is not unknown in our country. In this situation, it could be said that a countervailing or paramount interest is involved in requiring a candidate who chooses to subject himself / herself to public gaze and scrutiny to furnish the details of assets and liabilities of the spouse as well. That is one way of looking at the problem. More important, it is to be noted that the Parliament itself accepted in principle that not only the assets of the elected candidates but also his or her spouse and dependent children should be disclosed to the constitutional authority and the right of privacy should not come in the way of such disclosure; but, the hitch lies in the fact that the disclosure has to be made to the Speaker or Chairman of the House after he or she is elected. No provision has been made for giving access to the details filed with the presiding officer of the House. By doing so, the Parliament has omitted to give effect to the principle, which it rightly accepted as a step in aid to promote integrity in public life. Having accepted the need to insist on disclosure of assets and liabilities of the elected candidate together with those of other family members, the Parliament refrained from making a provision for furnishing the information at the time of filing the nomination. This has resulted in jeopardizing the right to information implicitly guaranteed by Article 19(1)(a). Therefore, the provision made in Section 75A regarding declaration of assets and liabilities of the elected candidates to the presiding officer has failed to effectuate the right to information and the freedom of expression of the voters/

citizens.

IV. (3) Educational qualifications

The last item left for discussion is about educational qualifications. In my view, the disclosure of information regarding educational qualifications of a candidate is not an essential component of the right to information flowing from Article 19(1)(a). By not providing for disclosure of educational qualifications, it cannot be said that the Parliament violated the guarantee of Article 19(1)(a). Consistent with the principle of adult suffrage, the Constitution has not prescribed any educational qualification for being Member of the House of the People or Legislative Assembly. That apart, I am inclined to think that the information relating to educational qualifications of contesting candidates does not serve any useful purpose in the present context and scenario. It is a well know fact that barring a few exceptions, most of the candidates elected to Parliament or the State Legislatures are fairly educated even if they are not Graduates or Post-Graduates. To think of illiterate candidates is based on a factually incorrect assumption. To say that well educated persons such as those having graduate and post-graduate qualifications will be able to serve the people better and conduct themselves in a better way inside and outside the House is nothing but overlooking the stark realities. The experience and events in public life and the Legislatures have demonstrated that the dividing line between the well educated and less educated from the point of view of his/her calibre and culture is rather thin. Much depends on the character of the individual, the sense of devotion to duty and the sense of concern to the welfare of the people. These characteristics are not the monopoly of well educated persons. I do not think that it is necessary to supply information to the voter to facilitate him to indulge in an infructuous exercise of comparing the educational qualifications of the candidates. It may be that certain candidates having exceptionally high qualifications in specialized field may prove useful to the society, but it is natural to expect that such candidates would voluntarily come forward with an account of their own academic and other

talents as a part of their election programme. Viewed from any angle, the information regarding educational qualifications is not a vital and useful piece of information to the voter, in ultimate analysis. At any rate, two views are reasonably possible. Therefore, it is not possible to hold that the Parliament should have necessarily made the provision for disclosure of information regarding educational qualifications of the candidates.

V. Conclusions:

Finally, the summary of my conclusions:

1. Securing information on the basic details concerning the candidates contesting for elections to the parliament or State Legislature promotes freedom of expression and therefore the right to information forms an integral part of Article 19(1)(a). This right to information is however, qualitatively different from the right to get information about public affairs or the right to receive information through the Press and electronic media, though, to a certain extent, there may be overlapping.

2. The right to vote at the elections to the House of people or Legislative Assembly is a constitutional right but not merely a statutory right; freedom of voting as distinct from right to vote is a facet of the fundamental right enshrined in Article 19(1)(a). The casting of vote in favour of one or the other candidate marks the accomplishment of freedom of expression of the voter.

3. The directives given by this Court in Union of India Vs. Association for Democratic Reforms [(2002) 5 SCC 294] were intended to operate only till the law was made by the Legislature and in that sense 'pro tempore' in nature. Once legislation is made, the Court has to make an independent assessment in order to evaluate whether the items of information statutorily ordained are reasonably adequate to secure the right of information available to the voter/citizen. In embarking on this exercise, the points of disclosure indicated by this Court, even

if they be tentative or ad hoc in nature, should be given due weight and substantial departure therefrom cannot be countenanced.

4. The court has to take a holistic view and adopt a balanced approach in examining the legislation providing for right to information and laying down the parameters of that right.

5. Section 33B inserted by the Representation of People (3rd Amendment) Act, 2002 does not pass the test of constitutionality firstly for the reason that it imposes blanket ban on dissemination of information other than that spelt out in the enactment irrespective of the need of the hour and the future exigencies and expedients and secondly for the reason that the ban operates despite the fact that the disclosure of information now provided for is deficient and inadequate.

6. The right to information provided for by the Parliament under Section 33A in regard to the pending criminal cases and past involvement in such cases is reasonably adequate to safeguard the right to information vested in the voter/ citizen. However, there is not good reason for excluding the pending cases in which cognizance has been taken by Court from the ambit of disclosure.

7. The provision made in Section 75A regarding declaration of assets and liabilities of the elected candidates to the Speaker or the Chairman of the House has failed to effectuate the right to information and the freedom of expression of the voters/citizens. Having accepted the need to insist of disclosure of assets and liabilities of the elected candidate together with those of spouse or dependent children, the Parliament ought to have made a provision for furnishing this information at the time of filling the nomination. Failure to do so has resulted in the violation of guarantee under Article 19(1)(a).

8. The failure to provide for disclosure of educational qualification does not, in practical terms, infringe the freedom of expression.

9. The Election Commission has to issue revised instructions to ensure implementation of Section 33A subject to what is laid down in this judgment regarding the cases in which cognizance has been taken. The Election Commission's orders related to disclosure to assets and liabilities will still hold good and continue to be operative. However, direction No.4 of para 14 insofar as verification of assets and liabilities by means of summary enquiry and rejection of nomination paper on the ground of furnishing wrong information or suppressing material information should not be enforced.

Accordingly, the writ petitions stand disposed of without costs.

Sd/-
..... J.
(P. V. REDDI)

New Delhi
March 13, 2003

SUPREME COURT OF INDIA

Civil Appeal No. 4262 of 2003

Ram Phal Kundu ..... Appellants

Vs.

Kamal Sharma ..... Respondent

Date of Order : 23.01.2004

Coram : V.N. Khare, CJI., S.B. Sinha and G.P. Mathur, JJ.

SUMMARY OF THE CASE

At the general election to the Haryana Legislative Assembly held in January – February, 2000, from 50-Safidon Assembly Constituency, two candidates viz. Shri Kamal Sharma and Shri Bachchan Singh, filed Form B in terms of paragraph 13 of the Election Symbols (Reservation and Allotment) Order 1968, both claiming to be candidates of Indian National Congress (INC) Shri Kamal Sharma filed his nomination paper on 03-02-2000 at 12.20 p.m. and Form A and B from the Indian National Congress were also filed along with his nomination paper. Shri Bachchan Singh filed his nomination papers on 03-02-2000 at 2.50 p.m. and he also filed Form B from the same party in which there was a declaration that the Form B given earlier in favour of Shri Kamal Sharma was rescinded. Scrutiny was taken up on 04-02-2000. Shri Bhupinder Singh Hooda, the authorized person to sign Form B filed an affidavit dated 04-02-2000 before the Returning Officer stating that Shri Kamal Sharma was the only candidate of Indian National Congress. The Returning Officer accepted the Form 'B' filed in favour of Sh. Bachchan Singh and consequently the nomination paper of Shri Kamal Sharma, which was signed by only one elector as proposer was rejected. On a representation made to the Election Commission, the Election Commission directed the Returning Officer to conduct fresh scrutiny. After re-scrutiny, the Returning Officer again accepted the nomination of Shri Bachchan Singh and rejected the nomination of Shri Kamal

Sharma inspite of the statement of Shri Hooda that Shri Kamal Sharma was the candidate of the party. The High Court had allowed the election petition filed by Shri Kamal Sharma. The Supreme Court set aside the order of High Court and held that the Returning Officer had rightly rejected the nomination of Shri Kamal Sharma. The Supreme Court held that paras 13 and 13 A of Symbols Order are exhaustive and lay down the procedure for determining whether a candidate is set up by a political party, and that the issue has to be decided by the Returning Officer as per the provisions of para 13 and 13 A and not on the basis of extrinsic evidence.

G.P. Mathur, J.

This appeal under Section 116A of the Representation of the People Act, 1951 (hereinafter referred to as "the Act") has been preferred by the returned candidate Ram Phal Kundu Against the judgment and order dated 8.5.2003 of High Court of Punjab and Haryana by which the election petition preferred by Kamal Sharma was allowed and the election of the appellant from 50-Safidon Assembly Constituency to the Haryana Vidhan Sabha was set aside and a direction was issued to the Election Commission of India to hold a fresh election for the said constituency.

2. The Election Commission of India issued a notification on 24.1.2000 calling upon the electors of Haryana to elect 90 members to the Haryana Vidhan Sabha including that from 50-Safidon Assembly Constituency by (Distt. Jind). The schedule for holding the elections was as under:

Filling of nomination papers	:	27.1.2000 to 3.2.2000
Scrutiny of nomination papers	:	4.2.2000
Last date for withdrawal of candidature	:	7.2.2000
Allotment of Symbols	:	7.2.2000 after 3.00 pm
Date of polling, if necessary	:	22.2.2000
Counting of votes	:	25.2.2000

3. The appellant Ram Phal Kundu filed his nomination paper as a candidate of Indian National Lok Dal Party (hereinafter referred to as "Lok Dal Party"). The respondent Kamal Sharma and Bachan Singh, both filed their nomination papers claiming to be candidates of Indian National Congress Party (hereinafter referred to as 'Congress Party'). The Returning Officer accepted the nomination paper of Bachan Singh as candidate of Congress Party and rejected that of Kamal Sharma. The election was held on 22.2.2000 as schedule and the appellant Ram Phal Kundu secured the highest number of valid votes and was declared to have been elected. Kamal Sharma then filed an election petition under Section 80, 81 read with Section 100 of the Act for setting aside the election of the appellant Ram Phal Kundu and for declaring his election as void. A further prayer was made that the Election Commission be directed to hold a fresh election to the said Assembly constituency. After trial of the petition, the High Court allowed the election petition on the ground that the nomination paper of Kamal Sharma was wrongly rejected. Accordingly, the election of the appellant Ram Phal Kundu was set aside and the Election Commission was directed to hold a fresh election.

4. The case set up by Kamal Sharma in the election petition is as follows:

The election petitioner applied to the Congress Committee for sponsoring his name for 50-Safidon Assembly Constituency to contest the election as a candidate of the said party. The Central Election Committee of the party vide Press release dated 2.2.2000 selected him as its candidate for the said Constituency. Shri Motilal Vora, General Secretary of the party issued From A in the name of Shri Bhupinder singh Hooda, President, Haryana Pradesh Congress Committee as the authorised person to intimate the names of the candidates to be set up by the party in the election. Shri Bhupinder Singh Hooda then communicated to the Returning Officer, 50-Safidon Assembly Constituency the name of the election petitioner Kamal Sharma as an approved candidate of the

congress Party in Form B. The election petitioner filed his nomination paper as a candidate of Congress Party at 12.20 p.m. on 3.2.2000 before the Returning Officer. During the course of scrutiny proceedings on 4.2.2000 it was revealed that another candidate, namely, Bachan Singh had also filed his nomination paper at 2.50 pm on 3.2.2000 claiming himself as a candidate set up by the Congress Party. The scrutiny proceedings were adjourned to 5.2.2000. Shri Bhupinder Singh Hooda filed an affidavit dated 4.2.2000 before Returning Officer that the election petitioner Kamal Sharma was the only person nominated as a candidate of the Congress Party and any other unsealed authorization letter of the party submitted by someone else was not valid. Shri Bhupinder Singh Hooda also wrote to the Chief Election Commission, New Delhi that Kamal Sharma was the only officially approved candidate of the Congress Party. The scrutiny proceedings were conducted by the Returning Officer on 5.2.2000, who after hearing counsel for the parties, wrote out a hand written order dismissing the objection filed by the election petitioner kamal Sharma and rejecting his nomination paper. The nomination paper of Bachan Singh as a candidate of the Congress Party was accepted. The election petitioner was the only official candidate of the Congress Party as Forms A and B submitted by him along with his nomination paper were duly singed and stamped by the seal of the party, whereas Form B submitted by Bachan Singh did not bear the seal of the party and was consequently invalid. The Returning Officer committed a grave illegality in overlooking another essential requirement of law that Form B submitted by Bachan Singh had not reached the office of the Chief Electoral Officer, Haryana within the prescribed time limit. The election petitioner then filed a petition before the Chief Election Commissioner, New Delhi on 6.2.2000, who by order dated 7.2.2000 set aside the order dated 5.2.2000 passed by the Returning Officer and directed him to conduct a fresh scrutiny at 10.00 a.m. on 8.2.2000. The Returning Officer, thereafter, gave notice to election petitioner Kamal Sharma, Bachan Singh And Shri Bhupinder Singh Hooda, who appeared before him and stated that Form B furnished by Bachan Singh was not issued by his approval and that the election petitioner was the only authorized candidate of the party.

However, the Returning Officer passed an order at 4.30 p.m. on 8.2.2000 dismissing the objection raised by the election petitioner and allotted the Symbol of the Congress Party to Bachan Singh. The result of the election was declared on 25.2.2000 and out of 85,742 valid votes polled, the appellant Ram Phal Kundu secured 45,382 valid votes and was declared as elected. In para 25 of the petition it is pleaded that there was no proper authorization by the Congress Party in favour of Bachan Singh as the Form B submitted by him did not contain the seal of the party and on account of wrongful rejection of the nomination paper of the election petitioner Kamal Sharma, the election of Ram Phal Kundu was vitiated.

5. The appellant Ram Phal Kundu contested the election petition on the ground, inter alia, that though the election petitioner produced Forms A and b before the Returning Officer that he is the nominee of the Congress Party, but subsequently Bachan Singh produced Forms A and B that he had been nominated by the Congress Party as a candidate for 50-Safidon Assembly Constituency. In Form B submitted by Bachan Singh the nomination of the election petitioner Kamal Sharma was rescinded and it was specifically mentioned that the Congress Party had changed its candidate and had nominated Bachan Singh as its official candidate. The notice in Form B as per amended Clause 13 of Election Symbols (Reservation and Allotment) Order, 1968 (hereinafter referred to as 'the Symbols Order') is required to be produced before the Returning Officer before 3.00 P.M. and there is no requirement that the same should also reach or produced before the Chief Electoral Officer. The nomination paper of election petitioner was filed along with requisite forms at 12.20 p.m. on 3.2.2000 whereas Bachan Singh had filed his nomination paper at 2.50 p.m. on 3.2.2000 had submitted Forms A and B. Thereafter, no further notice in Form B was received by the Returning Officer. The Form B submitted by the election petitioner is dated 2.2.2000 whereas the Form B submitted by Bachan Singh at 2.50 p.m. on 3.2.2000 wherein Shri Bhupinder Singh Hooda had himself mentioned that the candidature of the election petitioner Kamal Sharma was rescinded is dated 3.2.2000. It is further pleaded that the letter of

Shri Bhupinder Singh Hooda said to have been submitted on 4.2.2000 before the Returning Officer, is of no consequence and could not be taken into consideration in view of paras 13 and 13A of the Symbols Order which provide that the notice in writing in Form B regarding the declaration of the official candidate has to be made and submitted before the Returning Officer up to 3.00 p.m. on the last date if filing nomination papers and not thereafter. Shri Bhupinder Singh Hooda had not denied his signature on the authorization Form B in favour of Bachan Singh in the affidavits filed by him on 4th and 5th February, 2000 and the same having been filed subsequent to 3.00 p.m. on the last date of filing of the nomination paper were of no consequence. The fact that the seal of the party was not present in Form B of Bachan Singh was of no consequence as it is not a defect of substantial character and under paras 13 and 13A of the Symbols Order only the signature of the authorized person is required and it is nowhere provided that the form must contain the seal of the party. It is also pleaded that the Election Commission of India has no authority to set aside the order of the Returning Officer rejecting a nomination paper and to direct him to reconsider the matter. No appeal or revision lies to the Election Commission of India against an order rejecting a nomination paper. In para 22 it is pleaded that Bachan Singh contested the election as a candidate of the congress Party and the appellant won the said election by a margin of 8,324 votes, having secured more than 55% of the actual votes polled. The nominee of the congress Party was very much there in the election fray but the appellant was declared as elected. All the important leaders of Congress Party at the State level and the national level, including Shri Motilal Vora and others had campaigned for Bachan Singh. In the newspapers of 3.2.2000 it had been reported that the Congress Party had changed its candidate from Kamal Sharma to Bachan Singh.

6. It may be mentioned at the very outset that the election petitioner Kamal sharma impleaded the retuned candidate Ram Phal Kundu as the sole respondent and no other person was joined as party to the election petition. Though there is not even a whisper against the appellant Ram Phal Kundu and

the entire allegations are against Bachan Singh but he was not arrayed as a party to the election petition. Strictly speaking it is not a case of rejection of nomination paper but of ascertaining who was the candidate of congress Party as two persons had filed nomination papers claiming to be the candidate of the said party. Since only one person can be a candidate of a political party and after acceptance of the candidature of Bachan Singh, the nomination paper of the election petitioner Kamal Sharma could be treated as that of an independent candidate. But as it was not subscribed by 10 proposes being electors of the Constituency, it had to be rejected in view of First Proviso to Sub-section (1) of Section 33 of the Act. The non-joining of Bachan Singh may not result in dismissal of the election petition in terms of Section 82 of the Act. However, in absence of Bachan Singh having been joined as party to the election petition, an extremely difficult burden have been placed upon the appellant Ram Phal Kundu, who belongs to rival party (Lok Dal), to lead evidence regarding the internal affairs of Congress Party and to show that the nomination made in favour of Kamal Sharma had been subsequently rescinded and the party had set up Dachan Singh as its official candidate.

7. The main question which requires consideration is as to which of the two persons, namely, Kamal Sharma or Bachan Singh had been set up by the Congress Party. Para 13 and 13A of Election Symbols (Reservation and Allotment) Order, 1968, as amended by Clause 3 of Election Symbols (Reservation and Allotment) (Amendment) Order, 1999, which came into force on 20.5.1999, which govern the situation read as under:

> 13. When a candidate shall be deemed to be set up by a political party – for the purposes of an election from any parliamentary or assembly constituency to which this order applies, a candidate shall be deemed to be sent up by a political party in any such parliamentary or assembly constituency, if, and only if-

(a) the candidate has made the prescribed declaration to this effect in his nomination paper;

(b) A notice by the political party in writing, in Form B, to that effect has, not later than 3 p.m. on the last date of making nominations, been delivered to the Returning Officer of the constituency;

(c) the said notice in Form B is signed by the President, the Secretary or any other office bearer of the party, and the President, Secretary or such other office bearer sending the notice has been authorized by the party to send the notice;

(d) The name and specimen signature of such authorized person are communicated by the party, in Form A, to the Returning Officer of the constituency, and to the Chief Electoral Officer of the State or Union Territory concerned, not later than 3 p.m. on the last date for making nomination; and

(e) Forms A and B are signed, in ink only, by the said office bearer or person authorized by the party:

Provided that no facsimile signature or signature by means of rubber stamp, etc., of any such office bearer or authorized person shall be accepted and no form transmitted by fax shall be accepted.

13A. Substitution of a candidate by a political party—For the removal of any doubt, it is hereby clarified that a political party which has been given a notice in form B under paragraph 13 in favour of a candidate may rescind that notice and may give a revised notice in Form B in favour of another candidate for the constituency:

Provided that the revised notice in Form B, clearly indicating therein that the earlier notice in Form B has been rescinded,

reaches the Returning Officer of the constituency, not later than 3 p.m. on the last date for making nominations, and the said revised notice in Form B is signed by the authorized person referred to in clause (d) of paragraph 13:

Provided further that in case more than one notice in Form B is received by the Returning Officer in respect of two or more candidates, and the political party fails to indicate in such notice in Form B that the earlier notice or notices in Form B, has or have been rescinded, the Returning Officer shall accept the notice in Form B in respect of the candidate whose nomination paper was first delivered to him, and the remaining candidate or candidates in respect of whom also notice or notices in Form B has or have been received by him, shall not be treated as candidates set up by such political party."

In terms of para 13 and 13A of the Symbols Order, a candidate shall be deemed to be set up by a political party if the following conditions are fulfilled:-

(1) The candidate has made the prescribed declaration to that effect in his nomination paper.

(2) A notice by the political party in Form B to that effect has been delivered to the Returning Officer not later than 3.00 p.m. on the last date for making nomination.

(3) The notice in Form B is signed by the President, Secretary or any other office bearer of the party and such person sending the notice has been authorized by the party to send the notice.

(4) The name and specimen signature of such authorized person are communicated by the party in Form A to (i) the Returning Officer; and (ii) the Chief Electoral Officer of the State or Union

Territory concerned not later than 3.00 p.m. on the last date for making nomination.

(5) A political party which has given a notice in Form B in favour of candidate may rescind that notice and may give a revised notice in Form B in favour of another candidate, provided such revised notice in Form B clearly indicating therein that the earlier notice in Form B has been rescinded, reaches the Returning Officer not later than 3.00 p.m. on the last date for making nomination and such revised notice in Form B is signed by the authorized person referred to in Clause (d) of para 13.

(6) Forms A and B have to be signed in ink only by the office bearer or authorized person. No facsimile signature or signature by means of rubber stamp and no form transmitted by fax shall be accepted.

It may be noted that while Form A has to be submitted to both the Returning Officer of the Constituency and to the Chief Electoral Officer of the State, but there is no such requirement with regard to Form B. Form B has to be delivered only to the Returning Officer of the Constituency. The Symbols Order has made a specific provision that Forms A and B have to be signed in ink only and signature by means of rubber stamp, etc. shall not be accepted. In terms of the language used in paras 13 and 13A of the Symbols Order there is no requirement of putting the seal of the party in Forms A and B.

8. There is no dispute that Shri Motilal Vora. General Secretary of the Congress Party had sent a communication in Form A that Shri Bhupinder Singh Hooda had been authorized by the Indian National Congress to intimate the names of the candidates proposed to be set up by the party at the election and the said document Ex. PW2/M is on the record. A notice in Form B in favour of 'Kamal' dated 2.2.2000 signed in ink by Shri Bhupinder Singh Hooda was given by the election petitioner to the Returning Officer at 12.20 p.m. and it is marked

as Ex. PW/2/L. Another notice in Form B dated 3.2.2000 in favour of Bachan Singh and signed in ink by Shri Bhupinder Singh Hooda was given by Bachan Singh to the Returning Officer at 2.50 p.m. on 3.2.2000 and it is marked as Ex. PW4/A. At the bottom of this form it is mentioned as under:

> "The notice in Form B given earlier in favour of Shri Kamal S/o Janardhan as party's approved candidate, Smt. Kusum W/o Kamal as party's substitute candidate is hereby rescinded.

Below this writing there is signature of Shri Bhupinder Singh Hooda. In his cross examination PW 5 Shri Bhupinder Singh Hooda has admitted that Form B in favour of Bachan Singh contains his signature. He stated as under:

> ".....It is correct that document Ex. PW4/A which is Form B in favour of Shri Bachan Singh Arya bears my signature. Volunteered I am admitting only my signatures and not the contents of the Form…"

Towards the end of his cross-examination he stated as under:

> "On Form B issued to Shri Bachan Singh Arya I only own signature on this Form but I do not own the contents given in It." Thus, there is no dispute that Form B submitted by Bachan Singh contained a categorical statement to the effect that the notice given in Form B earlier in favour of Kamal Sharma as party's approved candidate and Smt. Kusum W/o Shri Kamal as party's substitute candidate is rescinded and the said Form B had been signed in ink by Shri Bhupinder Singh Hooda, who had been nominated as authorized person of the Congress Party. There is also no dispute that the Form B submitted by Bachan Singh was later in point of time and had been given at 2.50 p.m. on 3.2.2000 when the last time and date for filing of the nomination paper was 3.00 p.m. on 3.2.2000.

9. In his statement PW6 Kamal Sharma has stated that in the list released by All India Congress Committee on 2.2.2000 his name was mentioned as candidate for 50-Safidon Assembly Constituency. In the night he collected Forms A and B from the Camp Office and submitted his nomination paper along with Forms Act A and B to Returning Officer. A letter written by Shri Bhupinder Singh Hooda wherein it was mentioned that Kamal Sharma is the candidate of Congress Party from Safidon Constituency and no one else was a candidate, was delivered to the Returning Officer on 4.2.2000. This letter is on the record as Ex.PW2/J and it bears an endorsement by the Returning Officer that the same was received by him at 11.00 a.m. on 4.2.2000. He has also stated that the Returning Officer had a telephonic talk with Shri Hooda and therafter an affidavit duly sworn by him on 4.2.2000 that Kamal is the only nominated candidate of the congress Party, was also given. This affidavit also bears the endorsement of the Returning Officer that the same was received by him at 11.00 a.m. on 4.2.2000. PW5 Shri Bhupinder Singh Hodda has deposed that the name of Bachan Singh was under consideration as a Congress candidate but it was never finalized and, therefore, no Form B was issued to him and that Kamal Sharma was the candidate of the party. At about 3.30 p.m. on the last date of filing nomination, he received information that two nomination forms had been submitted on behalf of the congress party and thereafter he sent a letter through special messenger to the Returning Officer that Kamal Sharma is the official candidate. After receiving a telephonic call from the Returning officer on 4.2.2000, he informed him that Kamal Sharma is the official candidate and thereafter he sent an affidavit to that effect. He has further deposed that he wrote a letter to the Chief Election Commissioner and Chief Electoral Officer in this regard. Thus, the election petitioner Kamal Sharma has led evidence to show that after it had been revealed that Bachan Singh had also filed his nomination paper as a candidate of the Congress Party, he lodged a protest before the Returning Officer on the next day i.e. 4.2.2000 and Shri Bhupinder Singh Hooda telephoned to him and also sent a letter and an affidavit that only Kamal Sharma was the official

candidate. But all these letters and affidavits, etc. were received by the Returning Officer on 4.2.2000 and on subsequent dates.

10. The question that arises is whether this evidence, which is all subsequent to the last date of filing of the nomination paper, can be looked into in order to ascertain as to who had been set up as a candidate by the Congress Party.

11. The Election Symbols (Reservation and Allotment) Order, 1968 has been made in exercise of power conferred by Article 324 of the Constitution read with Section 219A of the Representation of the people Act 1951 and Rules 5 and 10 of the conduct of Election Rules, 1961 and all other powers enabling it in this behalf by the Election Commission of India. In Sadiq Ali v. Election Commission of India & Ors. AIR 1972 SC 187, the Court explained the reasons which led to the introduction of the Symbols and it was said that the object is to ensure that he process of election is as general and fair as possible and that no elector should suffer from any handicap in casting his vote in favour of a candidate of his choice. In Roop Lal Sathi v. Nachhattar Singh AIR 1982 SC 1559, it has been held that the Symbols Order is an order made under the Act.

12. Paras 13 and 13A of the Symbols Order lay down the mechanism for ascertaining when a candidate shall be deemed to be set up by a political party and also the procedure for substitution of a candidate. The opening part of para 13 says in unequivocal terms that for the purpose of an election for any Parliamentary or Assembly constituency a candidate shall be deemed to be set up by a political party *if and only if* the conditions mentioned in sub-paragraphs (a) to (e) are satisfied. Para 13A lays down the procedure for substitution of a candidate and also the requirements of a revised notice in Form B. The second proviso to this paragraph takes care of a situation where more than one notice in Form B is received by the Returning Officer and the political party fails to indicate in such notices in Form B that the earlier notice or notices have been rescinded. Thus, paras 13 and 13A are exhaustive and lay down the complete procedure

for determining whether a candidate has been set up by a political party. The Rule lad down in Taylor v. Taylor 1876 (1) Ch. D. 426 that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden was adopted for the first time in India by the Judicial Committee of the Privy Council in Nazir Ahmad v. King Emperor AIR 1936 PC 253. The question for consideration was whether the oral evidence of a Magistrate regarding the confession made by an accused, which had not been recorded in accordance with the statutory provisions viz. Section 164 Cr. P.C. would be admissible. The First Class Magistrate made rough notes of the confessional statements of the accused which he made on the spot and thereafter he prepared a memo from the rough notes which was put in evidence. The Magistrate also gave oral evidence of the confession made to him by the accused. The procedure of recording confession in accordance with Section 164 Cr. P.C. had not been followed. It was held that Section 164 Cr. P.C. having made specific provision for recording of the confession, oral evidence of the Magistrate and the memorandum made by him could not be taken into consideration and had to be rejected. In State of U.P. v. Singhara Singh AIR 1964 SC 358, a Second Class Magistrate not specially empowered, had recorded confessional statement of the accused under Section 164 Cr. P.C. The said confessions being inadmissible, the prosecution sought to prove the same by the oral evidence of the Magistrate, who deposed about the statement given by the accused. Relying upon the rule laid down in Taylor v. Taylor (supra) and Nazir Ahmad v. King Emperor (supra) it was held that section 164 Cr. P.C. which conferred on a Magistrate the power to record statements or confessions, by necessary implication, prohibited a Magistrate from giving oral evidence of the statements or confessions made to him. This principle has been approved by this Court in a series of decisions and the latest being by a Constitution Bench in Commissioner of Income Tax v. Anjum M.H. Ghaswala (2002) (1) SCC 633 (para 27). Applying the said principle, we are of the opinion that the question as to who shall be deemed to have been set up by a political party has to be determined strictly in accordance with paras 13 and 13A of the

Symbols order and extrinsic evidence cannot be looked into for this purpose unless it is pleaded that the signature of the authorized person of Form B had been obtained from his under threat or by playing fraud upon him. Where signature is obtained under threat or by playing fraud, it will be a nullity in the eyes of law and the document would be void.

13. The issue can be examined from another angle. In a case where more than one notice in Form B has or have been rescinded, the decision of controversy by extrinsic evidence would make the second proviso to para 13A wholly redundant. It is well settled principle of interpretation that the legislature is deemed not to waste its words or to say anything in vain. The Courts always presume that the legislature inserted every part of the Stature for a purpose and the legislative intention is that every part of the Statute of a purpose and the legislative intention is that every part of the Statute should have effect. (See J.K. Cotton spinning & Weaving Mills Co. v. State of U.P. AIR 1961 SC 1170, Moh. Ali Khan v. The Commissioner of Wealth Tax AIR 1997 SC 1165 and C.I.T. v. Kanpur Coal Syndicate AIR 1965 SC 325).

14. If instead of deciding the matter in accordance with paras 13 and 13A of the Symbols Order, it is decided on the basis of extrinsic evidence (oral or documentary) given subsequent to the last date of filing of nomination paper, it is capable of good deal of misuse. Governments are sometimes formed with razor thin majority or with the support of a small splinter group or of independent candidates. A political party may adopt a device of filing nomination papers of two candidates. If the candidate of the party wins well and good, but if the candidate loses, the other candidate whose nomination paper would have been rejected may file an election petition, lead extrinsic evidence to show that he was the real candidate of the party and thereby get the election of the returned candidate set aside.

15. An election is not just a contest between two persons. The whole constituency is involved in the election process which has to sent its

representative to the Assembly or Parliament. The entire governmental machinery has to work for smooth holding of the election and huge expenditure is incurred from the public exchequer. The date of polling is declared a public holding when all government offices, commercial establishments and institutions are closed, resulting in loss of productivity. Public interest demands that there should be no vagueness or uncertainty regarding the candidature of a person seeking to contest the election as a candidate of a recognized political party. Therefore, this exercise should be done strictly in accordance with para 13 and 13A of the symbols order and extrinsic evidence given in derogation thereof cannot be looked into.

16. There is no dispute that along with his nomination paper which was filed at 2.50 p.m. on 3.2.2000 Bachan Singh had submitted Forms A and B and thereafter no further notice in Form b was received by the Returning officer. Shri Motilal Vora, General Secretary of the Congress Party had issued Form A in the name of Shri Bhupinder Singh hooda authorizing him to intimate the names of the candidates to be set up by the Congress Party in the election. This Form contained the signature of Shri Motilal Vora and also three signatures of Shri Bhupinder Singh Hooda. In Form B it was mentioned that the notice in Form B given earlier in favour of kamal Sharma is rescinded and this was signed in ink by Shri Bhupinder Singh Hooda. Therefore, in terms of para 13 and 13A of Symbols Order Bachan Singh became the candidate of the Congress Party. In his order dated 5.2.2000 passed by the Returning Officer, he said that Bachan Singh had submitted Forms A and B at 2.50 p.m. on 3.2.2000 and thereafter no other nomination paper of Form had been submitted by any person and neither Kamal Sharma nor Shri Hooda had raised any objection regarding the signature on Form B and the only objection was that the same did not contain the seal of the Congress Party. It being not a defect of substantial character, the revised Forms A and B submitted by Bachan Singh will have to be accepted and accordingly Bachan Singh shall be treated as the candidate of the Congress Party. In pursuance of the Order passed by the Chief Election Commissioner on

7.2.2000 the Returning Officer heard the matter again where both the parties appeared with their respective counsel and Shri Hooda was also present. Shri Hooda admitted his signature on Form B submitted by Bachan Singh but stated that he had instructed the person concerned not to give the said Form to Bachan singh till he gave his consent for the same on telephone and that he never gave any such consent. He also said that as the said Form B did not bear the seal of the Congress Party, it was liable to be rejected and Kamala was the official candidate of the Congress party. The Returning Officer held that the acceptance of signature on Form B by Shri Hooda established that the same had been issued by him and the explanation offered by him for treating Kamal as the official candidate, was an internal matter of the Congress Party. He accordingly held that Form B submitted by Bachan Singh was perfectly valid and accordingly he shall be treated as the official candidate of the Congress Party and consequently the nomination paper of Kamal Sharma was rightly rejected. We are of the opinion that the view taken by the Returning Officer in his orders dated 5.2.2000 and 8.2.2000 being in accordance with law was perfectly correct.

17. Learned counsel for the respondents has laid great stress upon the fact that there was no seal of Congress Party on Form B which was submitted by Bachan Singh to the Returning Officer and consequently his nomination paper was invalid. It may be noticed that para 13 of the Symbols Order does not prescribe that Form B should also contain the seal of the party. In fact, it lays emphasis upon the signature of the person authorised by the party and says that the same should be in ink and that no fascimile signature or signature by means of rubber stamp, etc. shall be accepted and no form transmitted by fax shall be accepted. In the proforma of Form B given in the Symbols Order a note has been appended at the end of the Form which reads as under:

"N.B.

1. This must be delivered to the Returning Officer not later than 3 p.m. on the last date for making nominations.

2. Form must be signed in ink by the office bearer(s) mentioned above. No fascimile signature or signature by means of rubber stamp, etc., of any office bearer shall be accepted.

3. No form transmitted by fax shall be accepted.

4. Para 2 of the Form must be scored off, if not applicable, or must be properly filled, if applicable."

The Form B which has been submitted by Kamal Sharma no doubt bears seal of the Congress Party, which has been done by an ordinary rubber stamp with the commony used blue ink pad and there is nothing special about it. Such a seal can easily be prepared or procured by a little effort. It is not a type of seal which may be difficult to emulate and is kept in a safe custody under the charge of a responsible person, which may not be available to anyone. What is important and decisive is the signature in ink of the authorised person and not the seal of the party which can be made by an ordinary rubber stamp by any one. Section 36(4) of the Act lays down that the Returning Officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character. The absence of the seal of the Congress Party in the nomination paper of Bachan Singh cannot be said to be a defect of a substantial character so as to render it invalid.

18. The learned counsel for the respondent has submitted that Form B of Bachan Singh did not reach the office of Chief Electoral Officer and, therefore, there was no valid nomination of his. The High Court has gone to the extent of saying that though Bachan Singh had submitted Form A and Form B along with his nomination paper before the Returning Officer but no Form A in respect of his candidature was submitted by him to the Chief Electoral Officer and, therefore, the same would not have the effect of rescinding the candidature of Kamal Sharma. Learned counsel for the respondent has also referred to the amendment in Handbook for Returning Officers by which para 10.3(i) was substituted by the following sub-para:

> "Nomination paper filed by a candidate in which he has claimed to have been set up by a recognized National or State Party and which is subscribed by only one elector as proposer will be rejected, if a notice in writing to that effect has not been delivered to the Returning Officer of the Constituency and the Chief Electoral Officer of the State by an authorised office-bearer of that political party by 3.00 P.M. on the last date for making nominations (Notice in Form 'A' is required to be submitted to the Chief Electoral Officer and the Returning Officer concerned and notice in Form 'B' is to be submitted to the Returning Officer)".

On the basis of the above amendment of the handbook it has been urged that Form B was also required to be submitted to the Chief Electoral Officer and as the same had not been done by Bachan Singh, his candidature could not be regarded as valid.

19. We are unable to accept the submission made. The requirement of paras 13 and 13A of the Symbols Order is that Form B should be submitted to the Returning Officer. There is a no requirement of the submission of the said Form to the Chief Electoral Officer. The Handbook for Returning Officers contains instructions which have been issued by the Election Commission for the smooth holding of the election and being merely instructions cannot override the provisions of the Statute, Rules or the Order. In fact in the very first para of the first page of the Handbook in Chapter I titled as "Preliminary" it is written as under:

> "However, please note that this handbook cannot be treated as exhaustive in all respects and as a substitute for various provisions of election law governing the conduct of election."

The language used in the bracket in the substituted sub-para 10.3(I) clearly mentions that notice in Form B is to be submitted to the Returning Officer alone,

which is also the mandate of para 13(b) of the Symbols Order. The requirement of para 13(d) of the Symbols Order is that the party has to communicate the name and specimen signature of the authorised person in Form A to the Returning Officer of the Constituency and to the Chief Electoral Officer of the State and admittedly this had been done.

20. In view of our finding that Form B submitted by Bachan Singh was perfectly valid and as the same was submitted in the last at 2.50 p.m. on 3.2.2000 and it contained a clear recital that notice in Form b given earlier in favour Kamal Sharma is rescinded, he became the candidate of the Congress Party. The nomination paper of Kamal Sharma was, therefore, rightly rejected. The appeal consequently deserves to be allowed and the High Court judgement is liable to be set aside. However, as the learned counsel have made submissions on the merits of the case, we will also examine whether the election petitioner has been able to establish the case set up by him.

21. Learned counsel for the respondent has submitted that Central Election Committee of the Congress Party had selected the candidates for contesting the election and from 50-Safidon Assembly Constituency, the name of Kamal Sharma had been decided. For this reliance is placed on the testimony of PW 4 Punnu Ram who claims to be working as clerk in the office of Haryana Pradesh Congress Committee since 1970 and PW5 Shri Bhupinder Singh Hoonda. PW4 has deposed that the parliamentary body of All India Congress Committee selects the candidates while PW5 has deposed that the candidature is finally decided by the Central Election Committee of the Congress party. PW4 has proved a list Ex. PW.4 4/C OF candidates dated 2.2.2000 which bears the signature of Shri Oscar Fernandes, General Secretary, AICC. At the top of the list it is mentioned — “AICC Press Release”. It is not an original copy but a photocopy. The case of the appellant is that the aforesaid list was not a final list but was some kind of a tentative list and subsequently the Central Election Committee of the Congress Party decided the candidature of Bachan Singh Arya. PW2 Ravi Shankar, election Kanunga, District Election Office, Jind has

proved a list of the candidates which was submitted by Bachan Singh before the Returning Officer and is marked as Ex. PW2/S. In this list the name of Bachan Singh Arya is shown as a candidate for 50-Safidon Assembly Constituency. This list also bears the seal of Indian National Congress. It is important to note here that in the list Ex.PW4/C, the names of the candidates for three Constituencies, viz., Nos. 2- Naraingarh, 53-Ballabhagarh and 54-Palwal were not mentioned and for Constituency No.51-Faridabad, the name of Gyan Chand was shown. However, the list PW2/S, wherein the name of Bachan Singh Arya has been shown, is a complete list of all the 90 Constituencies wherein the names of the candidates for Constituency Nos. 2, 53 and 54 have also been mentioned. The name of A.C. Chaudhary is shown for Constituency No.51-Faridabad after deletion of the name of Gyan Chand. Both PW4 Punnu Ram and PW5 Shri Bhupinder Singh Hooda have admitted in their statement that the candidature of Gyan Chand was changed and finally A.C. Chaudhary had contested the election as an official candidate for the Congress Party for 51-Faridabad Constituency. PW5 had further admitted that three persons whose names are mentioned in the list Ex. PW2/S for Constituency Nos. 2, 53 and 54 actually contested the election as the official candidates for Congress Party. This conclusively establishes that the list dated 2.2.2000 (Ex PW4/C) wherein the name of Kamal Sharma is mentioned as a candidate, was not the final list but was some sort of a tentative list and the list was finalised later on. Both the lists, Ex. PW4/C and PW2/S prima facie appear to have been prepared on the same computer as the letters and method of typing are exactly similar. At the top of Ex. PW2/S it is mentioned–'The Central Election Committee has selected the following candidates for the ensuing Assembly Elections from Haryana." There appears to be no reason to doubt the correctness of list Ex. PW2/S which shows the name of Bachan Singh Arya and not that of Kamal Sharma. When Kamal Sharma was confronted with the situation that in the lists submitted by him (Ex. PW4/C) names of only 87 candidates were mentioned, he replied that he was not aware whether there were three constituencies regarding which decision had not been taken. When further confronted, he stated that it is true that there were 90

constituencies in Haryana, Regarding 51-Faridabad Constituency, he mentioned the name of Gyan Chand Ahuja as Congress candidate. When further cross-examined, he said that he cannot say whether Shri A.C. Chaudhary had fought the election. This shows that he had scant regard for truth and can go to any extent for supporting the list filed by him.

22. It is pleaded by Kamal Sharma in the election petition that after conclusion of the scrutiny proceedings, the Returning Officer passed a detailed order on 5.2.2000 rejecting his nomination paper and, thereafter he preferred a petition before the Chief Election Commission, New Delhi on 6.2.2000. The Election Commission vide its order dated 7.2.2000 accepted his petition and set aside the order dated 5.2.2000 of the Returning Officer and further directed him to hold fresh scrutiny on 8.2.2000 after giving notice and ensuring the presence of Shri Bhupinder Singh Hooda. Learned counsel for the respondent has submitted that when the re-scrutiny was done by the Returning Officer, Shri Bhupinder Singh Hooda was present and he made a statement before him that though Form B submitted by Bachan Singh contained his signature but the same was never validly issued by his office or by the party and that Kamal Sharma was the official candidate of the Congress Party. It has been urged that in view of this clear and categorical stand of Shri Bhupinder Singh Hooda, the Returning Officer committed manifest error of law in maintaining his earlier order wherein the candidature of Kamal Sharma had been rejected. The High Court while dealing with this aspect of the case has observed that “After the categorical stand adopted by Shri Hooda before the Returning Officer and in view of the explicit directions issued by the Election Commission of India vide order Ex. PW1/1 Returning Officer had really no option but to accept the statement of Shri Hooda and treat the petitioner as an official candidate of the Congress Party”. After noticing the statement of Shri Bhupinder Singh Hooda, the High Court held as under:

> “The said function was apparently a quasi judicial function and once the rescrutiny was ordered by the Election Commission of India and

> the same as conducted in the presence of the various candidates and in the presence of the authorised person of the Congress Party, namely Shri Bhupinder Singh Hooda, then the Returning Officer was expected to decide the matter keeping in view of the various facts and circumstances of the case and the documents on the record and the statement made by Shri Hooda. Apparently, he has not done so. In this view of the matter the order dated February 8, 2000 Ex. PW2/H passed by him, whereby the nomination papers of the petitioner have been rejected, is clearly unsustainable in law and improper under the circumstances of the case."

In order to appreciate the contention raised by the learned counsel and for judging the correctness of the reasoning given by the High Court, it is necessary to refer to the order of the Election Commission.

23. Kamal Sharma had presented a petition before the Chief Election Commissioner of India on 6.2.2000 praying that the order of the Returning Officer dated 5.2.2000 may be set aside, the objection raised by him be accepted and the candidature of Bachan Singh may be set aside. It was further prayed that he may be declared as official candidate of the Congress Party. The Election Commission passed a detailed order on the very next day i.e. on 7.2.2000 and after noticing the submissions made in the petition issued a direction to the Returning Officer to conduct a rescrutiny. The operate portion of the Order reads as under:

> "Now, therefore, the Election Commission hereby directs that the Returning Officer for the said 50-Safidon Constituency shall cause a rescrutiny of the nomination papers of the aforesaid candidates, namely, Shri Kamal and Shri Bachan Singh in accordance with the relevant provisions of the Constitution, Representation of the people Act, 1951 and the Election Symbols (Reservation and Allotment) Order, 1968 and the pronouncements of the Hon'ble Supreme Court,

particularly the pronouncement in the case of Rakesh Kumar vs. Sunil Kumar [1999 (2) SCC 489], on aforementioned issue as to who should be treated as the official candidate of the Indian National Congress. The Returning Officer on re-scrutinizing the nomination papers of the aforesaid candidates, shall also take further consequential steps as may become necessary, by treating all earlier proceedings in relation to said candidates, as ab initio void and redraw the list of validly nominated candidates."

For passing the aforementioned order, the Election Commission basically relied upon a decision of this Court in Rakesh Kumar v. Sunil Kumar 1999 (2) SCC 489. It is important to note that in this case the last date of filing nominations was 20.1.1997 and the date of polling was 6.2.1997 and, therefore, the case related to a period prior to the amendment of Symbols Order on 20.5.1999 by which para 13A has been added. Here, two persons, namely, Sunil Kumar and Veer Abhimanyu had submitted Forms A and B claiming to be candidate of Bhartiya Janta Party. At the time of scrutiny, the Returning Officer suo moto raised an objection to the effect that since BJP had set up more than one candidate, therefore, none could be treated as a candidate, of said political party and rejected the nomination papers of both Sunil Kumar and Veer Abhimanyu. Sunil Kumar made an application stating that he was the official candidate of the party and he requested for 24 hours time to produce an official confirmation of his candidature but the application was rejected and no time was given, though no other candidate (including Veer Abhimanyu) had raised any objection. It was in these circumstances that it was held by this Court that the Returning Officer ought to have granted him time to meet the objection in the interest of justice and fair play. This authority can have no application now on account of amendment to the Symbols Order which lays down a complete procedure for acceptance of nomination paper of a candidate set up by a recognised political party and substitution of a candidate. The factual situation here is also different.

24. It may be noticed that the petition by Kamal Sharma was filed on 6.2.2000 and the same was allowed by the Election Commission very next day i.e. on 7.2.2000 by which a direction was issued to the Returning Officer to hold a fresh scrutiny. There is nothing on record to indicate nor it appears probable that before passing the order, the Election Commission issued any notice to Bachan Singh. Apparently the order was passed behind his back. The order of the Election Commission to the effect that the Returning Officer shall take further consequential steps as may become necessary, by treating all earlier proceedings in relation to said candidates, as ab initio void and redraw the list of validly nominated candidates could not have been passed without giving an opportunity of hearing to Bachan Singh. That apart, it has been held by a catena of decisions of this Court that once the nomination paper of a candidate is rejected, the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage. (See N.P. Punnuswami v. Returning Officer AIR 1952 SC 64, Mohinder Singh Gill v. Chief Election Commission AIR 1978 SC 851, Election Commission v Shivaji AIR 1988 SC 61). Therefore, the order passed by the Election Commission on 7.2.2000 was not only illegal but was also without jurisdiction and the respondent Kamal Sharma can get no advantage from the same. The inference drawn and the findings recorded by the High Court on the basis of the order of the Election Commission, therefore, cannot be sustained.

25. Shri Bhupinder Singh Hooda had admitted in his cross-examination that Bachan Singh Arya had contested the election from 50-Safidon Assembly constituency and had won. He was a Minister when the Congress Party was in power. He had also contested in the year 1996 as a Congress candidate but had lost. The statements of PW4 and PW5 show that it is the Central Election Committee of the Congress Party which is the final authority to select a candidate to contest the election. Shri Bhupinder Singh Hooda, being President of the Party, was a member of the Central Election Committee. He, no doubt,

supported the candidature of Kamal Sharma but no other member of the Central Election Committee was examined as a witness to prove that he was the final choice of the party. Shri Hooda has admitted that the name of Bachan Singh was under consideration. Before the Returning Officer he had stated that though Form B of Bachan singh contained his signature but he had instructed that the same should not be issued to him till he gave instructions in that regard on telephone which he never gave, which also shows that there was uncertainty about the candidature. The success or defeat of a political party is good deal attributed to the President of the party. Shri Hooda being the President of Haryana Pradesh Congress Party would certainly be interested in having the election of the winning candidate of the rival party set aside, more so here when he seems to be very much interested in Kamal Sharma. There can be differences amongst the members regarding the choice of a candidate. In this background, Kamal Sharm should have examined other members of the Central Election Committee of Congress Party to substantiate his case that the Party had Finally selected him as its candidate and his candidature was never changed. The appellant being of arrival party Lok Dal and having defeated the Congress candidate could not have led this kind of evidence.

26. The election petitioner has examined in all six witnesses, out of whom PW 1 Bernard John is Under Secretary of the Election Commission of India, PW2 Ravi Shankar is the Election Kanungo in the District Election Office, Jind and PW3 Som Nath Luthra is the Assistant Chief Election Officer, Haryana and these witnesses have no personal knowledge of the controversy raised but have merely proved some documents. Apart from himself, the election petitioner has strongly relied upon the testimony of PW4 Punnu Ram and PW5 Shri Bhupinder Singh Hooda. PW4 Punnu Ram, who claims to be Clerk in the office of Haryana Pradesh Congress Committee since 1970, went to the extent of denying the signature of Shri Bhupinder Singh hooda in Form B which was submitted by Bachan Singh though Shri Hooda himself admitted his signature on the said form at three different places during the course of his cross-

examination. When questioned, he stated in his cross examination that he did not know whether Bachan Singh had earlier contested election from 50-Safodon Constituency or had ever fought election as a candidate of the Congress Party. He further stated that he did not know whether Bachan Singh had ever remained a Minister. It is not possible to believe that a person who had been serving as a Clerk in the Congress office at Chandigarh for 30 years would not be knowing that Bachan Singh had earlier contested election as a Congress candidate twice and had remained a Minister. This shows that he has scant regard for truth and can go to any extent to help the election petitioner. It will, therefore, not be safe to rely upon his testimony. Shri Bhupinder Singh Hooda being President of Haryana Congress Party would not be favourable inclined towards the appellant who is of the rival Lok Dal Party and would certainly be interested in the success of the Election Petition so that the election of the appellant may be set aside. He is, therefore, not an independent witness. The election petitioner has thus not led any independent evidence of unimpeachable character on which implicit reliance may be placed.

27. There is another aspect of the case which deserve notice. Kamal Sharma did not want to contest as an independent candidate but as a candidate of Congress Party. Shri Hooda has clearly admitted in his cross-examination that he instructed all the workers to campaign for the Congress Candidates and after withdrawal, Bachan Singh was adopted as the Congress candidate from 50-Safidon Constituency. The evidence adduced by the appellant Ram Phal Kundu shows that all the important Congress leaders like Shri Motilal Vora, Smt. Sheila Dixit, Shri Bhajan Lal and other campaigned for Bachan Singh. Thus, a candidate set up by the Congress Party contested the election for whom all the party workers and important leaders campaigned. The appellant secured 45,382 i.e. 55% of the total valid votes polled and thus won by an overwhelming majority. The appellant played absolutely no role of any kind in the rejection of nomination paper of kamal Sharma on account of acceptance of Bachan Singh as a candidate of Congress Party. It was an inter se dispute between two persons,

each claiming to be candidate of the same party. It will be apposite to refer to a well settled principle in election jurisprudence. After referring to earlier decisions in Jagar Nath v. Jaswant Singh AIR 1954 SC 210 and Gajanan Krishanand Bapat v. Dattaji Raghobaji Meghe 1995(5) SCC 347, this Court in Jeet Mohinder Singh v. Harminder Singh Jassi 1999(9) SCC 381 stated as under:

> "The success of a candidate who has won at an election should not be lightly interfered with. Any petition seeking such interference must strictly conform to the requirement of the law. Though the purity of the election process has to be safeguarded and the court shall be vigilant to see that people do not get elected by flagrant breaches of law or by committing corrupt practices, the setting aside of an election involves serious consequences not only for the returned candidate and the constituency, but also for the public at large inasmuch as re-election involves an enormous load on the public funds and administration."

Therefore, unless the election petitioner fully established his case, it will not be legally correct to set aside the election of the appellant. As discussed earlier, Kamal Sharma has failed to do so.

28. The appeal is, therefore, allowed and the judgment and order dated 8.5.2003 of the High Court is set aside. The election petition filed by Kamal Sharma is dismissed. The appellant will be entitled to his costs both here and in the High Court.

SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 2489 of 2004
(Arising out of SLP C No. 7457 of 2004)

Manda Jaganath ..... Appellant

Vs.

K.S. Rathnam & Ors. ..... Respondents

Date of Order : 16.04.2004

SUMMARY OF THE CASE

Shri K.S. Rathnam filed his nomination paper to contest elections from 28-Nagarkurnool(SC) Parliamentary Constituency in Andhra Pradesh in 2004. On scrutiny of nomination paper, the Returning Officer found that Form B submitted by the respondent was blank in columns 2 to 7 and scratch line indicating scoring off the requirement of the said was noticed. The Retuning Officer rejected the Form B, accepted the nomination paper and treated the respondent as independent candidate and did not allot him the symbol reserved for the candidates of Telengana Rashtra Samithi of which party the respondent claimed to be a candidate.

The respondent filed a writ petition before the High Court of Judicature, Andhra Pradesh praying for direction in nature of mandamus declaring the action of Returning Officer as illegal. High Court came to the conclusion that the irregularity, if any, found in Form B was so technical and trivial that same did not justify the decision of Returning Officer to treat him as independent candidate and passed the interim order setting aside the decision of Returning Officer. The appellant (Returning Officer) filed an appeal before Supreme Court on the grounds that High Court has no jurisdiction to entertain the petition after election process had started. Supreme Court held that it is a matter to be decided in an election

petition. Suffice it to say that the High Court on facts of this case, could not have interfered with the decision of Returning Officer to reject Form B filed by the respondent and set aside the impugned order of High Court and dismissed the writ petition pending before the High Court.

J U D G E M E N T

SANTOSH HEGDE, J.

Leave granted.

Heard learned counsel for the parties.

The first respondent herein filed his nomination to contest elections to the Parliament from 28 Nagarkurnool (SC) Constituency. On 2.4.2004 when the said nomination papers were taken up for scrutiny, the Returning Officer found that Form B submitted by the first respondent was blank in columns 2 to 7 and scratch line indicating scoring off the requirement of the said columns was noticed. Following the guidelines found in Handbook of Returning Officers issued by the Election Commission of India, the said Returning Officer rejected Form B filed by the first respondent herein and while accepting the nomination of the first respondent as an independent candidate he did not allot him the symbol reserved for the candidates of Telangana Rashtra Samithi of which party the first respondent claimed to be a candidate.

Being aggrieved by the said order of the Retuning Officer the first respondent and the Telangana Rashtra Samithi represented by its President filed a writ petition under Article 226 of the Constitution of India before the High Court of Judicature; Andhra Pradesh, Hyderabad praying inter alia for issuance of a writ, order or direction in the nature of mandamus declaring the action of the Returning Officer treating the first respondent as an independent candidate and not as a candidate set up by the Telangana Rashtra Samithi vide his order dated 2.4.2004 as illegal and further prayed for a direction to the said Returning

Officer to treat the first respondent as a candidate set up by the said Telangana Rashtra Samithi Political party and allot the symbol of 'car' to him. When the said writ petition came up for preliminary hearing the High Court, while issuing notice of admission and hearing learned counsel appearing for the parties at the interlocutory stage, came to the conclusion that the reason given by the Returning Officer for refusing to recognize the first respondent as an official candidate of Telangana Rashtra Samithi and consequential refusal to allot the official symbol of that party, was not acceptable even at that interlocutory stage because the errors pointed out by the Returning Officer were due to inadvertence and there was no other candidate set up by the said Telangana Rashtra Samithi in the said Constituency for which the first respondent had filed his nomination. It also took notice of an affidavit filed by the President of the Telangana Rashtra Samithi stating inter alia that the party had authorized him to issue B Form to the candidate set up by that party in the ensuing Assembly and Parliamentary elections and exercising said authority he had issued Form B to the first respondent herein. Based on the above material the High Court came to the conclusion that the irregularity, if any, found in Form B was so technical and trivial that the same did not justify the decision of the Returning Officer to treat the first respondent as an independent candidate and not as a candidate set up by the Telangana Rashtra Samithi, hence, issued the impugned directions setting aside the decision of the Returning Officer. It also came to the conclusion that the issue relating to allotment of symbol by the Returning Officer at the time of scrutiny of nomination papers is not one of the grounds on which an election petition could be filed under the provisions of the Representation of the People Act, 1951 (R.P.Act, 1951).

Being aggrieved by the interim order of the High Court, the appellant has filed the above appeal, which was listed on 8.4.2004 before us for mentioning for an early date of hearing the SLP. Noticing the urgency of the matter and prima facie case of lack of jurisdiction of the High Court to entertain a writ petition after the election process had started, we took up the matter on board

and issued notice to the respondents. We also considered it fit suspend/stay the operation of the impugned order.

Now, the parties are served with the court notice of this petition and are represented through their respective counsel who has requested us to finally dispose of the matter today because of the urgency involved.

Having heard the learned counsel, we grant leave in this matter and proceed to dispose of this appeal.

Ms. K. Amareshwari, learned senior counsel for the appellant and Mr. S. Muralidhar, learned counsel for the Returning Officer assailed the order of the High Court primarily on the ground that the high Court was not justified in entertaining a writ petition after issuance of election notification because of the specific bar found in Article 329 (b) of the Constitution of India read with the other provisions of the Representation of the People Act, 1951. They also contended that the High Court could not have directed the Returning officer to treat the first respondent as a candidate set up by the Telangana Rashtra Samithi and further direct the Returning Officer to allot the symbol of car which is reserved for the official candidate of the said political party only. They also submitted that in view of glaring defects and omissions found in Form B filed by the first respondent which are in contravention of the Representation of the People Act, the Rules and orders made there under, it was only the Returning Officer who was competent to adjudicate on such issues and the High Court could not have in a petition filed under Article 226 decided that issue. They placed strong reliance on the provisions of Article 329 (b) of the Constitution as also the judgments of the Court in:

1. N.P.Ponnuswami vs. The Returning Officers, Namakkal Constituency, Namakkal, Salem Dist, and Others (AIR1952 (39) SC (64);
2. Mohinder Singh Gill & Anr. V. The Chief Election Commissioner, New Delhi & Ors. (1978 1 SCC 405);

3. Election Commission of India V. Shivaji & Ors. (1988 1 SCC 277);

4. Ram Phal Kundu V. Karnal Sharma (2004 2 SCC 759).

Dr. Rajeev Dhawan, learned senior counsel appearing for the respondents before us who was the writ petitioner before the High Court, however, supported the judgment of the High Court stating that the bar found in Article 329 (b) of the Constitution is only in regard to the defects which are not of substantial nature and not a bar to correct errors arising out of irregularities and omissions which have no material bearing on the election or rights of parties. He placed strong reliance on the proviso to Rule 4 of the Conduct of Elections Rules, 1961. He also submitted that the defects pointed out by the Retuning Officer were of a very trivial nature and from a complete reading of the nomination papers filed in different forms, it was clear that the first respondent was a candidate proposed by the Telangana Rashtra Samithi and in such circumstances an omission to fill up clauses 2 to 7 in Form B can never be being treated as a fatal omission. He also contended that there being no substantial defect and there being no other nomination paper filed on behalf of that political party, the High Court was justified in rectifying that error of the Returning Officer but for which his client would have suffered great hardship and might have had to suffer a prolonged legal battle at a subsequent stage. He also submitted that since the appellant herein was not a candidate claiming either as a nominee of the Telengana Rashtra Samithi or claiming the official symbol of the said party he would not be in any manner prejudiced by the order of the High Court which would only further the interest of justice in facilitating the ongoing election process which is the main object of Article 329 of the Constitution of India.

He also relied on certain passages found in Mohinder Singh Gill's case (supra) as also Ponnuswarmi's case (supra) to support his contention. Learned counsel also placed strong reliance on section 36 of the Representation of the People Act as also clause 30 of the Election Symbols (Reservation and

Allotment) Order, 1968 to show that any error in Form B filed in regard to the allotment of the symbol would not be a defect of substantial nature.

It is an admitted fact that so far as the Elections to parliament from Constituency No. 28 Nagarkurnool (SC) Parliamentary Constituency in Andhra Pradesh is concerned, the process of election had already started not only by issuance of the notification by the President of India but also by issuance of the notification by the President of India but also by issuance of a notification fixing the calendar of events by the Election Commission. It is only pursuant to said notification that the first respondent filed his nomination before the Returning Officer on the last date of filing of nominations. It is an admitted fact that in Form A filed by the appellant, he had asked for the symbol of a car on the ground that he is a candidate proposed by the Telengana Rashtra Samithi. His candidature has also been properly proposed and seconded as a candidate for the election to the House of People from Nagarkurnool (28) Parliamentary Constituency, but in Form B which is also a statutory form required to be filed by the first respondent for claiming a reserved symbol of a particular party at part III in column (b) (ii) of the said form the candidate is required to give the particulars of the political party represented by him. Though in this column the respondent has stated that he is a candidate set up by the Telangana Rashtra Samithi party, which is a registered unrecognized political party, alternate printed words that he is contesting this election as an independent candidate is also retained. This column requires the candidate to strike out what is not applicable therein but the first respondent has failed to strike out the part that he is contesting that election as an independent candidate thus giving room for a doubt whether really he was a candidate representing Telengana Rashtra Samithi political party or he is contesting the election as an independent candidate. The more important and more glaring error that was noticed by the Returning Officer was the lack of particulars in columns 2 to 7 of the said form which is the requisite notice required to be given by the political party setting up the candidate in proof of the fact that the candidate named therein has been set up by and entitled to the

reserved symbol of that party. From a reading of the various clauses of Form B it is clear that only that person whose name and other particulars are furnished in columns 2 to 4 in the said form, can be treated as a representative or a candidate proposed by the said political party. As noticed by the Returning Officer we also see that except column I which mentions the name of the Constituency no other column which requires name of the approved candidate, name of father/mother/husband of the approved candidate, postal address of the approved candidate has been filled up to indicate that it is the first respondent who is the official candidate of that party and entitled to the symbol. On the contrary these column are struck off as if this Form B was not given to any one. Clause 2 of the said form requires a declaration to be made by the authorized person as to whom this Form B is being given. Even in this column the name of the first respondent is not mentioned. Clause 3 of the said form also requires a certificate that the candidate whose name is mentioned above is a member of that political party and his name is duly borne on the rolls of that party. None of this information is provided in the said clause of Form B.

In our opinion, whether the Returning Officer is justified in rejecting this Form B submitted by the first respondent herein or not, is not a matter for the High Court to decide in the exercise of its writ jurisdiction. This issue should be agitated by an aggrieved party in an election petition only.

It is to be seen that under Article 329 (b) of the Constitution of India there is a specific prohibition against any challenge to an election either to the Houses of Parliament or to the Houses of Legislature of the State except by an election petition presented to such authority and in such manner as may be provided for in a law made by the appropriate legislature. The parliament has by enacting the Representation of People Act, 1951 provided for such a forum for questioning such elections hence, under Article 329 (b) no forum other than such forum constituted under the R.P. Act can entertain a complaint against any election.

The word 'election' has been judicially defined by various authorities of this court to mean any and every act taken by the competent authority after the publication of the election notification.

In Ponnuswami (supra) this Court held:

> "The law of elections in India does not contemplate that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Art. 226 of the Constitution (the ordinary jurisdiction of the Courts having been expressly excluded") and another after they have been completed by means of an election petition."

The above view of this Court in Ponnuswami's case has been quoted with approval by the subsequent judgment in M.S. Gill (supra) wherein this Court after quoting the passages from said judgment in Ponnuswami's case held that there is a non-obstinate clause in Article 329 and, therefore, Article 226 stands pushed out where the dispute takes the form of calling in question an election, except in special situations pointed out but left unexplored in Ponnuswami's case. It is while considering the above unexplored situations in Ponnu Swami (supra) in M.S. Gill's case (supra) this Court held thus:

> "This dilemma does not arise in the wider view we take of section 100(1)(d)(IV) of the Act. Sri Rao's attack on the order impugned is in substance based on alleged non-compliance with a provision of Constitution viz., Article 324 but is neatly covered by the widely-worded, residual catch-all clause of Section 100. Knowing the supreme significance of speedy elections in our system the framers of the Constitution have, by implication postponed all election disputes to election petitions and tribunals. In harmony with this scheme section 100 of the Act has been designedly drafted to

> embrace all conceivable infirmities, which may be urged. To make the project foolproof Section 100 (1)(d)(iv) has been added to absolve everything left over. The court has in earlier rulings pointed out that Section 100 is exhaustive of all grievances regarding an election."

In the very same paragraph this Court, however, demarcated an area, which is available for interference by the High Court and the same is explained as follows:

> "But what is banned is not anything whatsoever done or directed by the Commissioner but everything he does or directs in furtherance of the election, not contrary wise. For example, after the President notifies the nation on the holding of elections under Section 15 and the Commissioner publishes the calendar for the poll under Section 30, if the latter orders returning officers to accept only one nomination or only those which come from one party as distinguished from other parties or independents, is that order immune from immediate attack. We think not. Because the Commissioner is preventing an election, not promoting it and the Court's review of that order will facilitate the flow, not stop the stream. Election, wide or narrow be its connotation, means choice from a possible plurality, monolithic politics not being our genius or reality, and if that concept is crippled by the Commissioner's act, he holds no election at all."

Of course, what is stated by this Court herein above is not exhaustive of a Returning Officer's possible erroneous actions which are amenable to correction in the writ jurisdiction of the courts. But the fact remains such errors should have the effect of interfering in the free flow of the scheduled election or hinder the progress of the election, which is the paramount consideration. If by an erroneous order conduct of the election is not hindered then the courts under

Article 226 of the Constitution should not interfere with the orders of the Returning Officers remedy for which lies in an election petition only.

In Election Commission of India V. Shivaji (supra) this Court while considering a challenge to the election notification which included certain Zila Parishads within a notified constituency, held following the judgment in Ponnuswami (supra) that even if there was any ground relating to the non-compliance with the provisions of the Act and the Constitution on which the validity of any election process could be questioned, the person interested in questioning the election has to wait till the election is over and institute a petition in accordance with Section 81 of the Act calling in question the election of the successful candidate.

Learned counsel for the writ petitioner before the High Court had relied upon a judgment of this Court in S.T. Muthusami v. K. Natarajan & Ors. (1988 1 SCC 572) wherein this Court had held following the judgement in Ponnuswami's case (supra) that entertaining of a writ petition by the High Court under Article 226 of the Constitution cannot be supported and consequently it set aside the judgement of the Division Bench of the High Court and dismissed the writ petition filed in the High Court. In that case the question involved was a dispute between two candidates claiming the official symbol of a political party. This judgment came to be distinguished by the High Court on the basis of facts though the law laid down there was squarely applicable against the maintainability of the writ petition.

Learned senior counsel for the respondent candidate contended that case of the first respondent before the High Court came within the exceptions noted by this Court in M.S. Gill's case (supra) which permits filing of a writ petition under Article 226 of the Constitution in certain exceptional cases. He contended that the facts in this case also show that but for the intervention of the High Court the progress in the election would have been stalled. With due respect to learned counsel we do not agree with this argument because by not allotting a

symbol claimed by the first respondent the Returning Officer has not stalled or stopped the progress of the election. Said respondent has been treated as an independent candidate and he is permitted to contest with a symbol assigned to him as an independent candidate, and consequently there is no question of stalling the election. His grievance as to such non-allotment of the symbol will have to be agitated in an election petition (if need be) as held in S.T. Muthuswami (supra).

Learned counsel then contended that non-allotment of a symbol, which the first respondent was legally entitled to would not be a ground of challenge available to him in the election petition under section 100 of the Representation of the People Act, 1951 therefore the High Court is justified in entertaining the petition. We do not think this argument of learned counsel is correct because as has been held by this Court in M.S. Gill's case (supra) sub-clause 4 of section 100(1)(d) of the Representation of the People Act, 1951 is widely worded residual clause which this Court in the said judgment of M.S. Gill case termed as "catch all clause". It is further stated in the said judgment that the said section has been added to absolve everything left over and the same is exhaustive of all grievances regarding an election, hence, in our opinion this argument of learned counsel for the first respondent should also fail.

The next argument of learned counsel for the respondent is that as per the provisions of section 36 of the R.P. Act, Rule 4 of the Conduct of Elections Rules, 1961 and Clause 30 of the Election Symbols (Reservation and Allotment) Order, 1968, omission found by the Returning Officer in Form B filed by the respondent herein are all curable irregularities and are not defects of substantial nature, calling for rejection of the nomination paper. We think these arguments based on the provisions of the statutes, Rules and Orders are all arguments, which can be addressed in a properly constituted election petition, if need be, and cannot be a ground for setting aside the order of the Returning Officer which is prima facie just and proper in our opinion.

We are not recording any conclusive opinion in regard to the applicability of the above statute, Rules and Orders because, as stated above, it is a matter to be decided in an election petition. Suffice it to say that the High Court on facts of this case could not have interfered with the decision of the Returning Officer to reject Form B filed by the first respondent.

For the reasons stated above, this appeal succeeds and the same is allowed, setting aside the impugned order of the High Court.

In view of the above decision of ours, we think nothing survives in the Writ Petition No. 6653/2004 titled K.S. Rathnam & Anr. Vs. The Returning Officer pending before the High Court, hence, we dismiss the same also.

Sd/-
..... J.
(N. SANTOSH HEGDE)

Sd/-
..... J.
(B. P. SINGH)

New Delhi
April 16, 2004

SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 8213 of 2001

K. Prabhakaran ..... Appellant

Vs.

P. Jayarajan. ..... Respondent

Civil Appeal No. 6691 of 2002

Ramesh Singh Dalal ..... Appellant

Vs.

Nafe Singh & Ors. . ..... Respondents

Date of Order : 11.01.2005

SUMMARY OF THE CASE

This is a Constitution Bench Judgement involving interpretation of Sections 8 (3) and 8 (4) of the Representation of the People Act 1951. Two appeals have been disposed of by this judgment. In CA 8213/2001, the issue was whether in the case of conviction for different offences at a common trial with sentences of imprisonment for different periods to be undergone consecutively, disqualification under Sub-section (2) and (3) of Section 8 of the Representation of the People Act would be attracted if the total term of imprisonment exceeds the period mentioned in the said Sub-sections. In C.A. 6691/2002 the question was whether the benefit of protection from disqualification under Sub-section (4) of Section 8 would be available for contesting any future election. In both the appeals there was also the question whether in the case of a person disqualified from contesting under Section 8, on account of conviction, the judgment of the appellate Court on

a date subsequent to the date of election having a bearing on the conviction ordered by the trial court, would have the effect of wiping out disqualification from a back date.

The Supreme Court held that the words 'any offence' used in Sub-section (3) of Section 8, refers to nature of offence and not the number of offences, and that it is immaterial whether the sentence awarded is in respect of one offence or more than one. Accordingly, in a majority judgment, it was held that in the case of conviction in a common trial for various offences with sentences of imprisonment of various period ordered to run consecutively, the different periods shall be added up, and if the total period on such adding up, is 2 years or more, disqualification provision under sub-section (3) of Section 8 is attracted. On the other two issues, the judgment was unanimous. It was held that the protection under sub-section (4) of Section 8 would be available only for protecting the membership in the House of which the convicted person was a member on the date of conviction and not for protecting against disqualification for contesting future elections. On the third issue, it was held that for the purposes of Section 100 (1) (d) (i), the question of qualification or disqualification of a candidate shall be determined with reference to the date on which he was declared elected, and that the crucial date for determining the question whether a nomination was improperly accepted by the Returning Officer, is the date of scrutiny of nominations. It was held that a decision of a subsequent date, in an appeal against conviction would not have the effect of wiping out disqualification that existed on the focal dates of date of election and date of scrutiny. In both the cases, the decisions given by the High Courts dismissing the Election Petitions were set aside.

J U D G E M E N T

R.C. LAHOTI, CJI (FOR SELF AND ON BEHALF OF HON. SHIVARAJ V. PATIL, B.N. SRIKRISHNA AND G.P. MATHUR, JJ.)

Facts in C.A. No. 8213/2001

Election to the No. 14 Kuthuparamba Assembly constituency was held in the months of April-May, 2001. There were three candidates, including the appellant K. Prabhakaran and the respondent P. Jayarajan contesting the election. Nominations were filed on 24.4.2001. The poll was held on 10.5.2001. The result of the election was declared on 13.5.2001. The respondent was declared as elected.

In connection with an incident dated 9.12.1991, the respondent was facing trial charged with several offences. On 9.4.1997, the judicial Magistrate First Class, Kuthuparamba held the respondent guilty of the offences and sentenced him to undergo imprisonment as under: -

Offences	Sentence
Under Section 143 read with Section 149 IPC	R.I. for a period of one month
Under Section 148 read with Section 149 IPC	R.I. for six months
Under Section 447 read with Section 149 IPC	R.I. for one month
Under Section 353 read with Section 149 IPC	R.I. for six months
Under Section 427 read with Section 149 IPC	R.I. for three months
Under Section 3(2)(e) under the P.D.P.P. Act read with Section 149 IPC	R.I. for one year

The sentences were directed to run consecutively (and not concurrently). Thus the respondent was sentenced to undergo imprisonment for a total period of 2 years and 5 months. On 24.4.1997, the respondent filed Criminal Appeal No. 118/1997 before the Sessions Court, Thalassery. In exercise of the power conferred by Section 389 of the Code of Criminal Procedure, 1973 (hereinafter 'the Code' for short) the Sessions Court directed the execution of the sentence of imprisonment to be suspended and the respondent to be released on bail during the hearing of the appeal.

The nomination paper filed by the respondent was objected to by the appellant on the ground that the respondent having been convicted and sentenced to imprisonment for a term exceeding 2 years was disqualified from contesting the election. However, the objection was overruled by the returning officer and the nomination of the respondent was accepted. The returning officer formed an opinion that the respondent was convicted for many offences and any of the terms of imprisonment for which he was sentenced was not 2 years, and therefore, the disqualification within the meaning of Section 8 (3) of the Representation of the People act, 1951 (hereinafter 'RPA', for short) was not attracted.

On 15.6.2001, the appellant filed an election petition under Chapter II of RPA mainly on the ground that the respondent was disqualified, and therefore, neither his nomination was valid nor could he have been declared elected.

On 25.7.2001, the Court of Sessions partly allowed the appeal filed by the respondent. The conviction of the accused and the sentences passed on him were maintained, subject to the modification that the substantive sentences of imprisonment for the several offences for which the respondent was found guilty were made to run concurrently.

On 5.10.2001, a learned Designated Election Judge of the high Court decided the election petition by directing it to be dismissed. The learned Judge

did not find any fault with the view taken by the returning officer that Section 8(3) of RPA was not attracted. The learned Judge also held that during the pendency of the election petition, the sentence passed by the trial court had stood modified by the appellate court which, while maintaining the conviction and different terms of imprisonment to which the respondent was sentenced, had directed the sentence to run concurrently. In the opinion of the High Court, the sentence, as modified by the appellate court, operated retrospectively from the date of the judgment of the trial court, and, therefore also the disqualification had in any case ceased to exist. The High Court placed reliance on two decisions of this Court namely ***Shri Manni Lal Vs. Shri Parmai Lal and others*** 1970 (2) SCC **462 and** ***Vidya Charan Shukla Vs. Purshottam Lal Kaushik*** 1981 (2) SCC 84.

Facts in C.A. 6691 / 2002

On 18.9.1993, FIR No. 386 for offences under Sections 148, 307,323,325,326/149 of Indian Penal Code and Sections 25 and 27 of Arms Act 1959 was registered against Nafe Singh, respondent No.1. One of the injured persons in the incident, died after the registration of the F.I.R. On 20.9.1993 the offence was converted into one of murder under Section 302 I.P.C. and other accused persons were arrested. Later on Nafe Singh was released on bail. On 10.5.1996 while the charges against Nafe Singh and other accused persons were being tried, elections took place in the State of Haryana. Nafe Singh contested elections and on 10.5.1996 he was declared elected as Member of Legislative Assembly from Bahadurgarh Constituency.

On 17.5.1999, the Sessions Court trying the accused and others, held Nafe Singh guilty of an offence punishable under Section 302 I.P.C. and other offences. On 19.5.1999 he was sentenced to undergo imprisonment for life. On 25.5.1999 he filed an appeal in the High Court against his conviction. On 8.10.1999 the High Court directed the execution of sentence of imprisonment passed against Nafe Singh to be suspended and also directed him to be

released on bail. Nafe Singh furnished bail bonds and was released on bail. By that time he had undergone imprisonment for four months and twenty-one days.

On 14.12.1999, the Governor of the State of Haryana dissolved Haryana Assembly for mid term poll. In the first week of January 2000 the Election Commission notified the election programme. For 37-Bahadurgarh Assembly Constituency, the last date for filling nominations was appointed as 3.2.2000. On 29.1.2000 Indian National Lok Dal, to which Nafe Singh belonged, released the first list of its official candidates wherein the name of Smt. Shiela Devi wife of Nafe Singh, respondent No. 1, was included. On 1.2.2000 Smt. Shiela Devi filed her nomination paper on Indian National Lok Dal ticket. On 2.2.2000 Nafe Singh also filed his nomination paper as a dummy candidate or an alternative to his wife Smt. Shiela. On the date of the scrutiny of nomination papers the appellant objected to the nomination of Nafe Singh submitting that the latter in view of his conviction and sentence of life imprisonment passed under Section 302 I.P.C. was disqualified for being chosen as a member of Haryana Assembly under Article 191 of the Constitution read with Section 8(3) of the RPA. The objection was overruled by the Returning Officer who accepted as valid the nomination paper filed by Nafe Singh. However, the nomination paper of Smt. Shiela, wife of Nafe Singh was not found to be in order and hence rejected. Indian National Lok Dal then nominated Nafe Singh as its candidate from Bahadurgarh Assembly Constituency. Polling was held on 22.2.2000. Results were declared on 25.2.2000 wherein Nafe Singh was declared elected over the appellant, the nearest rival; by a margin of 1,648 votes. There were, in all, eleven candidates in the election fray.

On 8.4.2000, the appellant filed an election petition under Chapter II of the RPA. One of the grounds taken in the election petition was of improper acceptance of the nomination paper of Nafe Singh by the Returning Officer. Nafe Singh contested the election petition. The learned Designated Election Judge of the High Court of Punjab and Haryana framed 13 issues arising from the

pleadings of the parties. Issues No. 1 to 7 sere heard as preliminary issues not requiring any evidence.

Before we may proceed to notice the result of the election petition as determined by the High Court, a few more dates need to be noticed, as they are relevant. The hearing of the preliminary issues commenced on 12.2.2001 and continued for several dates of hearing. On 19.3.2001 Nafe Singh, in spite of the hearing on all the issues having been already concluded, made a request to the High Court that the High Court may first decide his criminal appeal so that in the event of his being exonerated of the charges and being acquitted, he could gain the benefit of the decisions of this Court in Shri Manni Lal Vs. Shri Parmai Lal and others 1970 (2) SCC 462 and Vidya Charan Shukla Vs. Prushottam Lal Kaushik 1981 (2) SCC 84. The prayer made by the respondent – Nafe Singh was opposed on behalf of the appellant. However, the learned Designated Election Judge adjourned the hearing to 27.4.2001 and then to 3.5.2001 on which date the judgment was reserved. When the judgment in election petition was still awaited, on 1.8.2001 a Division Bench of the High Court decided the criminal appeal preferred by Nafe Singh, respondent No. 1. The appeal was allowed and respondent No. 1 was directed to be acquitted. The judgement of the Division Bench proceeds on its own merits but one thing which is noticeable from the judgment of the Division Bench of the High Court dated 1.8.2001 is that the complainant and the other injured persons had come to terms with the accused (respondent No.1), settled their differences and compromised. 15 persons, who had as witnesses supported the prosecution case at trial, had now filed their affidavits before the Appellate Court disowning their statements earlier given by them in the trial Court and stated (as the High Court has recorded in its decision), “that the parties had compromised their disputes and that the F.I.R. had been lodged on account of suspicion and at the instigation of certain persons and that no such occurrence had taken place.”

On 21.8.2001 Nafe Singh, respondent No. 1 placed the appellate judgment of acquittal on record of the election petition by moving an application in that

regard. On 20.12.2001 the appellant herein made a request to the Hon. Chief Justice of High Court requesting for his indulgence in getting the judgment in the election petition being pronounced. On 25.2.2002 the appellant moved an application before the learned Designated Election Judge praying for pronouncement of judgment at an early date. The judgment was pronounced on 5.7.2002. The election petition was directed to be dismissed. Out of several findings recorded by the High Court the two, which are relevant for the purpose of this appeal, are as under: -

(i) In view of the appeal preferred by the respondent having been allowed his conviction and sentence passed thereon respectively dated 17.5.1999 and 19.5.1999 stood wiped out as if no conviction had taken place as is the view taken by this Court in the case of Shri Manni Lal (supra) and Vidya Charan Shukla (supra);

(ii) That on the date of his conviction Nafe Singh was a Member of Legislative Assembly and, therefore, in view of the provisions contained in sub-section (4) of Section 8 of the RPA, the conviction did not take effect for a period of three months and as within that period an appeal was preferred which was pending and not disposed of on the date of nomination and election of Nafe Singh, he was protected by the said provision and the disqualification did not take effect.

Proceedings in the appeals

The election petitioners in both the cases have preferred these two statutory appeals under Section 116A of the RPA.

On 1.10.2002, C.A. No. 8213/2001 came up for hearing before a three-Judge Bench of this Court which expressed doubt about the correctness of the view taken in the cases of V*idya Charan Shukla (supra) and Manni Lal (supra),* the former being a three-Judge Bench decision, and therefore, directed the

matter to be placed for consideration by a Constitution Bench. The bench also felt that the other issue arising for decision in the case as to whether the applicability of Section 8(3), of RPA would be attracted only when a person is sentenced to imprisonment for not less than 2 years for a single offence was also a question having for reaching implications and there being no decided case of this Court available on the issue, it would be in public interest to have an authoritative pronouncement by a Constitution Bench so as to settle the law, and hence directed such other question also to be placed for consideration by the Constitution Bench. The order of reference is reported as (2002) 8 SCC 79.

C.A. No. 6691/2002 came up for hearing before this Court on 7.4.2003. It was directed to be tagged with C.A. No. 8213/2001 in view of one identical question arising for decision in this appeal. This is how both the appeal have come up for hearing before this Constitution Bench.

Three questions arise for decision: -

(1) Whether an appellate judgment of a date subsequent to the date of election and having a bearing on conviction of a candidate and sentence of imprisonment, passed on him would have the effect of wiping out disqualification from a back date if a person consequent upon his conviction for any offence and sentenced to imprisonment for not less than 2 years was disqualified from filing nomination and contesting the election on the dates of nomination and election;

(2) What is the meaning to be assigned to the expression – “A person convicted of any offence and sentenced to imprisonment for not less than 2 years” as employed in sub-section (3) of Section 8 of the Representation of the People Act, 1951? Is it necessary that the term of imprisonment for not less than 2 years must be in respect of one single offence to attract the disqualification?

(3) What is the purport of sub-section (4) of Section 8 of RPA? Whether the protection against disqualification conferred by sub-section (4) on a member of a House would continue to apply though the candidate had ceased to be a member of Parliament or Legislature of a State on the date of nomination or election?

Relevant Provisions

The relevant provisions of law may be set out as under: -

Constitution of India

Article 191. "Disqualification for membership – (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State-

* * * * *

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

* * * * *

The Representation of the People Act, 1951

"8 Disqualification on conviction of certain offences-

* * * * *

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years [other than any offence referred to in sub-section (1) or sub-section (2)] shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(4) Notwithstanding anything in sub-section (1), sub-section (2) of sub-section (3) a disqualification under either sub-section shall not, in

the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until 3 months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court."

"100. Grounds for declaring Election to be void. – (1) Subject to the provisions of sub- section (2) if the High Court is of opinion-

(a) That on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act; or

(d) That the result of the election, in so far as it concerns returned candidate, has been materially affected-

(i) by the improper acceptance or any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) By any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,

The High Court shall declare the election of the returned candidate to be void.

We have briefly stated in the earlier part of the judgment such facts relating to both the cases, which are not in dispute. Before dealing with the submissions made by the learned counsel for the parties, it would be appropriate to set out briefly the relevant facts and the law laid down in the cases of *Shri Manni Lal (supra)* and *Vidya Charan Shukla (supra)*.

Shri Manni Lal's case

Manni Lal's case (supra) is a two-Judge Bench decision of this Court. Parmai Lal, respondent No. 1 therein, filed his nomination on 9.1.1969. Two days later, on 11.1.1969, he was convicted for an offence under Section 304 I.P.C. and sentenced to 10 years RI. On 16.1.1969 he filed an appeal against his conviction in the High Court. Polling took place on 9.2.1969 Parmai Lal was declared elected on 11.2.1969. On 30.9.1961 the appeal filed by Parmai Lal was allowed by the High Court and his conviction and sentence was set aside. At that point of time, an election petition laying challenge to election of Parmai Lal was pending which was decided by the judgment delivered on 27.10.1969. The High Court refused to hold parmai Lal as disqualified under Section 8(2) of RPA. Manni Lal filed an appeal in this Court. This Court held that in a criminal case, acquittal in appeal does not take effect merely from the date of the appellate order setting aside the conviction; it has the effect of retrospectively wiping out the conviction and the sentence awarded by the lower court.

Bhargava, J., speaking for the Bench, observed – "it is true that the opinion has to be formed as to whether the successful candidate was disqualified on the date of his election; but this opinion is to be formed by the High Court at the time of pronouncing the judgement in the election petition. In this case, the High Court proceeded to pronounce the judgment on 27th October 1969. The High Court had before it the order of acquittal which had taken effect retrospectively from 11th January, 1969. It was, therefore, impossible for the High Court to arrive at the opinion that on 9th or 11th February 1969, respondent No. 1 was disqualified. The conviction and sentence had been retrospectively wiped out, so

that the opinion required to be formed by the High Court to declare the election void could not be formed." In the opinion of Bhargava, J. the effect of acquittal by the appellate court was similar to the effect of repeal of an enactment. To quote His Lordship — "The situation is similar to one that could have come into existence if parliament itself had chosen to repeal Section 8(2) of the Act, retrospectively with effect from 11th January, 1969 (the day of conviction of Parmai Lal). Learned counsel conceded that, if a law had been passed repealing Section 8(2) of the Act and the law had been deemed to come into effect from 11th January, 1969, he could not have possibly urged thereafter, when the point came up before the High Court, that respondent No. 1 was disqualified on 9th or 11th February 1969. The setting aside of the conviction and sentence in appeal has a similar effect of wiping out retrospectively the disqualification. The High Court was, therefore, right in holding that respondent No. 1 was not disqualified and that his election was not void on that ground." On this reasoning this Court upheld the judgment of the High Court that the election of Parmai Lal was not void on the ground of his conviction on the date of the poll and the declaration of the result.

Vidya Charan Shukla's Case

Vidya Charan Shukla's Case (supra) is a three Judge Bench decision of this Court. Vidya Charan Shukla was convicted and sentenced to imprisonment exceeding two years by the Sessions Court on the date of filing of nomination. Such conviction and sentence were effective on the date of election as also on the date of declaration of result. However, the execution of sentence was stayed by the High Court. The unsuccessful candidate filed an election petition and by the time the election petition came to be decide, the criminal appeal filed by Vidya Charan Shukla was allowed by the High Court and his conviction and sentence were set aside. Reliance was placed on Manni Lal's Case (supra) and the narrow question, which arose for decision before this Court, was whether the case fell within the ratio of Manni Lal's Case (supra) if the challenge was considered to

be one under clause (d) (i) and (iv) of Section 100. The Court noticed the principle laid down the *Dalip Kumar Sharma Vs. State of M.P.,* (1976) 1 SCC 560, to hold that an order of acquittal, particularly one passed on merits, wipes off the conviction and sentence for all purposes and as effectively as it had never been passed and an order of acquittal annulling or voiding a conviction operates from nativity. The conviction for the offence having been quashed by the High Court in appeal it "Killed the conviction not then, but performed the formal obsequies of the order which had died at birth."

Thereafter, this Court referred to the case of Manni Lal and expressed agreement with the view taken their in, that, once the disqualification of the returned candidate incurred on account of his conviction and sentence exceeding two years imprisonment which existed as a fact at the date of the election, is subsequently set aside by the High Court prior to the date of decision in election petition laying challenge to the validity of election under Section 100(1)(a) RPA, the election petition must fail because the acquittal had the effect of retrospectively wiping out the disqualification as completely and effectively as if it never had existed. It did not make much difference that the candidate stood convicted on the date of filing nomination as also on the date of election and earned acquittal after the election so long as it was before the date of pronouncement of judgment in the election petition by the High Court.

The emphasis in Manni Lal's Case (supra), that the opinion on the question of disqualification had to be formed by the High Court at the time it proceeds to pronounce judgement in the election petition and, therefore, it was by reference to the date of judgment in election petition by the High Court that the factum of disqualification was to be decided, was reiterated in Vidya Charan Shukla's Case (supra). The acquittal had retrospective effect of making the disqualification non-existent even at the time of scrutiny of the nominations.

However, it is pertinent to notice the dilemma, which the Court faced while dealing with an argument, advanced before it and dealt in paragraphs 39 and 40

of the judgment. A submission was made, what would happen if nomination of a candidate was rejected on account of his disqualification incurred by his conviction and sentence exceeding two years imprisonment and existing as a fact on the date of scrutiny of nomination and he brought an election petition to challenge the election of the returned candidate on the ground that his nomination was improperly rejected and if by the time the election petition came to be heard and decided, the conviction of the election petitioner was set aside in criminal appeal then, as a result of his subsequent acquittal, his conviction and sentence would stand annulled and obliterated with retrospective force and he would be justified in submitting that his nomination was illegally rejected and, therefore, the result of the election was materially affected and was liable to be set aside. The Court branded the said submission as 'hypothetical' requiring an academic exercise which was not necessary to indulge in. It would be note-worthy, as recorded vide Para 40 of judgment in Vidya Charan Shukla's Case, that correctness of the decision in Manni Lal's case was not disputed and there was no prayer made for reconsideration of the ratio of Manni Lal's case by a larger bench. The only submission made before the Court in Vidya Charan Shukla's Case was that the ratio in Manni Lal's case was distinguishable and hence inapplicable to the facts of Vidya Charan Shukla's Case. In such circumstances, the Court held "we would abide by the principle of stare decisis and follow the ratio of Manni Lal's case."

It is writ large that the position of law may have been different and the three-Judge bench which decided Vidya Charan Shukla's could have gone into the question of examining the correctness of the view taken in Manni Lal's case if only that submission would have been made.

Now we proceed to deal with the three issues posed for resolution before us.

Question (1):

Under clause (a) of sub-section (1) of Section 100 of the RPA, the High Court is called upon to decide whether on the date of his election a returned candidate was not qualified or was disqualified to be chosen to fill the seat under the Constitution or the RPA. If the answer were in the affirmative, the High Court is mandated to declare the election of the returned candidate to be void. The focal point by reference to which the question of disqualification shall be determined is the date of election.

It is trite that the right to contest an election is a statutory right. In order to be eligible for exercising such right the person should be qualified in the terms of the stature. He should also not be subject to any disqualification as may be imposed by the stature making provision for the elective office. Thus, the Legislature creating the office is well within its power to prescribe qualifications and disqualifications subject to which the eligibility of any candidate for contesting for or holding the office shall be determined. Article 191 of the Constitution itself lays down certain disqualifications prescribed by clauses (a) to (d) of sub-article (1) thereof. In addition, it permits, vide clause (e), any other disqualifications being provided for by or under any law made by Parliament. The Representation of People Act, 1951 is one such Legislation. It provides for the conduct of elections of the Houses of Parliament and to the House or houses of the Legislature of each State and the qualifications and the disqualifications for membership of those Houses.

Under sub-clause (i) of clause (d) of sub-section (1) of Section 100 of the RPA the improper acceptance of any nomination is a ground for declaring the election of the returned candidate to be void. This provision is to be read with Section 36(2)(a) which casts an obligation on the returning officer to examine the nomination papers and decide all objections to any nomination made, or on his own motion, by reference to the date fixed for the scrutiny of the nominations. Whether a candidate is qualified or not qualified or is disqualified for being chosen

to fill the seat, has to be determined by reference to the date fixed for the scrutiny of nomination. That is the focal point. The names and number of candidates who will be in the fray is determined on the date of the scrutiny of the nomination papers and the constituency goes to polls. Obviously, the decision by the returning officer has to be taken on the facts as they exist on that day. The decision must be accompanied by certainty. The returning officer cannot postpone his decision nor make it conditional upon what may happen subsequent to that date. Under Section 100(1)(d)(i) of the Act the High Court has to test the correctness of the decision taken by the returning officer and the fact whether any nomination was improperly accepted by reference to the date of the scrutiny of the nomination as defined in Section 36(2)(a). An election petition is heard and tried by a court of law. The proceedings in election petition are independent of the election proceedings which are held by the Executive. By no stretch of imagination the proceedings in election petition can be called or termed as continuation of election proceedings. The High Court trying an election petition is not hearing an appeal against the decision of returning officer or declaration of result of a candidate.

With respect to the learned judges who decided Shri Manni Lal's case (supra), the fallacy with which the judgement suffers is presumably an assumption as if the election petition proceedings are the continuation of the election proceedings. Yet, another fallacy with which the judgement, in our humble opinion, suffers is as if the High Court has to form opinion on the disqualification of a candidate at the time of pronouncing the judgment in the election petition. That is not correct. Undoubtedly, the High Court is forming an opinion on the date of judgment in election petition but that opinion has to be formed by reference to the date of scrutiny, based on such facts as can be fictionally deemed to have existed on a back date dictated by some subsequent event, but based on the facts as they had actually existed then, so as to find out whether the returning officer was right or wrong in his decision on scrutiny of nomination on that date, i.e., the date of scrutiny. The correctness or otherwise

of such decision by the returning officer cannot be left to be determined by any event which may have happened between the date of scrutiny and the date of pronouncement of the judgment by the High Court.

It is rather unfortunate that the correctness of the view taken in Shri Manni Lal's case was not questioned in Vidya Charan Shukla's case and an attempt was made only to distinguish the case of Shri Manni Lal. While interpreting a provision of law and pronouncing upon the construction of a statutory provision the Court has to keep in mind that the view of the law taken by it would be applied to myriad situations which are likely to arise. It is also well-settled that such interpretation has to be avoided as would result in creating confusion, anomaly, uncertainty and practical difficulties in the working of any system. A submission based on this principle was advanced before the three-Judge Bench in Vidya Charan Shukla's case; but unfortunately did not receive the attention of the Court forming an opinion that dealing with that submission (though forceful) would amount to indulging in 'hypothetical and academic exercise'.

We may just illustrate what anomalies and absurdities would result if the view of the law taken in Shri Manni Lal's case and Vidya Charan Shukla's case were to hold the field. One such situation is to be found noted in para 39 of Vidya Charan Shukla's case. A candidate's nomination may be rejected on account of his having been convicted and sentenced to imprisonment for a term exceeding two years prior to the date of scrutiny of nomination. During the hearing of election petition if such candidate is exonerated in appeal and earns acquittal, his nomination would be deemed to have been improperly rejected and the election would be liable to be set aside without regard to the fact whether the result of the election was materially affected or not. Take another case. Two out of the several candidates in the election fray may have been convicted before the date of nomination. By the time the election petition comes to be decided, one may have been acquitted in appeal and the conviction of other may have been upheld and by the time an appeal under Section 116A of the RPA preferred

in this Court comes to be decided, the conviction of one may have been set aside and, at the same time, the acquittal of the other may also have been set aside. Then the decision of the High Court in election petition would be liable to be reversed not because it was incorrect, but because something has happened thereafter. Thus, the result of election would be liable to be avoided or upheld not because a particular candidate was qualified or disqualified on the date of scrutiny of nominations or on the date of his election, but because of acquittal or conviction much after those dates. Such could not have been the intendment of the law.

We are also of the opinion that the learned judges deciding Shri Manni Lal's case (supra) were not right in equating the case of appellate acquittal with the retrospective repeal of a disqualification by statutory amendment.

In Vidya Charan Shukla's case (supra) Dalip Kumar Sharma's case (supra) has been relied upon which, in our opinion, cannot be applied to a case of election and election petition.

Dalip Kumar Sharma's case (supra) is a case of conviction under Section 303 I.P.C. One P was murdered on 24.10.1971. The accused was sentenced to life imprisonment on 18.5.1972. On 20.6.1973 the accused committed the murder of A and was convicted for such murder on 24.1.1974 and sentenced to death under Section 303 I.P.C. In appeal against conviction for the murder of P, the accused was acquitted on 27.2.1974. On the same day the High Court confirmed the death sentence of the accused under Section 303 I.P.C. holding that on the date on which the accused had committed the murder of A he was undergoing sentence of life imprisonment for the murder of P. In appeal preferred before this Court, it was held that the death sentence could not be upheld inasmuch as the accused had stood acquitted from the offence of the first murder and the acquittal in an appeal had the effect of wiping out the conviction in the first murder. The mandatory sentence of death by reference to Section 303 I.P.C. for the second offence could not be maintained.

Four factors are relevant. Firstly, the sentence of death was passed in judicial proceedings and the appeal against the judgment of the trial court being a continuation of those judicial proceedings, the Court was not powerless to take note of subsequent events. The sentence of death was passed based on an event which had ceased to exist during the pendency of the appeal. The court was, not only, not powerless but was rather obliged to take note of such subsequent event, failing which a grave injustice would have been done to the accused. Secondly, the court interpreted Section 303 I.P.C. which speaks of a person "under sentence of imprisonment for life" as meaning a person under an operative, executable sentence of imprisonment for life. A sentence once imposed but later set aside is not executable and, therefore, ceases to be relevant for the purpose of Section 303 I.P.C. Thirdly, the focal point was the date of conviction when the court is called upon to pronounce the sentence. Fourthly, it is pertinent to note that the well established proposition which the court pressed into service was that - "a court seized of a proceeding must take note of events subsequent to the inception of that proceeding", which position, the court held, is applicable to civil as well as criminal proceedings with appropriate modifications. The emphasis is on the events happening subsequent to the inception of that proceeding. In the cases at hand, the principle laid down in Dalip Kumar Sharma's case (supra) will have no application inasmuch as the validity of nomination paper is to be tested by deciding qualification or disqualification of the candidate on the date of scrutiny and not by reference to any event subsequent thereto.

The decision of this Court in **Amrit Lal Ambalal Patel vs. Himathbhai Gomanbhai Patel & Another,** AIR 1968 SC 1455, lends support to the principle that the crucial date for determining whether a candidate is not qualified or is disqualified is the date of scrutiny of nominations and a subsequent event which has the effect of wiping out the disqualification has to be ignored.

An appellate judgment in a criminal case, exonerating the accused-appellant, has the effect of wiping out the conviction as recorded by the Trial

Court and the sentence passed thereon - is a legal fiction. While pressing into service a legal fiction it should not be forgotten that legal fictions are created only for some definite purpose and the fiction is to be limited to the purpose for which it was created and should not be extended beyond that legitimate field. A legal fiction pre-supposes the existence of the state of facts which may not exist and then works out the consequences which flow from that state of facts. Such consequences have got to be worked out only to their logical extent having due regard to the purpose for which the legal fiction has been created. Stretching the consequences beyond what logically flows amounts to an illegitimate extension of the purpose of the legal fiction (See, the majority opinion in ***Bengal Immunity Co. vs. State of Bihar*** AIR 1955 SC 661). P.N. Bhagwati, J., as his Lordship then was, in his separate opinion concurring with the majority and dealing with the legal fiction contained in the Explanation to Article 286(1)(a) of the Constitution (as it stood prior to Sixth Amendment) observed - "Due regard must be had in this behalf to the purpose for which the legal fiction has been created. If the purpose of this legal fiction contained in the Explanation to Article 286(1)(a) is solely for the purpose of sub-clause (a) as expressly stated it would not be legitimate to travel beyond the scope of that purpose and read into the provision any other purpose howsoever attractive it may be. The legal fiction which was created here was only for the purpose of determining whether a particular sale was an outside sale or one which could be deemed to have taken place inside the State and that was the only scope of the provision. It would be an illegitimate extension of the purpose of the legal fiction to say that it was also created for the purpose of converting the inter-State character of the transaction into an intra-State one." His Lordship opined that this type of conversion would be contrary to the express purpose for which the legal fiction was created. These observations are useful for the purpose of dealing the issue in our hands. Fictionally, an appellate acquittal wipes out the trial court conviction; yet, to hold on the strength of such legal fiction that a candidate though convicted and sentenced to imprisonment for two years or more was not disqualified on the date of scrutiny of the nomination, consequent upon his acquittal on a much later date, would be

an illegitimate extension of the purpose of the legal fiction. However, we hasten to add that in the present case the issue is not so much as to the applicability of the legal fiction; the issue concerns more about the power of the Designated Election Judge to take note of subsequent event and apply it to an event which had happened much before the commencement of that proceeding in which the subsequent event is brought to the notice of the Court. An election petition is not a continuation of election proceedings.

We are clearly of the opinion that **Shri Manni Lal's case** (supra) and **Vidya Charan Shukla's case** (supra) do not lay down the correct law. Both the decisions are, therefore, overruled.

The correct position of law is that nomination of a person disqualified within the meaning of sub-section (3) of Section 8 of the RPA on the date of scrutiny of nominations under Section 36(2)(a) shall be liable to be rejected as invalid and such decision of the returning officer cannot be held to be illegal or ignored merely because the conviction is set aside or so altered as to go out of the ambit of Section 8(3) of the RPA consequent upon a decision of a subsequent date in a criminal appeal or revision.

What is relevant for the purpose of Section 8(3) is the actual period of imprisonment which any person convicted shall have to undergo or would have undergone consequent upon the sentence of imprisonment pronounced by the Court and that has to be seen by reference to the date of scrutiny of nominations or date of election. All other factors are irrelevant. A person convicted may have filed an appeal. He may also have secured an order suspending execution of the sentence or the order appealed against under Section 389 of the Code of Criminal Procedure 1973. But that again would be of no consequence. A Court of appeal is empowered under Section 389 to order that pending an appeal by a convicted person the execution of the sentence or order appealed against be suspended and also, if he is in confinement, that he be released on bail or bond. What is suspended is not the conviction or sentence; it is only the execution of

the sentence or order which is suspended. It is suspended and not obliterated. It will be useful to refer in this context to a Constitution Bench judgment of this Court in ***Sarat Chandra Rabha & Ors.*** *v.* ***Khagendranath Nath & Ors.*** (1961) 2 SCR 133. The convict had earned a remission and the period of imprisonment reduced by the period of remission would have had the effect of removing disqualification as the period of actual imprisonment would have been reduced to a period of less than two years. The Constitution Bench held that the remission of sentence under Section 401 of Criminal Procedure Code (old) and his release from jail before two years or actual imprisonment would not reduce the sentence into one of a period of less than two years and save him from incurring the disqualification. "An order of remission does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the court, though the order of conviction and sentence passed by the court still stands as it was. The power to grant remission is executive power and cannot have the effect which the order of an appellate or revisional court would have of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court."

In ***B.R. Kapur*** vs. ***State of T.N. & Another*** (2001) 7 SCC 231, a similar question, though in a little different context, had arisen for the consideration of the Constitution Bench. Vide para 44, the Court did make a reference to ***Vidya Charan Shukla's case*** but observed that it was a case of an election petition and, therefore, did not have a bearing on the construction of Article 164 of the Constitution which was in issue before the Constitution Bench. Obviously, the consideration of the correctness of the law laid down in ***Vidya Charan Shukla's case*** was not called for. However, still the Constitution Bench has made a significant observation which is very relevant for our purpose. The Constitution Bench observes (vide para 44) - "There can be no doubt that in a criminal case acquittal in appeal takes effect retrospectively and wipes out the sentence

awarded by the lower court. This implies that the stigma attached to the conviction and the rigour of the sentence are completely obliterated, but that does not mean that the fact of the conviction and sentence by the lower court is obliterated until the conviction and sentence are set aside by an appellate court. The conviction and sentence stand pending the decision in the appeal and for the purposes of a provision such as Section 8 of the Representation of the People Act are determinative of the disqualifications provided for therein" (emphasis supplied). To the same effect are observations contain in para 40 also.

We are, therefore, of the opinion that an appellate judgment of a date subsequent to the date of nomination or election (as the case may be) and having a bearing on conviction of a candidate or sentence of imprisonment passed on him would not have the effect of wiping out disqualification from a back date if a person consequent upon his conviction for any offence and sentenced to imprisonment for not less than two years was actually and as a fact disqualified from filing nomination and contesting the election on the date of nomination or election (as the case may be).

Question No. (2)

What is the meaning to be assigned to the expression "sentence to imprisonment for not less than 2 years" as occurring in Sec. 8(3) of the RPA? In a trial a person may be charged for several offences and held guilty. He may be sentenced to different terms of imprisonment for such different offences. Individually the term of imprisonment may be less than 2 years for each of the offences, but collectively or taken together or added to each other the total term of imprisonment may exceed 2 years. Whether the applicability of Section 8(3) above said would be attracted to such a situation.

Section 31 of the Code of Criminal Procedure, 1973 is relevant to find an answer for this. It provides as under :-

"**31. Sentence in cases of conviction of several offences at one trial.** _ (1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of Section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments, prescribed therefor which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court:

Provided that -

(a) In no case shall such person be sentenced to imprisonment for a longer period than fourteen years;

(b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.

(3) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence."

It is competent for a criminal court to pass several punishments for the several offences of which the accused has been held guilty. The several terms of imprisonment to which the accused has been sentenced commence one after the other and in such order as the court may direct, unless the court directs that

such punishments shall run concurrently. Each of the terms of imprisonment to which the accused has been sentenced for the several offences has to be within the power of the court and the term of imprisonment is not rendered illegal or beyond the power of the court merely because the total term of imprisonment in the case of consecutive sentences is in excess of the punishment within the competency of the court. For the purpose of appeal by a convicted person it is the aggregate of the consecutive sentences passed against him which shall be deemed to be a single sentence. The same principle can be held good and applied to determining disqualification. Under sub-section (3) of Section 8 of the RPA the period of disqualification commences from the date of such conviction. The disqualification continues to operate for a further period of six years calculated from the date of his release from imprisonment. Thus, the disqualification commences from the date of conviction whether or not the person has been taken into custody to undergo the sentence of imprisonment. He cannot escape the effect of disqualification merely because he has not been taken into custody because he was on bail or was absconding. Once taken into custody he shall remain disqualified during the period of imprisonment. On the date of his release would commence the period of continued disqualification for a further period of six years. It is clear from a bare reading of sub-section (3) of Section 8 of the RPA that the actual period of imprisonment is relevant. The provisions of Section 8 of the Representation of People Act, 1951 have to be construed in harmony with the provisions of the Code of Criminal Procedure, 1973 and in such manner as to give effect to the provisions contained in both the legislations. In the case of consecutive sentences the aggregate period of imprisonment awarded as punishment for the several offences and in the case of punishments consisting of several terms of imprisonment made to run concurrently, the longest of the several terms of imprisonment would be relevant to be taken into consideration for the purpose of deciding whether the sentence of imprisonment is for less than 2 years or not.

It was submitted by Shri K.K. Venugopal, the learned Senior Counsel for the respondent in C.A. No. 8213/2001, that the phrase "any offence" as occurring in Section 8(3) of the RPA should be interpreted to mean a single offence and unless and until the term of imprisonment for any one of the offences out of the several offences for which the accused has been convicted and sentenced is 2 years or more, the disqualification enacted under Section 8(3) would not be attracted. We are not impressed.

In ***Shri Balaganesan Metals*** v. ***M.N. Shanmugham Chetty & Ors.,*** (1987) 2 SCC 707, the word "any" came up for consideration of this Court. It was held that the word "any" indicates "all" or "every" as well as "some" or "one" depending on the context and the subject matter of the statute. Black's Law Dictionary was cited with approval.

In Black's Law Dictionary (sixth Edition) the word 'any' is defined (at p.94) as under :-

> **"Any**. Some; one out of many; an indefinite number. One indiscriminately of whatever kind or quantity.
>
> One or some (indefinitely).
>
> "Any" does not necessarily mean only one person, but may have reference to more than one or to many.
>
> Word "Any" has a diversity of meaning and may be employed to indicate "all" or "every" as well as "some" or "one" and its meaning in a given statute depends upon the context and the subject matter of the statute.
>
> It is often synonymous with "either", "every", or "all". Its generality may be restricted by the context; thus, the giving of a right to do some act "at any time" is commonly construed as meaning

> within a reasonable time; and the words "any other" following the enumeration of particular classes are to be read as "other such like," and include only others of like kind or character."

The word 'any' may have one of the several meanings, according to the context and the circumstances. It may mean 'all'; 'each'; 'every'; 'some'; or 'one or many out of several'. The word 'any' may be used to indicate the quantity such as 'some', 'out of many', 'an infinite number'. It may also be used to indicate quality or nature of the noun which it qualifies as an adjective such as 'all' or 'every'. (See the Law Lexicon, P. Ramanatha Aiyar, Second Edition, at p.116). Principles of Statutory Interpretation by Justice G.P. Singh (9th Edition, 2004) states (at p.302) - "When a word is not defined in the Act itself, it is permissible to refer to dictionaries to find out the general sense in which that word is understood in common parlance. However, in selecting one out of the various meanings of a word, regard must always be had to the context as it is a fundamental rule that "the meanings of words and expressions used in an Act must take their colour from the context in which they appear". Therefore, "when the context makes the meaning of a word quite clear, it becomes unnecessary to search for and select a particular meaning out of the diverse meanings a word is capable of, according to lexicographers".

In Section 8(3) of the RPA, the word 'any' has been used as an adjective qualifying the word 'offence' to suggest not the number of offence but the nature of the offence. A bare reading of sub-Section (3) shows that the nature of the offence included in sub-section (3) is 'any offence other than any offence referred to in sub-Section (1) or sub-section (2) (of Section 8)'. The use of adjective 'any' qualifying the noun 'offence' cannot be pressed in service to countenance the submission that the sentence of imprisonment for not less than two years must be in respect of a single offence.

Sub-section (3) in its present form was introduced in the body of the RPA by Act No. 1 of 1989 w.e.f. 15.3.1989. The same Act made a few changes in the

text of sub-section (4) also. The Statement of Objects and Reasons accompanying Bill No. 128 of 1988 stated, inter alia, "Section 8 of the Representation of the People Act, 1951 deals with disqualification on the ground of conviction for certain offences. It is proposed to include more offences in this section so as to prevent persons having criminal record enter into public life". (See the Gazette of India Extraordinary, Part II, Section 2, pp. 105, 114). The intention of Parliament is writ large; it is to widen the arena of Section 8 in the interest of purity and probity in public life.

The purpose of enacting disqualification under Section 8(3) of the RPA is to prevent criminalization of politics. Those who break the law should not make the law. Generally speaking, the purpose sought to be achieved by enacting disqualification on conviction for certain offences is to prevent persons with criminal background from entering into politics, and the House - a powerful wing of governance. Persons with criminal background do pollute the process of election as they do not have many a holds barred and have no reservation from indulging into criminality to win success at an election. Thus, Section 8 seeks to promote freedom and fairness at elections, as also law and order being maintained while the elections are being held. The provision has to be so meaningfully construed as to effectively prevent the mischief sought to be prevented. The expression "a person convicted of any offence" has to be construed as 'all offences of which a person has been charged and held guilty at one trial'. The applicability of the expression "sentenced to imprisonment for not less than 2 years" would be decided by calculating the total term of imprisonment for which the person has been sentenced.

Shri K.K. Venugopal, learned senior counsel appearing for respondent in one of the appeals, submitted that Section 8 of the RPA is a penal prevision and, therefore, should be construed strictly. We find it difficult to countenance the submission. Contesting an election is a statutory right and qualifications and disqualifications for holding the office can be statutorily prescribed. A provision for disqualification cannot be termed a penal provision and certainly cannot be

equated with a penal provision contained in a criminal law. If any authority is needed for the proposition the same is to be found in **Lalita Jalan & Anr.** *vs.* **Bombay Gas Co. Ltd. & Ors.,** (2003) 6 SCC107 which has held Section 630 of the Companies Act, 1956 not to be a penal provision. The Court has gone on to say, "the principle that statute enacting an offence or imposing a penalty is to be strictly construed is not of universal application which must necessarily be observed in every case."

In the case of P. Jayarajan the sentences of imprisonment were to run consecutively in terms of the judgment of the trial court. The periods of sentences of imprisonment for different offences shall have to be totalled up. On such totalling, the total term for which P. Jayarajan would have remained in Jail did exceed a period of 2 years and consequently attracted the applicability of Section 8(3) of the RPA which cast a disqualification upon P. Jayarajan on the date of scrutiny of the nomination papers. His nomination could not have been accepted by the returning officer and he was not right in holding him not disqualified. In the light of the view of the law taken by us on Question-1 above, the subsequent event of the several terms of imprisonment having been directed by the appellate court to run concurrently on a date subsequent to the date of scrutiny is irrelevant and liable to be ignored.

Question No. (3)

A comparative reading of sub-sections (3) and (4) of Section 8 of the RPA shows that Parliament has chosen to classify candidates at an election into two classes for the purpose of enacting disqualification. These two classes are : (i) a person who on the date of conviction is a Member of Parliament or Legislature of a State, and (ii) a person who is not such a member. The persons falling in the two groups are well defined and determinable groups and, therefore, form two definite classes. Such classification cannot be said to be unreasonable as it is based on a well laid down differentia and has nexus with a public purpose sought to be achieved.

Once the elections have been held and a House has come into existence, it may be that a member of the House is convicted and sentenced. Such a situation needs to be dealt with on a different footing. Here the stress is not merely on the right of an individual to contest an election or to continue as a member of a House, but the very existence and continuity of a House democratically constituted. If a member of the House was debarred from sitting in the House and participating in the proceedings, no sooner the conviction was pronounced followed by sentence of imprisonment, entailing forfeiture of his membership, then two consequences would follow. First, the strength of membership of the House shall stand reduced, so also the strength of the political party to which such convicted member may belong. The Government in power may be surviving on a razor edge thin majority where each member counts significantly and disqualification of even one member may have a deleterious effect on the functioning of the Government. Secondly, bye-election shall have to be held which exercise may prove to be futile, also resulting in complications in the event of the convicted member being acquitted by a superior criminal court. Such reasons seem to have persuaded the Parliament to classify the sitting members of a House into a separate category. Sub-section (4) of Section 8, therefore, provides that if on the date of incurring disqualification a person is a member of a House, such disqualification shall not take effect for a period of 3 months from the date of such disqualification. The period of 3 months is provided for the purpose of enabling the convicted member to file an appeal or revision. If an appeal or revision has been filed putting in issue the conviction and/ or the sentence which is the foundation of disqualification, then the applicability of the disqualification shall stand deferred until such appeal or application is disposed of by the court in appeal or revision.

In ***Shibu Soren*** *vs.* ***Dayanand Sahay & Ors.*** (2001) 7 SCC 425, a three-Judge Bench of this Court was seized of the question of examining a disqualification on account of the person at that time holding an office of profit. The Court held that such a provision is required to be interpreted in a realistic

manner having regard to the facts and circumstances of each case and the relevant statutory provisions. While “a strict and narrow construction” may not be adopted which may have the effect of “shutting of many prominent and other eligible persons to contest elections” but at the same time “in dealing with a statutory provision which imposes a disqualification on a citizen, it would not be unreasonable to take merely a broad and general view and ignore the essential points”. A balance has to be stuck between strict construction and what is at stake is the right to contest an election and hold office. “A practical view, not pedantic basket of tests” must, therefore, guide courts to arrive at appropriate conclusion. The disqualification provision must have a substantial and reasonable nexus with the object sought to be achieved and the provision should be interpreted with the flavour of reality bearing in mind the object for enactment.

Sub-section (4) operates as an exception carved out from sub-sections (1), (2) and (3) of Section 8 of the RPA. Clearly the saving from the operation of sub-sections (1), (2) and (3) is founded on the factum of membership of a House. The purpose of carving out such an exception is not to confer an advantage on any person; the purpose is to protect the House. Therefore, sub-section (4) would cease to apply no sooner the House is dissolved or the person has ceased to be a member of that House. Any other interpretation would render sub-section (4) liable to be annulled as unconstitutional. Once a House has been dissolved and the person has ceased to be a member, on the date of filing the nomination there is no difference between him and any other candidate who was not such a member. Treating such two persons differently would be arbitrary and discriminatory and incur the wrath of Article 14. A departure from the view so taken by us would also result in anomalous consequences not intended by the Parliament.

Conclusion

To sum up, our findings on the questions arising for decision in these appeals are as under :-

1. The question of qualification or disqualification of a returned candidate within the meaning of Section 100(1)(a) of the Representation of the People Act, 1951 (RPA, for short) has to be determined by reference to the date of his election which date, as defined in Section 67A of the Act, shall be the date on which the candidate is declared by the returning officer to be elected. Whether a nomination was improperly accepted shall have to be determined for the purpose of Section 100(1)(d)(i) by reference to the date fixed for the scrutiny of nomination, the expression, as occurring in Section 36(2)(a) of the Act. Such dates are the focal point for the purpose of determining whether the candidate is not qualified or is disqualified for being chosen to fill the seat in a House. It is by reference to such focal point dates that the question of disqualification under sub-Sections (1), (2) and (3) of Section 8 shall have to be determined. The factum of pendency of an appeal against conviction is irrelevant and inconsequential. So also a subsequent decision in appeal or revision setting aside the conviction or sentence or reduction in sentence would not have the effect of wiping out the disqualification which did exist on the focal point dates referred to hereinabove. The decisive dates are the date of election and the date of scrutiny of nomination and not the date of judgment in an election petition or in appeal thereagainst.

2. For the purpose of attracting applicability of disqualification within the meaning of “a person convicted of any offence and sentenced to imprisonment for not less than two years”, - the expression as occurring in Section 8(3) of the RPA, what has to be seen is the total length of time for which a person has been ordered to remain in prison consequent upon the conviction and sentence pronounced at a trial. The word ‘any’ qualifying the word ‘offence’ should be understood as meaning the nature of offence and not the number of offence/ offences.

3. Sub-section (4) of Section 8 of the RPA is an exception carved out from sub-sections (1), (2) and (3). The saving from disqualification is preconditioned by the person convicted being a Member of a House on the date of the conviction. The benefit of such saving is available only so long as the House

continues to exist and the person continues to be a Member of a House. The saving ceases to apply if the House is dissolved or the person ceases to be a Member of the House.

Result

For the foregoing reasons, Civil Appeal No. 8213 of 2001, ***K. Prabhakaran*** *Vs.* ***P. Jayarajan****,* is allowed. The judgment of the High Curt dated 5.10.2001 is set aside. The election petition filed by the appellant is allowed. The election of the respondent P. Jayarajan from No. 14 Kuthuparamba Assembly Constituency to the Kerala State Legislative Assembly, which was declared on 13.5.2001, is set aside. The respondent No. 1 shall bear the costs of the appellant throughout.

Civil Appeal No. 6691 of 2002 is also allowed. The judgment of the High Court dated 5.7.2002 is set aside. The election petition filed by the appellant shall stand allowed. The election of the respondent Nafe Singh from 37-Bahadurgarh Assembly Constituency is declared void as he was disqualified from being a candidate under Section 8(3) of the Representation of the People Act, 1951. The respondent No. 1 shall bear the costs of the appellant throughout.

Sd/-
.....CJI.
(R. C. LAHOTI)

Sd/-
..... J.
(SHIVRAJ V. PATIL)

Sd/-
..... J.
(B. N. SRIKRISHNA)

Sd/-
..... J.
(G. P. MATHUR)

New Delhi
January 11, 2005

SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 8213 of 2001

K. Prabhakaran ..... Appellant

Vs.

P. Jayarajan. ..... Respondent

WITH

Civil Appeal No. 6691 of 2002

Ramesh Singh Dalal ..... Appellant

Vs.

Nafe Singh & Ors. . ..... Respondents

J U D G E M E N T

K.G. Balakrishnan, J.

I had the advantage of reading the Judgment in draft prepared by noble and learned Brother, Lahoti, CJ, and I regret that I am unable to agree with the interpretation placed on Section 8(3) of the Representation of People's Act, 1951. On all other points, I respectfully agree with the decision.

Under Section 8(3) of the Representation of the People's Act, 1951, a person convicted of any offence and sentenced to imprisonment for not less than two years [other than any offence referred to in sub-section (1) or sub-section (2)] shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release. If at the time of scrutiny of the nomination papers, a person concerned was found disqualified, his nomination paper will be rejected and he would be unable to contest the

election. Under Section 100 of the Representation of People's Act, 1951, any improper acceptance of nomination is a valid ground for declaring the election void, if the result of the election, insofar as it concerns the returned candidate, has been materially affected.

The question for consideration is whether in a case where the accused person has been convicted on various counts and the total period of the sentence of imprisonment is two years or more and the Magistrate orders the sentence of imprisonment for various periods to run consecutively, and if the total period of such imprisonment to which the person convicted will have to undergo is two years or more, whether he could be disqualified under Section 8(3) of the Representation of People's Act. In other words, even if the sentence of imprisonment does not exceed two years or more for any one of the offences for which he is convicted, whether still he could be disqualified under Section 8(3) of the Representation of the People's Act, 1951 based on the order of the Magistrate/Judge to the effect that the sentence on various counts shall run consecutively.

The argument of the learned counsel for the appellant in Civil Appeal No. 8213 of 2001 is that it is the total period of the sentence on various counts which is material and in the instant case, the respondent was found guilty of offences on six counts. For the offence under Section 143 read with Section 149 IPC, he was sentenced to undergo R.I. for a period of one year while for the offence under Section 3(2)(e) of the Prevention of the Damage of the Public Property Act, 1984, he was sentenced to undergo R.I. for a period of one year, and for various other offences he had been sentenced to imprisonment for a period ranging from one month to six months and as the Judicial Magistrate First Class directed that the sentences on various counts shall run consecutively. It is argued by the appellant's learned Counsel that the respondent is convicted and sentenced to imprisonment for a period of more than two years and therefore disqualified under Section 8(3) of the Representation of People's Act, 1951. The question for

consideration is whether the respondent in Civil Appeal No. 8213 of 2001 had been convicted for any offence and sentenced to imprisonment for not less than two years. I am unable to subscribe to the contention advanced by the appellant's learned Counsel that the word "any" used in Section 8(3) of the Representation of the People's Act, 1951 should be construed so as to mean "more than one" or "all" or in a sense of plurality. It is also difficult to construe the words "not less than two years" used in Section 8(3) of the Representation of the People's Act by giving emphasis to the total period of imprisonment that a convict may undergo if all the periods of imprisonment for various offences are put together, when it is ordered to run consecutively.

From the words used in the first part of Section 8(3), viz. "a person convicted of any offence", it is clear that in order to incur disqualification, the person must have been convicted of any offence and sentenced to imprisonment for not less than two years. Out of the offences on six counts, for which the respondent had been found guilty, if all of them are taken individually, the respondent is not a person convicted of any offence, for which the sentence imposed on him is more than two years.

In the case of the respondent, the Magistrate ordered that the sentence on various counts shall run consecutively. That does not mean that the respondent had been convicted of any offence, for which the sentence of imprisonment is two years or more. The direction for the sentence to run concurrently or consecutively is a direction as to the mode in which the sentence is to be executed. That does not affect the nature of the sentence. It is also important to note that in the Code of Criminal Procedure, there are no guidelines or specific provisions to suggest under what circumstances the various sentences of imprisonment shall be directed to run concurrently or consecutively. There are no judicial decisions, to my knowledge, by superior courts laying down the guidelines as to what should be the criteria for directing the convict to undergo imprisonment on various counts concurrently or consecutively. In certain cases, if the person convicted is a habitual offender and he had been found guilty of

offences on various counts and it is suspected that he would be a menace if he is let loose on the society, then the Court would direct that such person shall undergo the imprisonment consecutively. Merely because the Magistrate ordered that the sentence shall run consecutively, and the aggregate period exceeds two years or more, a person convicted would not incur the disqualification under Section 8(3) of the Representation of the People's Act, 1951. If that be so, a Magistrate may order the sentence on various counts to run concurrently in one case and for the same type of offences, if another Magistrate directs the sentence on various counts to run consecutively, the person in the latter case would incur the disqualification whereas the former will not have any such disqualification under Section 8(3) of the Representation of the People's Act, 1951. The disqualification under Section 8(3) of the Representation of the People's Act, 1951 shall not be solely dependent on the direction as to the mode in which the sentence is to be executed, especially when there are no statutory or judicial guidelines in this regard.

Moreover, if the argument of the appellant's learned Counsel is to be accepted, the words used in Section 8(3) of the Representation of People's Act, 1951 are inadequate and the Legislature would have expressed its intention by stating that the total period of the sentence on various counts shall be taken into consideration to consider whether the imprisonment is for two years or more.

Section 8(3) of the Representation of People's Act, 1951 is a provision by which a person is disqualified from contesting the election. These words are to be strictly interpreted and if only the person squarely comes within the four corners of the ordinary meaning of the words used in the section, the disqualification could be used against him. If he has not been convicted for any offence, for not less than two years, he is not liable to be disqualified from contesting the election. Of course, the criminalization of politics has become a serious problem to be tackled and nobody would dispute that it affects the very foundation of our democratic institutions, but that by itself is not sufficient to

interpret the words in a very expansive manner so as to include within its ambit the persons who are strictly not coming within its purview, especially when the disqualification is not only from contesting the election and the disqualification would continue for a further period of six years since the release.

It is the gravity of the offence that matters and not the conviction for various minor offences and the total period of two years or more to be calculated by putting together all sentences for various minor offences. “Any offence” used in Section 8(3) of the Representation of People’s Act, 1951 is to be taken as “out of many offences” and the respondent in Civil Appeal No. 8213 of 2001 has not been convicted for any offence, for which the imprisonment is for a period of not less than two years and he was not disqualified and, in my opinion, the High Court rightly decided the question in his favour. The Election Petition filed by the appellant in Civil Appeal No. 8213 of 2001 was rightly rejected. Civil Appeal No. 8213 of 2001 is liable to be dismissed.

Sd/-
.....J.
(K. G. BALAKRISHNAN)

New Delhi
January 11, 2005.

SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 8213 of 2001

K. Prabhakaran ..... Appellant

Vs.

P. Jayarajan. ..... Respondent

WITH

Civil Appeal No. 6691 of 2002

Ramesh Singh Dalal ..... Appellant

Vs.

Nafe Singh & Ors. . ..... Respondents

O R D E R

In view of the majority opinion, Civil Appeal No. 8213 of 2001, ***K. Prabhakaran*** *Vs.* ***P. Jayarajan*****,** is allowed. The judgment of the High Court dated 5.10.2001 is set aside. The election petition filed by the appellant is allowed. The election of the respondent P. Jayarajan from No. 14 Kuthuparamba Assembly Constituency to the Kerala State Legislative Assembly, which was declared on 13.5.2001, is set aside. The respondent No. 1 shall bear the costs of the appellant throughout.

Civil Appeal No. 6691 of 2002 is also allowed. The judgment of the High Court dated 5.7.2002 is set aside. The election petition filed by the appellant shall stand allowed. The election of the respondent Nafe Singh from 37-Bahadurgarh Assembly Constituency is declared void as he was disqualified from being a

candidate under Section 8(3) of the Representation of the People Act, 1951. The respondent No. 1 shall bear the costs of the appellant throughout.

Sd/-
.....CJI.
(R. C. LAHOTI)

Sd/-
..... J.
(SHIVRAJ V. PATIL)

Sd/-
..... J.
(K. G. BALAKRISHNAN)

Sd/-
..... J.
(B. N. SRIKRISHNA)

Sd/-
..... J.
(G. P. MATHUR)

New Delhi
January 11, 2005

SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO. 257 OF 2005

Rameshwar Prasad & Ors. ..... **Petitioners**

Versus

Union of India & Anr. . ..... **Respondents**

[With W.P. (C) No.255 of 2005, W.P. (C) No. 258 of 2005 and W.P. (C) No. 353 of 2005]

Date of Order : 24.01.2006

SUMMARY OF THE CASE

A new Assembly to the State of Bihar was constituted by the Election Commission vide its Notification, dated 4th March, 2005, under Section 73 of the Representation of the People Act, 1951. The Assembly comprises of 243 members and to secure an absolute majority, support of 122 MLAs was required for formation of a Government by the elected representatives. None of the political parties / conglomeration of parties could prove this absolute majority before the Governor to stake claim for forming the Government. The Governor recommended to the President in his report dated 6th March, 2005, to keep the newly constituted Assembly in suspended animation temporarily. A notification was issued on 7th March, 2005 under Article 356 of the Constitution imposing President's rule over the State of Bihar and keeping the Assembly in suspended animation to explore the possibility of forming a majority Government in the State. Process of realignment of forces was set in motion by several political parties to provide a majority Government. The Governor of Bihar sent a report on 27th April, 2005 to the President stating that the situation was fast approaching to create political instability due to horse trading being indulged in by political parties / groups trying

to secure support of elected MLAs through various allurements like money, caste, posts etc. He stated that it would not be possible to contain the situation without giving the people another opportunity to give their mandate through a fresh poll. Subsequently, the Governor sent his further report dated 21st May 2005 to the President recommending dissolution of the assembly to provide one more opportunity to seek the mandate of the people. The Governor's report was accepted by the Union Cabinet and was sent to the President recommending the dissolution of the Bihar Legislative Assembly. The President accorded his approval and the notification dissolving the Bihar Assembly was issued formally on 23rd May, 2005 which has been impugned in the Writ petitions filed before the Supreme Court.

The Writ petitions were heard by the Constitutional Bench of the Supreme Court comprising the Hon'ble Chief Justice of India Mr. Y.K. Subharwal and Hon'ble Justices Mr. B.N. Agrawal, Mr. Ashok Bhan, Mr. Arijit Pasayat and Mr. K.G. Balakrishnan. After elaborate arguments, as per majority opinion, the Hon'ble Supreme Court pronounced its brief Order, dated 7th October, 2005 by which the notification dated 23rd May, 2005 was held to be unconstitutional, but having regard to the facts and circumstances of the case, relief directing status quo ante to restore the Legislative Assembly as it stood on 7th March, 2005, was declined. The Hon'ble Court in its brief Order, dated 7th October, 2005, held that pronouncement of judgement followed by detailed reasons would be delivered later.

The following intricate and important Questions of law having far-reaching impact were interpreted / determined in the detailed judgement dated 24th January, 2006 pronounced by the Hon'ble Supreme Court.

(1) Is it permissible to dissolve the Legislative Assembly under Article 174(2) (b) of the Constitution without its first meeting taking place?

(2) Whether the proclamation dated 23rd May, 2005 dissolving the Assembly of Bihar was illegal and unconstitutional ?

(3) If the answer to the aforesaid question was in affirmative, was it necessary to direct status quo ante as on 7th March, 2005 ?

(4) What is the scope of Article 361 granting immunity to the Governor?

In their majority judgement, dated 24th January, 2006, the Hon'ble Chief Justice and Hon'ble Mr. Justices B.N. Agrawal and Ashok Bhan interpreted the above issues as under:-

(1) There is no restriction under Article 174(2)(b) stipulating that the power to dissolve the Legislative Assembly can be exercised only after the first meeting of the Assembly.

(2) The proclamation dated 23rd May, 2005 was held to be unconstitutional.

(3) Having regard to the larger public interest and keeping in view the ground realities that the Election Commission, as a result of the impugned proclamation, had not only made preparations for the four phase election in Bihar but had also issued notification in regard to first two phases before conclusion of arguments, the relief was moulded by not directing status quo ante and consequently permitting the completion of the already set election process.

(4) The Governor enjoys complete immunity under the law and he is not answerable to any Court for the exercise and performance of the power and duties of his office. However, the immunity granted by Article 361(1) does not take away the power of the Court to examine the validity of the action including the ground of malafides.

J U D G E M E N T

Y. K. Sabharwal, CJI

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Under the aforesaid factual background, the points that fall for our determination are :

(1) Is it permissible to dissolve the Legislative Assembly under Article 174(2)(b) of the Constitution without its first meeting taking place?

(2) Whether the proclamation dated 23rd May, 2005 dissolving the Assembly of Bihar is illegal and unconstitutional?

(3) If the answer to the aforesaid question is in affirmative, is it necessary to direct status quo ante as on 7th March, 2005 or 4th March, 2005?

(4) What is the scope of Article 361 granting immunity to the Governor?

* * * * *

POINT NO. 1 : Is it permissible to dissolve the Legislative Assembly under Article 174(2) (b) of the Constitution without its first meeting taking place?

Article 174 of the Constitution deals with the power of the Governor to summon the House, prorogue the House and dissolve the Legislative Assembly. This Court never had the occasion to consider the question of legality of dissolution of a Legislative Assembly even before its first meeting contemplated under Article 172 of the Constitution. It has been contended on behalf of the petitioners by Mr. Narsimha and Mr. Viplav Sharma, appearing-in-person, that a Legislative Assembly can be dissolved under Article 174(2)(b) only after its first

meeting is held as postulated by Article 172 of the Constitution. The argument is that there cannot be any dissolution without even members taking oath and the Legislative Assembly coming into existence. What does not exist, cannot be dissolved, is the submission. In this regard, the question to be considered also is whether the date for first meeting of the Legislative Assembly can be fixed without anyone being in a position to form the Government.

Let us first examine the relevant constitutional and statutory provisions.

Part VI of the Constitution dealing with the States has six chapters but relevant for our purpose are Chapter II and Chapter III. Chapter II comprising Article 153 to Article 167 relates to the executive, Chapter III comprising Article 168 to Article 212 relates to the State Legislature.

The federal structure under our Constitution contemplates that there shall be a Legislature for every State which shall consist of a Governor and one or two Houses, as provided in Article 168. Article 170 prescribes that the Legislative Assembly of each State shall consist of members chosen by direct election from territorial constituencies in the States. Article 170, therefore, brings in the democratic process of election.

Article 164 puts into place an executive Government. It enjoins upon the Governor to appoint the Chief Minister and other ministers on the advice of the Chief Minister. The Council of Ministers (Article 163) exercises the executive power of the State as provided under Article 154. Article 164(2) provides that the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State.

As provided in Article 172, every Legislative Assembly of every State, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the Assembly. Article 174(1) provides that the Governor shall from time to time summon the House to meet at such time

and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session. Article 174(2)(b) provides that the Governor may from time to time dissolve the Legislative Assembly.

Every member of the Legislative Assembly of the State shall, before taking his seat, make and subscribe before the Governor, an oath or affirmation, as provided in Article 188 of the Constitution.

The contention urged is that the function of the Governor in summoning the House and administering the oath or affirmation to the members of the Legislative Assembly are not the matters of privilege, prerogative or discretion of the Governor but are his primary and fundamental constitutional obligations on which the principles of parliamentary democracy, federalism and even 'separation of power' are dependent. Further contention is that another constitutional obligation of the Governor is to constitute the executive Government.

According to Mr. Narasimha, the Governor failed to fulfill these constitutional obligations. Neither the executive Government nor the Legislative Assembly has been constituted by the Governor. On the other hand, the Governor has frustrated the very object of exercise of his constitutional obligation by dissolving the Legislative Assembly under Article 174(2)(b) without the Legislative Assembly being even constituted. When the Legislative Assembly is not even constituted, where is the question of its dissolution, is the contention urged. The submission is that under the scheme of Indian Constitution, it is impermissible to dissolve a Legislative Assembly before its first meeting and members making oath or affirmation as required by Article 188. According to the petitioners, under Indian Constitution, the Legislative Assembly is duly constituted only upon the House being summoned and from the date appointed for its first meeting. Article 172 which provides for duration of State Legislatures reads as under :

"172. Duration of State Legislatures - (1) Every Legislative Assembly of every State, unless sooner dissolved shall continue for (five years) from the date appointed for its first meeting and no longer and the expiration of the said period of (five years) shall operate as a dissolution of the Assembly:

Provided that the said period, may while a proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

(2) The Legislative Council of a State shall not be subject to dissolution, but as nearly as possible one third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

The aforesaid constitutional provision stipulates that five years term of a Legislative Assembly shall be reckoned from the date appointed for its first meeting and on the expiry of five years commencing from the date of the first meeting, the Assembly automatically stands dissolved by afflux of time. The duration of the Legislative Assembly beyond five years is impermissible in view of the mandate of the aforesaid provision that the Legislative Assembly shall continue for five years and 'no longer'. Relying upon these provisions, it is contended that the due constitution of the Legislative Assembly can only be after its first meeting when the members subscribe oath or affirmation under Article 188. The statutory deemed constitution of the Assembly under Section 73 of the R.P. Act, 1951, according to the petitioners, has no relevance for determing due constitution of Legislative Assembly for the purpose of Constitution of India.

Reference on behalf of the petitioners has also been made to law existing prior to the enforcement of the Constitution of India contemplating the commencement of the Council of State and Legislative Assembly from the date of its first meeting. It was pointed out that Section 63(d) in the Government of India Act, 1915 which dealt with Indian Legislature provided that every Council of State shall continue for five years and every Legislative Assembly for three years from the date of its first meeting. Likewise, Section 72(b) provided that every Governor's Legislative Council shall continue for three years from its first meeting. The Government of India Act, 1919, repealing 1915 Act, provided in Section 8(1) that every Governor's Legislative Council shall continue for three years from its first meeting and in Section 21 provided that every Council of State shall continue for five years and every Legislative Assembly for three years from its first meeting. Likewise, the Government of India Act, 1935 repealing 1919 Act, had provision identical to Article 172 of the Constitution.

Section 73 of the R.P. Act 1951, in so far as relevant for our purposes, is as under:

> **"73. Publication of results of general elections to the House of the People and the State Legislative Assemblies**. - Where a general election is held for the purpose of constituting a new House of the People or a new State Legislative Assembly, there shall be notified by [the Election Commission] in the Official Gazette, as soon as may be after [the results of the elections in all the constituencies] [other than these in which the poll could not be taken for any reason on the date originally fixed under clause (d) of section 30 or for which the time for completion of the election has been extended under the provisions of section 153] have been declared by the returning officer under the provisions of section 53 or, as the case may be section 66, the names of the members elected for those constituencies] and upon the issue of such notification that House or Assembly shall be deemed to be duly constituted."

In the present case, Notification under Section 73 of the RP Act, 1951 was issued on 4th March, 2005. The deemed constitution of the Legislative Assembly took place under Section 73 on the issue of the said notification. The question is whether this deemed constitution of Legislative Assembly is only for the purpose of the RP Act, 1951 and not for the constitutional provisions so as to invoke power of dissolution under Article 174(2)(b). The stand of the Government is that in view of aforesaid legal fiction, the constitution of the Legislative Assembly takes place for all purposes and, thus, the Legislative Assembly is deemed to have been 'duly constituted' on 4th March, 2005 and, therefore, the Governor could exercise the power of dissolution under Article 174(2)(b).

Section 73 of the RP Act, 1951 enjoins upon the Election Commission to issue notification after declaration of results of the elections in all the constituencies. The superintendence, direction and control of elections to Parliament and to the Legislature of every State vests in Election Commission under Article 324 of the Constitution. Article 327 provides that Parliament may make provision with respect to all matters relating to, or in connection with, elections to the Legislative Assembly of a State and all other matters necessary for securing the 'due constitution' of the House of the Legislature. Article 329 bars the interference by courts in electoral matters except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature. Article 327 read with Section 73 of the RP Act, 1951 provide for as to when the House or Assembly shall be 'duly constituted'. No provision, constitutional or statutory, stipulates that the 'due constitution' is only for the purposes of Articles 324, 327 and 329 and not for the purpose of enabling the Governor to exercise power under Article 174(2)(b) of the Constitution. In so far as the argument based on Article 172 is concerned, it seems clear that the due constitution of the Legislative Assembly is different than its duration which is five years - to be computed from the date appointed for its first meeting and no longer. There is no

restriction under Article 174(2)(b) stipulating that the power to dissolve the Legislative Assembly can be exercised only after its first meeting. Clause (b) of proviso to Section 73 of the RP Act, 1951 also does not limit the deemed constitution of the Assembly for only specific purpose of the said Act or Articles 324, 327 and 329 of the Constitution. The said clause provides that the issue of notification under Section 73 shall not be deemed to affect the duration of the State Legislative Assembly, if any, functioning immediately before the issue of the said notification. In fact clause (b) further fortifies the conclusion that the duration of the Legislative Assembly is different than the due constitution thereof. In the present case, we are not concerned with the question of duration of the Assembly but with the question whether the Assembly had been duly constituted or not so as to enable the Governor to exercise the power of dissolution under Article 174(2)(b). The Constitution of India does not postulate one 'due constitution' for the purposes of elections under Part XV and another for the purposes of the executive and the State Legislature under Chapter II and III of Part VI. The aforenoted provisions existing prior to the enforcement of Constitution of India are also of no relevance for determing the effect of deemed constitution of Assembly under Section 73 of the RP Act, 1951 to exercise power of dissolution under Article 274 (2)(b).

In ***K.K. Abu v. Union of India and Ors.*** **[AIR 1965 Kerala 229],** a learned Single Judge of the High Court rightly came to the conclusion that neither Article 172 nor Article 174 prescribe that dissolution of a State Legislature can only be after commencement of its term or after the date fixed for its first meeting. Once the Assembly is constituted, it becomes capable of dissolution. This decision has been referred to by one of us (Arijit Pasayat, J.) in **Special Reference No. 1 of 2002 (popularly known as Gujarat Assembly Election matter) [(2002) 8 SCC 237].** No provision of the Constitution stipulates that the dissolution can only be after the first meeting of the State Legislature.

The acceptance of the contention of the petitioners can also lead to a breakdown of the Constitution. In a given case, none may come forth to stake

claim to form the Government, for want of requisite strength to provide a stable Government. If petitioners' contention is accepted, in such an eventuality, the Governor will neither be able to appoint Executive Government nor would he be able to exercise power of dissolution under Article 174(2)(b). The Constitution does not postulate a live Assembly without the Executive Government.

On behalf of the petitioners, reliance has, however, been placed upon a decision of a Division Bench of Allahabad High **Court in the case of *Udai Narain Sinha v. State of U.P. and ors.* [AIR 1987 All. 203].** Disagreeing with the Kerala High Court, it was held that in the absence of the appointment of a date for the first meeting of the Assembly in accordance with Article 172(1), its life did not commence for the purposes of that article, even though it might have been constituted by virtue of notification under Section 73 of the RP Act, 1951 so as to entitle the Governor to dissolve it by exercising power under Article 174(2). It was held by the Division Bench that Section 73 of the RP Act, 1951 only created a fiction for limited purpose for paving the way for the Governor to appoint a date for first meeting of either House or the Assembly so as to enable them to function after being summoned to meet under Article 174 of the Constitution. We are unable to read any such limitation. In our view, the Assembly, for all intends and purposes, is deemed to be duly constituted on issue of notification under Section 73 and the duration thereof is distinct from its due constitution. The interpretation which may lead to a situation of constitutional breakdown deserves to be avoided, unless the provisions are so clear as not to call for any other interpretation. This case does not fall in the later category.

In Gujarat Assembly Election Matter, the issue before the Constitution Bench was whether six months' period contemplated by Article 174(1) applies to a dissolved Legislative Assembly. While dealing with that question and holding that the said provision applies only to subsisting Legislative Assembly and not to a dissolved Legislative Assembly, it was held that the constitution of any Assembly can only be under Section 73 of the RP Act, 1951 and the

requirement of Article 188 of Constitution suggests that the Assembly comes into existence even before its first sitting commences. **(Emphasis supplied by us).**

In view of the above, the first point is answered against the petitioners.

* * * * *

The question in the present case is not about MLAs voting in violation of provisions of Tenth Schedule as amended by the Constitution (91st Amendment), as we would presently show.

Certainly, there can be no quarrel with the principles laid in **Kihoto's case** about evil effects of defections but the same have no relevance for determination of point in issue. The stage of preventing members to vote against declared policies of the political party to which they belonged had not reached. If MLAs vote in a manner so as to run the risk of getting disqualified, it is for them to face the legal consequences. That stage had not reached. In fact, the reports of the Governor intended to forestall any voting and staking of claim to form the Government.

Undisputedly, a Governor is charged with the duty to preserve, protect and defend the Constitution and the laws, has a concomitant duty and obligation to preserve democracy and not to permit the 'canker' of political defections to tear into the vitals of the Indian democracy. But on facts of the present case, we are unable to accept that the Governor by reports dated 27th April and 21st May, 2005 sought to achieve the aforesaid objective. There was no material, let alone relevant, with the Governor to assume that there were no legitimate realignment of political parties and there was blatant distortion of democracy by induced defections through unfair, illegal, unethical and unconstitutional means.

The report dated 27th April, 2005 refers to (1) serious attempt to cobble a majority; (2) winning over MLAs by various means; (3) targeting parties for a

split; (4) high pressure moves; (5) offering various allurements like castes, posts, money etc.; and (6) horse-trading. Almost similar report was sent by the Governors of Karnataka and Nagaland leading to the dissolution of the Assembly of Karnataka and Nagaland, invalidated in **Bommai's case**. Further, the contention that the Central Government did not act upon the report dated 27th April, 2005 is of no relevance and cannot be considered in isolation since the question is about the manner in which the Governor moved, very swiftly and with undue haste, finding that one political party may be close to getting majority and the situation had reached where claim may be staked to form the Government which led to the report dated 21st May, 2005. It is in this context that the Governor says that instead of installing a Government based on a majority achieved by a distortion of the system, it would be preferable that the people/electorate could be provided with one more opportunity to seek the mandate of the people. This approach makes it evident that the object was to prevent a particular political party from staking a claim and not the professed object of anxiety not to permit the distortion of the political system, as sought to be urged. Such a course is nothing but wholly illegal and irregular and has to be described as mala fide. The recommendation for dissolution of the Assembly to prevent the staking of claim to form the Government purportedly on the ground that the majority was achieved by distortion of system by allurement, corruption and bribery was based on such general assumptions without any material which are quite easy to be made if any political party not gaining absolute majority is to be kept out of governance. No assumption without any basis whatever could be drawn that the reason for a group to support the claim to form the Government by Nitish Kumar, was only the aforesaid distortions. That stage had not reached. It was not allowed to be reached. If such majority had been presented and the Governor forms a legitimate opinion that the party staking claim would not be able to provide stable Government to the State, that may be different situation. Under no circumstances, the action of Governor can be held to be bona fide when it is intended to prevent a political party to stake claim for formation of the Government. After elections, every genuine attempt is

to be made which helps in installation of a popular Government, whichever be the political party.

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It is evident from the above that what ultimately determines the scope of judicial review is the facts and circumstances of the given case and it is for this reason that the Proclamations in respect of Karnataka and Nagaland were held to be bad and not those relating to Madhya Pradesh, Rajasthan and Himachal Pradesh.

We are not impressed with the argument based on a possible disqualification under Tenth Schedule if the MLAs belonging to LJP party had supported the claim of Nitish Kumar to form the Government. At that stage, it was a wholly extraneous to take into consideration that some of the members would incur the disqualification if they supported a particular party against the professed stand of the political party to which they belong. The intricate question as to whether the case would fall within the permissible category of merger or not could not be taken into consideration. Assuming it did not fall in the permissible arena of merger and the MLAs would earn the risk of disqualification, it is for the MLAs or the appropriate functionary to decide and not for the Governor to assume disqualification and thereby prevent staking of claim by recommending dissolution. It is not necessary for us to examine, for the present purpose, para 4 of the Tenth Schedule dealing with merger and/or deemed merger. In this view the question sought to be raised that there cannot be merger of legislative party without the first merger of the original party is not necessary to be examined. The contention sought to be raised was that even if two-third legislators of LJP legislative party had agreed to merge, in law there cannot be any merger without merger of original party and even in that situation those two-third MLAs would have earned disqualification. Presently, it is not necessary to decide this question. It could not have been gone into by the Governor for recommending dissolution.

The provision of the Tenth Schedule dealing with defections, those of RP Act of 1951 dealing with corrupt practice, electoral offences and disqualification and the provisions of Prevention of Corruption Act, 1988 are legal safeguards available for ensuring purity of public life in a democracy. But, in so far as the present case is concerned, these had no relevance at the stage when the dissolution of the Assembly was recommended without existence of any material whatsoever. There was no material for the assumption that claim may be staked based not on democratic principles and based on manipulation by breaking political parties.

There cannot be any doubt that the oath prescribed under Article 159 requires the Governor to faithfully perform duties of his office and to the best of his ability preserve, protect and defend the Constitution and the laws. The Governor cannot, in the exercise of his discretion or otherwise, do anything what is prohibited to be done. The Constitution enjoins upon the Governor that after the conclusion of elections, every possible attempt is made for formation of a popular Government representing the will of the people expressed through the electoral process. If the Governor acts to the contrary by creating a situation whereby a party is prevented even to stake a claim and recommends dissolution to achieve that object, the only inescapable inference to be drawn is that the exercise of jurisdiction is wholly illegal and unconstitutional. We have already referred to the Governor report dated 21st May, 2005, inter alia, stating that 17-18 MLAs belonging to LJP party are moving towards JDU which would mean JDU may be in a position to stake claim to form the Government. The further assumption that the move of the said members was itself indicative of various allurements having been offered to them and on that basis drawing an assumption that the claim that may be staked to form a Government would affect the constitutional provisions and safeguards built therein and distort the verdict of the people would be arbitrary. This shows that the approach was to stall JDU from staking a claim to form the Government. At that stage, such a view cannot be said to be consistent with the provisions of Tenth Schedule. In fact, the provisions of the said Schedule at that stage had no relevance. It is not a case

of 'assumption', or 'perception' as to the previsions of Constitution by the Governor. It is a clear case where attempt was to somehow or the other prevent the formation of a Government by a political party - an area wholly prohibited in so far as the functions, duties and obligations of the Governor are concerned. It was thus a wholly unconstitutional act.

It is true as has been repeatedly opined in various reports and by various constitutional experts that the defections have been a bane of the Indian Democracy but, at the same time, it is to be remembered that the defections have to be dealt with in the manner permissible in law.

If a political party with the support of other political party or other MLA's stakes claim to form a Government and satisfies the Governor about its majority to form a stable Government, the Governor cannot refuse formation of Government and override the majority claim because of his subjective assessment that the majority was cobbled by illegal and unethical means. No such power has been vested with the Governor. Such a power would be against the democratic principles of majority rule. Governor is not an autocratic political Ombudsman. If such a power is vested in the Governor and/or the President, the consequences can be horrendous. The ground of mal administration by a State Government enjoying majority is not available for invoking power under Article 356. The remedy for corruption or similar ills and evils lies elsewhere and not in Article 356(1). In the same vein, it has to be held that the power under Tenth Schedule for defection lies with the Speaker of the House and not with the Governor. The power exercised by the Speaker under the Tenth Schedule is of judicial nature. Dealing with the question whether power of disqualification of members of the House vests exclusively with the House to the exclusion of judiciary which in Britain was based on certain British legislature practices, as far as India is concerned, it was said in **Kihoto's case** that :

> "It is, therefore, inappropriate to claim that the determinative jurisdiction of the Speaker or the Chairman in the Tenth Schedule is not a judicial power and is within the non-justiciable legislative area."

The Governor cannot assume to himself aforesaid judicial power and based on that assumption come to the conclusion that there would be violation of Tenth Schedule and use it as a reason for recommending dissolution of assembly.

The Governor, a high Constitutional functionary is required to be kept out from the controversies like disqualification of members of a Legislative Assembly and, therefore, there are provisions like Article 192(2) in the Constitution providing for Governor obtaining the opinion of the Election Commission and acting according to such opinion, in the constitutional scheme of things. Similar provision, in so far as, member of Parliament is concerned being in Article 103(2) of the Constitution ***(Brundaban Nayak v. Election Commission of India & Anr.*** **[(1965) 3 SCR 53];** and ***Election Commission of India & Anr. v. Dr. Subramaniam Swamy & Anr.*** **[(1996) 4 SCC 104].**

For all the aforesaid reasons, the Proclamation dated 23rd May, 2005 is held to be unconstitutional.

POINT NO. 3 : If the answer to the aforesaid questions is in affirmative, is it necessary to direct status quo ante as on 7th March, 2005 or 4th March, 2005?

As a consequence of the aforesaid view on point no. 2, we could have made an order of status quo ante as prevailing before dissolution of Assembly. However, having regard to the facts and the circumstances of the case, in terms of order of this Court dated 7th October, 2005, such a relief was declined. Reasons are the larger public interest, keeping in view the ground realities and taking a pragmatic view. As a result of the impugned Proclamation, the Election Commission of India had not only made preparations for the four phase election to be conducted in the State of Bihar but had also issued Notification in regard to first two phases before conclusion of arguments. Further, in regard to these two phases, before 7th October, 2005, even the last date for making nominations and scrutiny thereof was also over. In respect of 1st phase of election, even the last date for withdrawal of nominations also expired and polling was fixed for

18th October, 2005. The election process had been set in motion and was at an advanced stage. Judicial notice could be taken of the fact that considerable amount must have been spent; enormous preparations made and ground works done in the process of election and that too for election in a State like the one under consideration. Having regard to these subsequent developments coupled with numbers belonging to different political parties, it was thought fit not to put the State in another spell of uncertainty. Having regard to the peculiar facts, despite unconstitutionality of the Proclamation, the relief was moulded by not directing status quo ante and consequently permitting the completion of the ongoing election process with the fond hope that the electorate may again not give fractured verdict and may give a clear majority to one or other political party - the Indian electorate possessing utmost intelligence and having risen to the occasion on various such occasions in the past.

POINT NO. 4 : What is the scope of Article 361 granting immunity to the Governor?

By order dated 8th September, 2005, we held that the Constitution of India grants immunity to the Governor as provided in

Article 361. Article 361(1), inter alia, provides that the Governor shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purported to be done by him in the exercise and performance of those powers and duties. We accepted the submissions made on behalf of the respondents that in view of this Article notice could not be issued to the Governor, at the same time, further noticing that the immunity granted does not affect the power of this Court to judicial scrutinise attack made on the Proclamation issued under Article 356(1) of the Constitution of India on the ground of malafides or it being ultra vires and that it would be for the Government to satisfy the Court and adequately meet such ground of challenge. A mala fide act is wholly outside the scope of the power and has no existence in the eyes of the law. We, further held that the expression 'purported to be done' in Article 361 does not cover acts which are mala fide or ultra vires

and thus, the Government supporting the Proclamation under Article 356(1) shall have to meet the challenge. The immunity granted under Article 361 does not mean that in the absence of Governor, the grounds of mala fide or being ultra vires would not be examined by the Court. This order was made at the stage when we had not examined the question whether the exercise of power by the Governor was mala fide or ultra vires or not. This question was argued later.

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The position in law, therefore, is that the Governor enjoys complete immunity. Governor is not answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties. The immunity granted by Article 361(1) does not, however, take away the power of the Court to examine the validity of the action including on the ground of malafides.

In view of the above, while holding the impugned Proclamation dated 23rd May, 2005 unconstitutional, we have moulded the relief and declined to grant status quo ante and consequentially permitted the completion of ongoing election process.

All petitions are disposed of accordingly.

Sd/-
..... CJI.
(Y.K. SABHARWAL)

Sd/-
..... J.
(B. N. AGRAWAL)

Sd/-
..... J.
(ASHOK BHAN)

New Delhi,
January 24, 2006

SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO. 257 OF 2005

Rameshwar Prasad & Ors. ..... **Petitioners**

Versus

Union of India & Ar. . ..... **Respondents**

[With W.P. (C) No.255, 258 and 353 of 2005]

J U D G E M E N T

Arijit Pasayat, J.

So far as scope of Article 361 granting immunity to the Governor is concerned, I am in respectful agreement with the view expressed by Hon'ble Chief Justice of India.

(1) Proclamation under Article 356 is open to judicial review, but to a very limited extent. Only when the power is exercised mala fide or is based on wholly extraneous or irrelevant grounds, the power of judicial review can be exercised. Principles of judicial review which are applicable when an administrative action is challenged, cannot be applied stricto sensu.

(2) The impugned Notifications do not suffer from any constitutional invalidity. Had the Governor tried to stall staking of claim regarding majority that would have fallen foul of the Constitution and the notifications of dissolution would have been invalid. But, the Governor recommended dissolution on the ground that the majority projected had its foundation on unethical and corrupt means which had been and were being adopted to cobble a majority, and such action is not constitutional. It may be a wrong perception of the Governor. But it is his duty to prevent installation of a Cabinet where the majority has been cobbled in the

aforesaid manner. It may in a given case be an erroneous approach, it may be a wrong perception, but it is certainly not irrational or irrelevant or extraneous.

(3) A Public Interest Litigation cannot be entertained where the stand taken was contrary to the stand taken by those who are affected by any action. In such a case the Public Interest Litigation is not to be entertained. That is the case here.

(4) Hypothetically even if it is said that the dissolution notifications were unconstitutional, the natural consequence is not restoration of status quo ante. The Court declaring the dissolution notifications to be invalid can assess the ground realities and the relevant factors and can mould the reliefs as the circumstances warrant. In the present case restoration of the status quo ante would not have been the proper relief even if the notifications were declared invalid.

(5) The Assembly is constituted in terms of Section 73 of the R.P. Act on the conditions indicated therein being fulfilled and there is no provision in the Constitution which is in any manner contrary or repugnant to the said provision. On the contrary, Article 327 of the Constitution is the source of power for enactment of Section 73.

(6) In terms of Article 361 Governor enjoys complete immunity. Governor is not answerable to any Court for exercise and performance of powers and duties of his office or for any act done or purporting to be done by him in the exercise of those powers and duties. However, such immunity does not take away power of the Court to examine validity of the action including on the ground of mala fides.

(7) It has become imperative and necessary that right persons are chosen as Governors if the sanctity of the post as the Head of the Executive of a State is to be maintained.

The writ applications are accordingly dismissed but without any order as to costs.

Sd/-

..... J.

(ARIJIT PASAYAT)

New Delhi,
January 24, 2006

SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO. 257 OF 2005

Rameshwar Prasad & Ors. ..... **Petitioners**

Versus

Union of India & Ar. . ..... **Respondents**

[With W.P. (C) No.255 of 2005, W.P. (C) No. 258 of 2005 &

W.P. (C) No. 353 of 2005]

J U D G E M E N T

K. G. Balakrishnan, J.

It is important to note that the writ petitioners have no case that JD(U) or any other alliance had acquired majority and that they had approached the Governor staking their claim for forming a Government. No material is placed before us to show that the JD(U) or its alliance with BJP had ever met the Governor praying that they had got the right to form a Government. The plea of the petitioners' counsel is that they were about to form a Government and in order to scuttle that plan the Governor sent a report whereby the Assembly was dissolved to defeat that plan is without any basis. The Governor in his report stated that 17 or 18 members of the LJP had joined the JD(U)-BJP alliance, but no materials have been placed before us to show that they had, in fact, joined the alliance to form a Government. One letter has been produced by one of the petitioners and the same is not signed by all the MLAs and as regards some of them, some others had put their signatures. Therefore, it is incorrect to say that the Governor had taken steps to see that the Assembly was dissolved hastily to prevent the formation of a Government under the leadership of the political party JD(U). If any responsible political party had any case that they had obtained majority support or were about

to get a majority support or were in a position to form minority Government with the support of some political parties and if their plea was rejected by the Governor, the position would have been totally different. No such situation had been reached in the instant case. It is also very pertinent to note that the order for dissolution of the State Assembly was passed after about three months of the proclamation imposing the President's Rule was issued under Article 356(1). When there was such a situation, the only possible way was to seek a fresh election and if it was done by the President, it cannot be said that it was a mala fide exercise of power and the dissolution of the Assembly was wholly on extraneous or irrelevant grounds. It is also equally important that in Karnataka, Meghalaya and Nagaland cases, there was a democratically-elected Government functioning and when there is an allegation that it had lost its majority in the Assembly, the primary duty was to seek a vote of confidence in the Assembly and test the strength on the floor of the Assembly. Such a situation was not available in the present case. It was clear that not a single political party or alliance was in a position to form the Government and when the Assembly was dissolved after waiting for a reasonable period, the same cannot be challenged on the ground that the Governor in his report had stated that some horse-trading is going on and some MLAs are being won over by allurements. These are certainly facts to be taken into consideration by the Governor. If by any foul means the Government is formed, it cannot be said to be democratically-elected Government. If Governor has got a reasonable apprehension and reliable information such unethical means are being adopted by the political parties to get majority, they are certainly matters to be brought to the notice of the President and at least they are not irrelevant matters. Governor is not the decision-making authority. His report would be scrutinized by the Council of Ministers and a final decision is taken by the President under Article 174 of the Constitution. Therefore, it cannot be said that the decision to dissolve the Bihar State Legislative Assembly, is mala fide exercise of power based on totally irrelevant grounds.

Applying the parameters of judicial review of Presidential action in this regard, I do not think that the petitioners in these writ petitions have made out a case for setting aside the Notification issued by the President on 23rd May, 2005. The Writ Petitions are without any merit they are liable to be dismissed.

Sd/-

..... J.

(K. G. BALAKRISHNAN)

New Delhi,
January 24, 2006

SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

Civil Appeal No. 1310 of 2001

IN THE MATTER OF :

Michael B. Fernandes ..... Appellant

Vs.

C.K. Jaffer Sharief & Ors. . ..... Respondents

Date of Order : 14.02.2002

SUMMARY OF THE CASE

In the Lok Sabha general election in 1999, EVMs were used for taking poll in 45 constituencies spread over 17 States/Union Territories. Bangalore North Parliamentary Constituency in Karntaka was one such constituency where EVMs were used. Election for this constituency was challenged by Shri Michael Fernandes, a candidate who was a candidate at that election in an election petition before the Karnataka High Court. The Election Commission, the Returning Officer and the Chief Electoral Officer, Karnataka reimpleaded as respondents in the Election Petition. By Order dated 16-6-2000, of the High Court, names of these respondents were deleted from the array of respondents. The election petitioner filed an appeal before the Supreme Court against the High Court's order, on the ground that the main questions raised in the election petition were directly concerned with the use of EVMs, maneuverability of the EVMs, non-observance of provisions of law, and tempering of the EVMs to alter the result of election, and hence the provision of CPC, should govern the issue as to who are necessary parties to the election petition. The Supreme Court, relying on the earlier decisions in **Jyoti Basu's case** and **B. Sundara Rami Reddy's case** held that only those numerated in section 82 of the Representation of the People Act, 1951, could be joined as parties in an Election Petition. The appeal was dismissed.

J U D G E M E N T

PATTANAIK, J.

This appeal is directed against the Order dated 16th June 2000, passed in Election Petition No. 29 of 1999. The aforesaid Election Petition had been filed by the appellant, challenging the validity of the election to the House of People from the Bangalore North Parliamentary Constituency, in which election, respondent No. 1 was declared to have been elected. In the election petition, the Election Commissioner, the Returning Officer and the Chief Electoral Officer of the State of Karnataka had been arrayed as respondents 6, 7 and 8. Those respondents filed an application before the High Court of Karnataka for their deletion inter alia on the ground that under Section 82 of the Representation of the People Act, it has been clearly indicated that who should be the parties to an election petition and since they have been unnecessarily impleaded, they should be deleted. The High Court by the impugned judgment having deleted the said respondents 6, 7 and 8 from the array of parties, the present appeal has been preferred.

Mr. R. Venkataramani, the learned senior counsel appearing for the appellant contended that the election petition having been filed, challenging the validity of the election of respondent No. 1, on the grounds contained in Section 100 (1) (d) (iii) (iv) and non-compliance with the provisions of the Constitution and the Rules by the election machinery having been alleged, respondents 7 and 8 at least ought to have been held to be proper parties and there could not have been an order of deletion. According to the learned counsel, these respondents 7 and 8 having failed to conform to the mandatory guidelines enacted by the Election Commission of India, as contained in the hand book of the Returning Officer and those guidelines being treated as an integral part of the rules as well as Article 324 of the Constitution, respondents 7 and 8 became proper parties to the election petition, in view of the nature of allegations pertaining to their official conduct. That being the position, the learned Single Judge, who was in session of the matter, erroneously deleted the said respondents 7 and 8. Mr.

Venkataramani however seriously does not challenge the order of deletion, so far as respondent No. 6 is concerned.

Mr. S. Muralidhar, the learned counsel appearing for the Election Commission, on the other hand submitted that the question of parties to an election petition is concluded by two earlier decisions of this Court in the case of ***Jyoti Basu and Ors. Vs. Debi Ghosal and Ors,*** **1982(1) S.C.C. 691** and ***B. Sundara Rami Reddy Vs. Election Commission of India and Ors,*** **1991 Supp. (2) S.C.C. 624** and therefore, the High Court was wholly justified in directing the deletion of those respondents from the array of parties and by such deletion, there has been no illegality requiring interference by this Court. Mr. Muralidhar, further contended that the representation of the People Act being a full code by itself, prescribing the procedure to be followed and indicating the parties to be arrayed to an election petition and respondents 7 and 8, not coming within the ambit of the said provision, the High Court rightly deleted them and that order need not be interfered with by this Court. The learned counsel lastly urged that in view of the nature of allegations made, the person making those allegations is required to prove the same and therefore, there is no justifiable reason, why the Election Officer or the Returning officer should be permitted to be added as a party to the election petition.

In order to examine the correctness of the rival submissions, it would be necessary for us to have a bird's eye view of the relevant provisions of the Act and the different case laws on the point. But one thing must be borne in mind that in the case in hand, the allegations made were in relation to the use of voting electoral machines, under Section 61A of the Act. The gravmens of the allegations in the election petition are that the Returning Officer as well as the Chief Electoral Officer had not complied with several provisions of the Conduct of Election Rules and respondents 7 and 8 had not acted in accordance with the guidelines issued by the Election Commission of India. The relevant paragraphs of the election petition pertaining to the infraction of Rules committed by respondents 7 and 8 are paragraphs 20a, 20d, 20f, 25 and 28. The

Representation of the People Act, 1951 [hereinafter referred to as 'the Act'] is an Act, providing for the Conduct of elections to the House of Parliament and to the House of Legislature of each State and it provides the qualifications and disqualifications for Membership of those Houses, the Corrupt Practices and other offences in connection with such elections and the decisions of doubts and disputes arising out of or in connection with such elections. The general procedure at elections has been enumerated in Chapter III. Section 61 of the Act provides the procedure for preventing personation of electors and Section 61A which was inserted by Act 1 of 1989 w.e.f. 15.3. 1989, deals with Voting machines at elections. Section 66 provides for declaration of result and Section 67 provides for submission of a Report of the result to the appropriate authority and the Election Commission and in case of an election to a House of Parliament, to the Secretary of that House by the Returning Officer, soon after the declaration of the result. It also provides for publication of the name of the elected candidate in the official gazette. Part VI starting with Section 79 deals with disputes regarding elections. Under Section 80 of the Act, no election shall be called in question except by an election petition presented in accordance with the provisions of this Part. Presentation of petition is dealt with in Section 81 and such petition could be presented on one or more of the grounds specified in sub-section (1) of Section 100 and Section 101. Section 82 stipulates as to who shall join as respondents to an election petition. Section 82 may be quoted herein below in extenso: -

"**Sec. 82. Parties of the petition**: - A petitioner shall join as respondents to his petition—

(a) Where the petitioner, in addition to claiming declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner and where no such further declaration is claimed, all the returned candidates; and

(b) Any other candidate against whom allegations of any corrupt practice are made in the petition."

Section 83 provides as to what should contain in an election petition and Section 86 in Chapter III deals with trial of election petition. Section 87 is the procedure for such trial and it provides that every election petition shall be tried as nearly as may be, in accordance with the procedure applicable under the code of civil procedure, 1908 to the trial of suits. As stated earlier, Section 100 indicates the grounds on which an election can be declared to be void and Section 101 indicates the grounds on which a candidate other than the returned candidate may be declared to have been elected. We are not concerned with the other provisions of the Act in the case in hand. An appeal to the Supreme Court has been provided under Section 116A. on a plain reading of Section 82, which indicates as to the person who can be joined as a respondent to an election petition, the conclusion is irresistible that returned candidate, the candidate against whom allegations of any corrupt practice have been made are to be joined as party respondent when declaration is sought for holding the election of the returned candidate to be void and when a prayer is made as to any other candidate to be declared to be duly elected, then all the contesting candidates are required to be made party respondents. On a literal interpretation of the aforesaid provisions of section 82, therefore, it can be said that an election petition, which does not make the persons enumerated in Section 82 of the Act, as party respondents, is liable to be dismissed. The two decisions of this Court directly on the question are the cases of **Jyoti Basu and Ors. Vs. Debi Ghosal and Ors. 1982(1). S.C.C. 691** and **B. Sundara Rami Reddy Vs. Election Commission of India and Ors. 1991 Supp. (2) S.C.C. 624.**

In the former case, Chinnappa Reddy, J, speaking for the Court, held that right to elect or to be elected or dispute regarding election are neither fundamental rights nor common law rights but are confined to the provisions of the Act and the Rules made there under and consequently, rights and remedies are all limited to those provided by the statutory provisions. On the question of

Joinder of parties, referring to Sections 82 and 86(4) of Representation of the People Act, it was held that the contest of the election petition is designed to be confined to the candidates at the election and all others are excluded and therefore, only those may be joined as respondents to an election petition, who are mentioned in Section 82 and 86(4) and no others. An argument had been advanced in that case that even if somebody may not be a necessary party under Section 82 of the Act, but yet he could be added as a proper party as provided in Order I Rule 10 of the Code of Civil Procedure. But the Court rejected that contention on a finding that the provisions of the Civil Procedure Code apply to election disputes only as far as may be and subject to the provisions of the act and any rules made there under and the provisions of the Code cannot be invoked to permit which is not permissible under the Act. It was in that context the Court further observed that the concept of 'proper parties' is and remain alien to an election dispute under the Act. This decision was followed in **B. Sundara Rami Reddy's case, 1991 Supp. (2) S.C.C. 624,** referred to supra and it was reiterated that the concept of 'proper party' is and must remain alien to an election dispute under the Act and only those may be joined as respondents to an election petition, who are mentioned in Sections 82 and 86(4) of the Act and no others. The Court in this case added that however desirable and expedient it may appear to be none-else shall be joined as respondents. Mr. Venkataramani, the learned senior counsel, appearing for the appellant, contended that the law enunciated in the two decisions and the observations made are too wide and while Section 82 casts an obligation on an election petitioner to join those mentioned in clauses (a) and (b) as party respondent, it does not put an embargo for addition of any other person in an appropriate case, depending upon the nature of allegation made and consequently the expression "any other" in the two decisions referred to above, must be held not to have been correctly used. Mr. Venkataramani relied upon the observations made by this Court in **M.S. Gill's case, 1978 (2) S.C.R. 272**, wherein the Court had observed that 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 circumstance and submitted that the basis of electoral democracy being a free and fair election and fairness imports and obligation to see that no wrong-doer candidate benefits from his own wrong. In case where allegations are made against the Returning Officer or the Chief Electoral Officer with regard to the conduct of the election, there should be no bar to array them as parties and according to Mr. Venkataramani in **Gill's case**, the Chief Election Commissioner was a party and, therefore, this Court in **Jyoti Basu** as well as the subsequent case, having not noticed the aforesaid judgment of the larger Bench, the latter decision will be of no assistance. We are not in a position to accept the submission of Mr. Venkataramani in as much as in **Gill's case**, an order of the Election commissioner was under challenge by filing a writ petition and it was not an election petition under the provisions of the Representation of the People Act. There is no dispute with the proposition that a free and fair electoral process is the foundation of our democracy, but the question for consideration is, whether by indicating in the Act as to who shall be arrayed as party, the Court would be justified in allowing some others as parties to an election petition. For the aforesaid proposition, **Gill's case**, is no authority. Mr. Venkataramani then relied upon the decision of Calcutta High Court in **Dwijendra Lal Sen Gupta Vs. Hare Krishna Konar, A.I.R. 1963 Calcutta 218**, where the question came up for consideration directly and the Calcutta High Court did observe that the Returning Officer may nevertheless in an appropriate case be a "proper party" who may be added as party to the election petition and undoubtedly, the aforesaid observation supports the contention of Mr. Venkataramani. Following the aforesaid decision, a learned Single Judge of the Bombay High Court in the case of **H.R. Gokhale Noshir C. and Ors. A.I.R. 1969 Bombay 177,** had also observed that the observations of Shah, J in **Ram Sewak Yadav's case, AIR 1964 SC 1249** in paragraph (6) is not intended to lay down that the Returning Officer can in no event be a proper party to an election petition. But both these aforesaid decisions of the Calcutta High Court and Bombay High Court had been considered by this Court in **Jyoti Basu case** and the Court took

the view that the public policy and legislative wisdom both seem to point to an interpretation of the provisions of the Representation of the People Act which does not permit the joining, as parties, of persons other than those mentioned in Sections 82 and 86(4). The court also in paragraph (12) considered the consequences if persons other than those mentioned in Section 82 are permitted to be added as parties and held that the necessary consequences would be an unending, disorderly election dispute with no hope of achieving the goal contemplated by Section 86(6) of the Act. In the aforesaid premises, we reiterate the views taken by this court in **Jyoti Basu's case** and reaffirmed in the latter case in **B. Sundara Rami Reddy** and we see no infirmity with the impugned judgment, requiring our interference under Article 136 of the Constitution. This appeal accordingly fails and is dismissed.

Sd/-
..... J.
(G. B. PATTANAIK)

Sd/-
..... J.
(S. N. PHUKAN)

Sd/-
..... J.
(S. N. VARIAVA)

New Delhi
February 14, 2002

SUPREME COURT OF INDIA

RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Civil) No. 6679/2004

(From the judgement and order dated 23.03.2004 in WPMP 5214/2004 of the HIGH COURT OF A.P. AT HYDERABAD)

Secretary, Ministry of Information & Broadcasting ..... Petitioner(s)

Vs.

M/s. Gemini TV Pvt. Ltd. & Others. ..... Respondent(s)

(With appln. for exem. from filing c/c of the impugned judgment and prayer for interim relief)

Date of Order : 13.04.2004

Coram : Hon'ble The Chief Justice
Hon'ble Mr. Justice S.B. Sinha
Hon'ble Mr. Justice S.H. Kpadia

For Petitioner(s)
Mr. Soli J. Sorabjee, AG
Mr. K.N. Raval, SG
Mr. Rajeev Sharma, Adv.
Mr. Anand Mishra, Adv.
Mr. Ashim Sood, Adv.
Mr. Ardhendumauli Kumar Prasad, Adv.
Mr. A.U. Khan, Adv.
Mr. Pawan, Adv.

For Respondent(s)
Nos. 1 and 2
Mr. Ramakanth Reddy, Adv.
Mr. P. Venkat Reddy, Adv.
Mr. Anil Kumar Tandale, Adv.
Mr. G.R.K. Prasad, Adv.
Mr. Wasay Khan, Adv.

For Election Commission
Mr. K.K. Venugopal, Sr. Adv.
Mr. S. Muralidhar, Adv.
Ms. Seema Bengani, Adv.
Mr. Somiran Sharma, Adv.

SUMMARY OF THE CASE

Rule 7(3) of the Cable Television Networks Rules, 1994 prohibits advertisements of religious or political nature on television channels. This Rule was challenged before the Andhra Pradesh High Court in writ petition No. 3959 of 2004 and in some other connected writ petitions. The High Court passed an interim order on 23rd March, 2004, staying the operation of Rule 7(3). The Ministry of Information and Broadcasting filed an SLP before the Supreme Court against the interim order dated 23rd March, 2004.

The Supreme Court, in an interim order passed on 13th April, 2004, directed that political parties, candidates or any other person or organization, intending to issue advertisement of political nature on TV Channel or Cable Network, should submit an application to the Commission or an officer designated by the Commission along with copies of the proposed advertisements, and it is only after obtaining necessary clearance from the Commission or the designated officer that the advertisement should be shown on TV Channel or Cable Network.

O R D E R

On 2nd April, 2004, while issuing notice on the special leave petition and passing an ad-interim order, we directed the Election Commission of India to suggest modalities as regards the advertisements to be telecast on electronic media, by cable operators and television channels. In pursuance thereof, the Election commission has suggested the modalities on an affidavit giving various suggestion. A copy of the said affidavit was handed over to the Union of India and the learned Attorney General who have also made a few suggestions. Shir K.K. Venugopal, learned senior counsel appearing for the Election Commission of India, Shri Soli J. Sorabjee, learned Attorney General, and Shri K. Ramakanth Reddy, learned counsel appearing for the respondent-cable operators agreed that these modalities, as suggested by the Election Commission of India, may be made part of the order of the Court.

Before we pass the order, it will be worthwhile to notice certain provisions of the cable Television Networks (Regulation) Act, 1995 (for short, "the Act") as amended from time to time, and the Rules framed there under. The object of the Act is to regulate the operation of the Cable Television Network in the country. Section 6 of the Act provides that no person shall transmit or re-transmit through a cable service any advertisement unless such advertisement is in conformity with the prescribed advertisement code. Section 11 of the Act provides that if any authorized officer has reason to believe that the provision of the Act have been or are being contravened by any cable operator, he may seize the equipment being used by such cable operator for operating the cable television network. Section 12 of the Act provides for confiscation of the equipment in the event of any violation of the provisions of the Act. Similarly, Section 13 of the Act also provides for seizure or confiscation of the equipments and punishment. Section 16 further provies for punishment for contravention of the provisions of the Act. Section 19 lays down that an authorized officer, if he thinks necessary or expedient so to do in the public interest, may, by order, prohibit any cable operator from transmitting or re-transmitting any advertisement which is not in conformity with the prescribed programmed code and advertisement code and it is likely to promote enmity on grounds of religion, race, language, caste or community or any other grounds whatsoever disharmony or feelings of enmity, hatred or ill-will between different religion, racial, linguistic or regional groups or caste or communities or which is likely to disturb public tranquility. Section 22 of the Act empowers the Central Government to frame Rules to carry out the provisions of the Act. The Central Government in exercise of the powers conferred on it by section 22 of the Act is empowered to make Rules which are known as the Cable Television Networks Rules, 1994 [for short, "the Rules"]. Rule 7 of the Rules provides that where an advertisement is carried in the cable service it shall be so designed as to conform to the laws of the country and should not offend morality, decency and religious susceptibilities of the subscribers. Sub-rule (2), inter alia, provides that no advertisement shall be permitted which derides any race, caste, color, creed and

nationality; is against any provision of the Constitution of India; and tends to incite people to crime, cause disorder or violence or breach of law or glorifies violence or obscenity in any way. Sub-Rule (3) further provides that no advertisement shall be permitted the objects whereof are wholly or mainly of religious or political nature; advertisements must not be directed towards any religious or political end. It is in this background, we now propose to pass the following order:

Every registered, National and state, political party and every contesting candidate proposing to issue advertisement on television channel and / or cable network will have to apply to the Election Commission/Designated Officer [as designated by the Election Commission] not later than three days prior to the date of the proposed commencement of the telecast of such advertisement. In case of any other person or unregistered political parties, they will have to apply not later than seven days prior to the date of the telecast. Such application shall be accompanied by two copies of the proposed advertisement in electronic form along with a duly attested transcript thereof. In case of first phase of elections, the application shall be disposed of within two days of its receipt and until decision thereon is taken, our order dated 2nd April 2004, shall apply. In case of subsequent phase of election, the application shall be disposed of within three days of its receipt and until the decision thereon is taken, our order dated 2nd April 2004, shall apply. While disposing of such applications, it will be open to the Election Commission/ Designated Officer to direct deletion/modification of any part of the advertisement.

The application for certification shall contain following details:

(a) The cost of production of advertisement;

(b) The approximate cost of proposed telecast of such advertisement on a television channel or cable network with the breakup of number of insertions and rate proposed to be charged for each such insertion;

(c) It shall also contain a statement whether the advertisement inserted is of for benefit of the prospects of the election of a candidate (s) / parties;

(d) If the advertisement is issued by any person other than a political party or a candidate, that person shall state on oath that it is not for the benefit of the political party or a candidate and that the said advertisement has not been sponsored or commissioned or paid for by any political party or a candidate; and

(e) A statement that all the payments shall be made by way of cheque or demand draft.

We find that Section 2 (a) of the Act defines “authorized officer”, within his local limits of jurisdiction, as (a) District Magistrate; (b) sub-divisional magistrate; or (c) or commissioner of Police. Similarly, Section 28-A of the Representation of People Act, 1951 provides that the Returning Officer, Assistant Returning Officer, presiding officer, Polling Officer and any other Officer appointed under this part and any police officer designated for the time being by the State Government, for the conduct of any election shall be deemed to be on deputation to the Election Commission for the period commencing on and from the date of the notification calling for such election and ending with the date of declaration of the results of such election and accordingly, officer shall during that period, be subject to the control, superintendence and discipline of the Election commission.

Since it is not physically possible for the Election Commission to have a pre-censorship of all the advertisements on various cable networks and television channels, it has become necessary to authorize the Election commission to delegate its powers in this behalf to the respective District Magistrates of all the States or Union Territories, not below the rank of a Sub-divisional magistrate or a member of the State Provincial Civil Service. This may be done by a general order issued by the Election commission. These officers shall act under the control;

superintendence and discipline of the Election Commission. The Election Commission in its turn may delegate its powers to the Chief Electoral Officer of each State or the Union Territories, as the case may be.

The Chief Electoral Officer of each State or Union Territory may appoint a committee for entertaining complaints or grievances of any political party or candidate or any other person in regard to the decision to grant or to refuse certification of an advertisement. The committee so appointed shall communicate its decision to the Election Commission.

The committee so constituted will function under the overall superintendence, direction and control of the Election Commission of India.

The decision given by the committee shall be binding and complied with by the political parties, candidates or any other person applying for advertisements in electronic media subject to what has been stated above.

The comments and observations for deletion or modification, as the case may be, made, shall be binding and complied with by the concerned political party or contesting candidate or any other person within twenty four hours from the receipt of such communication and the advertisement so modified will be re-submitted for review and certification.

We may clarify that provisions of section 126 of the Representation of people Act, 1951, shall apply to the advertisement covered by this order.

If any political party, candidate or any other person is aggrieved by the decision taken either by the committee or by the Designated Officer/Election Commission it will be open for them to approach only this Court for clarification or appropriate orders and no other Court, tribunal or authority shall entertain any petition in regard to the complaint against such advertisement. This order shall come into force with effect from 16th April 2004 and shall continue to be in force till 10th may, 2004.

This order is being issued in exercise of the powers under Article 142 of the Constitution of India and it shall bind all the political parties, candidates, persons, group of persons or Trusts who propose to insert the advertisement in the electronic media, including cable networks and/or television channels as well as cable operators.

It will be open to the Election Commission to requisition such staff as may be necessary for monitoring the telecast of such advertisements. Where the Election Commission is satisfied that there is a violation of this order or any provisions of the Act, it will issue an order to the violator to forthwith stop such violations and it will also be open to direct seizure of the equipments. Every order shall be promptly complied with by the person (s) on whom such order is served.

The funds to meet the cost of monitoring the advertisements should be made available to the Election Commission by the Union of India. Adequate publicity of this order shall be given by the Union of India on the electronic media and through print media.

This order is in continuation of the order passed by this Court on 2nd April 2004 and shall remain in operation as an interim measure till 10th May 2004.

Subject to the aforesaid order, the judgment of the High Court of Andhra Pradesh dated 23rd March, 2004 shall remain stayed. This order is passed not in derogation of but in addition to the powers of the Central Government in regard to the breach of the provisions of the Act.

List after the ensuing summer vacation.

Sd/-
(Alka Dudeja)
Court Master
13.4.2004

Sd/-
(Janki Bhatia)
Court Master
13.4.2004

SUPREME COURT OF INDIA

RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Civil) No. 6679/2004

(From the judgement and order dated 23.03.2004 in WPMP 5214/2004 of the HIGH COURT OF A.P. AT HYDERABAD)

SECRETARY, MINISTRY OF
INFORMATION & BROADCASTING ..... Petitioner(s)

Vs.

M/S. GEMINI TV PVT. LTD. & OTHERS. . ..... Respondent(s)

(With prayer for interim relief)
(With appln.(s) for exemption from filing c/c of the impugned Judgment).

Date : 05.07.2004. This petition was called on for hearing today.

CORAM : HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE G. P. MATHUR
HON'BLE MR. JUSTICE A.K. MATHUR

For Petitioner(s) Mr. Rajeev Sharma, Adv.

For Respondent(s) Mr. K. Ramakanta Reddy, Adv.
Mr. P. Venkat Reddy, Adv.
Mr. Anil Kumar Tandale, Adv.
Mr. S. Muralidhar, Adv.
Mr. Somiran Sharma, Adv.

O R D E R

The learned counsel for respondent No. 1 – M/s. Gemini TV Pvt. Ltd. Submits that the main petition pending in the High Court of Andhra Pradesh may itself be withdrawn to this Court and heard and decided here itself in view of the constitutional issues of wide ramifications arising for decision in the writ petition. The learned counsel for the petitioner does not oppose the prayer so made.

Accordingly, WP (C) No. 3959/2004 filed by respondent no. 1 herein is directed to be transferred to this Court.

The learned counsel for the petitioner prays for time for moving an appropriate application for transferring WP(C) Nos. 4539, 4880 and 4961 of 2004 pending in the High Court of Andhra Pradesh, to this Court. Let him do so within three weeks.

The interim order dated 13.04.2004 is directed to remain in operation until further orders.

Sd/-
(D. P. Walia)

Sd/-
(Radha R. Bhatia)

SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (C) NO. 22724 OF 1997

Union of India ..... Appellant(s)

Vs.

Harbans Singh Jalal & Ors. . ..... Respondent(s)

With T.P. (C) No.505/99, W.P. (C) No. 346/99,
S.L.P.(C) Nos.12346-349/99 & W.P.(C) No. 339/1999

Date of Order : 26.04.2001

SUMMARY OF THE CASE

The Punjab and Haryana High Court, by judgement dated 27.05.1997 in C.W.P. No. 270/1997 held that model code of conduct could be enforced from the date of announcement of an election. The Union of India filed an SLP before the Supreme Court against this judgement. As the SLP was pending, the issue was settled vide O.M. dated 16.04.2001 of the Ministry of Law and Justice issued in consultation with the Commission. In view of the O.M. dated 16.4.2001, the SLP and connected matters were disposed of by the Supreme Court.

O R D E R

S.P. Bharucha, Judge; N. Santosh Hegde, Judge; Y.K. Sabharwal, Judge

S.L.P. (C) No. 22724/97

This petition does not require consideration in view of the Office Memorandum dated 16th April 2001 arrived at in consultation between the Union of India and the Election Commission. It is, therefore, disposed of.

No order as to costs.

T.P. (C) No. 505/99

Learned counsel for the petitioner submits that nothing survives in the writ petition, which is sought to be transferred by reason of the passage of time and that, therefore, this transfer petition also has become in fructuous. It is disposed of as such.

No order as to costs.

W.P. (C)No. 346/99 & 339/99:

No one appears before before us on behalf of the petitioners.

The writ petitions are dismissed.

S.L.P. (C) No. 12346-349/99:

No one appears before us on behalf of the petitioner. The special leave petitions are dismissed.

Sd/-
..... J.
(S. P. BHARUCHA)

Sd/-
..... J.
(N. SANTOSH HEGDE)

Sd/-
..... J.
(Y. K. SABHARWAL)

New Delhi
April 26, 2001

MOST IMMEDIATE
SUPREME COURT MATTER / BY HAND

No. H. 11022 / 1 /2001-Leg. 11
Government of India
Ministry of Law. Justice & Co. Affairs
(Legislative Department)

New Delhi, the 16th April, 2001.

OFFICE MEMORANDUM

Subject : **SLP(C) No. 22724/97 : Union of India Vs. Harbans Singh Jalal and others - regarding Model Code of Conduct, pending for adjudication before the Hon'ble Supreme Court of India.**

* * * * *

In continuation of this Department's endorsement of even number dated 26.3.2001 on the subject mentioned above, the undersigned is directed to state that the Election Commission of India vide their letter No. 509/2001/JS-1/912 dated 11.4.2001 (copy enclosed) has agreed to modify the existing formulation in the Model Code of Conduct (1998) as under :

Paragraph VII(vi)(b) of the Model Code of Conduct would be substituted as below:
"(b) (except civil servants) lay foundation stones, etc. of projects or schemes of any kind; or

Further, after Clause (d) of sub-Para (vi) of Para VII, the following shall be inserted:

"**Note:** - The Commission shall announce the date of any election which shall be a date ordinarily not more than three weeks prior to the date on which the notification is likely to be issued in respect of such elections."

2. In terms of the above settlement agreed to between the Union of India and the Election Commission of India, further necessary steps to withdraw the aforesaid

SLP filed by the Union of India are required to be taken by filling a joint affidavit. The Central Agency Section's File No. 2263/97-CAS refers.

3. Accordingly, it is requested that the matter may be placed before the learned Attorney General. The SLP is already listed for hearing and likely to come up today. In case any other material / information is required in this regard, the undersigned may be contacted.

Sd/-
(N.L. Meena)
Joint Secretary and Legislative Counsel

To,

The Department of Legal Affairs,
(Attn.: Shri R.N. Poddar, JS&LA, In-Charge,
Central Agency Section)
Lawyer's Chamber No. 63,
Supreme Court Compound,
New Delhi-1.

Copy to:

The Secretary (Attn.: Shri K.J. Rao), Election Commission of India, Nirvachan Sadan, Nezw Delhi for information with reference to their letter dated 11.4.2001 cited above.

Sd/-
(Surender Kumar)
Under Secretary to the Govt. of India.

SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

Writ Petition (C) No. 199 of 2006

Jaya Bachchan ..... Petitioner(s)

Versus

Union of India & Ors. . ..... Respondent(s)

Date of Order : 08.05.2006

SUMMARY OF THE CASE

After obtaining the opinion of the Election Commission as required by Article 103(2) of the Constitution of India, the President of India in exercise of powers conferred under clause (1) of Article 103 had decided that the petitioner stands disqualified for being a Member of Rajya Sabha on and from 14th July, 2004. As per the opinion of the Election Commission rendered to the President of India under clause (2) of Article 103 that the petitioner became disqualified under Article 102(1)(a) of the Constitution for being a Member of Rajya Sabha on 14th July, 2006 on her appointment by the Government of Uttar Pradesh as Chairperson of the U.P. Film Development Council terming the same as "office of profit" under the Government of Uttar Pradesh.

The petitioner challenged both the said decisions of the President of India as well as the opinion of the Election Commission rendered by it to the President of India.

The petitioner relied on the decisions in Umrao Singh Vs. Darbara Singh [(1969) 1 SCR 421] and Divya Prakash Vs. Kultar Chand Rana and Anr. [1975(1) Sec. 264] and also referred to Biharilal Dobur Vs. Roshan Lal Bobur [(1984) 1 Sec. 551] and constituted that the post of Chairperson of the Council, and the

conferment of the rank of Cabinet Minister were only decorative, that she did not receive any remuneration or monetary benefit or other facilities from the State Government.

After careful examination of the decisions relied upon by the petitioner, the Hon'ble Supreme Court held that it was well settled that where the office carries with it certain emoluments or the order of the appointment states that the person appointed was entitled to certain emoluments, then it will be an office of profit, even if the holder of the office chooses not to receive/draw such emoluments and stated that what was relevant was whether pecuniary gain is 'receivable' in regard to the office and not whether pecuniary gain, in fact, received or received negligibly.

The Hon'ble Supreme Court held that the office did carry with it a monthly honorarium of Rs. 5000/-, entertainment expenditure of Rs. 10,000/-, other facilities including free accommodation and medical facilities and that these were pecuniary gains, cannot be denied. Thus the Hon'ble Supreme Court found no merit in the writ petition and the same was accordingly dismissed.

O R D E R

Y.K. Sabharwal, CJI; C.K. Thakker, J.; R.V. Raveendran, J.

The challenge in this petition filed under Article 32 of the Constitution of India, is to the order of the Hon'ble President of India, dated 16th March 2006, whereby, in exercise of powers conferred under clause (1) of Article 103 of the Constitution of India, the Hon'ble President has decided, after obtaining the opinion of the Election Commission as required by Article 103(2), that the petitioner stands disqualified for being a Member of the Rajya Sabha on and from 14th day of July 2004. The challenge is also to the opinion dated 2nd March, 2006 rendered by the Election Commission to the Hon'ble President, under clause (2) of Article 103, that the Petitioner became disqualified order Article 102 (1) (a) of

the Constitution for being a Member of the Rajya Sabha on and from 14th July, 2004 on her appointment by the Government of Uttar Pradesh as Chairperson of the U.P. Film Development Council.

2. The Government of Uttar Pradesh, by Official Memorandum dated 14.7.2004, appointed the petitioner as the Chairperson of Uttar Pradesh Film Development Council (for short 'the Council') and sanctioned to her the rank of a Cabinet minister with the facilities as mentioned in O. M. No. 14/1/46/87-C.Ex. (1) Dated 22.3.1991 (as amended from time to time). The benefits to which she became entitled, as a consequence, are:

(i) Honorarium of Rs. 5,000/- per month;

(ii) Daily allowance @ Rs. 600 per day within the State and Rs. 750/- outside the State Rs. 10,000/- per month towards entertainment expenditure.

(iii) Staff car with driver, telephones at office and residence, one P.S., one P.A. and two class IV employees.

(iv) Body Guard and night escort.

(v) Free accommodation and medical treatment facilities to her and family members.

(vi) Free accommodation in government circuit houses/guest houses and hospitality while on tour.

3. The Election Commission, after referring to the facts and the law enunciated by this Court in several decision, has expressed the opinion that the office of Chairperson of the Council to which the petitioner was appointed by the State Government by O.M. dated 14.7.2004, on the terms and conditions specified therein, is an "office of profit" under the Government of Uttar Pradesh for purposes of Article 102(1)(a) of the constitution. The Commission also found

that Section 3 of the Parliament (Prevention of Disqualification) Act, 1959 did not exempt the said office of profit from disqualification under Article 102(1) (a) of the Constitution.

4. The petitioner contends that the post of Chairperson of the council, and the conferment of the rank of Cabinet Minister, were only “decorative”, that she did not receive any remuneration or monetary benefit from the State Government; that she did not seek residential accommodation, nor used telephone or medical facilities; that though she traveled several times in connection with her work as chairperson, she never claimed any reimbursement; and that she had accepted the chairpersonship of the Council honorarily and did not use any of the facilities mentioned in the O.M. dated 22.3.1991. The petitioner contends that in the absence of any finding by the Election Commission that she had received any payment or monetary consideration from the State government, she could not be said to hold any office of profit under the State Government and, therefore, her disqualification was invalid.

5. It is not in dispute that the Council is not an autonomous body or statutory corporation, that the council has no budget of its own, and that all its expenses are met by the Department of the State Government administratively in-charge of it. Similarly, the fact that the petitioner was appointed as Chairperson of the council, conferring on her the rank of the Cabinet Minister entitling her to all the remuneration and benefits as provided in the O.M. Dated 22.3.1991 (extracted above), is also not disputed.

6. Clause (1) (a) of Article 102 provides that a person shall be disqualified for being chosen as, and for being, a member of either House of Parliament if he holds any office of profit under the government of India or the government of any State, other than an office declared by Parliament by law not to disqualify its holder. The term ‘holds an office of profit’ though not defined, has been the subject matter of interpretation, in several decisions of this court. An office of profit is an office which is capable of yielding a profit or pecuniary gain. Holding an

office under the Central or State Government, to which some pay, salary, emolument, remuneration or non-compensatory allowance is attached, is 'holding an office of profit' The question whether a person holds an office of profit is required to be interpreted in a realistic manner. Nature of the payment must be considered as a matter of substance rather than of form. Nomenclature is not important. In fact, mere use of the word 'honorarium' cannot take the payment out of the purview of profit, if there is pecuniary gain for the recipient. Payment of honorarium, in addition to daily allowances in the nature of compensatory allowances, rent free accommodation and chauffeur driven car at State expense, are clearly in the nature of remuneration and a source of pecuniary gain and hence constitute profit. For deciding the question as to whether one is holding an office of profit or not, what is relevant is whether the office is capable of yielding a profit or pecuniary gain and not whether the person actually obtained a monetary gain. If the "pecuniary gain" is "receivable" in connection with the office then it becomes an office of profit, irrespective of whether such pecuniary gain is actually received or not. If the office carries with it, or entitles the holder to, any pecuniary gain other than reimbursement of out of pocket / actual expenses, the office will be an office of profit for the purpose of Article 102(1)(a). This position of law stands settled for over half a century commending from the decision of Ravanna Subanna v. G.S. Kaggeerappa [AIR 1954 SC 653], Shivamurthy Swami Inamdar v. Agadi Sanganna Anadanappa [1971 (3) SCL 870], Satrucharla chandrasekhar Raju V. Vyricherla Pradeep Kumar Dev [1992 (4) SCC 404] and Shibu Soren V. Dayanand Sahay & Ors. [2001 (7) SCC 425].

7. The petitioner relied on the decisions in Umrao Singh V. Darbara Singh [(1969) 1 SCR 421] and Divya Prakash V. Kultar chand Rana & Anr. [1975 (1) SCC 264].

8. In Umrao Singh (supra) the question that arose for consideration was whether payment of a monthly consolidated allowance for performing all official duties and journeys concerning the work and a mileage allowance for the

journeys performed for official work outside the district and daily allowance for the days of attendance of meetings/travel/halt, would convert the office of Chairman of a Panchayat Samiti into an office of profit. This Court held that these were allowances paid for the purpose of ensuring that Chairman did not have to spend money out of his own pocket for discharging his official duties, and therefore, receipt of such allowances did not make the office one of profit.

9. In Divya Prakash (supra), this Court held that the post of a Chairmen of the Board of School Education of the State of Himachal Pradesh was not an office of profit. The candidate was appointed specifically in an honorary capacity without any remuneration. Further that post of Chairman did not carry with it a scale of pay. On the same date Bench also decided the case of K.B. Rohamare Vs. Shankar Rao [1975 (1) SCC 252], where while discussing the question at length, Ravanna Subanna (supra) was cited with approval. It was held in the said case that amount of money receivable (emphasis supplied by us) by a person in connection with the office he holds is material when deciding whether the office carried any profit.

10. Learned counsel for the petitioner has also referred to Biharilal Dabray Vs. Roshanlal Dabray [(1984) 1 SCC 551] and contended that citing Diva Prakash (supra), with approval, it was held that when a candidate is appointed in an honorary capacity without any remuneration even though post carried remuneration, he cannot be said to be holding an office of profit and thus was not disqualified under Article 191 (1) (a) of the Constitution. In Biharilal Dobray's case (supra) it was held that respondent was holding an office of profit under the State Government and his nomination was rightly rejected by the Returning Officer. In that case, the only question was whether the post the respondent was holding was one under State Government or not. The observations made with reference to Divya Prakash's case were clearly obiter. Further, an error seems to have been made while noticing Divya Prakash's case. In Divya Prakash it was held that the post did not carry with it any remuneration but in Biharilal Dobrey it was said that the post carried remuneration.

11. A careful examination of the decisions relied upon by learned counsel on behalf of the petitioner shows that each of those cases turned on its own facts and did not lay down any proposition of law contrary to what has been laid down in a series of decisions starting from Ravanna Subanna to Shibu Soren. It is well settled that where the office carries with it certain emoluments or the order of appointment states what the person appointed is entitled to certain emoluments, then it will be an office of profit, even if the holder of the office chooses not to receive/draw such emoluments. What is relevant is whether pecuniary gain is "receivable" in regard to the office and not whether pecuniary gain is, in fact, received or received negligibly.

12. In this case, as noticed above, the office carried with it a monthly honorarium of Rs. 5000/-, entertainment expenditure of Rs. 10,000/-, staff car with driver, telephones at office and residence, free accommodation and medical treatment facilities to self and family members, apart from other allowances etc. that these are pecuniary gain, cannot be denied. The fact that the petitioners is affluent or was not interested in the benefits/facilities given by the State government or did not, in fact, receive such benefits till date, are not relevant to the issue.

13. In this view, the question whether petitioner actually received any pecuniary gains or not is of no consequence. We find no merit in the writ petition and the same is, accordingly, dismissed.

Sd/-
..... J.
(Y. K. SABHARWAL)

Sd/-
..... J.
(C. K. THAKKER)

Sd/-
..... J.
(R. V. RAVEENDRAN)

New Delhi
May 08, 2006

HIGH COURT OF KARNATAKA, BANGALORE

BEFORE THE HON'BLE MR. JUSTICE K. SREEDHAR RAO

EP No. 29 of 1999

BETWEEN

Michael B. Fernandes
S/o J.J. Fernandes, aged about 65 years
No. 5, Myrtle Lane, Bangalore - 560 025 ..... Petitioner
(By Smt. Pramila Nesargi, Sr. Advocate &
M/s. Geetha Menon & Associates)

AND

1. C. K. Jaffer Sharief
   S/o Late C. Abdul Kareem
   Major
   No. 46, Haines Road, Bangalore - 560 005

2. L. Narayanaswamy
   S/o Shankarappa
   Major
   No. 196, 2nd Main Road
   KEB Colony, Goddalahalli, Bangalore - 560 094

3. M. Sundaramurthy
   S/o C. Masilamani
   Major
   No. 29, 12th Cross
   Vyalikaval, Bangalore - 560 003

4. K.N. Parameshappa
   S/o Narayanappa
   Major
   No. 10, Thandaya Naralu Street
   H.A. Farm Post, Hebbal Kempapura
   Bangalore - 560 024

5. Meer Layaq Hussain
S/o M.M. Hussain
Major
Dr. B.R. Ambedkar Medical College
Mens Hostel, Room No. 216, Shampur Road
Arabic College Post, K.G. Halli
Bangalore - 560 045

6. The Election Commission
Rep. by its Chief Election Commissioner
Nirvachan Bhavan
New Delhi

7. Shri Mohammed Sanaulla
Returning Officer and Dy. Commissioner
No. 12, Bangalore North Parliamentary
Constituency, Bangalore

8. Chief Electoral Officer
State of Karnataka
Cubbonpark, Bangalore - 560 001 ..... Respondents

(By Sri Venkateshwar N.K. & H.D. Amarnathan &
Madhumitabagchi for R-1, Sonnegowda for R-2)

Date of Order : 05.02.2004

SUMMARY OF THE CASE

The petition was filed on the grounds that introduction of Section 61A of the R.P. Act, 1951 which permits use of EVM in the elections to Assembly & Lok Sabha is bad in law as it permits arbitrariness and ultravires the Constitution.

The Hon'ble Court examined scientists from the BEL and studied safety aspects and ruled that EVM's are tamper-proof and any attempt to corrupt the machine shows the error made.

Accordingly the petition was rejected.

Justice K. Sreedhar Rao

This Election Petition filed under section 81 of the Representation of People Act, 1951, by the Petitioner/candidate at 1999 General Election to the House of People from no. 12, Bangalore North Parliamentary constituency held on 11.09.1999 through his advocates Smt. Pramila Nesargi, Ms. Geetha Menon and S Balaji with a prayer to (a) Declare that the declaration of result of Respondent No.1 from No.12 Bangalore North Parliamentary Constituency as null and void (b) direct repoll of the No. 12, Bangalore North Parliamentary constituency (c) declare that the section 61(A) of the Representation of Peoples Act and consequent rules under Chapter 2 of the conduct of Election Rules, 1961 as unconstitutional (d) declare that the elections under Electronic Voting Machine held in No. 12, Bangalore North Parliamentary Constituency as null and void (e) Award costs of the petition to the petitioner and (f) grant such other reliefs as the Hon'ble Court deems fit under the facts and circumstances of the case.

This petition coming on for hearing this day, the court made the following :

O R D E R

This Election Petition does not only challenge the integrity of the election of the first respondent but also the efficacy and integrity of the electronic voting machine used in the election of Yelahanka Parliamentary Constituency. The petitioner is the unsuccessful contestant at the 13th Loksabha Parliamentary Election held on 6-10-1999. The First respondent is the successful candidate. The respondent 2 to 5 are the other contesting candidates. Respondents 6 to 8 are Election Commission and its officers. This court deleted respondent 6 to 8 as not necessary parties. The Supreme Court confirmed the order.

2. The gist of the objections raised by the petitioner in the Election Petition disclose that the amendment to Representation of Peoples Act by incorporating section 61A and making provision for use of electronic voting machines and the consequent amendment to Rules is bad in law as it permits arbitrariness and

ultra vires the Constitution. An election conducted with the aid of electronic voting machine does not ensure the free and fair polling and counting, in view of the inherent defects in the electronic voting machine. It is also contended that electronic voting machine is vulnerable to tampering. Besides it is alleged that on account of the inherent errors in the electronic voting machine, there has been no proper counting of the votes.

3. The first respondent has denied the allegations made in the petition. The following issues were framed by my predecessor.

1. Whether the petitioner proves that there has been non-compliance of the provisions of the Constitution, Act, rules or orders made under the Act from the time of polling to counting resulting in materially affecting result of the election in so far as the first respondent is concerned?

2. Whether S.61 of the Representation of People Act and consequent rules under Chapter 2 of the conduct of Election Rules, 1961 is ultra-vires the constitution?

3. Whether the petitioner proves that elections held to No. 12, Bangalore North Parliamentary Constituency by using the Electronic voting machines is null & void?

4. Consequently whether the petitioner is entitled for a declaration that the result of the 1st respondent electing him from no.12 Bangalore North Parliamentary Constituency is liable to be declared as null and void?

5. Whether the petitioner has made out a case for re-poll?

4. In view of the disputed contentions, an additional issue is framed in the following manner:

Whether the electronic voting machines used in the conduct of the election is vulnerable to mischief or whether the electronic voting machine has in-built safeguards of tamper proof?

5. This case as usual of the civil litigations does not stand out as an exception for expeditious disposal. By the time the evidence is commenced and concluded, the political scenario of the country has undergone a thorough change, threatening a premature dissolution of Loksabha. In view of the changed contest, the Counsel for the petitioner submits that factual contentions regarding impropriety and illegality of election canvassed in the petition are given up and confine to challenge only on the legal aspects and feasibility of the use of electronic voting machines in the election process.

6. The Supreme Court in M*ohinder Singh Gill V. Chief Election Commissioner, New Delhi* 1978)2 SCR 272, (AIR 1978 SC 851) with lucidity has explained the scope and powers of the Election Commission while interpreting article 324 of the Constitution. Primarly the Legislature has to frame Rules regarding the superintendence, control and conduct of elections. Any gray area not covered by the rules, the Election Commission is empowered to regulate with the approval of the Government. The Election Commission cannot conduct itself over riding the provisions of the Act and the Rules.

7. In *A.C. Jose V Sivan Pillai and others,* AIR 1984 SC 921, for the first time the legitimacy of user of electronic voting machine in an election came in question. The Supreme Court held that in the existing structure of act and Rules, there is no provision for using electronic voting machine without necessary amendment and such a user was held to be bad in law. The Supreme Court further in para 36 listed out the serious faults in the use of electronic voting machine and found that with such defects it would not be advisable to use the electronic voting machine in the election.

8. Much water has flown under the bridge. There has been a tremendous advancement in the electronic technology. The electronic voting machine used in the election during 1982 is an obsolete model. The Scientist who is one of the co-designer of the electronic voting machine is examined as a court witness and his evidence unflinchingly supports the feasibility of use of electronic voting machines in the election. The defects of the machine pointed out in A.C. Jose's case no longer remain relevant. The present improved version of E.V.M. takes care of all those defects. The amendment to the People Representation Act and Rules is carried out pursuant to the observations of the Supreme Court. Therefore, it is untenable to contend that the amendment of the Act and Rules is ultra vires and bad in law.

9. About the functional efficacy of E.V.M., one of the scientists of the Bharat Electronic Limited (in short B.E.L.), who is the co-designer of the machine is examined as a court witness. The following is the gist of his evidence.

> Voting machine has two major units: one is control unit and other is balloting unit. Control unit is handled by the presiding officer, who is in-charge of the polling Booth. The control unit has all the intelligence in-built. The ballot unit is a dummy unit or otherwise called non-intelligence unit. The ballot unit has buttons and a lamp for each candidate arranged in a line. The ballot unit is kept in the polling compartment, 5 meters away from the control unit. The ballot Unit has a cable permanently attached. At the time of polling, the cable is connected to the control unit, when the voter press the button casting the vote to a candidate, the lamp by the side of the button will glow to indicate that the voting done is proper and simultaneously in the control unit a beep sound is heard to a range of 30 ft. The control unit functions in non-reversible cycle of voting process.

After the publication of the list of the candidates, the Returning Officer sets the number of contesting candidates in the control unit, which functions on a battery specially manufactured and supplied by B.E.L. The effective life of the battery is 48 hours of continuous functioning. In the balloting unit the printed ballot sheet is put behind the transparent screen. The balloting unit is capable of handling the ballot sheet containing 16 contestants and on the whole EVM is designed to handle a maximum of 64 contestants at an election. The balloting unit has got 16 buttons operatable through a panel cut out. After inserting the balloting paper in the ballot unit, the Returning Officer closes the lid and put a seal provided by the election commission in presence of the candidates/their agents. The lid and the flaps once closed and sealed cannot be opened without tampering the seal. The Returning officer simultaneously will set the control unit to receive the information about the number of candidates contesting in the election. By pressing the last “Can set” button in the control unit the number of contesting candidates is recorded. The candidate set compartment of the control unit is closed and sealed in the presence of the candidates / their agents. Thereafter the control unit and the balloting unit are put separately in a carrying cases and are sealed by the Returning Officer in presence of candidates/agents. The carrying cases containing control unit and balloting Unit are delivered to the presiding officers on the previous day to the election and would be carried to the polling booth.

The polling officer will verify the seals of the carrying cases, take out the control unit and balloting unit, verify the correctness of the seals. An hour before the polling time, mock poll is conducted to verify the functional capacity. The agents/candidates are asked to press the button in the balloting unit to cast their votes. Later on the “result

button" in the micro controller is pressed which display the number of votes polled. After demonstration of the correctness of the function, the 'clear button' is pressed which will erase all the data of the mock poll. After the mock poll, the presiding officer will close the result compartment by putting the seal provided by the election commission by which the voting machine is ready for polling.

The voter presents before the Presiding Officer, after verifying the identify, the Presiding Officer will press the 'balloting button' in the control unit and sent the voter to the polling cabin. When the voter press the 'balloting button' casting vote to the candidate of his choice, the lamp by the side of the button will glow indicating the correctness of voting. The control unit will give a beep sound to indicate that the vote casted is registered in the control unit. For the next vote to be casted, again it is necessary that the 'balloting button' in the control unit is to be pressed by the Presiding Officer, otherwise, mere pressed of button in the balloting unit by the voter will be of no consequence. For every next vote to be casted, it is necessary that the 'balloting button' in the control unit is to be pressed by the Presiding Officer. After polling time is over 'close button' in the control unit is pressed by the Pressing Officer by which the machine gets locked. Thereafter, the balloting unit is disconnected from the control unit, they are separately packed in the carrying cases and sealed in presence of the agents by the presiding officer. Later on they are transported to the counting centers and ballot unit and control unit are kept in a strong room before they are taken to the counting centers. At the time of counting, seals put by the Presiding officer to the control unit is verified to ensure that no tampering has taken place. When the 'result button' is pressed, machine will display the number of votes polled against each candidates sequentially.

Control unit has two main devise: one is micro controller and another is memory. Micro controller is one time programme component. Micro controller once fused with program code and data is unchangeable and irreversible. The memory device is functionally efficient and retain the voting data without the aid of a battery. The micro controller will record and register the voting data by cross checking with the memory for every vote. The programme code is encrypted and stored in the memory. It is not possible to replace the memory device in order to play mischief. If the memory device is removed, micro controller will detect and declare that the machine is in error state. The memory device and one time programmable micro controller are the pivotal devices of the EVM and they act as tamper proof device for the programme code and poll data.

If a voter damages the button of the balloting unit or for accidental reason the button of the balloting unit gets struck. Such errors are indicated in the control unit. In such cases, a spare balloting unit is used. The sound of error message is heard in the control unit like a alert sound, simultaneously the display panel will show letters “PE” indicating that balloting unit has gone out of order. If the connecting cable is damaged or cut, letter “LE” is displayed in the display panel of the control unit with an alert sound and these are the possible errors that can happen during use of machine during polling. If there is any error in the memory device, the machine is declared dead. The weak battery can also lead to error and the panel display will indicate by six dash marks. The presiding Officer will change the battery and continue polling. The defect in battery is a rare phenomenon. If the machine is not functioning, there will be no battery consumption.

The Micro controller manufactured with a given programme code is only useful for EVMS made for the elections by the B.E.L. Company and cannot be used for any other purpose. The programme code is encrypted by out-source agency in the presence of the responsible official of the BEL and the programme code is a business secret. Out-source agency would keep the encrypted data as utmost secrecy. It is further stated that the encrypted code and data is unchangeable and indelible by anybody, even by the manufacturer. Any attempt to tamper with the encrypted code would only result in damage to the machine. But the micro controller and memory cannot be manipulated by anybody. It is also stated that the EVM is tested to the temperature condition of 20 degree C to + 55 degree C. and electromagnetic radiation also would not affect the functioning of the machine. The witness categorically states that either by manipulation or by accident there is no possibility of transfer of votes from one candidate to another and the machine designed is fully tamper proof.

10. The witness is cross-examined at length by the counsel for the petitioner and nothing is elicited in the cross-examination from the witnesses about the vulnerability of the machine. The evidence on the other hand fully inspires the confidence of the court that the EVMs are fully tamper proof. There is no possibility of manipulation of mischief at the instance of anyone. The supreme Court in T.A. Ahammed Kabeer V A.A. Azeez and others, AIR 2003, 2271, has approved the fact that in the present version of EVM used in the 1999 general election, it is possible to get at the disputed impersonated votes by decoding. However, it is not possible to identify the impersonator, that short coming is well with the manual ballot system also.

11. The evidence further discloses that the EVM has seeming advantage over the traditional manual ballot method. In the manual method there is possibility of swift rigging at the end of polling time. But when the votes are cast through EVM

there has to be necessary minimum time lag between one vote and the next vote. Therefore, when the EVMs are used, the malpractice of rigging swiftly and quickly at the closing hours of the polling time stands avoided.

12. The EVMs have been put in use in the last general elections and in the last assembly elections in U.P. and other States. The practical wealth of experience has dispelled abundantly the theoretical unfounded apprehensions of the possible misuse. Cost-wise also, use of EVMs is economical. Traditional manual method involves huge cost towards printing charges and counting expenses. The said expenses will almost account to 30-40% of the election expenses. On one time investment by purchasing required EVMs, the cost of general elections to parliament and assembly and by-elections would get largely reduced. The life span of EVM is 15 years.

13. The invention of EVM has an interesting history. According to the evidence of the witness CW.1, the scientists of Bharath Electronics Limited developed electronic voting machine to handle the trade union elections. The election commission grasping the utility and its relevant to the country's general elections approached the B.E.L. for manufacturing a EVM suitable for the general elections. The scientists got involved themselves personally including C.W.1 in the general elections to study the nuances of the pattern and procedures of elections. After thorough practical experimentation and research the present version of EVM is designed. This invention is undoubtedly a great achievement in the electronic and computer technology and a national pride. It has come in the evidence of the witness that countries like Singapore, Malaysia and U.S.A. are interacting with BEL for supply of EVMs suitable for their election requirements.

14. For the reasons and discussions made above, Issue no.2 and additional issue is answered in affirmative. Issues No.1 and 2 and 4 pertain to the factual aspects of the election. In view of the imminent premature dissolution of Loksabha the Counsel has given up those issues. Accordingly, they are

answered in Negative and the election petition is dismissed. In the circumstances, no order as to costs.

The Registry is directed to furnish the copy of this judgment to the counsel appearing for the petitioner, to enable to her to submit the same to the election commission.

Sd/-
Judge

HIGH COURT OF CHHATTISGARH AT BILASPUR

Writ Petition No. 3627 of 2003

Election Commission of India

Vs.

State of Chhattisgarh and others

AND

Writ Petition No. 3628 of 2003

Election Commission of India

Vs.

State of Chhattisgarh and others

Petitioner by	Shri Kanak Tiwari with Shri Sandeep Dubey, Advocates
Respondent No. 1/ State by	Dr. N.K. Shukla, Addl. Advocate General
Respondent No. 2 by	Shri Prashant Mishra, Advocate
Union of India by	Shri Vinay Harit, Sr. Central Govt. Standing Counsel

Date of Order : 17.11.2003

SUMMARY OF THE CASE

In the matter of violation of model code of conduct by the two District Collectors, the Election Commission directed that those Officers be relieved of their duties District Election Officers–cum-District Collectors with immediate effect and given such postings that do not entail election related responsibilities and a panel of names of IAS Officers was called for appointment at their place. The two Collectors then filed the petitions before the Central Administrative Tribunal

aggrieved by the order passed by the State and claimed the following reliefs:- (i) to quash the impugned Order passed by the State, (ii) to call the relevant records and (iii) that the CAT may pass any such other orders as may deem fit. Interim relief sought was that pending final decision, the operation of the impugned order may be stayed and they be allowed to continue at the present place of posting. The CAT passed an interim order that status quo as existed on that day be maintained. After filing reply the Commission also filed application vacating stay and filed an application for pre-ponement of the date of hearing as the nomination was to start. The CAT then passed orders in both petitions that interim order to continue. The Election Commission then filed petition against the orders of the CAT. The Commission contended that the requirements under Section 24 of the Administrative Tribunals Act ought not to have been dispensed with in any case when they appeared and applied for vacation and pre-ponement, the Commission ought to have been heard on the implications of the interim order and same ought to have been vacated. The Collectors contended that the Commission has not heard them. The Court observed that in an ordinary course matter would have been remanded to the CAT for deciding the interim application for hearing both the parties but in view of the extraordinary situation regarding the conduct of elections it would be just and proper to decide the question of interim relief here. The Court held that it is case where ‘ a stitch in time would save nine’. And further held that the interim orders of CAT directing for maintaining status quo and its continuance are not legally sustainable and set aside the same and ordered CAT to decide the matter on its own merits in accordance with law.

O R D E R

As per Fakhruddin, J.

Both these petitions involve similar questions as such they have been heard together and being disposed of by common order:

2. The superintendence, directions and control of elections, preparation of Electoral rolls and conduct of all Elections for Parliament and State Legislature of every State vests under Article 324(1) of Constitution of India in Election Commission of India. It is provided that under Article 324(6) of the Constitution of India that the President or the Governor shall when requested by the Election Commission make available to it such staff as may be necessary for the discharge of the functions conferred on the Election Commission by Article 324(1) of the Constitution.

3. It is submitted by the petitioner that by notification issued by the Commission, the State of Chhattisgarh made available the staff including District Collectors / District Magistrate of the District and they have been notified as District Election Officer / District Returning Officer. It is contended that these officers/in the context of election related work are deemed to be on deputation to the election commission and subject to its disciplinary control. This has been made explicit according to petition under Section 13CC of the Representation of the People Act 1950 and Section 28A of the Representation of the People Act 1951.

4. It is submitted that the question of disciplinary jurisdiction of the Election Commission of India over officers under employment of Union of India and Governments of the States, Union Territories was the subject matter of Writ Petition (Civil) No. 606 of 1993 filed by the Election Commission of India before Hon'ble the Supreme Court under Article 32 of the Constitution of India. During pendency of the writ petition with a view to resolving certain differences that had arisen between the Election Commission of India and Union of India discussions were held between the said parties as well as nine other State Governments which were parties to the writ petition. Consequent thereto certain agreed terms of settlement were arrived at between the Election Commission of India and the Union of India as under :-

"The disciplinary functions of the Election Commission over officers, staff and police deputed to perform election duties shall extend to–

(a) Suspending any officer/official/police personnel for insubordination or dereliction of duty;

(b) Substituting any officer/official/police personnel by another such person, and returning the substituted individual to the cadre to which he belongs, with appropriate report on his conduct'

(c) Making recommendation to the competent authority, for taking disciplinary action, for any Act of insubordination or dereliction of duty, while on election duty, such recommendation shall be promptly acted upon by the disciplinary authority, and action taken will be communicated to the Election Commission; within a period of 6 months from the date of the Election Commission's recommendation.

(d) The Government of India will advise the State Governments that they too should follow the above principles and decisions, since a large number of election officials are under their administrative control."

5. It is submitted that the above terms of settlement were taken note of by Hon'ble the Supreme Court and W.P. No. 606/1993 was disposed of in terms of settlement vide order dated 21-9-2000. A copy of which has been field as Annexure P-1. Annexure P-1 is relevant and quoted below:-

O R D E R

"I.A. No. 5 of 2000 in W.P. (C) No. 606 of 1993

As between the Election Commission of India and the Union of India (the petitioner and the first respondent to the writ petition, it is

agreed that the writ petition be disposed of in terms of the Terms of Settlement recorded in paragraph (3) of the interim application.

Learned counsel for the Election Commission and the Union of India States that the States of Tripura Maharashtra, Tamil Nadu, Andhra Pradesh and Mizoram have accepted these terms in toto. Insofar as other States are concerned, there is some reservation either in respect of one or the other term or altogether.

The writ petition is disposed of in terms of aforesaid Terms of Settlements. As against States other than respondents 4, 6 and 7, the writ petition is allowed to be withdrawn and the issue is left open to be agitated in the appropriated proceedings, if raised.

S.L.P. (C) No. 12481 of 1993

Learned counsel for the Election Commission of India (petitioner states that the special leave petition has become infructuous. It is disposed of as such.

S.L.P. (C) No. 12721 of 1993

Learned counsel states that the issue involved in the original writ petition has been settled. On the application of learned counsel for the petitioner, the special petition is dismissed as withdrawn.

T. P. (C) No. 772 of 1993

The transfer petition relating to the afore-mentioned writ petition, therefore, does not survive and is dismissed as withdrawn.

T. P. (C) No. 774-75 of 1993

Learned counsel for the Election Commission of India (petitioner) states that these transfer petitions have become infructuous. They are disposed of as such.

T. P. (C) No. 39 of 1998.

The petitioner in-person is not present despite notice. In any event, the issue is now settled by the Terms of Settlement between the Election Commission of India and the Union of India in writ petition (c) No.606 of 1993. The transferred case is, therefore dismissed."

6. It is further submitted that consequent to Annexure P1, the Ministry of Personnel, Public Grievances and Pension issued Office Memoranda dated 7.11.2000 (Annexure P-2) and on 8-11-2000 Union of India addressed to all states Governments and Union Territories conveying to them the terms of settlement and requested that the State Governments may follow the terms of settlement in the case of officials deputed for Election duties by the State Government. Copy of which has been filed as Annexure P-3.

7. It is contended that the Election Commission had issued directives regarding banning the transfer of officers connected with the General Election / Bye Election and some of them are filed as Annexure P4. It is contended that the petitioner has also issued Code of Conduct for universal application in the States where the Assembly elections are to take place in the Month of November and December, 2003. A Compendium of Directions/instructions is filed as Annexure P-5.

8. It is submitted that the directions/instructions came to the knowledge of respondent No.2 on or about 10th October 2003. It is stated that the petitioner enjoys residuary powers for which no specific law has been made or any statutory rules issued and uses such jurisdiction with regard to such residuary powers as and when deemed fit in the larger interest of free and fair elections and therefore the provision is made that "in the special circumstances, transfers could be effected after permission of the Election Commission."

9. It is said that these powers are for a very limited period i.e. during the course of election proceedings. It is contended that respondent No.3 Central

Administrative Tribunal has been constituted. The jurisdiction, powers and authority of the Central Administrative Tribunal is given in Section 14 of the 1985 Act. It is submitted that Section 3(Q) defines service matters. The contention is that action of petitioner is that of merely shifting and does not fall within the mischief of the definition of service matters. It is submitted that the petitioner passed the order dated October 28, 2003 and issued directions to the State against Collectors of Jashpur and Baster for posting to Mantralaya. The State therefore passed order on 29th October 2003 posting them to mantralaya. It is stated that the Commission passed the order on receipt of the complaints. The Commission sought explanations of the District Election Officer and District Collectors of Jashpur and Bastar regarding violation of the Code of Conduct by them, and after considering the explanations offered by them, the Election Commission directed that these officers be relieved of their duties as District Election Officers and District Collectors with immediate effect and given such postings that do not entail election related responsibilities. It is also submitted that a panel of names of IAS officers was called for by return fax for the consideration of the Commission for appointment as District Collectors and District Election Officer of Jashpur and bastar districts.

10. Counsel for the petitioner submits that the respondent No.2 in each case holding the post of District Election Officer by virtue of Collector/District Magistrate presented the petitions before the Central Administrative Tribunal aggrieved by the order passed by the State. The reliefs claimed in those petitions are identical and are quoted below:–

> "(i) to quash the impugned order dated (Annexure A-9) passed by the respondent No.1.
>
> (ii) to call the relevant records.
>
> (iii) this Hon'ble Tribunal may kindly be further pleased to pass any such other order as this Hon'ble Tribunal may deem fit under the circumstances of the case."

11. The interim relief claimed in para 9 of the petition before the Central Administrative Tribunal is quoted below:–

> "Pending final decision, the operation and effect of the impugned order dated Annexure A-9, passed by the respondent No.1, may please be stayed and the petitioner be allowed to continue at the present place of posting."

12. The matter came up for hearing before the Central Administrative Tribunal, which after hearing the counsel appearing for respective Collectors passed the orders on 31-10-2003. This order dated 31-10-2003 passed in O.A. No. 755/2003 in case of Collector Jagdalpur by the Tribunal reads as under:-

> "**31.10.2003**
>
> Shri P.R. Bhave, learned Senior Advocate with Shri S.D. Gupta, learned counsel for the applicant.
>
> Heard the learned counsel for the applicant.
>
> The applicant who is a Collector and District Magistrate at Jagdalpur (Chhattisgarh) has filed this Original Application and has sought a direction to quash the order dated 29-10-2003 (Annexure A-7) by which he has been transferred to Secretariat Chhattisgarh State, Raipur. He has further sought a direction that pending final decision of this OA, the operation and effect of the impugned order dated 29-10-2003 be stayed.
>
> It has been alleged by the applicant that the impugned order passed by the respondent is arbitrary, punitive in nature and not in compliance of the principles of *audi altarum partam.* According to the applicant he has been transferred on the ground that he has violated the directions of the Election Commission and allowed the

distribution of five school bags even after the order of the Election Commission to stop the same. The applicant has stated that there is no lapse on the part of him and the directions issued by the Election Commission were promptly complied by him. He further submitted that the opportunity to furnish explanation given by the Election Commission was an empty formality, since the Election Commission has not considered the applicant's explanation before passing the impugned order.

We are well aware of the legal position laid down by the Hon'ble Supreme Court that the Court/Tribunal should not interfere in the matter of transfers unless they are violative of statutory rules or have been issued with malafide intention or are punitive in nature. In this case, the applicant has alleged that the transfer made by the respondents is arbitrary and punitive in nature and is in violation of principles of natural justice and Article 14 of the Constitution of India.

Issue notice to the respondents to show cause as to why this case be not admitted.

Shri K.N. Pethia, Additional Standing counsel for UOI present in the Court takes notice on behalf of Respondent No. 3. The learned counsel for the applicant is directed to serve notices to respondents 1 & 2 by speed post. Let reply be filed within a period of four weeks and rejoinder, if any, within a period of two weeks thereafter.

As regards interim relief, a short reply be filed by the respondents within a period of 10 days. In the meantime status quo as existed today shall be maintained.

List it for further orders on 13.11.2003 at Indore. C.C. be granted."

More or less similar is the order passed in O.A. No. 754/2003 in case of Collector Jashpur. The bone of contention is the interim order in both case to the effect that "As regards interim, a short reply be filed by the respondents within a period of 10 days. In the meantime the status quo as existed today shall be maintained."

13. It is submitted that the petitioner/Election Commission filed reply before the learned Central Administrative Tribunal. It also filed its letter dated 28-10-2003 Annexure (R-1/1), addressed to the Chief Secretary, State of C.G. Annexure R.1/1 dated 28.10.2003 is relevant and quoted below :-

"Dear Sir,

The commission had received following complaints regarding violation of Model Code of Conduct in Jashpur and Bastar Districts.

1. The school bags with the photographs of Shri Ajit Jogi, Chief Minister of Chhattisgarh are continuing to be distributed.

2. Some spectacles under a Government programme were distributed by the wife of Shri Ajit Jogi, the Chief Minister of Chhattisgarh in official functions organized in Jashpur and Baster District.

3. The District Collector of Jashpur traveled with Shri Ajit Jogi, Chief Minister of Chhattisgarh on a private helicopter requisitioned for election work by the Chief Minister.

The Commission had sought explanations of the District Election Officers and District Collectors of Jashpur and Baster regarding these violations. After considering the explanations offered by them, the Commission finds their conduct unbecoming of civil servants who exercise statutory powers as District Election

Officers and Returning Officer during the election period. The Commission has directed that these officers may be relieved of their duties as District Election Officers and District Collectors with immediate effect and given such positions that do not entail election related responsibilities. A panel of names of IAS officers may kindly be sent by return fax for the consideration of the Commission for appointment as District Collector and District Election Officers of Jashpur and Bastar Districts.

Yours sincerely,

(Anand Kumar)"

11. The petitioner / Election Commission also filed an application for vacating stay and also filed an applicant for pre-ponement of the date of hearing as the nomination was to start from 7-11-2003. The case came up for hearing before the learned Central Administrative Tribunal on 5-11-2003 and the learned Tribunal passed similar orders in both the petitions which read as under :-

"5.11.2003

Shri S.D. Gupta, learned counsel for the applicant.

Shri K.K. Trivedi, learned counsel for respondent No.1.

Shri K.N. Pethia, learned counsel for respondent No.3.

None for respondent No.2

This case was earlier fixed for orders on 13-11-2003 at Indore. The respondent no.1 has filed M.A. No. 1487/2003 for pre-ponement. Accordingly, the case is taken up today.

The order of status – quo was passed by this Tribunal on 31.10.2003 and in terms of the provisions of proviso to Section 24(b)

of the Administrative Tribunals Act, 1985, the case was directed to be listed for hearing on 13.10.03. As there was no Bench available at Jabalpur, the case was listed for hearing at Indore on 13.11.2003.

One of the grounds taken by the respondent No. 1 for pre-poning the date of hearing is the inconvenience to be faced for hearing at Indore.

The respondent No.1 has also filed an application for vacation of stay (MA No.1497/2003) and also a short reply to the OA. The Registry has pointed out that a copy of the same has not been served to the opposite parties. The learned counsel for the applicant submits that a copy of the same has been received by him only yesterday and he wants some short adjournment to reply to the aforesaid MA for vacation of stay. He further submits that unless an opportunity of hearing is given to the applicant to submit his case against the MA for vacation of stay, he cannot argue the case properly.

At this stage both the leaned counsel for applicant as well as respondent No. 1 agreed that the case may be finally fixed for hearing at Jabalpur on 21-11-2003.

Accordingly, list this case for final hearing at Jabalpur on 21.11.2003. In the meantime the respondents No.2 & 3 are directed to file their replies.

MA 1487/2003 is accordingly disposed of and the MA 1497/2003 will be taken up for hearing at the time of final hearing.

Interim order to continue.

C.c. be granted to the learned counsel for parties as per rules."

15. The present petitions have been filed by the petitioner / Election Commission against the order of respondent No. 3 dated 31-10-2003 as well as order dated 5.11.2003.

16. These matters came up for hearing on 7-11-2003 and after hearing the counsel for the petitioner / Election Commission, notices were issued to respondent No. 2 in each petitions, the Addl. Advocate General took notice on behalf of the State / respondent No.1 and as the Union of India was also a party before the Tribunal, notice was also given to the Sr. Standing Counsel for the Union of India Shri Vinay Harit. On 10-11-2003, it was submitted that returns on behalf of respondents No. 1 and 2 have been filed. It was stated by Shri Vinay Harit that he adopts the argument of the counsel for the petitioner. Counsel agreed that the matter be heard finally and accordingly heard.

17. Dr. Shukla, Addl. Advocate General appearing for the respondent No. 1 / State submitted that the State of CG on the receipt of order dated 28-10-2003 issued by the Election Commission, issued order dated 29-10-2003 regarding posting of the Collector, Jashpur and Collector Bastar and as such complied with the direction of Election Commission. It is submitted that Collector Jashpur and Collector Bastar filled the petitions before the General Administrative Tribunal and it is the Central administrative Tribunal, which has passed the order. It is reiterated that State on its return has stated legal submissions before this Court although on its part it has complied the order. In para vi of return, it is stated that the order is consent order and as such it cannot be challenged as the same has been passed by the Tribunal which has jurisdiction. The other contention is that the orders are interim orders and as such not amenable to writ jurisdiction of this Court under Article 227 of the Constitution of India. It is also submitted that Section 24 enables the Tribunal to pass interim orders and that having been passed cannot be challenged. It is further submitted that the Election Commission has already surrendered to the jurisdiction of Central Administrative Tribunal by submitting reply to the main application as well as application for

vacating stay. It is also contended that the Tribunals have been constituted under Article 323-A of the Constitution and can not be subjected to judicial review. It has been contended that the Commission has recorded a categorical finding that the respondent No. 2 conducted in a manner which is unbecoming of a civil servant and the Election Commission conducted an enquiry on the complaint made to it by seeking explanations from the respondent No. 2 and further that the Election Commission considered the material which was placed before it including the complaint and explanation of respondent No. 2. It is also contended that the Election Commission (petitioner) reached to the conclusion after due consideration that respondent no. 2 is guilty of misconduct to such an extent that his conduct is 'unbecoming of a Civil Servant". It is further contended that the above findings of the Election Commission which is a Constitutional Body of the highest rank would adversely affect the future prospects of respondent no. 2 and it would be weapon in the hands of the other competitors for the future promotion against respondent no. 2 It is also submitted that the material which is in possession of respondent / State shows that the respondent No. 2 is not guilty of violating of any code of conduct laid down by the Election Commission. Lastly it is reiterated that the jurisdiction is vested with the Central Administrative Tribunal.

18. The respondent No. 2 in each of the petitions have filed the return contending that the order passed by the State on 29-10-2003 is illegal and contrary to law. It is also submitted that Collector Bastar has not received any communication and explanation was not called for and he has not submitted any explanation. It is contended that the Tribunal has rightly passed the interim order and the order is consent order. It is further submitted that the respondent No. 2 have not violated any code of conduct. They have complied with the directions, they cannot be without remedy and they have exercised their right by invoking jurisdiction of Central Administrative Tribunal and further the Tribunal has acted in accordance with law. It is submitted that the respondent / Collectors are being victimized.

19. Section 14 of the Administrative Tribunals Act deals with jurisdiction, powers and authority of the Administrative Tribunals. Section 14 reads as under:-

> "14. **Jurisdiction, powers and authority of the Central Administrative Tribunals.** (1) Save as otherwise expressly provided in this Act. The Central Administrative Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers ad authority exercisable immediately before that day by all courts (except the Supreme Court) in relation to :
>
> (a) recruitment, and matters concerning recruitment, to any all-India Service or to any civil service of the union or a civil post under the Union or to a post connected with defence or in the defence services, being, in either case, a post filled by a civilian;
>
> (b) All service matters concerning-
>
> (i) a member of any All-India Service; or
>
> (ii) a person [not being a member of an All India Service or a person referred to in Clause(C)] appointed to any civil service of the Union or any civil post under the Union; or
>
> (iii) a civilian [not being a member of an All-India Service or a person referred to in Clause (C)] appointed to any defence services or a post connected with defence,
>
> and pertaining to the service of such member, person or civilian, in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation [or society] owned or controlled by the Government;

(c) all service matter pertaining to service in connection with the affairs of the Union concerning a person appointed to any service or post referred to in sub-clause (ii) or sub-clause (iii) of clause (b), being a person whose services have been placed by a State Government or any local or other authority or any corporation [or society] or other body, at the disposal of the Central Government for such appointment.

20. Section 24 of the Administrative Tribunals Act confers jurisdiction and conditions as to making of interim orders. Section 24 of the Administrative Tribunal Act is also relevant and quoted below:-

"24. **Conditions as to making of interim orders.**-Notwithstanding anything contained in any other provisions of this Act or in any other law for the time being in force, no interim order (whether by way of injunction or stay or in any other manner) shall be made on, or in any proceedings relating to, an application unless-

(a) copies of such application and of all documents in support of the plea for such interim order are furnished to the party against whom such application is made or proposed to be made; and

(b) opportunity is given to such party to be heard in the matter;

Provided that a Tribunal may dispense with the requirements of clause (a) and (b) and make an interim order as an exceptional measure if it is satisfied, for reasons to be recorded in writing, that it is necessary so to do for preventing any loss being caused to the applicant which cannot be adequately compensated in money but any such interim order shall, if it is not sooner vacated, cease to have effect on the expiry of a period of fourteen days from the date on which it is made unless the said requirements have been

complied with before the expiry of that period and the Tribunal has continued the operation of the interim order."

21. It is borne out from the record that the Election Commission as per Annexure P-11 on October 28, 2003, which has been quoted above, issued a direction that these officers i.e. respondent No. 2 in each petition, may be relieved of their duties as District Election Officers and District Collectors with immediate effect and given such postings that do not entail election related responsibilities. It was further directed that a panel of names of IAS officers may be sent by return fax for the consideration of the Commission for appointment as District Collector and District Election Officer of Jashpur and Bastar Districts.

22. The State of Chhattisgarh on 29-10-2003 passed an order respect of L.N. Suryawanshi and Shri B.S. Anant as per Annexure P-9, Annexure P-9 is quoted below:-

1- श्री एल.एन. सूर्यवंशी, भा०प्र०से० (१९९२) कलेक्टर, जिला बस्तर को तत्काल प्रभाव से अस्थाई रूप से आगामी आदेश तक संयुक्त सचिव, छत्तीसगढ़ शासन, मंत्रालय, रायपुर पदस्थ किया जाता है।

2- श्री बी०एस०अनन्त, भा०प्र०से० (१९९३) कलेक्टर, जिला-जशपुर को तत्काल प्रभाव से अस्थाई रूप से आगामी आदेश तक संयुक्त सचिव, छत्तीसगढ़ शासन, मंत्रालय, रायपुर पदस्थ किया जाता है।

छत्तीसगढ़ के राज्यपाल का नाम से तथा

आदेशानुसार

एस०के० मिश्र

मुख्य सचिव''

23. Article 324 of Constitution deals with superintendence, direction and control of elections to be vested in an Election Commission Article 324 (1) and 324 (6) of the Constitution of India are relevant and quoted below:-

"324 **Superintendence, direction and control of elections to be vested in an Election Commission.**- (1) The superintendence, direction and control of the preparation of the electoral rolls for and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as Election Commission).

(2) ……..

(3) ……..

(4) ……..

(5) ……..

(6) The President, or the Governor of a State, shall, when so requested by the Election Commission, made available to the Election Commissioner or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by Clause (1).

24. The Representation of the People Act 1950 and Representation of the People Act 1951 have also been referred to by the counsel for the parties. Section 13 CC of the Representation of People Act 1950 is relevant quoted below:-

"13 CC. **Chief Electoral Officers, District Election Officers, etc. deemed to be on deputation to Election Commission. –** The officers referred to in this Part and any other officer or staff employed in connection with the preparation, revision and correction of the electoral rolls for and the conduct of all elections shall be

deemed to be on deputation to the Election Commission for the period during which they are so employed and such officers and staff shall, during that period be subject to the control, superintendence and discipline of the Election Commission."

25. Section 15 of the Representation of the People Act relates to notifications for general election to a State Legislative Assembly and Section 28-A of the Representation of the People Act relates to Returning officer, presiding officer etc., deemed to be on deputation to Election Commission Sections 15 and 28A are also relevant and quoted below:-

"Notification for general election to a State Legislative Assembly. –(1) A General Election shall be held for the purpose of constituting a new Legislative Assembly on the expiration of the duration of the existing Assembly or on its dissolution.

(2) For the said purpose, the Governor or Administrator, as the case may be, shall by one or more notifications published in the official Gazette of the State on such date or dates as may be recommended by the Election Commission, call upon all Assembly constituencies in the State to elect members in accordance with the provisions of this Act and of the rules and orders made thereunder:

Provided that where a general election is held otherwise than on the dissolution of the existing Legislative Assembly, no such notification shall be issued at any time earlier than six months prior to the date on which the duration of that Assembly would expire under the provisions of Clause (1) of Article 172 or under the provisions of Section 5 of the Government of Union Territories Act. 1963 (20 of 1963), as the case may be.

28-A. Returning Officer, presiding officer, etc., deemed to be on deputation to Election Commission – The returning officer,

> assistant returning officer, presiding officer, polling officer and any other officer appointed under this Part, and any police officer designated for the time being by the State Government, for the conduct of any election shall be deemed to be on deputation to the Election Commission for the period commencing on and from the date of the notification calling for such election and ending with the date of declaration of the results of such election and accordingly, such officers shall, during that period, be subject to the control, superintendence and discipline of the Election Commission.

26. Shri Prashant Mishra appearing for respondent No. 2 relied on *AIR 1994 SC 1144 (Shriram Refrigeration Industries Ltd. and anr. –v- Commercial Tax Officer and ors)* and contended that writ against pending appeal before the appellate authority on similar issue by same party cannot be entertained. So far this authority is concerned, it is distinguishable as the jurisdiction being exercise under Article 227 of the Constitution in view of L. Chandra Kumar (supra). He further relied on 1996 SC 98 [para 26 (U.P. sales Tax Service Association – v- Taxation Bar Association Agra and ors.] He submitted that High Court has no power to prohibit the authority exercising statutory power from discharging statutory functions. Shri Mishra also relied on para 6 of judgment in (2001)8 SCC 97 (Estralla Rubber – v – Dass Estate (P) Ltd. He further relied on para 6 of judgment in (2001)8 SCC 477 (Sugarbai M. Siddiq and Ors. – v- Ramesh S. Hankare (dead) by irs.) He submitted that it was held in that case that in application under Article 227 of the Constitution of India, the High Court has to see whether the lower Court / tribunal has jurisdiction to deal with the matter and if so, whether the impugned order is vitiated by procedural irregularity; in other words, the Court is concerned not with the decision but with the decision making process. Shri Mishra relied on 2002(1) SCC 319 (Ouseph Mathai & Ors. – v – M. Abdul Khadir). He also relied on 1977 sc 2155 (All Party Hill Leaders' Conference Shilong – v – Captain W.A. Sangama and ors.) He also relied on para 5 of decision in 1955 SC 1(Gopal Das Mohta – v- Union of India and anr). Then he relied on para 1987 (Supp) SCC 136 (M/s. Hind

Lamps Ltd. – v- Commissioner of Income Tax, U.P.) Suffice it to say that in view of L. Chandra Kumar (Supra), this Court has jurisdiction under article 227 of the Constitution.

27. Dr. N.K. Shukla, learned Addl. Advocate General addressed on the question of jurisdiction of the Tribunal. He relied on L. Chandra Kumar's case (supra). He further relied on decision in AIR 1952 SC 16 (Commr. of Police, Bombay – v – Gordhandas Bhanji) and in AIR 1986 SC 111 (Kanhiya Lal Omar – v – R.K. Trivedi). Learned Addl. Advocate General further submitted that the Commission does not have any immunity. It is contended that Article 324 does not enable the Election Commission to override any of the legislations or statutory rules having force of legislation in any of the States. The Election Commissino can at the most recommend particular line of action to be adopted by the authorities on the subjects on which it does not possess authority or jurisdiction. He referred to decision in. He further relied on AIR 1992 Bombay 3 (Maharashtra Wine Merchants Association and ors - v – the State of Maharashtra and anr.) Regarding stand of the State Government learned Addl. Advocate General submitted that the State Government has passed the order on 29-10-2003.

28. Counsel for the respondent No. 2 contended that it is the Administrative Tribunal, which has the jurisdiction. Counsel referred to Kendriya Vidyalaya Sangathan and another – v – Subhash Sharma etc. (AIR 2002 SC 1295). It is contended that the Administrative Tribunals Act applied to all categories of Central Govt. servants. In this case. 1997 AIR SCW 1345 (Chandra Kumar – v – union of India and others) has also been considered.

29. Counsel for the petitioner vehemently contended that under Section 24 of the Administrative Tribunals Act, no interim order whether by way of injunction or stay or any order ought to have been made without hearing the Election Commission of India and giving to the Commission an opportunity in the matter specially in view of the notification for election having been issued on 3rd October 2003 and 7-10-2003. It is submitted that notice having not been given to them,

they have been greatly prejudiced. It is further submitted that requirements under Section 24 of the Act ought not to have been dispensed with and in any case when they appeared and apply for vacation and pre-ponement, the Commission ought to have been heard on the implications of the interim order and the same ought to have been vacated. The argument of counsel for the respondent-Collectors on the other hand is that the Election Commission has not provided opportunity and it was merely an empty formality and an eye-wash. Though in the order Annexure R/1, It is stated that explanations were called for, reply received and considered. In this connection it is pertinent to refer the decision of Hon'ble Court in case of Canara Bank – v – Debasis Das (AIR 2003 SC 2041), specially paragraphs 14 to 21 and they are quoted below:-

> "14. The expressions "natural justice" and "legal justice" do not present a water-tight classification. It is the substance of justice which is to be secured by both and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigants' defence.
>
> 15. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the

purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Rudymade in 1215, the first statutory recognition of this principle found its way into the "Magna Carta." The classic exposition of Sir Edward Coke of natural justice requires to "vocate interrogate and adjudicate." In the celebrated case of Cooper v. Wandsworth Board of Works (1963 (143) ER 414), the principle was thus stated :

"Even God did not pass a sentence upon Adam, before he was called upon to make his defence. "Adam" says, God, "where art thou has thou not eaten of the tree whereof I commanded thee that though should not eat."

Since then the principle has been chiseled, honed and refined, enriching its content. Judicial treatment has added light and luminosity to the concept, like polishing of a diamond.

16. Principles of natural justice are those rules which have been laid down by the Court as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.

17. What is meant by the term 'principles of natural justice' is not easy to determine. Lord Stummer (then Hamilton LJ) in Ray v. Local

Government Board (1914) 1 KB 160 at p. 199 : (83 LJKB 86) described the phrase as sadly lacking in precision. In General Council of Medical Education and Registration of U.K. V. Sanckman (1943 AC 627) : (1948) 2 All ER 337). Lord Wright observed that it was not desirable to attempt to force it into any procrustean bed and mentioned that one essential requirement was that the Tribunal should be impartial and have no personal interest in the controversy, and further that it should give a full and fair opportunity to every party of being heard.

18. Lord Wright referred to the leading cases on the subject. The most important of them is the Board of Education vs. Rice (1911 AC 179 : 80 LJKB 796), where Lord Loreburn, LC observed as follows:

"Comparatively recent statutes have extended, if they have originated, the practice of imposing upon departments or offices of State the duty of deciding or determining questions of various kinds. It will, I suppose usually be of an administrative kind, but sometimes, it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases, the Board of Education will have to ascertain the law and also to ascertain the facts. I need not an that in doing either they must act in good faith and fairly listen to both sides for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial……. The Board is in the nature of the arbitral Tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upn law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari."

Lord Wright also emphasized from the same decision the observation of the Lord Chancellor that the Board can obtain information

in any way they think best, always giving a fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statement prejudicial to their view." To the same effect are the observations of Earl of Selbourne, LO in Spackman v. Plumstead District Board of Works (1985 (10) AC 229 : 54 LJMC 81), where the learned and noble Lord Chancellor observed as follows:

"No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, law will imply no more than that the substaintial requirements of justice shall not be violated.He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice."

Lord selbourne also added that the essence of justice consisted in requiring that all parties should have an opportunity of submitting to the person by whose decision they are to be bound, such consideration as in their judgment ought to be brought before him. All these cases lay down the very important rule of natural justice contained in the oft-quoted phrase justice should not only be done, but should be seen to the done.'

19. Concept of natural justice has undergone a great deal of change in receipt years. Rule so natural justice are not rules embodied always expressly in a statute or in rules framed there under. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied an what its

context should be in given case must depend to a great extent on the fact and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. Expression 'civil consequences' encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its vide umbrella comes everything that affects a citizen in his civil life.

20. Natural justice has been variously defined by different Judges. A few instances will suffice. In Drew v. Drew and Lebura (1855 (2) Macg. 1.8. Lord Cranworth defined it as 'universal justice'. In James Dunber Smith v. Her Majesty the Queen (1877-78 (3) App Case 614, 623 JC) Sir Robort P. Collier, speaking for the Judicial Committee of Privy Council, used the phrase the requirements of substantial justice,' while in Arthur John Specman v. Plumstead District Board of Works (1884-85 (1) App Case 229, 240), Earl of Selbourne, SC preferred the phrase 'the substantial requirement of justice.' In Vionet v. Barrett (1885 (55) LJRD 39, 41 (lord Esher, MR defined natural justice as the 'the natural sense of what is right and wrong.' While, however, deciding Hookings v. Smethwick Local Board of Health (1890) (24) QBD 712). Lord Easher, M.R. instead of using the definition given earlier by him in Vioner's case (supra) chose to define natural justice as 'fundamental justice.' In Ridge v. Baldwin (1963) (1) WB 569, 578), Harman LJ, in the Court of appeal countered natural justice with 'fair-play in action' a phrase favoured by Bhagawati, J. in Maneka Gandhi v. Union of India (1978) (2) SCR 621). In Re R.N. (An Infaot) (1967 (2) B 617, 530), Lord Parker, C.J., preferred to describe natural justice as 'a duly to act fairly'. In Fairmount Investments Ltd., v. Secretary to State for Environment (1976 WLR 1255) Lord Russell of Willowan somewhat picturesquely

described nature justice as ‘a fair crack of the whip’ while Geoffrey Lane, LJ in Regina v. Secretary of State for Home Affairs Ex Parte Hosenball (1977 (1) WLR 766) preferred the homely phrase ‘common fairness’.

21. How then have the principle of natural justice been interpreted in the Court and within what limits are they to be confined? Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including therein quasi-judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair-play and justice which is not the preserve of any particular race or country but is shared in common by all men. The first rules in ‘nemo judex in causa sua’ or ‘nemo debet esse judex in propria causa sua’ as stated in (1605) 12 Co. Rep. 114 that is, ‘no man shall be a judge in his own cause,’ Coke used the form ‘aliquis non-debet esse judex in propria causa quia non-potest esse judex at pars’ (Co. Litt. 1418), that is, ‘no man ought to be a judge in his own case, because he cannot act as Judge and at the same time be a party.’ The form ‘nemo potest esse simul actor et judex, that, is ‘no one can be at once suitor and judge’ is also at times used. The second rule is ‘audi alteram partem,’ that is, here the other side, ‘At times and particularly in continently countries, the form ‘audietur at altera pars’ is used, meaning very much the same thing. A corollary has been deduced from the above two rules and particulary the audi alteram partem rule, namely, ‘quialiquid statuterit parte inaudita alteram actquam licet dixerit, haud acquum facerit’ that is, ‘he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right’ (See Bosewell’s case (1605) 6 Co. Rep. 48-b 52-a) or in other words, as it is now expressed, ‘justice should not only be done but should manifestly be seen to be done’.. Whenever an order is struck down as invalid being in violation of principles of natural justice,

there is no final decision and fresh proceedings are left upon. All that is done is to vacate to order assailed by virtue of its inherent defect, but the proceedings are not terminated.

Hon'ble Supreme Court in the abovesaid judgment in the paragraph stated hereinabove has elaborately elucidated the principles of natural justice interpreted in our judicial setup over the years by a process of judicial interpretation. The facts of each case in hand have to be examined by the Court keeping in mind the principles stated hereinabove.

30. The jurisdiction, property of the interim orders dated 31-10-2003 and 5-11-2003, their validity or otherwise has been a ssailed. In this connection, it is pertinent to refer paragraphs 37 and 38 of the decision in Public Services Tribunal Bar Association –v- state of U.P. and another [(2003) 4 SCC 104]. Para 37 and 38 of the judgment are relevant and quoted below:-

"37. Transfer is an incident of service and is made in administrative exigencies. Normally it is not to be interfered with by the courts. This Court consistently has been taking a view that orders of transfer should not be interfered with except in rare cases where the transfer has been made in a vindictive manner.

38. From the above-quoted decisions, it is evident that this Court has consistently been of the view that by way of an interim order the order of suspension, termination, dismissal and transfer etc. should not be stayed during the pendency of the proceedings in the Court."

31. It is contended that interference at the interim stage in a matter like this where respondent No. 2 is District Magistrate / Collector and by virtue of that District Election Officer would be giving the final relief at an interim stage which he would have got in case the order is set aside then an employee can be compensated by moulding the relief appropriately. But in case, the order is found to be justified then holding of the office during limited period of election would amount to usurpation

of an office which the person was not entitled to hold. It is reiterated at the Bar by Shri Kanak Tiwari that the order is not punititve but simply to substitute the person without any entry in C.R. and it is totally left to State as regards disciplinary action. In this connection. Shri Tiwari referred to para 6 reply in O.A. No. 754 / 2003 filed by the Commission before the Tribunal wherein it is mentioned that "the allegations are made that such an order of transfer will go as punishment against the applicant. Neither the status of the applicant is changed nor there is any change in his service condition. The fact is not to be recorded in the service record of the applicant and, as such he is not going to be prejudicied in any manner therefore, the allegation that the applicant is being penalized without following the procedure is baseless, hence denied". The statement is recorded.

32. Learned counsel for the parties relied on (1997) 3 SCC 261 (L. Chandra Kumar – v – Union of India and others). Pra 86, 90, 91 and 99 of the above judgment are relevant and quoted below:

> "86. After analyzing the situation existing in the High Courts at length, the LCI made specific recommendations towards the establishment of specialist Tribunal thereby lending force to the approach adopted in Sampath Kumar Case? The LCI noted the erstwhile international judicial trend which pointed towards generalist courts vielding thm place to specialist Tribunals. Describing the pendency in the High Courts as 'catastrophic, crises-ridden, almost unmanageable, imposing… an immeasurable burden on the system", the LCI stated that the prevailing view in Indian Jurisprudence that the jurisdiction enjoyed by the High Court is a holy cow required a review. It therefore, recommended the trimming of the jurisdiction of the High Courts by setting up specialist courts / Tribunals while simultaneously eliminating the jurisdiction of the High Courts.
>
> 90. We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect

of the power of judicial review, the jurisdiction of the High Courts under Article 226/227 cannot wholly be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings any may cause avoidable delay, if such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subert the jurisdiction of the Tribunals. Moreover, even in these special branches of law. Some areas do involve the consideration of constitutional questions on a regular basis, for instance, in service law matters, a large majority of cases involve an interpretation of Article 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Article 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Article 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decisions on merits which will be of use to it in finally deciding the matter.

91. It has also been contended before us that even in dealing with cases which are properly before the Tribunals, the Manner in which justice is dispensed by them leaves much to be desired. Moreover, the remedy provided in the parent statues, by way of an appeal by special

leave under Article 136 of the Constitution, is too costly and inaccessible for it to be real and effective. Furthermore, the result of providing such a remedy is that the docket of the Supreme Court is crowded with decisions of Tribunals that are challenged on relatively trivial grounds and it is forced to perform the role of a first appellate court. We have already emphasized the necessity for ensuring that High Courts are able to exercise judicial superintendence over the decisions of the Tribunals under Article 227 of the Constitution. In R.K. Jain case, after taking note of these facts, it was suggested that the possibility of an appeal from the Tribunal on questions of law to a Division Bench of a High Court within whose territorial jurisdiction the Tribunal falls, be pursued. It appears that no follow up action has been taken pursuant to the suggestion. Such a measure would have improved matters considerably. Having regard to both the aforestated contentions, we hold that all decision of Tribunals, whether created pursuant to Article 323-A or Article 323B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Divisions Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls.

99. In view of the reasoning adopted by us, we hold that clause 2(d) of the Article 323-A and clause 3(d) or Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the exclusion of jurisdiction" clauses in all other legislations enacted under the aegis Article 323-A and 323-B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in

discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323-A and Article 323-B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these tribunals will however be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls. The Tribunals, will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigations to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated."

33. Article 227 of the Constitution of India is relevant here and quoted below:-

"**Power of superintendence over all courts by the High Court.** – (1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) without prejudice to the generality of the foregoing provision, the High Court may–

(a) call for returns from such courts'

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such court's and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) the High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practicing therein:

Provided that any rules made, forms prescribed or tables settle under clause (2) or clause (30 shall not be inconsistent with the provision of any law for the time being in force. And shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Forces.

34. Learned counsel for petitioner submitted that the conduct of the election is entrusted with the Election Commission and while exercising that function, Article 324(6) of the Constitution of India is there to get the officers and staff and cooperation has to be rendered. It is submitted that the commission having lost the confidence cannot trust on these officers and if they are allowed to continue, it will adversely affect the conducting of election.

35. Counsel for respondent No. 2 submitted that Collector Jashpur has not been given any opportunity. He submitted that the matter may be remanded and the Tribunal may be directed for hearing the case finally. Counsel for both the Collectors submitted that they have been put to victimization

36. Counsel for the petitioner submitted that the interests of the respondent no.2 are well safeguarded. In para 5.10 of the petition the petitioner has made a statement that the petitioner did not in effect transfer the respondent no.2 from the present place of posting / assignment in the technical sense of the term. The order virtually shifts the respondent no.2 from the present place of posting during the course of the election process culminating in the declaration of the results of the ensuing assembly elections in so far as the Collector / District Magistrates

having been uniformly made District Election Officers and returning officers for the district, although it has been within the competence of the petitioner to have appointed some other officers also. The statement is recorded.

37. We are conscious of the fact that the Central Administrative Tribunal is a creature of the Constitution having conferred powers under Article 226 of the Constitution to decide the matters, relating to services. It has wide powers including declaring law to be ultra vires except the statute under which it has been constituted. The Administrative Tribunals as established under Article 323-A and the Administrative Tribunals Act, 1985 are an alternative institutional mechanism or authority, designed to be not less effective than the High Court, Consistently with the amended constitutional scheme but at the same time not to negate judicial review jurisdiction or constitutional courts. Transfer of jurisdiction in specified matters from the High Court to the Administrative Tribunal equates the Tribunal with the High Court insofar as the exercise of judicial authority over the specified matters is concerned. That, however, does not assign the Administrative Tribunals a status equivalent to that of the High Court nor does that mean that for the purpose of judicial review or judicial superintendence they cannot be subordinate to the High Court. In this connection law on the subject is expounded by Hon'ble Supreme Court in *T. Sudharkar Parsed v. Govt. of A.P. (2001) 1 SCC 516* in para 18 and 19. Para 18 and 19 of the judgement are quoted below:–

> "18. Subordination of Tribunals and courts functioning within the territorial jurisdiction of a High Court can be either judicial or administrative or both. The power of superintendence exercised by the High Court under Article 227 of the Constitution is judicial superintendence, such as one which vests in the High Court under Article 235 of the Constitution over subordinate Courts. Vide para 96 of *L. Chandra Kumar case* the Constitution Bench did not agree with the suggestion that the Tribunals be made subject to the supervisory jurisdiction of the High Court within whose territorial jurisdiction they

fall, as our constitutional scheme does not require that all adjudicatory bodies which fall within the territorial jurisdiction of any High Court should be subject to its supervisory jurisdiction. Obviously, the supervisory jurisdiction referred to by the constitution bench in para 96 of the judgment is the supervision of the administrative functioning of the Tribunals as is spelt out by discussion made in paras 96 and 97 of the judgment.

19. Jurisdiction should not be confused with status and subordination. Parliament was motivated to create new adjudicatory for a to provide new, cheap and fast-track adjudicatory system and permitting them to function by tearing off the conventional shackles of the strict rule of pleadings, strick rule of evidence, tardy trials, three/four-tier appeals, endless revisions and reviews-creating hurdles in the fast flow of the stream of justice. The administrative Tribunals as established under Article 323-A and the Administrative Tribunals Act, 1985 are an alternative institutional mechanism or authority, designed to be not less effective than the High Court, consistently with the amended constitutional scheme but at the same time not to negate judicial review jurisdiction of constitutional courts. Transfer of jurisdiction in specified matters from the High Court to the Administrative Tribunal equates the Tribunal with the High Court insofar as the exercise of judicial authority over the specified matters is concerned. That, however, does not assign the Administrative Tribunals a status equivalent to that of the High Court nor does that mean that for the purpose of judicial review of judicial superintendence they cannot be subordinate to the High Court. It has to be remembered that what has been conferred on the Administrative Tribunal is not only jurisdiction of the High Court but also of the subordinate courts as to specified matters. The High Courts are creatures of the Constitution and their Judges hold constitutional office having been appointed under the Constitution. The Tribunals are

creaters of statute and their Members are statutorily appointed and hold statutory office. In state of Orissa v. Bhagaban Sarangi it was held that the Administrative Tribunal is nonetheless a Tribunal and so it bound by the decisions of the High Court of the State and cannot side tract or bypass it. Certain observations made in the case of T.N. Seshan, Chief Election Commr. Of India v. Union of India may usefully be referred to. It was held that merely because some of the service conditions of the Chief Election Commissioner are akin to those of the Supreme Court Judges, that does not confer the status of a Supreme Court Judge on the CEC. This Court observed:

> "Of late it is found that even personnel belonging to other for – a claim equation with High Court and Supreme Court Judges merely because certain jurisdictions earlier exercised by those Courts are transferred to them not realizing the distinction between constitutional and statutory functionaries."

We are therefore clearly of the opinion that there is no anathema to the Tribunal exercising jurisdiction of the High Court and in that sense being supplemental or additional to the High Court but at the same time not enjoying status equivalent to the High Court and also being subject to judicial review and judicial superintendence of the High Court."

38. In an ordinary course we would have remanded the matter to the learned tribunal for deciding the interim application for hearing both the parties but in view of the extraordinary situation regarding the conduct of elections and since we have heard the learned counsel for the parties at length on orders dated 31.10.2003 and 05.11.2003 and on the applications filed by the respective parties before the tribunal and before this Court for grant of ad-interim writ and for vacation of ad-interim writ, its continuance or other wise, we are of the considered opinion that instead of remanding the matter back the matter. It is just and proper in the ends of justice to decide the question of interim relief here itself as it is noted that what

has been granted on 3110-2003 is “Status quo as existed today’. the expression “status quo as existed today” is a term of ambiguity. The ambiguity in the facts and circumstances when even the notification inviting nominations has been issued on 7.11.2003 it is in the national interest that ambiguity should not be allowed to prevail even for a day. So far as the term “status quo” is concerned, the Hon’ble Supreme Court in 1987 supp SCC 394 *(Bharat Coaking Coal Ltd. – v – State of Bihar)* had occasion to deal with the matter. Para 5 of the judgement is relevant and quoted below:–

> “5. The expression ‘status quo’ is undoubtedly a term of ambiguity and at time gives rise to doubt and difficulty. According to the ordinary connotation, the term ‘status quo’ implies the existing state of things at any given point of time. The qualifying words as in the High Court’ clearly limit the scope and effect of the status quo order. In the present case, the High Court determined only one question, namely that slurry was not coal or mineral. It refrained from entering into the question of right or title of the parties on the ground that it involved investigation into disputed questions of facts. Therefore, apart from the abstract question that slurry was not coal or mineral, the impugned judgment does not adjudicate upon the rights of the parties. Viewed from that angle, it is obvious that status quo as in the High Court cannot mean anything else except status quo as existing when the matter was pending in the High Court before the judgment was delivered. Both the parties understood the scope and effect of the status quo order as meaning the state of things existing while the writ petition was still pending i.e. till the delivery of the judgment by the High Court. Respondent 4 moved the High Court in Cri. M.P. No. 4841/86(8) without impleading the appellant herein and obtained the impugned order from the High Court dated January 3, 1987 which we have vacated. The proper course for respondent 4 to have adopted was to have approached this Court to seek

clarification, if he had any doubt as to the meaning and effect of the status quo order. We highly deprecate the conduct of respondent 4 for having approached the High Court and obtained the impugned order by suppressing the fact that this Court had passed the status quo order. Even so, strictly speaking, no case for contempt is made out on the plain terms of the status quo order. The parties were relegated back to the position that obtained while the writ petition was pending. They were therefore, subject to the order passed by the High Court dated January 15, 1985. No other conclusion is possible looking to the terms of the status quo order."

39. So far as the question of jurisdiction of this Court under Article 227 of the Constitution of India is concerned, the matter came up before the Hon'ble Apex Court in the matter of Surya Dev Rai–v–Ram Chander Rai & others reported in JT 2003(6) SC 465 and in the case of state, through Special Cell, New Delhi – v – Navjot Sandhu @ Afshan Guru and Ors. reported in JT 2003(4) SC 605. In the case of state, through special cell, New Delhi (supra), the Hon'ble Apex Court has held that

"The law is that Article 227 of the Constitution of India give the High Court the power of superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction. This jurisdiction cannot be limited or fettered by any Act of the State Legislature. The supervisory jurisdiction extends to keeping the subordinate tribunals within the limits of their authority and to seeing that they obey the law. The powers under Article 227 are wide and can be used, to meet the ends of justice. They can be used to interfere even with an interlocutory order. It is settled law that this power of judicial superintendence, under Article 227, must be exercised sparingly and only to keep subordinate Courts and Tribunal's within the bounds of their authority and not to correct mere errors."

In the case of Surya Dev Rai (Supra), the Hon'be Apex Court has held that

> "Under Article 227 of the Constitution of India, the writ of certiorary is an exercise of its original jurisdiction by the High Court; exercise of supervisory jurisdiction is not an original jurisdiction and in the this sense it is skin to appellate revisional or corrective jurisdiction. In exercise of supervisory jurisdiction the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, may be by way of guiding the inferior Court or Tribunal as to the manner in which it would now proceed further or afresh as commenced in which it would now proceed further or afresh as commended to or guided by the High Court. In appropriate cases the High Court, while exercising supervisory jurisdiction may substitute such a decision of its own in place of the impugned decision, as the inferior Court or Tribunal should have made. Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate Courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it has or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction."

40. Therefore, in view of the above law laid down by the Hon'ble Apex Court, the powers under Article 227 of the Constitution are wide and can be used to get the ends of justice. They can be used to interfere even with an interlocutory order and in appropriate cases, the High Court while exercising supervisory jurisdiction, may substitute such a decision of its own in place of the impugned decision, as the inferior Court or Tribunal should have made. When the subordinate Court has

assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it has or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasion thereby, the High Court may step in to exercise its supervisory jurisdiction. In the light of the above principle, if we look into the facts of the present case, the matter came up before the learned Tribunal on 31st October 2003 when the learned Tribunal passed on experts order against the State for maintaining status quo. If we look into the above order, this order was not passed in conformity with Section 24 of the Administrative Tribunals Act because the proviso to Section 24 speaks that in case the Tribunal wants to dispense with the requirement of clause (a) and (b) and make an interim order as an exceptional measure if it is satisfied, for reasons to be recorded in writing, that it is necessary so to do for preventing any loss being caused to the applicant which cannot be adequately compensated in money but any such interim order shall, if it is not sooner vacated cease to have effect on the expiry of a period of fourteen days therefore, before passing the experts interim order without giving notice to the opposite side, the learned Tribunal ought to have recorded the reasons for making such an order which the leaned Tribunal has not. Even when the respondent/Election Commission of India moved an application for pre-ponement and for vacating the order, the matter again came up before the Tribunal on 5-11-2003. On that day, learned counsel for the petitioner mentioned that he needs some time to file reply of the application for vacating stay filed by the respondent / Election Commission of India. Without passing any order on this, the learned Tribunal adjourned the matter for 21st November 2003 stating that both the parties are agreeable to fix the matter on 21st November 2003 for final disposal. In the circumstances, looking to the urgency involved in the matter as the process of holding elections is in operation and elections are fixed for 1st December and the question involved was of the shifting of the two Collectors who are District Election Officers, the learned Tribunal ought to have heard the application for vacating stay, if it was not possible on 5th November 2003, then on 6th or 7th November looking to the urgency of the matter. But the learned Tribunal failed to exercise the jurisdiction vested in it. As argued by learned counsel for the

petitioner that the Election Commission of India exercising its power under Article 324 of the Constitution of India was within its right to ordering for shifting of the District Election Officers those who were not working upto the satisfaction of the Election Commission of India and nobody can dictate to the Election Commission of India from whom the Election Commission of India has to take work of the District Election Officer. Even both the petitioners were not within their right to dictate the terms that the Election Commission of India has to take work from them as District Election Officers. It is the satisfaction of the Election Commission of India that from whom the Election Commission of India wants to take work of District Election Officer in order to discharge constitutional obligation to conduct free and fair election and to maintain purity of the elections. Therefore, we are of the considered opinion that the learned Tribunal while not passing the order on emergent basis on the application for vacating stay has failed to exercise jurisdiction by adjourning the matter for such a long time i.e. for 21-11-2003 without fulfilling the requirement of provisions of Section 24 of the Administrative Tribunals Act and such a way this Court has jurisdiction under Article 227 of the constitution of India to interfere with the interlocutory order passed by the Tribunal and if this order is allowed to exist then it will amount to failure of justice or grave injustice.

41. The Hon'ble Supreme Court in Surya Vev Rai-v-Ram Chander Rai and ors. (JT 2003 (6) SC 465), noted situations which may very frequently arise before the High Court and the guidelines have been given in para 37 of the judgement. Para 38 of the judgment is also relevant which is quoted below:-

> "38. …… the fact remains that the parameters for exercise of jurisdiction under Article 226 or 227 of the Constitution cannot be tied down in a straitjacket formula or rigid rules. Not less than often the High Court would be faced with dilemma. If it intervenes in pending proceedings there is bound to be delay in termination of proceedings. If it does not intervene, the error of the moment may earn immunity from correction. The facts and circumstances of a

> given case may make it more appropriate for the High Court to exercise self-restraint and not to intervene because the error of jurisdiction though committed is vet capable of being taken care of and corrected at later stage and the wrong done, if any, would be set right and the rights and equities adjusted in appeal or revision preferred at the conclusion of the proceedings. But there may be cases where a stitch in time would save nine. At the end, we may sum up by saving that the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the judge."

42. Having given our thoughtful consideration to the facts and circumstances of the case mentioned in earlier paragraphs of this order, with great respect, we are of the opinion that it is a case where 'a stitch in time would save nine'. In view of the above foregoing reasons we are of the opinion that the order dated 31-10-2003 directing for maintaining status quo and order dated 5-11-2003 directing for continuing the said interim order passed by the learned Tribunal are not legally sustainable and deserve to be set aside and the same are set aside. The original applications are listed on 21-11-2003 before the Tribunal. The parties may raise the questions before the learned Central Administrative Tribunal. The Tribunal to decide the matter on its own merits in accordance with law.

43. Before parting, we would like to make it clear that the observations and directions made in the order are with reference to the interim order and the merits / demerits of the cases are to be adjudicated by the learned Central Administrative Tribunal in accordance with law.

44. In view of the above directions and observations, the petitions are finally disposed of.

45. A copy of this order be placed in the record of W.P. No. 3628/2003.

Sd/-
(FAKHRUDDIN)
JUDGE

Sd/-
(L. C. BHADOO)
JUDGE

HIGH COURT OF JUDICATURE AT ALLAHABAD

CIVIL SIDE ORIGINAL JURISDICTION

Civil Misc. Writ Petition No. 2157 of 2002

1. Lalji Shukla,
   Son of Late Balbhadra Prasad Shukla,
   Additional Superintendent of Police (City) Allahabad.
2. Ajai Mohan Sharma,
   Son of Shri Madan Mohan Sharma
   Additional Superintendent of Police
   Yamunapar, Allahabad ..... Petitioners

Versus

1. Election Commission of India,
   Nirwachan Sadan, Ashoka Road, New Delhi.
2. Election Commissioner/Chief Electoral Officer,
   U.P., Lucknow.
3. State of Uttar Pradesh,
   through the Principal Secretary,
   Home Department, Lucknow.
4. Director General of Police,
   U.P., Lucknow.
5. Shri Virendra Bahadur Singh,
   Additional Superintendent of Police
   Police Headquarters, Allahabad.
6. Shri Ashok Kumar Pandey,
   Additional Superintendent of Police,
   Police Headquarters, Allahabad ..... Respondents

Counsel for the Petitioners	:	Sri Umesh Narain Sharma Sri Ravi Kiran Jain Sri Rishi Chandra
Counsel for the Respondents	:	S.C., Sri Pradeep Kumar Sri S.K. Mendiratta Sri S.N. Srivastava

Lalji Shukla and another ..... Petitioners

Versus

Election Commission of India, New Delhi and others ..... Respondents

Date of Order : 16.1.2002

SUMMARY OF THE CASE

The schedule of general election to the Uttar Pradesh Legislative Assembly was announced on 26.12.2001, with the notification of election scheduled to be issued on 16.1.2002. The Commission, on 28.12.2001, issued a direction that all officers connected with the conduct of elections directly or indirectly and all Police Officers who have completed four years of posting in the same district should be posted out of the district concerned. Challenging these directions the petitioners contended that these are beyond the powers of the Commission. The High Court dismissed the petition holding that these were valid directions and within the powers of the Commission Article 324(1).

O R D E R

Hon'ble M. Katju, Judge
Hon'ble S.K. Singh, Judge

Heard Shri U.N. Sharma leaned counsel for the petitioners Shri S.K. Mendratta and Shri S.N. Srivastava for the Election Commission and Shri Pradeep Kumar for the State Government.

This writ petition has been filed against impugned order of the Election Commission of India dated 28-12-2001, Annexure -1 to the writ petition and the subsequent transfer order dated 13.1.2002. Annexure -2 to the writ petition.

The petitioners are U.P. Government servants. Petitioner No. 1 is the S.P. City and petitioner No.2 is Addl. S.P. (Yamuna Paar) Allahabad. Both the

petitioners have been posted at Allahabad for more than four years. Petitioner No.1 joined as Addl. S.P. City on 25.4.1998 and prior to that he was posted in 42 Bn. PAC Naini, Allahabad and he has admittedly completed more than four years in Allahabad District. Similarly petitioner No.2 was posted as Addl. S.P. (Yamuna Paart), Allahabad, on 25.4.1998 and prior to that he was posted as Addl. S.P. City Allahabad and thus admittedly he has also completed more than four years at Allahabad.

The petitioners are challenging the impugned directives of the Election Commission of India dated 28.12.2001. Paragraph 3 of the said directive states that the Commission has directed those officers who have completed more than four years of stay in the same district should be moved out of the present district but should not be posted in their home district. In compliance with this directive of the Election Commission of India, the impugned transfer order has been passed.

Learned counsel for the petitioners submits that the impugned directive of the Election Commission of India is arbitrary and beyond the powers vested in it under Article 324 of the Constitution of India. We do not agree with this submission. Article 324(1) of the Constitution states as under–

> "The superintendence, direction and control of the preparation of the electoral rolls, for, and the conduct of, all elections of Parliament and in the Legislature of every State and of elections to the offices of President, Vice-President held under this Constitution shall be vested in a Commission (referred) to in this Constitution as the Election Commission."

A perusal of the said provision shows that the Election Commission is incharge of the superintendence, direction and control of the preparation of the electoral rolls for and the conduct of, all elections of the Parliament and to the

State Legislature. The words 'superintendence, direction and control and the words 'conduct of elections' are very wide words and thus they give power to the Election Commission to do all that is necessary to ensure free and fair elections so that the will of the people can be expressed thereby. In our opinion the impugned directions of the Election Commission are well within the powers conferred to it by Article 324(1) of the Constitution of India.

Learned counsel for the petitioners submits that the impugned directive is arbitrary. We do not agree. We have been informed by Sri Mediratta, learned counsel for the Election Commission that the reason for issuance of the above directive was that those officers who have completed four years in a particular district may have developed liaison with the politicians and other influential persons of the district and hence it would be conducive for ensuring fair elections that they should be moved out. Sri Mendiratta also stated that the same directive was issued in the election of 1998 and all elections thereafter which were conducted by the Election Commission. The same directives have also been issued for all other States where elections are being currently held, namely, Uttaranchal, Manipur and Punjab.

We are of the opinion that the impuged directive of the Election Commission is valid as it does not discriminate between different officers but a uniform directive has been issued for all the officers who have completed four years of stay in the same district, to move out. This directive appears to be quite reasonable. In our opinion this Court does not sit in appeal over such orders of the Election Commission, and all that it can see is whether the directive is absolutely whimsical, arbitrary or malafide. No allegation of malafide has been made in the petition against the Election Commission.

In *Tata Cellular Vs. Union of India,* reported in AIR 1996 S.C. 11 it has been held by the Supreme Court that the scope of / interference in administrative orders by the Court is very limited. In our opinion the impugned order is not a

judicial or quasi judicial order but it is purely administrative in nature. Hence the scope of interference by the Court in such case is limited, and it can only see whether the order is arbitrary or malafide. We are of the opinion that it does not suffer from any such defect. Merely because this court could have taken a different view that is not a good reason for interfering with such administrative order. This court is not testing the wisdom of the Election Commission. The Election Commission is a specialized body which is politically neutral and has experience in conducting elections and ordinarily it is for the Commission to decide what would be conducive for a fair election. Moreover, this Court does not ordinarily interfere with policy matters, unless the policy is clearly illegal.

Sri U.N. Sharma, learned counsel for the petitioner has relied on the decision of Supreme Court in M.S. Gill Vs. Chief Election commissioner in AIR 1978 SC 851 and has submitted that the respondent cannot supplement the reason given in the impugned order. In our opinion this decision is distinguishable because the impugned order does not give reasons at all. Hence there is no question of supplementing the reasons given in the impugned order. There are various kinds of administrative orders which often give no reasons e.g. transfer or suspension orders and it cannot be said that these orders are illegal merely because no reason has been given in them or because the respondents filed a counter affidavit giving reasons for the transfer or suspension, etc.

For the above reasons, we find no merit in this petition. It is accordingly dismissed.

Let a copy of this order be given, if possible today, to the parties on payment of usual charges.

Sd/-
M. KATJU, Judge

Sd/-
16.1.2002 S. K. SINGH, Judge

HIGH COURT OF JUDICATURE AT MADRAS

S.P. Nos. 3346, 3633, 4417, 4454, 4466, 4945, 5077, 6038 and 6039 of 2001

All India Anna Dravida Munnetra Kazhagam,
Rep. by its General Secretary,
J. Jayalalitha … Petitioner in W.P. Nos. 3346 and 4945 of 2001

M. Haneefa … Petitioner in W.P. No. 3633 of 2001

Pattali Makkal Katchi,
Rep. by its President,
G.K. Mani, M.L.A. … Petitioner in W.P. Nos. 4417 and 5077 of 2001

The All India Forward Block (Tamil Nadu)
Rep. by its General Secretary L. Santhanam … Petitioner in W.P. No. 4454 of 2001

Indian National League
Rep. by its All India General Secretary
and State President N. Abdul Latheef … Petitioner in W.P. No. 4466 of 2001

Communist Party of India
Tamil Nadu State Council
Rep. by its Secretary
R. Nallakannu … Petitioner in W.P. Nos. 6038 and 6039 of 2001

The Chief Election Commissioner,
Election Commission of India
Nirvachan Sadan, Ashoka Road,
NEW DELHI – 110001 … Respondent in W.P. Nos. 3346, 4417, 4466 and 6039 and 1st Respondent In WP. 3633, 4945, 5077 and 6038 of 2001 and 2nd Respondent in W.P. No. 4454 of 2001

Union of India Rep. by its Secretary to the Ministry of Home Affairs, South Block NEW DELHI	… 2nd Respondent in W.P. No. 3633 of 2001
Union of India Rep. by its Secretary Ministry of Law, Justice & Co. Affairs Sastri Bhavan NEW DELHI – 110 001	… 2nd Respondent in W.P. W.P. No. 4945, 5077 6038 of 2001 and 1st Respondent in W.P. No. 4454 of 2001
The Chief Electoral Officer and Special Secretary to Government Public (Election III) Department, Fort St. George CHENNAI – 600 009	… 3rd Respondent in W.P. No. 3633 of 2001
Tamil Nadu Government Rep. by its Chief Secretary Secretariat Building, Fort St. George, CHENNAI – 600 009	… 4th Respondent in W.P. No. 3633 of 2001

For Petitioner in W.P. Nos. 3346 and 4945 of 2001	:	Mr. P.P. Rao, Sr. Counsel assisted by Mr. K.V. Viswanathan for Mr. N. Jothi
For Petitioner in W.P. No. 3633 of 2001	:	Mr. O.R. Abdul Kalaam
For Petitioner in W.P. No. 4417 and 5077 of 2001	:	Mr. D. Gubendragunabalan
For Petitioner in W.P. No. 4466 of 2001	:	Mr. P.M. Premnazir Khan
For Respondents in W.P. Nos. 3346, 4417, 4454, 4466, 4945 5077, 6038 and 6039 of 2001	:	Mr. G. Rajagopalan, Senior Counsel for Mr. M.R. Raghavan

For 2nd Respondent in W.P. Nos. 3633, 4945, 5077 and 6038 of 2001 and 1st Respondent in W.P. No. 4454 of 2001 : Mr. V.T. Gopalan, Addl. Solicitor General, for Mr. K. Ramakrishna Reddy, A.C.G.S.C.

Date of Order : 10.4.2001

Coram : The Hon'ble Mr. N.K. Jain, The Chief Justice and
The Hon'ble Mr. Justice K. Samath

SUMMARY OF THE CASE

There were two sets of writ petitions filed before the High Court which were taken up for hearing together as being identical. The first set of writ petitions sought direction to declare section 61-A of the Representation of the People Act, 1951 as invalid and ultra vires, and the other set of writ petitions sought direction from the Hon'ble Court to Election Commission not to use the EVMs in the ensuing elections in Tamil Nadu, Pondicherry, Kerala and West Bengal.

The petitioners contended that the manner of voting is enshrined in Section 59 of the R.P.Act, 1951 and Section 61-A is not a method to supplement and supplant the method of voting as adequately indicated in the rest of the provisions of the Act but it is only an alternative method as Section 61-A is somewhat restricted to use EVMs in 'such constituency or constituencies' only as the Election Commission may deem fit. Their argument was that the word 'such in the context cannot mean all constituencies and hence EVMs cannot be used for the whole lot of constituencies. It was submitted that Sec. 61-A of the R.P.Act, 1951 suffers from arbitrariness on account of abdication of powers. The petitioners also sought to stop the use of EVMs. In ensuing general elections on the grounds of lack of secrecy, possibility of tempering, fragility and difficult preservation of the machine and its contents.

The Election Commission in its counter affidavits in respective writ petitions, denied the allegations stating that section 61-A is in no way repugnant to the provisions of the Constitution and the R.P.Act, and it made an elaborate mention about the design and functioning of the EVMs, the voting procedure, its cost-effectiveness, its imperiousness to rigging and safety of the machine and its contents.

Finding no ground to prohibit the use of EVMs in the ensuing elections, the Hon'ble High Court dismissed all the writ petitions and connected miscellaneous petitions expressing agreement with the contentions of the Election Commission.

O R D E R

N.K. Jain, Chief Justice

Dr. J. Jayalalitha, former Chief Minister of Tamil Nadu, and the General Secreary of All India Anna Dravida Munnetra Kazhagam, with the allegation that AIADMK, a registered political party registered with the Election Commission of India has filed writ petition W.P. No. 3346 of 2001 on 21.2.2001 seeking to issue a writ of prohibition or direction in the nature of writ prohibiting the Election Commission of India from using Electronic Voting Machines in the constituencies in the ensuing General Elections to the Tamil Nadu State Legislative Assembly. A learned single Judge ordered notice on 22.02.2001 and further directed the Registry to place the matter before the First Bench as the matter involved public interest.

2. W.P. No. 3633 of 2001 was filed on 23.2.2001 by one Haneefa, who alleges to be a businessman and manufacturer of Electrical and Electronic equipments, including Electronic Voting Machines, praying to issue a direction to remove, strike and declare Section 61-A of Representation of People Act, 1951 (hereinafter referred to as Act) as invalid and ultra vires the Act and Articles of the Constitution, and to direct the Chief Election Commissioner of India to forbear from using EVMs in the ensuing Assembly Election in four States viz., Tamil Nadu, Pondicherry, Kerala and West Bengal.

3. W.P. No. 4454 of 2001 was filed by the General Secretary of All India Forward Bloc (Tamil Nadu) on 8.3.2001, a recognized political party, seeking for a direction to declare Section 61-A of the Act as ultra vires the Constitution and the Parent Act.

4. Another W.P. No. 4945 of 2001 was filed by the AIADMK on 13.3.2001 for a direction to declare Section 61-A of the Act, as ultra vires and repugnant to Articles 324, 326, 327 and 328 of the Constitution of India, a part from the other provisions of the Act itself for the reasons that the said Section was inserted on the ground of lack of guidelines, arbitrariness and exercise of vague, unfettered and uncanalised power given to the Election Commission of India in selecting the constituency or constituencies for using Electronic Voting Machines. The learned single Judge ordered notice on 14.3.2001, and directed to post the matter before the First Bench.

5. W.P. No. 5077 of 2001 was filed on 14.3.2001 by the President of the Pattali Makkal Katchi (PMK) a political party registered with the Election Commission of India seeking for a direction to declare Section 61-A of the Act, as ultra vires, and also to strike it down as the powers conferred on the first respondent – Election Commission are vague and without guidelines, in selecting constituencies for using Electronic Voting Machines (in short EVMs).

6. W.P. No. 6038 of 2001 was filed by the Communist Party of India (CPI), a recognized and registered political party with the Election Commission of India on 27.3.2001 praying for a direction to declare Section 61-A of the Act, 1951, on the same grounds, as stated in the other writ petiions, stated above.

7. Similarly, W.P. No. 4417 of 2001, W.P. No. 4466 of 2001 and W.P. No. 6039 of 2001 were filed on 5.3.2001, 5.3.2001, 5.3.2001 and 27.3.2001 respectively by the Pattali Makkal Katchi (PMK), Indian National League and Communist Party of India, registered political parties, with the same prayer to forbear the Election Commission of India from using the Electronic Voting Machines in the ensuing

general elections 2001 to be conducted for the Legislative Assembly Constituencies in Tamil Nadu, and also in the Union Territory of Pondicherry, and in the Tiruchirapalli Parliament Constituency in Tamil Nadu.

8. There are two sets of writ petitions viz., one challenging the vires of Section 61-A of the Act, and another for a direction not to use the Electronic Voting Machines in the ensuing elections in Tamil Nadu, Pondicherry, Kerala and West Bengal.

9. The case put for the by the writ petitioners in the various writ petitions in brief is:

> The manner of voting is enshrined in Section 59 of the 1951 Act and it shall be by ballot in the manner as may be prescribed. Section 61-A has been inserted permitting the introduction of the use of EVMs in respect of certain constituencies. Section 94 refers to the maintenance of secrecy of voting and it should not be infringed upon under any circumstances. In the event of filing election petition, only when ballot papers are made available for Court's scrutiny, the Court could exercise its power. But no corresponding provision for safeguard is made in the event of EVMs being used, and nothing is said about the preservation of the contents in the EVMs.

10. It is also pointed out that Chapter II of Part IV of the Conduct of Elections Rules, 1961 (hereinafter referred to as the 'Rules') deals with voting by EVMs. Rule 49-E speaks about the preparation of voting machines for the polls. Rule 49-E(2) speaks about the demonstration of the voting machines by the Presiding Officer of the poll. Rule 49-E(3) and E(4) relate to sealing of the machines. The overall control of the machine is only with the Presiding Officers of the polling booth. Section 49-L deals with the procedure for voting through EVMs. Ruel 49-O allows an elector to exercise no vote option to avoid his vote being impersonated or rigged. In the conventional system, a voter can get a ballot paper

but need not mark and the secrecy is maintained. There is no such provision in EVMs for exercising no vote. The secrecy is thus lost.

11. It is alleged that the ballot box is made out th thick iron sheets, while EVM is a fragile instrument and the buttons to be used are meant for feather touch operations. Any bad element could damage the same. During the pendency of the election petitions either before the High Court or the Supreme Court, the preservation of EVMs requires several supporting apparatus to be kept continuously running which will be very difficult.

12. As regards the actual working of EVMs, a doubt is raised as to whether an individual can press the button more than once and cast his vote more than once. Another doubt is also raised as to when a person casts his vote, normally the next vote can be cast only after the lock is released by the Presiding Officer in the booth, but if a voter and an officer connive, is it possible to exercise more than one vote. Whether a voter can know that his vote has been duly registered is also a doubt raised by some of the petitioners. Some writ petitioners raised another doubt that after one person has voted, if the Presiding Officer forgets to released the lock and the next voter presses the button of his choice and the vote does not register, will the second voter know that his vote has not been registered. It is also asked as to what is the guarantee if a person presses a button next to a particular symbol, that the vote has indeed been accounted in that at symbol only and not in any other symbol. Another question is also posed to the effect that in the event of an election petition, how can the validity of each vote be accounted for. Another interesting question is raised regarding the mode to ensure the prevention of mischiefs viz. introduction of computer bugs and viruses and internet hacking since EVMs are set up with computerized voting facility by a programmed microchip. Some writ petitioners apprehend a situation that if a voter deliberately or accidentally disconnects the EVMs during election process or damages it in any way necessitating spot repair or even replacing of the machine, what would happen to the votes already cast.

13. It is further pointed out that Section 61-A is somewhat restricted to use EVMs in 'such constituency or constituenceis' only as the Election Commission (hereinafter referred to as 'EC') may deem fit. The word "such" in the context cannot mean all constituencies. EVMs cannot be used for the whole lot of constituencies. This section also does not authorize the use of EVMs in the ensuing General Elections to the State Legislative Assembly. The machines, if at all necessary , could be initially tested in Panchayat and Local Body Elections on a large scale and only if found successful, they could be used in General Elections. It is stated that Section 61-A of the Act is not a method to supplement or supplant the method of voting as adequately indicated in the rest of the provisions of the Act but it is only an alternative method. It cannot displace or dislodge the procedure laid down for voting by means of paper ballots. The delegated legislation has no check over it and there is no way of obtaining redress. No rules had been framed on the issue of how the study was made to use EVMs in certain constituencies. With similar allegations that vague, unfettered and arbitrary powers have been given to the Election Commission in respect of use of EVMs, the petitioners are before us with the prayer as stated above.

14. Detailed counters in respective writ petitions have been filed by the Election Commission denying the allegations, as alleged in the affidavits filed in support of the writ petitions. It is stated that in view of the decision of the Supreme Court in A.C. JOSE v. SIVAN PILLAI (AIR 1984 SC 921), the EVMs could not be used after 1983. But on the recommendation of the Election Commission, Act 1 of 1989 was introduced by the Parliament introducing Section 61-A. Corresponding amendments were made in the Rules and a new Chapter regarding EVMs was inserted. The design and model of the existing EVMs were finalized by the EC in May 1989. By March 1990, the Commission procured 1,50,000 EVMs from Electronics Corporation of India Ltd. (ECIL for short) at a cost of Rs. 73.5 Crores. It is also stated that the matter was referred to the Electoral Reforms Committee known as 'Dinesh Goswami Committee', which appointed another 'Technical experts Committee' consisting of distinguished scientists. The Exports Committee

examined the machines minutely from all technical angles and recommended its use. The Election Commission held meetings in December 1995 and May 1997 in which a large number of parties were positive about the introduction of EVMs. A conclusion was arrived at that the EVMs had to be introduced in India initially in a limited manner and thereafter, it should be expanded. In 1998 general elections, due to paucity of time, EVMs could not be used. However, in November 1998, the use of EVMs was started at the general elections to the Legislative Assemblies in Madhya Pradesh , Rajasthan and Delhi. In the counter, the proper preparations so made, regarding choosing of constituencies, preparation of materials to polling and counting agents and the conduct of special training programmes to them by the Election Commission are stated in detail. Mass Communication through media is also mentioned. The arrangements made for testing of each machine, by the personnel of mobile parties consisting of technical staff and the readiness for replacement of any machine, if machine developed any defect are also mentioned. The Election Commission engaged the 'Centre for study of Developing Societies, Delhi" to conduct a detailed study on the use of EVMs in Madhya Pradesh and Delhi during 1999 bye-elections in which the awareness of public at 87.7%, the favourable response for use of EVMs at 90.6% and time taken for counting by 2 to 3 hours, were revealed. It is stated that in June 1999 the EC extended the use of EVMs to 45 Parliamentary constituencies for electing the 13th Lok Sabha involving 17 States including the State of Tamil Nadu and 3 Union Territories covering 62,360 polling stations, the number of electors being almost 60 million. In Delhi, all the Parliamentary Constituencies with 9,132 polling stations were covered by EVMs. The use of EVMs during the general election to the Haryana Legislative Assembly in February 2000 is also spoken to. It is further stated that out of 1,01,245 machines used in the Lok Sabha and State Assembly Elections between 1998 and 2000, only 12 machines were found to have developed some defects in operation of memory with the error percentage 0.001. If any machine needed replacing, the memory of the votes recorded therein before the defect developed remains intact and can be retrieved at the time of counting the votes. In order to eliminate such defects, a further review by a team of officers of the EC

with the representatives of ECIL at Hyderabad was held on 26.4.2000. The improvements made in the new machines pertaining to the provision of additional set of memory device to store data and an auxiliary display unit to read and display the data stored are also set out in the counter in detail. The technology is robust and simple. The Government of India accepting the proposals of the EC provided funds for the purchase of more EVMs during the general elections in April-May 2001. The commission accordingly placed orders for the purchase of 1,30,000 more EVMs from the ECIL and BEL at a cost of Rs. 150 Crores.

15. In the counter, elaborate mention is made about the design of EVMs and the voting procedure, annexing the manuals prepared by BEL and ECIL. It is categorically stated that by using the EVMs the need for printing huge quantity of ballot papers is dispensed with saving the cost of paper and printing to a great extent. Voting by EVMs is smooth and easy and the result can be ascertained in two hours. No rigging is possible. The functioning of EVMs is narrated in the counter in detail. The present EVM can be used in a constituency where the number of contesting candidates is up to 64. The voter can see a red light glowing against the name and the symbol of the contested candidates and also hear a 'beep' sound emanating from the control unit to indicate that his vote has been recorded for whom it was intended. Every vote will be recorded only after releasing through the control unit for the next elector. Thus, no vote will be wasted. The control unit is like the brain of the whole system. It can record 3840 votes at a polling station. It is also stated that in the case of filling of an election petition, using the information so kept in the memory of EVMs, it can be retrieved.

16. Like conventional voting, Section 169(1)(h) empowers the making of Rule for safe custody of voting machines and contents and by the insertion of Rules 92(1-A), 92(2)(dd), 93(1-A) and Rule 94(aa), safe custody and the preservation of voting machines are taken care of, Rules 49-B, 49-E, 49-L, 49-M, 49-T and 49U of the Rules provide for the preparation of voting machines, sealing and for securing and their applications have been stated in detail in the counter.

17. It is stated that no single occasion of the smashing or damaging or tampering with the EVM has been reported. The memory of EVMs shall not be erased at least for ten years. It is not possible for an individual elector to press the candidate's button on the balloting unit more than once. The checking of the identity of the elector through agents is maintained in EVMs also. Thus, no proxy vote can be franchised. The indication of glowing of green bulb when it is 'ready' and the beep sound after casting the vote have been mentioned in the counter. It is also stated that the microchip, which is the brain of the whole system, can never be replaced. The programme is written independently in the assembly language of the microprocessor by the two Public Sector Corporations, ECIL and BEL, and fused on the microprocessor chip at the facility of the chip manufacturer, Hitachi Corporation, Japan. Once fused, the instructions cannot be altered or overwritten by anyone including the persons writing the programme. This is commonly known as firmware. In the case of EVMs the microprocessor chip is soldered directly on the printed circuit motherboard. Since the distances between the contacts are too small to be handled even by highly skilled worders, the actual placement is done using machines with in-built robotic arms and contact leads are wave-soldered on to the motherboard. It is infeasible for the chip to be replaced through a manual process. It is further stated that general purpose computers such as desk-top Personal Computers cannot be compared with the EVMs produced in India.

18. It is also stated that Section 61-A of the 1951 Act empowers the Election Commission to use the EVMs in such constituency or constituencies, as the Election Commission may deem fit, taking into consideration the circumstances of each case. In an appropriate case, the Commission may even decide to use the EVMs in all Constituencies of a State if justified and warrant the use of such machines. The intention of the Parliament was to maximize the use of EVMs in General Election. The Constitution and the statutory provisions. Collectively give the limited area where discretion should be exercised. With these, it is submitted that al the writ petitions deserve to be dismissed.

19. A detailed counter affidavit has been filed on behalf on the Union of India denying the allegations made by the writ petitioners. It is stated that Section 61-A has been inserted by Act 1 of 1989 in conformity with the pronouncement of A.C. JOSE's case and corresponding Rules were made there under. Relevant portions from the Statement of Objects and Reasons are mentioned. It is categorically stated that there is no abdication of power, and sufficient guidelines are available to the Election Commission as evidenced by the Rules. It is further submitted that the manner of voting through voting machines has been elaborately prescribed by the Rules. Most of the averments in the counter affidavit of the Election Commission are reiterated in this counter affidavit. Huge amount to the tune of Rs. 150 crores has been spent for acquisition of EVMs to conduct elections in a free, fair and smooth manner. The apprehensions of the writ petitioner are unfounded and Section 61-A is in no way repugnant to the provisions of the constitution and the Act. Therefore, the writ petitions have to be dismissed with exemplary costs.

20. W.P. Nos. 6038 and 6039 of 2001 were filed on 27.3.2001, and also posted before the Court on 29.3.2001.

21. As the points involved are same and identical and as agreed to, all the writ petitions are heard together.

22. Mr. P.P. Rao, learned senior counsel argued exhaustively on 27.3.2001 and 28.3.2001. The learned counsel for the petitioners in other writ petitions adopted the arguments of Mr. P.P. Rao, learned senior counsel.

23. Mr. P.P. Rao, learned senior counsel for the petitioner in W.P. No. 3346 and 4945 of 2001 mainly attacked the decision of EC making use of EVMs, stating that Section 61-A of Act suffers from arbitrariness on account of abdication of powers. He submitted that power has been conferred under Section 59 of the Act, the words "notwithstanding" "in such manner as may be prescribed" and "such constituency or constituencies" used in Section 61-A will clearly reveal that there

is abdication of powers. Therefore, the said Section is liable to be struck down. He relied upon the decision in *RE ART 143, Constitution of India and Delhi Laws Act (1912) etc., (AIR 1991 SC 332)* wherein after referring to American and English cases, it has been held as follows:

> "… The policy may be particularized in as few or as many words as the legislature thinks proper and it is enough if an intelligent guidance thinks proper and it is enough if an intelligent guidance is given to the subordinate authority. The Court can interfere if no policy is discernible at all or the delegation is of such an indefinite character as to amount to abdication, but as the discretion vests with the legislature in determining whether there is necessity for delegation or not, the exercise of such discretion is not to be disturbed by the Court except in clear cases of abuse."
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> * * * * *
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> "… The limits of the powers of delegation in India would therefore have to be ascertained as a matter of construction from the provisions of the Constitution itself and as I have said the right of delegation may be implied in the exercise of legislative power only to the extent that it is necessary to make the exercise of the power effective and complete…"

He submitted that essential things relating to the election must be provided only by the legislation and not by delegated legislation. He also relied on paragraphs 231 to 234, 246, 252 and 262 of the aforesaid judgment. Learned senior counsel then referred to the portions in the decision wherein it was held that 'the delegation of legislative authority could be permissible but only as ancillary to, or in aid of the law making powers by the proper legislature and not as a means to be used by the latter to relieve itself of its own responsibility or essential duties by devolving the same on some other agent or machinery and it can, on no account throw the

responsibility which the Constitution imposes upon it on the shoulders of an agent or delegate and thereby practically abdicate its own powers. He further relied on the decision in *B. Shama Rao vs Union Territory of Pondicherry (AIR 1967 SC 1480)* particularly referring to paragraph 5 wherein it has been stated that "the legislatures had power to delegate within certain limits but delegation of an essential legislative function which amounts to abdication even partial is not permissible". Stressing the above proposition, learned senior counsel submitted that in the instant case, there is total abdication of legislative power by Parliament to the Election Commission. Learned counsel drew our attention to paragraph 24 of the aforesaid judgment in which majority view was expressed, paragraph 37 wherein the classification was commented upon by Mahajan, J. and respective views expressed by Their Lordships in different paragraphs of the said judgment. Learned senior counsel also referred to the decision in *Hamdard Dawakhana and another vs The Union of India and Others (AIR 1960 SC 554)* where the constitutionality of Drugs and Magic Remedies Act, 1954 was challenged on the ground of violation of the Articles in Part III of the Constitution of India and the impugned section therein was struck down. He further submitted that even when the words used were "subject to" in the above mentioned case, the Supreme Court did not hesitate to strike down the offending Rule and the same principle would be squarely applicable to the present case, where the words "notwithstanding anything" have been used. Then, the learned counsel relied upon the decisions in *Jyoti Pershad and Others vs. Administrator for The Union Territory of Delhi and Others (AIR 1961 SC 1602)* and *Ramakrishna Dalmia vs S.R. Tendolkar (AIR 1958 SC 538)* to show that exerssive delegation is present in this case. Relying upon the decision in *M/s Devi Das Gopal Krishnan, etc. vs State of Punjab and others (AIR 1967 SC 1895)* pertaining to the case which arose under the Punjab General Sales Tax Act, learned senior counsel submitted that guidelines are necessary to conduct election in the manner as prescribed and in the absence of the same, Section 61-A is liable to be struck down as it is ultra vires the Act. He also relied upon the decision in *Harakchand Ratanchand Banthia and Others etc.*

vs Union of India and Others (AIR 1970 SC 1453) and contended that there is excessive delegation in the instant case.

24. Next, he relied on the decision of Supreme Court in *A.N. Parasuraman and Others vs State of Tamil Nadu [(1989) 4 SCC 683]* and contended that the legislature cannot delegate its essential function of determining the legislative policy and rule of conduct. He also submitted that the mere fact that high constitutional functionary, viz., Election Commission, has been invested with the power cannot make any difference. The learned senior counsel also relied on the decision of the Supreme Court in *Delhi Transport Corporation vs D.T.C. Mazdoor Congress and Others (AIR 1991 SC 100)* where it was observed "fundamental rights can ill-afford to be consigned to the limbo of undefined premises and uncertain applications. That will be a mockery of them.

25. The learned senior counsel also relied on the decision of the Supreme Court in *A.R. Antulay vs R.S. Nayak and Another [(1998) 2 SCC 602]* and submitted that no prejudice need to be proved for enforcing the fundamental rights. The violation itself is prejudice. In the instant case, no opportunity was given to the public at large when particularly most of the voters are illiterate and are more accustomed to the traditional method of voting. Learned senior counsel submitted that opportunity of being heard must have been given to the public when their rights are involved in the same way as provided for delimitation of constituencies and reservation of constituencies for S.Cs. and S.Ts. Learned senior counsel then relied upon the decision in *S.L. Kapoor vs Jagmohan (AIR 1981 S.C. 136)* in which it has been postulated that the requirements of natural justice are met only if opportunity to represent is given in view of proposed action. It is absent in this case and as such, it is a clear violation of principles of natural justice rendering the Act a nullity. Learned counsel vehemently contended that though right to vote is not a fundamental right, it is a constitutional right and not a mere statutory right. He stoutly argued that violation of fundamental right itself renders the impugned action void.

26. He further contended that Their Lordships while setting aside the impugned election for want of jurisdiction, in A.C. Jose's case (cited supra) observed that before the introduction of voting machines, people should have been given training and in the instant case, no training was given. Therefore, Section 61-A is liable to be struck down as ultra vires.

27. Mr. Abdul Kalam, learned counsel for the petitioner in W.P. No. 3633 of 2001 has raised two points viz., (i) right to vote is curtailed or invaded rather it destroys the very purpose of the election and (ii) by delegation under Section 61-A whether it curtails the power of Election Tribunal.

28. Mr. V.T. Gopalan, learned Additional Solicitor General for the respondent – Union of India, commenced his argument reiterating the averments made in the counter affidavit. It was submitted that after the decision of the Honourable Supreme Court in A.C. Jose case (cited supra), the defects pointed out therein have been removed by introducing Section 61-A o 15.3.1989. Thereafter, the Rules have been framed exercising the power conferred under Section 169 of the Act. He also submitted that a detailed procedure for the EVMs has been prescribed in the Act and the Rules. He submitted that the Section should be read with the Rule framed under the Act. He submitted that a policy to use the EVMs is there in the Act and it is sufficient and there is no question of excessive delegation. He submitted that Rules only supplement the Section and they are not overriding the Act. As such, no question of excessive delegation will arise. He also submitted that no question of absence of guidelines would arise in this case. Learned Additional Solicitor General submitted that nothing is available to lay our hands on, to contend that Section 61-A has been introduced arbitrarily. He further submitted that the petitioners have not challenged the Rules and only Section 61-A has been challenged. He pointed out that the Rules have been framed using delegated legislation and they are to be laid on the table of both the Houses of Parliament and the Parliament can make amendments, if necessary. He submitted that as stated above, the Parliament's control over the delegated legislation is

present and no question of abdication of powers by the Parliament to the Government will arise. He drew our attention to sub-Section (ee), (gg), and (h) of Section 2, which elaborately detail out the manner and the procedure to be followed at the polling stations, at the counting points and also about the preservation of EVMs in safe custody. He implored that the Rules have to be read as part and parcel of the Act. He relied on the decision in *Peerless General Finance and Investment Corporation Ltd.* Case (1992 (2) SCC 343). He took us through Chapter II of the Conduct of the Election Rules particularly, Rules 49(A) to 49(X). According to the learned Additional Solicitor General, a thorough reading of Section 61-A coupled with Section 169(2) and Chapter II of the Rules as stated above will show that there is a complete scheme and it is a code by itself for voting through electronic voting machines. Rebutting the argument that Parliament alone can make provision for election matters, relying upon Article 312, where delegation is permitted, he submitted that the phrases used in Art 327 and Art 312 are more or less couched in similar language. He also relied on the decision in *D.S. Garewal vs State of Punjab (AIR 1959 SC 512).* He relied on the decision in *Rajnarain Singh vs Chairman, Patna Administration Committee (AIR 1954 S.C. 569),* wherein it was held as follows:

> "delegation is given to the Court to eh extent of authorizing an executive authority to modify the law, but not in any essential feature. As to what constitutes an essential feature cannot be enunciated in general terms. Thus, there can be delegation of legislative functions to executive authorities within certain limits".

This decision, according to the learned Additional Solicitor General, is a complete answer to the case of the petitioner as in the instant case the rules were laid before the Parliament and once they got the seal of approval, nothing further could be decided against the rules.

29. On the question of interpretation of Statues, learned Additional Solicitor General relying upon the decision in *Sanjeev Coke Mfg. Co. vs Bharat Coking*

Coal Ltd. (AIR 1983 SC 239), submitted that once a statute leaves Parliament House, the court is the only authentic voice to echo the intent of the Parliament. He further submitted that keeping in mind the number of EVMs available, the fact that elections are going to be held only for five State Assemblies, the fact that the voting machines can be used only if the maximum number of candidates is less than 64, and the Election commission is going to use EVMs in such constituencies and, therefore, it will not mean that there is an arbitrary exercise of power.

30. On the question of violation of principles of natural justice, learned Additional solicitor General submitted that there is no obligation to give public hearing, rather opportunity was given to the political parties, and their suggestions have also been considered. Sufficient safeguards have been given in the Rules. The vires of the Act is now challenged after an abnormal delay, even when on earlier occasion respective political parties participated in the elections and voters have exercised their votes through the EVMs. Only to forestall the election, the vires of the Act is now challenged when the elections are going to be held within two months. He further submitted that though the propositions enunciated in the case laws, cited by the learned senior counsel for the petitioner, are not disputed, yet they are not applicable to the facts of the present case.

31. Mr. G. Rajagopalan, learned senior counsel appearing for the respondent Election Commission took us through the chronological stages shown in the Representation of People Act especially Chapter IV Polling, Chapter VII publication of results in Part V and Sections 56 to 62 of the Act. He submitted that two methods are contemplated for the conduct of election viz., one under Section 59 and another under Section 61-A of the Act which came to be inserted after the pronouncement in A.C. Jose case (supra). He submitted that right to vote is not a constitutional right but a statutory right. Therefore, nobody can say that he will vote in a particular way. Voting can be done either through ballot as referred to under Section 59 or through voting machines as stated under Section 61-A. He relied on the passages available in the book authored by Her Excellency. T.S. Rama Devi.

Governor of Karnataka and Mr. S.K. Mendiratta, wherein it has been mentioned that "the huge consumption of papers, lakhs of ballot boxes, storage and upkeep during the non-electino period is a serious problem". EVMs are simpler and quicker. It was also submitted that EC was satisfied scientifically and technologically that these machines cannot be tampered with and all the political parties are aware of the same.

32. Regarding the words "notwithstanding anything" used in Section 61-A learned senior counsel referred to various dictionaries viz., Black's Law Dictionary VII Edition, Legal Thesaurus by William C. Burton, and Dictionary on Modern Legal Usage and submitted that what is contained in Section 61-A is nothing more and nothing less and it cannot be construed that it overrides the provision for ever. He clarified that recording of vote by machines is notwithstanding what is contained in Section 59 and the Rules made thereunder. The phrase was used by way of abundant caution. For that proposition, he relied on the decisions in *Union of India vs G.M. Kokil (AIR 1984 SC 1022)*, P.E.K. Kalliani Amma vs K. Devi (AIR 1996 SC 1963) and *The Dominion of India etc. vs. Shrinbai A. Irani and Another (AIR 1954 SC 596).* He also submitted that the scheme of the Act is very clear and unambiguous. To remove the defects pointed out in A.C. Jose's case, which held that there was want of legislative sanction, after due deliberations and consideration, the Parliament has enacted Act 1 of 1989 and section 61-A has been inserted. Lastly, he submitted that the word "notwithstanding" is to be read in the context of combined reading of Sections 59 and 61-A.

33. Learned senior counsel submitted that when there is no arbitrariness, the question of abdication of power does not arise. As regards "constituency or constituencies", the same has to be decided by the Election Commission as per the available situation. The use of EVMs is a foolproof system, not prone to any error, and it was also confirmed by the various technical experts and Committees formed. Therefore, these writ petitions are filed for nothing but to stall the election process for one reason or other. He submitted that the writ petitions are liable to be dismissed.

34. Mr. P.P. Rao, learned senior counsel, in rejoinder, brought to our notice the difference between Section 59 and 61-A and submitted that there is no mandate in Section 61-A, like in Section 59. He further submitted that the procedural part is left with the Government of India. Rule making power is given to Union of India under Section 169, and their power is notwithstanding anything contained in the Act and the Rules made thereunder, which amounts to abdication of powers. The words "notwithstanding anything" is the objectionable part. About the constituencies as to where it shall be used, the legislation is silent. That apart, it is left completely to the EC, whereas Section 59 leaves nothing to the EC. Therefore, Sections 59 and 61-A are not pari material. He also submitted that as far as EC is concerned, unfettered power of discretion is given to select the constituencies.

35. Regarding abdication of power learned senior counsel submitted that Section 169(3) talks of laying before Parliament, which shall be for delegation of power and not in the case of abdication of powers. Safeguards are contemplated in the case of delegated legislation and not in the case of abdication, which goes to the root of the matter. He further submitted that Section 61-A does not say that voting machine means electronic or non-electronic machine whereas Section 59 clearly says ballot. He also submitted that it is also not said in the Section that both ballot and voting machines can be side by side. He submitted that explanation to Section 61-A refers to ballot or ballot papers whereas Section 61-A does not use the word ballot. Learned senior counsel submitted that though right to vote is not a fundamental right, yet it is a constitutional right, not a statutory right. He drew our attention to Article 246(1). Learned senior counsel submitted that the difference between Articles 312 and 327 has already been specified and for that proposition, he relied on the decision in *Harla vs The State of Rajasthan (AIR 1951 SC 467).*

36. Mr. N. Jothi, learned counsel for the petitioner in rejoinder in reply to the stand of the EC, submitted that they can even overrule the explanation given under Section 61-A in view of the words used "anything' contained in the Act and Rules. He submitted that no advantage has been shown and the advantages stated

cannot be a greater advantage at all. He further submitted that one of the advantages that invalid votes can be eliminated is not at all an advantage, as the voters will do it intentionally. He also argued that there is no question of estoppel on the part of the petitioner, as every election gives fresh cause of action. Pertaining to election profess, learned counsel submitted that the it starts with finalization of the candidates. He further submitted that the machines are not sealed in the presence of any of the political parties prior to the finalization of the candidates. But they are now available with the revenue officers. He submitted that neither the political parties nor the public are permitted to see them. So there is every possibility of setting the programme in such a way as to favour a particular party candidate. He apprehends that there is every possibility of pressing 'Result' button at the stage of voting itself. He also submits the EVMs can be destroyed by banging on it. He further submitted that in counting nobody knows how the votes are counted.

37. We have heard the learned counsel for the respective parties and perused the materials and the citations relied on by the counsel at bar. It will be appropriate to extract the relevant Sections framed under the Act and the respective amendments, which are as follows:

Section 61-A:

"Voting machines at elections – Notwithstanding anything contained in this Act or the rules made thereunder, the giving and recording of votes by voting machines in such manner as may be prescribed, may be adopted in such constituency or constituencies as the Election Commission may, having regard to the circumstances of each case, specify.

Explanation – For the purpose of this section, "voting machine" means any machine or apparatus whether operated electronically or otherwise used for giving or recording of votes and any reference to a ballot box

or ballot paper in this Act or the rules made thereunder shall, save as otherwise provided, be construed as including a reference to such voting machine wherever such voting machine is used at any election."

Section 58

"Fresh poll in the case of destruction, etc.., of ballot boxes

– (1) If at any election, -

(a) any ballot box used at a polling station or at a place fixed for the poll is unlawfully taken out of the custody of the presiding officer or the returning officer, or is accidentally or intentionally destroyed or lost, or is damaged or tampered with, to such an extent, that the result of the poll at that polling station or place cannot be ascertained; or

(aa) any voting machine develops a mechanical failure during the course of the recording of votes; or

(b) any such error or irregularity in procedure as is likely to vitiate the poll is committed at a polling station or at a place fixed for the poll the returning officer shall forthwith report the matter to the Election Commission."

Section 59:

"Manner of voting at elections – At every election where a poll is taken votes shall be given by ballot in such manner as may be prescribed, and no votes shall be received by proxy."

Section 169:

"(1) …

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provided for all or any of the following matters, namely:-

… … … … …

(ee) the manner of giving and recording of votes by means of voting machines and the procedure as to voting to be followed at polling stations where such machines are used;

… … … … …

(gg) the procedure as to counting of votes recorded by means of voting machines;

(h) the safe custody of [ballot boxes, voting machines], ballot papers and other election papers, the period for which such papers shall be preserved and the inspection and production of such papers;

(i) … … … … …

(3) Every rule made under this Act shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or [in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made], the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

38. Let us first examine whether the new Section 61-A introduced by Act 1 of 1989 is ultra vires the Constitution and in particular. Articles 14, 248, 324 and

326 to 328. Learned counsel for the petitioner vehemently contended that Section 61-A suffers from arbitrariness, excessive delegation, lack of guidelines, and by the use of the expression 'notwithstanding' there is total ' abdication' of legislative power.

39. So far as the law is concerned, it is well settled that either the Rule or the notification cannot override the provisions of the Act, but at the same time it can supplement the Act. Now the question is Whether the insertion of Section 61-A overrides the other provisions of the Act or not. It is also settled that delegation of legislative authority could be permissible with restrictions / limitations but the Parliament can on no account throw the responsibility, which the Constitution imposes upon it on the shoulders of an agent or delegate. No doubt, if any provision of the Act confers uncanalised and uncontrolled powers to the executive, it will be ultra vires. The crux of the argument of the learned senior counsel for the petitioners is that due to the words "notwithstanding", "in the manner as may be prescribed" and "such constituency or constituencies", Section 61-A is ultra vires the Act. It is seen that Section 61-A, which has been inserted to give effect to the decision in *A.C. Jose vs Sivan Pillai (AIR 1984 SC 921)*, consists of three parts, viz., the enacting part spelling out the wisdom and policy of Parliament, the non obstante clause giving overriding effect to the enacting part, and the third part, viz., delegation fo the power of manner of using the voting machine. Under Sections 169(2) (ee) (gg) and (h) specific power has been given to make Rules, and Rules have to be read as part of the Act. The Rules have to be laid before Parliament and we are told that the new Rules relating to EVMs were laid before both the Houses of Parliament. The Parliament indeed can make amendments, if necessary. The Parliament's control over the legislation cannot be said to be absent. The legal and constitutional position as it then stood, has been summed up in A.C. Jose's case to the effect that when there is no Parliamentary legislation or rule made under the said legislation, the Commission is free to pass any orders in respect of the conduct of elections. It is also made clear that when there is an Act and express Rules are made there under, it is not open to the Commission to

override the Act or the Rules and pass orders in direct disobedience to the mandate contained in the Act or the Rules. It has been specifically stated that the powers of the Commission are meant to supplement rather than supplant the law in the matter of superintendence. It is crystal clear that no mandate is given a go-by by the enactment of Section 61-A. The word 'notwithstanding' should mean that, notwithstanding what is stated in Section 59 with regard to ballot papers, votes given by ballot shall mean and include the giving and recording of votes by voting machines. The word 'notwithstanding' has been defined variedly as 'despite, inspite of' in Black's Law Dictionary VII Edition; 'all the time, although, nevertheless' (William C Burton); As rightly pointed out by Mr. G. Rajagopalan, learned senior counsel, the said word cannot be construed to mean that it overrides every other provision. Section 59 and 61-A can co-exist if a harmonious construction is attempted. In *Union of India and another v. G.M. Kokil and Others* (AIR 1984 SC 1022), the word 'notwithstanding' has been considered by the Supreme Court and it is categorically stated that non obstante clause is a legislative device employed to give overriding effect to certain provisions. Similarly, *in Smt. P.E.K. Kalliani Amma and Others vs. K. Devi* and Others (AIR 1996 SC 1963), non obstante clause has been dealt with and found that the non-obstante clause will not be an impediment for the operation of the enactment. In *The Dominion of India etc. v. Shrinbai A. Irani and another* (AIR 1954 SC 596), it has been observed that "the non obstante clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the Legislature by way of abundant caution and not by way of limiting the ambit and scope of the operative part of the enactment". A reference can also be made to the decision in *P.E.K. Kalliani Amma v. K. Devi (supra)* wherein their Lordships held as follows :

> "Non Obstante Clause is sometimes appended to a Section in the beginning with a view to give the enacting part of the Section, in case of conflict, an overriding effect over the provision of Act mentioned in that clause. It is equivalent to saying that in spite of the provision or Act mentioned in the non obstante clause, the

> enactment following it will have its full operation or that the provision indicated in the non obstante clause will not be an impediment for the operation of the enactment [see *Union of India vs. G.M. Kokil* (1984 Supp. SCC 196)]"

In view of the above discussion, so far as the word "notwithstanding" is concerned, we are of the view that the mere use of the word "notwithstanding" in the facts and circumstances of the case, cannot be held to be amounting to abdication of powers.

40. Regarding the contention that the words "in such manner as may be prescribed" cannot be used in the absence of any guidelines, the Parliament after the decision rendered in A.C. Jose's case, had deliberations and after consideration declared its policy to use EVMs. We are of the view that the Parliament cannot give elaborate details. Therefore, by merely saying that no guidelines have been given explicitly, Section 61-A cannot be declared as ultra vires the Act. This argument can be looked at from another angle also. A look at Section 59 which reads, "at every election where a poll is taken, votes shall be given by ballot 'in such manner as may be prescribed', and no votes shall be received by proxy" shows that the Parliament has used the same words "in such manner as may be prescribed" employed in Section 61-A also, and it is prevailing from the beginning. It is revealed that Parliament for conducting elections through ballot boxes have not given any guidelines as suggested but Rules have been framed to conduct elections as that of papers ballot, in such a manner prescribed i.e. for that, specific rules are there. So, when such a system was in vogue, it cannot be said that in the absence of guidelines. Section 61-A has to be struck down for using the words "in such manner as may be prescribed". In other words, without any elaborate detail regarding the procedure of conducting elections through ballot box in Section 59 of the Act, when the system was settled, a procedure was there. So, on merely saying that no guidelines have been given under Section 61-A when under this Section also rules, and manner have been prescribed, no direction can be given,

and the argument of Mr. Rao is not acceptable. We are of the firm view that when the Sections and the Rules form a complete code by themselves, no question of absence of guidelines will arise. That apart, as stated above, sub-sections (2)(ee), (2)(gg),and (2)(h) of Section 169 make it clear that sufficient power has been conferred upon the EC to make Rules.

41. Regarding the contention that without specifying the constituency, mentioning 'such constituency or constituencies', in Section 61-A of the Act, is ultra vires, on a perusal, we find that the scheme of the Act is very clear and the legislative policy is to permit EVMs. Section 61-A provides that the giving and recording of votes by EVMs in such manner as may be prescribed may be adopted in such constituency or constituencies as the EC may, having regard to the circumstances of each case, specify. According to the learned counsel for the writ petitioners to choose the constituency where EVM has to be used, more power has been given to the EC. As we have stated already, the use of EVMs depends upon the number of contestants, the stage of elections in a particular constituency, feasibility and the availability of machines. Taking into account all these circumstances, the EC has to decide whether in such constituency, EVMs can be used or not. Therefore, it cannot be said for the use of EVMs and to exercise discretion, more power is given to the EC, and interference is required by this Court. For the reasons discussed above, we are also of the view that no particular constituency can be earmarked in Section 61-A of the Act itself for the use of EVMs because of the primacy of the EC under Art. 324 of the Constitution. That apart, as between Arts. 324 and 327, Art. 324 is not subject to any provision of the Constitution. In such circumstances, if the Parliament makes any law, which has even indirect effect of interfering with the EC, that law would certainly be invalidated. Further as per Section 169 of the Act, the Central Government may consult with the Election Commission for making rules for carrying out the purposes of the Act. In view of this, we are quite convinced that the policy of the Parliament alone is stated in the Act, leaving the details to the Central Government to get implemented in consultation with the EC. Therefore, on this ground also, it cannot be said that Section 61-A smacks of arbitrariness.

42. So far as the argument regarding delegation of powers is concerned, the learned senior counsel relied on the decision in *M/s. Tata Iron and Steel Ltd. Vs. Workmen* (AIR 1972 SC 1917), wherein stressing the need for flexibility of procedure to meet the changing circumstances and that the Parliamentary procedure and discussion in getting through a legislative measure is time consuming, the Supreme Court explained the necessity for delegated legislation and observed as follows :

> "The legislature, it must be borne in mind, cannot abdicate its authority and cannot pass on to some other body the obligation and the responsibility imposed on it by the Constitution. It can only utilize other bodies or authorities for the purpose of working out the details within the essential principles laid down by it. In such cases, therefore, it has to be seen if there is delegation of the essential legislative function or if it is merely a case in which some authority or body other than the legislature is empowered to work out the subsidiary and ancillary details within the essential guidelines, policy and principles, laid down by the legislative wing of the Government".

43. If we examine the present situation in the light of note of caution found in the above judgment of the Supreme Court, as discussed above, the conclusion is inescapable that there has been no abdication. The policy decision to use EVMs is taken by Parliament and the details are to be worked out only by the EC in the fact situation.

44. Under Section 169 of the Act, the Central Government in consultation with the EC by notification in the Official Gazette may make rules for carrying out the purposes of the 1951 Act. Incidentally, as already noticed Article 324 is supreme and is not subject to any provision in the Constitution and in fact, Articles 326 and 327 are subject to Article 324. The framers of the Constitution took care to leave scope for exercise of residuary power by the Commission in its own right and it is within the domain of the Election Commission to conduct election and it is for

the Government to articulate its policy and the decision is to be carried out by EC, the details of which cannot be provided in the enacted law and further, it is bound to take some time to cope with the situation.

45. The power of superintendence, direction and control of the preparation of the electoral rolls and the conduct of all elections have been vested with the EC under Article 324 of the Constitution. This position is strengthened in view of the decision in *Mohinder Singh vs. Chief Election Commissioner* (AIR 1978 SC 851) wherein it was held that every contingency could not be foreseen or anticipated with precision. That is why there is no hedging in Article 324. The Commissioner may be required to cope with some situation, which may not be provided for in the enacted laws and the rules. The Supreme Court also extracted from Sutherland Statutory Construction, 3rd Edition, Page 20 the following :

> "An express statutory grant of power or the imposition of a definite duty carries with it by implication, in the absence of a limitation, authority to employ all the means that are usually employed and that are necessary to exercise of the power or the performance of the duty … That which is clearly implied is as much a part of a law as that which is expressed".

The Supreme Court ultimately found that the Election Commission is competent to order repoll in an appropriate case.

46. It is also noticed that the Rules framed under Section 169 of the 1951 Act have not been challenged. Merely saying that there has been excessive legislation is not enough. As already stated, the Parliament is not expected to say every minute detail in the Act itself and the desires and wishes of the Parliament are to be carried out and for that Rules have been made wherein elaborate procedure has been prescribed. That apart, the counsel has not been able to point out, which rule is ultra vires the Act or the Constitution, in the instant case. We

find substance in the argument of Mr. V.T. Gopalan, Additional Solicitor General to the effect that the Rules framed and laid down before the House of Parliament will answer many of the queries raised by the petitioners. The provisions of the 1951 Act and the Rules make a complete code by themselves. In view of the above discussion, we are of the view that the EC is not invested with arbitrary exercise of power in the matter of choice of constituency or constituencies.

47. So far as the argument that in the Statement of Objects and Reasons, it is only mentioned, 'modern electronic processes should be deployed, 'side by side', with the existing conventional system in the voting process', but now, without determining and deciding certain constituencies, the Election Commission is going to use EVMs in the entire elections, and therefore it is bad, is concerned, the counsel cannot take advantage of mentioning of the words 'side by side' in the Statement of Objects and Reasons. It cannot be interpreted that even at one constituency or even in one booth, both systems can go side by side. It only means, the Election Commission has to decide about the constituency or constituencies for the use of EVMs at present where the contestants do not exceed 64. It depends upon the feasibility and the other circumstances, which are within the domain of the Election Commission, by exercising its discretion to come to a conclusion. Moreover, the Election Commission cannot implement the new system overnight to all the constituencies and it can be implemented in a phased manner and in doing so, it can be used as per the procedure in select constituencies and in other places, the old method will be adopted. That apart, it is well established that objects and reasons are only an external guide for making a provision. In *S.S. Bola v. B.D. Sardana* (AIR 1997 S.C. 3127), it has been held that if the words used in the statute are clear and unambiguous, then the statute itself declares the intention of the legislature and in such a case, it would not be permissible for a Court to interpret the statute by examining the Objects and Reasons for the statute in question. Therefore, the Section cannot be struck down on the ground of arbitrariness also when the provisions are clear, as in the present case.

48. As already stated, the principles set out in the various decisions relied on by the learned senior counsel for the petitioners are not at all helpful to decide the controversy in hand. However, the point to be considered is whether, as contended by the learned senior counsel in the present case, there has been total abdication of legislative power by the Parliament to the EC. The position can be aptly summarized by borrowing liberally from the judgment of Mukherjea, J. (as the learned Judge then was) in RE ARTICLE 143, Constitution of India etc. (AIR 1951 SC 332) particularly paragraphs 246 and 262. After referring to the American and the English cases, the learned Judge has succinctly put the matter and the relevant portions as follows :

> "The limits of the powers of delegation in India would therefore have to be ascertained as a matter of construction from the provisions of the Constitution itself and as I have said the right of delegation may be implied in the exercise of legislative power only to the extent that it is necessary to make the exercise of the power effective and complete …
>
> … The legislature must retain in its own hands the essential legislative functions, which consist in declaring the legislative policy and laying down the standard, which is to be enacted into a rule of law, and what can be delegated is the task of subordinate legislation, which by its very nature is ancillary to the statute which delegates the power to make it".

In *Rajnarain Singh vs. Chairman, Patna Administration Committee (supra)*, the Supreme Court dealt with under Section 3 of the Bihar and Orissa Act 1 of 1915, as amended in 1928, by which the Central Government was given power to frame rules in future, which may have the effect of adding, altering, varying or amending the rules accepted under Section 4 as binding. The rules were laid on the table of Parliament for 14 days before they were to come into force. The Supreme Court

held that Parliament had in no way abdicated its authority but was keeping strict vigilance and control over its delegate. The relevant portion runs as follows:

> "delegation is given to the Court to the extent of authorizing an executive authority to modify the law, but not in any essential feature. As to what constitutes an essential feature cannot be enunciated in general terms. Thus, there can be delegation of legislative functions to executive authorities within certain limits"

49. In view of what we have stated above, we have no hesitation to hold that there is no abdication of powers. No excessive delegation also can be traced out. Parliament has given sufficient powers to the Election Commission and it has been used in just, fair and proper manner. We are also of the view that no arbitrariness is shown and there is no absence of guidelines in the introduction of Section 61-A, as stated above. So, we find no good reason to declare that Section 61-A is ultra vires. We answer the question raised at the beginning in the negative. The writ petitions W.P. Nos. 3346 and 3633 of 2001 challenging the vires of the Section are therefore dismissed.

50. Now, the other writ petitions, wherein some doubts and apprehensions have been raised about the satisfactory functioning of the EVMs, can be considered as per the respective arguments advanced by the parties. To understand the issue on hand and to decide the issue, we think it necessary to repeat what had already been mentioned earlier. As the facts culled out from the records, it is seen that after the decision in Jose's case, on the recommendation of the Election Commission, Section 61-A came to be introduced to the Representation of the People Act, 1951 and corresponding amendments were also incorporated in the conduct of Election Rules mentioning about the procedure of conduct of elections using EVMs. Section 49-A talks of design of EVMs, fixing the label and set the number of contesting candidates. Section 49-D speaks about the admission to polling stations of candidates and election agents. Section 49-E speaks about the preparation of voting machines and the demonstration to the effect that no vote

had already been recorded in the voting machine. The procedure regarding fixation of paper seal, affixing signatures of agents, seal used for securing the control unit and closing the same were elaborately mentioned. Identification of electors, which is a salient feature is talked in Section 49-H coupled with Section 49-J challenging the identify by the agents. Safeguards against impersonation are spoken to in Section 49-K. Procedure for voting is elaborately narrated in Section 49-L and maintenance of secrecy of voting is mentioned in Section 49-M(2). Section 49(O) talks about the procedure when elector decides not to vote. This will not amount to invalid vote. Section 49-P speaks about tendered votes. We take such pain just to show that sufficient safeguards have been taken in introducing the above Sections formulating the procedures to be followed while making use of EVMs by introduction of Section 61-A.

51. The matter relating to the use of EVMs was referred by the Government in February, 1990 to the 'Dinesh Goswami Committee' consisting of representatives of several recognized national and State parties, which in turn, for the technical evaluation of the machines, appointed a technical experts committee, consisting of distinguished scientists. The technical experts committee examined the machines minutely from every angle and unanimously recommended the machines for using in elections. The EVMs were put to use during the general elections to the Legislative Assemblies in Madhya Pradesh, Rajasthan and Delhi in November, 1998 and they worked efficiently and smoothly without any problem, appreciated by one and all. Moreover, the 'Centre for Study of Developing Societies', Delhi, engaged by the Election Commission, conducted a detailed study on the use of EVMs during these elections and the study indicated that the response to the use of EVMs was very favourable with 90.6% saying that they preferred the EVMs. Further in 45 constituencies, EVMs were put to use in February, 2000 general elections to the Haryana Legislative Assembly. Out of 1,01,245 machines used during these elections between 1998 and 2000 only 12 machines, working out to 0.001%, were found to have developed some problems. In order to eliminate even such marginal defects, a further review by a team of officers of the Election

Commission with the representatives of ECIL at Hyderabad was held and certain improvements were made. The Election Commission had taken every precaution as a prudent normal person can take in this matter. Though the error margin is negligible, they did not want to take any chance and made corrections in the machines. During the use of EVMs in the Asembly Elections during 1998, they had stationed mobile parties with spare EVMs to replace in the event of any emergencies. They took various steps like mass media campaign and holding public demonstrations about the use of the machines, for both the public and the agents of the political parties. Now, it is seen that they had gained the confidence and only after they were satisfied, they went in for the use of the same.

52. It is settled that this Court while exercising the writ jurisdiction under Article 226 of the Constitution of India has no power to sit in appeal over the conclusions arrived at by Technical Experts and eminent scientists. Nor has this Court the expertise to go into the technical aspects. Nonetheless as some apprehensions are voiced, the Court can see whether a person, who is a voter in the voter's list, will be allowed to cast vote of his choice and every vote will go and count for the account of the particular contestant to whom he voted and whether with the connivance of the offices, a voter can cast more than one vote.

53. On considering this aspect, we find that specific rules are there. Merely on the apprehension, howsoever strong it may be, a decisive conclusion cannot be arrived at. Assumptions and presumptions cannot lead to a decision in the absence of concrete materials placed, when the entire case was argued on the basis of apprehension. This Court cannot come to the conclusion on the basis of such apprehension so as to defeat the object of the Act and the purpose of using EVMs. The mere statement that the petitioner could demonstrate some EVMs to show the possibility of misuse, is not helpful as those machines are not going to be used in the polls. In view of the earlier discussion, this Court finds no ground to witness the demonstration.

54. On a perusal of the Rules and the counter affidavits, as discussed above, it is clear that the identity of the voter is ascertained by proper identity card or by the polling agents / representatives of the political parties at that particular booth. Each and every voter is subjected to that test. That is not taken away. About the functioning of the EVMs, it has been categorically stated that it contains two units, namely control unit and ballot unit, which are inter connected. Once a person casts a vote, a beep sound would emanate and he cannot again press the balloting unit and it would be locked automatically. Unless the next voter arrives to vote, after completing the formalities, the Presiding Officer will not release the lock. Moreover, the agents/representatives of all the contestants are there to inform the Presiding Officer to release the lock if necessary. Only after the polling officer releases the lock of the next person, the machine will become functional. Further when agents of all the contestants are there, it is not possible for the Polling Officer to connive with anybody as suggested, in releasing the locks. Furthermore, the responsibility of accountability to the number of persons voted in that booth is fixed on the Polling Officers concerned. So, the Polling Officer cannot at his own whims and fancies, release the lock. In any case, it is not possible for the Presiding Officer to connive with the voter to cast vote more than once. So, the apprehension of the petitioners is uncalled for.

55. Learned counsel submitted that as per the observations made in A.C. Jose case (supra), the EVMs should be used initially in urban areas, which is lacking in this case and as such, the use of EVMs should be stopped. As discussed and as seen from the counter, the machine is so simple, robust and the Election Commission has the discretion to select the constituency or constituencies where the EVMs to be used, after ascertaining the feasibility. The argument of the learned counsel for the petitioners is not appealing to us on this ground.

56. Next, it is contended that a doubt will always remain there as to whether the vote of an elector has been registered. A perusal fo the machine manual produced before us reveals that whenever a person casts his vote, a beep sound

will be heard to those who are present in the booth concerned, and that is the signal of the registration of the casting of vote. A safety measure is provided that if the concerned person or agents do not hear any sound, they will inform the Polling Officer to release the lock.

57. Next I was vehemently contended that there is no guarantee provided to the effect that an elector could be sure that the vote cast by him by pressing the button, has been registered to the account of the contestant whom the voter intended. In the counter of the Election Commission, it has been mentioned that the EVMs have been so designed and manufactured in such a foolproof manner that each vote is recorded faithfully and correctly only for the candidate in whose favour it is cast by the elector. The programme in the microchip in the EVM cannot be re-written or replaced. It is also seen that the gap is so little that only robotic arms can solder the leads. Further it is seen that it is absolutely impossible, when a vote is registered to a particular contestant, it can be accounted to another candidate. It is also seen that this apprehension had been removed by a demonstration of the EVMs before the Election Commission and the representatives of various political parties. The manufacturing process involves the logical design of the electronic gadgets and the programme is written independently by the Public Sector Corporations ECIL and BEL and fused with the chip at the facility of the manufacturer Hitachi Corporation, Japan. In view of this, the apprehension of the counsel that it will not go in the account of the same contestant falls to the ground. As per Rule 49-E (2) of the Rules, the presiding officer, immediately before the commencement of the poll, shall demonstrate to the polling agents and other persons present that no vote has already been recorded in the voting machine. In view of the full safeguard in the Rules, the contention on pre-programming of EVMs, falls to the ground. For the same reason, the argument that the polling agents and political parties are not permitted to see the EVMs before polling and therefore there is a possibility of programming in favour of a particular candidate is unfounded.

58. It is also seen that control unit is the brain of the whole system. It has various buttons, 'ballot', 'close', 'total' and 'result'. Every branch of the unit is safeguarded and only the officers concerned can operate those buttons by braking a paper seal. At every branch, the seals of polling agents are to be obtained. So, fi there is any tampering, it could be noticed by one and all. So also, the apprehension of the counsel for the petitioner that at the time of polling itself, a voter can press the result button is misconceived. So far as the apprehension that nobody knows as to how the votes are counted, elaborate procedure has been set out in Part V and Rule 66-A. Chapter 5 in EVM Manuals submitted by the Election Commission also speak about the counting procedure. The book titled 'Elections in India – Major Events & New Initiative 1996-2000' published by Election Commission elaborately details the procedure in the conduct of elections.

59. There is also no question of introducing any virus or bugs for the reason that the EVMs cannot be compared to personal computers. The pgoramming in computers, as suggested, has no bearing with the EVMs. The computer would have inherent limitations having connections through Internet and by their very design, they may allow the alteration of the programmes but the EVMs are independent units and the programme in EVM is entirely a different system. The accidental damage of the EVMs will not cause any danger to the votes already cast and the poll can be continued with the new one, as mobile parties with spare EVMs will be requisitioned, as per the contention of the Election commission.

60. The advantages of using EVMs outweight the advantages in conventional ballot boxes. Need for printing huge quantity of ballot papers is dispensed with saving on cost of paper and printing. The invalid votes in the old system play a major role in turning the result of the elections. In some cases, the margin between the elected and defeated candidate is below 500 where as the invalid votes run to 1000. In the EVMs invalid vote does not arise and every vote will be accounted. No rigging is possible and results can be ascertained in a shorter time. In the ballot papers in the conventional system, the voters prefer to

write some messages leaving a bad taste and also wasting the whole exercise. This is not possible in the EVMs. It is worthwhile to mention that the former Chief Election Commissioner, presently adorning the Chair of Governor, Karnataka, praised the use of EVMs in the election to the effect that it is cheaper, easy to use and quicker and the need for printing huge quantity of ballot papers is dispensed with saving the cost of paper and printing.

61. Learned counsel submits that right of hearing was given pertaining to the provisions of SC/ST Act and Delimitation Act. No such provision is prescribed in Section 61-A. We feel that this argument is not laudable for the reason that notice of hearing afforded in the provisions of SC/ST and Delimitation Act will not have anything to do with this case, as the right of a voter is not curtailed in the instant case and the use of EVMS in the elections cannot be said to be bad on this count. The cases relied upon by the learned counsel on this issue are not helpful. Further, individual notice of hearing to more than 100 millions of voters is beyond imagination. As already stated, in the meetings conducted by Election Commission, various political parties participated and wide publicity was made through T.V., Cinema, AIR, Press, etc. So, the contention that after the last election, EC had not made any programme to start with the use of EVMs in urban places, is not appealing and on this ground, the use of EVMs cannot be stopped. That apart, it is seen that millions of people had cast their votes using EVMs during the early occasions and wide publicity was given for the use of EVMs. So, in view of the discussion we had earlier, we feel that the argument of the learned counsel for the petitioners on this aspect will not hold any field.

62. Mr. N. Jothi, learned counsel for the petitioners, submitted that mere sitting of the Election Commission with political parties alleged is not sufficient and it will not preclude them from challenging the use of EVMs and he relied on A.C. Jose case (supra). But this ground cannot be taken advantage of by the learned counsel to contend that EVM itself is bad and no delay had occurred. As already stated there is no estoppel in challenging the statute but once the petitioners had participated in the discussions and thereafter participated in the earlier elections wherein EVMs were used after insertion of Section 61-A, the argument of the

learned counsel for the petitioners is not helpful. On the other hand, the argument of the learned counsel for the Election Commission that the writ petitions are filed now only to forestall the ensuing elections has some force.

63. The argument of Mr. Rao, learned senior counsel, that the ultimate decision to start using EVMs taken by the Election Commission was not disclosed to them and a wrong impression was given in the counter affidavit that all agreed is not helpful and as discussed, it cannot lead to banning using the EVMs for the reason stated above. That apart, the petitioners have not pointed out any single failure in the machines earlier used in some of the constituencies in Tamil Nadu during the Bye-Elections 1999, nor it was challenged.

64. The mere wild allegation of Mr. N. Jothi, learned counsel for the petitioners, that programme could have been written so as to suit the ruling party, is not tenable. The election is being conducted by the Election Commissioner, who is an independent high constitutional functionary. So, we are not acceding to the learned counsel for petitioners to issue a direction to ban the use of EVMs on this ground.

65. So also the apprehension of the learned counsel that a mere blow on the EVM will damage the entire system and the data stored already would have jumped to other persons also is not tenable in view of the elaborate safeguards provided in the Rules.

66. The allegation of Mr. Jothi, learned counsel, that machines are not sealed before political parties and are with the revenue officers and they are not permitted to see and on the basis of that they should be prohibited, in our view, it is uncalled for, for the reasons already stated.

67. The contention of the learned counsel that the use of EVMs in Japan and United States of America proved to be a failure also will not hold any water. In India, we are not following the system prevailing in the United States of America or Japan.

68. The contention of the learned counsel that the objection raised by the political parties should have been taken into consideration, that the EVMs should have been used initially at urban places and thereafter only final decision should have been arrived at, is also not tenable. In fact, there is clamour for use of EVMs in more constituencies which would be evident from the letters on file, addressed to the Election Commission by political parties, which are in opposition. In our view, the voter cannot dictate that he should be allowed to cast his vote in the method he chooses. In view of the insertion of Section 61-A and the procedure prescribed and the Rules framed there under, we are satisfied that there is no bar on the Election Commission to choose the constituencies to use the EVMs and it is well within its jurisdiction in the exercise of the power conferred upon it. Therefore, as held above, no direction as prayed for in these writ petitions can be granted.

69. Mr. N. Jothi, learned counsel for the writ petitioners contended that what all the Election Commission had contended before this Court had already been negatived by the Supreme Court in A.C. Jose case (supra) itself. That A.C. Jose case, their Lordships found that the use of EVMs itself was bad for want of legislative power and accordingly, repelled the contentions of Election Commission advanced therein. In the said decision, their Lordships also observed at para 37, 'however, we refrain from making any comments on either the defects or advantages of voting machines because it would be for the legislature and the Government, if it revises its decision at one time or the other, to give legal sanction to the direction given by the Commission.' In the instant case, after the introduction of Section 61-A, Rules were framed there under. In the meeting conducted by Election Commission, several political parties participated and apprehensions raised by political parties were also clarified. In the subsequent elections, millions of electors cast their votes using the EVMs. In such a fact situation, the argument of the learned counsel for the Election Commission that the purpose of the challenge of the writ petitioners raising technical aspects, with inordinate delay of about 10 years is only to forestall the ensuing elections to be held within two months has some force. As already stated, since we have upheld Section 61-A,

and on merits also, we find no infirmity to call for our interference. Under these circumstances, it is not proper and necessary to dismiss the writ petitions on this ground of delay.

70. As already discussed, the procedure has been fully set out in the Rules. That apart, no Rule has been challenged. On this ground also Section 61-A, cannot be held to be bad. So, a direction to ban the election cannot be issued on that ground also.

71. Next it was contended that sufficient training was not given. This contention is also not tenable. As per the counter, sufficient training has been given to the officials and officers concerned. As discussed, we are satisfied that the EVMs are user friendly and they can be used with ease without spending much of the time on training. As stated before us, the Election Commission will spread full awareness among the voters through various programmes in the mass media and will ensure to impart proper and more training before the actual election. It is expected that the EC will carry out its objectives expeditiously.

72. The other argument advanced on the other side is that no voter has approached the Courts anywhere in India and therefore, the writ petitions filed by political parties cannot be entertained and are to be dismissed as not maintainable and no direction in the nature of Writ of Prohibition can be issued as it is settled that a writ of prohibition is not a writ of course but can only be issued when there is a defect of the jurisdiction apparent on the face of the proceedings if the authority exceeded the jurisdiction or assumed jurisdiction when there is no jurisdiction. According to the Election Commission, political parties are not voters themselves. So, they cannot take up the cause of voters and insist that they expected a particular voter had voted in their favour, to defeat the secrecy of the voter in the democracy. Though the argument has some substance, since we have already considered the vires and upheld Section 61-A, and have also gone into the merits of the case and satisfied that sufficient safeguard has been provided as per the Rules, it will not be proper to throw out the writ petitions on the ground of maintainability at this

stage. We are satisfied that sufficient safeguard has been provided as per the Rules. So, we are of the view that the writ petitions cannot be thrown on the ground on this score.

73. The argument of Mr. Jothi that the mere quick results and elimination of invalid votes cannot be a ground to have the EVMs when they have in-built danger, has no substance. Nothing has been shown to convince us what is the in-built danger. We are quite satisfied with the procedure prescribed under the Rule for the use of EVMs. From the counter also, we are satisfied with its functioning. It is very simple and perfectly sound as per technology without defect. As stated, this Court, on an overall consideration, including the points alleged, has upheld the vires of the Act.

74. So far as W.P. No. 3633 of 2001 is concerned, a machine was designed by the petitioner therein but it was not accepted by the Election Commission and ultimately, it was turned down. He filed a writ petition challenging the same and it was dismissed. Now, the petitioner has filed this petition challenging the vires of Section 61-A of the Act. Election Commission has objected to stating that the present writ petition is not maintainable. In our view, the writ petitioner could have challenged the vires of the Section 61-A in his earlier writ petition itself. That apart, the petitioner was also not able to show that he is a voter in the electoral list and he filed the writ petition in the capacity of a voter. Since we have already gone into the merits of the case, it is entirety, it will not be proper to dismiss the writ petition solely on the ground of maintainability of this writ petition.

75. As stated above, though this Court is not inclined to go into technical aspects, but as argued vehemently, on an overall consideration, we find that no two votes can be cast by a single voter, as every vote is recorded only after releasing the lock by the Polling Officer. Registration of vote is ensured by glowing of the bulb in ‘green’. The secrecy is thus maintained. There is a provision for demonstration before voting, and sealing at every stage including at the counting stage. The result button can be touched only by piercing the paper seal and not

otherwise. At every stage, the agents of the respective parties are there. We are quite convinced that sufficient safe guards are maintained by framing of Rules to have the election conducted in a just, fair and proper manner. The data are stored in the EVMs permanently and they can be retrieved and used in the event of any Election Petition/s being filed before the Court of Law. The apprehension of the petitioners that the use of EVMs will not serve any purpose because of lack of procedures on maintaining the secrecy, counting, registration of votes to the person to whom it was intended by pressing button, is unfounded. The minor defects which occurred in earlier elections amounting to 0.001% are negligible. The Election Commission also informed us that by use of some more modern technology, such defects also would be eliminated. In view of what has been stated above, we are in entire agreement with the contentions of the EC and we find no good ground to prohibit the use of EVMs in the ensuing elections. All objections raised on behalf of the petitioners are not acceptable and liable to be rejected. No other points were argued. The writ petitions have no merit and are liable to be dismissed. Accordingly, all the writ petitions are dimissed.

76. We hope and trust that the EC will ensure that the various minus points attributed to EVMs are taken proper note of and remedial measures are taken well in advance including wide publicity before EVMs are put into operation so that a voter, whose name is in the voters' list, shall exercise his franchise and a free, fair and independent election can be held and the public can repose confidence in the system and the election process. All the writ petitions fail and are dismissed. There will be no order as to costs. Consequently, all the connected miscellaneous petitions are also dismissed. Office shall issue a copy of this order to the Election Commission of India.

HON'BLE HIGH COURT OF JUDICATURE AT ALLAHABAD LUCKNOW BENCH : LUCKNOW

Writ Petition No. 1872 (MB) of 2004

Abhay Singh
S/o Shri Ram Lautan Singh
R/o Village Mangatur, Dist. Pratapgarh ..... Petitioner

Versus

State of U.P. through its Principal Secretary,
Home Department, Civil Secretariat, Lucknow & Others ..... Opposite Parties

Date of Order : 12.04.2004

SUMMARY OF THE CASE

This case relates to the challenging of order of the Election Commission of India directing the State Government of U.P. to transfer the Superintendent of Police and the Additional Superintendence of Police, Pratapgarh on the grounds that the Chief Election Commissioner of India has no power or authority under law to issue such directions and that the said action of the Commission was politically motivated. The Court observed that the petitioner has not filed a copy of the impugned order. The Court took the view that for holding free and fair elections, it is the duty of the Election Commission of India to issue necessary directions to the State Government even in the matter of transfer. The Court held that the writ petition was devoid of merits and accordingly rejected at the admission stage.

O R D E R

Hon'ble U.K. Dhaon, J.; Hon'ble M.A. Khan, J.

Heard Sri R.N. Gupta learned counsel for the petitioner, Sri Ashok Nigam who has put in appearance on behalf of the Election Commission of India and the learned Standing Counsel who has accepted notice on behalf of opposite parties 1 and 2. Service of notice on opposite parties 5 and 6 is dispensed with.

The petitioners have approached this Court against the order dated 7.4.2004 purported to have been passed by the Election Commission of India by which, it is alleged, directions were issued to the State Government to transfer the Superintendent of Police and the Additional Superintendent of Police, Pratapgarh. Sri R.N. Gupta, learned counsel for the petitioner submits that the Chief Election Commissioner of India has no power or authority under law to issue direction to the State Government to transfer the Superintendent of Police and the Additional Superintendent of Police, Pratapgarh. He further submits that the action of the Election Commission of India is politically motivated.

Dr. Ashok Nigam, learned counsel appearing for opposite parties 3 and 4 submits that there is no illegality in the order of the Election Commission of India by which directions were issued to the State Government for transfer of the Suprintendent of Police and the Additional Superintendent of Police, Pratapgarh. He has relied upon the decisions of Hon'ble the Supreme Court in Kanhiya Lal Omar *v.* R.K. Trivedi and others reported in AIR 1986 SC 111, A.C. Jose v. Sivan Pillai and others reported in AIR 1984 SC 921 and Mohinder Singh Gill and anr v. *The chief Election Commissioner, New Delhi and others* reported in AIR 1978 SC 851.

We have considered the arguments of the learned counsel for the parties and gone through the record.

Under Article 324 of the Constitution of India, the Election Commission of India is vested with the power of superintendence, direction and control for conducting free and fair elections. As the elections for the parliamentary constituencies in the State of U.P. have been notified by the Election Commission of India, the transfer and postings can be made by the State Government only with the prior permission of the Election Commission of India. During the period of elections, the entire control of the Officers posted in the District and the staff assigned with the work related to elections are under the direct control of the Election Commission of India. Hon'ble the Supreme Court in Kanhiya Lal Omar (Supra) has held in paragraph 16 as under:

> *"16. Even if, for any reason, it is held that any of the provisions contained in the Symbols Order are not traceable to the Act or the Rules, the power of the Commissioner under Article 324(1) of the Constitution which is pienary in Character can encompass all such provisions. Article 324 of the Constitution operates in area left unoccupied by legislation and the words 'superintendence', 'direction' and 'control' as well as 'conduct of all elections' are the broadest terms which would include the power to make all such provisions…."*

The petitioner has not filed a copy of the impugned order dated 7.4.2004.

We are of the view that for holding free and fair elections, it is the duty of the Election Commission of India to issue necessary directions to the State Government even in the matter of transfer. The Election Commission of India has issued the directions to the State Government for the transfer of the Superintendent of Police and the Additional Superintendent of Police, Pratapgarh for free and fair elections.

The writ petition is devoid of merits. It is accordingly rejected at the admission stage.

Sd/-
..... J.
(U. K. DHAON)

Sd/-
..... J.
(M. A. KHAN)

Dated : 12th April, 2004

HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH : JAIPUR

S.B. Civil Writ Petition No. 2231/204

Rajasthan Advertising Company through its Sole Proprietor, Raj Kumar Mahar, son of Shri Chandu Ram, aged about 45 years, resident of 53, Chandrakala Colony, Durgapur, Jaipur (Rajasthan) ..... Petitioner

Versus

1. Rajasthan State Road Transport Corporation through its Chairman & Managing Director, Parivahan Marg, Chomu House, Jaipur

2. Election Commission of India through its Secretary, Nirvachan Sadan, Ashoka Road, New Delhi

3. Chief Electoral Officer Rajasthan, Secretariat, Jaipur ..... Respondents

WRIT PETITION UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA

AND

IN THE MATTER OF ARTICLES 14, 19(1)(G) & 21 OF THE CONSTITUTION OF INDIA

AND

IN THE MATTER OF IMPUGNED DECISION/LETTER DATED 08.04.2004 ISSUED BY MANAGING DIRECTOR, RAJASTHAN STATE ROAD TRANSPORT CORPORATION, JAIPUR TO THE PETITIONER COMPANY.

S.B. Civil Writ Petition No. 2231/04

Rajasthan Advertising Company

Vs.

RSRTC & Others

Date of Order : 30.04.2004

SUMMARY OF THE CASE

The Writ Petition was filed under Article 226 of the Constitution challenging the directions of the Rajasthan State Road Transport Corporation to nullify and over-ride the already concluded contracts between the petitioner Company and the RSRTC regarding advertisement panels (belonging to BJP) on the buses of the Corporation during the General Election to Lok Sabha, 2004. The respondent no.1 (RSRTC) had granted permission to the petitioner Company for display of advertisement panels on the entire fleet of its buses for a period of six weeks from 15.03.2004 on payment @ Rs. 306/- per bus. The petitioner Company entered into an agreement with BJP for display of its publicity materials during the abovementioned period. As the election process for the general election to Lok Sabha was already under way during the said period, some complaint was made to the Election Commission alleging violation of model code of conduct. In pursuance thereof, the Chief Electoral Officer, Rajasthan in his letter dated 01.04.2004 asked the RSRTC to withdraw/cancel its permission/contracts with the petitioner Company and, accordingly, the RSRTC directed the petitioner in its letter dated 08.04.2004 to remove its advertisement panels, let out to a political party (BJP), from the buses within 24 hours. Being aggrieved and dissatisfied with this direction of the RSRTC, this Writ Petition was preferred on the grounds stating that the said action of RSRTC was in violation of the provisions of Article 19(1) (g) of the Constitution, as the petitioner had the right to carry on trade and business. It was also contended that the Election Commission did not have any

plenary power to negate the already concluded contracts and the model code of conduct could not be extended unilaterally affecting the rights, obligations and finances of the petitioner Company.

The High Court held that the Election Commission had plenary power to ensure free and fair election given under Article 324 and had rightly issued directions to remove such panels and advertisement during the election when model code of conduct was in force. The High Court further held that the petitioner Company was only restrained by the respondents from displaying panels, boards etc. belonging to the campaigning political party (BJP) and was not restrained from displaying the same other than political parties.

The Writ Petition was dismissed by the High Court with no order as to cost.

Hon'ble Mr. K.S. Rathore, J.

Mr. A.K. Sharma,
Mr. Shailesh Prakash Sharma,
Mr. Mukesh Kumar Mena, for the Petitioner.
Mr. Manish Bhandari, for the Respondent No. 1
Mr. B.C. Chirania, for the Respondent No. 2
Mr. Satish Khandelwal
Mr. Bharat Vyas, for the Respondent No. 3
Mr. P.K. Sharma, for the Intervenor.

REPORTABLE

At the request of the learned counsel for the respective parties, the matter is heard finally at this stage.

The petitioner M/s. Rajasthan Advertising Company is carrying on its trade and business of advertising in the State of Rajasthan mainly through display of

advertising panels, boards including glowsign boards, flex boards (digital printing), wall painting, show paintings etc.

The Managing Director of the Rajasthan State Road Transport Corporation, vide letter dated 21.2.2004, had shown its interest of taking on hire the entire bus panels (back/side and inside) of total fleet of buses and had enquired about the terms and conditions for displaying the same.

Pursuant to the letter dated 21.2.2004, the Executive Director (Admn.) of the respondent corporation had informed the petitioner company for granting space/ panel for advertising on about 4200 buses of the respondent corporation including Deluxe and CTS buses at a rate of Rs. 306/- per bus for a period of one month or more.

The respondent corporation asked the petitioner company to give its consent with the advance amount of one month by way of cheque/demand draft in the name of Corporation along with a consent letter.

The petitioner company agreeing upon the terms and conditions of the respondent Corporation had written a consent letter dated 28.2.2004 to the Executive Director (Admn.) of the respondent corporation giving its consent for hiring the bus panels of the entire fleet of buses totalling to approximately 4200 in number for a period of six weeks commencing from 15.3.2004 @ 306/- per bus desired by the respondent corporation and out of the total amount of Rs. 19,27,800/-, panel cheque for 50% of the total amount i.e. Rs. 9,63,900/- drawn on the Urban Co-operative Bank Ltd., Jaipur favouring RSRTC was enclosed with the consent letter dated 28.2.2004.

After receipt of the consent letter dated 28.2.2004, the respondent corporation had granted permission/sanction for display of advertisement panels for the period commencing from 15.3.2004 to 30.4.2004.

The petitioner company was within its right to enter into negotiations and contracts for sale of space and display of advertisement panels on the roadways buses with any party/person including a political party in exercise of its right, the petitioner entered into an agreement with Bhartiya Janata Party (BJP) for display of its publicity material on the space made available by the RSRTC in accordance with the terms and conditions negotiated and agreed upon between the petitioner and BJP.

Some complaint was made to the respondent No. 2 in regard to violation of model code of conduct for the guidance of the political parties and candidates issued by the Election Commission of India and in pursuance thereof the letter was issued by the respondent No. 3 to respondent No. 1 on 1.4.2004 and same was also endorsed to the petitioner company whereas the respondent corporation had informed the Zila Nirvachan Adhikari that the Corporation was a commercial institution and display of advertisement was its regular work/feature which was also a source of income and it was also informed that the respondent Corporation had not made any discrimination in persons or any political party.

The respondent Corporation vide letter dated 5.4.2004 had enquired the petitioner company to submit information in this regard and same was submitted by the Petitioner through letter dated 7.4.2004. After receiving the reply from the petitioner, the Corporation has taken a decision in view of direction issued by the Chief Election Officer, State of Rajasthan and vide letter dated 8.4.2004 directed the petitioner company to remove its advertisement panels (belonging to BJP) from the buses of corporation within a period of 24 hours failing which proceedings against the petitioner company were directed to be taken.

Being aggrieved and dissatisfied with the letter dated 8.4.2004, this present writ petition is preferred by the petitioner on the ground that the action of the respondent is wholly in violation of the principle of natural justice and also in violation of the provisions of Article 19(1)(g) of the Constitution of India as the petitioner has a right to carry on trade and business of advertising.

Mr. A.K. Sharma, learned counsel appearing on behalf of the petitioner submitted that after having granted advertising space by the respondent, the petitioner was absolutely and within his legal right to sell space to any other person or party and it was in exercise of his legal right that the petitioner has entered into an agreement with BJP for displaying the publicity material on more than 4000 buses and further submitted that the Election Commission of India does not have any plenary power to negate, nullify and over-ride the already concluded contracts between parties like the petitioner and RSRTC and the model code of conduct of election cannot be extended unilaterally so as to destroy or suspend commercial transactions affecting the rights, obligations and finances of the petitioner.

Mr. Sharma further submitted that the respondents are bound by the doctrine of principle of promissory estoppel to extend the benefit to which the petitioner is entitled and action of the respondent is in violation of the doctrine of principle of promissory estoppel.

Per contra, Mr. B C Chirania learned counsel appearing on behalf of respondent No. 2, Election Commission of India, submitted that the Election Commission is supreme authority for conducting the election all over India. The Commission has been constituted under Article 324 of the Constitution of India and has been given plenary powers to ensure free and fair elections all over India.

The model code of conduct as evolved is a code voluntarily adopted by the political parties to ensure free and fair election and level playing field between the contesting political parties and candidates as well as the party in power. Such code of conduct embodies a uniform policy which applies to all the States and Union territories of Union of India and the order dated 8.4.2004 has been passed following the same uniform policy/code of conduct and it is settled preposition of law that Election Commission has wide powers of Superintendence direction and control under article 324 of the Constitution of India for free and fair conduct of election and any step taken or order passed by the Commission in the exercise of such

powers, once model code of conduct for election comes into operation, then the same cannot be challenged under Article 226 of the Constitution of India.

Mr. Chirania further submitted that Hon'ble the Supreme Court has repeatedly stated time and time again that no public property can be used by any political party during model code of conduct for any type of election campaign and the commission has also issued similar directions from time to time restraining all political parties including ruling party from using public property for its own use during model code of conduct for the purpose of campaigning during elections.

Mr. Chirania relied on the case of Hon'ble the Supreme Court "Election Commission of India Vs. Ashok Kumar" (2000 volume 8 page 216) in para 13 wherein the Supreme Court has discussed the wide powers of the Election Commission of India under Article 324 of the Constitution of India which is reproduced hereunder :-

> "Article 324 of the Constitution contemplates constitution of the Election Commission in which shall vest the superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the legislature of every State and of elections to the offices of President and Vice-President held under the Constitution. The words "superintendence, direction and control" have a wide connotation so as to conclude therein such powers which though not specifically provided but are necessary to be exercised for effectively accomplishing the task of holding the elections to their completion."

The same view has been taken by Hon'ble the Supreme Court in the judgment titled as Union of India vs. Association for democratic reforms (2002 volume 5 SCC page 294) in para 24 and 25. He also referred a judgment rendered by Hon'ble the Supreme Court in the case of common cause (a registered society) versus Union of India (1996 volume 2 SCC 752).

All these judgments referred by Mr. Chirania shows that Article 324 has given wide power of superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State. Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from.

The Election Commission of India declared the Schedule of Parliamentary Election on 29.2.2004 and with that declaration model code of conduct came into force.

In the present case as the advertisement found on the public property i.e. the buses of the corporation after model code of conduct came into operation which compelled Election Commission of India to issue direction for removal of the advertisements on the buses of the corporation as the public property is used by the party in power for campaigning.

Mr. Bharat Vyas who is appearing on behalf of the respondent No. 3, Chief Electoral Officer, Rajasthan, has reiterated the submissions made on behalf of respondent No. 2 and submitted that the buses run by the RSRTC are public property and the public property cannot be allowed to be used for election purpose of the political party. The permission by the Corporation for use of its buses for election purpose of political party is against model code of conduct and it violated free and fair election process, therefore, in view of the direction of respondent No. 2, the respondent No. 3 had taken action in compliance of the order issued by the Election Commission of India as the model code of conduct becomes effective and during currency of the model code of conduct, advertisements by political party cannot be allowed to display on buses to ensure free and fair process of election.

Mr. P. K. Sharma who was allowed to intervene on behalf of the applicant supported the submission as made on behalf of respondents No. 2 and 3.

Mr. Manish Bhandari who is representing respondent No. 1 RSRTC does not dispute that the contract was awarded in favour of the petitioner for the period

commencing from 15.3.2004 to 30.4.2004 and also does not dispute that in pursuance of the direction issued by respondent 2 and 3, the order dated 8.4.2004 communicated to the petitioner to remove the advertisement belonging to BJP within a period of 24 hours.

I have given my thoughtful consideration to the submissions made on behalf of the respective parties and after carefully perusal of the model code of conduct which was made effective from the date of commencement of the Parliamentary Election i.e. 29.2.2004. As Hon'ble Supreme Court in various judgments referred before me taken a consistent view that the Election Commission of India under Article 324 has power of superintendence, direction and control of the preparation of the electoral rolls for and the conduct of all elections to Parliament and the legislature of every State and the elections to the offices of President and Vice President held under the Constitution.

To ensure free and fair election the Commission may be required to cope with some situation which may not be provided for in enacted laws and rules.

The Superintendence and control over the conduct of elections by the Election Commission include the scrutiny of all expenses incurred by a political party, a candidate or any other association or body of persons or by any individual in the course of the election. The expression "Conduct of election" is wide enough to include in its sweep, the power to issue directions in the process of the conduct of an election to the effect that the political parties shall submit to the Election Commission, for its scrutiny, the details of the expenditure incurred or authorized by the parties in connection with the election of their respective candidates.

Thus, it is no doubt that the Election Commission has plenary power for completion of free and fair election as given under Article 324.

Now the question remains that the petitioner was awarded contract for a period commencing from 15.3.2004 to 30.4.2004 and in view of the direction issued vide letter dated 8.4.2004, the petitioner has removed the panels, boards from the

RSRTC buses meaning thereby the petitioner admittedly only deprived of his business for the period from 8.4.2004 to 30.4.2004 for 22 days. The petitioner is only restrained by the respondents to display panels, boards etc. belonging to the campaigning of ruling party (BJP). The petitioner is not restrained to display advertisement in the RSRTC buses other than political parties.

As discussed hereinabove, in view of the model code of conduct, the Election Commission has power to restrain the person to utilise the public property for displaying boards and panels with a view to campaigning political party as the Hon'ble Supreme Court gives ample power to the Election Commission and Article 324 also given vast power to the Election Commission to issue such directions.

In view of these facts, I am not agree with the submissions made by the learned counsel for the petitioner that the Election Commission cannot issue direction to remove panels, boards, advertisements etc. belonging to campaigning of ruling party (BJP) and as per the ratio decided by the Supreme Court in various judgments, the Election Commission has rightly issued directions to remove such panels and advertisements to ensure free and fair election.

At the most if the petitioner is suffering any loss between the period from 8.4.2004 to 30.4.2004, the petitioner can move before the appropriate forum for the damages caused in view of the order dated 8.4.2004 though the petitioner is also well aware of model code of conduct and he should not enter into agreement with the political parties which is not permitted under the model code of conduct.

In view of the aforesaid discussion, nothing survives in this writ petition. The writ petition fails and is hereby dismissed with no orders as to cost.

Sd/-

..... J.

(K S RATHORE)

THE GAUHATI HIGH COURT

(High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram & Arunachal Pradesh)

Civil Rule (PIL) Nos. 185/98, 253/98 & 254/98

1. Sri H.R.A. Choudhury
   Guwahati, Assam

2. Smt. Sufia Khatun
   Nagaon, Assam ..... Petitioners
   in CR (PIL) 185/98

1. Sri Sadhan Chakravorty
   Guwahati

2. Sri Rajendra Prasad
   Guwahati

3. Mustt. Raushanara Begum (Islam)
   Dhubri,Assam ..... Petitioners
   in CR (PIL) 254/98

1. Md. Abdul Kayam
   Secretary
   Assam Pradesh Congress (I) Committee,
   G.S. Road, Guwahati ..... Petitioner
   in CR (PIL) 254/98

Versus

1. The Election Commission of India through
   the Secretary, Election Commission of India
   Nirvachan Sadan, Ashoka Road, New Delhi-1

2. The Chief Electoral Officer, Assam,
   Election Department, Dispur, Guwahati

3. The Additional Chief Electoral Officer, Assam,
   Election Department Dispur, Guwahati

4. The District Election Officer
Kamrup, Guwahati

5. The District Election Officer,
Dubri, Assam

6. The Electoral Registration Officer,
54 No. West Guwahati LA Constituency,
Guwahati

7. The Assistant Electoral Registration Officer,
No. 54 West Guwahati LA Constituency, Guwahati

8. The Electoral Registration Officer,
No. 21, Mankachar LA Constituency,
DC's Office, Dhubri, Assam

9. The Assistant Electoral Registration Officer,
No. 21, Mankachar LA Constituency,
DC's Office, Dhubri

10. The Union of India through the Secretary to
the Government of India, Ministry of Law, Justice
and Company Affairs, Shastri Bhawan, New Delhi

11. The State of Assam through the Secretary
to the Government of Assam, Election Department,
Dispur, Guwahati ..... Respondents

Present :

The Hon'ble Mr. Justice J.N. Sarma
The Hon'ble Mr. Justice A.K. Patnaik

For the Petitioners — Mr. B.K. Das
Mr. S.N. Bhuyan, Sr. Advocates
Mr. AFG Osmani
Mr. S. Huda
Mr. B.S. Sinha
Mr. M.H. Rajbarbhuiya
Mr. D. Mazumdar
Ms. A. Begum

Mr. N.J. Sarkar
Mr. K. Alam Mazumdar
Mr. S.H. Saikia
Mr. I.A. Hazarika
Mr. A.K. Das
Mr. U.C. Nath, Advocates

For the Respondents — Mr. P.K. Goswami, Sr. Advocate
Mr. K.K. Mahanta
Sr. Central Government
Standing Counsel
Mr. S. Muralidhar
Mr. B.P. Kataky, Sr. Advocate
Mr. B.D. Goswami
Mr. M.R. Pathak, Advocates

Date of Order : 11.1.2002

SUMMARY OF THE CASE

The common prayer of the petitioners in these writ petitions was for a direction on the respondents to delete the letter 'D' marked against the names of persons who had been included in the final electoral rolls and for directing the respondents not to interfere with the right of such persons to exercise their franchise in the election.

The Hon'ble High Court referred to and quoted as well the instructions issued from time to time by the Election Commission to the Chief Electoral Officer, Assam for intensive revision of the electoral rolls in Assam with reference to 1.1.1997 as the qualifying date and the order of the Commission dated 5.1.1998 in which the Commission under its plenary powers of superintendence, direction and control of preparation of electoral rolls and conduct of elections had directed that the persons whose names had been provisionally entered into the electoral rolls in the State of Assam and against whose names the letter 'D' had been indicated to denote that his citizenship status was doubtful/disputed should not been allowed

to cast their votes at the ensuing general elections to the House of the People and also at any election held thereafter, so long as the citizenship status of any such person is not determined in his favour by the appropriate Tribunal, to whom his case had been referred.

Challenging the instructions and order of the Commission, the Counsel for the petitioners submitted that the Commission had issued the direction in purported exercise of its plenary power of superintendence, direction and control of preparation of electoral rolls for, and conduct of elections under Article 324 of the Constitution, and argued that the Commission had no such plenary powers that as under Articles 326 and 327 of the Constitution, the Parliament was empowered to make a law, and it enacted the Representation of People Act, 1950 and Representation of People Act, 1951 which provided for preparation of electoral rolls and for conduct of elections. They also referred to the various provisions under the Registration of Electors Rules, 1960 regarding inclusion of names in the electoral rolls.

Referring to the observations of the Supreme Court in the case of Mohinder Singh Gill, the Hon'ble High Court held that the power of the Commission under 324 of the Constitution had to be exercised consistent with the constitutional scheme and the provisions of the R.P.Act, 1950 and the R.P.Act, 1951, but for a situation for which the legislature had not made any provision, the Commission can exercise the power and issue instructions, guidelines and orders regarding preparation of electoral rolls and conduct of elections.

Regarding the marking of letter 'D', against the names of the persons whose citizenship status was doubtful/disputed and who were not allowed to cast their votes, the Hon'ble High Court observed that as per the constitutional scheme a person who was not a citizen of India, was not entitled to be registered as a voter in any election. The Hon'ble High Court held that any law made by the Parliament under Article 327 cannot confer any right on a person who was not a citizen of India to vote at the elections. The Hon'ble Court further held that a person who

is not a citizen of India and who suffers from the disqualification mentioned in section 16 of the R.P.Act, 1950, is not an elector in relation to a constituency even though his name is entered in the electoral roll of that constituency.

Directing the Govt. of India and the Govt. of Assam, that they must ensure that sufficient number of Tribunals were constituted for deciding the citizenship status, the Hon'ble High Court dismissed all the three writ petitions. The Hon'ble High Court, however, showed serious concern on the influx of foreigners to Assam citing the references made in the CEOs' Conference held in 1978.

J U D G E M E N T & O R D E R

Patnaik, J.

These three writ petitions are public interest litigations raising common questions of fact and law, and were heard analogously, and are being disposed of by this common judgment.

The petitioner No. 1 in Civil Rule (PIL) No. 185/98 is the Secretary General of the United Minorities Front, Assam, a registered political party of the State of Assam representing the religious, linguistic and ethnic minorities in the State of Assam. The petitioner No. 2 in the said writ petition is a person whose name appears in the electoral roll of polling centre No. 89(A) of 86 Nagaon Legislative Assembly Constituency, but against her name the letter 'D' has been marked on account of which she is not in a position to cast her vote. Names of 14 other persons similarly appear in the electoral roll of polling centre No. 89(A) of 86 Nagaon Legislative Assembly Constituency, but against their names the letter 'D' has been marked, as a result of which they are not in a position to cast their vote.

The names of three petitioners in Civil Rule (PIL) No. 253/98 have been included in the final electoral roll published on 9.12.1997, but against their names the letter 'D' has been indicated. By a communication dated 6.1.1998 of the Additional

Chief Electoral Officer, Assam & Officer on Special Duty, Election Department, the concerned authorities has been informed that as per the order of the Election Commission of India persons whose names have been provisionally entered in the electoral rolls in the State of Assam and against whose names the letter 'D' has been indicated to denote that their citizenship status as doubtful/disputed shall not be allowed to cast their votes at the ensuing general election to the House of the People and also at any election held thereafter either to the House of the People or to the Legislative Assembly of the State of Assam so long as the citizenship status of any such person is not determined in his favour by the appropriate Tribunal to whom his case has been referred.

The petitioner in Civil Rule (PIL) No. 254/98 is the Secretary of the Assam Pradesh Congress(I) Committee, Guwahati, and it has been stated in the writ petition that he has been instructed and authorised by the APCC(I), Guwahati, to challenge the aforesaid order of the Election Commission of India communicated by the Additional Chief Electoral Officer, Assam & Officer on Special Duty, Election Department by his Memo. dated 6.1.1998 to all concerned.

The common prayer of the petitioners in these three writ petitions is for a direction on the respondents to delete the letter 'D' marked against the names of persons who have been included in the final electoral rolls and for directing the respondents not to interfere with the right of such persons to exercise their franchise in the election.

It appears that the Election Commission of India, (hereinafter referred to as "the Commission"), has issued instructions from time to time to the Chief Electoral Officer, Assam, for intensive revision of the electoral rolls in Assam with reference to 1.1.1997 as the qualifying date. These instructions of the Commission are contained in the communications dated 7.10.1996, 4.2.1997 and 17.7.1997, copies of which have been annexed to the reply affidavit filed on behalf of the Commission. The instructions of the Commission which provide that the cases of persons whose citizenship is in doubt are to be referred to appropriate Tribunals for determination

of their citizenship are contained in paragraphs - 3.8, 3.9 and 3.10 of the guidelines annexed to the communication dated 17.7.1997 of the Commission to the Chief Electoral Officer, Assam. The said paragraphs 3.8, 3.9 and 3.10 of the guidelines are quoted hereinbelow :

> 3.8 The Electoral Registration Officer shall, on receipt of the verification reports from the Local Verification Officers, consider the same. Where he is satisfied, on such report and such other material/information as may be available to him, about the eligibility of the person, he shall allow his name to continue on the roll and include it in the final roll. Where, however, he is not so satisfied and has reasonable doubt about the citizenship of any person, he shall refer all such doubtful cases to the competent authority under the Illegal Migrants (Determination by Tribunals) Act, 1983 or the Foreigners Act, 1946, as the case may be. For the convenience of the Electoral Registration Officer, the Commission has devised a proforma (Annexure-'B') for making such reference which shall be adopted by all the Electoral Registration Officers. While making such a reference, the Electoral Registration Officer shall also furnish to the Competent authority all documentary evidence collected during the process of verification (including the local verification report) pertaining to the person concerned, and also inform the person concerned of his case having been referred by him to the competent authority.
>
> 3.9 After the case of a person has been referred by the Electoral Registration Officer to the competent authority as aforesaid, he shall wait for a decision of the relevant Tribunal in relation to that person and act according to such decision.
>
> 3.10 Where the relevant Tribunal decides that any such person is not a citizen of India, the Electoral Registration Officer shall proceed

under Rule 21A of the Registration of Electors Rules, 1960 to have the name of such person deleted from the electoral roll, before it is finally published. The Electoral Registration Officer shall issue notice as required under the proviso to the said Rule 21A of the Registration of Electors Rules, 1960 to the individual concerned in the prescribed format. (Please see Para-16 of Chapter V - Claims and Objections - of the Hand Book for Electoral Registration Officers).

It further appears that by an order dated 5.1.1998 of the Commission, copy of which has been annexed to the reply affidavit filed on behalf of the Commission, it has been directed that persons whose names have been provisionally entered in the electoral rolls in the State of Assam and against whose names the letter 'D' has been indicated to denote that their citizenship status as doubtful/disputed, shall not be allowed to cast their vote at the ensuing general election to the House of the People and also at any election held thereafter either to the House of the People or to the Legislative Assembly of the State of Assam so long as the citizenship status of any such person is not determined in his favour by the appropriate Tribunal to whom his case has been referred. For the aforesaid direction of the Commission, reasons have also been recorded by the commission in the said order dated 5.1.1998. Portions of the said order dated 5.1.1998 which contained the direction and the reasons and which are relevant for deciding these case are quoted hereunder:

"Whereas, the Commission has carefully examined that question and observed that under Article 326 of the Constitution, "The elections to the House of the People and to the Legislative Assemblies of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than eighteen years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and

is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election"; and

Whereas Section 16 of the Representation of the People Act, 1950 further provides that a person shall be disqualified for registration in an electoral roll, if, he, inter alia, is not a citizen of India; and

Whereas, Sections 62(1) and 62(2) of the RP Act, 1951 provide that no person shall, even if his name is for the time being entered in the electoral roll of any constituency, vote at any election in any constituency, if he is subject to any of the disqualifications referred to in Section 16 of the RP Act, 1950; and

Whereas, the conjoint reading of the above-referred Article 326 of the Constitution, Section 16 of the RP Act, 1950 and Section 62 of the RP Act, 1951, leaves no one in any manner of doubt that only a citizen of India alone, and no one else, is eligible to vote at elections to the House of the People and the State Legislative Assemblies; and

Whereas, in the light of the above unambiguous mandate of the Constitution of India and RP Acts, 1950 and 1951 that only the Indian citizens alone, and no one else, shall vote at the aforesaid elections, it logically follows that a person, whose citizenship status is in question and under consideration before a Foreigners Tribunal or an Illegal Migrants Determination Tribunal shall not be eligible to vote, unless such Tribunal decides in his favour that he is a citizen of India.

Now, therefore, the Election Commission of India, under its plenary powers of superintendence, direction and control of

preparation of electoral rolls for, and conduct of elections to, Parliament and Legislature of every State, hereby directs that the aforementioned persons, whose names have been provisionally entered into the electoral rolls in the State of Assam and against whose names the letter 'D' has been indicated to denote that his citizenship status is doubtful/disputed, shall not be allowed to cast their votes at the ensuing general election to the House of the People, and also at any election held thereafter, either to the House of the People or to the Legislative Assembly of the State of Assam (or to the Legislature of any other State), so long as the citizenship status of any such person is not determined in his favour by the appropriate Tribunal, to whom his case has been referred.

Challenging the instructions and the order of the Commission, quoted above, Mr. B.K. Das and Mr. S.N. Bhuyan, learned senior counsel appearing for the petitioners, submitted that it appears that the Commission has issued the aforesaid direction in purported exercise of its plenary powers of Superintendence, direction and control of preparation of electoral rolls for, and conduct of election to, Parliament and Legislature of every State vested in it under Article 324 of the Constitution of India. But, in fact the Commission has no such plenary powers under Article 324 of the Constitution. They argued that under Articles 326 and 327 of the Constitution, the Parliament is empowered to make a law for the elections to the House of the People and to the Legislative Assembly of every State on the basis of adult suffrage, and the Parliament has in fact enacted the Representation of the People Act, 1950, and the Representation of the People Act, 1951, (hereinafter referred to as "the RP Act, 1950, and "the RP Act, 1951") providing for, inter alia, preparation of electoral rolls and for conduct of elections to the House of Parliament and to the House or Houses of the Legislature of each State. Mr. Das and Mr. Bhuyan referred to the provisions of Section 21 of the RP Act, 1950, to show that preparation and revision of electoral rolls should be in the manner prescribed by the Registration of Electors Rules, 1960, (for short, "the Rules, 1960"), made under the RP Act,

1950. They also referred to the provisions of the Rules, 1960, and in particular rules 5, 10, 12, 13 and 21-A thereof to show that elaborate provisions have been made therein for inclusion of names in the electoral rolls, objections to such inclusion and for deletion of such names after giving due reasonable opportunity to persons concerned to show cause. They referred to the decision of the Supreme Court in HM Trivedi vs. VB Raju, AIR 1973 SC 2602, for their submission that the RP Act, 1950, provides a complete code in the matter of preparation and maintenance of electoral rolls. According to Mr. Das and Mr. Bhuyan, once an electoral roll is finally published in accordance with the said provisions of the RP Act, 1950, and the Rules, 1960, the Commission cannot exercise its plenary powers under Article 324 of the Constitution to make any amendment, transposition or deletion in such electoral roll. They referred to the provisions of sub-section (3) of section 23 of the RP Act, 1950, to show that no such amendment, transposition or deletion of any entry is permissible after the final publication of such electoral roll. According to Mr. Das and Mr. Bhuyan, the power of the Commission under Article 324 of the Constitution has to be exercised consistent with the law made by the Parliament under Article 326 and 327 of the Constitution, namely, the RP Act, 1950, and the RP Act, 1951, and that the impugned instructions of the Commission and the impugned order of the Commission, quoted above, are, therefore, ultra vires the powers of the Commission. In this context, Mr. Bhuyan pointed out that while the electoral roll was published on 9.12.1997, the impugned order of the Commission for not allowing the persons against whom the letter 'D' has been marked in the electoral rolls to cast their vote was passed by the Commission on 5.1.1998, i.e., after the publication of the final electoral roll.

It was next submitted by Mr. Das and Mr. Bhuyan that sub-section (1) of Section 62 of the RP Act, 1951, confers a right on every person who is for the time being entered in the electoral roll of any constituency to vote in that constituency. Thus, the impugned order dated 5.1.1998 of the Commission debarring persons whose names have been entered in the electoral roll finally published from exercising their statutory right to vote is violative of section 62 of the RP Act, 1951,

and is void. They cited the decision of the Supreme Court in the case of *Shyamdeo Pd. Singh vs. Nawal Kishore Yadav*, AIR 2000 SC 3000 for the proposition that once a person is entered in the electoral roll of any constituency, he is entitled to vote in that constituency under Section 62 of the RP Act, 1951. They also relied on the decision of the Supreme Court in *Lal Babu Hussein vs. Electoral Registration Officer,* (1995) 8 SCC 100, wherein some directions were issued by the Supreme Court relating to deletion of names of persons on the suspicion that they were not citizens of India. They submitted that as per the aid decision of the Supreme Court, it is the Electoral Registration Officer or any other officer empowered under the RP Act, 1950, and the Rules, 1960, who is to take the decision as to whether or not a person's name can be deleted on the ground that he is not a citizen of India after giving reasonable opportunity to such person and the Tribunals constituted under the Illegal Migrants (Determination by Tribunals) Act, 1983, and the Foreigners Act, 1946, are not the authorities to decide the question as to whether a person's name should be included in the electoral roll or not. Mr. Bhuyan further submitted that the three petitioners in Civil Rule (PIL) NO. 253/98 have not been given any opportunity whatsoever to show cause as to why the letter 'D' should not be marked against their names in the final electoral roll. Finally, Mr. Das contended that the instructions and the order of the Commission for indicating the letter 'D' against the names of various persons in the electoral rolls and for debarring such persons from exercising their right to vote in the elections to the House of the People and the Legislative Assembly of Assam are based on extraneous considerations.

In reply, Mr. P.K. Goswami, learned senior counsel appearing for the Commission, submitted that the fact that there are a large number of foreigners in the State of Assam has been taken note of both by the Parliament and the court. He referred to the statement of objects and reasons appended to the Illegal Migrants (Determination by Tribunals) Act, 1983, (hereinafter referred to as the "IMDT Act, 1983,") which states that the influx of foreigners who illegally migrated into India across the borders of the sensitive eastern and north-eastern region of the country and remained in the country poses a threat to the integrity and security of the said

region and that continuance of these persons in India has given rise to serious problems. He also referred to the decision of the Supreme Court in *All India Lawyers Forum for Civil Liberties vs. Union of India & Others,* (1999) 5 SCC 714, in which the Supreme Court has observed that the matter of infiltration from Bangladesh and the presence of the infiltrators in certain regions in this country is a matter of serious concern, and has expressed the hope that the Union of India and the States bordering Bangladesh will take effective steps to check infiltration and deport illegal infiltrators. He also cited the decision of this court in *Kamaluddin vs. State of Assam*, 2000 (2) GLT 79, in which this problem of influx of a good number of foreigners has been taken note of, and the court has expressed its displeasure with regard to the casual and cavalier manner in which voters' list is prepared in Assam. Mr. Goswami submitted that the Commission has considered this problem of presence of a large number of foreigners in the State of Assam, and has issued the instructions and guidelines in its communications dated 7.10.1996, 5.2.1997 and 17.7.1997 to the Chief Electoral Officer, Assam for intensive revision of the electoral rolls in Assam with reference to 1.1.1997 as the qualifying date with the object of ensuring that only citizens of India are enrolled in the electoral rolls. He referred to different paragraphs of the said instructions and guidelines to show that this object is sought to be achieved with minimum harassment to persons. He submitted that the said instructions and guidelines of the Commission provided sufficient procedural checks to ensure that genuine citizens are not excluded from enrolment in the electoral rolls, and that before deletion of the name of a person from the electoral roll a first opportunity is given to such person at the first stage of enumeration, a second opportunity is given to such person at the second stage of draft publication of electoral roll and a third opportunity is given after the appropriate Tribunal decided that a person is not a citizen of India. He further submitted that under the IMDT Act, 1983, the Foreigners Act, 1946, and the Rules made thereunder it is the Tribunal constituted under the said Acts and the Rules made thereunder which has the power to decide as to whether a person is a citizen of India or not and it is for this reason that the instructions and the guidelines of the Commission provided that where there is doubt with regard to citizenship status of a person his case is

to be referred to the appropriate Tribunal constituted under the said Act. He vehemently argued that there is nothing illegal or arbitrary in such guidelines and the instructions of the Commission to refer the cases of persons whose citizenship status is in doubt to an impartial Tribunal constituted under the said two Acts and the Rules made thereunder particularly when the Rules, as amended, provide for such reference. He pointed out that under Section 13 of the IMDT Act, 1983, the Tribunal has to enquire into a reference made to it as expeditiously as possible and make an endeavour to conclude the enquiry within a period of six months from the date of service, on the person concerned, of a copy of such reference or application. He further submitted that even though the citizenship status of several persons at the time of preparation of electoral rolls was in doubt, the Commission has been very fair in allowing the names of such persons to be entered in the electoral rolls provisionally with the letter 'D' marked against their names. He submitted that by the impugned order dated 5.1.1998, however, the Commission has directed that such persons who have been provisionally entered in the electoral rolls will not be allowed to cast their vote in the elections until they are held to be citizens. He pointed out that the impugned order dated 5.1.1998 of the Commission itself contained the reasons for its directions. The reasons given by the Commission in the said order dated 5.1.1998 are that under section 16 of the RP Act, 1950, a person who is not a citizen of India is disqualified for registration in the electoral roll and under sub-sections (1) and (2) of Section 62 of the RP Act, 1951, even if a person's name is for the time being entered in the electoral roll of any constituency, he cannot cast his vote at any election in that constituency if he is subject to any of the disqualifications referred to in section 16 of the RP Act, 1950 including the disqualification of not being a citizen of India. Mr. Goswami argued that this is a correct interpretation of the provisions of Section 16 of the RP Act, 1950, and sub-sections (1) and (2) of Section 62 of the RP Act, 1951 and relied on the decision of the Supreme Court in *Shyamdeo Pd. Singh vs. Nawal Kishore Yadav (supra).* He further argued that even in the case of *Lal Babu Hussein vs. Electoral Registration Officer (supra)* cited by Mr. Das and Mr. Bhuyan, learned counsel for the petitioners, the Supreme Court made it clear in paragraph-6 of its

directions that before taking a final decision in the matter relating to citizenship of any person, the Electoral Registration Officer or any other person enquiring into the matter will bear in mind the provisions of the Constitution and the Citizenship Act and all related provisions bearing on the question of citizenship, and then pass appropriate speaking orders. Regarding the powers of the Commission under Article 324 of the Constitution, Mr. Goswami cited the decisions of the Supreme Court in *Mohinder Singh Gill vs. Chief Election Commissioner,* (1978) 1 SCC 405; and *Kanhaiya Lal Omar vs. R.K. Trivedi*, AIR 1986 SC 111, in which it has been held that Article 324 of the Constitution is a plenary provision vesting power in the broadest terms in the Commission in respect of superintendence, direction and control as well as conduct of elections, and the same operates in areas left unoccupied by legislation. He submitted that in fact Sections 21 and 22 of the RP Act, 1950, themselves recognize this power of the Commission to give general or special direction regarding preparation and correction of electoral rolls.

The first question to be decided in these cases is whether the Commission has exceeded its powers under Article 324 of the Constitution in issuing guidelines, quoted above, for provisionally registering the persons in the electoral rolls with the letter 'D' marked against their names pending determination of their citizenship by appropriate Tribunals under the IMDT Act, 1983, the Foreigners Act, 1946, and the Rules made thereunder. In *Mohinder Singh Gill vs. Chief Election Commissioner. (supra),* the Supreme Court had the occasion to deal with Article 324 of the Constitution vis-a-vis the RP Act, 1950, and the RP Act, 1951, made by the Parliament under Article 327 of the Constitution, and the Supreme Court held:

> "Article 324, which we have set out earlier, is a plenary provision vesting the whole responsibility for national and State elections and, therefore, the necessary powers to discharge that function. It is true that Article 324 has to be read in the light of the constitutional scheme and the 1950 Act and 1951 Act. Sri Rao is right to the extent he insists that if competent legislation is enacted

as visualised in Article 327 the Commission cannot shake itself free from the enacted prescriptions."

"Even so, situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So ti is that the Constitution has made comprehensive provision in Article 324 to take care of surprise situations. That power itself has to be exercised, not mindlessly nor mala fide, not arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation. More is not necessary to specify; less is insufficient to leave unsaid. Article 324, in our view, operates in areas left unoccupied by legislation and the words 'superintendence', direction and control, as well as 'conduct of all elections' are the broadest terms ..."

It will thus be clear from the aforesaid observations of the Supreme Court in the case of *Mohinder Singh Gill* that the power of the Commission under Article 324 of the Constitution has to be exercised consistent with the provisions of the RP Act, 1950 and the RP Act, 1951 made under Article 327 of the Constitution. But in the aforesaid decision, the Supreme Court made it further clear that in situations for which the enacted law has not provided for, the Commission has the power in the broadest terms under Article 324 of the Constitution to issue guidelines, instructions and pass orders. This power of the Commission under Article 324 of the Constitution to issue instructions and orders in areas left unoccupied by legislation, however, has to be exercised not in a malafide, arbitrary or partial manner or without any application of mind. This position of law has been reintegrated in *Kanhiya Lal Omar vs. R.K. Trivedi, (supra),* in which the Symbols order issued by the Commission had been challenged on the ground that the Symbols Order was not provided for in the RP Act, 1951, made by the Parliament under Article 327 of the Constitution. The Supreme Court held :

> "Even if for any reason, it is held that any of the provisions contained in the Symbols Order are not traceable to the Act or the Rules, the power of the Commission under Article 324(1) of the Constitution which is plenary in character can encompass all such provisions. Article 324 of the Constitution operates in areas left unoccupied by legislation and the words 'superintendence', 'direction' and 'control' as well as 'conduct of all elections'are the broadest terms which would include the power to make all such provisions."

Thus, the law is now well-settled by the Apex Court that the power of the Commission under Article 324 of the Constitution has to be exercised consistent with the constitutional scheme and the provisions of the RP Act, 1950, and the RP Act, 1951, but for a situation for which the legislature has not made any provision, the Commission can exercise the power and issue instructions, guidelines and orders regarding preparation of electoral rolls and conduct of elections. But such instructions, guidelines and orders should not be arbitrary or vitiated by malafide or partiality.

The next question to be decided in these cases is whether the impugned instructions, guidelines and orders, quoted above, of the Commission to the Electoral Registration Officer, Assam, for referring the cases of persons whose citizenship is in doubt to the competent authority under the IMDT Act, 1983 or the Foreigners Act, 1946, and for enrolling their names in the final electoral rolls with the letter 'D' marked against their names till the appropriate Tribunals decide the matter, and for not allowing such persons to cast their votes at any election to the House of the People or to the Legislative Assembly of the State of Assam are inconsistent with the Constitutional scheme, the provisions of the RP Act, 1950, or the provisions of the RP Act, 1951, or are arbitrary or vitiated by malafide. The Constitutional scheme for elections to the House of the People and to the Legislative Assembly of every State is given in Articles 326 and 327 of the Constitution. Article 326 of the

Constitution provides that the elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage, that is to say, every person who is a citizen of India and who is not less than eighteen years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under the Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election. It is thus clear that as per the Constitutional scheme a person who is not a citizen of India is not entitled to be registered as a voter in any election. Article 327 of the Constitution further provides that subject to the provisions of the Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses. Since the power of the Parliament under Article 327 of the Constitution to make provisions with respect to elections to Legislatures is subject to the provisions of the Constitution, such power has to be exercised consistent with the provisions of Article 326 of the Constitution. Hence, any law made by the Parliament under Article 327 of the Constitution cannot confer any right on a person who is not a citizen of India to vote at the elections.

In exercise of its powers under Article 327 of the Constitution, the Parliament has enacted the RP Act, 1950, and the RP Act, 1951. Section 16(1) of the RP Act, 1950, and Sections 2(e) and 62(1) and 62(2) of the RP Act, 1951 are quoted hereinbelow :

> 16. Disqualifications for registration in an electoral roll. - (1) A person shall be disqualified for registration in an electoral roll if he -
>
> (a) is not a citizen of India; or

(b) is of unsound mind and stands so declared by a competent court; or

(c) is for the time being disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections,

2(e) "elector" in relation to a constituency means a person whose name is entered in the electoral roll of that constituency for the time being in force and who is not subject to any of the disqualifications mentioned in section 16 of the Representation of the People Act, 1950 (43 of 1950).

62. Right to vote. - (1) No person who is not, and except as expressly provided by this Act; every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency.

(2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in section 16 of the Representation of the People Act, 1950 (43 of 1950).

Thus, section 16(1) of the RP Act, 1950, makes a provision consistent with Article 326 of the Constitution that a person who is not citizen of India shall be disqualified for registration in an electoral roll. Similarly, section 2(e) of the RP Act, 1951, defines an 'elector' in relation to a constituency to mean a person whose name is entered in the electoral roll in that constituency for the time being in force and who is not subject to any of the disqualifications mentioned in Section 16 of the RP Act, 1950. Thus, a person who is not a citizen of India and who suffers from this disqualification mentioned in section 16 of the RP Act, 1950, is not an elector in relation to a constituency even though his name is entered in the electoral roll of that constituency. This definition of elector in section 2(e) of the RP Act, 1951,

is also consistent with the Constitutional scheme in Article 326 of the Constitution that only a citizen of India is entitled to be registered as a voter at the elections. Sub-section (1) of section 62 of the RP Act, 1951, provides that a person who for the time being is entered in the electoral roll of any constituency shall be entitled to vote in that constituency. But sub-section (2) of section 62 of the RP Act, 1951, provides that no person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in section 16 of the RP Act, 1950. Sub-sections (1) and (2) of section 62 of the RP Act, 1951 read together make it clear that a person who is not a citizen of India and suffers from this disqualification mentioned in section 16 of the RP Act, 1950, will have no right to vote under section 62 of the RP Act, 1951, even though he is for the time being entered in the electoral roll of a constituency.

In the case of *Shyamdeo Pd. Singh vs. Nawal Kishore Yadav (supra)*, the Supreme Court discussed at length the aforesaid scheme in Articles 326 and 327 of the Constitution as well as section 16 of the RP Act, 1950, and section 62 of the RP Act, 1951, and held that even if the name of a person is entered in the electoral roll for the time being, but such person is disqualified under any of the provisions of section 16 of the RP Act, 1950, he has no right to vote at the elections by virtue of sub-section (2) of section 62 of the RP Act, 1951. Paragraph-13 of the said decision of the Supreme Court as reported in AIR 2000 SC 3000 is quoted hereunder :

> A perusal of the abovesaid provisions leads to certain irresistible inferences. Article 326 of the Constitution having recognised the doctrine of adult suffrage has laid down constitutional parameters determinative of the qualifications and disqualifications relating to registration as a voter at any election. The two Articles, i.e. Article 326 and Article 327 contemplate such qualifications and disqualifications being provided for, amongst other things, by the appropriate Legislature. The fountain source of the 1950 Act and

1951 Act enacting provisions on such subject are the said two Articles of the Constitution. The provisions of section 16 of the 1950 Act and section 62 of the 1951 Act read in juxtaposition go to show that while Section 16 of the 1950 Act provides for 'disqualifications for registration' in an electoral roll, (qualifications having been prescribed by section 27 thereof). Section 62 of the 1951 Act speaks of 'right to vote' which right is to be determined by reference to the electoral roll of the constituency prepared under the 1950 Act. The eligibility for registration of those enrolled having been tested by reference to section 16 of section 27 of the Act, as the case may be, and the electoral roll having been prepared, under the 1950 Act if a person is or becomes subject to any of the disqualifications provided in clauses (a), (b) and (c) of sub-section (1) of section 16, two consequences may follow. His name may forthwith be struck off the electoral roll, in which the name is included, under sub-section (2) of section 16 of the 1950 Act. Even if the name is not so struck off yet the person is disqualified from exercising right to vote at the election by virtue of sub-section (2) of section 62 of the 1951 Act. The qualifications prescribed for enrolment in the electoral roll as provided by the 1950 Act are : (1) ordinary residence in a teachers' constituency, (ii) being engaged in the relevant educational institution for a total period of at least three years within the six years immediately before the qualifying date. The enquiry into availability of these eligibility qualifications, under the scheme of the 1950 Act is to be made at the time of preparation of the electoral roll or while entering or striking out a name in or from the electoral roll shall not be entitled to vote at the election. To put it briefly a disqualification under section 16 of the 1950 Act has a relevance for and a bearing on the right to vote under section 62 of the 1951 Act but being not qualified for enrolment in the electoral roll under section 27 of the 1950 Act has no relevance for or bearing on the right to vote at an

election under section 62 of the 1951 Act. That is the distinction between a 'disqualification' and 'not being qualified."

Thus, the submission of Mr. Das and Mr. Bhuyan, learned counsel for the petitioners, that once the name of a person is entered in the final electoral roll, he cannot be disallowed from exercising his right to vote under Article 326 of the Constitution and section 62 of the RP Act, 1951, is misconceived. In our considered opinion, if such a person whose name has been included in the final electoral roll suffers from the disqualification of not being a citizen of India mentioned in section 16 of the RP Act, 1950, he cannot be allowed to vote in view of the specific provisions in Article 326 of the Constitution, section 16 of the RP Act, 1950, and sections 2(e) and 62(2) of the RP Act, 1951. Thus, the instructions, guidelines and orders of the Commission are consistent with the Constitutional scheme and the provisions of the RP Act, 1950, and the RP Act, 1951.

Further, the provisions of the RP Act, 1950, and the RP Act, 1951, are general provisions meant for the entire country and the Parliament while enacting the said provisions has not provided for the peculiar situation relating to influx and presence of a large number of foreigners in Assam. For such situation of presence of a large number of persons who are not the citizens of India and who are not entitled to register themselves in the electoral rolls under Article 326 of the Constitution and section 16 of the RP Act, 1950, and have no right to vote under section 2(e) and section 62(2) of the RP Act, 1951, the Commission could issue instructions, guidelines and orders in exercise of its plenary power under Article 324 of the Constitution. Such instructions, guidelines and orders, however, should not be arbitrary or affected by malafide or partiality as has been held by the Apex Court in the case of Mohinder Singh Gill (supra). In the case of Lal Babu Hussein (supra), the Supreme Court issued some directions to be followed in case of any person's citizenship was in doubt. Paragraphs 3, 4, 5 and 6 of the said directions of the Supreme Court in Lal Babu Hussein's case are quoted hereinbelow :

3. If any person whose citizenship is suspected is shown to have been included in the immediately preceding electoral roll, the Electoral Registration Officer or any other officer inquiring into the matter shall bear in mind that the entire gamut for inclusion of the name in the electoral roll must have been undertaken and hence adequate probative value be attached to that factum before issuance of notice and in subsequent proceedings;

4. The Officer holding the enquiry shall bear in mind that the enquiry being of quasi-judicial nature, he must entertain all such evidence, documentary or otherwise, the affected person concerned may like to tender in evidence and disclose all such material on which he proposes to place reliance, so that the person concerned has had a reasonable opportunity of rebutting such evidence. The person concerned, it must always be remembered, must have a reasonable opportunity of being heard;

5. Needless to state that the Officer, inquiring into the matter must apply his mind independently to the material placed before him and without being influenced by extraneous consideration or instructions;

6. Before taking a final decision in the matter, the Officer concerned will bear in mind the provisions of the Constitution and the Citizenship Act extracted hereinbefore and all related provisions bearing on the question of citizenship and then pass an appropriate speaking order (since an appeal is provided).

Thus, as per the aforesaid directions of the Supreme Court in Lal Babu Hussein's case, in case of a person whose citizenship is suspected, the Electoral Registration Office or any other officer inquiring into the matter before taking any final decision in the matter has to bear in mind the provisions of the Constitution

and the Citizenship Act extracted in the judgment and all related provisions bearing on the question of citizenship and is also required to give all reasonable opportunity to the person likely to be affected by the order that he proposes to pass. Since the provisions of the IMDT Act, 1983 or the Foreigners Act, 1946, have bearing on the question of citizenship of a person, the Electoral Registration Officer cannot ignore the said provision which, inter alia, provide for decision by the Tribunals constituted under the said two Acts relating to citizenship status of a person. Moreover, paragraph 3.10 of the guidelines in the instructions of the commission dated 17.7.1997 provided that where the relevant Tribunal decides that any person is not a citizen of India, the Electoral Registration Officer shall issue a notice as required under the proviso to rule 21A of the Rules, 1960, to the individual concerned in the prescribed format and proceed for deletion of his name from the electoral roll in accordance with rule 21A. The proviso to rule 21A of the Rules, 1960, stipulates that before taking any action for deletion of name of a person from the electoral roll under rule 21A, the Electoral Registration Officer shall make every endeavour to give him a reasonable opportunity to show cause why the action proposed should not be taken in relation to him. Thus, the impugned guidelines of the commission also provides for reasonable opportunity to a person whose name is proposed to be deleted from the electoral roll and is in consonance with the Rule of law and the directions of the Supreme Court in Lal Babu Hussein's case, and cannot be held to be arbitrary or vitiated by malafide or partiality.

Considering, however, the gradual manner in which references are being decided in the State of Assam by Tribunals, such persons whose cases are referred to Tribunals constituted under the IMDT Act, 1983, and the Foreigners Act, 1946, may suffer great prejudice if the said Tribunals take years to decide the references made to them. Section 13 of the IMDT Act, 1983, provides for expeditious enquiry by Tribunals and casts an obligation on the Tribunals to make all endeavour to conclude the enquiry within a period of six months from the date of service, on the person concerned, of a copy of reference or application. We are of the view that the Tribunals constituted under the IMDT Act, 1983, and the Foreigners Act, 1946,

functioning within the jurisdiction of this court must expeditiously enquire into and decide the reference made to them, and the Government of India and the Government of Assam must ensure that sufficient number of Tribunals are constituted so that all references made to the Tribunals pursuant to the impugned instructions and guidelines of the Commission are concluded well in advance before the next elections to the House of the People of Union Parliament or the Legislative Assembly of Assam. The Registry of this court will send authenticated copies of this judgment to the Cabinet Secretary, Government of India, the Chief Secretary, Government of Assam and all the Tribunals under the IMDT Act, 1983, and the Foreigners Act, 1946, functioning within the jurisdiction of this Court for compliance of our aforesaid directions.

Subject to the aforesaid directions, the writ petitions are dismissed. Considering however the entire facts and circumstances of the case, we make no order as to costs.

Sd/-
(A. K. PATNAIK)
Judge

J. N. Sarma, J.

I agree with the judgment, but I add the following few lines. The influx of foreigners to Assam is a burning issue. On this issue there was lot of blood-bath in Assam, there was a long drawn agitation on this. What was achieved by that is a different question, but there is no justification to keep the issue below the carpet. If the authority makes an attempt to fight the issue in a democratic and legal manner, that should receive due recognition in the hand of the Court, instead of trying to shoot it down in a trigger happy manner. This question received attention in the hand of Chief Election Commissioner in the Conference of C.E.Os held on October 25 & 26 of 1978. I quote below the extract of the speech of C.E.O.:

"Special Problems regarding large scale inclusion of foreign nationals, particularly in North-Eastern region :

I would like to refer to the alarming situation in some States, especially, in the North-Eastern region, wherefrom disturbing reports are coming regarding large scale inclusion of foreign nationals in the electoral rolls. In one case, the population in 1971 census recorded an increase as high as 34.98 per cent over the 1961 census figures, and this increase was attributed to the influx of a very large number of persons from the neighbouring countries. This influx has become a regular feature. I think that it may not be a wrong assessment to make that, on the basis of increase of 34.98 per cent between two census, the increase that is likely to be recorded in the 1991-census would be more than 100 per cent over the 1961-census. In other words, a stage would be reached when that State may have to reckon with the foreign nationals who may, in all probability, constitute a sizeable percentage, if not the majority of the population in that State. Another disturbing factor in this regard is the demand made by the political parties for the inclusion in the electoral rolls of the names of such migrants who are not Indian citizens, without even questioning and properly determining their citizenship status. This is a serious state of affairs. The gravity of the situation, therefore, calls for drastic and effective measures. After ascertaining your views in the matter, I propose to address a communication to the Union Home Ministry stressing the immediate need for the necessary administrative set up at the lowest possible level for the purpose of identifying each foreign national in the country and for the expeditious grant of certificates of citizenship under the Citizenship Act to all eligible persons by adopting an effective and uniform procedures."

The matter received the attention of the Parliament. I quote below the objects and reasons of Illegal Migrants (Determination by Tribunals) Act, 1983 :

> "The influx of foreigners who illegally migrated into India across the borders of the sensitive eastern and north-eastern regions of the country and remained in the country poses a threat to the integrity and security of the said regions. A substantial number of such foreigners who migrated into India after the 25th day of March, 1971, have, by taking advantage of the circumstances of such migration and their ethnic similarities and other connections with the people of India, illegally remained in India without having in their possession lawful authority so to do. The continuance of these persons in India has given rise to serious problems. The clandestine manner in which these persons have been trying to pass off as citizens of India has rendered their detection difficult. After taking into account the need for their speedy detection the need for protection of genuine citizens of India and the interests of the general public, the President promulgated, on the 15th October, 1983, the Illegal Migrants (Determination by Tribunals) Ordinance, 1983, to provide for the establishment of Tribunals."

The matter also received attention of the Supreme Court in 1999 (5) SCC 714 which has been referred to in the main judgment. Sri Goswami further drew our attention to a reported decision of this court where because of lack of proper caution and attention in preparing the voter's list a Pakistani national by getting his name inserted in the voter's list even contested the Assembly Election in Assam.

On this background and factual matrix, we have decided the matter with anxiety not to cause injustice to genuine Indian citizens, but to stop/prevent foreigners being included in Voters' List.

Sd/-
(J. N. SARMA)
Judge

ELECTION COMMISSION OF INDIA

In re :
Disqualification of Smt. Jaya Bachchan, a sitting Member of Parliament (Rajya Sabha)

Reference Case No. 3 of 2005
[Reference from the President of India under Article 103(2) of the Constitution of India]

Present :

For the Petitioners	1. Shri S. N. Shukla, Advocate 2. Shri Madan Mohan, Petitioner
For Opposite Party	1. Shri Dinesh Dwivedi, Sr. Advocate 2. Shri P.D. Gupta, Advocate 3. Shri Kamal Gupta, Advocate 4. Shri Ashish Mohan, Advocate

Date of Opinion : 2.3.2006

SUMMARY OF THE CASE

Smt. Jaya Bachchan, who was elected to the Council of States from Uttar Pradesh in June 2004, was appointed as Chairperson of the Uttar Pradesh Film Development Council on 14th July, 2004, by the Uttar Pradesh Government . A petition was filed before the President by Sh. Madan Mohan, under Article 103(1) of the Constitution, raising the question of disqualification of Smt. Bachchan on the ground hat she was holding an office of profit under the Uttar Pradesh Government following her appointment as Chairperson of the said Council, with the status of a Cabinet Minister, and entitled to certain benefits and facilities. The President referred the petition to the Commission for its Opinion under Article 103(2). Smt. Bachchan took the plea that she had never availed of any benefit after her appointment. The Commission, in its Opinion tendered to the President, held the view that the office of Chairperson of the Uttar Pradesh Film Development

Council held by Smt. Bachchan answered the tests laid down by the Supreme Court for determining whether an office was an office of profit under the government, and accordingly, gave its opinion that Smt. Bachchan incurred disqualification for being a member of the Rajya Sabha, from the date of her appointment as Chairperson of the Council.

O P I N I O N

This is a reference dated 20th September 2005, from the President of India, under Article 103(2) of the Constitution, seeking opinion of the Election Commission on the question whether Smt. Jaya Bachchan, a sitting Member of Parliament (Rajya Sabha), has become subject to disqualification for being a member of that House under Article 102(1) of the Constitution.

2. The question of alleged disqualification of Smt. Bachchan (opposite party) arose on a petition (undated) submitted by Shri Madan Mohan (petitioner) of Kanpur (Uttar Pradesh) to the President seeking disqualification of the opposite party under Article 103(1) of the Constitution. In the petition, the petitioner averred that after the election of the opposite party to the Rajya Sabha in June 2004, the Uttar Pradesh Government appointed her as the Chairperson of Uttar Pradesh Film Development Council, (hereinafter referred to as 'the Council') vide office memorandum dated 14th July 2004, under the signature of Chief Secretary to the State Government. The petitioner claimed that the O.M. dated 14.7.2004, appointing the opposite party as Chairperson, also conferred on her the status of a Cabinet Minister on her such appointment as chairperson. The petitioner's contention was that the facilities provided to the opposite party as Chairperson of the Council made her the holder of an office of profit within the meaning of Article 102(1)(a) and she has, thus, incurred disqualification on such appointment for being a member of the Rajya Sabha.

3. The opposite party was called upon by the Commission's notice dated 6th October, 2005 to submit her written statement in reply to the petition by 31st October, 2005, and the Commission also fixed a hearing on 28th November, 2005.

4. In her reply filed on 26.10.2005, the opposite party submitted that on her appointment as Chairperson of the Council, she was granted only certain 'FACILITIES' and not any salary, honorarium or allowance. She claimed that the 'FACILITIES' were provided on account of the status of Cabinet Minister granted to her, and not as the Chairperson of the Council. She further averred that Cabinet status was granted to her in view of her stature in the field of films and that the appointment was in an honorary capacity to aid and advise the Council. She also contended that she being a Minister in Uttar Pradesh (the reference, presumably, was to the Cabinet Minister's status granted to her), was protected from disqualification under the provisions of Section 3(a) of the Parliament (Prevention of Disqualification) Act, 1959 (hereinafter referred to as '1959 Act), which declares that an office held by a Minister, Minister of State or Deputy Minister for the Union or for any State, whether ex officio or by name, shall not disqualify the holder thereof for being chosen as, or for being, a Member of Parliament. She also requested for adjournment of hearing by 8 weeks on the ground that the records relating to her appointment as Chairperson of the Council were with the Allahabad High Court (Lucknow Bench) in connection with an election petition filed by the same petitioner challenging her election to the Rajya Sabha and she required more time for obtaining the documents and filing further reply.

5. On the above request, the Commission postponed the hearing to 7.12.05 and allowed the opposite party to file supplementary reply upto 21.11.2005. She was also asked to file copy of the election petition referred to in her reply and also the orders passed by the High Court in that matter.

6. The petitioner filed his rejoinder to the written statement of the opposite party on 29.11.2005. In the rejoinder, the petitioner reiterated that appointment of the opposite party to the office of Chairperson of the Council was made by the State Government and she was given the rank of Cabinet Minister by virtue of such appointment as Chairperson. He further submitted that in terms of her appointment order, the opposite party was entitled to the following benefits and facilities :

- Honorarium of Rs. 5,000/- per month.
- Daily allowance @ Rs. 600/- per day within the State and Rs. 750/- outside the State.
- Rs. 10,000/- per month towards entertainment expenditure.
- Staff car with driver, telephones at office and residence, one P.S., one P.A. and two class IV employees.
- Body Guard and night escort.
- Free accommodation and medical treatment facilities to her and family members.
- Free accommodation in government circuit houses/guest houses and local hospitality while on tour.

7. The petitioner contended that the above facilities and pecuniary benefits made the office held by the opposite party, an office of profit within the meaning of Article 102(1)(a) of the Constitution. He also stated that the opposite party had resigned from the same post at the time of contesting election to the Rajya Sabha in 2004 and that fact of her resignation itself made it evident that she considered the post as an office of profit attracting disqualification. The petitioner further submitted that the reliance placed by the opposite party on the provisions of section 3(a) of the 1959-Act was misplaced as the provisions of that section only save an office held by a Minister, whether *ex officio* or by name, and not the holder of an office who is given the status of a Minister, as in the present case. The petitioner also relied upon the opinion given by the Commission to the President in 1981 in the case of Shri R. Mohanrangam, the then sitting member of the Rajya Sabha, to the effect that the benefits received by him by virtue of his appointment to the office of Special Representative of Tamil Nadu Government made the office an office of profit even though he received no honorarium/salary in that case.

8. On 2nd December, 2005, the opposite party, through her counsel, submitted an application seeking further postponement of the hearing on the ground that due to the illness of her husband she would require at least a fortnight to file her further reply in the matter. The Commission acceded to this request and postponed the hearing to 28th December, 2005, with the extension of time upto 15th December, 2005, to file additional written statement, if any. On 20th December, 2005, the opposite party's counsel submitted another application praying for yet another postponement of hearing citing the illness of her husband and stating that her ailing husband required her constant presence. The Commission granted this request as well and further postponed the hearing to 12th January, 2006. The time for filing of additional reply/written statement was also extended till 2nd January, 2006.

9. On 6th January, 2006, the opposite party submitted additional reply to the petition. In her supplementary reply, the opposite party stated that the petitioner had raised new pleadings in the rejoinder contrary to the normal accepted practice in judicial proceedings. She also reiterated that she had not accepted any salary/ honorarium or compensatory allowance, and that she had only availed of "FACILITIES" in view of grant of Cabinet Minister's rank to her. She further stated that she had not availed of any residential accommodation in any form and no money had been spent on her from the State Exchequer. She added that she never used any telephone or medical facilities to which she was entitled vide her order of appointment. She also submitted that her resignation from the same post before contesting election to the Rajya Sabha had nothing to do with the issue of the office being an office of profit. She further stated that the question raised in the reference is subject matter of adjudication before the Allahabad High Court in Election Petition No. 4 of 2004 filed by the same petitioner and, therefore, to avoid conflict of opinion, adjudication in the present reference case may be deferred till the High Court gives its decision.

10. In her additional reply, the opposite party also made a further request for postponement of hearing on the ground that records relating to her appointment in

question are required to be obtained from the High Court. The Commission, however, did not accede to her request this time as repeated opportunities had already been given and the hearing was already postponed thrice on her request, and decided that hearing would be held on 12.1.2006, as scheduled.

11. At the hearing on 12.1.2006, the petitioner appeared alongwith his learned counsel, Shri S.N. Shukla. In his oral submissions, the learned counsel referred to the office memorandum No. 492/19-2-2004-89/2001, dated 14.7.2004 of the Uttar Pradesh Government, appointing the opposite party as the Chairperson of the Council. He submitted that the memorandum appointing the opposite party as Chairperson of the Council clearly stated that by virtue of the appointment she would be granted the status of a Cabinet Minister and would be entitled to the facilities mentioned in the State Government's office memorandum no. 14/1/46/87-CX(1), dated 22.3.1991, as amended from time to time, which specifically enumerates salary/honorarium, allowances and other facilities to which the authorities granted the status of a Cabinet Minister are entitled. Shri Shukla stated that the opposite party was entitled to daily allowance of Rs. 600/- within Uttar Pradesh and Rs.750/- outside the State, whereas a Member of Parliament is entitled to a daily allowance of only Rs. 500/-. Thus, according to the learned counsel, as the daily allowance payable to the opposite party exceeded the amount of daily allowance payable to a Member of Parliament, the office of Chairperson of the Council could not be said to fall under the exempted category provided under clause (h) of Section 3 of the 1959-Act.

12. Sri Shukla further submitted that for attracting the provisions of Article 102(1)(a) of the Constitution, three conditions are required to be satisfied, viz. (i) there should be an office to which appointment is made, (ii) it should be an office of profit, and (iii) the office should be one under the Government. According to the learned counsel, the fact that the office of the Chairman of the Council was in existence before the appointment of the opposite party to that post and other persons were appointed to the post from time to time made it clear that this was an office existing

and independent of the opposite party, and thus the test laid down by the Supreme Court in *Kanta Kathuria vs. Manak Chand Surana* (AIR 1970 SC 694) was satisfied that it was an 'office' within the meaning of Article 102(1)(a) of the Constitution. Coming to the second condition, Shri Shukla submitted that the language of the appointment order dated 14.7.2004 read with office memorandum dated 22.3.1991, as amended from time to time, made it clear that the opposite party was entitled to monthly honorarium, various allowances, and other facilities, such as accommodation, vehicle, staff, etc. and this, according to him, proved beyond any doubt that the office held by the opposite party is an 'office of profit'. He relied upon the judgement of the Supreme Court in the case of *Shibu Shoren vs. Dayanand Sahay* (AIR 2001 SC 2583) in which it was held that remuneration other than salary would also make an office an 'office of profit'. He also relied upon the order passed by the President in the case of disqualification of Shri Mohanrangam (Reference case no. 7 of 1981) in which case, Sh. Mohanrangam was disqualified on the opinion of the Commission. Regarding the third condition, Shri Shukla contended that the crucial test to determine whether an office is under the Government, is the test whether appointment is made by the Government and whether the incumbent can be removed from the office by the Government. Shri Shukla submitted that in the present case, there is no doubt or second opinion on the fact that the appointment was made by the Uttar Pradesh Government and that the State Government has the power to terminate the appointment. He also cited the decision of the Bombay High Court in *Dr. Deorao Laxman Anande vs. Keshav Laxman Borkar* (AIR 1958 Bombay 314) in support of the contention that the crucial test to determine this issue is the test of appointment. Shri Shukla further submitted that the budget of the Council was provided fully from the funds of the State Government and that the opposite party performed functions of and for the Government as Chairperson of the Council.

13. Shri Dinesh Dwivedi, learned senior counsel, appeared for the opposite party. He contended, at the outset, that the post held by the opposite party would fall in the exempted category under clause (h) and clause (i) of section 3 of the Parliament

(Prevention of Disqualification) Act, 1959. Referring to the contention of the learned counsel for the petitioner that the opposite party was entitled to higher daily allowance than the daily allowance payable to a Member of Parliament, he submitted that the daily allowance was payable to the opposite party only when she performed journey in connection with her work as Chairperson of the Council and not as sitting fee.

14. According to him, as per the O.M. dated 14.7.2004, appointing the opposite party as the Chairperson of the Council, she was not entitled to any salary, and she was only provided 'facilities', by virtue of the status of Cabinet Minister granted to her. Such 'facilities' did not include salary or any pecuniary gain, and she only drew compensatory allowance. He contended that cabinet status was granted to her in view of her stature as a film personality, and this was independent of her appointment as Chairperson of the Council. Shri Dwivedi submitted that a Cabinet Minister was entitled to certain facilities and opposite party was granted only such facilities. He referred to the definition of 'compensatory allowance' as per Section 2(a) of the 1959-Act. He stated that the opposite party did not draw any honorarium, or avail of facilities of residential accommodation or telephone, and therefore, the office of Chairperson could not be treated as an office of profit, as there was no pecuniary benefit accruing to the opposite party, who is a well off person herself.

15. The learned senior counsel further contended that the office of Chairperson of the Council did not fulfill the requirements to be treated as an office under the Government. According to him, power of appointment and removal from the post vesting in the Government was not sufficient to bring the post under the category of 'office under the government'. He submitted that the control exercised by the Government on the performance of duties by the incumbent was critical to determine whether the post held by her could be treated as an office under the government for the purposes of Article 102(1)(a). The learned counsel referred to the judgment of the Supreme Court in Sibhu Soren's case to support this claim. He claimed that the Council was an autonomous body to advise the government on matters related to development of films, and the government did not interfere in

the functioning of the Council in any manner. He also stated that the Council, by the very nature of its duties, could not be said to be performing any important government functions. It could be considered as an optional function of the government. In view of these, the learned senior counsel contended that the Council was not an office under the Government. Shri Dwivedi further stated that the Council did not have nay budget of its own, and payment of expenses of the Council was made from government funds. Shri Dwivedi contended that in the case of Sibhu Soren, he had received honorarium also in addition to compensatory allowances, and hence that case was distinguishable from the present case where no honorarium has been drawn by the opposite party. He also contended that the case of Shri Mohanrangam, referred to by the petitioner, was not applicable in the present case, as the findings in that case were contrary to the rulings of the Supreme Court in subsequent cases. On the other hand, he relied upon the decision of the Karnataka High Court in the case of Ramakrishna Hegde (AIR 1993 KT 54).

16. The learned counsel for the petitioner, in his rejoinder, stated that the question of an office falling under the exemption clause under Section 3(h) or 3(i) of the 1959-Act would arise only where a person was entitled only to compensatory allowance not exceeding the daily allowance to which a Member of Parliament is entitled. He stated that in the present case, the petitioner was entitled to daily allowance, compensatory allowance, house rent, and honorarium, apart from facilities such as vehicle, driver, staff, telephone, etc. According to him, the argument that the opposite party was entitled to only facilities was misconceived. The learned counsel submitted that it was immaterial whether the entitlement was in the name of salary or under any other nomenclature, and the emphasis was on 'entitlement' and not on actual drawing of the amount. He submitted that a person may not draw the amount at present, but may very well choose to draw it at a future juncture. He added that if she was entitled to an amount that would bring such entitlement within the meaning of 'profit'. He relied upon the judgments of the Supreme Court in the case of *M.P. Rajashekharan vs. Vatal Nagaraj* [(2002) 2 SCC 704) and *Rabindra Kumar Nayak vs. Collector, Mayurbhanj* [(1999) 2 SCC 627] to support his

contention that actual drawing of the amount is not relevant, and it is the entitlement to draw the amount that is crucial in deciding the issue of disqualification. The learned counsel also submitted that Shri Ramakrishna Hegde's case, relied upon the opposite party, was not applicable here as in that case, the appointment order itself made it clear that Shri Hegde, as Deputy Chairman of the Planning Commission, would not be entitled to any salary, and that he would only draw compensatory allowance.

17. On conclusion of the hearing, both the parties were given one week's time to file written arguments, which they did.

18. The Commission has carefully considered and duly analysed the written and oral submissions made on behalf of both the parties.

19. First of all, the Commission would like to examine the effect of pendency of Election Petition No. 4 of 2004 before the Allahabad High Court on the present proceedings before the Commission. It is seen that the main issue raised in the election petition is the rejection of nomination of the petitioner (also the petitioner herein). In any event, the challenge in an election petition is limited to the challenge against the election concerned, and it cannot be a ground for deferring a proceeding under Article 103(1) relating to the issue of post-election disqualification, which has to be decided by the President, and President alone, on the opinion tendered by the Commission. The Supreme Court's decision in *Election Commission vs. Dr. Subramanian Swamy and Others* (AIR 1996 SC 1810) conclusively settles this issues.

20. The main question which falls for determination of the Commission is whether the office of the Chairperson of the Uttar Pradesh Films Development Council to which the opposite party has been appointed on 14.7.2004 is an 'office of profit under the Government of Uttar Pradesh' within the meaning of Article 102(1)(a) of the Constitution. The underlying principle and the real intention of the constitution makers in incorporating the provisions relating to disqualification under Article 102(1)(a) is to keep the legislatures independent of the executive. It was felt desirable that members of legislatures should not feel themselves beholden to the

executive government and lose their independence of thought and action in the discharge of their public duties as representatives of the people. This provision also acts as a check on the executive governments to hold out blandishments to members of the legislatures, so that the latter would be free to carry out their duties to their electorates uninfluenced by any considerations of personal loss or gain. Explaining the above logic behind the provisions of Article 102(1)(a), the Supreme Court observed in *Ashok Kumar Bhattacharyya v. Ajoy Biswas* (AIR 1985 SC 211):

> "The approach which appeals to us to interpret the expression 'office of profit' is that it should be interpreted with the flavour of reality bearing in mind the **object for enactment of Article 102(1)(a), namely, to eliminate or in any event to reduce the risk of conflict between the duty and interest amongst members of the legislature by ensuring that the legislature does not have persons who receive benefits from the executive and may thus be amenable to its influence."**

21. Again, emphasizing the object of Article 102(1)(a) [which is similar to Article 191(1)(a) of the Constitution], the Supreme Court observed in *M.V. Rajashekaran vs. Vatal Nagaraj* (AIR 2002 SC 742):

> "The very object of providing the disqualification under Article 191 of the Constitution is that the person elected to the Legislative Assembly or the Legislative Council should be free to carry on his duty fearlessly without being subjected to any kind of governmental pressure. The Court, therefore is required to find out as to whether there exists any nexus between the duties discharged by the candidate and the Government, and that a conflict is bound to arise between impartial discharge of such duties in course of his employment with the duties which he is required to discharge as a Member of Legislature, on being elected. While examining the aforesaid question the Court has to look at the substance and not

> the form and, further it is not necessary that all factors and tests laid down in various cases must be conjointly present so as to constitute the holding of an office of profit under the Government."

22. The term 'office of profit' is not defined either in the Constitution or in the Representation of the People Act, 1951. However, the Commission has the benefit of illuminating decisions of the Supreme Court in a catena of cases in which the apex court has considered the question on various occasions. The Supreme Court has held that the question has to be decided on the facts of each case. The tests laid down by the Supreme Court basically reduce to the question whether the person is appointed to an office under the Government and whether such office is an office yielding profit to the holder. In Maulana Abdul Shakur vs. Rikhab Chand (AIR 1958 SC 52), the Supreme Court held :

> "... the power of the government to appoint a person to an office or to continue him in that office or revoke his appointment at their discretion and payment from out of Government revenues are important factors in determining whether a person is holding an office of profit under the Government, though payment from a source other than Government is not always a decisive factor."

23 In *Shivamurthy Swami Inamdar vs. Agadi Sanganna Andanappa* (AIR 1971 SCC 870), the Supreme Court summed up the following tests to determine whether an office is an office of profit under the Government :

(i) Whether the Government makes the appointments;

(ii) Whether the Government has the right to remove or dismiss the holder;

(iii) Whether the Government pays remuneration;

(iv) What the functions of the holder are and does he perform them for Government; and

(v) Whether the Government exercises any control over the performance of these functions.

24. The Supreme Court has held in various subsequent cases that all the above tests need not co-exist conjointly for determining whether an office is an office of profit under the government. In *Madhukar G.E. Pankakar v. Jaswant Chobbildas Rajani* [(1977) SCC 70], the Supreme Court observed that for deciding the question whether an office is an 'office of profit' under the government, it is the circumstances that have to be looked at and not the form and further all the several factors stated by the Court, as determinative of the holding of an office under the Government, need not be conjointly present.

25. For deciding the present question referred to it by the President, the Commission has to be guided by, and apply, the above tests laid down by the Supreme Court to the facts and circumstances of the present case of appointment of the opposite party to the post of Chairperson of the Council. The word 'office' has been interpreted by the Supreme Court to mean a position or place to which certain duties are attached, especially one of a more or less public character. In *Kanta Kathuria Vs. Manak Chand Surana* (AIR 1970 SC 694), the test laid down by the Supreme Court was that the office should be subsisting, permanent, substantive position which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders. This principle was upheld in the case of *Rabindra Kumar Nayak vs. Collector, Mayurbhanj* [(1999) 2 SCC 627] also. In the case of *M. V. Rajashekharan Vs. Vatal Nagaraj* [(2002) 2 SCC 704], even the office of Chairman of one man Commission specially constituted was also held to be an 'office' for the purpose of disqualification. In the present case, it is evident from the admitted facts that the office of Chairperson of the Council is existing independently of the present incumbent and has been held by various persons, including Chief Secretary to the Government of Uttar Pradesh, from time to time. Thus, the first requirement of Article 102(1)(a) of the Constitution is met that the opposite party has been appointed by the Government of Uttar Pradesh to an 'office' within the meaning of Article 102(1)(a).

26. There is also little scope for argument or dispute, as sought to be contended or raised by the learned counsel for the opposite party, that the office to which she has been appointed is not an office under the Government of Uttar Pradesh. It is not disputed that the appointment in the present case has been made by the Government of Uttar Pradesh, as is evident from the appointment order dated 14th July, 2004 which is signed by the Chief Secretary to Government of Uttar Pradesh and which shows *ex facie* that the appointment has been made in the name of the Governor of the State. The learned senior counsel for the opposite party also fairly conceded that the power to terminate the appointment of the opposite party as the Chairperson of the Council vests in, and rests with, the Government of Uttar Pradesh. Further, the funds of the Council are provided wholly by the State Government and is fairly conceded that the Council has no independent budget and its expenditure is met by the administrative department of the State Government.

27. The learned senior counsel for the opposite party cited the judgment of the Supreme Court in *Satrucharla Chandrasekhar Raju Vs.Vyricherla Pradeep Kumar Dev* (AIR 1992 SC 1959), wherein it was observed that the true test for determining whether a person is holding an office of profit under the Government is the degree of control the Government has over the office, its composition, the degree of its dependence on the government for its financial needs and the functional aspect, namely, whether the body is discharging any important Governmental function or just some function which is merely optional from the point of view of the Government. He stated at the hearing that the Council was not performing any important governmental functions and its activities could only be treated as optional from the point of view of the Government as it was only advising the Government on policies related to development of films in the State.

28. The Commission sees no force in the above averment of the learned senior counsel of the opposite party. The Council has been set up by the State Government to aid and advise it in the matters relating to development of film industry in the

State. The very fact that the State Government has considered it necessary to set up the Council and is spending its precious funds on the Council shows that the Government is interested in the development of film industry in the State and has undertaken the task by setting up the Council to aid and advise it in this behalf. The further fact that the opposite party was appointed to the office of Chairperson of the Council with the status of a Cabinet Minister with the attendant benefits and facilities must lead to the obvious conclusion that the Council and its Chairperson had certain important duties to perform and tasks to accomplish for the Government. No Government would set up a Council and make appointments thereto with such high status without any significant reason or end to achieve. It is thus futile to contend that the Council is not performing any important function of or for the Government.

29. It was also averred by the learned senior counsel for the opposite party that the Council is an autonomous body, not subject to the control of the Government. But nothing has been brought on record by him to support or substantiate his above averment. On the other hand, the very fact that the Council has no budget of its own and its administrative expenses are met by the department administratively incharge of the Council negates the averment of learned senior counsel for the opposite party of the Council being an autonomous body and the Government having no control over it.

30. Having regard to the above, the tests laid down by the Supreme Court to determine whether an office is ‘an office under the Government’ are fully satisfied in the present case. The appointment has been made by the Sate Government, which also has the power to terminate the appointment at its will, the expenditure on the maintenance of the office is wholly borne by the State Government, the incumbent Chairperson of the Council performs functions for the Government and the Government controls the functioning of the Council. Thus, there is no manner of any doubt that the office of the Chairperson of the Council to which the opposite party has been appointed is ‘an office under the Government of Uttar Pradesh’.

31. The main controversy between the contesting parties in the present case is on the question whether the office of the Chairperson of the Council held by the opposite party is an 'office of profit'. The case of the learned counsel for the petitioner is that by virtue of the appointment order dated 14th July, 2004, of the opposite party whereby she was conferred the status of a Cabinet Minister, she is entitled to the following remunerations and benefits in terms of the State Government's office memorandum No. 14/1/46/87-CX(1), dated 22.3.1991, as amended from time to time :

- Honorarium of Rs. 5,000/- per month.
- Daily allowance @ Rs. 600/- per day within the State and Rs. 750/- outside the State.
- Rs. 10,000/- per month towards entertainment expenditure.
- Staff car with driver, telephones at office and residence, one P.S., one P.A. and two class IV employees.
- Body Guard and night escort.
- Free accommodation and medical treatment facilities to her and family members.
- Free accommodation in government circuit houses/guest houses and hospitality while on tour.

32. The case set up by the learned senior counsel for the opposite party, on the other hand, is that she is not entitled to any Honorarium mentioned above and that she has been granted only the 'FACILITIES' mentioned in the above referred O.M. dated 22.3.1991. To examine the rival contentions, it is appropriate to reproduce the appointment order dated 14th July, 2004, of the State Government appointing the opposite party as Chairperson of the Council:

''कार्यालय–ज्ञापन

श्री राज्यपाल महोदय श्रीमती जया बच्चन, मा0 संसद सदस्य, राज सभा को उत्तर प्रदेश राज्य फिल्म विकास परिषद का अध्यक्ष मनोनीत किये जाने की सहर्ष स्वकृति प्रदान करते हैं।

2. श्री राज्यपाल महोदय श्रीमती जया बच्चन, मा0 संसद सदस्य, को उत्तर प्रदेश राज्य फिल्म विकास परिषद के अध्यक्ष के रूप में कैबिनेट मंत्री का स्तर भी प्रदान करते हैं, जिसके फलस्वरूप उन्हें समय–समय पर यथा संशोधित गोपन अनुभाग–1 के कार्यालय ज्ञाप संख्या 14/1/46/87–सी0 एक्स0 (1), दिनांक 22 मार्च, 1991 में वर्णित सुविधाएं उक्त कार्यालय ज्ञाप में इंगित प्रक्रियानुसार प्राप्त होंगी

हस्ताक्षर
(करनैल सिंह)
प्रमुख सचिव"

33. A bare reading of the above appointment order issued by the State Government negatives the contention of the learned senior counsel for the opposite party. The O.M. dated 22.3.1991, referred to in the appointment order, specifies the 'salary/allowances and other facilities' to which a person appointed to a post and granted the status of a Cabinet Minister becomes entitled in terms of that O.M. The contention of the learned senior counsel for the opposite party that she was granted only 'facilities' and not the salary or allowances payable to the holder of such office is not borne out or substantiated by the express wording of her appointment order. The word 'facilities' in the O.M. dated 22.3.1991, has to be read as *ejusdem generis* to the word 'other' used in that O.M. as an adjective to the word 'facilities' and, when so read, leads to the irresistible inference and conclusion that the 'salary/allowance' is also a facility within the meaning of said O.M. attached to the office of the Chairperson of the Council. Thus, by virtue of her appointment as Chairperson of the Council vide the State Government O.M. dated 14.7.2004,

she was made entitled to the Honorarium of Rs. 5,000/- per month and also all other allowances and facilities specified in the State Government's O.M. dated 22.3.1991, as amended from time to time, and not merely the facilities of accommodation, staff car, TA/DA, etc., as contended by the learned senior counsel for the opposite party. The averment of the said counsel that the opposite party was entitled to TA/DA only when she proceeded on tour and that she was not granted any daily allowance for attending the sittings of the Council further supports the view that she was made entitled to a lump sum Honorarium of Rs. 5,000/- per month in lieu of any daily allowance or sitting fee.

34. The following observation of the Supreme Court in *Shibu Soren Vs. Dayanand Sahay* (AIR 2001 SC 2583) is relevant on this issue :

> "The expression "office of profit" has not been defined either in the Constitution or in the Representation of the People Act. In common parlance, the expression 'profit' connotes an idea of some pecuniary gain. If there is really some gain, its label - 'honorarium' - 'remuneration' - 'salary' is not material - it is the substance and not the form which matters and even the quantum or amount of "pecuniary gain" is not relevant - what needs to be found out is whether the amount of money **receivable** by the concerned person in connection with the office he holds, gives to him some "pecuniary gain", other than as 'compensation' to defray his out of pocket expenses, which may have the possibility to bring that person under the influence of the executive, which is conferring that benefit on him."

35. Viewed in the light of the above observation of the Supreme Court, no one is left in any manner of doubt that the honorarium of Rs. 5,000/- per month payable to the Chairperson of the Council is 'pecuniary gain' to the holder of that office and is not by way of any compensatory allowance to defray out of pocket expenses.

36. The learned senior counsel for the opposite party sought to rely on the judgment of the Karnataka High Court in *Ramakrishna Hegde Vs. State of Karnataka* (AIR 1993 Karnataka 54) in support of his submission that the opposite party was not granted any honorarium. The case of Ramakrishna Hegde is distinguishable on facts from the present case of the opposite party. In Shri Hegde's case, in the order of his appointment as Deputy Chairman of the Planning Commission itself, it was specifically stated that he was not entitled to any salary, and would draw only travelling allowance/daily allowance, conveyance allowance, etc., whereas, as seen above from the appointment order of the opposite party in the present case, that appointment order makes her entitled to 'honorarium' of Rs. 5000/- per month in addition to various other allowances and facilities as per the State Government's O.M. dated 22.3.1991. It has already been seen that 'entitlement' to honorarium and other allowances makes the office an office of profit.

37. The next contention of the learned counsel for the opposite party was that she had neither drawn nor been paid any honorarium or any other allowances, right since the day of her appointment to the present office in July 2004 and, thus, there has been no pecuniary gain to her by virtue of her said appointment. The contention of the learned counsel for the petitioner, on the other hand, is that she may not have drawn or received any honorarium, etc., so far, but she was and is still 'entitled' to draw and receive all honoraria, allowances, etc., enumerated in the State Government's O.M. dated 22.3.1991. There is much force in the contention of the learned counsel for the petitioner. The following observation of the Supreme Court in *Mahadeo Vs. Shantibhai and Others* (40 ELR 81) applies aptly to the facts of the present case :

> "An office of profit really means an office in respect of which a profit may accrue. It is not necessary that it should be possible to predicate of a holder of an office of profit that he was bound to get a certain amount of profit irrespective of the duties discharged by him."

38. In this case, the appellant Mahadeo was included in the panel of lawyers prepared by the Central and Western Railway Administration and he was to be paid a certain fee as and when he appeared before any court on behalf of that administration. It was contended by the appellant that he was to receive remuneration only in case he thought it proper to appear in any case on behalf of that administration. The Supreme Court rejected that contention and held him to be disqualified for holding an 'office of profit' under the government. Again, in the case of *Rabindra Kumar Nayak Vs. Collector, Mayurbhanj* [(1999) 2 SCC 627] which related to the appointment of an advocate as an assistant public prosecutor on a daily fee of Rs. 100/-, the Supreme Court held that the said appointment amounted to holding an 'office of profit' and it was immaterial that the appellant did not in fact receive any fee. Thus, what matters is whether the holder of office is 'entitled' to any remuneration or other pecuniary gain, and not whether he or she has actually received or drawn any remuneration or other pecuniary gain. The Supreme Court also held in *Ravanna Subanna Vs. Kaggeerappa* (AIR 1954 SC 653) that :

> "The word 'profit' connotes the idea of pecuniary gain. If there is really a gain, its quantum or amount would not be material but the amount of money **receivable** by a person in connection with the office he holds may be material in deciding whether the office really carries any profit."

39. On the careful perusal of the appointment order of the opposite party and its analysis in the light of the above decisions and observations of the Supreme Court, the Commission is satisfied that her appointment to the post of Chairperson of the Council carries 'profit' and her office is an 'office of profit' within the meaning of Article 102(1)(a) of the Constitution.

40. Lastly, it was contended by the learned senior counsel for the opposite party that even if the post of Chairperson of the Council is an 'office of profit' under the Government, the holder thereof is not disqualified as the disqualification in respect

of that post stands removed by the provisions of sections 3(h) and 3(i) of the Parliament (Prevention of Disqualification) Act, 1959. For facility of reference, the relevant clauses (h) and (i) of section 3 of the 1959-Act are reproduced below:

"3. Certain offices of profit not to disqualify. - It is hereby declare that none of the following offices, in so far as it is an office of profit under the Government of India or the Government of any State, shall disqualify the holder thereof for being chosen as, or for being, a Member of Parliament, namely :-

(a) .....

(h) the office of chairman or member of a committee (whether consisting of one or more members), set up temporarily for the purpose of advising the Government or any other authority in respect of any matter of public importance or for the purpose of making an inquiry into, or collecting statistics in respect of, any such matter, **if the holder of such office is not entitled to any remuneration other than compensatory allowance;**

(i) the office of chairman, director or member of any statutory or non-statutory body other than any such body as is referred to in clause (h), if the holder of such office is not entitled to any remuneration other than compensatory allowance, but excluding (i) the office of chairman of any statutory or non-statutory body specified in Part II of the Schedule; (ii) the office of chairman or secretary of any statutory or non-statutory body specified in Part II of the Schedule;"

41. The term 'compensatory allowance' referred to in the above sections 3(h) and 3(i) has been defined in section 2(a) of the above Act as follows :

"2(a) 'Compensatory Allowance' means any sum of money payable to the holder of an office by way of daily allowance [such allowance not exceeding the amount of daily allowance to which a member

> of Parliament is entitled under [the Salary, Allowances and Pension of Members of Parliament Act, 1954 (30 of 1954)], any conveyance allowance, house rent allowance or travelling allowance for the purpose of enabling him to recoup any expenditure incurred by him in performing the functions, of that office."

42. A conjoint, reading of the above mentioned provisions of sections 3(h), 3(i) and 2(a) makes it clear that for an 'office' to be protected against disqualification under the above mentioned clauses (h) and (i), the following conditions must be satisfied :

> The holder of office should not be in receipt of, or entitled to, any remuneration other than 'compensatory allowance'; and
>
> The 'compensatory allowance' should not exceed the daily allowance to which a Member of Parliament is entitled.

43. The Commission has already held above that the opposite party is not only entitled to certain compensatory allowances but also an honorarium of Rs. 5,000/- per month in addition by virtue of her appointment order dated 14th July, 2004. Thus, the very first condition mentioned in clauses (h) and (i) of section 3 of 1959-Act for exempting the holders of certain offices from the purview of disqualification under Article 102(1)(a) is not satisfied in the present case. Therefore, the learned senior counsel for the opposite party cannot validly contend or claim that the office held by the opposite party is covered by the provisions of section 3(h) and/or section 3(i) of the 1959-Act. It is also noteworthy that, as per the own admission of the learned senior counsel for the opposite party, she is entitled to a daily allowance of Rs. 600/- while travelling inside the State of Uttar Pradesh and Rs. 750/- per day while travelling outside it, in terms of the State Government's O.M. dated 22.3.1991. The said O.M. also states that she would be entitled to a chauffeur driven car, free accommodation in the State Government Guest Houses and Circuit Houses and also local hospitality while on tour. On a conjoint reading

of the above, the amount of daily allowance of Rs. 600/- for travel inside the State of Uttar Pradesh can also be considered as a source of profit to the incumbent, as it cannot be considered to be mere compensatory allowance to defray out of pocket expenses. The submission of the learned senior counsel that the opposite party is an affluent person otherwise and that the benefits granted to her by the State Government are immaterial to her is only to be stated to be rejected. The issue here is one of law and not the financial status or standing of the person appointed to the office of profit under the government.

44. In view of the forgoing, the Commission is fully satisfied that office of Chairperson of the Uttar Pradesh Film Development Council to which Smt. Jaya Bachchan has been appointed by the State Government of Uttar Pradesh by its O.M. dated 14th July, 2004, on the terms of conditions specified therein, is an 'office of profit under the Government of Uttar Pradesh' within the meaning of Article 102(1)(a) of the Constitution. Further, the Commission is also satisfied that the said office of Chairperson of the Council is not exempt, under the provisions of Section 3 of the Parliament (Prevention of Disqualification) Act, 1959, from disqualification under the said Article 102(1)(a) of the Constitution.

45. Having regard to the above, the Commission is of the considered opinion that Smt. Jaya Bachchan became disqualified under Article 102(1)(a) of the Constitution for being a member of the Rajya Sabha on, and from, the 14th July, 2004 on her appointment by the Government of Uttar Pradesh as Chairperson of the Uttar Pradesh Film Development Council.

46. The reference from the President is accordingly returned with the opinion of the Commission to the above effect.

Sd/-	Sd/-	Sd/-
(Navin B. Chawla)	(B.B. Tandon)	(N. Gopalaswami)
Election Commissioner	Chief Election Commissoner	Election Commissioner

Place : New Delhi
Dated : 2nd March, 2006

ELECTION COMMISSION OF INDIA

In re :
Alleged disqualification of Smt. Sonia Gandhi,
former Member of Lok Sabha under Article 102(1)(a) of the Constitution

Reference Case No. 6 of 2005
[Reference from the President of India under Article 103(2)
of the Constitution]

Date of Opinion : 03.04.2006

SUMMARY OF THE CASE

A petition was filed before the President by Shri Sanjay Jarauliya, under Article 103(1) of the Constitution, alleging that Smt. Sonia Gandhi, a sitting member of the Lok Sabha had incurred disqualification under Article 102(1)(a), on the ground that she was holding the office of Chairperson of the National Advisory Council, alleged to be an office of profit. The President referred the petition to the Commission for Opinion under Article 103(2), which was received in the Commission on 23rd March, 2006. On the same date, Smt. Gandhi resigned her seat in the Lok Sabha. In view of the resignation, the Commission, going by the precedent in such cases, took the view that since Smt. Gandhi ceased to be a member of the Lok Sabha, the question raised about her alleged disqualification for being a member of that House had become infructuous.

O P I N I O N

This is a reference dated 23rd March, 2006 from the President of India, under Article 103(2) of the Constitution, seeking opinion of the Election Commission on the question whether Smt. Sonia Gandhi, who was then a sitting member of the Lok Sabha, has become subject to disqualification for being a Member of Lok Sabha under Article 102(1)(a) of the Constitution.

2. The question of alleged disqualification of Smt. Sonia Gandhi was raised in a petition dated 18th March, 2006 submitted to the President by Shri Sanjay Jarauliya,

Member, Nagar Working Committee, Bharatiya Janata Party, Indore Unit, alleging that Smt. Sonia Gandhi, then sitting Member of Parliament (Lok Sabha), was holding two offices of profit - one as Member of Parliament and the other as Chairperson of the National Advisory Council. The petitioner contended that in view thereof, Smt. Sonia Gandhi should be disqualified from being a member of the Lok Sabha, under Article 102 (1)(a) of the Constitution. Other than a bare statement regarding the alleged appointment of Smt. Sonia Gandhi as Chairperson of the National Advisory Council, no other details about the date of appointment to the said office, nature of the office, profit attached to the office, etc., was given in the petition.

3. While the reference received in the Commission on 23rd March, 2006, was under preliminary scrutiny Smt. Sonia Gandhi resigned her membership in the Lok Sabha on the same day, as notified by the Lok Sabha Secretariat vide their notification No. 21/3/2006/T, dated 23rd March, 2006. In the said notification, a copy whereof was sent to the Commission by the Lok Sabha Secretariat on 24.3.2006, it was mentioned that Smt. Sonia Gandhi had resigned her seat in the Lok Sabha and her resignation was accepted by the Speaker w.e.f. 23rd March, 2006.

4. In view of the resignation by Smt. Sonia Gandhi of her seat in the Lok Sabha, the preliminary issue arising for consideration of the Commission is whether the question of her alleged disqualification raised in the petition referred, survives for any opinion of the Commission under Article 103(2) of the Constitution.

5. The proceedings before the Commission in cases of references from the President and Governors under Articles 103(2) and 192(2) are quasi-judicial proceedings. Hence, in such matters, the Commission is guided by and follows the principles, procedures and policy adopted by the Supreme Court and High Courts. As a general principle, the Courts look into live issues between the parties and do not undertake to decide an issue which is purely academic or has become infructuous on account of any supervening event. In cases where during the pendency of an election appeal, the candidate whose election was under challenge ceased to be a member of the House concerned, on his death or on account of

his resignation from the seat in the House concerned or where the House itself got dissolved, the Supreme Court has treated the appeal as infructuous and dismissed the appeal as such. In *Podipireddy Achuta Desai v. Chinnam Joga Rao* [(1987) Supp SCC 42], where the House was dissolved during the pendency of the election appeal, the Supreme Court held:

> "The questions raised in this election appeal are of some importance. We also see the force of the submissions urged on behalf of the appellant. All the same, having regard to the fact that fresh elections have already taken place and the appeal has become redundant in that sense, we will be undertaking a futile exercise if we examine the validity or otherwise of the view taken by the High Court in dismissing the election petition. Under the circumstances without expressing any view, one way or the other, on the validity or otherwise of the decision of the High Court, we direct that this appeal shall stand disposed of with no order as to costs."

6. Earlier, the Supreme Court in the case of *Loknath Padhan vs. Birendra Kumar Sahu* (AIR 1974 SC 505), had held :

> "Assembly being dissolved, the setting aside of the election of the respondent would have no meaning or consequence and hence the Court should refuse to embark on a discussion of the merits of the question arising in the appeal. We think there is great force in this preliminary contention urged on behalf of the respondent. It is a well settled practice recognised and followed in India as well as England that a Court should not undertake to decide an issue, unless it is a living issue between the parties. If an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties it would be waste of public time and indeed not proper exercise of authority for the Court to engage itself in deciding it.....

..... In the present case, the Orissa Legislative Assembly being dissolved, it has become academic to consider whether on the date when the nomination was filed, the respondent was disqualified under Section 9-A. Even if it is found that he was so disqualified, it would have no practical consequence, because the invalidation of his election after the dissolution of the Orissa Legislative Assembly would be meaningless and ineffectual.....

..... The finding that the respondent was disqualified would be based on the facts existing at the date of nomination and it would have no relevance so far as the position at a future point of time may be concerned, and therefore, in view of the dissolution of the Orissa Legislative Assembly, it would have no practical interest for either of the parties. Neither would it benefit the appellant nor would it affect the respondent in any practical sense and it would be wholly academic to consider whether the respondent was disqualified on the date of nomination."

7. Again, the Supreme Court observed in *Dhartipakar Madan Lal vs. Rajiv Gandhi* (AIR 1987 SC 1577) as follows :

The election under challenge relates to 1981, its term expired in 1984 on the dissolution of the Lok Sabha, thereafter - another general election was held in December 1984 and the respondent was again elected from 25th Amethi Constituency to the Lok Sabha. The validity of the election field in 1984 was questioned by means of two separate election petitions and both the petitions have been dismissed. The validity of respondent's election has been upheld in *Azhar Hussain vs. Rajiv Gandhi*, AIR 1986 SC 1253 and *Bhagwati Prasad vs. Rajiv Gandhi* (1986) 4 SCC 78; (AIR 1986 SC 1534). Since the impugned election relates to the Lok Sabha which was dissolved in 1984 the respondent's election cannot be set aside in

the present proceedings even if the election petition is ultimately allowed on trial as the respondent is a continuing member of the Lok Sabha not on the basis of the impugned election held in 1981 but on the basis of his subsequent election in 1984. Even if we allow the appeal and remit the case to the High Court the respondent's election cannot be set aside after trial of the election petition as the relief for setting aside the election has been rendered in fructuous by lapse of time. In this view grounds raised in the petition for setting aside the election of the respondent have been rendered academic. Court should not undertake to decide an issue unless it is a living issue between the parties. If an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties, it would be waste of public time to engage itself in deciding it. Lord Viscount Simon in his speech in the House of Lords in *Sun Life Assurance Company of Canada vs. Jervis,* 1944 AC 111 observed; "I do not think that it would be a proper exercise of the Authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. It is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties to a matter in actual controversy which the House undertakes to decide as a living issue." These observations are relevant in exercising the appellate jurisdiction of this Court."

8. The Commission has consistently followed the above judicial principle in the reference cases where the member, against whom complaint was made, ceased to be a member of the House concerned, before opinion was tendered by the Commission and the question decided by the President or the Governor. In all such cases, the consistent view held by the Commission was that the reference had become infructuous. To cite a few such cases, the Commission's Opinion dated

17.6.1971 in the reference case regarding alleged disqualification of Shri Rajnibhai Choudhary and twelve other members of Gujarat Legislative Assembly (51 ELR 354), Opinion dated 10.1.1972 in the matter of alleged disqualification of Shri Lajinder Singh Bedi and two other members of Punjab Legislative Assembly (51 ELR 360), Opinion dated 2.7.1980 in the case of alleged disqualification of Shri Avdhesh Singh and ten other members of Uttar Pradesh Legislative Assembly, Opinion dated 17.10.1990, in the case of allege disqualification of Dr. Jaganath Mishra, Member of Rajya Sabha, Opinion dated 27.10.1990 in the case of alleged disqualification of Shri Mahadeo Kashiray Patil, Member of Rajya Sabha, Opinion dated 12.7.1992 in the case of alleged disqualification of Smt. Jayanthi Natarajan, member of Rajya Sabha, and Opinion dated 29.8.1997, regarding alleged disqualification of Mrs. J. Jayalalitha, member of Tamil Nadu Legislative Assembly, may be seen in this context.

9. The case of Dr. Jaganath Mishra (Reference Case of 2 of 1989) was identical in facts and circumstances, to the present case. The question raised in that case was about alleged disqualification of Dr. Jagannath Mishra, then sitting Member of Rajya Sabha, on the ground that he was holding the office of Chairman-cum-Director General of the L.N. Mishra Institute of Economic Development and Social Change, Patna. In that case, a petition dated 10.6.1989, was referred to the Commission by the President, on 10.7.1989. During the pendency of inquiry by the Commission into the question raised, Dr. Mishra resigned his seat in the Rajya Sabha, and his resignation was accepted by the Chairman of the House on 16.3.1990. The Commission then tendered the opinion that following the resignation of Dr. Mishra, the reference from the President had become infructuous. The Commission in its Opinion tendered in that case, observed :

> "Consequent upon the acceptance of resignation of Dr. Mishra on 16.3.1990, he is no longer a member of the Council of States from that day. Therefore, the question whether he is disqualified for continuing as a Member of that Council no longer survives for

> consideration at present as he is already not a Member of that Council now. In these circumstances, the reference received from the President seeking the opinion of the Commission whether Dr. Mishra has become subject to disqualification to continue as Member of the Council of States has become infructous."

10. In Reference Case No. 1 of 1992 in which the question raised in the petition dated 22.6.1992 submitted before the Governor, was whether Smt. Jayanthi Natarajan, then sitting Member of Rajya Sabha, had incurred disqualification on the ground that she was an Additional Central Government Standing Counsel from 5.5.1992 to 15.6.1992. The petition was referred to the Commission on 30.6.1992. The term of membership of Smt. Natarajan expired on 29.6.1992. The Commission considered the reference as infructous as her membership of the House had come to an end on 29.6.1992, and tendered opinion to that effect on 12.7.1992.

11. In the Reference Cases relating to Ms. Jayalalitha (Reference Case Nos. 1(G)- 6(G) of 93 and 1(G) of 94), [references from the Governor of Tamil Nadu under Article 192(2)] raising the question of alleged disqualification of Ms. Jayalalitha from membership; of Tamil Nadu Legislative Assembly, the Assembly in which she was a member and the membership of which was the subject matter of the question raised in the cases, was dissolved during the pendency of the reference cases. Following the dissolution of the Assembly, the Commission took the view that the cases had become infructous. In that case, relying on the decision of the Supreme Court in *Loknath Padhan vs. Birendera Kumar Sahu* (supra), the Commission observed:

> "Having considered all relevant aspects of the said question, the Commission is of the view that any such opinion now would be unnecessary. Any enquiry, at this stage, into the question whether Ms. Jayalalitha had become subject to disqualification for continuing as a Member of the earlier House of the Tamil Nadu Legislative Assembly, already dissolved in May, 1996, would be of mere

academic interest now, and would be an exercise in futility. Any pronouncement on the above question would not affect her present status, one way or the other, nor would such pronouncement serve any meaningful purpose at this stage. It is a well settled judicial practice, recognised and followed in India, that if an issue is purely academic, in that its decision one way or the other would have no impact on the position of the parties, it would be waste of public time, and indeed not proper exercise of authority for the courts to engage themselves in deciding such academic issues. Shri Bobde was right in placing reliance on the decision of the Supreme Court in the case of L*oknath Padhan vs. Birendra Kumar Sahu (supra).* In that case, the election of successful candidate to the Orissa Legislative Assembly was challenged on the ground that he had a subsisting contract with the Government of Orissa for the execution of certain works and that he was disqualified under Section 9A of the Representation of the People Act, 1951. The High Court dismissed the election petition, but an appeal was pending before the Supreme Court, when, in the meanwhile, the Orissa Legislative Assembly was dissolved. The Supreme Court dismissed the appeal, as having become infructuous, in view of dissolution of the State Legislative Assembly."

12. It would, thus, be seen that in all reference cases in which the person to whom the complaint pertained ceased to be a Member of the House concerned, the Commission has consistently tendered opinion to the effect that the case had been rendered infructuous, and any opinion by the Commission on the question raised would only be of academic value.

13. Having regard to the above constitutional and legal position, and consistent with the view taken by the Commission in all such reference cases in the past, mentioned above, the Commission is of the considered opinion that the present

reference on the question of alleged disqualification of Smt. Sonia Gandhi for being a member of the Lok Sabha has become infructuous, in view of the fact that Smt. Sonia Gandhi has already resigned her seat in the Lok Sabha on 23rd March, 2006, and is thus no longer a member of the House.

14. Accordingly, the said reference is hereby returned to the President with the Commission's opinion, under Article 103(2) of the Constitution, to the effect that the same has become infructuous.

Sd/-	Sd/-	Sd/-
(Navin B. Chawla)	(B.B. Tandon)	(N. Gopalaswami)
Election Commissioner	Chief Election Commissoner	Election Commissioner

Place : New Delhi
Dated : 3rd April, 2006

ELECTION COMMISSION OF INDIA

In re :
Alleged disqualification of Shri Balbir Kumar Punj,
former Member of Rajya Sabha, under Article 102(1)(a) of the Constitution

Reference Case No. 10 of 2006
[Reference from the President of India under Article 103(2)
of the Constitution]

Date of Opinion : 07.04.2006

SUMMARY OF THE CASE

This was a petition filed before the President by Shri Vijay Garg, on 21st March, 2006, under Article 103(1) of the Constitution, alleging that, Shri Balbir Kumar Punj, a sitting member of the Rajya Sabha had incurred disqualification under Article 102(1)(a), on the ground that he had held the office of Vice-Chairperson, National Commission for Youth, under the Ministry of Youth Affairs and Sports, from 15th March 2002 to 17th July 2004. Shri Punj was elected to the Rajya Sabha at the biennial election held in 2000. His term as member of the Rajya Sabha expired on 2nd April 2006. The Commission in its Opinion to the President on 7th April 2006, took the view that following the expiry of the term of membership of Sh. Punj, the petition became infructuous. The Commission observed that as the gap between the receipt of the reference and the date of expiry of the term of membership of Sh. Punj was barely a week, there was no scope for any inquiry into the question of alleged disqualification.

O P I N I O N

This is a reference dated 24th March, 2006 from the President of India, under Article 103(2) of the Constitution, seeking opinion of the Election Commission on the question whether Shri Balbir Kumar Punj, who was then a sitting member of the Rajya Sabha, has become subject to disqualification for being a Member of Rajya Sabha under Article 102(1)(a) of the Constitution.

2. The question of alleged disqualification of Shri Balbir Kumar Punj was raised in a petition dated 21st March, 2006 submitted to the President by Sh. Vijay Garg, President, Delhi Youth Welfare Association, F-1, Shastri Nagar, Delhi – 110052, alleging that Shri Balbir Kumar Punj (mentioned as 'Balbir K. Punj' in the petition), then sitting Member of Parliament (Rajya Sabha), had held the office of Vice-Chairperson, National Commission for Youth, under the Ministry of Youth Affairs and Sports, from 15th March 2002 to 17th July 2004. The petitioner alleged that Sh. Punj was granted the status of Minister of State and was enjoying privileges and perks as available to a Minister as well as Vice Chairperson of the said Commission for Youth. According to the petitioner, the said office was an office of profit, and hence, Sh. Punj had incurred disqualification for being a member of Rajya Sabha. The petitioner contended that in view thereof, Shri Punj should be disqualified from being a member of the Rajya Sabha, under Article 102(1)(a) of the Constitution.

3. Shri Punj was elected to Rajya Sabha in 2000, and his term as member of the Rajya Sabha expired on 2nd April 2006. The reference from the President was received in the Commission on 25th March, 2006. The petition of Shri Vijay Garg was not accompanied by any document supporting his contention of alleged appointment of Sh. Punj to the office of Vice-Chairperson of National Commission for Youth. As the period between the receipt of reference in the Commission and the date of retirement of Sh. Punj as member of Rajya Sabha was only about one week, there was hardly any time to obtain requisite details from the petitioner and/or to give an opportunity to Sh. Punj to submit his reply to the allegations, or to conduct any meaningful inquiry into the question raised by the petitioner. Now that Sh. Punj has retired from membership of the Rajya Sabha on 2.4.2006, he has ceased to be a member of that House with effect from that date.

4. In view of the retirement of Sh. Punj from membership of the Rajya Sabha on 2.4.2006, the preliminary issue arising for consideration of the Commission

is whether the question of his alleged disqualification raised in the petition referred, survives for any opinion of the Commission under Article 103(2) of the Constitution.

5. The proceedings before the Commission in cases of references from the President and Governors under Articles 103(2) and 192(2) are quasi-judicial proceedings. Hence, in such matters, the Commission is guided by the follows the principles, procedures and policy adopted by the Supreme Court and High Courts. As a general principle, the Courts look into live issues between the parties and do not undertake to decide an issue which is purely academic or has become infructuous on account of any supervening event. In cases where during the pendency of an election appeal, the candidate whose election was under challenge ceased to be a member of the House concerned, on his death or on account of his resignation from the seat in the House concerned or where the House itself got dissolved, the Supreme Court has treated the appeal as infructuous and dismissed the appeal as such. *In Podipireddy Achuta Desai Vs Chinnam Joga Rao* [(1987) Supp SCC 42], where the House was dissolved during the pendency of the election appeal, the Supreme Court held:

> "The questions raised in this election appeal are of some importance. We also see the force of the submissions urged on behalf of the appellant. All the same, having regard to the fact that fresh elections have already taken place and the appeal has become redundant in that sense, we will be undertaking a futile exercise if we examine the validity or otherwise of the view taken by the High Court in dismissing the election petition. Under the circumstances without expressing any view, one way or the other, on the validity or otherwise of the decision of the High Court, we direct that this appeal shall stand disposed of with no order as to costs."

6. Earlier, the Supreme Court in the case of *Loknath Padhan vs Birendra Kumar Sahu* (AIR 1974 SC 505), had held:

"Assembly being dissolved, the setting aside of the election of the respondent would have no meaning or consequence and hence the Court should refuse to embark on a discussion of the merits of the question arising in the appeal. We think there is great force in this preliminary contention urged on behalf of the respondent. It is a well settled practice recognized and followed in India as well as England that a Court should not undertake to decide an issue, unless it is a living issue between the parties. If an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties it would be waste of public time and indeed not proper exercise of authority for the Court to engage itself in deciding it…..

…… In the present case, the Orissa Legislative Assembly being dissolved, it has become academic to consider whether on the date when the nomination was filed, the respondent was disqualified under S. 9-A. Even if it is found that he ws so disqualified, it would have no practical consequence, because the invalidation of his election after the dissolution of the Orissa Legislative Assembly would be meaningless and ineffectual…..

……. The finding that the respondent was disqualified would be based on the facts existing at the date of nomination and it would have no relevance so far as the position at a future point of time may be concerned and therefore, in view of the dissolution of the Orissa Legislative Assembly, it would have no practical interest for either of the parties. Neither would it benefit the appellant nor would it affect the respondent in my practical sense and it would be wholly academic to consider whether the respondent was disqualified on the date of nomination.

7. Again, the Supreme Court observed in *Dhartipaka Madan Lal Vs Rajiv Gandhi* (AIR 1987 SC 1577) as follows :

> The election under challenge relates to 1981, its term expired in 1984 on the dissolution of the Lok Sabha, thereafter another general election was held in December 1984 and the respondent was again elected from 25th Amethi Constituency to the Lok Sabha. The validity of the election field in 1984 was questioned by means of two separate election petitions and both the petitions have been dismissed. The validity of respondent's election has been upheld in *Azhar Hussain Vs Rajiv Gandhi,* AIR 1986 SC 1253 and *Bhagwati Prasad Vs Rajiv Gandhi* (1986) 4 SCC 78 : (AIR 1986 SC 1534). Since the impugned election relates to the Lok Sabha which was dissolved in 1984 the respondent's election cannot be set aside in the present proceedings even if the election petition is ultimately allowed on trial as the respondent is a continuing member of the Lok Sabha not on the basis of the impugned election held in 1981 but on the basis of his subsequent election in 1984. Even if we allow the appeal and remit the case to the High Court the respondent's election cannot be set aside after trial of the election petition as the relief for setting aside the election has been rendered infructuous by lapse of time. In this view grounds raised in the petition for setting aside the election of the respondent have been rendered academic. Court should not undertake to decide an issue unless it is a living issue between the parties. If an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties, if would be waste of public time to engage itself in deciding it. Lord Viscount Simon in his speech in the House of Lords in *Sun Life Assurance Company of Canada Vs Jervis,* 1944 AC 111 observed; "I do not think that it would be a proper exercise of the Authority which this House possesses to hear appeals if it occupies

> time in this case in decidng an academic question, the answer to which cannot affect the respondent in any way. It is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties to a matter in actual controversy which the House undertakes to decide as a living issue." These observations are relevant in exercising the appellate jurisdiction of this Court."

8. The Commission has consistently followed the above judicial principle in the reference cases where the member, against whom complaint was made, ceased to be a member of the House concerned, before opinion was tendered by the Commission and the question decided by the President or the Governor. In all such cases, the consistent view held by the Commission was that the reference had become infructuous. To cite a few such cases, the Commission's Opinion dated 17-06-1971 in the reference case regarding alleged disqualification of Sh. Ranjibhai Choudhary and twelve other members of Gujarat Legislative Assembly (51 ELR 354), Opinion dated 10-1-1972 in the matter of alleged disqualification of Sh. Lajinder Singh Bedi and two other members of Punjab Legislative Assembly (51 ELR 360), opinion dated 2-7-1980 in the case of alleged disqualification of Sh. Avdhesh Singh and ten other members of Uttar Pradesh Legislative Assembly, Opinion dated 17-10-1990, in the case of alleged disqualification of Dr. Jaganath Mishra, member of Rajya Sabha, Opinion dated 27-10-1990 in the case of alleged disqualification of Sh. Mahadeo Kashiray Patil, member of Rajya Sabha, Opinion dated 12-7-1992 in the case of alleged disqualification of Smt. Jayanthi Natarajan, member of Rajy Sabha, and opinion dated 29-8-1997, regarding alleged disqualification of Ms. J.Jayalalitha, member of Tamil Nadu Legislative Assembly, may be seen in this context.

9. In the case of Dr. Jaganath Mishra (Reference Case of 2 of 1989), the question raised in that case was about alleged disqualification of Dr. Jagannath Mishra, then sitting Member of Rajya Sabha, on the ground that he was holding

the office of Chairman-cum-Director General fo the L.N. Mishra Institute of Economic Development and Social Change, Patna. In that case, a petition dated 10.6.1989, was referred to the Commission by the President, on 10.7.1989. During the pendency of inquiry by the Commission into the question raised, Dr. Mishra resigned his seat in the Rajya Sabha, and his resignation was accepted by the Chairman of the House on 16.3.1990. The Commission then tendered the opinion that following the resignation of Dr. Mishra, the reference from the President had become infructous. The Commission in its Opinion tendered in that case, observed :

> "Consequent upon the acceptance of resignation of Dr. Mishra on 16-03-1990, he is no longer a member of the Council of States from that day. Therefore, the question whether he is disqualified for continuing as a member of that Council no longer survives for consideration at present as he is already not a member of that Council now. In these circumstances, the reference received from the President seeking the opinion of the Commission whether Dr. Mishra has become subject to disqualification to continue as member of the Council of States has become infructous."

10. In Reference Case No. 1 of 1992 in which the question raised in the petition dated 22.6.1992 submitted before the Governor, was whether Smt. Jayanthi Natarajan, then sitting Member of Rajya Sabha, had incurred disqualification on the ground that she was an Additional Central Govt. Standing Counsel from 5-5-1992 to 15-6-1992. The petition was referred to the Commission on 30.6.1992. The term of membership of Smt. Natarajan expired on 29.6.1992. The commission considered the reference as infructous as her membership of the House had come to an end on 29-6-1992, and tendered opinion to that effect on 12.7.1992. The present case is almost similar to the case of Smt. Jayanthi Natarajan.

11. In the Reference Cases relating to Ms. J. Jayalalitha, (Reference Case Nos. 1(G) – 6(G) of 93 and 1 (G) of 94, [references from the Governor of Tamil Nadu under Article 192 (2)] raising the question of alleged disqualification of Ms. Jayalitha from membership of Tamil Nadu Legislative Assembly, the Assembly in which she was a member and the membership of which was the subject matter of the question raised in the cases, was dissolved during the pendency of the reference cases. Following the dissolution of the Assembly, the Commission took the view that the cases had become infructous. In that case, relying on the decision of the Supreme Court in *Loknath Padhan Vs Birendera Kuamr Sahu* (Supra), the Commission observed.:

> "Having considered all relevant aspects of the said question, the Commission is of the view that any such opinion now would be unnecessary. Any enquiry, at this stage, into the question whether Ms. Jayalalitha had become subject to disqualification for continuing as a member of the earlier House of the Tamil Nadu legislative Assembly, already dissolved in May, 1996, would be of mere academic interest now, and would be an exercise in futility. Any pronouncement on the above question would not affect her present status, one way or the other, nor would such pronouncement serve any meaningful purpose at this stage. It is a well settled judicial practice, recognized and followed in India, that if an issue is purely academic, in that its decision one way or the other would have no impact on the position of the parties, it would be waste of public time, and indeed not proper exercise of authority for the courts to engage themselves in deciding such academic issues. Shri Bobde was right in placing reliance on the decision of the Supreme Court in the case of Loknath Padhan Vs Birendra Kumar Sahu (Supra). In that case the election of successful candidate to the Orissa Legislative Assembly was challenged on the ground that he had a subsisting contract with the Government of Orissa for the execution

of certain works and that he was disqualified under Section 9A of the Representation of the People Act, 1951. The High Court dismissed the election petition, but an appeal was pending before the Supreme Court, when, in the meanwhile, the Orissa Legislative Assembly was dissolved. The Supreme Court dismissed the appeal, as having become infructuous, in view of dissolution of the State Legislative Assembly.

12. It would, thus, be seen that in all reference cases in which the person to whom the complain pertained ceased to be a member of the House concerned, the Commission has consistently tendered opinion to the effect that the case had been rendered infructuous, and any opinion by the Commission on the question raised would only be of academic value.

13. Having regard to the above constitutional and legal position, and consistent with the view taken by the Commission in all such reference cases in the past, mentioned above, the Commission is of the considered opinion that the present reference on the question of alleged disqualification of Shri Balbir Kumar Punj for being a member of the Rajya Sabha has become infructuous, in view of the fact that the term of his membership in the Rajya has expired on 2.4.2006, and he is no longer a member of the House.

14. Accordingly, the said reference is hereby returned to the President with the Commission's opinion, under Article 103(2) of the Constitution, to the effect that the same has become infructuous.

Sd/-	Sd/-	Sd/-
(Navin B. Chawla)	(B.B. Tandon)	(N. Gopalaswami)
Election Commissioner	Chief Election Commissoner	Election Commissioner

Place : New Delhi
Dated : 7th April, 2006

ELECTION COMMISSION OF INDIA

In re :
Alleged disqualification of Prof. Vijay Kumar Malhotra, a sitting Member of Lok Sabha, under Article 102(1)(a) of the Constitution of India

Reference Case No. 13 of 2006
[Reference from the President of India under Article 103(2) of the Constitution of India]

Date of Opinion : 07.04.2006

SUMMARY OF THE CASE

The President made a reference to the Commission under Article 103(2) of the Constitution, on a petition dated 20th March 2006, submitted to the President by Shri Anubhav Anand Aron, raising the question of alleged disqualification of Prof. Vijay Kumar Malhotra, a sitting member of the Lok Sabha, for being a member of that House, on the ground that Prof. Malhotra had held the office of President of All India Copuncil for Sports from July 2002 to July 2004. Prof. Malhotra was elected to the Lok Sabha at the general election to the Lok Sabha held in April-May 2004. The Commission observed that the alleged appointment of Prof. Malhotra was made prior to his election as a member of the Lok Sabha, and opined that this was a case of pre-election disqualification, if at all any disqualification was attracted, and that such cases of pre-election disqualifications could only be raised by means of election petitions presented n accordance with the provisions of the Representation of the People Act, 1951, and hence the petition was not maintainable under Article 103(1).

O P I N I O N

This is a reference dated 29th March, 2006, from the President of India, seeking the opinion of the Election Commission under Article 103(2) of the Constitution of India, on the question of alleged disqualification of Prof. Vijay Kumar Malhotra, a sitting member of Lok Sabha, under Article 102 (1)(a) of the Constitution of India.

2. The above question arose on the petition dated 20th March, 2006, submitted by Shri Anubhav Anand Aron, Advocate, R/o G-1st, 141 Madangir, New Delhi, to the President of India, under Article 103(1) of the Constitution, raising the question of alleged disqualification of Prof. Malhotra, elected to the Lok Sabha at the general election held to the Lok Sabha in 2004, for being a member of Lok Sabha, under clause (a) of Article 102(1) of the Constitution of India, on the ground that he was holding the office of President of All India Council for Sports, from July 2002 to July 2004. As per the statement of the petitioner in his petition, Prof. Malhotra was appointed as the President of the All India Council for Sports in July 2002, and he contested the general election to the Lok Sabha in 2004 while he was holding the said office. The petitioner has further stated that Prof. Malhotra resigned from the office of the President of the said Council on 15th July, 2004. Thus, the petition does not contain any allegation, whatsoever, that Prof. Malhotra was appointed to this post at any point of time after his election to the Lok Sabha in 2004.

3. It is well settled that under Article 103(1) of the Constitution of India, the jurisdiction of the President to decide question of disqualification of a sitting Member of Parliament arises only in disqualifications incurred after election as a Member of the House. The jurisdiction of the Election Commission to inquire into such question of the alleged disqualification, on being referred to it by the President under Article 103(2) of the Constitution, also arises only in case of post-election disqualification. Any question of pre-election disqualification, i.e. disqualification from which a person was suffering at the time of, or prior to his election, can be raised only by means of an election petition presented in accordance with the provision of Art. 329(b) of the Constitution read with Part-VI of the Representation of the People Act, 1951, and in no other manner. Reference is invited, in this connection, to the Supreme Court's catena of decisions in *Election Commission vs. Saka Venkata Rao* (AIR 1953 SC 201); *Brundaban Naik vs. Election Commission* (AIR 1965 SC 1892); *Election Commission vs. N.G. Ranga* (AIR 1978 SC 1609); etc. In a very large number of

other similar cases in the past, the Commission has given similar opinion, on the references made to it by the President and Governors of States.

4. In view of the well settled constitutional position, referred to above, the question of the alleged disqualification of Prof. Vijay Kumar Malhotra, being a case of pre-election disqualification, if at all, cannot be raised under Article 103(1) of the Constitution. The Election Commission also has no jurisdiction to express any opinion on the question of such alleged pre-election disqualification. The present petition is, therefore, not maintainable before the President in terms of Article 103(1) of the Constitution.

5. The reference received from the President, in the present case, is accordingly, returned with the opinion of the Election Commission of India, under Article 103(2) of the Constitution, to the above effect that it is not maintainable under Article 103(1)of the Constitution.

Sd/-	Sd/-	Sd/-
(Navin B. Chawla)	(B.B. Tandon)	(N. Gopalaswami)
Election Commissioner	Chief Election Commissoner	Election Commissioner

Place : New Delhi
Dated : 7th April, 2006

ELECTION COMMISSION OF INDIA

In re :
Alleged disqualification of Shri Mohammad Azam Khan,
Member of the Uttar Pradesh Legislative Assembly
under Article 191(1)(a) of the Constitution

Reference Case No. 2(G) of 2005
[Reference from the Governor, Uttar Pradesh under Article 192(2) of the Constitution)

Date of Opinion : 03.04.2006

Present

For the Petitioner	1. Shri V.K. Agrawal, Advocate
	2. Shri V. Kumar, Advocate
For opposite party	1. Shri R.K. Anand, Senior Advocate
	2. Shri M.A. Siddiqui, Advocate
	3. Shri I.U. Khan, Advocate
	4. Shri H.R. Suhail Khan, Advocate
	5. Shri Bhagvan Sharma, Advocate
	6. Ms. Shivani Lal, Advocate
	7. Ms. Debonita, Advocate
	8. Shri Ajay Kumar, Advocate
	9. Shri M.S. Ganesh, Senior Advocate
	10. Shri K. Seshachary, Advocate

SUMMARY OF THE CASE

The Governor of Uttar Pradesh made a reference to the Commission under Article 192(2) of the Constitution, on a petition submitted to him by Shri Krishna

Kant Shukla, on the question of alleged disqualification of Shri Mohd. Azam Khan, a sitting member of the Uttar Pradesh Legislative Assembly. The issue raised in the petition was that Shri Azam Khan was appointed by the Uttar Pradesh Government to the office of Chairman of the Uttar Pradesh Jal Nigam, alleged to be an office of profit. In this case, after hearing the parties, the Commission observed that the full facts relating to the facilities allegedly provided to Shri Azam Khan were not available for the Commission to formulate its opinion, and hence the Commission sought certain information and clarification from the Uttar Pradesh government, and later decided to summon the Managing Director of the Jal Nigam for taking evidence. At that stage, the Uttar Pradesh Legislature made an amendment to the Uttar Pradesh State Legislature (Prevention of disqualification)Act, 1971, specifying 79 offices which included the office of Chairman of the Uttar Pradesh Jal Nigam, as offices to be exempted from disqualification. The amendment was given retrospective effect from 1st January 2003. The Commission, taking note of the said amendment and the decision of the Supreme Court in *Kanta Kathuria Vs. Manak Chand Surana*, about the power of the Legislature to make law under Article 191(1)(a) with retrospective effect, opined that if at all there was any disqualification in this case, the same stood removed by virtue of the amendment made to the law with retrospective effect, and hence the petition had been rendered infructuous.

O P I N I O N

This is a reference dated 2nd April, 2005, from the Governor of Uttar Pradesh, under Article 192(2) of the Constitution, seeking the Commission's opinion on the question whether Shri Mohammad Azam Khan, a sitting member of Uttar Pradesh Legislative Assembly, has become subject to disqualification under Article 191(1)(a) of the Constitution. Incidentally, Shri Mohammad Azam Khan is also a Cabinet Minister of Uttar Pradesh holding the charge of Urban Development.

2. The above question was raised before the Governor in a petition dated 3rd September, 2004, submitted before him by Shri Krishna Kant Shukla, an Advocate in Lucknow. The petitioner, in his petition, stated that Shri Azam Khan who is a member of the Uttar Pradesh Legislative Assembly, elected at the general election to the Legislative Assembly held in 2002, was appointed as the Chairman of the Uttar Pradesh Jal Nigam (hereinafter referred to as 'Nigam'), a statutory body constituted under the Uttar Pradesh Water Supply and Sewerage Act, 1975 ('1975 Act' for short). He stated that the appointment was made vide the Uttar Pradesh Govt. Order No. 3011/Naw-3-2004-Nagar Vikas Anubhag-3, dated 19.8.2004, and Sh. Azam Khan assumed charge of the said office on 26.8.2004. According to the petitioner, the Nigam is fully controlled by the State Government, and its income is partly funded through loans and grants advanced by the State Government. The petitioner contended that the Chairman of the Nigam performs very important functions such as recruiting and appointing staff of all categories including Chief Engineers. He further stated that under Section 7(1) of the 1975 Act, the Chairman is entitled to receive such remuneration as may be fixed by the Government. In his contention, the office of Chairman of the Nigam is an office of profit within the meaning of Article 191(1)(a) of the Constitution, and consequently, Shri Azam Khan has incurred disqualification from being a Member of the Legislative Assembly under the said Article.

3. The Commission issued notice to the opposite party (Shri Azam Khan) on 9.5.2005, for filing his reply, which he did on 31.05.2005 and later the petitioner filed his rejoinder. The Commission fixed a personal hearing in the matter on 22.07.2005. The hearing was postponed to 11.08.2005 on the request of the petitioner. On 11.08.2005, the learned counsel for the petitioner requested for a further adjournment on the ground that he needed more time to seek instructions and prepare the case. On this request, the hearing was adjourned to 12.08.2005. At the hearing, the learned counsel for the petitioner reiterated the submissions in his petition that the office of Chairman of the Nigam was an office of profit. Shri M.S. Ganesh, the learned senior counsel for the opposite party, however,

stated that the appointment order of Shri Azam Khan as Chairman of the Nigam itself made it clear that Shri Azam Khan would not be entitled to any additional salary, allowance or other facilities by virtue of his appointment as Chairman of the Nigam. According to him, this took the office of Chairman to which Shri Azam Khan was appointed, out of the purview of 'office of profit'. He made a further submission that under Section 3(3) of the 1975 Act, the Nigam is deemed to be a local authority for all purposes, and hence, the office of Chairman of the Nigam can not be treated as an office under the Government.

4. The question whether an office is an 'office of profit under the Government' has to be decided on the basis of facts and circumstances of each individual case. In the present case, as full facts relating to the facilities provided to Shri Azam Khan in his capacity as the Chairman of the Nigam were not placed before the Commission, the Commission decided to obtain further information and details in this behalf from the Government of Uttar Pradesh and from the Nigam. In reply to various communications sent by the Commission to the Chief Secretary of Uttar Pradesh, some information was made available to the Commission. However, it was seen that the information furnished was not complete and conclusive and also contradictory in certain respects. Further, the log books of the staff cars attached to the Nigam, which were summoned by the Commission, also indicated that several cars were used by officials of various Departments other than that of the Nigam and in many cases cars were shown to have been used on 'VIP duty' without giving the names of VIPs who had used those cars. In view of this, for proper appreciation of facts, the Commission decided to summon the Managing Director of the Nigam for examination/and oral evidence and fixed a hearing for this purpose on 10.02.2006, with notice to the two parties that they may be present for cross examination if they so desired. By a letter dated 7.02.2006, Shri Azam Khan made a request for postponement of the hearing for examination of the MD on the ground that his Counsel was unwell. This request was granted and the hearing was postponed to 3.03.2006. On the day of hearing on 3.03.2006, a letter dated 3.03.2006 was received from the

Chief Engineer, Ghaziabad Division of the Nigam, stating that the MD of the Nigam was hospitalized and hence was not in a position to appear before the Commission. Therefore, the hearing was again adjourned and later fixed for 24.3.2006, and both the parties were duly informed.

5. On 24.3.2006, Shri R.K. Anand, Sr. Advocate, appeared on behalf of Shri Azam Khan. The petitioner did not appear. The MD of the Nigam, also did not appear, and later, an application dated 22.3.2004, by him, stating that he was under medical advice not to undertake journey, and requesting for another date for his appearance, was received in the Commission.

6. Shri R.K. Anand, submitted an application placing on record a copy of the Uttar Pradesh State Legislature (Prevention of Disqualification) Amendment Act, 2006, amending the Uttar Pradesh State Legislature (Prevention of Disqualification) Act, 1971 (hereinafter referred to as '1971 Act'). By this amendment, clause (x) of Section 3 of the 1971 Act, has been amended. Section 3 of the Principal Act of 1971 provides that none of the offices mentioned thereunder in clauses (a) to (y) shall disqualify or be deemed ever to have disqualified the holder thereof for being chosen as, or for being member of the State Legislature. The amend clause (x) of the said Section 3 now reads follows:

> "(x) the office of the Chairman, or Vice-Chairman or member (whether called Director or by any other name) of each of the following bodies, namely;"

7. In the principal Act, the above mentioned clause (x) contained names of four offices. The said four offices mentioned therein have been substituted *vide* clause 3 of the Amendment Act, 2006, by a list of 79 Offices which includes, among others, "Uttar Pradesh Jal Nigam" at item No. 20. Thus, as a result of the above mentioned Amendment Act of 2006, the office of Chairman of the Jal Nigam is now one of the offices declared by the Uttar Pradesh Legislature as an office exempted from purview of disqualification under Article 91(1)(a) of the Constitution.

8. The above mentioned Amendment Act of 2006 has been given retrospective effect and is deemed to have come into force on 1st January, 2003. At the hearing on 24.3.2006, Shri R.K. Anand relied on the decision of the Supreme Court in Kanta Kathuria vs. Manak Chand Surana [1969 (3) SCC 268] wherein the Supreme Court upheld the power of Parliament and State Legislatures to make laws with retrospective effect in exercise of their power under Articles 102(1)(a) and 191(1)(a) exempting certain offices from the purview of disqualification under those Articles.

9. In the instant case, it is an admitted position that Sh. Azam Khan was appointed to office of Chairman of the Jal Nigam on 19.8.2004, and he assumed charge of the office on 23.8.2004. By virtue of the amendment now made to Section 3(x) of the 1971 Act, with retrospective effect from 1st January, 2003, the holder of the said office of Chairman of the Jal Nigam is exempted from disqualification. The Constitution has empowered the State Legislature to declare, by law, any office as an office which will not disqualify its holder under Article 191(1)(a) for being chosen as, or being a member of the State Legislature. It is also a settled position that such law can be given retrospective effect. The Commission has accordingly taken cognizance of such amendment legislations with retrospective effect, in the past. In the reference case (No. 4 of 1980) regarding alleged disqualification of Shri Gaya Lal and 23 other members of the Haryana Legislative Assembly, during the pendency of the reference before the Commission, the Haryana State Legislature amended the Haryana State Legislature (Prevention of Disqualification) Act, 1974, on two occasions, by virtue of which the offices held by the said MLAs were brought under the exempted categories. In that case, the Commission in its opinion dated 21.05.1981 held the view that the disqualifications, if any, stood removed in their cases and the reference became infructuous. The present case is also similar in facts and circumstances to those cases. Therefore, if at all there was any disqualification of Shri Azam Khan on account of his appointment to the office of the Chairman of the Jal Nigam, in August, 2004, the same stands removed now, by virtue of

the amendment made to the 1975 Act, expressly specifying the said office as an office which is not to disqualify its holder within the meaning of Article 91(1)(a) of the Constitution.

10. Having regard to the above constitutional and legal position, the Commission is of the considered view that the question raised in the petition dated 3rd September, 2004 of Shri K.K. Shukla does not survive now, as the alleged disqualification, if any, of Shri Mohammad Azam Khan stands removed with retrospective effect. Accordingly, the reference from the Governor is returned with the Commission's opinion to the effect that if at all there was any disqualification incurred by Shri Mohd. Azam Khan, following his appointment to the office of Chairman of the Uttar Pradesh Jal Nigam, the same now stands removed by virtue of the Uttar Pradesh State Legislature (Prevention of Disqualification) Amendment Act, 2006, and the reference has accordingly been rendered infructuous now.

Sd/-	Sd/-	Sd/-
(Navin B. Chawla)	(B.B. Tandon)	(N. Gopalaswami)
Election Commissioner	Chief Election Commissoner	Election Commissioner

Place : New Delhi
Dated : 3rd April, 2006.