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LANDMARK JUDGEMENTS ON ELECTION LAW

(A Compilation of important and far-reaching Judgements pronounced by Supreme Court of India, High Courts and Election Commission of India)

VOLUME - II

ELECTION COMMISSION OF INDIA
NEW DELHI

Volume II

Volume I

(Details of following Judegements are available in Landmark Judgements Volume I)

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SUPREME COURT OF INDIA*

Civil Appeal No. 1553 of 1980$
(Decision dated 26-2-1982)

Joyti Basu and Others, .. ***Appellants***

Vs.

Debi Ghosal and Others, .. ***Respondents.***

SUMMARY OF THE CASE

Sh. Mohd. Ismail, sponsored by the Communist Party of India (Marxist), was elected to the House of the People from the 19-Barrackpore Parliamentary Constituency in West Bengal at the general election held in January, 1980. An election petition was filed before the Calcutta High Court by one of the rival candidates Shri Debi Ghosal. In that election petition, the election petitioner joined, apart from the returned candidate, Sh. Jyoti Basu, who was the Chief Minister of West Bengal, and two other Ministers of the Government of West Bengal, as respondents, alleging that they had colluded and the conspired with the returned candidate to commit various corrupt practices.

Shri Jyoti Basu submitted before the High Court that he could not be impleaded as respondent to an election petition under the provisions of the Representation of the People Act, 1951. That objection was, however, over -ruled by the High Court.

Aggrieved by the order of the High Court rejecting his application for striking out his name from the array of parties in the election petition, Shri Jyoti Basu filed the present appeal before the Supreme Court. The Supreme Court upheld his contention and allowed his appeal, holding that under Section 82 of the Representation of the People Act, 1951 only the candidates at the impugned election could be joined as respondents to an election petition, and no one else.

Representation of the Peple Act (43 of 1951), Ss. 82, 86 (4), 87 (1) and 99 — Election petition — Persons mentioned in Ss 82 and 86 (4) only can be joined as respondents. (1981) 85 Cal WN 532, Reversed.

No one may be joined as a party to an election petition otherwise than as provided by Ss. 82 and 86 (4) of the Act. It follows that a person who is not a candidate may not be joined as a respondent to the election petition. (1981) 85 Cal WN 532 Reversed (Paras 9, 13)

It is not as if a person guilty of a corrupt practice can get away with it. Where at the concluding stage of the trial of an election petition, after evidence has been given, the Court finds that there is sufficient material to hold a person guilty of a corrupt practice, the Court may then issue a notice to him to show cause under S. 99 and proceed with further action. The legislative provision contained in Section 99 which enables the Court, towards the end of the trial of an election petition, to issue a notice to a person not a party to the proceeding to shows cause why he should not be "named" in sufficient clarification of the legislative intent that such person

may not be permitted to be joined as a party to the election petition. AIR 1952 SC 64; AIR 1954 SC 210; AIR 1969 SC 677 and AIR 1969 SC 872 (Para 11) Rel. on.

Cases Referred: Chronological Paras

AIR 1973 Punj & Har 163 (FB)	13
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JUDGMENT

Present:- R.S. Pathak and O. Chinnappa Reddy, JJ.

Mr. Somnath Chatterjee, Sr. Advocate, Mr. Rathin Das and Mr. Aninda Mitter, Advocates with him, for Appellants; Mr Sidhartha Shankar Ray, Sr. Advocate, M/s. R.K. Lala and T.V.S.N. Chari, Advocates with him, for Respondent No. 1.

CHINNAPA REDDY, J:– The first appellant, Jyoti Basu, is the Chief Minister and appellants two and three Buddhadeb Bhattacharya and Hashim Abdul Halim, are two Ministers of the Government of West Bengal. They have been impleaded by the first respondent as parties to an election petition filed by him questioning the election of the second respondent to the House of the People from the 19 Barrackpore Parliamentary Constituency in the midterm Parliamentary election held in January, 1980. There were five candidates who sought election from the Constituency. Mod. Ismail, the first respondent, whose candidature was sponsored by the Communist Party of India (Marxist) was, elected securing 2,66,698 votes as against Debi Ghosal, a candidate sponsored by the Indian National Congress led by Smt. Indira Gandhi who secured 1,62,770 votes. The other candidates Ramjit Ram, Robi Shankar Pandey and Bejoy Narayan Mishra secured 25,734, 12,271 and 2,763 votes respectively. The first respondent filed an election petition in the High Court of Calcutta questioning the election of the second respondent Mohd. Ismail on various grounds. He impleaded the returned candidate as the first respondent, and the other three unsuccessful candidates as respondents 2, 3 and 4 to the election petition. Besides the candidates at the election, he impleaded several others as respondents. The District Magistrate and returning Officer was impleaded as the fifth respondent, Buddhadeb Bhattacharya, the Minister for Information and Publicity, Government of West Bengal as the sixth respondent. Jyoti Basu, the Chief Minister as the seventh respondent, Md. Amin, the Minister of the Transport Branch of the

Home Department as the eighth respondent, Hashim Abdul Halim, the Minister of the Legislative and the Judicial Department as the ninth respondent and the Electoral Registration Officer as the tenth respondent. It was averred in the election petition that the Chief Minister and the other Ministers of the Government of West Bengal who were impleaded as parties to the election petition had colluded and conspired with the returned candidate to commit various alleged corrupt practices. Apart from denying the commission of the various alleged corrupt practices, the Chief Minister and the other Ministers claimed in their written statements that the election petitioner was not entitled to implead them as parties to the election petition. They claimed that as they were not candidates at the election they could not be impleaded as parties to the election petition. The Chief Minister and two of the other ministers, Hashim Abdul Halim and Buddhadeb Bhattacharya filed an application before the High Court of Calcutta to strike out their names from the array of parties in the election petition. The application was dismissed by the Calcutta High Court on the ground that the applicants (appellants) were proper parties to the election petition and, therefore, their names should not be struck out of the array of parties. The appellants have preferred this appeal after obtaining special leave of this Court under Art. 136 of the Constitution.

2. Shri Somnath Chatterjee, learned counsel for the appellant submitted that the concept of a proper party was not relevant in election law and that only those persons could be impleaded as parties who were expressly directed to be so impleaded by the Representation of the People Act, 1951. He claimed that in any case such persons were entitled to be struck out from the array of parties. On the other hand Shri Sidhartha Shankar Ray, and Shri R.K. Lala, learned counsel for the first respondent submitted that the appellants were proper parties to the election petition and their presence was necessary for a complete, final and expeditious decision on the questions involved in the action.

3. To properly appreciate the rival contentions it is necessary to refer to the relevant provisions of the Constitution of India and the two Representation of the People Acts, of 1950 and 1951.

4. First the Constitution, Part XV deals with elections. Art 324 vests in the Election Commission the superintendence, direction and control of the preparation of the electoral rolls and the conduct of all elections to Parliament and to the Legislatures of the State. Art. 325 provides that there shall be one general electoral roll for every territorial constituency and that no person shall be ineligible for inclusion in such rolls on grounds only of religion, caste, sex or any of them. Art 326 provides that election to the House of the People and to the Legislative Assemblies of States shall be on the basis of adult franchise. Art. 327 enables Parliament to make laws with respect to all matters relating to elections to either House of Parliament or to the Houses of the Legislature of a State, Art. 328 enables the Legislature of a State, if Parliament has not made such legislation, to make laws with respect to all matters relating to elections to the Houses of the Legislature of the

State. Art. 329 bars interference by Courts in electoral matters and clause (b), in particular, provides that no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petiton presented to such authority and in such manner as may be provided for by or under any law made by the appropriate legislature.

5. Next, the Representation of the People act, 1950. This Act provides for the delimitation of the constituencies for the purpose of elections to the House of the People and the legislatures of States, the qualification of voters at such elections, the preparation of electoral rolls and other matters connected therewith.

6. Last, the Representation of the People Act of 1951. Part VI of the Act deals with "Disputes regarding elections". Sec. 79 defines various terms and expressions used in the Parts VI and VII. Cl (b) defines a 'candidate' as meaning "a person who has been or claims to have been duly nominated as a candidate at any election, and any such person shall be deemed to have been a candidate as from the time when, with the election in prospect, he began to hold himself out as a prospective candidate." Sec. 80 imposes a statutory ban on an election being called in question except by an election petiton presented in accordance with the provision of Part VI of the Act. Sec. 80-A vests in the High Court, the jurisdiction to try an election petition. Sec. 81 provides for the presentation of an election petition on one or more of the grounds specified in Sec. 100 (1) and Sec. 101 by any candidate at such election or any elector who was entitled to vote at the election. Sec. 82 is entitled "Parties to the petition" and is as follows:

"82. Parties to the petition — A petitioner shall join as respondents to his petition —

(a) Where the petitioner, in addition to claiming a 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 prescribes the content of the petition. Sec. 84 provides that a petitioner may, in addition to claiming a declaration that the election of the returned candidate is void, claim a further declaration that he himself or any other candidate has been duly elected. Sec. 86 deals with trial of election petitions. Sub sec. (4) provides for an application by a candidate who is not already a respondent to be joined as a respondent. It is in these terms:

"(4) Any candidate not already a respondent shall, upon application made by him to the High Court within fourteen days from the date of commencement of the trial and subject to any order as to security for costs which may be made by the High Court, be entitled to be joined as a respondent."

Section 87 is concerned with the procedure before the High Court and it is as follows:

"87. (1) Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 to the trial of suits:

Provided that the High Court shall have the discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings.

(2) The provisions of the Indian Evidence Act, 1872, shall, subject to the provisions of this Act, be deemed to apply in all respects to the trial of an election petition." Section 90 enables the returned candidates or any other party to "recriminate" in cases where in the election petition a declaration that a candidate other than the returned candidate has ben elected is claimed. Sec. 98 prescribes the orders that may be made by the High Court at the conclusion of the trial of an election petition. It provides that the High Court shall make an order dismissing the election petition or declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected. Sec. 99 enables the High Court to make, at the time of making an order under Sec. 98 an order recording a finding whether any corrupt practice has or has not been proved to have been committed at the election, and the nature of corrupt practice; and the names of all persons, if any, who have been proved at the trial to have been guilty of corrupt practice and the nature of that practice. The proviso to Sec. 99(1), however, prescribes that no person who is not a party to the petition shall be named in the order unless he had been given notice to appear before the High Court to show cause why he should not be so named and he had also been given an opportunity to cross examine any witness who had already been examined by the High Court and had given evidence against him and an opportunity of calling evidence in his defence and of being heard. Sec. 100 enumerates the grounds on which an election may be declared void. The High Court, it is said, among other grounds, shall declare the election of a returned candidate void in cases where corrupt practices are proved, where such corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of the returned candidate or his election agent. Where the corrupt practice has been committed in the interests of the returned candidate by an agent other than his election agent, the result of the election in so far as it concerns the returned candidate must also be shown to have been materially affected. Sec. 101 prescribes the grounds for which a candidate, other than the returned candidate may be declared to have been elected, Sec. 110 provides for the procedure when an application for withdrawal of an election petition is made to the Court. Sec. 110 (3) (c) says that a person who might himself have been

a petitioner may apply to the Court to be substituted as a petitioner in place of the party withdrawing. Section 112(3) provides for the continuance of the election petition on the death of the sole petitioner in an election petition or of the survivor of several petitioners, by any person who might himself have been a petitioner and who applies for substitution within the stipulated period.

7. The nature of the right to elect, the right to be elected and the right to dispute an election and the scheme of the constitutional and statutory provisions in relation to these rights have been explained by the Court in N.P. Ponnuswami v. Returning Officer, Namakkal Constituency, 1952 SCR 218: (AIR 1952 SC 64) and Jagan Nath v. Jaswant Singh, AIR 1954 SC 210. We proceed to state what we have gleaned from what has been said, so much as necessary for this case.

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. An election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. 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. In the trial of election disputes, Court is put in a straight jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act, 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self-contained code within which must be found any right claimed in relation to an election or an election dispute. We are concerned with an election dispute. The question is who are parties to an election dispute and who may be impleaded as parties to an election petition. 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 says?

9. Section 81 prescribes who may present an election petition. It may be any candidate at such election; it may be any elector of the constituency, it may be non else. Sec. 82 is headed "Parties to the petition" and clause (a) provides that the petitioner shall join as respondents to the petition the returned candidates if the relief claimed is confined to a declaration that the election of all or any of the returned candidates is void and all the contesting candidates if a further declaration is sought that he himself or any other candidate has been duly elected. Clause (b) of S. 82 requires the petitioner to join as respondent any other candidate against whom allegations of any corrupt practice are made in the petition. Section 86(4) enables any candidate not already a respondent to be joined as a respondent. There is no other provision dealing with the question as to who may be joined as respondents. It is significant that while cl. (b) of S. 82 obliges the petitioner to join as a respondent any candidate against whom allegations of any corrupt practice are made in the petition, it does not oblige the petitioner to join as a respondent any other person against whom allegations of any corrupt practice are made. It is equally significant that while any candidate not already a respondent may seek and, if he so seeks, is entitled to be joined as a respondent under S 86 (4) any other person cannot, under that provision seek to be joined as a respondent, even if allegations of any corrupt practice are made against him. It is clear that the contest of the election petition is designed to be confined to the candidates at the election. All others are excluded. The ring is closed to all except the petitioner and the candidates at the election. If such is the design of the statute, how can the notion of 'proper parties' enter the picture at all? We think that the concept of 'proper parties' is and must remain alien to an election dispute under the Representation of the People Act, 1951. Only those may be joined as respondents to an election petition who are mentioned in S. 82 and S. 86 (4) and no others. However, desirable and expedient it may appear to be, none else shall be joined as respondents.

10. It is said, the Civil Procedure Code applies to the trial of election petitions and so proper parties whose presence may be necessary in order to enable the Court 'effectually and completely to adjudicate upon and settle all questions involved' may be joined as respondents to the petitions. The question is not whether the Civil Procedure Code applies because it undoubtedly does, but only 'as far as may be' and subject to the provisions of the Representation of the People Act, 1951 and the rules made thereunder. Section 87(1) expressly says so. The question is whether the provisions of the Civil Procedure Code can be invoked to permit that which the Represntation of the People Act does not. Quite obviously the provisions of the Code cannot be so invoked. In Mohan Raj v. Surendra Kumar Taparia, (1969) 1 SCR 630 : (AIR 1969 SC 677), this Court held that the undoubted power of the Court (i.e. the Election Court) to permit an amendment of the petition cannot be used to strike out allegations against a candidate not joined as a respondent so as to save the election petition from dismissal for non-joinder of necessary parties. It was said, "The Court can order an amendment and even strike out a party who is not necessary. But where the Act makes a person a necessary

party and provides that the petition shall be dismissed if such a party is not joined, the power of amendment or to strike out parties cannot be used at all. The Civil Procedure Code applies subject to the provisions of the Represntation of the People Act and any rules made thereunder. When the Act enjoins the penalty of dismissal of the petition for non-joinder of a party the provisions of the Civil Procedure Code cannot be used as a curative means to save the petition". Again, in K. Venkatesara Rao v. Bekkam Naramsimha Reddi, (1969) 1 SCR 679 : (AIR 1969 SC 872 at p. 877), it was observed:-

"With regard to the addition of parties which is possible in the case of a suit under the provisions of O.1, R. 10 subject to the added party's right to contend that the suit as against him was barred by limitation when he was impleaded, no addition of parties is possible in the case of an election petiton except under the provisions of sub-sec. (4) of S. 86"

11. The matter may be looked at from another angle. The Parliament has expressly provided that an opportunity should be given to a person who is not a candidate to show cause against being 'named' as one guilty of a corrupt practice. Parliament, however, has not thought fit to expressly provide for his being joined as a party to the election petition either by the election petitioner or at the instance of the very person against whom the allegations of a corrupt practice are made. The right given to the latter is limited to show cause against being 'named' and that right opens up for exercise when, at the end of the trial of the election petition notice is given to him to show cause why he should not be 'named'. The right does not extend to participation at all states and in all matter, a right which he would have if he is joined as a party at the commencement. Conversely the election petitioner cannot by joining as a respondent a person who is not a candidate at the election subject him to a prolonged trial of an election petition with all its intricacies and ramifications. One may well imagine how mischievous minded persons may harass public personages like the Prime Minister of the country, the Chief Minister of a State or a political leader of a national dimension by impleading him as a party to election petitions, all the country over. All that would be necessary is a seemingly plausible allegation, casually or spitefully made, with but a facade of truth. Everyone is familiar with such allegations. To permit such a public personage to be impleaded as a party to an election petition on the basis of a mere allegation, without even prima facie proof, an allegation which may ultimately be found to be unfounded, can cause needless vexation to such personage and prevent him from the effective discharge of his public duties. It would be against the public interest to do so. The ultimate award of costs would be no penacea in such cases, since the pubic mischief cannot be repaired. That is why Public Policy and legislative wisdom both seem to point 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). It is not as if a person guilty of a corrupt practice can get away with it. Where at the concluding stage of the trial of an election petition, after evidence has

been given, the Court finds that there is sufficient material to hold a person guilty of a corrupt practice, the Court may then issue a notice to him to show cause under Section 99 and proceed with further action. In our view the legislative provision contained in Sec. 99 which enables the Court, towards the end of the trial of an election petition, to issue a notice to a person not a party to the proceeding to show cause why he should not be 'named' is sufficient clarification of the legislative intent that such person may not be permitted to be joined as a party to the election petition.

12. There is yet another viewpoint. When in an election petition in addition to the declaration that the election of the returned candidate is void a further declaration is sought that any candidate other than the returned candidate has been duly elected, Sec. 97 enables the returned candidate or any other party to 'recriminate' i.e. to give evidence to prove that the election of such candidate would have been void if he had been a returned candidate and a petition had been presented to question his election. If a person who is not a candidate but against whom allegations of any corrupt practice are made is joined as a party to the petition then, by virtue of his position as a party, he would also be entitled to 'recriminate' under Sec. 97. Surely such a construction of the statute would throw the doors of an election petition wide open and convert the petition into a 'free for all' fight. A necessary consequence would be an unending, disorderly election dispute with no hope of achieving the goal contemplated by Sec. 86 (6) of the Act that the trial of the election petition should be concluded in six months. It is just as well to remember that 'corrupt practice' as at present defined by Sec. 123 of the Act is not confined to the giving of a bribe but extends to the taking of a bribe too and, therefore, the number of persons who may be alleged to be guilty of a corrupt practice may indeed by very large, with the consequence that all of them may possibly be joined as respondents.

13. In view of the foregoing discussion we are of the opinion that no one may be joined as a party to an election petition otherwise than as provided by Sections 82and 86 (4) of the Act. It follows that a person who is not a candidate may not be joined as a respondent to the election petition. The appeal is therefore, allowed with costs and the names of the appellants and the seventh respondent in the appeal are directed to be struck out from the array of parties in the election petition. We may mention that in arriving at our conclusion we have also considered the following decisions cited before us: S.B. Adityan v. S. Kandasami, AIR 1958 Mad 171. Dwijendra Lal Sen Gupta v. Harekrishna Konar, AIR 1963 Cal 218, H.R. Gokhale v. Bharucha Noshir C. AIR 1969 Bom 177 and S. Iqbal Singh v. S. Gurdas Singh Badal, AIR 1973 Punj & Har 163 (FB)

Appeal allowed

SUPREME COURT OF INDIA*

Civil Appeal No. 277 of 1980$
(Decision dated 26-10-1982)

Km. Shradha Devi .. ***Appellant***

Vs.

Krishna Chandra Pant and Others .. ***Respondents***

SUMMARY OF THE CASE

Km. Shradha Devi filed an election petition before the Allahabad High Court, challenging the election of Shri Krishna Chandra Pant to the Council of States, at the biennnial election held in 1978.

At that election, 421 votes were polled, of which 11 votes were declared as invalid by the Returning Officer. In the election petition, several allegations were made in regard to the improper rejection of these 11 votes and also about improper reception of certain other votes. These votes had been cast under the system of proportional representation by means of a single transferable vote. The High Court allowed the inspection of only 4 of the 11 invalid votes, on the ground that the petitioner had given details about the rejection of these 4 votes only in her election petition. Further, as a result of the scrutiny done by the Joint Registrar of the High Court under the direction of the High Court, he could co-relate only 2 of the aforesaid 4 ballot papers with the petitioner's allegations. The High Court then took those 2 ballot papers into consideration and found that election petitioner had still lost the election.

Aggrieved by the order of the High Court, the present appeal was filed before the Supreme Court. The Supreme Court set aside the order of the High Court, holding that the High court should have examined all the 11 invalid votes. The Supreme Court held that the petitioner had to offer prima facie proof of errors in counting and if errors in counting were established, by providing proof of some errors in respect of some ballot papers, scrutiny and recounting could not be limited to those ballot papers only and that a recount could be ordered of all disputed ballot papers. The Supreme Court, therefore, sent the case back to the High Court for re-examination of the case by a re-scrutiny of all the 11 ballot papers under dispute.

The Supreme Court also laid down that any remark or writing on a ballot paper to invalidate it must be such as to unerringly point in the direction of identity of the voter and that in the absence of such suggested remark or writing the ballot paper could not be rejected merely because these were some remarks or writings by which the voter may possibly be identified.

(A) Representation of the People Act (43 of 1951), Ss. 100 (1) (d) (iii), 81 — Conduct of Election Rules (1961), R. 73 (2) (d) — Petition for scrutiny and recount on allegation of miscount — Imprope rejection of valid votes — Prima facie proof — Nature of —Specific averment in respect of each ballot paper rejected as invalid Not necessary — Proof of errors in respect of some ballot papers furnished — Scrutiny and recount cannot be limited to those ballot papers only. Election Petition No. 2 of 1978, D/- 11-12-1979 (All) Reversed. (Evidence Act (1872), Ss 101-104).

In an election petition for relief of scrutiny and recount on the allegation of miscount. It is not the requirement of law that in respect of each ballot paper rejected as invalid a specific averment must be so made as to identify the ballot paper and only those that can be correlated to the allegations in the petition specifically and not generally shall be recounted. Election Petition No. 2 of 1978, D/- 11-12-1979 (All) Reversed.

(Para 8)

When a petition is for relief of scrutiny and recount on the allegation of miscount the petitioner has to offer prima facie proof of errors in counting and if errors in counting are prima facie established a recount can be ordered. If the allegation is of improper rejection of valid votes which is covered by the broad spectrum of scrutiny and recount because of miscount, petitioner must furnish prima facie proof of such error. If proof is furnished of some errors in respect of some ballot papers, scrutiny and recount cannot be limited to those ballot papers only. If the recount is limited to those ballot papers in respect of which there is a specific allegation of error and the correlation is established, the approach would work havoc in a Parliamentary constituency where more often 10,000 or more votes are being rejected as invalid. Law does not require that while giving proof of prima facie error in counting each head of error must be tested by only sample examination of some of the ballot papers which answer the error and then take into consideration only those ballot papers and not others. This is not the area of inquiry in a petition for relief of recount on the ground of miscount.

(Para 8)

(B) Representation of the People Act (43 of 1951), Ss. 100 (1) (d) (iii), 81 — Conduct of Election Rules (1961), S. 73 (2)—

Election by assembly members — Voting in accordance with proportional representation by means of single transferable vote — Casting of first preference vote is sine qua non for validity of ballot paper — failure to cast remaining preferences would not invalidate ballot paper.

When voting is in accordance with the proportional representation by means of the single transferable vote it is obligatory to cast the first preference vote for ensuring the validity of the ballot paper and the first preference vote must be so cast as not to leave anyone in doubt about it. The remaining preferences are optional with elector. He may or may not exercise his franchise for the remaining preferences. If he chooses not to exercise remaining preferences the ballot paper cannot be rejected as invalid for failure to exercise the remaining preferences. Rule 73 (2) to exhaustive of the grounds on which a ballot paper at a voting at election by Assembly members shall be rejected as invalid and on a true and in depth reading of it does not transpire that the failure to cast the remaining preferences would invalidate the ballot paper.

(Para 12)

(C) Representation of the People Act (43) of 1951) Ss 100 (I) (d) (iii) 81 - Conduct of Election Rules (1961) Rr. 37A (I) 73 (2) (a) - Election by Assembly members - voting in accordance with proportional representation by means of single transferble vote - First preference vote if exercised clearly and unambiguously - Error in exercising subsequent preferences will not invalidate ballot paper - It is valid in past.

Where the voting is in accordance with the proportional representation by means of the single transferable vote, once the first preference vote has been clearly and unambiguously exercised, the ballot paper cannot be rejected on the ground that low down the ladder there was some error in exercising the subsequent preferences. It follows that not only such a ballot paper has to be held as valid ballot paper but its validity shall continue up to the stage in preferences where an error or confusion transpires which would not permit computation of subsequent preferences below the level of error

(Para 13)

(D) Representation of the People and (43 of 1951) Ss 100 (1) (d) (iii), 81- Conduct of Election Rules (1961), R. 73 (2) - Election by Assembly members - Rejection of ballot paper as invalid - Every and any mark or writing on ballot paper does not per se result in invalidation of vote. Election Petiton No. 2 of 1978, D/-11-12-1979 (All.) Reversed.

Every and any mark or writing on ballot paper does not per se result in invalidation of the vote. The mark or identification should be such as to unerringly revealed identity of the voter and the evident prior arrangement connecting the mark must be made available. Any mark or writing of an innocuous nature or meaningless support cannot be raised to the level of suggestive mark or writing as toe identity of the voter.

(Para 15)

There must be some causal connection between the mark and the identity of the voter that looking at one the other becomes revealed. Therefore, the mark or a writing itself must reasonably give indication of the voter's identity. It may be that there must be extrinsic evidence from which it can be inferred that the mark was placed by the voter by some arrangement

(Para 15)

In the instant case out of total eleven (11) the ballot papers rejected as invalid the High Court did not examine the 9 ballot papers on the erroneous view that only two were correlated to the averments in the petition. There was specific averment in the petition that the marks on these ballot papers were not such as to lead to identity of the elector and that the ballot papers could not be rejected as invalid under Rule 73 (2) (d). This allegation is wholly substantiated by a casual look at the remaining nine ballot papers. The error is apparent. Once the error has been established the scrutiny and recount had to be ordered as a prima facie case of miscount is made out and therefore the decision of the High Court rejecting the petition is liable to be set aside. Election Petition No. 2 of 1978 D/- 11-12-1979 (All) Reversed.

(Para 15)

(E) Representation of the People Act (43 of 1951) Sections 100 (1) (d) (iii) 81-Conduct of Election Rules (1961), Rule 73-Rejection of ballot papers as invalid - Returning Officer and Court should not attempt to chart easy course of rejecting ballot papers as invalid on slightest pretext. Election Petiton No. 2 of 1978, D/- 11-12-1979 (All) Reversed)

Free and fair election being the fountain source of Parliamentary democracy attempt of the Returning Officer and the court should be not to chart the easy course of rejecting ballot papers as invalid under the slightest pretext but serious attempt should be made before rejecting ballot papers as invalid to ascertain, if possible, whether the elector has cast his vote with sufficient clarity revealing his intendment. In the instant case, the Returning Officer has charted an easy course unsupportable by evidence and the High Court failed to exercise its jurisdiction of scrutiny of all ballot papers for a serious error has been pointed out in respect of two ballot papers out of a total of 11 invalid ballot papers. Therefore, the judgment and order of the High Court are set aside and the matter is remanded to the High Court for further proceeding according to law. Election Petiton No. 2 of 1978. D/- 11-12-1979 (all reversed).

(Para 16)

Cases Referred: Chronological Paras

AIR 1980 SC 1362 : (1980) 3 SCR 1302	14
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JUDGMENT

Present:- D.A. Desai and A.P. Sen, JJ.

Mr. A.P.S. Chauhan. Mr. C.K. Ratnaparkhi and Mr. D.P.S. Chauhan. Advocates for Appellant Mr. A.N. Sen. Sr Advocate Mr. C.P. Lal. Advocate with him (for No. 1) and Miss. Kamlesh Bansal. Advocate for no. 16 for Respondents.

DESAI, J. – An unsuccessful candidate for election to Council of State Rajya Sabha at the election held on March 28, 1979, is the appellant. At the biennial election for electing members to Council of States from the constituency of elected members of the Uttar Pradesh Legislative Assembly 19 candidates including the appellant and the 1st respondent were duly nominated as candidates. 11 members were to be elected. Election was to be held as mandated by Clause (4) of Article 80 of the Constitution in accordance with the system of proportional representation by means of the single transferable vote. After the poll was closed according to the time prescribed by the Election Commission under Section 56 of the Representation of the People Act, 1951 (1951 Act for short), the Returning Officer, R.W, 4 Satya Priya Singh commenced counting of votes. As the election was to be in accordance with the system of proportional representation by means of the single transferable vote, the Returning Officer as required by Rule 76 of the Conduct of Election Rules, 1961 ('Rules' for short), proceeded to ascertain the quota. In all 421 members exercised the franchise. Eleven ballot papers were rejected by the Returning Officer as invalid. Accordingly the quota was worked out at the value of 3417. Respondents 2 to 11 were declared elected as each of them secured the value of ballot papers greater than the quota in the course of counting. As the counting proceeded further, the contest was between the election petitioner (appellant) and the 1st respondent and the 1st respondent was declared elected in the 14th count. Once all the 11 vacancies were filled in, counting was closed.

2. Petitioner filed an election petition under Section 81 of the 1951 Act in the High Court of Judicature (Lucknow Bench). Lucknow. The petition was for scrutiny and recount on the allegation of miscount and directed against the 1st respondent because he was declared elected to the last vacancy.

3. Petitioner alleged that the result of the election in so far as it concerns the returned candidate – 1st respondent – has been materially affected by the

improper rejection of valid votes by wrongly declaring them invalid as well as by improper reception of what otherwise would have been the invalid votes if the Returning Officer had been consistent in his approach and, therefore, the election of the returned candidate not only should be declared void but in his place by a proper computation of votes the petitioner should be declared elected to the 11th vacancy. The petition primarily being for relief of scrutiny and recount on the allegation of miscount it was necessary to allege and offer prima facie proof of the possible errors in the counting which, if satisfactorily established, would enable the Court to direct a recount. It may be stated that no prima facie proof has been offered of the improper reception of an otherwise invalid vote in favour of the 1st respondent and that allegation may be excluded from further consideration. Petitioner alleged that there has been an improper rejection of the valid votes cast in her favour and that has materially affected the result of the election. Petitioner states that even though it was obligatory upon the Returning officer to show all the ballot papers which he rejected as invalid to the candidates and/or their counting agents, he only showed four out of the eleven ballot papers held invalid by him and did not show the rest of them. To the question as to why votes were rejected as invalid it is alleged that the Returning Officer informed that counting agents that there were marks and cutting in the ballot papers which may possibly identify the voters and, therefore, such ballot papers have been rejected on the ground set out in Rule 73 (2) (d) of the Rules. Four specific allegations of error, improper rejection of votes otherwise valid necessiating scrutiny and recount are set out in paragrpahs 14, 15, 17 and 18 of the election petition. It was also alleged that of the four ballot papers shown there was one in which first preference was indicated in favour of the petitioner but that was illegally rejected by the Returning Officer on the ground that it contained an overwriting in respect of the 10th preference vote marked by the voter. The second error alleged in the petition is that in one ballot paper the 4th preference figure was put in a bracket and this was illegally rejected on the ground that the voter can be identified. The third allegation is to the effect that the ballot paper containing a 1st preference vote cast in favour of the candidate Shri Surendra Mohan was illegally rejected by the Returning Officer on the ground that the voter had given his 1st preference vote at two places whereas in fact the voter had given his 1st preference vote only to Shri Surendra Mohan and had given 11th preference vote to another candidate which could be demonstrably established by scrutiny of the ballot paper. The fourth error alleged to have crept in the counting was that the Returning Officer invalidated two other ballot papers on the ground that there were overwritings in the 8th and 9th preference votes respectively and that even though these ballot papers did not contain any mark or writing by which the voters could be identified, they were rejected as invalid contrary to the relevant provision. It was urged that these prima facie errors when substantiated would clearly make out a case of miscount and the same can be corrected by scrutiny and recount. The scrutiny and recount was sought to be confined specifically to the decision of the Returning Officer rejecting 11 votes as invalid. The contentions where

crystallised in the course of hearing of the appeal by urging that when the election is to be held in accordance with the system of proportional representation by means of the single transferable vote, if the first preference is properly and assertively cast any error in setting out the remaining preferences would not enable the Returning Officer to reject the whole ballot papers as invalid. The second specific contention is that every unrequired mark, cutting, erasure cannot tantamount to any indication which would enable the voter to be identified but the writing or mark must be such that the voter can be and not merely might be identified and there is no such cutting, mark or erasure.

4. The 1st respondent contested the petition, inter alia, contending that the quota was not 3417 as contended for on behalf of the petitioner but it was 3217 and that respondents 2 to 11 received more than the quota hence they were declared elected and that the contest continued between him and the petitioner and in the 14th count the 1st respondent was declared elected as the value of his ballot papers exceeded the value of the ballot papers of other continuing candidates together with the surplus votes not transferred. He specifically denied though he was not present at the counting that all the ballot papers rejected at the counting were not shown to the counting agents and contended that no error in counting is shown and that it is not open to the Court to direct recount by first examining the ballot papers rejected as invalid. Some technical contentions were taken by him with which we are not concerned in this appeal.

5. A learned single judge of the High Court to whom the election petition was assigned framed as may as 11 issues on which the parties were at variance. In the course of hearing of the petition the petitioner moved an application for a direction that an inspection of the 11 ballot papers rejected as invalid by the Returning Officer may be given to the petitioner. The Court directed inspection of four ballot papers to be given as per order dated May 2, 1979. The 1st respondent, the returned candidate questioned the correctness of this order in this Court in special leave petition filed by him. In the meantime all the disputed 11 ballot papers were summoned from the Returning Officer and the Court directed Joint Registrar to open the sealed packet containing ballot papers and consistent with the allegations in paras 14, 15, 17 and 18 of the petition, try to correlate the ballot papers in respect of which the allegation of improper rejection may prima facie appear to be of substance and give inspection of those four ballot papers to both the parties. The learned counsel appearing for the petitioner was not inclined to take inspection in this truncated manner and disclosed his desire to move this Court against the order granting only inspection of four ballot papers. The learned Judge by his order dated May 16, 1979, directed that the sealed packet containing the ballot paper shall not be opened until further orders of the Court and the same shall be kept in safe custody with the Joint Registrar. It appears, thereafter the petitioner preferred the special leave petition but ultimately the same appears to have been withdrawn and sought direction of the Court for compliance with the order for showing four ballot papers as per

the previous order. The Court accordingly directed that the Joint Registrar shall open the sealed packet of the rejected ballot papers and allow the returned candidate or his counsel and the petitioner or her counsel to have visual inspection of the ballot papers without allowing the parties or their counsel to handle the ballot paper. Time and date of the inspection was fixed by the Court. The Joint Registrar opened the sealed envelope but found some difficulty in complying with the order of the Court directing giving of inspection of four ballot papers out of 11 rejected ballot papers because there was no specification as to which four ballot papers were to be the subject matter of inspection. Ultimately he took recourse to the averments in the petition, examined each allegation, attempted to correlate it to the ballot papers in his hand not found that only two ballot papers could be correlated to the allegations made in the petition and gave inspection of two ballot papers and kept other 9 ballot papers, of which he did not give inspection, in sealed envelop On this report of the Joint Registrar the learned Judge called for the sealed envelop, opened up the envelope in the presence of the learned counsel for the parties to verify the correctness of the report of the Joint Registrar and being satisfied that it was correct, he made an order to that effect on Dec. 5, 1979.

6. Thereafter the parties went to trial. Neither the unsuccessful candidate, the petioner, nor the 1st respondent the returned candidate, stepped into the witness box. On behalf of the petitioner PW. 1 Shri Shakir Ali Siddiqui, PW. 2 Udit Narain Sharma, election agent of candidate Shri Surendra Mohan, and PW. 3 Kalpnath Singh, election agent of the petitioner were examined. RW. 1 Habibul Rahman Nomani, counting agent of Smt. Manohara, RW 2 Deo Bahadur Singh, election agent of the returned candidate 1st respondent, RW 3 Prabhat Kumar Misra, observer deputed by the Election Commission and RW. 4 Satya Priya Singh, Returning Officer were examined on behalf of the returned candidate.

7. The learned Judge rejected the petition substantially holding that the petitioner has failed to prove that all eleven rejected ballot papers were not shown to the counting agents. It was held that petitioner failed to prove such error in counting which would enable her to seek relief of scrutiny and recount. In reaching this conclusion, with great respect, the learned Judge has completely misdirected himself as to the nature of proof required for a relief of scrutiny and recount on the allegation of miscount. The learned Judge first took up the allegations of errors in counting, more particularly directed to the allegation of improper rejection of valid votes which would materially affect the result as set out in paras 14, 15, 17 and 18 of the petition, and then through the help of the Joint Registrar excluded the nine ballot papers without giving inspection and only took into consideration two ballot papers which answered the error as complained of and then proceeded to hold that even if these two ballot papers rejected as invalid are taken into account and the value of the votes computed, the result would not be materially affected and, therefore, rejected the election petition.

8. When a petition is for relief of scrutiny and recount on the allegation of miscount, the petitioner has to offer prima facie proof of errors in counting and if errors in counting are prima facie established a recount can be ordered. If the allegation is of improper rejection of valid votes which is covered by the broad spectrum of scrutiny and recount because of miscount, petitioner must furnish prima facie proof of such error. If proof is furnished of some errors in respect of some ballot papers, scrutiny and recount cannot be limited to those ballot papers only. If the recount is limited to those ballot papers in respect of which there is a specific allegation of error and the correlation is established, the approach would work havoc in a Parliamentary constituency where more often we find 10,000 or more votes are being rejected as invalid. Law does not require that while giving proof of prima facie error in counting each head of error must be tested by only sample examination of some of the ballot papers which answer the error and then take into consideration only those ballot papers and not others. This is not the area of inquiry in a petition for relief of recount on the ground of miscount. True it is that a recount is not granted as of right, but on evidence of good grounds for believing that there has been a mistake on the part of Returning Officer' (See Halsbury's Law of England 4th Edn., Vol. 15, para 940). This Court has in terms held that prima facie proof of error complained of must be given by the election petitioner and it must further be shown that the errors are of such magnitude that the result of the election so far as it affects the returned candidate is materially affected, then recount is directed. What was broadly alleged by the petitioner in the election petition was that where election is held in accordance with the proportional representation by the single transferable vote it would be illegal and erroneous for the Returning Officer to reject as invalid a ballot paper if after first preference vote is validly cast some error is committed in indicating the remaining preferences. Instances of error set out in paras 14, 15, 17 and 18 spelt out a ground that the ballot papers, which were rejected under rule 73 (2) (d) did not contain or carry any mark or writing by which elector can be identified and that there has been thus improper rejection of a vote otherwise validly cast or which is partially valid. Without allowing inspection of all the disputed ballot papers the learned Judge has accepted that at least two ballot papers can be correlated to allegation in paras 15 and 17 which would prove the allegation made in the petition. The learned Judge, however, held that the rejection of these two ballot papers was correct. A further observation is that even if the rejection of these two ballot papers is held to be improper, the result of the election so far as returned candidate is concerned is not materially affected. And it would be succinctly pointed out that allegation in Para 18 in respect of two others ballot papers is wholly substantiated. Even at the cost of repetition it must be said it is not the requirement of law that in respect of each ballot paper rejected as invalid a specific averment must be so made as to identify the ballot paper and only those that can be correlated to the allegations in the petition specificially and not generally shall be recounted. That is contrary to the requirement of the Act and the Rules.

9. The impermissible approach of the learned judge compelled us with the consent of learned counsel for the parties to call for the 11 ballot papers rejected as invalid. A direction to open sealed envelopes was given and at the request of learned counsel for the parties Xerox copy of each ballot papers was supplied to both the sides and the appeal was further set down for hearing.

10. We now proceed to examine the contentions in this petition. Let us first have a look at the relevant constitutional and statutory provisions. Clause (4) of Article 80 provides that the representatives of each State in the Council of State shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote. The fasciculus of Rules in Parts VI and VII of the Rules are relevant. Part VI is headed 'Voting at Elections by Assembly Members and in Council Constitutencies'. Rule 70 provides that the provisions of Rules 28 to 35 and 36 to 48 shall apply: (a) to every election by assembly members in respect of which no direction has been issued under Clause (a) of Rule 68, subject to the modifications setout in the sub-rules of Rule 70. The important modification of which we must take notice is the introduction of Rule 37-A setting out the method of voting at such election. It may be extracted:

"37A- Method of voting - (1) Every elector has only one vote at an election irrespective of the number of seats to be filled. (2) An elector in giving his vote

(a) shall place on his ballot paper the figure 1 in the space opposite the name of the candidate for whom he wishes to vote in the first instance; and

(b) may, in addition, place on his ballot paper the figure 2, or the figures 2 and 3, on the figures 2, 3 and 4 and so on in the space opposite the names of the other candidates in the order of his preferences.

Explanation — The figures referred to in Clauses (a) and (b) of this sub-rule may be marked in the international form of Indian numerals or in the Roman form or in the form used in any Indian language but shall not be indicated in words".

11. Part VII is headed 'Counting of votes at Election by Assembly Members or in Council Constituencies'. It defines expressions such as 'continuing candidate', 'count' 'exhausted paper', 'first preference', 'original vote', 'surplus', transferred vote' and 'unexhausted paper'. These are technical terms each having a bearing on the question of counting of votes. 'First preference' vote has been defined to mean the figure 1 set opposite the name of a candidate; 'second preference' means the figure 2 set opposite the name of a candidate; 'third preference' means the figure 3 set opposite the name of a candidate, and so on. 'Original vote' is defined to mean in relation to any candidate, a vote derived from a ballot paper on which a first preference is recorded, for such candidate Rule 73 provides for scrutiny and opening of

ballot boxes and packets of postal ballot papers. Sub-rule (2) of Rule 73 is material which may be extracted:

"73. Scrutiny and opening of ballot boxes and packet of postal ballot paper—

(2) A ballot paper shall be invalid on which—

(a) the figure 1 is not marked; or

(b) the figure 1 is set opposite the name of more than one candidate or is so placed as to render it doubtful to which candidate it is intended to apply or

(c) the figure 1 and some other figure are set opposite the name of the same candidate; or

(d) there is any mark or writing by which the elector can be identified; or

(e) there is any figure marked otherwise than with the article supplied for the purpose:

Provided that this clause shall not apply to a postal ballot paper.

Provided further that where the returning officer is satisfied that any such defect as is mentioned in this clause has been caused by any mistake or failure on the part of a presiding officer or polling officer, the ballot paper shall not be rejected, merely on the ground of such defect.

Explanation — The figures referred to in Clauses (a), (b) and (c) of this sub rule may be marked in the international form of Indian numerals or in the Roman form or in the form used in any Indian language, but shall not be indicated in words".

12. The Returning Officer while counting votes at election by Assembly members has to bear in mind the implication of voting in accordance with the proportional representation by means of the single transferable vote. What is obligatory in this system of voting is that every elector must exercise his first preference vote. Rule 37-A (I) specifies that every elector has one vote only irrespective of the number of seats to be filled in at such election. Rest are preferences. In order to exercise franchise at such election the elector is under a duty to give his 1st preference vote. Where the 1st preference vote is not exercised the ballot paper will have to be rejected as invalid as mandated by R. 73(2) (a) which provides that the ballot paper shall be invalid on which figure 1 is not marked. By the combined reading of R. 37-A (2) (a) with R. 73(2) (a) it unquestionably transpires that in this system of voting as understood in contradistinction to single member constituency where a cross has to be placed against the name or the symbol of the candidate the first preference vote is a sine qua non for validity of the ballot paper. The provision contained in Rule 37-A (2) (b) read with Rule 73(2) (a) and (b) would manifestly show that the elector is not required to exercise all preferences available to him at the election. To illustrate, if as in the present case there were 11 vancancies, the elector can go on exercising his preferences up to 11th number by putting figures 1 to 11 against the candidates whom the elector wants to accord his preferences according to his own choice. But while

exercising the preferences it is obligatory in order to render the ballot paper valid to give first preference vote. It is optional for the elector to exercise or not to exercise his remaining preferences. This must be so in the very nature of things because this system of voting was devised to provide minority representation. If amongst 421 electors as in the present case a party has 220 members owing allegiance to the party and each one can exercise 11 votes with the reservation that not more than one vote can be given to one candidate and that a cross up to the totality of number 11 can be placed against 11 different candidates, no one else having 201 votes in his pocket can get elected. To avoid this monolithic political pocket borough of votes this more advanced system of proportional representation by means of the single transferable vote was devised. The very expression proportional representation is onomatopoeia in the sense it shows that various interests especially the minority groups can secure representation by this more advanced method of franchise. True , where there are single member constituencies this system is not helpful. But where there are multi member constituencies this system has a distinct advantage and the advantage becomes discernible from the fact that Rule 37-A (2) (a) provides that an elector in giving his vote shall place on his ballot paper the figure 1 in the space opposite the name of the candidate for whom he wishes to vote in the first instance. The expression 'shall' demonstrate the mandate of the section and when compared with sub-clause (b) which provides that an elector in giving his vote may, in addition, place in his ballot paper the figure 2 or the figures 2, 3, 4 etc. which would bring in sharp focus the mandatory and the directory part in Cols. 2 (a) and 2 (b). The underlying thrust of the section become further manifest by referring to Rule 73 (2) (a) and (b) which provide that a ballot paper shall be invalid on which the figure 1 is not marked or the figure 1 is set opposite the name of more than one candidate or is so placed as to render it doubtful to which it is intended to apply. Sub clause (c) of sub-rule (2) of Rule 73 further brings out the intendment of the provision because it mandates that the ballot paper shall be invalid on which the figure 1 and some other figures are set opposite the name of the same candidate. It, therefore, necessarily follows that when voting is in accordance with the proportional representation by means of the single transferable vote it is obligatory to cast the first preference vote for ensuring the validity of the ballot paper and the first preference vote must be so cast as not to leave any one in doubt about it. The remaining preferences are optional with the elector. He may or may not exercise his franchise for the remaining preferences. If he chooses not to exercise remaining preferences the ballot paper cannot be rejected as invalid for failure to exercise the remaining preferences. Rule 73(2) is exhaustive of the grounds on which a ballot paper at a voting at election by Assembly members shall be rejected as invalid and on a true and indepth reading of it, it does not transpire that the failure to cast the remaining preferences would invalidate the ballot paper. This conclusion is reinforced by the provisions contained in Rule 37-A (1) which provides that every elector has only one vote at an election irrespective of the number of seats to be filled. Therefore, the vote is only one and even if there

is more than one seat to be filled in, subsequent preferences may be indicated by the elector and it is optional with him not to exercise preferences outside his only one vote which he must cast by indicating unambiguously his first preference.

13. What then follows? If there is only one vote at such an election and the preferences are as many as there are seat chronologically to be indicated and failure to exercise preferences subsequent to first preference would not invalidate the ballot paper, it must follow as a corollary that if the elector has committed some error in exercising his preferences lower down the ladder the whole of the ballot paper cannot be rejected as invalid. To illustrate, if the elector has with sufficient clarity exercised his preferences, say 1 to 5 in chronological order but while exercising his sixth preference he having the right to exercise the preference up to 11, has committed an error the error in exercising his sixth preferences would not render the whole ballot paper invalid and his preference up to 5 will have to be taken into account while computing the vote. We specifically invited learned counsel on both sides to assists us in examining this aspect as we were treading on an uncovered ground. In fact, we adjourned the matter to enable Mr. Chauhan, learned counsel for the petitoner and Mr. A.K. Sen learned counsel for the respondent to study the problem and at the resumed hearing it was not only not disputed but unambiguously conceded that in view of the provision contained in Rule 37-A read with R. 73 (2) once the first preference vote has been clearly and unambiguously exercised the ballot paper cannot be rejected on the ground that lower down the ladder there was some error in exercising the subsequent preferences. If this is the correct interpretation of R. 37-A, it must follow that not only such a ballot paper has to be held as valid ballot paper but its validity shall continue up to the stage in preferences where an error or confusion transpires which would not permit computation of subsequent prefernences below the level of eror. To illustrate the point if as in the present case the voter had option to exercise 11 preferences and if he has exercised his preferences 1 to 5 correctly and unambiguously and has committed an error in exercising sixth preferece and it cannot be said with certainty for whom the sixth preference vote was cast, the ballot paper has to be held valid in computation of votes up to and inclusive of the fifth preference and rejected for the preferences down below as if the elector has not exercised his further preferences which was optional with him. The ballot paper can thus be partially valid. This is not a startling proposition but is the logical outcome of the system of voting. No authority is needed in support of it but if one is required it is to be found in the statement of law in paragraph 636 page 345, Vol 15 of the Halsbury's Law of England, 4th Edn. It may be extracted:

"636 Ballot papers rejected in part. Where at a local government election or poll consequent on a parish or community meeting the voter is entitled to vote for more than one candidate or at a poll consequent on a parish or community meeting on more than one question, a ballot paper is not to be

deemed to be void for uncertainty as respects any vote as to which no uncertainty arises and that vote is to be counted".

We have examined this aspect in depth because out of 11 invalid ballot papers which we have marked now in the Xerox copies from 'A' to 'K' for identification, ballot paper marked 'B' has been rejected under Rule 73(2) (b) by the Returning Officer on the ground that figure 1 appears against two candidates J.P. Singh and Surendra Mohan. The High Court has accepted the rejection as valid. It is difficult to accept this view of the Returning Officer affirmed by the High Court because figure 1 has been clearly marked against the candidate Surendra Mohan and the figure 11 is noted against the candidate J.P. Singh. There is some overwriting in the two strokes of figure 11 but it must be remembered that explanation appended to Rule 37-A permits that the figures indicating preferences may be marked in the international form of Indian numerals or in the Roman form or in the form used in any Indian language but shall not be indicated in words. All other figures indicating the preferences have been written in Hindi numerals and 11 is by two strokes having the loop at the top slightly overwritten but the preference is the 11th preference against J.P. Singh, is indisputable and is clearly visible to the naked eye. Obviously this ballot paper marked 'B' could not have been rejected on the ground mentioned in R 73 (2) (b).

14. We may now turn to remaining nine ballot papers. Remaining nine ballot papers have been rejected on the ground that by some mark on the ballot paper itself the voter can be identified. There is a specific allegation to that effect in para 18 of the election petition. Before we examine each individual ballot paper, let the full import of the provision be made clear. Rule 73(2) (d) provides that a ballot paper shall be invalid on which there is any mark or writing by which the elector can be identified. Section 94 of the 1951 Act ensures secrecy of ballot and it cannot be infringed because no witness or other person shall be required to state for whom he has voted at an election. Section 94 was interpreted by this Court in Raghubir Singh Gill v. Gurcharn Singh Tohra, (1980) 3 SCR 1302 : (AIR 1980 SC 1362), to confer a privilege upon the voter not to be compelled to disclose how and for whom he voted. To ensure free and fair election which is pivotal for setting up a parliamentary democracy, this vital principle was enacted in Section 94 to ensure that a voter would be able to vote uninhibited by any fear or any undesirable consequences of disclosure of how he voted. As a corollary it is provided that if there is any mark or writing on the ballot paper which enables the elector to be identified the ballot paper would be rejected as invalid. But the mark or writing must be such as would unerringly lead to the identity of the voter. Any mark of writing of an innocuous nature or meaningless import cannot be raised to the level of such suggestive mark or writing as to reveal the identity of the voter. In Woodward vs. Sarsons, (1874-75) LR 10 CP 733 interpreting an identical provision it was observed as under:

"It is not every writing or every mark besides the number on the back which is to make the paper void, but only such a writing or mark as is one by which the voter can be identified."

It would imply that there must be some causal connection between the mark and the identity of the voter that looking at one the other becomes revealed. Therefore, the mark or a writing itself must reasonably give indication of the voter's identity. It may be that there must be extrinsic evidence from which it can be inferred that the mark was placed by the voter by some arrangement. In this context one can advantageously refer to the statement of law in Halsbury's Laws of England 4th Edn., Vol 15, para 634. It may be extracted:

"634. Ballot papers rejected for marks of identification — Any ballot paper on which anything is written or marked by which the voter can be identified, except the printed number on the back, is void and must not be counted. The writing or mark must be such that the voter can be, and not merely might possibly be, identified."

"As respect ballot papers which have names, initials, figures or other possible marks of identification on them by which it might be suggested that the voter could be identified, it has been said that the Court should look at the paper and form its own opinion whether what is there has been put there by the voter for the purpose of indicating for whom he votes; if the voter has not voted in the proper way (if for example he has made two crosses, or some other such marks which might have been intended for purposes of identification), but the Court comes to the conclusion on looking at the paper that the real thing that the voter has been doing is to try, badly or mistakenly, to give his vote, and make it clear for whom he voted, then these marks should not be considered to be marks of identification unless there is positive evidence of some agreement to show that it was so".

In Woodward's case the Court came to the conclusion that the placing of two crosses or three crosses or a single stroke in line of a cross or a straight line or a mark like imperfect letter 'P' in addition to the cross or star instead of a cross or a cross blurred or marked with a tremulous hand, or a cross placed on the left side of the ballot paper, or a pencil line drawn through the name of the candidate not vote for, or a ballot paper torn logitudinally through the centre, are not marks which would invalidate the votes on the ground that the mark was such that the voter can be identified. Similarly Election Tribunal in Sohan Lal vs. Abinash Chander, (1953) 4 ELR 55 held that the addition of a horizontal line after figure 1 indicating first preference vote would not invalidate the ballot paper, unless there was evidence that the horizontal line was drawn so as to reveal the identity of the voter. In the absence of any such evidence the ballot paper was held valid. It would, therefore, follow that the mark or writing which would invalidate the ballot paper must be such as to unerringly point in the direction of identity of the voter. In the absence of such suggested mark or writing the ballot paper cannot be rejected merely because there is some mark or writing on the ground that by the mark or writing the voter may be identified. One has to

bear in mind the difference between can be identified and might possible be identified.

15. The High Court did not examine the other 9 ballot paper on the erroneous view that only two were correlated to the averment in the plaint. There was specific averment in para 18 of the petiton that the marks were not such as to lead to identity of the elector and that the ballot papers could not be rejected as invalid under Rule 73 (2) (d). This allegation is wholly substantiated by a casual look at the remaining nine ballot papers. The error is apparent. Once the error has been established the scrutiny and recount had to be ordered as a prima facie case of miscount is made out and, therefore, the decision of the High Court is liable to be set aside. At one stage we were inclined to examine the validity of each ballot paper. But as the High Court has not undertaken that exercise it would not be proper for us to undertake the same for the first time here. The position of law having been made very clear, namely, that once an error is established it is not necessary that the pleadings must show error in respect of each individual invalid ballot paper. Prima facie proof of error resulting in miscount having been established, a scrutiny and recount has to be ordered. And the scrutiny of invalid ballot papers must precede the recount. It is further made clear that where voting is in accordance with the proportional representation by the single transferable vote a ballot paper can be valid in part. And it must be remembered that every mark or writing does not result in invalidation of the vote. The mark or identification should be such as to unerringly reveal the identity of the voter and the evidence of prior arrangement connecting the mark must be made available. There is no such evidence. Therefore, the ballot papers could not have been rejected on the ground mentioned in Rule 73(2) (d) such marks being in this case some erasures or a bracket.

16. Free and fair election being the fountain source of Parliamentary democracy attempt of the Returning Officer and the Court should be not to chart the easy course of rejecting ballot papers as invalid under the slightest pretext but serious attempt should be made before rejecting ballot papers as invalid to ascertain, if possible, whether the elector has cast his vote with sufficient clarity revealing his intendment. In this case we are satisfied that the Returning Officer has charted an easy course unsupportable by evidence and the High Court failed to exercise its jurisdiction of scrutiny of all ballot papers once a serious error has been pointed out in respect of two ballot papers out of a total of 11 invalid ballot papers. Therefore, we find it difficult to accept the view taken by the High Court. Accordingly, this appeal is allowed and the judgment and order of the High Court are set aside and the matter is remanded to the High Court for further proceeding according to law. The High Court shall examine all invalid ballot papers, ascertain the reasons for the rejection, satisfy itself whether the reason is valid or unconvincing and decide the validity of the ballot paper as a whole or in part and direct computation of the votes over again. The High Court may bear in mind that the decision of the Returning Officer rejecting ballot papers as

invalid is subject to review of the High Court in a proper election petition (See Halsbury's Laws of England. Para 638 p. 345 Vol 15 4th Edn.).

17. It would be open to the High Court to take assistance of the Chief Electoral Officer or such other person well versed in computing the votes in this complicated system of counting as considered necessary to determine the final outcome of recount.

18. As the matter has been delayed sufficiently, we hope that the High Court would expeditiously dispose of the same. The costs of the hearing in this Court would abide the final outcome of the appeal.

Appeal allowed.

SUPREME COURT OF INDIA*

Civil Appeals Nos. 1775. 1975 (E) and 2736 (E) of 1981$
(Decision dated 25.11.1983)

Pashupati Nath Sukul ***.. Appellant***

Vs.

Nem Chandra Jain and Others ***.. Respondents***

The Election Commission of India ***.. Appellant***

Vs.

Nem Chandra Jain and Others ***.. Respondents***

And

State of Uttar Pradesh ***.. Appellant***

Vs.

Nem Chandra Jain and Others ***.. Respondents***

SUMMARY OF THE CASE

After the general election to constitute a new Legislative Assembly for the State of Uttar Pradesh held in May/June, 1980, the Election Commission constituted the new House on 9th June, 1980 by its notification under Section 73 of the Representation of the People Act, 1951. On 17th June, 1980, a notification was issued by the President calling upon the elected members of the Uttar Pradesh Legislative Assembly to elect certain members to the Council of States. According to the election programme fixed by the Election Commission, the 24th June, was the last date for making nominations for the election and the poll was scheduled to be held on 4th July, 1980. On the date of issuing the notification calling the election, i.e., 17th June, 1980, the new House of the Legislative Assembly had not yet met for its first meeting and the newly elected members of the Assembly had not yet taken the oath as required by Article 188 of the Constitution before taking their seats in the House. After the aforesaid election to the Council of States was over on 4th July, 1980, one of the defeated candidates, Shri Nem Chandra Jain, filed an election petition before the Allahabad High Court calling in question the whole election, mainly, on two grounds, namely, (i) that the members of the Uttar Pradesh Legislative Assembly could not nominate candidates for the election, as they had not taken the oath under Article 188 of the Constitution by the time the nominations closed for the election, and (ii) the Secretary to the Uttar Pradesh Legislative Assembly, who was appointed as Returning Officer for the election by the Election Commission under Section 21 of the Representation of the People Act, 1951, could not be appointed as such Returning Officer, as he was not an Officer of the Government within the meaning of the said Section 21. The High Court, by its order

dated 10th July, 1981, upheld the above contentions of the election petitioner and declared the whole election as void.

Aggrieved by the order of the High Court, the present appeals were filed before the Supreme Court. The Supreme Court, by its order dated 25th November, 1983, reversed the decision of the High Court on both the above issues and allowed the appeals, upholding the election. The Supreme Court held that an elected member, who has not taken oath under Article 188 of the Constitution but whose name appears in the notification published by the Election Commission under Section 73 of the Representation of the People Act, 1951, can take part in all non-legislative activities of an elected member, including the election to the Council of States. The Supreme Court also held that the word 'Government' in Section 21 of the above Act should be interpreted liberally so as to include within its scope the Legislature, the Executive and the Judiciary.

(A) Representation of the People Act (43 of 1951) S. 21 - Constitution of India Arts. 102, 187, 191 and 367 - Appointment of returning officer - Secretary to State Legistative Assembly is officer of Government - He can be appointed as returning officer at election for Rajya Sabha seat. Election Petn. No.7 of 1980, D/- 10-7-1981 (All), Reversed. (General Clauses Act (10 of 1897, S. 3(23).

The Secretary of a State Legislative Assembly is an officer of the Government and as such is qualified to be appointed as the Returning Officer at an election held to fill a seat in the Rajya Sabha.

(Para 12)

The position of a person who works as an officer of the Legislature of a State is that even though he belongs under Art. 187 of the Constitution to the staff of the State Legislature. He is still an officer of Government in the broad sense in which the expression "Government" is used in Art. 102 (1) (a) and Art. 191 (1) (a) of the Constitution. If the expression "Government" used here is construed as meaning the Executive Government only, then it would defeat the very purpose of these provisions of the Constitution. Similarly, he has to be treated as an officer of Government for purposes of S. 21 of the R.P. Act also qualified for being appointed as the Returning Officer for an election held under the Act . After the commencement of the Constitution the Secretaries of the State Legislatures almost as a matter of rule are being appointed as Returning Officers for election to the Rajya Sabha and for election to the Legislative Councils of States and Parliament has not thought it fit to amend suitably. S. 21 of the Act expressly including the officers of the State Legislatures amongst the persons qualified to be appointed as Returning Officers even though it has amended that section once by specifically including officers of local authorities. Parliament all along has treated the Secretaries of all along has treated the Secretaries of the State Legislatures as officers of Government for purposes of S. 21 and has found it convenient to do so having regard to the nature of the work to be carried out by them. Thus it must be held that the word "Government" in Art. 102 (1) (a) and in Art. 191 (1) (a) of the Constitution and the word "Government" in the expression "an officer of Government" in S. 21 of the Representation of the People Act should be interpreted liberally so as to include within its scope the Legislature, the Executive and the Judiciary. The High Court erred in equating the word "Government" occurring in S 21 of the Act to the Executive Government only and in further holding that the officers of the State Legislature could not be treated as officers of Government for

purposes of that section. The finding of the High Court that the Secretary of the Uttar Pradesh State Legislature could not be appointed as the Returning Officer for the election to the Rajya Sabha is therefore, unsustainable. Election Petn No. 7 of 1980 D/- 10-7-1981 (All) . Reversed.

(Para 12)

(B) representation of the People Act (43 of 1951). Ss. 33. 73 - Constitution of India, Arts. 188 ,191 and 193 - Election to Rajya Sabha seat - Proposal of candidate - Person elected but who has not taken oath as required by Art. 188 can validly propose. Election Petn. No. 7 of 1980, d/- 10-7-1981 (All.) . Reversed.

A person elected as a member of a Legislative Assembly but who has not made and subscribed the prescribed oath or affirmation as required by Art. 188 of the Constitution can validly propose a person as a candidate at an election held for filling a seat in the Rajya Sabha. Election Pen. No. 7 of 1980 D/- 10-7-1981 (All.) . Reversed.

An elected member who has not taken oath but whose name appears in the notification published under S. 73 of the Act can take part in all non-legislative activities of an elected member. The right of voting at an election to the Rajya Sabha can also be exercised by him. In this case since it is not disputed that the name of the proposer had been included before the date on which he proposed the name of the appellant as candidate in the notification published under S. 73 of the Act and in the electoral roll maintained under S. 152 of the Act. It should be held that there was no infirmity in the nomination. For the same reason even the electoral roll which contained the names of elected members appearing the notification issued under S. 73 of the Act cannot be held to be illegal.

(Para 19)

Invariably there is an interval of time between the constitution of a House after a general election as provided by S. 73 of the Act and the summoning of the first meeting of the House. During that interval an elected member of the Assembly whose name appears in the notification issued under S. 73 of the Act is entitled to all the privileges, salaries and allowances of a member of the Legislative Assembly, one of them being the right to function as an elector at an election held for filling a seat in the Rajya Sabha. That is the effect of S. 73 of the Act which says that on the publication of the notification under it the House shall be deemed to have been constituted. The election in question does not form a part of the Legislative proceedings of the House carried on at its meeting. Nor the vote cast at such an election is a vote given in the House on any issue arising before the House. The Speaker has no control over the election. The election is held by the Returning Officer appointed for the purpose. Under S. 33 of the Act the nomination paper has to be presented to the Returning Officer between the hours of eleven o'clock in the forenoon and three o'clock in the afternoon before the last day notified for making nominations under S. 30 of the Act. Then all further steps such as scrutiny of nominations and withdrawal of nominations take place before the Returning Officer. All the steps taken in the course of the election fall outside the proceedings that take place at a meeting of the House.

(Para 17)

Cases Referred: Chronological Paras

AIR 1979 SC 1109 : (1979) 3 SCR 972 : 1979 Lab IC 818	**12**
AIR 1977 SC 2328: (1978) 1 SCR 423: 1977 Lab IC 1857	**12**

AIR 1964 SC 254: (1964) 4 SCR 311	**12**
AIR 1956 SC 285: (1955) 2 SCR 1331	**9**
AIR 1914 Cal 152:ILR 41 Cal 384	**18**
(1830) 10 B & C 486: 109 ER 714. The King v. Swyer	**18**
(1716-49) 1 Strange 582:93 ER 714. The Case of Myer of Penrvn	**18**

JUDGMENT

Present:- S.Murtaza Fazal Ali : O. Chinnappa Reddy and E.S. Venkataramiah. JJ.

VENKATARAMIAH, J.:- **At the conclusion of the hearing of the above appeals on November 16, 1983. We pronounced the following order:**

"Heard counsel for the parties. The appeals are allowed and the order of the High Court is set aside without any order as to costs."

2. We now give our reasons.

3. Two questions arise for consideration in these three appeals which are filed against the judgment and order dated July 10. 1981 of the High Court of Allahabad in Election Petition No. 7 of 1980. They are :

1. **Whether the Secretary of a State Legislative Assembly is not qualified to be appointed as the Returning Officer at an election held to fill a seat in the Rajya Sabha ?**

2. **Whether a person elected as a member of a Legislative Assembly but who has not made and subscribed the prescribed oath or affirmation as required by Article 188 of the Constitution can at an election held for filling a seat in the Rajya Sabha?**

4. **In February, 1980 the Legislative Assembly of the State of Uttar Pradesh was dissolved by the President by issuing a notification under Article 356 of the Constitution. A notification was issued by the Governor of Uttar Pradesh under Section 15 (2) of the Representation of the People Act 1951 (hereinafter referred to as 'the Act') in April. 1980 calling upon all the Assembly constituencies in Uttar Pradesh to elect members to the Legislative Assembly. After the results of the elections in all the constituencies held pursuant to the said notification were declared. The Election Commission of India issued a notification elected for the said constituencies as required by Section 73 of the Act on June 9, 1980. The elected members were notified that they could take the oath as required by Article 188 of the Constitution at the Session of the Legislative Assembly which had been summoned to meet on June 27, 1980 and on subsequent days. In the meanwhile on June 17, 1980, the Election Commission issued a notification calling upon the elected members of the Uttar Pradesh Legislative Assembly to elect a person for the purpose of filling a vacancy in the Rajya Sabha. By that a notification, the Election Commission fixed the following programme for purpose of the said election:**

(a) 24-6-1980 - as the last date for making nomination.

(b) 25-6-1980 - as the date for scrutiny of the nomination papers.

(c) 27-6-1980- as the last date for withdrawal of candidature.

(d) 4-7-1980 - as the date on which a poll, if necessary, would be taken.

(e) 7-7-1980 - as the date before which the election had to be completed.

5. **Shri S. P. Singh, Secretary of the Uttar Pradesh Legislative Assembly was appointed as the Returning Officer and Shri Uma Shankar, Joint secretary as the Assistant Returning Officer for conducting the aforesaid election.**

6. **Pashupati Nath Sukul, the appellant in Civil Appeal No. 1775 of 1981 (hereinafter referred to as 'the appellant') and Nem Chandra Jain respondent No. 1 were nominated as the candidates at that election. At the time of scrutiny respondent No. 1 filed objections to the nomination of the appellant raising two grounds— (i) that the appellant was disqualified as he was a Government servant and (2) that the proposer of the candidature of the appellant was not qualified to propose his candidature as he had not get taken the oath as required by Article 188 of the Constitution. The appellant pleaded that as he had retired voluntarily from the Government service he was not disqualified for being chosen as member of the Rajya Sabha and that the proposer of his candidature was an elected member of the Legislative Assembly who was competent to make the proposal even though he had not taken the oath as provided in Article 188 of the Constitution. The objections of respondent No. 1 were overruled and the nomination papers of both the appellant and respondent No. 1 were accepted by the Returning Officer. At the poll which took place on July 4. 1980, the appellant secured 325 votes and respondent No. 1 got 41 votes. Accordingly the appellant was declared to be elected as a member of the Rajya Sabha. Aggrieved by the result of the election respondent No. 1 filed an election petition before the High Court calling in question the result of the election on various grounds and of them we are now concerned with two grounds only and they are (1) that as the Secretary of the Legislative Assembly was neither an officer of the Government nor of a local authority he could not be appointed as the Returning Officer under Section 21 of the Act. and (2) that as the proposer of the nomination paper of the appellant had not made and or subscribed the oath or affirmation as required by Article 188 of the Constitution on the date of the nomination there was improper acceptance of the nomination of the appellant. The appellant, the Election Commission of India, the State of Uttar Pradesh and Shri S. P. Singh, the Returning Officer were impleaded as respondents to the election petition. The name of the Governor of Uttar Pradesh who had also been impleaded as a respondent was deleted by the order of the High Court. The petition was contested by the appellant and others who had been impleaded as respondents in the election petition. At the conclusion of the trial, the High Court set aside the election of the appellant on the following grounds viz that Shri S. P. Singh, Secretary, Legislative Assembly was not qualified to be appointed as the Returning Officer that the proposer of the candidature of the appellant by a member of the Legislative Assembly who had not made and subscribe the oath or affirmation as required by Article 188 of the Constitution on the date of nomination was illegal and hence there was improper acceptance of the nomination of the appellant and that there was no valid electoral roll in force on the date of nomination. Aggrieved by the judgment of the High Court, the appellant has preferred Civil Appeal No. 1775 of 1981, the Election Commission of India has filed Civil Appeal No.1975 (E) of 1981 and the State of Uttar Pradesh has preferred Civil Appeal No. 2736 (E) of 1981. All these three appeals are disposed of by this common judgment.**

7. **We shall first deal with the question whether the Secretary of the Legislative Assembly was not qualified to be appointed as the Returning Officer for the election Section 21 of the Act which deals with the appointment of Returning Officers reads thus:**

"21. Returning Officers. - For every constituency for every election to fill a seat or seats in the Council of States and for every election by the members of the Legislative Assembly of a State to fill a seat or seats in Legislative Council of the State. the Election Commission shall in consultation with Government of the State designate or nominate a returning officer who shall be an officer of Government or of a local authority:

Provided that nothing in this section shall prevent the Election Commission from designating or nominating the same person to be the returning officer for more than one constituency." (Emphasis added).

8. **The contention of respondent No 1 which has been accepted by the High Court is that the Secretary of the Legislative Assembly being not an officer of Government or of a local authority he was not qualified to be appointed as the Returning Officer. The argument is that 'Government' in the expression 'an officer of Government' used in Section 21 of the Act means the Executive only and an officer of the Legislature is not therefore an officer of Government.**

8-A. **This case is an illustration of some legal problems solutions for which appear to be quite obvious but when an attempt is made to give reasons for such solutions one would be confronted with many difficulties though not insurmountable. The expressions ' Government' and ' an officer of Government" are not defined in the Constitution or in the Act Article 367 of the Constitution provides that unless the context otherwise requires the General Clauses Act. 1897. shall subject to an adaptations and modifications that may be made therein under Article 372 of the Constitution apply for the interpretation of the Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India. Section 3 (23) of the General Clauses Act. 1897 defines 'Government' as follows:**

"3 (23) 'Government' or 'the Government' shall include both the Central Government and any State Government".

9. **The above definition is an inclusive definition and it suggests that there may be other organs of State which may be included within the meaning of the expression 'Government'. The expressions 'Central Government' and State Government' are defined in Section 3 (8) and Section 3 (60) of the General Clauses Act, 1897 respectively. These definitions are to be adopted unless there is nothing in the context to the contrary. A general review of the constitutional provisions shows various expressions used in it to describe the several organs of the State. In Part I of the Constitution the expressions 'the Union' 'the State' and 'the Union Territories' are used. In Article 12 of the Constitution we find the expression 'Government and Parliament of India' and 'Government and the Legislature of each of the States' suggesting that Government is different from the Union Legislature or the Legislatures of the States. This is for purposes of Part III of the Constitution. In Article 102 (1) (a) and Article 191 (1) (a) of the Constitution the expression 'the Government of India' and the Government of any State' are used and they provide that a person holding an office of profit under the Government of India or a State Government is disqualified for being chosen as a member of Parliament or of a state Legislature respectively. Article 98 and Article 187 of the Constitution provide for the appointment of separate secretariat staff of each House of Parliament and of the State Legislatures respectively. Article 146 and Article 229 of the Constitution respectively deal with the appointment of officers and servants of the Supreme Court and of the High Courts. Article 148 (5) and Article 318 of the Constitution respectably deal with conditions of service etc. of the employees working in the**

office of the Comptroller and Auditor-General of India and the Public Service Commissions. Part XIV of the Constitution contains provisions relating to the services under the Union Government and the State Governments. It contains Article 311 which cannot be denied to the employees in the Legislature and in the Judiciary. Dealing with the nature of the office held by the officers working in the High Court who are governed by Article 229 of the Constitution this Court has observed in Pravat Kumar Bose v. The Hon'ble the Chief Justice of Calcutta High Court. (1955) 2 SCR 1331 ; (AIR 1956 SC 285) thus (at p. 293 of AIR):

"A close scrutiny of the terminology so used shows a marked departure in the language of Article 320 (3) (c) from that in Article 310 and 311. Officers and members of the staff attached to a High Court clearly fall within the scope of the phrase "persons appointed to public services and posts in connection with the affairs of the State" and also of the phrase "a person who is a member of a civil service of a State" as used in Articles 310 and 311. The salaries of these persons are paid out of the State funds as appears from Article 229 (3) which provides that the administrative expenses of a High Court including all salaries, allowances and pensions payable to or in respect of officers and servants of the High Court are chargeable upon the Consolidated Fund of a State. The item relating to such administrative expenses has to form part of the annual financial statement to be presented to the State Legislative Assembly u/Art. 202 and estimates thereof can form the subject-matter of the discussion in the Legislature under Article 203 (1). They must therefore be taken "to hold posts in connection with the affairs of the State and to be members of the civil service of the State"."

10. **Entry 5 of List II of the Seventh schedule to the Constitution relates to 'Local Government' that is to say. the constitution, powers of municipal corporation and improvement trusts, district boards, mining settlemeent authorities and other local authorities for the purpose of local self-Government or village administration. In each of these cases it becomes necessary to examine the relevant provisions of law applicable to it in order to determine whether the officers and staff of the various organs are officers of Government or not. Before taking up such examination the meaning of the expression 'Government' has to be ascertained.**

11. **A student of International law understands by the expression 'state' as a fully sovereign independent community residing in a specified territory with a legal capacity to enter into international relations and having the power to fulfil the obligations with the international law imposes on the family of nations. It should also have been admitted or recognised as State on a footing of equality with other States. A State implies the existence of a community or group of people occupying a geographical area or territory in which they permanently reside possessing internal sovereignty and independence of foreign control and a political organisation or agency through which the collective will of the people is expressed and enforced. The last of the elements of a State referred to above is generally called as a Government. A student of Political Theory and Comparative Politics may describe a Government as monarchical. republican democratic or dictatorial depending upon its peculiar features. It may be federal or unitary. A political philosopher may describe a Government as imperial. (illegible). capitalist or socialist. The above list is not really exhaustive. But these are only different form of Government and 'Government' here is used in a very broad sense. From the legal point of view, Government may be described as the exercise of certain powers and the performance of certain duties by public authorities or officers. together with certain**

private persons or corporations exercising public functions. The structure of the machinery of Government and the regulation of the powers and duties which belong to the different parts of this structure are defined by the law which also prescribes to some extent the mode in which these powers are to be exercised or these duties are to be performed (See Halsbury's Laws of England. Fourth Edition. Vol. 8. Para 804). Government generally connotes three estates, namely, the Legislature, the Executive and the Judiciary while it is true that in a narrow sense it is used to connote the Executive only. The meaning to be assigned to that expression, therefore, depends on the context in which it is used.

12. **In our Constitution, which has a federal structure there are both at the level of the Union and at the level of the States detailed provisions, pertaining to the Legislature the Executive and the Judiciary. All the three organs are concerned with the governance of the country - one organ makes the laws. the second enforces them and the third interprets them though sometimes their functions may be overlapping. In this sense all the three organs together constitute the Government at their respective level. It is significant that the President is a part of Parliament under Article 79 of the Constitution. the executive power of the Union is vested in him under Article 53 (1) of the Constitution and he appoints Judges of the Supreme Court under Article 124 (2) and he can issue an order removing a Judge of the Supreme Court under Article 124 (4) of the Constitution of course subject to the limitations contained therein. At the level of the State too the position is analogous to the position at the level of the Union. The Governor is a part of the Legislature of the State under Article 168(1) of the Constitution. The executive power of the state is vested in him under Article 154 (1) and he is consulted in the appointment of Judges of the High Court. While under Article 235 of the Constitution the High Court is vested with the control over the Subordinate Judiciary of the State. in the case of dismissal or removal of a judicial officer in the Subordinate Judiciary. the Governor has to issue the order though on the recommendation made by the High Court. A study of these provisions shows that there is no water tight compartment between the three major organs of the State. The Controller and Auditor- General of India though he is assigned an independent status is an officer under the Union Government. (See Gurugobinda Basu v. Sankari Prasad Ghosal. (1964) 4 SCR 311: (AIR 1964 SC 254.) The Judges of the Supreme Court and of a High Court are not servants of Government but hold a constitutional office (vide Union of India v. Sankal Chand Himatlal Seth. (1978) 1 SCR 423: (AIR 1977 SE 2328) and Hargovind Pant v. Dr. Raghukul Tilak. (1979) 3 SCR 972: (AIR 1979 SC 1109). But the Comptroller and Auditor-General of India and the Judges of the Supreme Court and of a High Court are not eligible to contest elections to Parliament and the State Legislatures in view of Article 102 (1) (a) and Article 191 (1) (a) of the Constitution as the case may be because they are serving in connection with the affairs of the Union (see Article 360 (4) (b) of the Constitution) and are. therefore. holding offices of profit under the Central Government. The position of a person who works as an offices of the Legislature of a State is also the same. Even though he belongs under Article 187 of the Constitution to the staff of the State Legislature he is still an officer of Government in the broad sense in which the expression 'Government' is used in Article 102 (1) (a) and Article 191 (1) (a) of the Constitution. If the expression 'Government' used here is construed as meaning the Executive Government only then it would defeat the very purpose of these provisions of the Constitution. Similarly he has to be treated as an officer of Government for**

purposes of Section 21 of the Act also qualified for being appointed as the Returning Officer for an election held under the Act. It is not disputed that after the commencement of the Constitution the Secretaries of the State Legislatures almost as a matter of the rule are being appointed as Returning Officers for election to tha Rajya Sabha and for election to the Legislative Councils of States and Parliament has not thought it fit to amend suitably S.21 of the Act expressly including the officers of the State Legislatures amongst the persons qualified to be appointed as Returning Officers even though it has amended that section once by specifically including officers of local authorities. Parliament all along has treated the Secretaries of the State Legislatures as officers of Government for purposes of Section 21 and has found it convenient to do so having regard to the nature of the work to be carried out by them. It may be noted that even though Article 98 and Article 187 of the Constitution contemplate the establishment of a separate secrerariat staff for each House of Parliament and of the State Legislature respectively the salaries and allowances of the members of that staff are paid out of the Consolidated Fund of India or of the State as the case may be after they are voted by the House or Houses concerned. Their appointment and other conditions of service are regulated by rules made by the President or the Governor as the case may be until an appropriate law is made by Parliament or the State Legislature as the case may be. We are of the view that the word 'Government' in Article 102 (1) (a) and in Article 191 (1) (a) of the Constitution and the word 'Government' in the expression 'an officer of Government' in Section 21 of the Act should be interpreted liberally so as to include within its scope the Legislature, the Executive and the Judiciary. The High Court erred in equating the word 'Government' occurring in Section 21 of the Act to the Executive Government only and in further holding that the officers of the State Legislature could not be treated as officers of Government for purposes of that section. The finding of the High Court that the Secretary of the Uttar Pradesh State Legislature could not be appointed as the Returning Officer for the election to the Rajya Sabha is therefore unsustainable.

13. **The second question to be considered is whether the nomination of the appellant was liable to be rejected on the ground that the proposer was not eligible to nominate a candidate as he has not made and subscribed the oath or affirmation as prescribed by Article 188 of the Constitution.**

14. **Section 33 of the Act prescribes the requirements for a valid nomination. It provides that the nomination paper should be completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer. Clauses (d) and (e) of Section 2 (1) of the Act define the words 'election' and 'elector' respectively. 'Election' means an election to fill a seat or seats in either House of Parliament of in the House or either House of the Legislature of a state other than the State of Jammu and Kashmir. '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). Sub-clause (b) of clause (1) of Article 80 of the Constitution stated that the Council of States (the Rajya Sabha) shall in addition to twelve members nominated by the President under sub-clause (a) thereof consist of not more than two hundred and thirtyeight representatives of the States and of the Union Territories. Clause (2) of Article 80 of the Constitution provides that the allocation of seats in the Council of States to be filled by representatives of the States and of the Union territories shall be in**

accordance with the provisions in that behalf contained in the Fourth Schedule to the Constitution. Clause (4)of Article 80 provides that the representatives of each State in the Council of States shall be elected by the elected members of the Lagislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote. Section 152 of the Act provides that the Returning Officer for an election by the elected members of the Legislative Assembly of a State to fill a seat or seats in the Council of States shall for the purposes of such election maintain in his office in the prescribed manner and form a list of elected members of that legislative Assembly. Clause (c) of sub-rule (1) of Rule 2 of the Conduct of Elections Rules, 1961 defines "election by Assembly members as an election to the Council of States by the elected members of the Legislative Assembly of a State or by the members of the electoral college of a Union Territory or an election to the Legislative Council of a State by the members of the Legislative Assembly of a State. 'Elector' is defined by clause (d) of sub-rule (1) of Rule 2 of the said Rules in relation to an election by Assembly members as any person entitled to vote at that election.

15. **In the present case the notification containing the names of elected members of the Uttar Pradesh Legislative Assembly who participated at the election in question had been published under Section 73 of the Act on June 9, 1980 and that the previous Legislative Assembly had been dissolved earlier in February 1980. This is not a case where general elections to the Legislative Assembly had been held before the normal tenure of the existing Legislative Assembly was over. Section 73 of the Act which prescribes the publication of results of general elections reads thus:**

"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 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 House 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 pole 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."

(Emphasis added)

16. **On the publication of the notification on June 9, 1980 under Section 73 of the Act in the instant case the Assembly was deemed to be duly constituted. Article 188**

of the Constitution prescribes the oath to be taken or the affirmation to be made by every member of a Legislative Assembly or a Legislative Council:

"188. Every member of the Legislative Assembly or the Legislative Council of a State shall before taking his seat make and subscribe before the Governor 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."

17. **Article 191 of the Constitution prescribes the disqualifications for membership of the Legislative Assembly or Legislative Council of a State. On the incurring of any such disqualification a member of a Legislative Assembly or a Legislative Council ceases to be a member thereof. Article 193 of the Constitution provides for the penalty for sitting and voting before making oath or affirmation under Article 188 of the Constitution or when not qualified or when disqualified the penalty being in respect of each day five hundred rupees to be recovered as a debt due to the State. It does not say that if an elected member of a Legislative Assembly sits and votes before taking oath as prescribed by Article 188 of the Constitution he shall automatically ceases to be a member of the House even though it is possible that his seat may be declared as vacant under Article 190(4) of the Constitution if for sixty days he is absent from all meetings of the House without its permission. Now the question is whether the making of oath or affirmation is a condition precedent for being eligible to act as a proposer of a valid nomination for election to the Rajya Sabha. The rule contained in Article 193 of the Constitution as stated earlier is that a member elected to a Legislative Assembly cannot sit and vote in the House before making oath or affirmation. The worse 'sitting and voting 'in Art 193 of the Constitution imply the summoning of the House under Art 174 of the Constitution by the Governor to meet at such time and place as he thinks fit and the holding of the meeting of the House pursuant to the said summons or an adjourned meeting. An elected member incurs the penalty for contravening Article 193 of the Constitution only when he sits and votes at such a meeting of the House. Invariably there is an interval of time between the constitution of a House after a general election as provided by Sec. 73 of the act and the summoning of the first meeting of the House. During that interval an elected member of the Assembly whose name appears in the notification issued under S. 73 of the Act is entitled to all the privileges, salaries and allowances of a member of the Legislative Assembly one of them being the right to function as an elector of an election held for filling a seat in the Rajya Sabha. That is the effect of S. 73 of the Act which says that on the publication of the notification under it the House shall be deemed to have been constituted. The election in question doesn't form a part of the Legislative proceedings of the House carried on at its meeting. Nor the vote cast at such an election is a vote given in the House on any issue arising before the House. The speaker has no control over the election. The election is held by the Returning Officer appointed for the purpose. As mentioned earlier under S. 33 of the Act the nomination paper has to be presented to the Returning Officer between the hours of eleven o'clock in the forenoon and three o'clock in the forenoon before the last day notified for making nomination under S. 30 of the Act. Then all further steps such as scrutiny of nominations and withdrawal of nominations take place before the Returning Officer. R. 69 of the Conduct of Elections rules 1961 provides that at an election by Assembly members where a poll becomes necessary the Returning Officer for such election shall as soon as may be after the last date for the withdrawal of candidatures send to each elector a notice informing him of the date,**

time and place fixed for polling. Part VI of the Conduct of Elections Rules 1961 which contains R. 59 and Part VII there of deal with the procedure to be followed at an election by assembly members. R. 85 of the Conduct of Elections Rules 1961 provides that as soon as may be after a candidate has been declared to be elected the returning officer shall grant to such candidate a certificate of election in Form 24 and obtain from the candidate an acknowledgment of its receipt duly signed by him and immediately sent the acknowledgment by registered post to the Secretary of the Council of States or as the case may be the Secretary of the Legislative Council. All the steps taken in the course of the election thus fall outside the proceedings that take place at a meeting of the House.

18. **We may here refer to the decision of the Calcutta High Court in Bhupendra Nath v. Ranjit Singh ILR 41 Cal 381:(AIR 1914 Cal 152). The facts of that case were these. An election was held on February 14, 1913 to the Legislative Council of the Governor-General from the constituency consisting of the non-official additional members of the Bengal Legislative Council of the Governor General. There were at that time thirty-four non-official additional members but two of them had not taken the oath of allegiance at the time of the election as prescribed by the Bengal Council Regulation VII. At the election there were four candidates- the plaintiff Bhupendra Nath Basu, the 1st defendant Maharaja Ranjit Singh the 2nd defendant. Surendra Nath Banerjee and Nawab Badruddin Haidar. As a result of the poll the second defendant got 22 votes, the first defendant got 18 votes the plaintiff 17 and Nawab Badruddin Haider 11 Votes. Accordingly, defendants 1 and 2 were declared elected to fill the two seats. The plaintiff after being unsuccessful in his petition to the Governor-General filed a suit before the High Court questioning the validity of the election. He prayed that the votes should be recounted after excluding the votes cast by the two members who had not taken the oath of allegiance. Regulation VII referred to above provided that every person elected or nominated under the regulations should before taking his seat at a meeting of the council make an oath or affirmation of his allegiance to the Crown and Regulation VIII provided that if such a person "fails to make the oath or affirmation prescribed by Regulation VII within such time as the Governor-in-Council may consider reasonable the Governor shall by notification in the local Official Gazette declare the election or nomination to be void or his seat to be vacant." Such a declaration had not been made on the date of the election. The contention of the plaintiff was rejected by the High Court in the following terms:**

"Moreover I am not satisfied that the view of the Government as to the taking of the oath of allegiance is not a correct one. Doubtless the English cases that were referred to the case of the Mayor of Penryn (1 Strange 582 and The King v. Swyer ((1830) 10 B & C 486) have decided that a person is admitted to a public office which requires the oath of allegiance only when the oath of allegiance is taken. That does not get rid of the difficulty that arises from these Regulations. These Regulations constitute an electoral College of elected members of the Local Council to elect two persons to be members of the Council of His Excellency the Governor-General. I am not satisfied on the Regulations that the learned Advocate-General has called my attention to that when the electors have the right of giving their votes by means of registered letter for the purpose of being members of electoral college and for that purpose only that the mere fact of election to the Local Council was not sufficient to constitute a person so elected a member of the electoral college. It is only for the purpose of exercising the legislative functions conferred by the

Regulations and by the Act that the oath of allegiance is required. Moreover as that Advocate-General has pointed out the mere fact of omission to take an oath of allegiance does not ipso facto cause a member to vacate his seat: under Regulation VIII of the Bengal Council Regulations the discretion is given to the Governor as to his declaring a seat to be vacant if the person elected fails to take an oath of allegiance. In my opinion in this case the Rule fails and must be discharged and discharged with costs."

19. **We are of the view that an elected member who has not taken oath but whose name appears in the notification published under Section 73 of the Act can take part in all non-legislative activities of an elected member. The right of voting at an election to the Rajya Sabha can also be exercised by him. In this case since it is not disputed that the name of the proposer had been included before the date on which he proposed the name of the appellant as a candidate in the notification published under Section 73 of the Act and in the electoral roll maintained under Section 152 of the Act it should be held that there was no infirmity in the nomination. For the same reason even the electoral roll which contained the names of elected members appearing in the notification issued under Section 73 of the Act cannot be held to be illegal. That is how even respondent No. 1 appears to have understood the true legal position as he was also proposed as a candidate by an elector who had not yet made the oath or affirmation. The second contention also fails. No other contention was pressed before us. We are therefore of the view that the findings recorded by the High Court on the basis of which the election of the appellant to the rajya Sabha was set aside are erroneous.**

20. **In the result we allow the above appeals set aside the judgment of the high Court and dismiss the election petition filed by respondent No. 1. Having regard to the novelty of the questions raised in this case the parties are directed to bear their own costs throughout.**

Appeals allowed.

SUPREME COURT OF INDIA*

Civil Appeals No. 3839 of 1982$
(Decision dated 5.3.1984)

A. C. Jose ***.. Appellant***

Vs.

Sivan Pillai and Others ***.. Respondents***

SUMMARY OF THE CASE

At the election to the Kerala Legislative Assembly, held in May, 1982 from 70-Parur Assembly Constituency, the Election Commission used, for the firt time, Electronic Voting Machines (EVMs) at 50 polling stations out of 84 polling stations in the constituency, for recording and counting of votes at those polling stations. Shri A.C.Jose, who lost the election, questioned before the Kerala High Court the use of EVMs at the aforesaid 50 polling stations in the constituency on the ground that the Representation of the People Act, 1951 and the Conduct of Elections Rules, 1961 did not provide for use of EVMs for the purpose of conducting the poll and counting of votes in elections in India. The High Court dismissed the election petition, holding that the Election Commission was empowered by Article 324 of the Constitution to use the EVMs, though the said statutory provisions did not specifically provide for the use thereof in elections.

The Supreme Court, which the appellant approached by way of the present appeal, however, reversed the order of the High Court and accepted the contention of the petitioner-appellant. The Supreme Court held that the EVMs could not be used in elections without an express provision in the law. The Supreme Court also held that the Election Commission has to conduct elections according to law enacted by Parliament and it could, in exercise of its powers under Article 324 of the Constitution, supplement the law but not supplant it. The Supreme Court, therefore, declared the election from the Parur Assembly Constituency as void and directed a re-poll to be held in the 50 polling stations where EVMs were used.

(A) Constitution of India, Art. 324 - Election commission - Powers of - extent - Conduct of elections - Commission cannot override provisions of Act or Rules - Representation of the People Act (43 of 1951), Sections 59 and 100 (1) (d) - Conduct of Election Rules (1961) Part IV - Order of commission directing casting of Votes by mechanical process - Order is without jurisdiction. 1952 Ker LT 876, Reversed.

The legal and constitutional position as regards conduct of elections is as follows:-

(a) 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,

(b) where there is an Act and express Rules made thereunder, 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. In other words the powers of the Commission are meant to supplement rather than supplant the law (both statute and Rules) in the matter of superintendence, direction and control as provided by Art. 324.

(c) where the Act or the Rules are silent, the Commission has no doubt plenary powers under Art. 324 to give any direction in respect of the conduct of election and

(d) where a particular direction by the Commission is submitted to the Government for approval as required by the Rules, it is not open to the Commission to go ahead with implementation of it at its own sweet will even if the approval of the Government is not given. (para 25)

The word 'ballot' in its strict sense would not include voting by the use of voting machines. The Act by framing the Rules completely excluded the mechanical process which, if resorted to would defeat in a large measure the mandatory requirements of the Rules. (Para 29, 33)

Hence the order of the Commission directing casting of ballot by machines in some of the polling stations was without jurisdiction and could not have been resorted to 1982 Ker LT 876 Reversed. (Para 35)

(B) Evidence Act (1 of 1872), S. 115 - Estoppel - No estoppel against statute.

While considering a constitutional or statutory provision there can be no estoppel against a statute and whether or not the appellant agreed or participated in the meeting which was held before introduction of the voting machines if such process is not permissible or authorised by law he cannot be stopped from challenging the same. (Para 38)

Cases Referred:	Chronological Paras
AIR 1978 SC 851: (1978) 2 SCR 272	**16,21**
AIR 1972 SC 187 (1972) 2 SCR 318	**11**
AIR 1952 SC64: 1952 SCR 218	**19,20**

JUDGMENT

Present:- S. Murtaza Fazal Ali, A. Varadarajan and Ranganath Misra, J.J.

M/s. K. K. Venugopal and G. Vishwanatha Iyer, Sr.Advocates, Mr. E. M. S. Anam, Advocate with them, for Appellant; M/s Ram Jethmalani and M. M. Abdul Khader, Sr. Advocates. M/s Dileep Pillai and M. A. Firoz, Advocates with them, for Respondent No. 1: M/s K. G. Bhagat, Addl, Sol, General Miss A. Subhashini; Advocate with him for Union; M/s S. S. Ray and A. K. Sen, Sr. Advocates, Miss A. Subhashini. Advocate, with them, for the Election Commissioner Mr. Ram Jethmalani, Sr Advocate, Miss Rani Jethmalani, Advocate with them for the Intervener.

FAZAL ALI, J.:- **This election appeal has been filed by the appellant, who was a candidate for election to "No. 70 Parur Assembly Constituency'" in Kerala but was not elected. Six candidates contested the said election which was held on May 19. 1982, out of whom the first respondent (Sivan Pillai), who was a candidate of the Communist Party of India, and the appellant were the two principal contestants. The result of the election was announced on May 20, 1982 in which the first respondent was declared elected having secured 30450 votes as against 30327 votes secured by the appellant. Thus the first respondent secured 123 more votes than the**

appellant. Of the 30450 votes, 11268 were cast manually , according to the conventional method provided in the Conduct of Election Rules, 1961 (for short, to be referred to as the 'Rules' made under the Representation of the People Act, 1951 (hereinafter to be referred to as the 'Act'), and 19182 votes were cast by means of electronic machines (for short , to be referred to as 'voting machines'). This was done in pursuance of the direction issued by the Election Commission of India (for facility to be refereed to as the Commission) by virtue of a notification published in the Kerala Gazette on 13-5-82. The said notification was purported to have been made under Art 324 of the Constitution of India and has been extracted on pages 3 to 5 of the judgment of the High Court and it is not necessary for us to repeat the same having regard to the point of law that we have to decide in the instant case.

2. **It may be mentioned that prior to issuing the notification the Commission had sought the sanction of the Government of India which was however refused. As mentioned above the votes by the mechanical process were cast in 50 out of the 84 polling stations.**

3. **The trial Court upheld the validity of voting by machine and held that the respondent was duly elected to the Assembly seat. Hence, this appeal by the appellant.**

4. **Art 324 of the Constitution gives full powers to the Commission in matters of superintendence , direction and control of the preparation of electoral rolls and also for the conduct of elections to the Parliament and State Legislatures. It was argued that the Commission being a creature of the Constitution itself, its plenary powers flowing directly from Art 324 will prevail over any Act passed by the Parliament or Rules made thereunder. In order to buttress this argument, it was contended that the manner of voting was a matter coming within the ambit of Arts. 324 and 327 which empowered the Parliament to make laws in respect of matters relating to or in connection with the elections to the Parliament or the State Legislatures and would be deemed to be subsidiary to the power contained in Art 324 and if there was any conflict between a law enacted by the Parliament and the powers given to the Commission regarding regulating the conduct of elections to Parliament that law must yield to Art 324. Otherwise the very object of Art 324 would be defeated. Notice was given by this Court both to the Union of India as also the Commission though in terms of Section 82 of the Act they are not necessary parties and were not before the High Court.**

5. **This is a very attractive argument but on a closer scrutiny and deeper deliberation on this aspect of the matter, it is not possible to read into Art 324 such a wide and uncanalised power, which is entrusted to the Commission as Mr. Jethmalani would have us believe. Part XV of the Constitution contains Art 324 to 328 which relate to the manner in which elections are to be held ,the rights of persons who are entitled to vote, preparation of electoral rolls, delimitation of constituencies, etc. but this is merely the storehouse of the powers and the actual exercise of the these powers is left to Parliament under Arts 325 to 329 In other words, art 324 has to be read in harmony with and not in isolation of Arts 326 to 329, Art 324 may be estracted thus:**

"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 if 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 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 Ejection 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 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 Commission by clause (1)."

6. **While interpreting a constitutional provision we must remember the memorable words of Chief Justice Marshal: "We must never forget that it is the Constitution which we are expounding ."**

7. **Another golden rule laid down by this Court on the interpretation of statutes is that we should so interpret the language of a Statute as to suppress the mischief and advance the object. It is true that Art 324 does authorise the Commission to exercise powers of superintendence, direction and control of preparation of electoral rolls and the conduct of elections to Parliament and State legislatures but then the Article has to be read harmoniously with the Articles that follow and the powers that are given to the Legislatures under entry No. 72 in the Union List and entry No. 37 of the State List of the Seventh Schedule to the Constitution. The Commission in the garb of passing orders for regulating the conduct of elections cannot take upon itself a purely legislative activity which has been reserved under the scheme of the Constitution only to Parliament and the State legislatures. By no standards can it be said that the Commission is a third chamber in the legislative process within the scheme of the Constitution. Merely being a creature of the Constitution will not give**

it plenary and absolute power to legislate as it likes without reference to the law enacted by the legislatures.

8. **It was further argued that this power was necessary in order to make the Commission an independent body and in this connection our attention was drawn to a speech of Dr. Ambedkar in the Constituent Assembly when the question of making the Election Commission an independent body was being debated. At page 905, Constituent Assembly Debates (Vol. 8), Dr. Ambedkar observed thus:**

"But the House affirmed without any kind of dissent that in the interests 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 questions from the category of Fundamental Rights and put it in a separate part containing Articles 289, 290 and so on. Therefore, so for 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."

9. **These observations merely show that the intention of the founding fathers of our Constitution was to make the Commission a separate and independent body so that the election machinery may be outside the control of the executive government. What Dr. Ambedkar, or for that matter the founding fathers intended was that the superintendence, direction and control of the preparation of electoral roll and of all elections to Parliament and State Legislatures should be left to the Election Commission This object has been fully carried out by the provisions in Arts. 324 to 329. Neither the observations of Dr Ambedkar nor the provisions of the Constitution could ever have intended to make the Commission an apex body in respect of matters relating to elections , conferring on it legislative powers ignoring the Parliament altogether.**

10. **Mr. Asoke Sen, Appearing for the Commission, speaking in the same strain as Mr Jethmalani, contended that Article 324 was a Code in itself and was couched in a very plain and simple language which admits of no ambiguity and, if so construed, it gives full powers and authority to the Commission to give any direction in connection with the conduct of elections. It was further submitted that if this interpretation is not given then Arts 325 to 329 would amount to defeating the very object which was sought to be achieved by Art 324. Supporting argument was built up by Mr Sen by heavily relying upon the opening words in Art 327 to the effect "subject to the provisions of this Constitution" and absence of any such rider in Art 324 for the reasons which we will give hereafter, it is not possible for us to accept the somewhat far-fetched argument of the learned counsel.**

11. **Reliance was placed on a decision of this Court in Sadiq Ali v Election Commission of India (1972) 2 SCR 318 (AIR 1972 SC 187) where the Court observed thus (at p. 193 of AIR),**

"Article 324 of the Constitution provides inter alia that the superintendence, direction and control of the preparation of electoral rolls for and the conduct of all elections to Parliament and legislative Assemblies of the States and all elections to

the offices of President and Vice-President held under the Constitution shall be vested in the Commission.

Without prejudice to the generality of the foregoing power, sub-section (2) enumerates some of the matters for which provision may be made in the rules. Sub-section (3) requires that the rules framed should be laid before each House of Parliament. Conduct of Election Rules 1961 were thereafter framed by the Central Government. Rule 5 of those Rules requires the Commission to specify the symbols that may be chosen by candidates at elections in Parliamentary and Assembly elections in Parliamentary and Assembly elections and the restrictions to which that choice shall be subject. Rule 10 makes provision for allotment symbols to the contesting candidates by the Returning Officer subject to general or special directions issued by the Commission.

12. **The first part of the above observations merely repeats the language of Art 324 but the second part clearly shows that the power under Art 324 is conditioned by the Rules made by the Central Government for the conduct of all elections. These observations, therefore do not appear to us to be of any assistance to the stand taken by the appellant.**

13. **Reliance was also placed on the following observations in the said case.**

"Question then arises as to what is the binding nature of the decision given by the Commission under paragraph 15. In this respect it has to be borne in mind that the Commission only decides the question as to whether any of the rival sections or groups of a recognised political party each of whom claims to be that party is that party. The claim made in this respect in only for the purpose of symbols in connection with the elections to the Parliament and State Legislatures and the decision of the Commission pertains to this limited matter" (Emphasis ours)

14. **These observations also do not advance the matter any further because it was clearly held that the claim made in respect of symbols pertained only to the limited matter which was being considered by the Commission. The following observations of this Court in that case completely clinch the issue against the appellant.**

"It would follow from what has been discussed earlier in this judgement that the Symbols Order makes detailed provisions for the reservation, choice and allotment of symbols and the recognition of political parties in connection therewith. That the Commission should specify symbols for elections in Parliamentary and assembly constituencies has also been made obligatory by Rule 5 of Conduct of Election Rules." (emphasis supplied)

15. **Thus it is manifestly apparent from this decision that the rule-making power of the Commission under the Act with respect to symbols, would have to prevail over any order that it may pass and the words "conduct of elections" would not make the Commission a purely legislative body.**

16. **Another case on which great reliance was placed is: Mohinder Singh Gill v. Chief Election Commissioner, New Delhi, (1978) 2 SCR 272 (AIR 1978 SC 851). In this case it was held that an Order passed by a statutory functionary on certain specific ground cannot be supplemented by external evidence like affidavits or otherwise This case also nowhere lays down that the Commission possesses plenary powers - both executive and legislative - in the guise of conduct of elections. One of the main questions posed by Krishna Iyer, J., speaking for the Court was as follows (at p.861 of AIR)**

"Can the Election Commission clothed with the comprehensive functions under Article 324 of the Constitution cancel the whole poll of a constituency after it has been held but before the formal declaration of the result has been made and direct a fresh poll without reference to the guidelines under Sections 58 and 64 (a) of the Act, or other legal prescription or legislative backing. If such plenary power exist is it exercisable on the basis of his inscrutable 'subjective satisfaction' or only on a reviewable objective assessment reached on the basis of circumstances vitiating a free and fair election and warranting the stoppage of declaration of the result and directions of a fresh poll not merely of particular polling stations but of the total conctituency?"

17. **The learned Judge while answering the question observed thus:**

"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 Art 324 has to be read in the light of the constitutional scheme and the 1950 Act and the 1951 Act. Sri Rao is right to the extent he insists that if competent legislation is enacted as visualized in Article 327 the Commission cannot make himself free from enacted prescriptions. And the supremacy of valid law over the Commission argues itself No one is an imperium in imperio in our constitutional order. It is reasonable to hold that the Commissioner cannot defy the law armed by Art 324 Likewise his functions are subject to the norms of fairness and he cannot act arbitrarily Unchecked power is alien to our system. .....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." (Emphasis ours)

18. **The observations, extracted above furnish a complete answer to the arguments of Mr. Jethmalani and Mr. Asoke Sen as it has been clearly held that Art. 324 would operate only in areas left unoccupied by legislation, even if the widest possible connotation is given to the language of Art 324. While summarising the propositions the Court made the following observations**

"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. Secondly the Commission shall be responsible to the rule of law act bona fide and be amenable to the norms of natural justice in so far as conformance to such canons can reasonably and realistically be required of it as fairplay-in-action in a most important area of the constitutional order, viz., elections." (Emphasis ours)

19. **This is actually the main spirit and gist of the decision which appears to have been relied upon by the appellant but which does not at all support his stand. In the aforesaid case, there did not appear to be any conflict between the Order passed by the Commission and the Act or the Rules. The question at issue in the instant case did not really arise in the form and shape as has been presented before us. On the other hand, the matter seems to have been fully settled by an earlier decision of this Court in N. P. Pannuswami v Returning Officer, Namakkal Constituency 1952 SCR 218 : (AIR 1952 SC 64) where Fazal Ali. J (as he then was) while making a very**

pointed and crisp approach, scientifically analysed the position thus (at p. 68 of AIR)

"Broadly speaking, before an election machinery can be brought into operation there are three requisites which require to be attended to namely (1) there should be a set of laws and rules making provisions with respect to all matters relating to or in connection with elections and it should be decided as to how these laws and rules are to be made; (2) there should be an executive charged with the duty of securing the due conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections. Articles 327 and 328 deal with the first of these requisites, Article 324 with the second and Article 329 with third requisite. The other two articles in Part XV viz., Article 325 and 326 deal with two matters of principle to which the Constitution-framers have attached much importance. The are:- (1) prohibition against discrimination in the preparation of or eligibility for inclusion in the electoral rolls on grounds of religion, race, caste, sex or any of them and (2) adult suffrage. Part XV of the Constitution is really a code in itself providing the entire ground-work for enacting appropriate laws and setting up suitable machinery for the conduct of elections."

20. **We fully endorse and follow the above observations of the Constitution Bench which lay down the correct law on the subject and we have nothing further to add to the approach made by this Court in the case referred to above. On the other hand, our view that Articles 324 to 329 have to be construed harmoniously flows as a logical corollary from the ratio in Pounuswami's case (AIR 1952 SC 64).**

21. **The pointed and pungent observations, extracted above, really amount to Bible of the election law as culled out from an interpretation of the provisions of Arts 324 to 329 of the Constitution, and were referred to with approval even in Mohinder Singh Gill's case (AIR 1978 SC 851) (supra). During the last three decades this case has neither been distinguished not dissented from and still holds the field and with due respect, very rightly. No other case ever made such a dynamic and clear approach to the problem, perhaps due to the fact that no such occasion arose because the Commission has always been following the provisions of the Act and the Rules and had never attempted to arrogate to itself powers which were not meant to belong to it. Indeed if we were to accept the contention of the respondents it would convert the Commission into an absolute despot in the field of election so as to give directions regarding the mode and manner of elections by-passing the provisions of the Act and the Rules purporting to exercise powers under cover of Art. 324. If the Commission is armed with such unlimited and arbitrary powers and if it ever happens that the person 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.**

22. **Further, such an absolute and uncanalised power given to the Commission without providing an guidelines would itself destroy the basic structure of the Rule of Law. It is manifest that such a disastrous consequence could never have been contemplated by the Constitution makers for such an interpretation as suggested by the counsel for the respondent would be far from attaining the goal of purity and sanctity of the electoral process. Hence we must construe Arts 324 to 329 as an integral part of the same scheme collaborating rather than colliding with one another. Moreover a perusal of Arts 324 to 329 would reveal that the lagislative**

powers in respect of matters relating to Parliament of the State Legislatures vests in Parliament and in no other body. The Commission would come into the picture only if no provision has been made by Parliament in regard to the elections to the Parliament or State Legislatures. Furthermore, the power under Art 324 relating to superintendence, direction and control was actually vesting of merely all the executive powers and not the legislative powers. In other words, the legislative power of Parliament or of the legislature of a State being made subject to Art. 324 only means that no law made by Parliament under Art. 327 or by a State Legislature under Art. 328 can take away or deprive the Commission of the executive power in regard to matters entrusted to it. viz. superintendence direction and control of elections. The right to file an election petition directly flows from Art. 329 and cannot be affected in any manner by the Commission under Art. 324.

23. **In view of the above, it is not necessary for us to consider a number of other authorities that were cited before us as they do not appear to be directly on point.**

24. **It is pertinent to indicate that the High Court fell into an obvious fallacy by acceptance of the position that the direction of the Commission was intended to operate in an uncovered field When the Act and the Rules prescribed a particular method of voting the Commission could not innovate a new method and contend that use of the mechanical process was not covered by the existing law and therefore did not come in conflict with the law in the field.**

25. **To sum up therefore, the legal and constitutional position as follows:**

(a) 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,

(b) where there is an Act and express Rules made thereunder, 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. In other words, the powers of the Commission are meant to supplement rather than supplant the law (both statute and Rules) in the matter of superintendence direction and control as provided by Art. 324,

(c) where the Act or the Rules are silent the Commission has no doubt plenary powers under Art. 324 to give any direction in respect of the conduct of election and

(d) where a particular direction by the Commission is submitted to the Government for approval as required by the Rules, it is not open to the Commission to go ahead with implementation of it at its own sweet will even if the approval of the Government is not given.

26. **Apart from the arguments referred to above an alternative argument put forward before us was that even the Rules framed under the Act authorise the Commission to give directions is hold voting by the use of a voting machine and this is covered by Section 59 of the Act and Rule 49 of the Rules. This argument merits serious consideration. In the instant case, the main grievance of the appellant is that the voting by mechanical process was not permissible either under the Act or under the Rules. Reliance was, however, placed by the appellant on Section 59 of the Act which runs thus:**

"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.

27. **It is obvious that Section 59 uses the words "ballot in such manner as may be prescribed", which means prescribed by the Rules made under the Act. A reference to Section 61 of the Act would show that Parliament intended use of ballot paper only for casting of votes. This takes us to Rule 49, the relevant part of which may be extracted thus:**

"49. Voting by ballot at notified polling stations.

(1) Notwithstanding anything contained in the preceding provisions of this part, the Election Commission may, by notification published in the Official Gazette at least 15 days before the date, or the first of the dates, of poll appointed for an election direct that the method of voting by ballot shall be followed in that election at such polling stations as may be specified in the notification."

28. **It was submitted that having regard to the modern and changing conditions of the society a dynamic approach should be made to the interpretation of the aforesaid two legal requirements. The matter does not rest here: something could be said for the view that the word 'ballot' includes voting by machines. Section 59 proceeds to explain its intention in setting up the mode, manner and method of voting by prescribing express rules as to how the voting should be done. In this connection, reference may be made to Rule 22 which relates to the form of ballot paper and its contents Rule 23 requires the Returning Officer to record on the counterfoil of the ballot paper the electoral roll number of the elector as entered, in the marked copy of the electoral roll. Rule 27 refers to the return of ballot paper after an elector has recorded his vote or made his declaration. Rule 30, which prescribes the contents of the ballot papers, is completely contrary to the concept of ballot by machine. Similarly, Rules 33, 38, 39 and 40 seem to be wholly inconsistent with the mechanical process but seem to adopt the conventional method. As we have already indicated, these Rules are binding on the Commission and it cannot by an executive fiat either override them or act contrary to the statutory provisions of the Rules.**

29. **On a proper and detailed analysis of these Rules it is clear that the Act by framing the Rules completely excluded the mechanical process which, if resorted to, would defeat in a large measure the mandatory requirements of the Rules.**

30. **It is a well settled rule of interpretation of statutes that words, phrases or sentences of a statute should ordinarily be understood in their natural, ordinary, popular and grammatical sense unless such a construction leads to absurdity. Mr. Jethmalani argued that the word 'ballot' is wide enough to include the mechanical process and therefore, the direction of the Commission falls squarely within the four corners of both Section 59 and Rule 49. Reliance was placed on the dictionary meaning of the word 'ballot' which has been defined in Black's Law Dictionary (Fourth Edn) at page 182 thus.**

"means act of voting, usually in secret, by balls or by written or printed tickets or slips or paper, the system of voting by balls of tickets, or by any device for casting or recording votes. as by voting machine."

In Stroud's Judical Dictionary (Third Edn.) however, 'ballot' means "votes recorded — all ballot papers put into the ballot boxes by the electors (p. 3239)" Stroud therefore, does not subscribe to the view of casting of vote through a voting machine and we agree with thus view because casting of votes by machine is a mechanical process, which has come into existence long after the act was passed and is not generally invoked in most of the democratic countries of the world.

31. **Concise Oxford Dictionary defines the word 'ballot. thus**

“(usu. secret) voting; small ball, ticket or paper used in voting; votes so recorded; lot-drawing”

32. **In Webster's Third New International Dictionary (Vol. I) at page 168 'ballot' is defined thus.**

“to obtain a vote from (a body of voters) (the men on the proposal), to select by ballot or by the drawing of lots.”

33. **It may be mentioned here that word 'ballot' has been derived from the word 'ballota' which existed at a time when there was no question of any system of voting machie Even in 1951 when the Act was passed or the Rules made, the system of voting by machine was not in vogue in this country In these circumstances, therefore, we are constrained to hold that the word 'ballot' in its strict sense would not include voting by the use of voting machines Legislatures must be deemed to be aware of the modern tendencies in various democratic countries of the world where the mechanical system has been introduced and if despite the plain meaning of the word 'ballot' they did not choose to extend the definition given as far back as 1950, it may be safely presumed that the Parliament intended to use the word 'ballot' in its popular rather than a technical sense. Our view finds a good deal of support from the circumstance that even though the system of voting by mechanical process was submitted to the Government for approval yet the same was declined which shows that the rule-making authority was not prepared to switch over to the system of voting by machines perhaps on account of the legal bar as indicated by us.**

34. **It is rather unfortunate that the Union of India which is a party to this case, has taken a very neutral stand by neither supporting nor opposing the direction given by the Commission.**

35. **Having regard to these circumstances, therefore, we are clearly of the opinion that according to the law as it stands at present, the Order of the Commission directing casting of ballot by machines in some of the polling stations, as indicated above, was without jurisdiction and could not have been resorted to.**

36. **It was further pointed out by the respondent that the process of voting by machines is very useful as it eliminates a number of drawbacks and expedites, to a great extent, the declaration of the result of the election by eliminating the process of counting of votes from the ballot boxes. On the oher hand, the appellant has pointed out a number of defects, some of them being of a vital nature, which would defeat the electoral process. We would now indicate some of the apparent defects which were pointed out to us by the counsel for the appellant after giving a demonstration of the voting machine before us:**

“The absence of a provision for identifying the candidate for whom a void vote has been cast—

(a) by impersonating a dead voter,

(b) by impersonating an absentee voter,

(c) by the genuine voter who tenders a vote after a vote has been cast in his name by an impersonator (R.42),

(d) where a vote is void having been cast after closing time (R.43),

(e) where the voter has cast votes in more than one booth in the same constituency (S. 62 (2)).

(f) where the voter has cast two votes in two constituencies (S. 63 (3)),

(g) where the voter is disqualified under Section 16 of the Act (Section 62 (4)),

(h) where an elector marks a ballot paper wrongly for a candidate, he loses the right to get a fresh ballot paper for casting his vote correctly (R. 41).

The provisions of Section 100 (1) (d) and more so Section 101 (a) and (b) under which by excluding the void votes or votes cast as a result of corrupt practices any other candidate can be declared duly elected as the true representative of the constituency."

37. **On the other hand, a number of advantages which could be obtained by using the mechanical process were pointed out by the respondent, the sum and substance of which was that despite some defects the electoral process would be expeditious and would cut out a number of delays or mistakes committed at various stages. The fact, however, remains that if the mechanical process is adopted, full and proper training will have to be given to the voters which will take quite some time. 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. For these reasons, it is not necessary for us to go into the very detailed notes of arguments submitted by the parties in respect of this aspect of the matter.**

38. **Lastly, it was argued by the counsel for the respondents that the appellant would be estopped from challenging the mechanical process because he did not oppose the introduction of this process although he was present in the meeting personally or through his agent. This argument is wholly untenable because when we are considering a constitutional or statutory provision there can be no estoppel against a statute and whether or not the appellant agreed or participated in the meeting which was held before introduction of the voting machines, if such a process is not permissible or authorised by law he cannot be estopped from challenging the same.**

39. **For the reasons given above, we allow the appeal, set aside the election of the respondent with respect to the 50 polling stations where the voting machines were used and we direct a repoll to be held in these 50 polling stations. We, however, do not touch or disturb the results of the votes secured in the other 34 polling stations which was done in accordance with law, viz., the use of ballot papers. After the repoll, the result of the election would be announced afresh after taking into account the votes already secured by the candidates, including the Respondent. We make no order as to costs.**

40. **In course of argument, Mr. Sen for the Commission informed us that at eleven elections held under the Act, the mechanical device was used and in nine, no challenge has been raised. It follows that our judgment will not affect those nine elections in any manner.**

Appeal allowed

SUPREME COURT OF INDIA*

Civil Appeal No.2182 (NCE) of 1984$
(Decision dated 25.4.1984)

Election Commission of India .. ***Appellant***

Vs.

State of Haryana .. ***Respondent***

SUMMARY OF THE CASE

The Election Commission decided to hold a bye-election to the Haryana Legislative Assembly from Taoru Assembly Constituency in 1984. It decided to issue the notification calling the bye-election on 18th April, 1984. The State of Haryana, however, wrote to the Commission that the law and order situation in the constituency was not conducive to the holding of free and fair election and wanted the bye-election to be postponed. The Commission did not agree with the assessment of the State Government as to the law and order situation in the constituency and went ahead with its planned schedule of calling the bye-election on 18th April, 1984. The State Government approached the Punjab and Haryana High Court on 17th April, 1984 and obtained an ex-parte order from the High Court staying issuance and publication of the Commission's notification on 18th April, 1984.

Aggrieved by the order of the Punjab and Haryana High Court, the Election Commission approached the Supreme Court on 18th April 1984. The Supreme Court, appreciating the urgency of the matter, heard the Commission's appeal in the afternoon of 18th April, 1984 and suspended the operation of the High Court's state Order. Subsequently, the Supreme Court heard the matter at length on several days and ultimately by a majority judgment (4:1) struck down the High Court's Order, holding that the High Court was not justified in substituting its own opinion for that of an authority (Election Commission) duly appointed for specific purpose by the law and the Constitution. The apex Court also held that though the State Government was in the best position to assess the law and order situation in the State, the ultimate decision as to whether it was possible and expedient to hold the election at any given point of time must rest with the Election Commission.

(A) Constitution of India, Arts. 226 and 324 — Ex parte order — Bye-election to Legislative Assembly seat — Election Commission fixing date and proposing to issue notification — State Government challenging order before H.C. — Grant of ex parte order staying issue of notification is illegal. Order dated 17-4-1984 (Punj and Har), Reversed. ((i) Ex parte order — Legality; (ii) Election — Notification — Stay of Ex parte order).

The widely prevalent practice of parties obtaining ex parte order has to be disapproved when they can give prior intimation of the proposed proceedings to the opposite side, without much inconvenience or prejudice. When the public authorities do so, it is all the more open to disapprobation. In the instant case, the parties have taken a tooth for a tooth. The Government of Haryana obtained an ex parte order from the High Court when it could easily have given prior intimation of the intended proceedings to the Election Commission of India. The latter is constitutionally identifiable, conveniently accessible and easily available for being contacted on the most modern systems of communication. The Election Commission of India, too, rushed to the Supreme Court without informing the Government of Haryana that it proposes to challenge the order of the High Court and to ask for stay of that order. The Government of Haryana is also identifiable and accessible with the same amount of ease. Order dated 17-4-1984 (Punj & Har), Reversed.

(Para 6)

(B) Constitution of India, Arts. 226 and 324 — Representation of the People Act (43 of 1951), Ss. 30, 56 and 150 — Proposed bye-election to Legislative Assembly seat in State — Issue of notification — Controversy over position of law and order in State between State Govt. and Election Commission — Stay of issue of notification by High Court is illegal. Order dated 17-4-1984 (Punj & Har), Reversed, (Election — Postponement).

(Per Majority M.P. Thakkar, J. Contra):

The difference between the Government of Haryana and the Chief Election Commission centres round the question as to whether the position of law and order in the State of Haryana is such as to make it inexpedient or undesirable to hold the proposed by-election at this point of time. The Government of Haryana is undoubtedly in the best position to assess the situation of law and order in areas within its jurisdiction and under its control. But the ultimate decision as to whether it is possible and expedient to hold the elections at any given point of time must rest with the Election Commission. Arbitrariness and mala fides destroy the validity and efficacy of all orders passed by public authorities. It is therefore necessary that on an issue like the present, which concerns a situation of law and order, the Election Commission must consider the views of the State Government and all other concerned bodies or authorities before coming to the conclusion that there is no objection to the holding of the elections at this point of time.

(Para 8)

In the instant case the correspondence between the Chief Secretary of Haryana and the Chief Election Commissioner shows that the latter had taken all the relevant facts and circumstances into account while taking the decision to hold the by-election to a Constituency in accordance with the proposed programme. The situation of law and order in Punjab and, to some extent, in Haryana is a fact so notorious that it would be naive to hold that the Election Commission is not aware of it. There is no doubt that the Election Commission came to its decision after bearing in mind the pros and cons of the whole situation. It had the data before it. It cannot be assumed that it turned a blind eye to it. In these circumstances, it was not in the power of the High Court to decide wheather the law and order situation in the State of Punjab and Haryana is such as not to warrant or permit the holding of the

by-election. Order dated 17-4-1984 (Punj & Har), Reversed; (1982) 2 SCC 218, Rel. on.

(Para 7)

It would be open to the Chief Election Commissioner to review his decision as to the expediency of holding the poll on the notified date. In fact, not only would it be open to him to reconsider his decision to hold the poll as notified, it is plainly his duty and obligation to keep the situation under constant scrutiny so as to adjust the decision to the realities of the situation. All the facts and circumstances, past and present, which bear upon the question of the advisability of holding the poll on the notified date have to be taken into account and kept under vigil. That is a continuing process which can only cease after the poll is held. Until then, the Election Commission has the locus, for good reasons, to alter its decisions. AIR 1974 SC 1218, Rel. on.

(Para 9)

Further, the circumstance that the High Court has the knowledge of a fact will not justify the substitution by it of its own opinion for that of an authority duly appointed for a specific purpose by the law and the Constitution. Different people hold different views on public issues, which are often widely divergent. Even the Judges. A Judge is entitled to his views on public issues but he cannot project his personal views on the decision of a question like the situation of law and order in a particular area at a particular period of time and hold that the Election Commission is in error in its appraisal of that situation.

(Para 10)

Cases Referred:	Chronological Paras
(1982) 2 SCC 218: 1982 UJ (SC) 371	**7,8,14,15**
AIR 1974 SC 1218 : (1974) 3 SCR 738	**9**

JUDGMENT

Present:- Chandrachud, C.J., V.D. Tulzapurkar, R.S. Pathak, D.P. Madan and M.P. Thakkar, JJ.*

CHANDRACHUD, C. J. (for himself and on behalf of V.P. TULZAPURKAR, R.S. PATHAK AND D.P. MADON, JJ.):— **We had passed an interim order on April 18, suspending the operation of the order passed by the High Court of Punjab & Haryana, on April 17, 1984. The High Court, by its aforesaid order, had stayed the issuance and publication of the notification by the Election Commission of India under Ss. 30, 56 and 150 of the Representation of the People Act, 1951. We had directed that the special leave petition should be listed before us the next day for considering whether the interim order should be confirmed.**

2. **On February 28. 1984, this Court gave a judgment in Civil Appeal No. 5501 of 1983, setting aside the election of the returned candidate from the 59-Taoru Assembly Constituency in Haryana. As a result of that judgment, a vacancy arose in the Legislative Assembly of the State of Haryana from that Constituency. On April 6, 1984, the Election Commission of India sent a message to the Chief Secretary, Haryana, who is the Chief Electoral Officer for the State of Haryana, informing him**

that the Commission had fixed a certain programme for holding the by-election to the Taoru Constituency. According to that programme, the notification under S.150 of the Representation of the People Act, 1951, was to be issued on April 18. 1984, the last date for filing nominations is April 25, 1984, while the date of poll is May 20, 1984. The Election Commission fixed an indentical programme for filling 23 other vacancies in the legislative assemblies of Andhra Pradesh, Karnataka and West Bengal.

3. **On April 7, 1984, the Election Commission received a telex message from the Chief Secretary, Government of Haryana, conveying the request of the Haryana Government that the proposed by-election should be held along with the general elections to the Lok Sabha, which are due later this year. On April 11, 1984, the Chief Secretary wrote a letter to the Chief Election Commissioner renewing the aforesaid request for two reasons:**

(1) The next general election to the Haryana Vidhan Sabha is due in May, 1987 and since the Taoru vacancy had occurred recently on February 28, 1984, there was no immediate necessity to fill it; and

(2) deferring the by-election would save time, labour and expense.

On April 12, 1984, the Election Commission informed the Chief Electoral Officers by a telex message that it had decided to adhere to the programme of by-elections to 24 vacancies in their respective jurisdictions. The telex message mentioned specifically that the Commission had taken into consideration the replies received by it from various State Govts. and their Chief Electoral Officers on the question of holding the elections as proposed. On the same date i.e. April 12, 1984, copies of notifications to be published on April 18, 1984 in the Haryana Gazette were sent to the Chief Electoral Officer of Haryana. By a separate communication of the same date, the Commission informed all the political parties about the programme fixed by it for holding the by-elections. A press note was also issued to the same effect on the same date.

4. **The Chief Secretary, Haryana, met the Chief Election Commissioner on April 14 and explained to him personally why it was neither advisable nor possible to hold the by-election to the Taoru seat as proposed by the latter. On April 16, the Chief Secretary wrote a letter to the Chief Election Commissioner reiterating the view of his Government. He added in that letter that it would not be possible to hold the election during the proposed period because, the neighbouring State of Punjab was going through a serious problem of law and order, that there was a dispute regarding territorial adjustment and division of waters between the State of Haryana and the Akali Party in Punjab, that the said dispute was used by the Akali Party for stepping up terrorist activities, that the terrorists had attacked persons occupying high public offices, that there was a serious threat to the lives of many important persons in Haryana, that public meetings had been banned by the District Magistrate under Section 144 of the Criminal Procedure Code and that the situation in the State was such that it would not be possible to hold public meetings for election purposes for a few months. On April 17, the Chief Election Commissioner replied to the Chief Secretary's letter of April 16 by saying that the Commission had taken the decision to hold the by-election after taking into consideration all factors, that it was not clear how the Constituency of Taoru in Gurgaon, which is about 35 kilometers from Delhi, and which is quite far away from Punjab would have any fallout of the Punjab situation and that the political parties**

who were duly informed of the proposed election programme had not opposed the holding of the by-election at this point of time. On the same date that the Chief Election Commissioner wrote the aforesaid letter, the Government of Haryana filed a writ petition in the High Court of Punjab and Haryana and obtained an exparte order, which is impugned in this special leave petition.

5. **We passed the interim order on April 18 after hearing a fairly long and exhaustive argument from Shri Siddhartha Shankar Ray who appeared on behalf of the appellant, the Election Commission of India, and the learned Additional Solicitor General who appeared on behalf of the respondent, the State of Haryana. We heard further arguments of the parties on the 19th, Shri Asoke Sen appearing for the respondent. Since the matter raises questions of general public importance, we grant special leave to appeal to the petitioner.**

6. **We often express our disapproval of the widely prevalent practice of parties obtaining ex parte orders when they can give prior intimation of the proposed proceedings to the opposite side, without much inconvenience or prejudice. When the public authorities do so, it is all the more open to disapprobation. But here, the parties have taken a tooth for a tooth. The Government of Haryana obtained an ex parte order from the High Court when it could easily have given prior intimation of the intended proceedings to the Election Commission of India. The latter is constitutionally identifiable, conveniently accessible and easily available for being contacted on the most modern systems of communication. The Election Commission of India, too, rushed to this Court on the 18th without informing the Government of Haryana that it proposes to challenge the order of the High Court and to ask for stay of that order. The Government of Haryana is also identifiable and accessible with the same amount of ease. We do hope that the smaller litigants will not form the belief that the bigger ones can get away with such lapses. Were it not for the fact that this matter brooked no delay, we would have hestitated to pass any interim order without the appellant giving prior intimation of its proposed action to the respondent.**

7. **As stated earlier, notifications setting the election process in motion were to be issued on April 18. One day before that, the State Government approached the High Court in a hurry, asking it to stay the election process, which the High Court has done. This Court held in the West Bengal Poll case, A.K.M. Hassan Uzzaman v. Union of India, (1982) 2 SCC 218, that the imminence of the electoral process is an important factor which must guide and govern the passing of orders in the exercise of the High Court's writ jurisdiction and that, the more imminent such process, the greater ought to be the reluctance of the High Court to take any step which will result in the postponement of the elections. We regret to find that far from showing any reluctance to interfere with the programme of the proposed election, the High court has only too readily passed the interim order which would have had the effect of postponing the election indefinitely. Considering that the election process was just round the corner, the High Court ought not to have interfered with it. The non-speaking order passed by it affords no assistance on the question whether there were exceptional circumstances to justify that order.**

8. **The fact that the election process was imminent is only one reason for our saying that the High Court should have refused its assistance in the matter. The other reason for the view which we are taking is provided by the very nature of the controversy which is involved herein. The difference between the Government of**

Haryana and the Chief Election Commission centres round the question as to whether the position of law and order in the State of Haryana is such as to make it inexpedient or undesirable to hold the proposed by-election at this point of time. The Government of Haryana is undoubtedly in the best position to assess the situation of law and order in areas within its jurisdiction and under its control. But the ultimate decision as to whether it is possible and expedient to hold the elections at any given point of time must rest with the Election Commission. It is not suggested that the Election Commission can exercise its discretion in an arbitrary or mala fide manner. Arbitrariness and mala fides destroy the validity and efficacy of all orders passed by public authorities. It is therefore necessary that on an issue like the present, which concerns a situation of law and order, the Election Commission must consider the views of the State Government and all other concerned bodies or authorities before coming to the conclusion that there is no objection to the holding of the elections at this point of time. On this aspect of the matter, the correspondence between the Chief Secretary of Haryana and the Chief Election Commissioner shows that the latter had taken all the relevant facts and circumstances into account while taking the decision to hold the by-election to the Taoru Constituency in accordance with the proposed programme. The situation of law and order in Punjab and, to some extent, in Haryana is a fact so notorious that it would be naive to hold that the Election Commission is not aware of it. Apart from the means to the knowledge of the situation of law and order in Punjab and Haryana, which the Election Commission would have, the Chief Secretary of Haryana had personally apprised the Chief Election Commissioner as to why the State Government was of the view that the elections should be postponed until the Parliamentary elections. We see no doubt that the Election Commission came to its decision after bearing in mind the pros and cons of the whole situation. It had the data before it. It cannot be assumed that it turned a blind eye to it. In these circumstances, it was not in the power of the High Court to decide whether the law and order situation in the State of Punjab and Haryana is such as not to warrant or permit the holding of the by-election. It is precisely in a situation like this that the ratio of the West Bengal Poll case (1982) 2 SCC 218 would apply in its full rigor.

9. **We must add that it would be open to the Chief Election Commissioner, as held in Mohd. Yunus Saleem v. Shiv Kumar Shastri, (1974) 3 SCR 738, 743-744 : (AIR 1974 SC 1218 at pp. 1221-1222) to review his decision as to the expediency of holding the poll on the notified date. In fact, not only would it be open to him to reconsider his decision to hold the poll as notified, it is plainly his duty and obligation to keep the situation under constant scrutiny so as to adjust the decision to the realities of the situation. All the facts and circumstances past and present, which bear upon the question of the advisability of holding the poll on the notified date have to be taken into account and kept under vigil. That is a continuing process which can only cease after the poll is held. Until then, the Election Commission has the locus, for good reasons, to alter its decision. The law and order situation in the State, or in any part of it, or in a neighbouring State, is a consideration of vital importance for deciding the question of expediency or possibility of holding an election at any particular point of time. We are confident that the Chief Election Commissioner, who is vested with important duties and obligations by the Constitution, will discharge those duties and obligations with a high sense of responsibility, worthy of the high office which he holds. If he considers it necessary, he should hold further discussions with the Chief Electoral Officer of Haryana and**

consult, once again, leaders of the various political parties on the question whether it is feasible to hold the poll on the due date. On an important issue such as the holding of an election, which is of great and immediate concern to the entire political community, there can be no question of any public official standing on prestige, an apprehension which was faintly projected in the State's arguments. A sense of realism, objectivity and non-alignment must inform the decision of the Election Commission on that issue.

10. **It was urged that the High Court of Punjab and Haryana would have a fair and clear understanding of the happenings in Punjab and their repercussions in Haryana, which would justify its interference with the decision of the Election Commission to hold the by-election now. The first part of this argument need not be disputed and may even be accepted as correct. Indeed, every citizen of this country who has some degree of political awareness, would have a fair idea of the situation in Punjab and its impact on the even flow of life in the neighbouring State of Haryana. But the second part of the argument is untenable. The circumstance that the High Court has the knowledge of a fact will not justify the substitution by it of its own opinion for that of an authority duly appointed for a specific purpose by the law and the Constitution. Different people hold different views on public issues, which are often widely divergent. Even the Judges. A Judge is entitled to his views on public issues but the question is whether he can project his personal views on the decision of a question like the situation of law and order in a particular area at a particular period of time and hold that the Election Commission is in error in its appraisal of that situation. We suppose not.**

11. **For these reasons, we confirm the interim order which was passed by us on April 18, allow this appeal and set aside the High Court's order of April 17. Unless otherwise directed by the Chief Election Commissioner, the election programme will have to go through as already notified.**

12. **There will be no order as to costs.**

THAKKAR, J. (Minority view):—13. **Holding of a by-election to fill even a single vacancy at the earliest date is an extremely desirable end in a democratic framework. Even so if such circumstances exist, and a reasonable prognosis can be bona fide made, that holding the by-election for filling up that vacancy, is fraught with grave danger, not only to the lives of election officers, candidates as also political leaders addressing election meetings, as also of voters, and poses a grave danger which altogether outweighs the advantage of holding the election along with the by-elections in other States, should the matter not engage very serious attention of the Election Commission? Not even when it is shown that having regard to the sensitive and explosive situation it was likely to worsen a situation which was already worse? More so when all that was to be gained by holding the by-election as proposed was to be able to hold it along with other by-elections on the same day as in other States which had by itself no significance or virtue. And if the Election Commission without due deliberation summarily turns down the request to defer the election programme for that by-election even by a few days in such circumstances, can the High Court be faulted for passing an ad interim order, which has the result of postponding the election, not for an indefinite period, but for a few days till the parties are heard? Is the order passed by the High court in such circumstances so gross that instead of allowing the High court to confirm it or vacate it, upon the other side showing cause, this Court should invoke the**

jurisdiction under Article 136 of the Constitution of India to set it aside? More particularly when the consequence would be no more serious than this, namely, that the by-election cannot be held (there is no virtue in doing so) on the same day along with other by-elections.

14. **That the High Court has the power to issue a direction or order which has the effect of postponing an election if the situation so demands would appear to be the law declared by a five-judge Constitution Bench presided over by the learned Chief Justice who presides over this Bench as well. In A.K.M. Hassan Uzzaman v. Union of India and Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman, (1982) 2 SCC 218 the conclusions are recorded in the operative order dated March 30, 1982, reading as under:**

"1. The transferred case and the appeals connected with it raise important questions which require a careful and dispassionate consideration. The hearing of these matters was concluded four days ago, on Friday, the 26th. Since the judgment will take some time to prepare, we propose, by this Order, to state our conclusions on some of the points involved in controversy:

(1) The High Court acted within its jurisdiction in entertaining the writ petition and in issuing a rule nisi upon it, since the petition questioned the vires of the laws of election. But, with respect, it was not justified in passing the interim orders dated February 12 and 19, 1982 and in confirming those orders by its judgment dated February 25, 1982. Firstly, the High Court had no material before it to warrant the passing of those orders. The allegations in the writ petition are of a vague and general nature, on the basis of which no relief could be granted. Secondly, though the High Court did not lack the jurisdiction to entertain the writ petition and to issue appropriate directions therein, no High Court in the exercise of its powers under Article 226 of the Constitution should pass any orders, interim or otherwise, which has the tendency or effect of postponing an election, which is reasonably imminent and in relation to which its writ jurisdiction is invoked. The imminence of the electoral process is a factor which must guide and govern the passing of orders in the exercise of the High Court's writ jurisdiction. The more imminent such process, the greater ought to be the reluctance of the High Court to do anything, or direct anything to be done, which will postpone that process indefinitely by creating a situation in which, the Government of a State cannot be carried on in accordance with the provisions of the Constitution. India is an oasis of democracy, a fact of contemporary history which demands the Courts the use of wise statesmanship in the exercise of their extraordinary powers under the Constitution. The High Courts must observe a self-imposed limitation on their power to act under Article 226, by refusing to pass orders or give directions which will inevitably result in an indefinite postponement of elections to legislative bodies, which are the very essence of the democratic foundation and functioning of our Constitution. That limitation ought to be observed irrespective of the fact whether the preparation and publication of electoral rolls are a part of the process of 'election' within the meaning of Article 329 (b) of the Constitution. We will pronounce upon that question later in our judgment.

(2) **x** **x** **x**

(3) **x** **x** **x**

2. For these reasons and those which we will give in our judgment later, we dismiss the writ petition filed in the Calcutta High Court which was transferred for disposal to this Court. All orders, including interim orders, passed by the Calcutta High Court are hereby set aside. Civil Appeals 739 to 742 of 1982 will stand disposed of in the light of the dismissal of the writ petition, out of which they arise.

3. x x x

4. x x x"

Does Hassan's case enjoin that no such interim order can ever be passed by the High Court?

15. **The relevant extract from the conclusion recorded in Hassan's case has been reproduced hereinabove. Of course, the exact parameters of the decision and the true ratio cannot be known till the judgment containing reasons is born. As on today no one can predict what exactly will be decided by the Court in Hassan's case when the judgment eventually comes to be pronounced (who can make a guess about the colour or shade of the eyes of a child which is yet to be born?) But it can be reasonably said that the following extract (1982) 2 SCC 218 (219):**

"The imminence of the electoral process is a factor which must guide and govern the passing of orders in the exercise of the High Court's writ jurisdiction. The more imminent such process, the greater ought to be the reluctance of the High Court to do anything, or direct anything to be done, which will postpone that process indefinitely by creating a situation in which, the Government of a State cannot be carried on in accordance with the provisions of the Constitution."

Warrants the view that Hassan's case does not enjoin that an interim order of such a nature can never be passed in any situation. If that were not so, the Court would not have said (1) that imminence of electoral process is a factor which must guide and govern the passing of orders (meaning thereby that while such orders can be passed this factor must be accorded due consideration) and (2) that "more imminent such process, the greater ought to be the reluctance of the High Court to do anything or direct anything to be done which will postpone the process indefinitely" (which means it must be done only with reluctance when elections are imminent). The aforesaid statement of law made in the context of "general elections" does not warrant the view that Hassan's case enjoins that an election programme cannot be postponed even for a few days even in the case of a by-election, whatever be the situation, and whatever be the circumstances, in which the High Court is called upon to exercise its jurisdiction. It is therefore not unreasonable to proceed on the premise that even according to Hassan's case the court has the power to issue an interim order which has the effect of postponing an election but it must be exercised sparingly (with reluctance) particularly when the result of the order would be to postpone the installation of a democratically elected popular government. The portion extracted from the operative order in Hassan's case brought into focus a short while ago which adverts to "imminence of elections" and to "directions which will inevitably result in indefinite postponement of elections to legislative bodies which are the very essence of the democratic functions of our Constitution" leaves no room for doubt that the observations were being made in the context of the expiry of the term of legislature as envisioned by Article 172 of the Constitution of India and consequential general elections for such

legislature. This must be so because the legislature would stand dissolved on the expiry of the term, and a new legislature has to be elected. It is in this context (presumably) that a reference is made to "imminence of elections". For a by-election like the one we are concerned with, there can be no question of "imminence" or "indefinite postponement of elections" which would stall the installation of a democratically elected government. It is no body's case that the party position was such that the result of the election to this vacant seat would have tilted the majority one way or other. No oblique motive has even been hinted at. The High Court was therefore not unjustified in proceeding on the assumption that it had such a power.

Does the ad interim order passed by the High Court merit being upturned in exercise of the jurisdiction under Article 136 of the Constitution of India?

16. **The only question which arise is whether the present was a case where the High Court could not have granted the ad interim order. Be it realized that if the High court had not granted the order and the Election Commission had not chosen to appear on or before April 18, 1984 the High Court would have perhaps become powerless to pass any order, whatever be the justification for it, as the "electoral-process" would have actually commenced. Can the High court then be faulted for passing the impugned order faced as it was by an unprecedented situation like the present? On the one hand, the Election Commission appeared to have been altogether oblivious to the dimension as regards the bonafide apprehension pertaining to the life and security of the National leaders who might address public meetings, the candidates, the officers engaged in election work, and the voters. The danger was further aggravated in the face of open threats held out to the lives of the National leaders of different political parties. What is more, the Election Commission has shown total unawareness of the circumstance that public meetings were prohibited under Section 144 of the Code of Criminal Procedure in the constituency going to the polls. On the other hand the only consequence of granting a stay would have been to postpone the election programme by a few days in the event of the Election Commission not choosing to appear in the Court (to show cause why the ad interim order should not be made absolute) on or before April 18, 1984 which was the scheduled date for issuance of the notification announcing the election programme. The Election Commission could have appeared before the High Court and got the stay vacated in time instead of approaching this Court by way of the present appeal by Special Leave. The Election Commission could not have failed to realise that no serious consequence would have flowed from the impugened order even if stay was vacated, not immediately, but a few days later, for, it was only a by-election to one single seat of no significance which would not have resulted in postponement of the installation of an elected government. Worse come to worse, the by election could not have been held along with by-elections in other States on the 'same' day. The Election Commission has not been able to show what possible detriment would have been suffered if the by-election could not have been so held on that particular day. If the High Court was prima facie satisfied that the Election Commission had failed to take into account vital matters and appeared to have acted on non-consequential considerations, and had acted arbitrarily in turning down the request of the State Government as also the Chief Electoral Officer of Haryana, why could the High Court not grant a stay? And should this Court interfere in such a fact-situation? Learned Counsel for the Election Commission, though repeatedly requested, is unable to point out either from the**

affidavit filed on 18th, or from the additional affidavit filed on the 19th, that the aforesaid factors were taken into reckoning by the Commission. It is not stated that these factors do not exist or have been invented by the State Government with any oblique motive. The contents of the affidavit filed by the Election Commission reveal that it was altogether oblivious to all the relevant factors recounted earlier. There is nothing to show that a single factor was present on its mental screen. The Election Commission has not apprised the Court as to how and why any or all of these factors were considered to be immaterial. No inkling is given as to how the Election Commission thought that the problems could be overcome. By what process of self-hypnotism did the Election Commission convince itself that free and fair elections could be held even when public meetings were banned in the constituency? How, and by what process of ratiocination did the Election Commission convince itself that free elections could be held in a situation where the candidates would consider it hazardous to contest or to indulge in election propaganda, and even voters would be afraid to vote? If the Election Commission had any idea as to how the hurdles could be crossed and problem resolved, it has chosen not to reveal its perception of the matter. The Election Commission perhaps has good answers. But the silence is the only answer which has been given by the Commission as also its counsel on this aspect. "I know my job and it is none of the business of the Courts" seems to be the attitude. All that has been stated by the learned counsel for the Commission is that every thing was considered (without even disclosing the content of the expression 'everything'). Counsel has of course set up an alibi by saying that affidavits had to be prepared by burning mid-night oil. But in that case the concentration would have been on everything of importance and what was the essence of the matter could not have been overlooked or forgotten. And if it has escaped attention, the conclusion is inevitable that the Election Commission had not attached due importance and weightage to the basic problem and had not applied itself seriously to a serious problem.

17. **The fact is established that the Chief Secretary and the Chief Election Officer of Haryana, had personally apprised the Chief Election Commissioner of the prevailing situation sometime before 14th April, 1984. The Election Commission has not even disclosed this fact in the petition or in the additional affidavit. Nor has the Election Commission apprised us as to what transpired at the meeting. The Election Commission has been less than candid even to this Court. No doubt the Chief Election Commissioner is holding a responsible post. But that does not make him infallible or render his decision or act any the less arbitrary if he has failed to inform himself of all the relevant factors and has failed to direct his attention to the core problem. It is no doubt true that theoretically the Election Commission can still postpone the polling, if it is so minded. But should the Court remain a passive spectator in this extraordinary situation and leave the Nation to the mercy of an individual, however high be his office, when it is evident that he has secluded himself in his ivory tower and has shut his eyes to the realities of the situation and closed his mind to the prognosis of the matter. The Court can certainly satisfy itself whether the Election Commissioner had kept his eyes, ears and mind open, and whether he was able to show that all relevant factors including the consideration as to what advantage was to be secured as against the risk to be faced, entered into his reckoning. If this is not shown to have been done, as in the present case, his decision**

is vitiated and the Court need not feel helpless. The High Court was therefore fully justified in passing the impugned order. Appeal is accordingly dismissed.

Appeal allowed

SUPREME COURT OF INDIA*

Civil Appeal Nos. 652 and 653 (NCE) of 1985
(Decision dated 1.3.1985)

Samarath Lal ***.. Appellant***

Vs.

The Chief Election Commissioner and Others ***.. Respondents***

and

Chief Electoral Officer ***.. Appellant***

Vs.

Khem Raj and Others ***.. Respondents***

SUMMARY OF THE CASE

At the general election to the Rajasthan Legislative Assembly in 1985, Shri Samarath Lal was allotted the symbol 'Lotus' in one of the Assembly Constituencies ,on the basis that he was the official candidate Bharatiya Janata Party. A writ petition was filed before the Rajasthan High Court by one of the rival candidates, claiming that he, and not Shri Samarath Lal, was the official of the candidate of Bharatiya Janata Party. The High Court accepted the contention of the petitioner and directed that the symbol 'Lotus' be allotted to him.

Aggrieved by the order of the High Court, Shri Samarath Lal filed the present appeal before the Supreme Court. The Supreme Court allowed the appeal and set aside High Courts's Order, holding that the High Court had no jurisdiction to interfere in the matter in view of Article 329 (b) of the Constitution.

ALLOTMENT OF SYMBOL—Symbol "Lotus"—Allegation of allotment to a wrong candidate of Bharatia Janata Party—Stay Order by High Court on operation of order of allotment—Bar on Interference by Court—Constitution of India—Article 329(b).

On a writ petition filed by an aggrieved candidate, the Division Bench of the High Court of Rajasthan, stayed the operation of the allotment of reserve symbol "Lotus" to a candidate held by the Election Commission as the official candidae of the Bharatiya Janata Party.

JUDGMENT

Present:- D.A. Desai and A.N. Sen JJ.

On appeal, the Supreme Court reversed the order of the High Court vacatig the stay and HELD—

That Order (of the High Court) runs in the face of the text of the Constitution (See Article 329-B) and the view expressed by this Court in at least three cases, too well-known to cite, namely, the West Bengal Poll Case, the Haryana Poll Case and the Assam Elections Case.The Election Commission having alloted the symbol of "Lotus" to be appellant Samarath Lal on the basis that he is the official candidate of the Bharatiya Janata Party, the Division Bench could not have interfered with that order by staying its operation. We wish that the learned Judges had realised the enormous inconvenience, expense and confusion which their order is calculated to produce. The elections are only a couple of days away and we understand, the ballot papers showing "Lotus" as the symbol of the appellant and the "Bicycle" as the symbol of the contending respondent No. 4 have been already printed. Respondent 4 has to be content with the "bicycle". The Lotus belongs to the appellant.

CIVIL APPEAL NOS. 652 AND 653 (NCE) OF 1985

ORDER

Special leave Granted.

Having considered the relevant facts of the case to which our attention has been drawn by learned council for both the sides and the Attorney General, we find it impossible to uphold the order dated February 27th, 1985 passed by the Division Bench of the High Court. That Order runs in the face of the Court of the Constitution (Sec. Article 329b) and the view expressed by this Court in at least three cases, too well known to cite, namely the West Bengal Poll case, the Haryana Poll case and the Assam elections case. The Election Commission having allotted the symbol of 'Lotus' to the appellant Samarath Lal on the basis that he is the official candidate of the Bharatiya Janata Party, the Division Bench could not have interfered with that order by staying its operation. We wish that the learned Judges had realised the enormous inconvenience, expense and confusion which their order is calculated to produce. The elections are only a couple of days away and, we understand, the ballot papers showing 'Lotus as the symbol of the appellant and the 'Bicycle' as the symbol of the contending respondent No. 4 have been already printed.

Respondent 4 has to be content with the bicycle. The Lotus belongs to the appellant.

Accordingly, we set aside the judgement and the interim order of the Division Bench of the High Court dated February 27th, 1985 and contends the order of the learned Single Judge of the High Court dated february 21st, 1985. The Writ Petition filed in the High Court by respondent 4 stands dismissed.

The appeal will stand disposed of in terms of this order. There will be no order as to costs.

Appeal upheld.

SUPREME COURT OF INDIA*

Civil Appeal Nos. 739 to 741 and 742 of 1982 and Transferred Case No. 3 of 1982$
(Decision dated 8.5.1985)

Lakshmi Charan Sen and Others .. ***Appellants***

Vs.

A.K.M. Hassan Uzzaman and Others .. ***Respondents***

And

Election Commission and Others ..***Appellants***

Vs.

A.K.M. Hassan Uzzaman and Others .. ***Respondents***

With

A.K.M. Hassan Uzzaman and Others .. ***Appellants***

Vs.

Union of India and Others .. ***Respondents***

SUMMARY OF THE CASE

On the eve of the general election to the West Bengal Legislative Assembly in 1982, a writ petition was filed before the Calcutta High Court that the electoral rolls in the State of West Bengal had not been properly revised for the purposes of the said general election and that the rolls should be revised afresh before the general election. A learned single Judge of the Calcutta High Court gave some interim orders on the 12th and 19th February, 1982, which were confirmed by him on 25th February, 1982. By those orders, the learned single Judge directed that the instructions issued by the Election Commission should not be implemented by the Chief Electoral Officer and others, that the revision of electoral rolls be undertaken de novo, and that no notification be issued under Section 15 (2) of the Representation of the People Act, 1951 calling the general election to the West Bengal Legislative Assembly, until the rolls were duly revised. Against these interim orders, certain appeals were filed by the Election Commission and others and the

writ petition before the High court was transferred by the Supreme Court to it for disposal.

The Supreme Court, by a majority decision (4:1), allowed the appeals and dismissed the writ petition before the Calcutta High Court. In this landmark judgment, the Supreme Court held that the right to be included in the electoral roll or to challenge the inclusion of any name in the roll is a statutory right conferred on an individual and not upon any political party. The Supreme Court also held that the directions of the Election Commission are binding on the Chief Electoral Officers, even though they may not be treated as if they are law. But the violation of any such direction does not create any right in any individual to challenge the election.

The Supreme Court further held that the High Courts should not pass any orders under Article 226 of the Constitution which would tend to postpone elections indefinitely. The Court observed that more imminent an electoral process, the greater ought to be the reluctance of the High Court to do anything or direct anything to be done which will postpone that process indefinitely and create a situation in which the Government of a State cannot be carried on in accordance with the provisions of the Constitution. The High Courts must observe a self-imposed limitation on their powers to act under Article 226 by refusing to pass orders or give directions which will inevitably result in indefinite postponement of elections to Legislative bodies.

(A) Registration of Electors Rules (1960), R. 20 – Right to be included in electoral roll or to challenge includion of any name in the roll – It is a right conferred on individual and not on political party–(Consititution of India, Art. 226)

The right to be included in the electoral roll or to challenge the inclusion of any name in the roll is a right conferred upon an individual and not upon any political party. It must be emphasized that Election laws do not recognize polictical parties except in rule 11(c) of the Registration of Electors Rules, 1960, the Election Symbols (Reservation and Allotment Order, 1968, and Explanation 1 to section 77(1) of the Act of 1951.

(Para 15)

(B) Representation of the People Act (43 of 1950), Ss. 21 and 23 — Registration of Electors Rules (1960), Rr. 20 and 23 — Election — Claims for inclusion of names and objections relating to inclusion of certain names, in electoral rolls, not disposed of — Election not vitiated thereby — It has to be held on basis of electoral roll in force on last date for making nominations.

Per Majority (Baharul Islam, J. contra) —

The fact that certain claims for inclusion of names in electoral rolls and objections relating to inclusion of certain names therein are not finally disposed of, even assuming that they are filed in accordacne with law, cannot arrest the process of election to the legislature. The election has to be held on the basis of the electoral roll which is in force on the last date for making nominations.

(Para 20)

The fact that the revision of electoral rolls, either intensive or summary, is undertaken by the Election Commission does not have the effect of putting the electoral roll last published in cold storage. The revision of electoral rolls is a continuous process which has to go on, elections or no elections. Various provisions contained in S.21 indicate that if an electoral roll is not revised, its validity and

continued operation remain unaffected, at least in a class of cases. That exemplifies an important principle which applies in the case of electoral rolls Section 21(3) of the Act of 1950 confers upon the Election commission the power to direct a special revision of the electoral roll. The proviso to that sub-section also says that until the completion of the special revision so directed, the electoral roll for the time being in force shall continue to be in force. That proves the point that Election laws abhor a vacuum. Insofar as the electoral rolls are concerned, there is never a moment in the life of a political community when some electoral roll or the other is not in force. Section 23(3) of the said Act also points in the same direction. It is not suggested that claims and objections filed in the prescribed form should not be decided promptly and in accordance with law. But, the important point which must be borne in mind is that whether or not a revision of an electoral roll is undertaken and, if undertaken whether or not it is completed, the electoral roll for the time being in force must held the field. Elections cannot be postponed for the reason that certain claims and objections have still remained to be disposed of. According to sub-rule(3) of rule 23 of the Registration of Electors Rules, 1960, the "presentation of an appeal under this rule shall not have the effect of staying or postponing any action to be taken by the Registration Officer under rule 22". Rule 22 imposes upon the Registration Officer the obligation to publish the electoral roll which, together with the list of amendments, becomes the electoral roll of the constituency. Thus, the fact that an appeal is pending under rule 23(1) against the decision of a Registration Officer under Rule 20, 21 or 21A does not constitute an impediment to the publication of the roll and to the roll, upon such publication, coming into force. Rule 20 provides for inquiry into claims and objections: Rule 21 provides for inclusion of names which are left out of the roll owing to inadvertence or error; while, Rule 21A provides for the deletion of names of dead persons and of persons who cease to be, or are not, ordinary residents of the particular constituency. Notwithstanding the fact that the roll contains these errors and they have remained to be corrected, or that the appeals in respect thereof are still pending, the Registration Officer is under an obligation to publish the roll by virtue of Rule 22.

(Paras 16 to 19)

(C) Representation of the People Act (43 of 1950), S. 146 — Directions of Election Commission to Chief Electoral Officers — Not law — Violation thereof — Election is not rendered invalid.

The directions issued by the Election Commission, though binding upon the Chief Electoral Officers, cannot be treated as if they are law, the violation of which could result in the invalidation of the election, either generally, or specifically in the case of as individual.

(Para 21)

There is no provision in either the Act of 1950 or the Act of 1951 which would justify the proposition that the directions given by the Election Commission have the force of law. Election Laws are self-contained codes. One must look to them for identfying the rights and obligations of the parties, whether they are private citizens or public officials. Therefore, in the absence of a provision to that effect, it would not be correct to equate with law, the directions given by the Election Commission to the Chief Electoral Officers. The Election Commission is, of course, entitled to act ex debito justitiae, in the sense that, it can take steps or direct that steps be taken over and above those which it is under an obligation to take under the law. It is,

therefore, entitled to issue directions to the Chief Electoral Officers. Such directions are binding upon the latter but, their violation cannot create rights and obligations unknown to the Election Law. To take a simple example, if the Election Commission issues a directive to a Chief Electoral Officer to invite leaders of political parties for a meetting to consider their grievances pertaining to the electoral roll, the failure to hold such a meeting cannot be equated with the failure to comply with the provision of a law. Leaders of political parties who were asked to be invited by the Election Commission cannot challenge the process of election on the ground that the directive issued by the Election Commission was violated by the Chief Electoral Officer. The question is not whether the directions issued by the Election Commission have to be carried out by the Chief Electoral Officers and are binding upon them. The plain answer is that such directions ought to be carried out. The question is whether, the failure on the part of the Chief Electoral Officer to comply with the directions issued by the Election Commission furnishes any cause of action to any other person, like a voter or a candidate, to complain of it.

(Para 21)

(D) Constitution of India, Art. 226 — Petition to challenge electoral rolls — High Court should not pass interim orders which would tend to postpone election to State Assembly indefinitely which were imminent. (i) Registration of Electors Rules (1960), R.20 — (ii) Representation of the People Act (43 of 1950), S. 21).

(Para 24)

(E) Representation of the People Act (43 of 1950), S. 21 — Registration of Electors Rules (1960), R. 20 — Political parties filing claims and objections under R. 20 — Leaders of parties should be given notices. (Per Baharul Islam, J.)

(Para 37)

(F) Representation of the People Act (43 of 1950), S. 21 — Preparation of electoral rolls — Enumerators should not be persons affiliated to any political party directly or indirectly, (Per Baharul Islam, J.)

(Para 38)

(G) Constitution of India, Art, 226 — Mandamus — Inclusion and exclusion of names in electoral rolls challenged — Affected persons not named — Concerned electoral registration officers not make parties — Mandamus cannot be issued. (Per Baharul Islam, J.)

(Para 39)

Cases Referred :	Chronological Paras
AIR 1978 SC 851 : (1978) 2 SCR 272	**25**
AIR 1971 SC 1348 : (1970) 3 SCC 147	**25**
AIR 1952 SC 64 : 1952 SCR 218	**24, 25, 26**

For the Appearing Parties:–

JUDGMENT

Present:- Chandrachud. C.J., D.A. Desai, A.P. Sen, E.S. Venkataramiah and Baharul Islam. JJ.**

M/s. K.K. Venugopal, S.N. Kacher, N.N. Gupta, Soli, J. Sorabjee, Somnath Chatterjee, R.K. Garg, F.S. Nariman, A.K. Sen, S.S. Ray, B.N. Sen, B.P. Banerji, Sr. Advocates and M/s Pranab Chatterjee, Miss Radha Rangaswamy, N.K. Chakravarthy, B.V Desai, M. Majumdar, Kapil Sibal, Ashok Ganguly, L.K. Gupta,

U.N. Banerjee, Parijat Sinha, P.R. Setharaman, Ajit Panja, Mrs. Mithu Chakravarthi, Advocates with them. Mr. M.C. Bhandare, Sr. Advocate and Mrs. S. Bhandare, Mr. A.K. Karkhanis, Miss C.K. Sucharita and T. Sridharan, Advocates with him Mr. P.R. Mridul, Sr. Advocate and Mr. Vineet Kumar, Advocate with him.

For the Respondents :—

Union of India in all matters Mr. L.N. Sinha, Att. General, Mr. K. Parasaran, Sol. Genl. Mr. M.K. Banerjee, Addl. Sol. General, K.S. Gurumurthy and Miss A Subhashini, Advocates with them.

For the Interveners:

P.H. Parekh and R.N. Karanjawal, Advocates.

For Bar Council of India:—

Miss Rani Jethamalani. For H.N. Bahuguna, President, Democratic Society Party, R.C. Kaushik, Advocate.

CHANDRACHUD, C.J. (On behalf of himself and Desai, A.P. Sen and Venkataramiah, jj.) (Majority view):—

There are four appeals and a Transferred Case before us. The appeals arise out of interim orders passed by a learned single judge of the Calcutta High Court on February 12 and 19, 1982 which were confirmed by him on February 25, 1982. Those orders were passed in a Writ Petition filed under Article 226 of the Constitution asking for the writs of mandamus and certiorari, directing that the instructions issued by the Election Commission should not be implemented by the Chief Electoral Officer and others; that the revision of electoral rolls be undertaken de nova; that claims, objections and appeals in regard to the electoral roll be heard and disposed of in accordance with the rules; and that, no notification be issued under S. 15(2) of the Representation of the People Act, 1951 calling for election to the West Bengal Legislative Assembly, until the rolls were duly revised.

2. **Transferred Case No. 3 of 1982 is that very writ petition. It was withdrawn for hearing and final disposal to this Court by an order dated March 4, 1982. That writ petition was filed by eight persons against the Union of India, the Election Commission, the Chief Election Commissioner and the Chief Electoral officer, West Bengal. The writ petitioners, who succeeded in obtaining interim orders from the High Court are in the array of respondents in the four appeals. Three out of those appeals are filed by persons who contend that the High Court ought not to have interfered with the election process which was imminent. The fourth appeal, No. 742 of 1982, is filed by the Election Commission of India, the Chief Election Commissioner and the Chief Electoral Officer, West Bengal. Their contention is that the High Court had no juurisdiction to entertain the writ petition by reason of Art. 329(b) of the Constitution, that the election proces which had already begun should not have been interfered with by the High Court and that the recommendation made to the Governor of West Bengal by the Election Commission under section 15(2) of the Act 1951 was being thwarted by 'frivolous and baseless' objections raised by the writ petitioners.**

3. **The writ petitioners are enrolled as voters in the electoral roll of the West Bengal Legislative Assembly. The validity of several provisions of the Representation of the People Act, 1950, the Representation of the People Act, 1951, the Registration of Electors Rules, 1960, and the Conduct of Election Rules, 1961 was challenged in the writ petition but, it is unnecessary to spend any time over that matter since, the validity of none of those provisions was questioned before us. Shorn of that challenge, it is doubtful whether the High Court would have passed the impugned orders. Be that as it may, what is to be noted is that the points which are raised for our consideration do not involve the validity of any law and are restricted to illegalities and irregularities alleged to have been committed by the Chief Electoral Officer, West Bengal and by the officers subordinate to him in regard to the preparation of the electoral rolls which would be used for the purposes of election to the West Bengal Legislative Assembly.**

4. **The Chief Electoral Officer, by a Circular dated March 12, 1981, asked all the District Officers and the Sub-Divisional Officers under him to make a de novo intensive revision of the electoral rolls for the general election to the Legislative Assembly. West Bengal, without reference to the then existing electoral rolls. The grievance of the writ petitioners is that the guidelines of instructions issued by the Chief Electoral Officer were not only not adhered to by the subordinate officers but were blatantly violated in certain cases. It is alleged, for example, that the exact extent of the polling areas was not demarcated clearly, no house to house visits were made and, the names of the members of each household who had attained the age of 21 years on the prescribed date were not recorded in several cases. According to them, the guidelines issued by the Chief Electoral Officer for a de novo intensive revision of the electoral rolls are vague, unreasonable and arbitrary, as a result of which, it would not be possible to hold free and fair elections on the basis of those rolls.**

5. **By a Memorandum dated May 12, 1981, which was after the work of the intensive revision of the electoral rolls had begun, the Election Commission of India informed the Chief Electoral Officers of all the States and the Union Territories that its attention was drawn to certain irregularieties in the matter of revision of electoral rolls and that in many cases, lists pertaining to certain polling booths were found to be defective. For example, the polling areas covered by the polling booths were not clearly demarcated, the polling booths were not compact, care was not taken to ensure that voters belonging to weaker sections or minority communities would be able to reach the polling booths and that the Commission's instructions that polling booths should be set up in colonies inhabited by Harijans and other weaker sections of the society, even though the number of voters may be less than 500, were not carried out appropriately. According to the petitioners, the instructions issued by the Election Commission were not carried out in the State of West Bengal. They also contend that the instructions issued by the Chief Election Commissioner in the Circular dated May 12, 1981 were at variance with the instructions issued by the Chief Eelctoral Officer, West Bengal on March 12, 1981, thereby making it difficult for the Electoral Officers to carry out their duly appointed duties. The petitioners have then referred in the writ petition to radiograms dated June 21 and July 4, 1981 issued by the Election Commission. It is contended that the directions issued in those radiograms are arbitrary and illegal for various reasons.**

5A. **The further grievance made by the petitioners in the writ petition is that the preparation of electoral rolls on the basis of polling stations was made arbitrarily and improperly in that, the total number of voters in several constituencies, after the house to house enumeration, differed in material particulars from the total number of voters in the Draft Electoral Roll which was published in the month of September 1981. It is alleged that the Draft Electoral Rolls were manipulated by including therein not only Bangladesh Nationals but minors, dead persons and refugees from Assam who were still living in refugee camps. According to the petitioners, these infirmities in the electoral rolls were of such a basic and inherent character that unless a further de novo revision of the electoral rolls was undertaken, it would be unfair to allow the elections to be held on the basis of the revised electoral rolls. The revision work of the electoral rolls which was undertaken in West Bengal could not possibly be finished within the time prescribed since, so the petitioners say, the State was passing through a difficult period, particularly in the matter of law and order and because of natural calamities. The infirmities in the revised electoral rolls which are pointed out by the petitioners may be summed up as the inclusion of teenagers and aliens therein, exclusion of persons who are qualified to be enrolled as voters, the incorporation of fictitious entries and mistakes and distortions in names and surnames. One of the grievances of the petitioners is that these manipulations in the electoral rolls became possible because of the deliberate infltration of the CPI (M) members of the Government staff in the election machinery. It is alleged that complaints relating to individual cases were sent to the Election Commission but no attention was paid to them.**

6. **According to he petitioners, the scheme of the Election law and the rules framed thereunder is so designed that unless all the objections are decided by the appellate authority and the Registration Officer and the electoral rolls are correspondingly amended, especially when a de novo revision of the electoral rolls is directed to be made, it is impermissible to issue a notification under S. 15(2) of the Act of 1951.**

7. **Yet another grievance of the petitioners is that nearly 8 lakhs complaints were filed in regard to the voters lists but no notice was issued to the concerned persons while deciding those complaints. In a few cases where notices were sent, not enough time was given to the complainants to appear before the concerned authorities to make their contentions. Indeed the petitioners so contend the claim of the Election Commission that it had already looked into most of the complaints was, on the face of it, exaggerated. Nearly 8 lakhs complaints are alleged to have been filed by the Indian National Congress by way of a sample survey which related to 100 out of 294 constituencies in the State of West Bengal.**

8. **The petitioners wind up the writ petition by asserting that the ban imposed by Article 329 of the Constitution cannot prevent them from filing the writ petition under Art, 226 since they were not challenging the 'commencement of polling'. Their challenge was to the constitutionality of the law relating to elections and the arbitrary actions on the part of the Election Commission. The writ petition contains exactly 100 grounds on the basis of which the holding of the impending elections to the West Bengal Legislative Assembly was challenged. The Election Commission had declared on February 9, 1982 in a Press Conference that the final voters lists would be published on March 1, 1982 and that the elections may be held at any time between April and June 24, 1982.**

9. **We have set out the case of the petitioners at some length because their writ petition was withdrawn for disposal by this Court. The merits of the petition are being considered for the first time here, which makes it necessary to know the state of pleadings and the nature of the relief claimed in the petition.**

10. **By their writ petition, the petitioners ask for the following reliefs: (i) That the Chief Election Commissioner and the Chief Electoral Officer be restrained from acting, either by themselves or through their subordinates, in pursuance of the instructions or directions issued by them from time to time: (ii) that they should be restrained from scoring out any names from the electoral rolls which were finally published; (iii) that they should be restrained from issuing or publishing any notification under S. 15(2) of the Act of 1951 without preparing the electoral rolls de novo, after the disposal of the appeals against orders whereby claims and objections were decided and (iv) that they should be restrained from holding elections to the West Bengal Legislative Assembly until the disposal of all the claims, objections and appeals under the Acts of 1950 and 1951.**

11. **On February 12, 1982, the learned single Judge of the Calcutta High Court issued a rule on the writ petition and granted ad interim relief to the petitioners as prayed for by them. The writ petition was directed to be listed on February 19, 1982 when, after some arguments, the matter was adjourned to February 25. Some time later, four special leave petitions were filed in this Court against the ad interim order passed by the learned Judge. On February 23, 1982 certain directions were issued in one of these special leave petitions by a Bench consisting of three of us, namely, D.A. Desai J., A.P. Sen J. and Baharul Islam J. It was directed that, since the High Court was seized of the writ petition and in view of the comity amonst judicial functionaries, it was better that the High Court completed the hearing by February 25, 1982. The order proceeded to say: "It is reuested that the writ petition shall be placed on the Board of the learned Judge on Wednesday, 24th February, 1982 and shall be heard and hearing completed and order pronounced before the expiry of Thursday, 25th February, 1982..... The learned Judge should proceed to hear the matter without considering any direction about production of the documents by the Election Commission or by any parties as that part of the order is stayed at the instance of Election Commission. The parties are precluded from making any requests for adjuournment."**

12. **The writ petition was called out for hearing before the learned Judge on February 25, when he directed the respondents to the writ petition to take certain steps before the issuance of the notification under S. 15(2) of the Act of 1951. In effect, he confirmed the ad interim order passed on February 12, 1982.**

13. **We will deal with the legal contentions presently but, before doing so, we would like to demonstrate that the grievance made by the petitioners agaisnt the Election Commission, the Chief Electoral Officer and their subordinates is wholly imaginary and unjustified. We were taken through the counter-affidavits filed by Shri Narayanan Krishnamurthi, Chief Electoral Officer, West Bengal, and Shri K. Ganesan, Secretary to the Election Commission, in answer to the writ petition. The facts stated therein, which are beyond the pale of controversy, afford a complete answer to the petitioners' contentions. The following position emerges from the affidavit filed by the Chief Electoral Officer:**

Steps taken with regard to the intensive de novo revision of electoral rolls in 1981 under section 21 of the Representation of the People Act, 1950 read with Rule 25 or the Registration of Electors Rules, 1960 and Rules 4 to 23 of the said Rules.

(1) The general elections to the Lok Sabha were held in early 1980. The electoral rolls in the State of West Bengal for all the 294 assembly constituencies were revised intensively in 1979, along with the revision of rolls in all other States and Union Territories, for the purpose of holding that election.

(2) After the said general election to the Lok Sabha, and the general elections to certain State Assemblies which were held in June 1980, the electoral rolls were revisd summarily by way of special revision throughout the country, under the new scheme of preparation of electoral rolls polling-stationwise, thereby making every part of the electoral roll compact for a well-defined polling area and making them as far as possible conterminous with the polling stations which then existed. After the said special revision of the electoral rolls,the same were finally published by 31st December 1980.

(3) As the general election to the Legislative Assemblies of the States of Haryana, Himachal Pradesh and West Bengal were due in 1982, the Election Commission of India directed that the rolls in the aforesaid three States for all the constituencies should be intensively revised with reference to the qualifying date, which was to be January 1, 1981.

(4) The Commission directed that the widest possible publicity should be given to the programme of revision of rolls through mass media and that a meeting with the representatives of State units of recognised political parties should be held to apprise them of the revision schedule and to seek their active co-operation.

(5) The following programme, as modified later, was approved by the Election Comission for the intensive revision of electoral rolls in the State of West Bengal:

(a) For 274 assembly constituencies, house to house enumeration was to be completed by June 30, 1981 and for the rest of the 20 constituencies by August 31, 1981. Draft publication of printed electoral rolls for 274 assembly constituencies was to be made on 7.9.1981 and for the remaining 20 constituencies on 22.10.1981.

(b) The period for lodging claims and objections was fixed between 7.9.1981 and 28.9.1981 in respect of 274 assembly constituencies and between 22.10.1981 and 12.11.1981 in respect of the remaining 20 constituencies.

(c) Final publication of the electoral rolls after disposal of claims and objections was to be made on 31.12.1981.

(6) The Chief Electoral Officer, according to the instructions of the Election Commission, issued orders to the Electoral Registration Officers of 21 assembly constituencies in Calcutta where house to house enumeration was first taken up, that 2 copies of the electoral rolls as finally published should be supplied by December 31, 1980 to recognised political parties for the purpose of intensive revision. Similar directions were issued to the officers of the remaining constituencies for the supply of 2 copies of the electoral rolls, where the house to house enumeration was taken up later.

(7) Press releases and advertisements in all dailies of West Bengal were issued on the question of intensive revision of electoral rolls in respect of 21 constituencies in

Calcutta, seeking co-operation from all citizens and political parties, with special reference to house to house enumeration. In June 1981, similar advertisements were issued in the dailies of West Bengal regarding the intensive revision of electoral rolls in respect of other constituencies.

(8) Communications were sent between January and July 1981 by the Chief Electoral Officer to all political parties regarding the intensive revision of electoral rolls in respect of the assembly constituencies in Calcutta, seeking their co-operation in the task of complete revision of the electoral rolls.

(9) After the Election Commission issued revised condensed instructions for the enumeration of electoral rolls in the State of West Bengal, the Chief Electoral Officer communicated those instructions to all the Electoral Registration Officers in the State, together with his own directions regarding the programme of enumeration, checking and supervision.

(10) On March 19, 1981, a press release was issued in all the dailies of West Bengal, giving the details of the programme of enumeration, of the publication of the rolls in draft, inviting claims for inclusion of names in the rolls and objections to the inclusion of names, if any, and also inviting objections to the particulars in respect of entries in the draft roll so published. The press release explained the procedure for filling up the enumeration cards.

(11) In terms of the instructions issued by the Election Commission on May 13, 1981, corresponding detailed instructions were issued by the C.E.O. to the District Election Officers and Electoral Registration Officers regarding the preparation and finalisation of the list of polling stations.

(12) On June 29, 1981 the Presidents and Secretaries of all political parties were informed by a communication that a meeting will be held at the Writers' Building in Calcutta on 8.7.1981 at 11.00 a.m. in regard to the de novo intensive revision of electoral rolls with 1.1.1981 as the qualifying date and requesting them to make it convenient to attend.

(13) On July 7, 1981 a press release and press advertisements were issued in all dailies of West Bengal regarding the programme of revision of electoral rolls and the preparation and finalisation of the list of polling stations.

(14) On July 8, 1981 a meeting with political parties was held under the chairmanship of the C.E.O. in which, representatives of different political parties participated. In that meeting, the programme and procedure governing the remaining stages of intensive revision were explained to the participants. They were requested to bring to the notice of the concerned Electoral Registration Officers the complaints and defects, if any, regarding the enumeration work and the electoral rolls that were scheduled for publication in a draft form in September-October 1981.

(15) On July 8, 1981, letters were addressed to the political parties by the C.E.O. regarding the programme of intensive revision and finalisation of polling stations. In those letters, it was specifically stated that "as this is a very gigantic exercise involving intensive field work and spot enquiry and careful and laborious office work, your co-operation is solicited to make this operation a success".

(16) In September and October 1981, printed draft electoral rolls were published in the offices of the Electoral Registration Officers and in the polling areas of each

constituency concerned for the convenience of the public so that they could inspect the rolls and file their claims and objections near their places of residence. Such draft electoral rolls were published on 7.9.1981 in respect of 274 Assembly constituencies and on 22.10.1981 in respect of the remaining 20 Assembly constituencies. The draft rolls were kept for public inspection for 21 days.

(17) On September 7, 1981 yet another press advertisement in all dailies of West Bengal was issued, not only reaffirming the draft publication of rolls regarding 274 Assembly constituencies on 7.9.1981, but also indicating the procedure for filing claims and objections under the law.

(18) On October 9, 1981 a communication was sent by the C.E.O. to all the political parties regarding draft publication of the electoral roll of the remaining 20 constituencies on 22.10.1981 indicating again the procedure for filing claims and objections.

(19) In early December 1981, Shri Ajit Kumar Panja of the Indian National Congress made a complaint regarding the non-inclusion and wrong inclusion of certain entries in the electoral roll of 158-Burtola Assembly constituency. A special check was made and remedial action taken in respect of 6000 entries before the finalisation of the intensively revised rolls of 31.12.1981. The Electoral Registration Officer, who is the Collector of Calcutta, made a report in that behalf, a copy of which is annexed to the counter-affidavit of Shri Krishnamurthi.

(20) The final publication of intensively revised electoral rolls which were prepared de novo during 1981, after a house to house enumeration in all the 294 Assebly constituencies, was made with printed supplements on 31.12.1981. This revision was made with reference to the qualifying date as 1.1.1981. With this, the process of intensive revision which was commenced on 1.1.1981 in the State of West Bengal was completed.

(21) The total number of claims received in the prescribed form No.6, and those admitted, and the total number of objections filed in the prescribed form No. 7, and those allowed, were as follows:

Total number of claims filed in Prescribed Form No. 6	**4,17,231**
Total number of claims admitted	**3,05,072**
Total number of objections filed in prescribed form No. 7	**1,09,865**
Total number of objections allowed	**65,430**

Steps with regard to summary revision of the electoral rolls undertaken in 1982 under section 21 of the Representation of the People Act, 1950 read with rule 25 and rules 9 to 23 of the Registration of Electors Rules, 1960 so as to bring the Electoral Rolls up-to-date i.e. with reference to the qualifying date as 1.1.1982.

(1) On December 9, 1981, the Election Commission directed the Chief Electoral Officers of all States and Union Territories (except Assam, Andhra Pradesh, Karnataka, Meghalaya, Nagaland and Tripura) to undertake summary revision of electoral rolls in 1982 with reference to 1.1.1982 as the qualifying date and chalked out a programme for the same.

(2) On December 14, 1981 the Commission wrote a letter to all political parties at their headquarters giving the details of the above programme for the summary revision of electoral rolls and soliciting their co-operation.

(3) A press release and an advertisement were issued in all the dailies of West Bengal on 23.12.1981 informing the public about the draft publication of the electoral rolls, in the course of summary revision of rolls in 1982. A copy of this release was also endorsed to all political parties on 23.12.1981.

(4) A circular letter was addressed to the General Secretaries and Presidents of all political parties in West Bengal by the C.E.O. giving details of the programme of summary revision of electoral rolls in 1982 and soliciting their co-operation. By this letter, politial parties were also informed that 2 copies of the supplements to the draft electoral rolls, being intensively revised then and, due for publication on 31.12.1981, would be supplied to each political party free of cost.

(5) The electoral rolls which were prepared de novo after house to house enumeration in 1981 and which were intensively revised in all the 294 assembly constituencies in the State were finally published with the supplements on December 31, 1981.

(6) On January 1, 1982 the finally published electoral rolls with the supplements were published in draft in the respective polling areas by all the Electoral Registration Officers for the purpose of summary revision undertaken in 1982. Claims and objections were specifically invited in the prescribed forms under the law.

(7) Due to the internal misunderstanding between Shri Ajit Kumar Panja and Shri Anand Gopal Mukherjee of the Indian National Congress, the authorities were unable for some little time to discover who, between those two, was entitled to receive copies of he electoral rolls. The rolls were supplied after the position was clarified.

(8) On January 4, 1982 an advertisement was issued in all dailies of West Bengal informing the public as to the exact contents of Forms 6, 7 and 8 of the Registration of Electors Rules, 1960 and also intimating to them that no fees will be required to be paid for submitting claims or objections in those forms.

(9) The draft rolls were kept for public inspection in the respective polling areas and in the offices of the Electoral Registration Officers concerned. Claims and objections were asked to be presented either to the officer designated for the purpose under the law or to the Electoral Registration Officer concerned.

(10) The following Table shows the position regarding the claims and objections made in the prescribed form and accepted:

(For table see below)

14. **These facts establish in an ample measure that the grievances made by the petitioners are unsupported by facts. It is significant that none of the petitioners has been denied a place in the electoral roll nor were the objections raised by any one of them dismissed. As we have stated earlier, none of the four persons who forwarded the omnibus complaints even filed an affidavit in support of those complaints.**

15. **Holding the elections to legislatures and holding them according to law are both matters of paramount importance. On the one hand is the individual's statutory right of franchise, on the other is the constitutional obligation imposed by Article 168 that "For every State there shall be a Legislature.....” We find it**

somewhat odd that in the instant case, individuals whose rights are alleged to have been violated have not come to the Court at all. Not one out of the eight lakhs. Persons who have come to the Court are members of a political party who claim to represent them. While we are on this question, it must be emphasized that Election Laws do not recognise political parties except in rule 11 (c) of the Registration of Electors Rules, 1960 , the Election Symbols (Reservation and Allotment) Order, 1968, and Explanation 1 to S. 77 (1) of the Act of 1951. The right to be included in the electoral roll or to challenge the inclusion of any name in the roll is a right conferred upon an individual and not upon any political party. The petitioners are espousing the cause of unnamed and undisclosed persons through a writ petition, which does not even claim to possess a representative capacity. The upshot of the petition filed by item is that some 3 crores of voters were being deprived of an opportunity to exercise their franchise in order that an investigation should be made as to whether the names of some 5 lakhs and odd persons should be included in or excluded from the electoral roll.

16. **The fundamental error from which the writ petition suffers is this. The fact that the revision of electoral roll, either intensive or summary, is undertaken by the Election Commission does not have the effect of putting the electoral roll last published in cold storage. The revision of electoral rolls is a continuous process which has to go on, elections or no elections. For example, the revision of electoral rolls has to be undertaken under S. 21 of the Act of 1950, whether or not an election is impending. Sub-section (1) of S. 21 provides that the "electoral roll of each constituency shall be prepared in the prescribed manner by reference to the qualifying date and shall come into force immediately upon its final publication in accordance with the rules made under this Act." Sub-section (2) of section 21 provides for the revision of the electoral roll prepared under sub-section (1). The proviso, which is important, says that if the electoral roll " is not revised as aforesaid", the validity or continued operation of the "said" electoral roll shall not be affected. The controversy whether the proviso governs clause (b) of section 21 (2) only or whether, it applies to clause (a) of that section also is futile, though it may be interesting from the point of view of a text-book writer on the 'Interpretation of Statutes'. The crux of the matter is that if an electoral roll is not revised, its validity and continued operation remain unaffected, at least in a class of cases. That exemplifies an important principle which applies in the case of electoral rolls.**

17. **Section 21 (3) of the Act of 1950 confers upon the Election Commission the power to direct a special revision of the electoral roll. The proviso to that sub-section also says that until the completion of the special revision so directed, the electoral roll for the time being in force shall continue to be in force. That proves the point that Election Laws abhor a vacuum. Insofar as the electoral rolls are concerned, there is never a moment in the life of a political community when some electoral roll or the other is not in force.**

18. **Section 23 (3) of the Act of 1950 also points in the same direction. Under that provision, no amendment, transposition or deletion of an entry can be made under section 22 and no direction for the inclusion of a name in the electoral roll of a constituency can be given, after the last date for making nomination for an election in the particular constituency. The election has to be held on the basis of the electoral roll which is in force on the last date for making nominations. If that were**

not so, the easiest expedient which could be resorted to for the purpose of postponing an election to the legislature would be to file complaints and objections, omnibus or otherwise, which would take days and months to decide. It is not suggested that claims and objections filed in the prescribed form should not be decided promptly and in accordance with law. But the important point which must be borne in mind is that whether or not a revision of an electoral roll is undertaken and, if undertaken, whether or not it is completed, the electoral roll for the time being in force must hold the field. Elections cannot be postponed for the reason that certain claims and objection have still remained to be disposed of. Then, claimants and objectors could even evade the acceptance not notices and thereby postpone indefinitely the decision thereon. The holding of elections to the legislatures, which is a constitutional mandate, cannot be made to depend upon the violation of interested parties.

19. **According to sub-rule (3) of rule 23 of the Registration of Electors Rules, 1960, the "presentation of an appeal under this rule shall not have the effect of staying or postponing any action to be taken by the Registration Officer under rule 22". Rule 22 imposes upon the Registration Officer the obligation to publish the electoral roll which, together with the list of amendments, becomes the electoral roll of the constituency. Thus, the fact that an appeal is pending under rule 23 (1) against the decision of a Registration Officer under rule 20, 21 or 21 A does not constitute an impediment to the publication of the roll and to the roll, upon such publication, coming into force Rule 20 provides for inquiry into claims and objections; rule 21 provides for inclusion of names which are left out of the roll owing to inadvertence or error; while, rule 21 A provides for the deletion of names of dead persons and of persons who cease to be, or are not, ordinary residents of the particular constituency. Notwithstanding the fact that the roll contains these errors and they have remained to be corrected, or that the appeals in respect thereof are still pending, the Registration Officer is under an obligation to publish the roll by virtue of rule 22.**

20. **As a result of this discussion, it must follow that the fact that certain claims and objections are not finally disposed of, even assuming that they are filed in accordance with law, cannot arrest the process of election to the legislature. The election has to be held on the basis of the electoral roll which is in force on the last date for making nominations.**

21. **One of the questions which was debated before us and to which we must now turn, is whether the directions given by the Election Commission to the Chief Electoral Officers have the force of law under the Acts of 1950 and 1951. There is no provision in either of these Acts which would justify the proposition that the directions given by the Election Commission have the force of law. Election Laws are self-contained Codes. One must look to them for identifying the rights and obligations of the parties, whether they are private citizens or public officials. Therefore, in the absence of a provision to that effect, it would not be correct to equate with law, the directions given by the Election Commission to the Chief Electoral Officers. The Election Commission is, of course, entitled to act ex debito justitiae, in the sense that, it can take steps or direct that steps be taken over and above those which it is under an obligation to take under the law. It is, therefore, entitled to issue directions to the Chief Electoral Officers. Such directions are**

binding upon the latter but, their violation cannot create rights and obligations unknown to the Election Law. To take a simple example, if the Election Commission issues a directive to a Chief Electoral Officer to invite leaders of political parties for a meeting to consider their grievances pertaining to the electoral roll, the failure to hold such a meeting cannot be equated with the failure to comply with the provision of a law. Leaders of political parties who were asked to be invited by the Election Commission cannot challenge the process of election on the ground that the directive issued by the Election Commission was violated by the Chief Electoral Officer. The question is not whether the directions issued by the Election Commission have to be carried out by the Chief Electoral Officers and are binding upon them. The plain answer is that such directions ought to be carried out. The question is whether, the failure on the part of the Chief Electoral Officer to comply with the directions issued by the Election Commission furnishes any cause of action to any other person, like a voter or a candidate, to complain of it. We are of the opinion that the directions issued by the Election Commission, though binding upon the Chief Electoral Officers, cannot be treated as if they are law, the violation of which could result in the invalidation of the election, either generally, or specifically in the case of an individual. In the instant case, the Chief Electoral Officer carried out faithfully the directions issued by the Election Commission. But, even if he had not, he could not be accused of disobeying a law.

22. **We have already adverted to the various steps taken by the Election Commission and the Chief Electoral Officer for removing the apprehensions of the petitioners and a few others. The following narration of events will complete that picture. The facts stated below appear in the counter-affidavit of the Chief Electoral Officer, Shri N. Krishnamurthi.**

Steps taken by the Chief Electoral Officer, in the exercise of his suo motu powers under rules 21 and 21 A of the Registration of Electors Rule, 1960 with regard to inquiries into omnibus complaints.

1. In late December 1981 and early January 1982, Shri Bhola Nath Sen and Shri Ajit Kumar Panja of the Indian National Congress wrote letters to the Election Commission complaining of rigging of electoral rolls. Replies were sent to them stating specifically that, under the law, claims and objections were required to be lodged before the Electoral Registration Officers who were statutorily charged with the duty of deciding those claims and objections. They were further informed that if any Electoral Registration Officer failed to deal with those claims and objections in accordance with law, complaints could be lodged with the Election Commission and the C.E.O. in order to enable them to investigate into them. They were also assured that, in the meantime, the lists forwarded by them were being looked into Similar replies were sent to other complainants.

2. Shri Anand Gopal Mukherjee, President of the Pradesh Committee of the Indian National Congress, West Bengal, Shri Bhola Nath Sen, Leader of the Legislature Party of the Indian National Congress, West Bengal, Shri Priya Ranjan Das Munshi, Shri Sougat Roy and Shri Pradip Bhattacharya met the Chief Election Commissioner and brought to his notice that the rolls in West Bengal had been manipulated to a large extent by inclusion of under-aged persons, dead persons and temporary residents. They were requested to examine the rolls as finally published

on December 31, 1981. It is significant that none of these persons has filed any affidavit in the present proceedings in support of their complaint.

3. In reply to a letter dated January 7, 1982 from Shri A.K. Sen, the Commission advised him also that the Electoral Registration Officers were constituted as authorities to prepare and bring the rolls up to date and, therefore, all claims and objections should be filed with them.

4. On January 15, 1982 Shri A.K. Panja made several complaints to the Chief Election Commissioner and alleged, particularly, that the electoral machinery of the State was influenced by the Co-ordination Committee of CPI (M). it is noteworthy that none of the omnibus complaints made by Shri Panja bore the signature of any person, though the printed form contains a column for the signature of the complainant.

5. The omnibus complaints made by Shri Panja and by Dr. Gopal Das Nag wre referred to the concerned Electoral Registration Officers, even though they were not in the prescribed form. The District Election Officers submitted detailed reports to the C.E.O. controverting the allegations with the help of facts and figures.

6. The authorised representatives of the Indian National Congress in the various constituencies were given copies of the intensively revised electoral rolls.

7. Between January 22 and January 25, 1982 radiogram messages were sent by the C.E.O. to the Electoral Registration Officers stating that they could use their suo motu powers even on the basis of unsigned complaints, if the complaints appeared to be genuine.

8. On January 22, 1982 the Election Commission of India decided to send a Team of its Officers to West Bengal to look into the complaints regarding large scale errors and omissions in the electoral rolls. On January 28, the Commission's Team of Officers went to Calcutta for the purpose of making a sample survey of the work done in the matter of revision of electoral rolls.

9. In order to facilitate a proper inquiry into the omnibus complaints, the date of official publication of the electoral roll was postponed with the approval of the Election Commission of India.

10. Radiogram messages were sent on January 28 and 29, 1982 to the District Election Officers and the Electoral Registration Officers, explaining the procedure which they should adopt under rules 21 and 21 A of the 1960 Rules, for correcting the electoral rolls.

11. These messages were sent in pursuance of the specific request made by Shri Anand Gopal Mukherjee and Shri Abdul Sattar to the Secretary of the Election Commission on February 2, 1982. They had also asked that notices of hearing of cases under rules 21 and 21 A of the 1960 Rules on the basis of the omnibus complaints should be served on the local representatives of the parties. Notices were delayed in certain cases, as in case of Shri A.K. Panja who had given his address at Calcutta, without mentioning the name and address of his local representative.

12. The Team of Officers deputed by the Election Commission visited various places in Calcutta and conducted an on-the-spot verification of complaints on a

selective basis. It examined documents, reports and the electoral rolls and it met various leaders of the Indian National Congress. On a careful inquiry, it found that the allegations made by them were not borne out by the facts.

13. On the basis of the report submitted by the Team of Officers deputed by the Election Commission, it was decided on February 9, 1982 that no case was made out for undertaking a further de novo revision of the electoral rolls, especially since the percentage of errors was far too small.

14. The work of investigation into the omnibus complaints was intercepted as a result of the ad interim injunction granted by the Calcutta High Court on February 12, 1982. It was only after the orders passed by this Court on March 4, 1982 that further investigation into the omnibus complaints could be undertaken.

22A. **We need no greater proof than this of two things : one, that the Chief Electoral Officer, West Bengal, carried out the directions of the Election Commission as, indeed, he was bound to; and two, that there is no substance in the grievance of the petitioners in regard to the preparation or revision of the electoral roll.**

23. **It is unnecessary to refer to the counteraffidavit of Shri K. Ganesan, Secretary to the Election Commission of India since counsel for the petitioners, particularly Shri A.K. Sen, stated before us that there was no complaint to make against the Election Commission.**

24. **The only question which remains outstanding is whether the preparation and publication of electoral rolls are a part of the process of 'election' within the meaning of Art. 329 (b) of the Constitution. That Article provides :**

"Bar to interference by courts in electoral matters. - Notwithstanding anything in this Constitution.

(a) xxx xxx xxx

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question 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."

On the conclusion of arguments in this case, we had passed an order on March 30, 1982 by which we had indicated that we will pronounce upon the question abovestated later in our judgment. In the light of the conclusion recorded by us that the petitioners have not made out any case for the grant of relief claimed by them, it is unnecessary for us to decide the question whether the expression 'election' which occurs in Article 329 (b), comprehends the preparation and publication of electoral rolls. Besides, as indicated by us in the order dated March 30, 1982, the view which we took was that though the High Court was justified in entertaining the writ petition and issuing a rule therein since, the writ petition apparently contained a challenge to several provisions of Election Laws, it was not justified in passing any order which would have the effect of postponing the elections which were then imminent. Even assuming, therefore, that the preparation and publication of electoral rolls are not a part of the process of 'election' within the meaning of Article 329 (b), we must reiterate our view that the high Court ought not to have

passed the impugned interim orders, whereby it not only assumed control over the election process, but as a result of which the election to the Legislative Assembly stood the risk of being postponed indefinitely. The order dated March 30, 1982 which we will presently reproduce, contains our reasons in support of this conclusion. Very often, the exercise of jurisdiction, especially the writ jurisdiction, involves questions of propriety rather than of power. The fact that the Court has the power to do a certain thing does not mean that it must exercise that power regardless of the consequences. As observed by a Constitution Bench of this Court in N.P. Ponnuswami v. Returning Officer, Namakkal Constituency, 1952 SCR 218 : (AIR 1952 SC 64) :

"Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted." (p. 234) : (at p. 70 of AIR).

25. **On the question as to the connotation of the word 'election' in Article 329 (b), we may point out three decisions of this Court, one of which is N.P. Ponnuswami (AIR 1952 SC 64) referred to above, the other two being Pampakavi Rayappa Belagali v. B.D. Jatti, (1970) 3 SCC 147: (AIR 1971 SC 1348) and Mohinder Singh Gill v. Chief Election Commr., New Delhi, (1978) 2 SCR 272 : (AIR 1978 SC 851). It was held in Ponnuswami (AIR 1952 SC 64) that the word 'election' is used in Art. 329 (b) in the wide sense of covering the entire process culminating in the election of the candidate. Fazal Ali J., who spoke for the Court in that case, has referred to a passage in Halsbury's Laws of England to the following effect :**

"It is a question of fact in each case when an election begins in such a way as to make the parties concerned responsible for breaches of election law, the test being whether the contest is "reasonably imminent". Neither the issue of the writ nor the publication of the notice of election can be looked to as fixing the date when an election begins from this point of view. Nor, again, does the nomination day afford any criterion." (p. 227) : (at p. 68 of AIR)

In Pampakavi Rayappa Belagali (AIR 1971 SC 1348), it was held that the scheme of the Act of 1950 and the amplitude of its provisions show that the entries made in an electoral roll of a constituency can only be challenged in accordance with the machinery provided by the Act and not in any other manner or before any other forum unless, some question of violation of the provisions of the Constitution is involved (p. 150). In Mohinder Singh Gill (AIR 1978 SC 851), Krishna Iyer J., speaking for the Constitution Bench, has considered at great length the scope and meaning of Art. 329 (b) of the Constitution. Describing that Article as the "Great Wall of China", the learned Judge posed the question whether it is so impregnable that it cannot be bypassed even by Article 226. Observing that "every step from start to finish of the total process constitutes 'election', not merely the conclusion or culmination", the judgment concludes thus :-

"The rainbow of operations, covered by the compendious expression 'election', thus commences from the initial notification and culminates in the declaration of the return of a candidate."

26. **We have expressed the view that preparation and revision of electoral rolls is a continuous process, not connected with any particular election. It may be difficult, consistently with that view, to hold that preparation and revision of electoral roll is a part of the 'election' within the meaning of Article 329 (b), Perhaps, as stated in Halsbury in the passage extracted in Ponnuswami (AIR 1952 SC 64), the facts of each individual case may have to be considered for determining the question whether any particular stage can be said to be a part of the election process in that case. In that event, it would be difficult to formulate a proposition which will apply to all cases alike.**

27. **The delay in pronouncing this judgment is to be regretted. A large number of factors have contributed to it but, no more about them.**

28. **The order dated March 30,1982 passed by us, reads thus :**

"The Transferred Cases and the Appeals connected with it raise important questions which require a careful and dispassionate consideration. The hearing of these matters was concluded four days ago, on Friday, the 26th. Since the judgment will take some time to prepare, we propose, by this order, to state our conclusions on some of the points involved in the controversy :

(1) The High Court acted within its jurisdiction in entertaining the Writ Petition and in issuing a Rule Nisi upon it, since the petition questioned the vires of the laws of election. But with respect, it was not justified in passing the interim orders dated February 12, and 19, 1982 and in confirming those orders by its judgment dated February 25, 1982. Firstly, the High Court had no material before it to warrant the passing of those orders. The allegations in the Writ Petition are of a vague and general nature, on the basis of which no relief could be granted. Secondly, though the High Court did not lack the jurisdiction to entertain the Writ Petition and to issue appropriate directions therein, no High Court in the exercise of its powers under article 226 of the Constitution should pass any orders, interim or otherwise, which has the tendency or effect of postponing an election, which is reasonably imminent and in relation to which its writ jurisdiction is invoked. The imminence of the electoral process is a factor which must guide and govern the passing of orders in the exercise of the High Court's writ jurisdiction. The more imminent such process, the greater ought to be the reluctance of the High Court to do anything, or direct anything to be done, which will postpone that process indefinitely by creating a situation in which, the Government of a State cannot be carried on in accordance with the provisions of the Constitution. India is an oasis of democracy, a fact of contemporary history which demands of the Courts the use of wise statesmanship in the exercise of their extraordinary powers under the Constitution. The High Courts must observe a self-imposed limitation on their power to act under Article 226, by refusing to pass orders or give directions which will inevitably result in an indefinite postponement of elections to legislative bodies, which are the very essence of the democratic foundation and functioning of our Constitution. That limitation ought to be observed irrespective of the fact whether the preparation and publication of electoral rolls are a part of the process of 'election' within the meaning of article 329 (b) of the Constitution. We will pronounce upon that question later, in our judgment.

(2) We are unable to accept the argument advanced on behalf to the petitioners that the Election Commission, or the Chief Electoral Officer or the Electoral Registration Officers have in any manner acted in violation of the Constitution, the Representation of the People Act of 1950 and 1951, or the Registration of Electors Rules, 1960. The Election Commission issued the various directives ex debito judtitiae, as steps-in-aid of a fair election. They are being observed faithfully and honestly, and shall be so observed until the deadline mentioned in section 23 (3) of the Act of 1950. The manner in which the directives are being implemented cannot be regarded as unreasonable in the circumstances of the case.

It takes years to build up public confidence in the functioning of constitutional institutions , and a single court hearing, perhaps, to sully their image by casting aspersions upon them. It is the duty of the courts to protect and preserve the integrity of all constitutional institutions, which a devised to foster democracy. And when the method of their functioning is questioned, which it is open to the citizen to do, courts must examine the allegations with more than ordinary care. The presumption, be it remembered, is always of the existence of bona fides in the discharge of constitutional and statutory functions. Until that presumption is displaced, it is not just or proper to act on pre-conceived notions and to prevent public authorities from discharging functions which are clothed upon them. We hope and trust that the charges levelled by the petitioners against the Election Commission, the Chief Electoral Officer and the Electoral Registration Officers will not generate a feeling in the minds of the public that the elections held hitherto in our country over the past thirty years under the superintendence, direction and control of successive Election Commissions have been a pretence and a facade. The public ought not to carry any such impression and the voters must go to the ballot-box undeterred by the sense of frustration which the petitioners' charges are likely to create in their minds. We see no substance in the accusation that the voters' lists have been rigged by the election authorities with the help of enumerators belonging to any particular political party. Enumerators are mostly drawn from amongst teachers and Government servants and it is difficult to imagine that thirty-five years after independence, they are totally colour-blind. They are the same in every State and every constituency. The safeguard lies in the efficiency and impartiality of the higher officers who have to decide objections filed in relation to the voters' lists. That safeguard is not shown to have failed in the instant case.

(3) Surprisingly, though rightly, no argument was made before us on behalf of the petitioners on the question of the constitutional validity of any of the provisions of the Act of 1950 and 1951 or the Rules. 'Surprisingly', because, the major part of the writ petition is devoted to the adumbration of a challenge to some of those provisions and yet no argument was urged before us in support of that challenge. 'Rightly', because, there is no substance whatsoever in that challenge and counsel exercised their judgment fairly and judiciously in refusiong to waste the time of the Court in pursuing an untenable contention. Only one learned counsel, Shri Bhola Nath Sen, complained that the fee of ten paise prescribed by Rule 26 of the Rules of 1960 is unreasonable since, there are many voters who cannot afford to pay ten paise. The argument must be rejected out of hand as devoid of substance and as lacking in awareness of Indian Economics. There is no voter in our country who does not have or cannot raise a sum of ten paise to ventilate his objection to the voters' list. Counsel should not grudge at least that modest achievement to our

successive Governments which have been fighting a relentless war against poverty. The reason for our mentioning that a large part of the writ petition is devoted to a statement of constitutional challenge to election laws, is, that it is upon a petition of this nature that the High Court's jurisdiction was invoked. The petition is dressed up in constitutional attire but, before us, no counsel tried even to have the feel of it, except Shri Bhola Nath Sen. We will have occasion to demonstrate how, in a petition of this nature, no interim relief was permissible, especially in terms of prayer clause (f) by which the entire election process was brought to a standstill.

For these reasons and those which we will give in our judgment later, we dismiss the writ petition filed in the Calcutta High Court which was transferred for disposal to this Court. All orders, including interim orders, passed by the Calcutta High Court are hereby set aside Civil Appeals 739 to 742 of 1982 will stand disposed of in the light of the dismissal of the writ petition, out of which they arise. There will be no order as to costs."

Our learned Brother Baharul Islam J. passed separate order which reads thus :

"I regret my inability to associate myself with some of the observations made by Lord the Chief Justice, in para 2 of the order just pronounced. While I do not have any doubt in the integrity and impartiality of the Election Commission, I am not satisfied that all the Electoral Registration Officers concerned and all the staff working under them, were beyond reproach in their conduct in implementing the relevant provisions of the Constitution, the Representation of the People Acts of 1950 and 1951, the Electoral Registration Rules, 1960 and the directions given by Election Commission in the preparation of the electoral rolls. I, however, agree that the Writ Petition under Article 226 of the Constitution filed before the Calcutta High Court and transferred to this Court be dismissed and the stay orders granted by the High Court be vacated, for reasons to be given in my judgment to follow.

Mr. Nariman, learned counsel for the Election Commission told us at the time of hearing that the claims and objections already filed had been, and were being, looked into. It is hoped that claims and objections, if any, outstanding yet, will be disposed of, and names included, in the electoral rolls till the last date of making nominations, as permissible under Section 23 (3) of the Representation of the People Act, 1950."

We order accordingly.

BAHARUL ISLAM, J. (Minority view) :-

29. **The Constitution of India envisages a Sovereign, Socialist, Secular, Democratic Republic, Each of the terms 'Sovereign' 'Socialist', 'Secular', Democratic' and 'Republic' is significant and pregnant with meaning deeper than the apparent. Unless their true significance if properly realized, no provision of the Constitution or any other statute can be interpreted in its true perspective. Republic connotes the existence of a President. The Indian Constitution has provided for a democratically elected President The Constitution also has provided for a form of Government by the People's representatives democratically elected on the basis of adult franchise irrespective of caste, creed, race or sex. The term 'Secular' has been incorporated in the Preamble by the Constitution (Forty-Second Amendment) Act, 1976 and is effective from January 3, 1977. The addition of the term 'Socialist' is note for mere ornamentation, but with a definite object. The term 'Socialist' has**

both an economic as well as a political content. The basic needs of a citizen of any civilized country with any form of Government are food, clothing, education and health services. A citizen of any modern democratic State has also an additional need, which is a political right. It is the right of participation in the governance of the country directly or indirectly. This participation of an adult citizen of our country starts with the right to vote for a candidate and elect a representative of his choice to the legislatures and other self-governing institutions. This right to vote presupposes a right to be enrolled as an elector provided, of course, he has the requisite qualifications prescribed by the Constitution and the election laws and other statutes and has none of the disqualifications enumerated in those laws.

30. **Chapter XV of the Constitution provides for elections to the House of People and the Legislatures of the States. Article 326 of the Constitution provides for elections to the House of People or to the Legislative Assemblies of the States on the basis of adult suffrage: that is to say, every person who is a citizen of India and who is not less than 21 years of age on a particular date and is not otherwise disqualified under the Constitution or any law on the ground of non-residence and unsoundness of mind, crime, corrupt or illegal practice shall be entered into the register as voter for such election. The basis of election on adult franchise and the right to be registered as a voter at an election of a person with the requisite qualifications and having no disqualifications are constitutional mandates. By virtue of powers given under Article 327 of the Constitution, the Parliament has already made provisions, inter alia, for the purpose of the preparation of the electrol rolls and matter connected therewith in the Representation of the People Act, 1950 (hereinafter referred to as 'the 1950 Act') and the Registration of Electors Rules, 1960 (hereinafter 'the Electors Rules, 1960) and for the purpose of conduct of election to the House of Parliament and to the Houses of State Legislatures and to matters relating to such elections in the Representation of the People Act, 1951 (hereinafter referred to as the 1951 Act') and the Conduct of Election Rules, 1961 (hereinafter referred to as the Election Rules, 1961)**

Article 324 (1) of the Constitution vests the superintendence, direction and control of the preparation of electoral rolls for the conduct of all elections to Parliament and to the Legislature of a State and of elections to the offices of President and Vice-President on the Election Commission, the Constitution of which is provided for under Article 324 (2). Sub-Article (6) of Article 324 provides that the President or the Governor of a State shall, when so requested by the Election Commission , make available to the Election Commission as may be necessary for the discharge of the functions conferred on the Election Commission under Clause (1) of Article 324. This shows that for the purpose of preparing the electoral rolls for the purpose of conducting elections, the Election Commission, although a very high and independent constitutional functionary, does not have a staff of its own appointed and removable by it. The staff made available to the Election Commission for the above purposes are the employees of a State or the Central Government. In other words, as the staff working for the preparation of the electoral rolls and the conduct of the elections are not the staff of the Election Commission, they are not independent like Election Commission, itself, but are liable to be influenced by the concerned Executive Government. This is an important thing to be remembered, and I shall have to refer to it later.

31. **Article 325 of the Constitution provides that there shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of Legislature of a State and no person shall be ineligible for inclusion in any State electoral roll or claim to be included in any special electoral roll for any such constituency on grounds only or religion, caste, sex or any of them. In other words, so long as an adult citizen of India has requisite qualifications to be registered as an elector and has no disqualifications to be registered as such, he has a constitutional right to be registered as an elector. Illegal omission of the names of persons who were qualified from the electoral roll or inclusion of the names of persons who are not qualified or who have disqualifications has far reaching consequences. Let us take a hypothetical illustration. Suppose, in India or in a State of India there are two political parties, A&B with near equal strength. Let us also suppose that Party A is in power either at the Centre or in the States or both and suppose Party B is in opposition either in the Centre or in the States or both. Unless the electoral roll is prepared strictly in accordance with the provisions of the 1950 Act and the 1960 Rules, the electoral roll will have no sanctity, and the election conducted on such defective electoral roll will tilt the balance of power. On the other hand, if names of foreigners who are sure to support a particular party are included in the voters' list, or names of eligible persons who will not vote for a particular party and vote for another particular party, the result is obvious.**

32. **The basis of a free and fair election is the voters' list prepared in accordance with the 1950 Act and the 1960 Rules. If this is not so done, the electoral rolls will have no sanctity and the consequent election will also not inspire confidence of the people.**

33. **The next question is whether the objection to the inclusion of wrong names or claims to inclusion of eligible names in the electoral rolls can be taken in an election petition under S. 100 of the 1951 Act. It cannot be. Mr. Nariman, counsel appearing for the Election Commission, submits that a qualified citizen has a right to be enrolled in the electoral roll, but he has no right to vote in a particular election. He is apparently - and only apparently - right. For Art. 326 itself, says that an eligible citizen "shall be entitled to be registered as a voter at any such election." But the enrolment of the name of a person in the electoral rolls absolutely meaningless unless he can also exercise his vote. If before the claims and objections of about eight lakhs voters, as alleged in this case are disposed of, the election be held, the result would be a farce and will not reflect the will of the people. It has been argued by Mr. Nariman that eight lakhs are voters of the State and the claims and objections in a particular constituency may be about a few thousands. Even in the counteraffidavit, filed on behalf of the Election Commission, it has been stated that the error may be 2 or 2½ per cent. This percentage, though looks small, is very material in an election fought by multiplicity of political parties and independent candidates as is notoriously the case in India.**

34. **The statutory provisions dealing with the preparation of the electoral rolls for Assembly Constituencies are Part III of 1950 Act that deals with "Electoral Rolls for Assembly Constituencies" and Part II of 1960 Rules that provides for the preparation of the electoral rolls for Assembly Constituencies. Section 21 of the 1950 Act provides for the preparation and revision of electoral rolls. Sub-sec. (1) of this section provides that the electoral roll for each constituency shall be prepared in the**

prescribed manner by reference to the qualifying date and shall come into force immediately upon its final publication in accordance with the rules made under this Act. Qualifying date has been defined under S. 14 (b) of the 1950 Act as the "1st day of January of the year in which it is so prepared or revised" "in relation to the preparation or revision of every electoral roll" under Part III. S. 15 provides that for every constituency there shall be an electoral roll which shall be prepared in accordance with the provisions of the Act. The preparation has to be made under the superintendence, direction and control of the Election Commission. S. 16 provides that a person who is not a citizen of India, a person of unsound mind, a person who is found to be guilty of corrupt practices and other offences in connection with the elections shall not be registered as electors. Ss. 15 and 21 are mandatory. Sub-sec. (2) of S. 21 provides that the aforesaid electoral roll shall be revised in the prescribed manner with reference to the qualifying date (i) before the general election to the Legislative Assembly of a State or the House of the People and (ii) before each bye-election to file a casual vacancy in a seat allotted to the constituency, unless otherwise directed by the Election Commission for reasons to be recorded in writing. In other words, revision before a general election or a bye-election of the electoral roll is the rule and non-revision is the exception which is permissible only when the Election Commission directs for reasons to be recorded in writing. Cl. (b) of sub-sec. (ii) provides that the electoral roll shall be revised in any year in the prescribed manner by reference to the qualifying date if such revision has been directed by the Election Commission. In other words, the Election Commission may direct that an electoral roll be revised in any year although there may be no ensuing general or bye-election. There is a proviso added after clause (b). It is in the following terms :

"If the electoral roll is not revised as aforesaid, the validity or continued operation of the said electoral roll shall not be affected."

There is a controversy in the interpretation of the proviso. One argument is that this proviso governs both the clauses (a) and (b) of subsection (2). The other argument is that the proviso controls only clause (b). In my opinion, the proviso controls clause (b) only and not clause (a); for, after the word "shall", clause (a) starts with, "unless otherwise directed by the Election Commission for reasons to be recorded in writing." In Clause (b) also "that the revision shall be made in any year if such revision is directed by the Election Commission." In other words, either in the entire State or in a particular constituency of the State, there is no general or bye-election during the period of five years, the electoral roll may not have to be revised but the existing roll will be a valid roll for other purposes. For example; if some elector wants to show for the purpose of election either to the Council of States or for any other purpose, other than election in the constituency, the entry in the existing electoral roll will be proof-enough for that purpose. But the unrevised electoral roll will not be valid for the purpose of holding a general or a bye-election. The reasons are obvious. For example, if an electoral roll is prepared before a particular general election to a Legislative Assembly but there has been no revision for one reason or the other, say, for four or five years, or for a longer period, no general election can be held on the basis of the electoral roll prepared earlier. The reasons again are obvious; for, during this period of four or five years or longer period, a large number of young people have become adults. And a number of persons whose names were registered in the existing electoral rolls must have died

or left the constituency. As the election has to be held on adult franchise under the mandate of the Constitution, those who were below 21 years before four or five years have now a constitutional right to be enrolled as voters. And if the names of the dead persons or the persons who have migrated from the constituency are not deleted, there is the possibility of bogus voting in the names of those persons. Therefore, it is not permissible in normal circumstances to hold a general or bye-election on an electoral roll unless it is revised as directed under sub-section (1) of Section 21. The above interpretation is consistent with the basic objective of election indicated above.

35. **Section 22 of 1950 Act provides for the correction of entries in the electoral rolls. Section 23 is important. It deals with the inclusion of names in the electoral rolls. Subsection (1) of Section 23 provides that any person whose name is not included in the electrol roll of a constituency may apply to the electoral registration officer for the inclusion of his name in that roll. Sub-section (2) of Section 23 provides that the electoral registration officer shall, if satisfied that the applicant is entitled to be registered in the electoral roll, direct his name to be included therein subject to the proviso to Section 23 (2). Sub-section (3) of Section 23 enjoins that after the last date for making nominations for an election in a particular constituency, no amendment, transposition or deletion of any entry is permissible. Section 24 provides for appeals against the orders of an electoral registration officer under Section 22 or 23 to the Chief Electoral Officer in the prescribed manner.**

Let us now turn to Part II of the Electors Rules, 1960. Rules 10 and 11 provide for the publication of the draft roll and further publicity of the roll and the notice in Form 5. Rule 12 provides for lodging claims and objections within a period of thirty days from the date of publication of the roll in draft under Rule 10 for inclusion or deletion of names. Rule 13 provides that the claims have to be preferred in Form 6; objections have to be preferred in Form 7 and objections to a particular or particulars in an entry have to be made in Form 8. There are other restrictions also in lodging claims and/or objections in Forms 6, 7 and 8. Rule 14 provides that every claim or objection shall be presented to the registration officer or any other officer designated by him in this behalf. Rule 15 provides that the officer mentioned in Rule 14 shall maintain in duplicate a list of claims in Form 9, a list of objections to the inclusion of names in Form 10 and a list of objections to particulars in Form 11 and keep exhibited one copy of each such lists on a notice board in his office. Rule 15 is mandatory. After complying with sub-rule (1) of Rule 15, the designated officer after complying with the requirement of sub-rule (1) forward with his remarks, if any, the list of claims and objections in Forms 9, 10 and 11 to the appropriate registration officer. Under Rule 16, the registration officer also shall maintain in duplicate the three lists in Forms 9, 10 and 11, entering thereon the particulars of every claim or objections as and when it is received by him, whether directly under Rule 14 or on being forwarded to him under Rule 15; and keep exhibited one copy of such list on a notice board in his office. Rule 16 is also mandatory.

The registration officer, under Rule 17, has the power to reject any claim or objection which is lodged within the prescribed time or in the prescribed form and manner. Under Rule 18, if the registration officer is satisfied as to the validity of any claim or objection, he may allow it without further inquiry after the expiry of one week from the date on which it is entered in the list exhibited by him under clause

(b) of Rule 16. There is, however, a restriction on the power of the registration officer under the proviso to Rule 18. That restriction is that if there be a demand for inquiry in writing to the registration officer by any person against the acceptance of claim or objection, such claim or objection shall not be allowed without further inquiry. Rule 19 provides that where a claim or objection is not allowed under Rule 17 or 18, the registration officer shall give notice of hearing of the claim and objection. Under sub-rule (2) of Rule 19 that the notice mentioned in sub-rule (1) of Rule 19 may be given either personally or by registered post or by affixing it to the person's residence or last known residence within the constituency. Rule 20 gives power to the registration officer to hold a summary inquiry into the claim and objection under Rule 19. Under sub-rule (2) to Rule 20, the hearing of the claimant or the objector and the person objected to and any other person who, in the opinion of the registration officer, is likely to be of assistance to him, shall be entitled to appear and be heard. Sub-rule (3) to Rule 20 gives a discretion to the registration officer to require any claimant or objector or any person objected to appear in person before him, or require that the evidence tendered by any person shall be given on oath and administer an oath for the purpose.

A combined reading of Rules 18, 19 and 20 show that they are based on the principle of natural justice keeping in view the right of an eligible voter to be included in the electoral roll and the right of any person to see that the names of persons not so eligible, but wrongly included earlier, be deleted from the electoral roll. Rule 21 gives suo motu power to the registration officer to include names inadvertently omitted. Rule 21 (A) gives suo motu power to the registration officer to delete the names of dead electors or of persons who have ceased to be or are not ordinarily residents in the constituency. Rule 22 is very important. It gives power to the registration officer to prepare a lists, after compliance of Rules 18, 20, 21 and 21 A and publish the roll together with the list of amendments by making a complete copy thereof available for inspection and displaying a notice in Form 16 at his office. Under sub-rule (2) of Rule 22, on such publication, the roll together with the list of amendments "shall be the electoral roll of the constituency." Under sub-rule (3), this roll shall be the "basic roll" for the constituency. Rule 23 provides for appeal from the decision of the registration officer under Rule 20, 21 or 21 A to an appropriate authority. These provisions disclose the importance to be given to the preparation of an electoral roll.

36. **It is true, as submitted on behalf of the Election Commission, that a perfect electoral roll is not possible. But at the same time, it must be remembered that the name of any eligible voter should not be omitted or the name of any disqualified person should not be included in the electoral roll, in violation of any constitutional or statutory provisions. The error, when pointed out, has to be removed. It must also be remembered that a large section of the electorate of our country consists of illiterate people and not politically so conscious as to see that their names are in the electoral roll. Needles to say that ours is a democratic country with a parliamentary form of government that is run on party basis. The parliamentary form of government depends on political parties. A duty therefore is cast on the political parties to educate the electorate and take steps that the names of eligible persons are included in the electoral rolls and that names of ineligible persons are deleted. Erroneous inclusion or ommission of the names of a few persons may not be of much consequence. But if a considerable number of the names of such persons are either wrongly included in, or excluded from, the electoral roll, it will be of great**

consequence to a particular party either in power or in the position. The electoral registration officer, therefore, cannot be fastidious as to whether the claims and objections are strictly in prescribed forms. Even when there are omnibus objections by a political party or political parties, as in this case, filing claims and/or objections, such claims and objections have to be inquired into and necessary action taken so that the correct opinion of the electorate may be reflected in the result of the election.

37. **In the instant case, it must be said in fairness to the Election Commission, on receipt of omnibus complaints and objections on behalf of a large number of persons, the Election Commission directed the Chief Electoral Registration Officer of West Bengal to inquire into these claims and objections and take appropriate action. But it does not appear or there is nothing on record to show that those claims and objections, albeit omnibus, may be sometimes not strictly in the prescribed forms, were disposed of by the Electoral Registration Officer after issue of notices as required by the rules. The affidavits filed on behalf of the Election Commission by Mr. Krishnamurthi, and Mr. Ganeshan vaguely state that they were "duly" disposed of.**

In para 46 of the affidavit of Mr. N. Krishnamurti, the Chief Electoral Officer of West Bengal, it has been, inter alia, stated, "similarly, as regards the letter dated January 17, 1982 of Shri Bholanath Sen addressed to me regarding his complaints in respect of the Bhatar Assembly Constituency I say that all specific complaints contained in his letter have been duly looked into by the Electoral Registration officer and I have also examined the same. I crave leave to refer to the reports in this regard at the time of hearing" (emphasis added). It has not been stated that the complaints were inquired into after issue of notices as required by law.

In clause (z) of Part I of another affidavit filed by Mr, Krishnamurthi, it has been stated:

"In early December, 1981 Shri Ajit Panja, Leader of Indian National Congress, made a complaint regarding the non-inclusion and wrong inclusion of certain entries in the electoral roll of 158 of Burtola Assembly Constituency. A special check was made and remedial action taken in respect of 6000 entries out of 89,000 entries before the finalisation of the intensively revised rolls of 31-12-1981. A copy of the report of the Electoral Registration Officer who is the Collector of Calcuta is annexed as Annexure 19"

The second part on page 4 of Annexure 19 reads :

"At the time of house to house enumeration, enumerators approached the head of household and handed over to them their electoral cards under their signature. At this time, the Supervisors also signed both the copies of the electoral cards. After the electoral cards were deposited in our office, the Supervisors made a test check of about 30% of the electoral cards. Myself along with my Assistant E. R. Os. made a test check of about 10%. On such test case, large number of voters were included in the draft roll. In particular, in Burtolla Assembly Constituency, more than 6000 voters were included by the Assistant E.R.Os at the time of their test check. A test check of about 5 to 10% was conducted in respect of the decreases in number of voters in all the constituencies by special squads. In Burtolla Assembly

Constituency such test checks were conducted by Sr. A. Roy Chaudhury, Addl. Treasury Officer and Assistant E.R.O.....”

It has not been stated as to what happened to, and what remedial measures were taken in respect of, the other 83,000 entries. It has also been stated in this affidavit that in Form 6, (1) total number of claims received was 4, 17, 231; (2) total number of claims allowed was 3,05,072. It has not been explained as to what was done to the other claims of 1,12,159, or that these cases were rejected after hearing, as required by law. It has also been stated in the affidavit that the total number of objections received in Form 7 was 1,09,665 and the total number of objections allowed was 65,430. It has not been explained as to what was done in respect of the difference of 44,435 objections or that these objections were rejected after hearing as enjoined by law. What has been stated in para (o) at page 26-A of the affidavit is, "all the above claims and objections in Forms 6,7 and 8 were to be 'duly dealt with and disposed of by the Electoral Registration Officers by that date'. But it has not been stated that they were disposed of as required by law. It must be said in fairness to Mr. Krishnamurthi that as Dr. Gopal Das Nag had not been able to file his specific complaints with the concerned Electoral Registration Oficers before January 16, 1982 which was the dead-line date, and as these omnibus complaints had been given to him prior to 16-1-1982, "in order not to be too technical (though in law the complaint and objections had to be in the prescribed forms and had to be submitted to the respective Electoral Registration Officers within the prescribed time) by a radiogram I requested the concerned Electoral Registration Oficers of 16 constituencies in respect of which the omnibus complaints were made by the complainant in question, to accept them and promptly enquire into them and take remedial action under Rule 21 and 21 A of the 1960 Rules so that the enquiry could be completed with the utmost promptitude and to report back with respect to the remedial action taken." But there is nothing show that his directions were in fact carried out by the Electoral Registration Officers in accordance with the relevant Rules.

It has been stated in clause (p) at page 38 of the affidavit that "pursuant to the various radiogram messages, the District Election Oficers had taken the following action and were continuing to take the following actions :-

(i) In respect of complaints in Forms 6, 7 and 8, they were being dealt with and disposed of.

(ii) In respect of the specific cases in omnibus complaints, they were being enquired into and treated as information for action under Rules 21 and 21 A of 1960 Rules after due investigations mostly with 100% on the spot verification. Proformas indicating the manner in which the omnibus complaints were accepted or rejected or disposed of were duly filled in after determination and forwarded to the Chief Electoral Officer".

With regard to the complaint that notices were not received by the claimants and objectors, it has been admited that "due to postal delay, the intimation neither reached Shri Ajit Kumar Panja or his agent about the hearing; In fact, the law does not require any intimation to be given to any representative of political parties in connection with enquiries under Rules 21 and 21 A except that reasonable opportunity should be given to the affected person whose name for deletion is included in the list under Rule 21 A of the 1960 Rules. The procedure set out on 2nd

February, 1982 was only to facilitate an expeditious disposal of the complaint if found to be genuine."

Technically, Mr. Krishnamurthi is right that a political party is not entitled to, under the law, to receive any notice but in the background of the illiteracy and ignorance and lack of political consciousness of a large action of the electorate, it is but proper and in consonance with the spirit of the Constitution and the Election Laws that notices be given to the leaders of political parties who file complaints or omnibus complaints and claims and objections. It has also been stated in para (r) at page 41 of the affidavit that , "The team visited various places in Calcutta and in the districts of Hooghly, 24-Parganas, Midnapore and Malda for on-the-spot verification of complaints on selective basis". There is nothing to show that these on-the spot verification were made with prior notice to the complainants/objections and/or their representatives. Obviously, a thorough enquiry into the complaints/objections were not made "inasmuch as the percentage of errors with reference to the total electors was too low and below normal", as pleaded on behalf of the Election Commission. But it must be remembered that the fate of a political party is decided by small margin of voters in our country as the political forces have not yet fully crystallised and as there are too many political parties in our country, and the elections are multi-cornered.

There may be another reason for a Registration Officer for not strictly following the provisions of law in disposing the claims/objections inasmuch as "the proceedings under Rules 21 and 21A of 1960 Rules are summary in nature having regard to the necessity of expeditious revision of electoral rolls within a time bound programme" as contended on behalf of the Election Commission in their affidavits. It has also been asserted in para 27 at page 64 of the affidavit that the decision in disposing of the claims and objections under Rules 21 and 21 A of 1960 Rules, "The Electoral Registration Officer is not required to communicate his decision to any person making claims and objections when taking decision under Rules 21 and 21A of 1960 Rules as the proceedings under Rules 21 and 21A are taken under his suo motu power".

38. **The Writ Petition has been filed by eight writ petitioners of whom Petitioner No. (1) is the General Secretary of the West Bengal State Muslim League and also member of the National Executive of the Indian Union Muslim League and a member of the existing West Bengal Legislative Assembly, No. (2) is a member of the Polit Bureau of the All India Communist Party, No. (3) is the President of All India Christian Democratic Party, No. (4) is the Vice-President of the West Bengal Unit of the Janta Party and Executive Member of National Committee of Janta Party and ex- M.P., No. (5) is a member of the All India Congress Committee (Socialist) and an ex- M.P., No. (6) is a sitting member of the existing West Bengal State Legislative Assembly and Secretary of the Congress Legislative Party, West Bengal Assembly, No. (7) is a member of the Republican Party of India, and No. (8) is the Vice-President of All India Forward Block Central Committee.**

The petition contains 98 paragraphs of which paras 3 to 70 refer to the provisions of law, para 73 to the alleged anomalies in the voters' lists. Paras 86, 93 and 95 refer to the alleged illegal inclusion/omission of the names of about 8,00,000 voters. It has been stated in paragraph 72 that 14 constituencies were affected by cyclones and other calamities, about 1000 to 5000 teenagers were included in the voters' lists, a large number of aliens were included in the voters' lists, a large

number of bona fide voters were excluded, fictitious entries were made and distorted names were recorded. It was also alleged that CPI (M) enumerators having allegiance to the party in power in West Bental were appointed for the preparation of the voters' lists. The answer on behalf of the Election Commission is that the enumerators were teachers who are normally appointed as enumerators. In my opinion, no persons who are members of a political party or of an association affiliated to a political party should be appointed to be eumerators of voters so that there may not be any foul play or rigging in the preparation of the electoral roll. Enumerators should be persons who are not affiliated , either directly or indirectly to any political party, whetehr in power or not; for this purpose, it is desirable that only Government officers including teachers of Government schools and colleges may be appointed enumerators, and not of non-government organisations or institutions, unless their rules debar their employees to be members of political parties.

It, therefore, cannot be said that in the revision of the electoral roll, all possible care as enjoined by the letter and spirit of the Constitution and the statutes was taken in this case.

39. **Now about reliefs, in this case, however, reliefs prayed for, are not possible to be granted. It is not the petitioners' case that the electoral rolls in all the 294 constituencies in West Bengal have not been revised in accordance with law. They have made allegations only with respect of constituencies and omnibus complaints were filed only in respect of two constituencies namely, Bartolla and Bhatar. Although there were no electoral rolls prepared in accordance with law for Bartolla and Bhatar constituencies the general election of the entire State cannot be held up, as electoral rolls are prepared and published constituencywise. It is, therefore, not possible to hold up the election in respect of all the constituencies unless a case is made out that no election can be held in any of all the 294 constituencies. Secondly, no concrete names of persons have been mentioned in the Writ Petitions and so it is not possible to issue any writ of mandamus to the electoral registration officers for the inclusion or exclusion of the names of those persons, as the case may be, in or from the electoral rolls. Thirdly, the authorities actually responsible for inclusion or exclusion of names are the electoral registration officers but they have not been made parties to the petition and so no writ of mandamus can be issued against them; and it is not possible to make them parties so late.**

Ordered accordingly

SUPREME COURT OF INDIA*

Petition for Special Leave to Appeal (Civil) No. 7822 of 1985.
(Decision dated 12.8.1985)

Krishna Ballabh Prasad Singh ***..Petitioner***

Vs.

Sub Divisional Officer Hilsa-cum-Returning Officer and Others ***..Respondents***

SUMMARY OF THE CASE

At the general election to the Bihar Legislative Assembly held in March, 1985, after the counting of votes in Islampur Assembly Constituency was over, the Returning Officer announced that the petitioner, Shri Krishna Ballabh Prasad Singh, was duly elected. A certificate of election in Form-22, appended to the Conduct of Elections Rules, 1961, was also granted to him. But the declaration in Form 21 C under Rule 64 A of the said Rules was not yet prepared by the Returning Officer and not sent to the authorities required thereunder. While preparing that declaration, the Returning Officer discovered that the votes of one booth had not been counted. He then took those votes into account and found that some other candidate, and not the petitioner, had got the majority of votes. He thereupon cancelled the election certificate of the petitioner and declared the said other candidate to be the successful candidate. A declaration was then prepared in Form 21 C and fresh certificate in Form 22 was issued to the elected candidate.

The petitioner filed a writ petition in the Patna High Court challenging the declaration made by the Returning Officer in favour of the above mentioned elected candidate. A Division Bench of two Judges of the High Court heard the writ petition and, on a difference of opinion between the two, the case was referred to a third Judge of the High Court. The Third Judge agreed with the view taken by one of the Judges of the Division Bench that the writ petition must fail because of the bar imposed by Article 329 (b) of the Constitution, and that an election petition was the proper remedy.

The present appeal was filed against the above order of the High Court, raising the question as to when the election process came to end and up to what stage the bar in Article 329 (b) operated against writ petition. The Supreme Court held that the process of election came to end only after the declaration in Form 21 C was made and the consequential formalities were completed by the Returning Officer. The writ petition in the present case was, thus, not entertainable.

Constitution of India, Arts, 329(b) and 226 – Representation of the People Act (43 of 1951), Ss. 66 and 169 – Conduct of Election Rules (1961), R. 66, Form 22 and R. 64(a) Form 21-C – Election dispute – Writ petition – Maintainability – Certificate of election in

Form 22 under R. 66 granted to petitioner – However, declaration in Form 21-C not prepared under Cl. (a) of R. 64 – Later, election of petitioner cancelled and respondent declared successful candidate – Writ petition challenging declaration – Not maintainable because of bar imposed by Art. 329(b) – Election petition alone would be maintainable.

Where a certificate of election in Form 22 under R. 66 was granted to the petitioner but the declaration in Form 21C was not prepared under Cl. (a) of R. 64 and sent to the authorities required thereunder and the Returning Officer, on discovering that the ballot papers of one booth had not been counted, took those votes into account and thereafter issued a notice cancelling the election of the petitioner and declaring the respondent to be the successful candidate and a declaration in Form 21C was then prepared declaring the respondent to be the elected candidate and a fresh certificate in Form 22 was issued a writ petition challenging the declaration made in favour of the respondent would not be maintainable as the process of election came to an end only after the declaration in Form 21C was made and the consequential formalities were completed. The bar of Cl. (b) of Art. 329 of the Constitution came into operation only thereafter and an election petition alone was maintainable. The announcement by the Returning Officer that the petitioner had been elected had no legal status because the declaration in Form 21C had not yet been drawn up. Even the grant of the certificate of election in Form 22 to the petitioner cannot avail him because R. 66 contemplates the grant of such certificate only after the candidate has been declared elected under S. 66, which refers back to R. 64 and therefore to Form 21C. There having been no declaration in Form 21C at the relevant time, the grant of the certificate of election in Form 22 to the petitioner was meaningless. Judgment of Patna High Court Affirmed. (Paras 4 and 5)

JUDGMENT

Present:- R.S. Pathak and Sabyasachi Mukharji, JJ.

PATHAK, J.:– **The petitioner and the fourth respondent contested an election to the Bihar Legislative Assembly seat from the Islampur Assembly Constituency in March, 1985. After the votes had been polled, the counting of votes was taken up on March 6, 1985. Pursuant to allegations made by the parties, the Election Commission of India ordered re-polling in sixty stations. On the conclusion of the re-poll the votes were counted and the petitioner was found to have secured more votes than the fourth respondent. The fourth respondent applied for a recount of the votes but the Returning Officer rejected the application and announced that the petitioner had been duly elected to the Assembly. A certificate of election in Form 22 under Rule 66 of the Conduct of Election Rules, 1961, was granted to the petitioner. It seems that the declaration in Form 21C was not prepared under Clause (a) of Rule 64 of the Conduct of Election Rules, 1961, and sent to the authorities required thereunder. The Returning Officer, on discovering that the ballot papers of one booth had not been counted took those votes into account and thereafter issued a notice cancelling the election of the petitioner and declaring the fourth respondent to be the successful candidate. A declaration in Form 21C was then prepared declaring the fourth respondent to be the elected candidate, and a fresh certificate in Form 22 was issued.**

2. **The petitioner filed a writ petition in the Patna High Court challenging the declaration made in favour of the fourth respondent. A division Bench of two Judges of the High Court heard the writ petition and on a difference between the two the case was referred to a third Judge of the High Court. The third Judge agreed with the view taken by one of the Judges of the Division Bench that the writ petition must fail because of the bar imposed by Clause (b) of Article 329 of the Constitution and that an election petition was the proper remedy.**

3. **In this petition for special leave against the majority judgment of the High Court, the only question is whether the bar enacted in Clause (b) of Article 329 operates against the writ petition. Learned counsel for the petitioner urged that the petitioner is entitled to maintain the writ petition and to contend that the returning officer had no power to cancel the election of the petitioner and declare the fourth respondent elected. It is submitted that the process of election was completed as soon as the counting of votes was concluded and a certificate of election in Form 22 was granted to the petitioner certifying that he had been elected and therefore no question arose of the petitioner filing an election petition. What is challenged, says the petitioner, is the declaration by the returning officer thereafter that the fourth respondent, and not the petitioner stood elected. We see no force in the contention.**

4. **The process of election set forth in the Representation of People Act. 1951, consists of several stages and towards the end it requires a declaration of the result of the election. Section 66 of the Act provides that when the counting of votes has been completed the Returning Officer must declare forthwith the result of the election "in the manner provided in this Act of the rules made thereunder". Thereafter, under S. 67 the result of the election is reported by the Returning Officer to the authorities specified therein and the declaration is published in the Official Gazette. It may be mentioned that according to S. 67A of the Act the date on which the candidate is declared by the Returning Officer under S. 66 to be elected is regarded as the date of election of that candidate. Now, as contemplated by S. 66 the declaration of the result of the election must be in the manner provided by the Act or the rules made thereunder. The procedure for declaring the result of the election is set forth in Rule 64 of the Conduct of Election Rules, 1961. Rule 64 provides:—**

"64. Declaration of result of election and return of election. The Returning Officer shall, subject to the provisions of Section 65 if and so far as they apply to any particular case then —

(a) declare in Form 21C or Form 21D as may be appropriate, the candidate to whom the largest number of valid votes has been given to be elected under Section 66 and send signed copies thereof to the appropriate authority, the Election Commission and the chief electoral officer; and

(b) complete and certify the return of election in Form 21E and send signed copies thereof to the Election Commission and the Chief Electoral Officer."

It is plain that the declaration envisaged by the law that a candidate has been elected is the declaration in Form 21C or Form 21D. The declaration in Form 21C is made in a general election and the declaration in Form 21D is made when the election is held to fill a casual vacancy. It is now settled law that the right to vote, the right to stand as a candidate for election and the entire procedure in relation thereto are created and determined by statute. Accordingly, when S. 66 of the Representation of the People Act. 1951 provides that the result of the election shall

be declared in the manner provided by the Act or the Rules made thereunder the declaration can be effected in that manner only. The manner is clearly expressed in Rule 64 of the Conduct of Election Rules, 1961. There is no other manner. There must be a declaration in Form 21C or Form 21D. The announcement by the Returning Officer that the petitioner had been elected has no legal status because the declaration in Form 21C had not yet been drawn up. Even the grant of the certificate of election in Form 22 to the petitioner cannot avail him because Rule 66 contemplates the grant of such certificate only after the candidate has been declared elected under S. 66, which refers us back to Rule 64 and therefore to Form 21C. There having been no declaration in Form 21C at the relevant time, the grant of the certificate of election in Form 22 to the petitioner was meaningless.

5. **We are of opinion that the process of election came to an end only after the declaration in Form 21C was made and the consequential formalities were completed. The bar of Clause (b) of Article 329 of the Constitution came into operation only thereafter and an election petition alone was maintainable. The writ petition cannot be entertained.**

6. **Learned counsel for the petitioner contends that it was not open to the returning officer to antedate the Form 21C drawn up by him by placing on it the date on which he originally announced the result of the election. That is a ground learning on the merits of the dispute between the parties, which as we have observed must properly be the subject of an election petition.**

7. **The petition for special leave fails and is rejected.**

Petition dismissed.

SUPREME COURT OF INDIA*

Transferred Cases Nos. 364 to 382 of 1984$
(Decision dated 30.9.1985)

Indrajit Barua and Others, etc. ... ***Petitioners***

Vs.

Election Commission of India and Others ..***Respondents***

SUMMARY OF THE CASE

On the eve of general election to the Assam Legislative Assembly in 1979, certain writ petitions were filed before the Guwahati High Court, seeking a direction to the Election Commission not to hold the general election as the electoral rolls were alleged to be defective. The High Court entertained the writ petitions but did not grant interim stay of elections. Subsequently, the elections to the State Assembly were held and the House constituted. After the general election, some more writ petitions were filed before the High Court challenging the electoral rolls and questioning the validity of all the elections to the Legislative Assembly and praying for dissolution of the House. At the instance of the Election Commission, all these writ petitions were transferred to Supreme Court for disposal.

The Supreme Court dismissed all the petitions by an order dated 28th September, 1984. It gave detailed reasons for its order dated 28th September, 1984 by a subsequent order dated 30th September, 1985. The Supreme Court held that the general election as a whole could not be called in question by a writ petition, even though there was a common ground which might have vitiated the elections from all the constituencies and that election from each constituency had to be challenged separately by an election petition. The Supreme Court also held that the validity of election could not be called in question on the ground that the electoral rolls were defective as the finality of electoral rolls could not be assailed in an election petition.

[Editorial Note — The text of the case is reported in full in AIR 1984 SC 1911. Hon'ble Judges had then observed that detailed reasons will follow later. Judgment in pursuance thereof is printed hereunder.]

(A) Constitution of India, Art 226 — Election — It can be challenged only in manner prescribed by Representation of the People Act — Writ petition under Art. 226, challenging elections to State legislature — Not maintainable, (Representation of the People Act (1950) S. 81) (Para 6)

(B) Constitution of India Art. 329(b) — Election — Preparation of electoral rolls — It is not a process of election. AIR 1985 SC 1233, Poll. (Para 12)

(C) Representation of the People Act (43 of 1950), S.21(2) proviso — Election — Challenge as to, on ground of defective electoral roll.

In a suitable case challenge to the electoral roll for not complying with the requirements of the law may be entertained. But the election of a candidate is not open to challenge on the score of the electoral roll being defective. Holding the elections to the legislature and holding them according to law are both matters of paramount importance. Such elections have to be held also in a accordance with a time bound programme contemplated in the Constitution and the Act. The provision added in S. 21(2) of the Act of 1950 is intended to extend cover to the electoral roll in eventualities which otherwise might have interfered with the smooth working of the programme (Para 12)

Cases Referred:	Chronological Paras
AIR 1985 SC 1233	12
AIR 1984 SC 1911	1, 3, 12, 13
AIR 1970 SC 340 : 1970: 1 SCR 845	3
AIR 1957 SC 304 : 1957 SCR 68	9
AIR 1955 SC 233 : 1954 SCR 1104	4
AIR 1954 SC 210 : 1954 SCR 892	4
AIR 1954 SC 520 : 1955 SCR 267	5
AIR 1952 SC 64 : 1952 SCR 218	12

JUDGMENT

Present:- P.N. Bhagwati C.J. Amarendra Nath Sen, V. Balakrishna Eradi. Ranganath Misra. V. Khalid. JJ.

Mr. V. M. Tarkunde, Mr. P. G. Barua, Mr. S.N. Medhi, Mr. Shanti Bhushan, Mr. K.K. Venugopal, Mr. Sole J. Sorabji & S.M. Medhi. Sr. Advocate, Mr. Hrishikesh Roy, Mrs. & Mr. Karanjawala, Mr. K. Pablay, Mr. Swaraj Kaushal, Mr. E.C. Vidyasagar, Sushma Swaraj, Mr. N.M. Ghatate, Mr. S.V. Deshpande, Mr. Lira Goswami, Mrs. R. Swamy, Mr. C.S. Vaidyanathan, Mr. P. Choudhary, Mr. P.G. Barua, Miss Lakshmi Anand Kumar and Mss. N. Rama Kumaran, Advocates, with them for Petitioners;

Mr. K. Parasaran, Attorney General, Mr. K.G. Bhagat, Addl. Solicitor General, Mr. A.K. Sen. Mr. F.S. Nariman and Mr. P.R. Mridul, Sr. Advocates, Mr. S.N. Bhuyan. Advocate General. Assam, Mr. K. Swamy Ms. A. Subhashini, Mr. S.K. Nandy, Mr. M.Z. Ahmed and Mr. Kath Hazarika, Advocates with them for Respondents.

RANGANATH MISRA, J. :— **At the conclusion of the hearing, in view of the urgency of the matter as also the importance of the issues involved we made an order on September, 28, 1984 (reported in AIR 1984 SC 1911) setting out briefly our conclusions and had indicated that detailed reasons would be given in the judgment to be delivered later.**

2. **On the 12th January 1983 election to all the 126 seats of the Assam Legislative Assembly was notified to be held in February, 1983. Very disturbed conditions had been prevailing in Assam for a few years prior to this period and one of the issues**

leading to the agitation was the electoral rolls of 1979 prepared under the Representation of the People Act, 1950 (1950 Act for short). When general election was notified a set of writ petitions were filed in the Gauhati High Court being Civil Rules 87 and 228-246 of 1983. The first application asked for a mandamus to the Election Commission and the State Government then under President's rule not to hold elections on the basis of the defective electoral rolls and to defer holding of elections on account of the prevailing disturbed situation in the State. In the second group of writ petitions the Court was asked to issue a mandamus for preparation of fresh electoral rolls according to law before election could be held and to restrain the Commission and the State Government from holding elections on the basis of defective and void electoral rolls. The High Court did not grant interim order of stay of election though the writ petitions were entertained. Consequently elections were held to the State Legislature and by Notification of February 27, 1983, the results of the election were duly notified. A number of writ petitions were then filed in the Gauhati High Court more or less making similar allegations and substantially challenging the electoral rolls of 1979 and questioning the validity of all the elections to the Legislative Assembly and praying for dissolution of the House. In some of these applications relief of quo warranto was also asked for against named returned candidates. These writ petitions were numbered as Civil Rules 524, 691-693, 695-699, 706-707, 694 and 595 (?) of 1983 and were in due course transferred to this Court at the instance of the Election Commission for disposal. They have, therefore, been assigned new numbers as Transferred Cases. We have thus two sets of cases, transferred from the Gauhati High Court — the first set challenging the electoral rolls of 1979 and the Notification for holding of the elections and asking for staying of the elections and the second set challenging the elections after they were held and notified on the ground that the holding of elections on the basis of the void electoral rolls of 1979 was contrary to law and vitiated the elections.

3. **Our order of September, 28 1984, (reported in AIR 1984 SC 1911), not only indicated the conclusions but also provided brief reasons for the same. We therefore propose to refer to the relevant portions thereof on each issue arising for consideration. Dealing with the challenge to the validity of elections to Assam Legislative Assembly, we had said.**

"The principal ground on which the validity of the elections has been challenged is that the electoral rolls were not revised before the elections in contravention of the provisions of S. 21. subsec. (2) (a) of the Representation of the People Act 1950, and the elections were held on the basis of the electoral rolls of 1979. Now it is undoubtedly true that the electoral rolls were not revised before the impugned elections were held but the Election Commission dispensed with the revision of the electoral rolls by an order dated January, 7, 1983, made under the opening part of S. 21 sub-sec. (2) and this order has not been challenged in any of the writ petition. Hence the impugned elections cannot be challenged on the ground that they were without revision of the electoral rolls. The petitioners also attacked the validity of the electoral rolls of 1979 on the ground that the Election Commission had by the Press Note dated September, 18 1979, erroneously directed the electoral authorities in charge of revision of the electoral rolls not to delete the names of any persons from the electoral rolls on the ground of lack of qualification of citizenship since the question of citizenship was not one which could be decided by the electoral authorities and the electoral rolls of 1979 were therefore invalid and the impugned

elections held on the basis of the electoral rolls of 1979 were void. We do not think there is any substance in this contention.

In the first place, Art. 329(b) of the Constitution bars any challenge to the impugned elections by a writ petition under Art. 226 as also on the ground that the electoral rolls on the basis of which the impugned elections were held were invalid. The petitioners sought to escape from the ban of Art 329 (b) by contending that they are challenging the impugned elections as a whole and not any individual election and that the ban of Art 329(b) therefore does not stand in the way of the writ petitions filed by them challenging the impugned elections. But we do not think this escape route is open to the petitioners. There is in the Representation of the People Act, 1951, no concept of elections as a whole. What that Act contemplates is election from each constituency and it is that election which is liable to be challenged by filing an election petition. It may be that there is a common ground which may vitiate the elections from all the constituencies but even so it is the election from each constituency which has to be challenged though the ground of challenge may be identical. Even where in form the challenge is to the elections as a whole in effect and substance what is challenged is election from each constituency and Art. 329(b) must, therefore, be held to be attracted.

We are of the view that once the final electoral rolls are published and elections are held on the basis of such electoral rolls, it is not open to anyone to challenge the election from any constituency or constituencies on the ground that the electoral rolls were defective. That is not a ground available for challenging an election under S.100 of the Representation of the People Act, 1951. The finality of the electoral rolls cannot be assailed in proceeding challenging the validity of an election held on the basis of such electoral roll vide Kabul Singh v. Kundan Singh (1970) 1 SCR 845 : (AIR 1970 SC 340) Art. 329(b) in our opinion clearly bars any writ petition challenging the impugned election on the ground that the electoral rolls of 1979 on the basis of which the impugned elections were held were invalid."

Article 329(b) of the Constitution provides:

"Notwithstanding anything in this Constitution:—

(a) x x x x x x x

(b) No election to either House of Parliament or to the House or either House of the Legislature or a State Shall be called in question 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."

4. **Therefore, an election can be challenged only by filing of an election petition in the manner prescribed by the Representation of the People Act. 1951. A Constitution Bench of this Court in Jagan Nath v. Jaswant Singh. 1954 SCR 892 : (AIR 1954 SC 210) has said:**

"The general rule is well settled that the statutory requirement of election law must be strictly observed and that an election contest is not an election at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the Court possesses no common law power."

In Hari Vishnu Kamath v. Syed Ahmad Ishaq. 1955 SCR 1104 at p. 1111 : (AIR 1955 SC 233 at Pp. 238-239) Venkatarama Ayyar. J. speaking for the Court said:

".....These are instances of original proceedings calling in question an election and would be within the prohibition enacted in Art. 329 (b). but when once proceedings have been instituted in accordance with Art. 329(b) by presentation of

an election petition, the requirements of that article are fully satisfied. Thereafter when the election petition is in due course heard by a Tribunal (now the High Court) and decided, whether its decision is open to attack and if so, where and to what extent, must be determined by the general law applicable to decisions of Tribunals. ..... The view that Art. 329(b) is limited in its operation to initiation of proceedings for setting aside an election and not to the further stages following on the decision of the Tribunal is considerably reinforced when the question is considered with reference to a candidate whose election has been set aside by the Tribunal."

5. **To the same effect are the observations of another Constitution Bench in the case of Durga Shankar Mehta v. Raghuraj Singh, 1955 SCR 267 : (AIR 1954 SC 520) Mukherjea. J. (as he then was) spoke for the Court thus:**

"The non obstante clause with which Art. 329 of the Constitution begins and upon which the respondent's counsel lays so much stress debars us, as it debars any other Court in the land, to entertain a suit or a proceeding calling in question any election to the Parliament or the State Legislature. It is the Election Tribunal (now the High Court) alone that can decide such disputes and the proceeding has to be initiated by an election petition and in such manner as may be provided by a statute...."

6. **These are clear authorities — and the position has never been assailed — in support of the position that an election can be challenged only in the manner prescribed by the Act. In this view of the matter, we had concluded that writ petitions under Art. 226 challenging the election to the State Legislature were not maintainable and election petitions under S. 81 of the Act had to be filed in the High Court. The Act does not contemplate a challenge to the election to the Legislature as a whole and the scheme of the Act is clear. Election of each of the returned candidates has to be challenged by filing of a separate election petition. The proceedings under the Act are quite strict and clear provisions have been made as to how an election petition has to be filed and who should be parties to such election petition. As we have already observed when election to a legislature is held it is not one election but there are as many elections as the legislature has members. The challenged to the elections to the Assam Legislative Assembly by filing petition under Art. 226 of the Constitution was therefore not tenable in law.**

7. **It is the admitted case of parties before us that the electoral rolls of all the constituencies excepting one in the State of Assam were last revised intensively during the year 1979 with reference to January 1, 1979., as the qualifying date. In the case of No. 114 — Jonai (S.T.) Assembly Constituency only summary revision was undertaken as intensive revision was not possible for the reason that these areas were submerged heavily by flood water at the relevant time. The general election to the House of Parliament was held in 1980 on the basis of the said electoral rolls. An annual revision of the electoral rolls as per requirement of the law as also the practice obtaining in the rest of the country could not be undertaken in 1980-81 or 1982 mainly on account of adverse law and order situation prevailing in the State.**

8. **The legislative Assembly of the State of Assam had been dissolved by the President acting under Art. 356 of the Constitution by proclamation dated March 19, 1982, and the extended period was due to expire on March, 18, 1983. The Election Commission was intimated by the Union government on January 6, 1983, that the Presidential proclamation would be revoked by the end of February, 1983.**

Holding of election in Assam for constituting the Legislative Assembly well before the end of that period therefore became an immediate necessity. The Election Commission had hardly eight weeks time in its hand to complete the process. Without loss of further time the Commission issued the Notification announcing the election programme on January 12, 1983 and the election was proposed to be held on the basis of the existing electoral rolls of 1979.

9. **According to the petitioners the electoral rolls of 1979 without being appropriately revised as required by law were not the proper rolls on the basis of which election could have been conducted. It has been pointed out that the process of revision had been undertaken but the Election Commission suddenly stopped it and decided that the unrevised and out of date rolls would provide the basis for holding of the elections. It is the submission of the petitioners on the basis of a decision of this Court in Chief Commr. Ajmer v. Radhy Shyam Dani. 1957 SCR 68 : (AIR 1957 SC 304). that it is essential for democratic elections that proper electoral rolls should be maintained and in order that the same may be available it is necessary that after the preparation of the electoral rolls opportunity should be given to the parties concerned to scrutinise whether the persons enrolled as electors possess the requisite qualifications. Opportunity should also be given for the revision of the electoral rolls and for the adjudication of the claims for being enrolled. Unless these are done the obligation cast upon those holding the elections is not discharged and the elections held on such imperfect electoral rolls would acquire no sanctity and would be liable to be challenged at the instance of the parties concerned. In the case referred to above validity of municipal elections was under consideration. Obviously provisions of Art 329(b) of the Constitution had no application to such election and this Court was dealing with the statutory requirements for holding of the elections.**

10. **Challenge to the 1979 electoral rolls is on the basis that persons who are not citizens of India have been included in the electoral rolls. Infiltration of people from outside India into Assam and inclusion of their names in the electoral rolls constituted one of the main grounds for the agitation in Assam. S. 16 of the 1950 Act clearly provides that a person shall be disqualified for registration in an electoral roll if he is not a citizen of India. Detailed provision has been made in the Registration of Electors Rules to raise objection to the inclusion of the name of a disqualified person. Part III of the 1950 Act makes provision for electoral rolls for Assembly Constituencies S. 21 deals with preparation and revision of electoral rolls; S. 22 provides for correction of entries in electoral rolls while S. 23 authorised inclusion of names in electoral rolls. S. 24 provides an appeal to the Chief Electoral Officer from any order made by the Electoral Registration Officer under Ss. 22 and 23, S. 21 making provision for preparation and revision of electoral rolls runs thus;**

"(1) The electoral roll for each constituency shall be prepared in the prescribed manner by reference to the qualifying date and shall come into force immediately upon its final publication in accordance with the rules made under this Act.

(2) The said electoral roll—

(a) shall, unless otherwise directed by the Election Commission for reasons to be recorded in writing, be revised in the prescribed manner by reference to the qualifying date—

(i) before each general election to the House of People or to the Legislative Assembly of a State; and

(ii) before each bye-election to fill a casual vacancy in a seat allotted to the constituency and

(b) shall be revised in any year in the prescribed manner by reference to the qualifying date if such revision has been directed by the Election Commission:

Provided that if the electoral roll is not revised or continued operation of the said electoral roll shall not thereby be affected.

(3) x x x x x x x x

The proviso, therefore, makes the position clear beyond doubt that if for some reason an electoral roll is not revised as required by sub. S(2) the unrevised roll is not affected in any way and continues to be the electoral roll holding the field.

11. **Dealing with the aspect about the validity of electoral rolls of 1979, we have indicated:**

"We may also point out that in our opinion the electoral rolls of 1979 cannot be condemned as invalid. The counter-affidavits of Shri Ganesan, Secretary to the Election Commission and Shri Ashok Kumar Arora Additional Chief Electoral Officer. Assam clearly show that the procedure prescribed by the Representation of the People Act 1950 for revision of the electoral roll was followed. The Press Note dated September 18, 1979 on which considerable reliance was placed on behalf of the petitioner must be read along with the correspondence exchanged between the Chief Electoral Officer. Assam and the Secretary to the Election Commission prior to the issue of the Press Note and if all these documents are read as a whole its clear that no instructions were issued by the Election Commission to the Chief Electoral Officer not to decide the question of citizenship if any objection to a particular entry in the draft electoral rolls was raised on the ground of lack of qualification of citizenship. All that the Election Commission directed the Chief Electoral Officer to do was to proceed on the basis that those whose names were already included in the previous electoral rolls — and we may point out that the electoral rolls of 1977 on the basis of which the election to the Assam Legislative Assembly were held in 1978 were not at any time challenged by any of the petitioners — should be prima facie regarded as satisfying the qualification of citizenship and if any specific objection to the inclusion of any particular person on the ground of lack of qualification of citizenship was raised. It should be decided by the appropriate electoral authorities and the burden of showing the such person was not a citizen should be on the objector. We are informed and the affidavits also go to show that in fact a large number of objections based on the ground of lack of qualification of citizenship were disposed of by the appropriate electoral authorities after the publication of the draft electoral rolls. So far as the inclusion of any new names in the draft electoral rolls was concerned the Election Commission directed that the utmost care should be taken to ensure that only citizens were enrolled as electors. We do not think that these were in any way in defiance of the provisions of the Representation of the People Act 1950 and the Electoral Registration Rules 1960 made under that Act. The electoral rolls of 1979 must therefore, be regarded as not suffering from any legal infirmity though we may reiterate once again that even if the electoral rolls of 1979 were invalid that would not affect the validity of the impugned elections nor would a writ petition under Art 226 of the Constitution be maintainable for challenging the impugned election."

12. **From the materials placed by the parties and the Election Commission, we have come to the conclusion that the Election Commission did not give directions**

contrary to the requirements of S. 16 of the Act and the revision of the 1979 electoral rolls could not be undertaken for reasons beyond the control of the Election Commission. As pointed out by us in our order of September 28 1984 (reported in AIR 1984 SC 1911) there was no dispute as to the electoral roll of 1977 nor was any challenge advanced against the election of 1978 to the State Legislature held on the basis of such rolls. Admittedly, the 1979 rolls were the outcome of intensive revision of the rolls of 1977. That being the position and in view of the proviso to sub-sec (2) of S. 21 which we have extracted above the electoral rolls of 1979 were validly in existence and remained effective even though the process contemplated in sub-sec (2) for revision had not either been undertaken or completed. It has been indicated by a Constitution Bench decision of this Court in Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman. C. As. Nos. 739 - 741 of 1982 decided on 8-5-1985 : (AIR 1985 SC 1233), that preparation and revision of electoral rolls is a continuous process not connected with any particular election but when an election is to be held the electoral roll which exists at the time when election is notified would form the foundation for holding of such election. That is why sub-s (3) of S. 23 provides for suspension of any modification to the electoral roll after the last date of making of nominations for an election and until completion of the election. We had therefore come to the conclusion that the electoral rolls of 1979 were not invalid and could provide the basis for holding of the elections in 1983. Whether preparation and publication of the electoral rolls are a part of the process of election within the meaning of Art. 329(b) of the Constitution is the next aspect to be considered. In N.P. Ponnuswami v. Returning Officer Namakkal Constituency 1952 SCR 218 (AIR 1952 SC 64) this Court had to decide the amplitude of the term "election" Fazal Ali J. speaking for the Constitution Bench indicated;

"It seems to me that the word 'election' has been used in Part XV of the Constitution in the wide sense that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature. The use of the expression "conduct of elections" in Art. 324 specifically points to the wide meaning, and that meaning can also be read consistently into the other provisions which occur in Part XV including Art. 329(b). That the word "election" bears this wide meaning whenever we talk of elections in a democratic country is borne out by the fact that in most of the books on the subject and in several cases dealing with the matter one of the questions mooted is, when the election begins. The subject is dealt with quite concisely in Halsbury's laws in England in the following passage under the heading "Commencement of the Election":

'Although the first formal step in every election is the issue of the writ, the election is considered for some purposes to begin at an earlier date. It is a question of fact in each case when an election begins in such a way as to make the parties concerned responsible for breaches of election law the test being whether the contest is "reasonably imminent". Neither the issue of the writ nor the publication of the notice of election can be looked to as fixing the date when an election begins from this point of view. Nor, again does the nomination day afford any criterion. The election will usually begin at least earlier that the issue of the writ. The question when the election begins must be carefully distinguished from that as to when 'the conduct and management of" an election may be said to begin. Again, the question as to when a particular person commences to be a candidate is a question to be considered in each case.'

The discussion in this passage makes it clear that the word "election" can be and has been appropriately used with reference to the entire process which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process."

We are not prepared to take the view that preparation of electoral rolls is also a process of election. We find support for our view from the observations of Chandrachud C.J. in Lakshmi Charan Sen's case (AIR 1985 SC 1233) (supra) that "it may be difficult consistently with that view to hold that preparation and revision of electoral roll is a part of 'election' within the meaning of Artl 329(b)". In a suitable case challenge to the electoral roll for not complying with the requirements of the law may be entertained subject to the rule indicated in Ponnuswami's case, (AIR 1952 SC 64) (supra). But the election of a candidate is not open to challenge on the score of the electoral roll being defective. Holding the election to the Legislature and holding them according to law are both matters of paramount importance. Such elections have to be held also in accordance with a time bound programme contemplated in the Constitution and the Act. The proviso added in S. 22(2)(21)(2)(?) of the Act of 1950 is intended to extend cover to the electoral rolls in eventualities which otherwise might have interfered with the smooth working of the programme. These are the reasons for which we came to the conclusion that the electoral roll of 1979 had not been vitiated and was not open to be attacked as invalid.

13. **Two other brief contentions may now be noticed. In Transferred Case No. 364/84 there was a prayer that the electoral rolls on the basis of which election from Assam would be held should be revised before the holding of such election as required by S. 21(2) (a) of the Act of 1950. This meant an intensive revision. Counsel appearing for the Election Commission made a statement before the Court to the following effect:**

"The Commission will carry out revision of the electoral rolls for all constituencies in Assam in accordance with the Act and the Rules and such revision shall, as far as practicable, be intensive revision and wherever it is not practicable to carry out intensive revision in any constituency or constituencies the revision shall be summary or special revision."

We indicated in our order of September, 28, 1984 (reported in AIR 1984 SC 1911) that the statement made on behalf of the Election Commission must allay the apprehension of all the petitioners in the case since it made it clear that before elections are held in Assam there would be revision of the electoral rolls in the manner indicated in the statement Considerable argument was advanced with reference to the electoral card. As it appears the Election Commission had introduced a form different from the one prescribed in Form 4 read with rule 8 of the Electors Registration Rules. Here again a statement was made on behalf of the Commission to the following effect:

"For the sake of greater clarity and keeping in view the provisions of S. 2(c) of the Representation of the People Act, 1951 and Form 4 of the Registration of Electors Rules 1960 the word 'citizen' shall be substituted for the word 'elector' wherever it occurs in the electoral card by issuance of a direction by the Election Commission."

With the adoption of the basis indicated in the statement, the objection on the score must be taken to have vanished.

14. **Considerable argument had also been advanced regarding the carrying out of revision of electoral rolls. Petitioners wanted that the Election Commission should do so suo motu while the Election Commission pleaded its inability keeping in view the ambit and stupendous proportion of the task and pleaded that claim or objection should be the foundation of the revision. Dealing with this question, after hearing counsel at great length we had stated:**

"The only direction which we can give to the Election Commission is to carry out revision of the electoral rolls in accordance with the procedure prescribed in the Representation of the People Act. 1950 and the Electors Registration Rules, 1960. But since the Election Commission has stated before us that it will carry out revision of the electoral rolls and that such revision shall as far as practicable, be intensive revision and where it is not so practicable it will be summary or special we do not think it necessary to give any further directions to the Election Commission. When the draft electoral rolls are ready as a result of such revision carried out by the Election Commission it will be open to any one whose name is not included in the draft electoral rolls to lodge a claim for inclusion of his name on the ground that he is an eligible elector and if the name of any person is erroneously included in the draft electoral rolls even though he is not a citizen it will be equally open to anyone entitled to object to challenge the inclusion of the name of such person in the draft electoral rolls by filing an objection in accordance with the Electors Registration Rules, 1960. It is neither desirable nor proper for us to lay down as to what quantum of proof should be required for the purpose of substantiating any such claims or objections lodged before the Election Commission. It would be for the appropriate electoral officer to consider and decide in the light of such material as may be produced before him by the objector as also by the person whose name is sought to be deleted from the electoral rolls and such further material as may be available to him including the electoral rolls of the earlier years whether such person is a citizen or not. We may point out that the appropriate electoral officer may also on his own, if he has on the material available to him including the electoral rolls of the earlier years, reason to entertain any doubt, take steps to satisfy himself in regard to the citizenship of a person whose name is sought to be included or has been included in the electoral rolls.

15. **We take note of the position — and with a sense of satisfaction — that with the accord reached about Assam the agitation seems to have ended. The Election Commission is at work and in compliance with the provisions of the Act and the Rules the electoral rolls are being revised. We hope and trust that elections which are indispensable to the democratic process would be held in accordance with law as expediently as possible and on the basis of a revised electoral roll in terms of the statement made to the Court by the Election Commission.**

Order Accordingly.

SUPREME COURT OF INDIA*

Writ Petition No. 11738 of 1985
(Decision dated 24.9.1985)

Kanhiya Lal Omar ***..Petitioner***

Vs.

R.K. Trivedi and Others ***..Respondents***

SUMMARY OF THE CASE

The Election Commission has issued the Election Symbols (Reservation and Allotment) Order, 1968, providing for the recognition of political parties as National or State parties, determination of disputes between the splinter groups of such recognised political parties, allotment of symbols to candidates, etc. The petitioner, Shri Kanhiya Lal Omar, filed the present writ petition before the Supreme Court under Article 32 of the Constitution, challenging the constitutional validity of the said Order. The principal contention urged by the petitioner was that the Symbols Order was legislative in character and could not have been issued by the Commission because the Commission is not entrusted by law with power to issue such a legislative order.

The Supreme Court dismissed the writ petition, upholding fully the constitutional validity of the said Symbols Order. The Supreme Court held that the power to issue the symbols order is comprehended in the powers of superintendence, direction and control of elections vested in the Commission under Article 324 of the Constitution. Any provision of the Symbols Order which could not be traced to the Representation of the People Act, 1951 or the Conduct of Elections Rules, 1961 can easily be traced to the reservoir of power under Article 324 (1) of the Constitution, which empowers the Commission to issue all directions necessary for the purpose of conducting smooth and fair and free elections. The Supreme Court also rejected the contention of the petitioner that any reference to registration, recognition, etc., of political parties by the Symbols Order is unauthorised and against the political system adopted by our country.

Constitution of India, Art. 324 – Conduct of Election Rules (1961), Rr. 5,10 – Election Symbols (Reservation and Allotment) Order (1968) – Symbols Order – Election Commission can issue such order – Power to issue Symbols order is comprehended in power of superintendence, direction and control of elections vested in Commission. (Representation of the People Act (43 of 1951) S.169) – (Interpretation of statutes – Liberal Construction.)

The Election Commission is empowered to recognise political parties and to decide disputes arising amongst them or between splinter groups within a political party. It is also empowered to issue the Symbols Order. It could not be said that when the Commission issued the Symbols Order it was not doing so on its own behalf but as the delegate of some other authority. The power to issue the Symbols Order is comprehended in the power of superintendence, direction and control of elections vested in the Commission. AIR 1972 SC 187 Foll.

(Para 13)

Even if for any reason, it is held that any of the provisions contained in the Symbols Order are not traceable to the Representation of the People Act or the Conduct of Election Rules, the power of the Commission under Art. 324(1) of the Constitution which is plenary in character can encompass all such provisions. Art. 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. AIR 1978 SC 851 and AIR 1984 SC 921 Rel. on.

(Para 16)

It cannot be said that the Central Government which had been delegated the power to make rules under S.169 of the Act could not further delegate the power to make any subordinate legislation in the form of the Symbols Order to the Commission, without itself being empowered by the Act to make such further delegation. Any part of the Symbols Order which cannot be traced to Rr. (Rules) 5 and 10 of the Rules can easily be traced in this case to the reservoir of power under Art. 324(1) which empowers the Commission to issue all directions necessary for the purpose of conducting smooth, free and fair elections. While construing the expression "superintendence, direction and control" in Art. 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 person 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.

(Para 17)

Although till recently the Constitution had not expressly referred to the existence of political parties, by the amendments made to it by the Constitution (Fifty-Second Amendment) Act, 1985 there is now a clear recognition of the political parties by the Constitution. The Tenth Schedule to the Constitution which is added by the above Amending Act acknowledges the existence of political parties and sets out the circumstances when a member of Parliament or the State Legislature would be deemed to have defected from his political party and would thereby be disqualified for being a member of the House concerned. Hence it is difficult to say

that the reference to recognition, registration etc., of political parties by the Symbols Order is unauthorised and against the political system adopted by our country.

(Para 10)

It cannot be said that the several evils, malpractices etc., which are alleged to be existing amongst the political parties today are due to the Symbols Order which recognises political parties and provides for their registration etc. The reasons for the existence of such evils, malpractices etc. are to be found elsewhere.

(Para 18)

Cases Referred: Chronological	Paras
AIR 1984 SC 921 : (1984) 3 SCR 74	**16**
AIR 1982 SC 1559 : (1983) 1 SCR 702	**15**
AIR 1978 SC 851 : (1978) 2 SCR 272	**16**
AIR 1977 SC 2155 : (1978) 1 SCR 393	**14**
AIR 1972 SC 187 : (1972) 2 SCR 318	**11, 14**

JUDGMENT

Present:- E.S. Venkataramiah and R.B. Misra, JJ.

Mr. Gobind Mukhoty, Sr. Advocate, Mr. R.P. Gupta and Miss. Kirti Gupta, Advocates with him for Petitioner.

E.S. VENKATARAMIAH, J.:– **In this petition filed under Art. 32 of the Constitution the petitioner challenges the constitutional validity of the Election Symbols (Reservation and Allotment) Order, 1968 (hereinafter referred to as 'the Symbols Order') which is issued by the Election Commission (hereinafter referred to as 'the Commission'). The principal contention urged by the petitioner in support of his contention is that the Symbols Order which is legislative in character could not have been 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 symbols that may be chosen by the candidates at elections in parliamentary and assembly constituencies. It is further urged that Art. 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 Order.**

2. **It is necessary to set out the relevant provisions of law having a bearing on the above question at the outset for a proper appreciation of the contentions urged on behalf of the petition. Art. 324(1) of the Constitution reads thus:**

"324.(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)."

3. **Articles 327 and 328 of the Constitution which vest the power of making provisions with respect to elections on Parliament and the Legislatures in the States read as follows:**

"327. 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.

328. Subject to the provisions of this Constitution and in so far as provision in that behalf is not made by Parliament, the Legislature of a State may from time to time by law make provision with respect to all matters relating to, or in connection with, the elections to the House or either House of the Legislature of the State including the preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses."

4. **Article 327 of the Constitution confers the power on Parliament to make by law provisions 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 subject to the provisions of the Constitution. Art. 328 of the Constitution confers similar power on the Legislature of a State to make provision with respect to all matters relating to, or in connection with, the elections to the House or either House of the Legislature of the State including the preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses subject to the provisions of the constitution and in so far as provision in that behalf is not made by Parliament. In exercise of the power conferred by Art. 327 of the Constitution Parliament has enacted the Representation of the People Act, 1951 (43 of 1951) (hereinafter referred to as 'the Act') providing for the conduct of elections to the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections. S.169 of the Act empowers the Central Government to promulgate rules, after consultation with the Commission, for carrying out the purposes of the Act. In exercise of the said power the Central Government has promulgated the Conduct of Elections Rules, 1961 (hereinafter referred to as 'the Rules'). Rr.5 and 10 of the Rules which are material for the purposes of this case read thus:**

"5. Symbols for elections in parliamentary and assembly constituencies – (1) The Election Commission shall, by notification in the Gazette of India, and in the Official Gazette of each State, specify the symbols that may be chosen by candidates at elections in Parliamentary or assembly constituencies and the restrictions to which their choice shall be subject.

(2) Subject to any general or special direction issued by the Election Commission either under sub-rule (4) or sub-rule (5) of rule 10, where at any such election, more nomination papers than one are delivered by or on behalf of a candidate, the declaration as to symbols made in the nomination paper first delivered, and no other declaration as to symbols shall be taken into consideration under R.10 even if that nomination paper has been rejected.

10. Preparation of list of contesting candidates– .....

(4) At an election in a Parliamentary or assembly constituency, where a poll becomes necessary, the returning officer shall consider the choice of symbols expressed by the contesting candidates in their nomination papers and shall, subject to any general or special direction issued in this behalf by the Election Commission—

(a) allot a different symbol to each contesting candidate in conformity, as far as practicable, with his choice; and

(b) if more contesting candidates than one have indicated their preference for the same symbol, decide by lot to which of such candidates the symbol will be allotted.

(5) The allotment by the returning officer of any symbol to a candidate shall be final except where it is inconsistent with any directions issued by the Election Commission in this behalf in which case the Election Commission may revise the allotment in such manner as it thinks fit.

(6) Every candidate or his election agent shall forthwith be informed of the symbol allotted to the candidate and be supplied with a specimen thereof by the returning officer."

5. **Sub-rule (1) of Rule 5 of the Rules empowers the Commission to specify by a notification in the Gazette of India and in the Official Gazette of each State, the symbols that may be chosen by candidates at elections in Parliamentary or assembly constituencies and the restrictions to which their choice shall be subject. Sub-rule (4) of R.10 of the rules provides that at an election in a Parliamentary or assembly constituency, where a poll becomes necessary, the returning officer shall consider the choice of symbols expressed by the contesting candidates in their nomination papers and shall subject to any general or special direction issued in this behalf by the Commission allot a different symbol to each contesting candidate in conformity, as far as practicable, with his choice and if more contesting candidates than one have indicated their preference for the same symbol, decide by lot to which of such candidates the symbol will be allotted. Sub-r. (5) of R.10 of the Rules provides that the allotment by returning officer of any symbol to a candidate shall be final except where it is inconsistent with any directions issued by the Commission in this behalf in which case the Commission may revise the allotment in such manner as it thinks fit. Under sub-rule (6) of R.10 of the Rules every candidate or his election agent should be informed forthwith the symbol allotted to the candidate and is entitled to be supplied with a specimen thereof. Purporting to exercise its power under Art. 324 of the Constitution read with R.5 and R.10 of the Rules, the Commission issued the Symbols Order in the year 1968 which is impugned in this petition. The Preamble to the Symbols Order reads thus:**

"S.O. 2959 dated 31st August, 1968 – Whereas the superintendence, direction and control of all elections to Parliament and to the Legislature of every State are vested by the Constitution of India in the Election Commission of India;

And, whereas, it is necessary and expedient to provide in the interests of purity of election to the House of the People and the Legislative Assembly of every State and in the interests of the conduct of such elections in a fair and efficient manner, for the specification, reservation, choice and allotment of symbols, for the

recognition of political parties in relation thereto and for matters connected therewith.

Now, therefore, in exercise of the powers conferred by Art. 324 of the Constitution, read with R.5 and R.10 of the Conduct of Elections Rules, 1961, and all other powers enabling it in this behalf, the Election Commission of India hereby makes the following Order."

6. **The expression 'Political Party' is defined in Paragraph 2(1)(h) of the Symbols Order thus:**

"2.(1)(h)— 'Political party' means an association or body of individual citizens of India registered with the Commission as a political party under paragraph 3 and includes a political party deemed to be registered with the Commission under the proviso of sub-paragraph (2) of that paragraph;"

7. **Paragraph 3 of the Symbols Order provides that any association or body of individual citizens of India calling itself a political party and intending to avail itself of the provisions of the Symbols Order shall make an application to the Commission for its registration as a political party for the purposes of the Symbols Order. Sub-paragraphs (2), (3) and (4) of paragraph 3 of the Symbols Order provide for the manner in which such applications should be made by associations and bodies calling themselves as political parties for registration with the Commission. That paragraph empowers the Commission to consider all relevant particulars and to decide whether the association or body should be registered as a political party or not and its decision in that regard is stated to be final. Paragraph 4 of the Symbols Order provides that in every contested election a symbol shall be allotted to a contesting candidate in accordance with the provisions of the Symbols Order and different symbols shall be allotted to different contesting candidates at an election in the same constituency. The symbols specified by the Commission are classified into two categories by paragraph 5 of the Symbols Order. They are either reserved or free. A reserved symbol is a symbol which is reserved for a recognised political party for exclusive allotment to contesting candidates set up by that party. A free symbol is a symbol other than a reserved symbol. Paragraph 6 of the Symbols Order provides for the classification of the political parties into recognised political parties and unrecognised political parties. Amongst the recognised political parties according to the Symbols Order there are two categories, namely, national parties and the State parties. The Symbols Order further provides for the determination of the question whether a candidate has been set up by a political party or not. It deals with the power of the Commission to issue instructions to unrecognised political parties for their expeditious recognition on fulfilment of conditions specified in paragraph 6. The power of the Commission in relation to splinter groups or rival sections of a recognised political party and its power in case of amalgamation of two or more political parties are dealt with in paragraphs 15 and 16 of the Symbols Order. Under paragraph 17 of the Symbols Order the Commission is required to publish by one or more notifications in the Gazette of India lists specifying the national parties and the symbols respectively reserved for them the State parties, the State or States in which they are State parties and the symbols respectively reserved for them in such State or States, the unrecognised political parties and the State or States in which they function and the free symbols for each State. Every such list is required to be kept up-to-date, as far as possible. Under paragraph 18 of the Symbols Order the Commission has reserved to itself the power to issue**

instructions and directions for the clarification of any of the provisions of the Symbols Order, for the removal of any difficulty which may arise in relation to the implementation of any such provisions and in relation to any matter with respect to the reservation and allotment of symbols and recognition of political parties, for which the Symbols Order makes no provision or makes insufficient provision and provision is in the opinion of the Commission necessary for the smooth and orderly conduct of elections.

8. **The petitioner claims to be a convener of a social organisation named "SAPRAYA" situated at 67/68, Daulat Ganj, Kanpur (U.P.) which is stated to have been established for the purposes of propagating 'National truth' and for acquainting the people of India about the ideals cherished by it. The petitioner is aggrieved by the emergence of a large number of political parties at the national level and at the State level which according to him has prejudiced seriously the ideals of a democratic country. He has referred in the course of the petition to the various acts committed by the several political parties which according to him are highly detrimental to the interests of the country. He contends that the emergence of these political parties is due to the provisions contained in the Symbols Order which provides for the registration of political parties, reservation and allotment of symbols in favour of various political parties. It is contended by the petitioner that the Symbols Order is liable to be struck down on the ground that the Commission is not empowered to issue it either under the Constitution or the act and the Rules made thereunder. It is his contention that there is no provision, constitutional or legal, which justifies the recognition of political parties for purposes of election.**

9. **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. Art. 324 of the Constitution contains detailed provisions regarding the constitution of the Commission and its general powers. The Commission consists of the Chief Election Commissioner who is appointed by the President and it may also consist such number of other Election Commissioners, if any, as the President may from time to time fix, who are also to be appointed by the President. When Election Commissioners are appointed, the Chief Election Commissioner becomes the Chairman of the Commission. There is provision for the appointment of Regional Commissioners to assist the Commission. In order to ensure the independence and impartiality of the Commission, it is 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 of India and that the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment. An Election Commissioner or a Regional Commissioner cannot be removed from office except on the recommendation of the Chief Election Commissioner. The superintendence, direction and control of the conduct of elections referred to in Art. 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 Art. 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 any Parliament the Legislature of a State may under Art. 328 read with Entry 37 of 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 Art. 324(1) naturally are subject to any law made either under Art. 327 or under Art. 328 of the Constitution. The word 'election' in Art. 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. Hence there is need for using symbols to denote the candidates who contest elections so that the illiterate voter may cast his vote in secrecy in favour of the candidate of his choice by identifying him with the help of the symbol printed on the ballot paper against his name.

10. **It is true that till recently the Constitution did not expressly refer to the existence of political parties. But their existence is implicit in the nature of democratic form of Government which our country has adopted. The use of a symbol, be it a donkey or an elephant, does give rise to an unifying effect amongst the people with a common political and economic programme and ultimately helps in the establishment of a Westminister type of democracy which we have adopted with a Cabinet responsible to the elected representatives of the people who constitute the Lower House. The political parties have to be there if the present system of Government should succeed and the chasm dividing the political parties should be so profound that a change of administration would in fact be a revolution disguised under a constitutional procedure. It is no doubt a paradox that while the country as a whole yields to no other in its corporate sense of unity and continuity, the working parts of its political system are so organised on party basis – in other words, "on systematized differences and unresolved conflicts." That is the essence of our system and it facilitates the setting up of a Government by the majority. Although till recently the Constitution had not expressly referred to the existence of political parties, by the amendments made to it by the Constitution (Fifty-Second Amendment) Act, 1985 there is now a clear recognition of the political parties by the Constitution. The Tenth Schedule to the Constitution which is added by the above Amending Act acknowledges the existence of political parties and sets out the circumstances when a member of Parliament or of the State Legislature would be deemed to have defected from his political party and would thereby be disqualified for being a member of the House concerned. Hence it is difficult to say that the reference to recognition, registration etc. of political parties by the Symbols Order is unauthorised and against the political system adopted by our country.**

11. **Paragraph 15 of the Symbols Order which dealt with the power of the Commission in relation to splinter groups or rival sections of a recognised political party came up for consideration before this Court in Sadiq Ali v. Election Commission of India (1972) 2 SCR 318: (AIR 1972 SC 187).**

12. **The Court observed in that case at pages 341-343 (of SCR) (at p.201 of AIR) thus:**

"It would follow from what has been discussed earlier in this judgment that the Symbols Order makes detailed provisions for the reservation, choice and allotment of symbols and the recognition of political parties in connection therewith. That the Commission should specify symbols for elections in Parliamentary and assembly constituencies has also been made obligatory by rule 5 of Conduct of Election Rules. Sub-rule (4) of rule 10 gives a power to the Commission to issue general or special directions to the Returning Officers in respect of the allotment of symbols. The allotment of symbols by the Returning Officers has to be in accordance with those directions. Sub-rule (5) of rule 10 gives power to the Commission to revise the allotment of a symbol by the Returning Officers in so far as the said allotment is inconsistent with the directions issued by the Commission. It would, therefore, follow that Commission has been clothed with plenary powers by the abovementioned Rules in the matter of allotment of symbols. the validity of the said Rules has not been challenged before us. If the Commission is not to be disabled from exercising effectively the plenary powers vested in it in the matter of allotment of symbols and for issuing directions in connection therewith, it is plainly essential that the Commission should have the power to settle a dispute in case claim for the allotment of the symbol of a political party is made by two rival claimants. In case, it is a dispute between two individuals, the method for the settlement of that dispute is provided by paragraph 13 of the Symbols Order. If on the other hand, a dispute arises between two rival groups for allotment of a symbol of a political party on the ground that each group professes to be that party, the machinery and the manner of resolving such a dispute is given in paragraph 15. Paragraph 15 is intended to effectuate and subserve the main purposes and objects of the Symbols Order. The paragraphs is designed to ensure that because of a dispute having arisen in a political party between two or more groups, the entire scheme of the Symbols Order relating to the allotment of a symbol reserved for the political party is not set at naught. The fact that the power for the settlement of such a dispute has been vested in the Commission would not constitute a valid ground for assailing the vires of and striking down paragraph 15. The Commission is an authority created by the Constitution and according to Article 324, the superintendence, direction and control of the electoral rolls for and the conduct of elections to Parliament and to the Legislature of every State and of elections to the offices of President, and Vice-President shall be vested in the Commission. The fact that the power of resolving a dispute between two rival groups for allotment of symbol of a political party has been vested in such a high authority would raise a presumption, though rebuttable, and provide a guarantee, though not absolute but to a considerable extent, that the power would not be misused but would be exercised in a fair and reasonable manner.

There is also no substance in the contention that as power to make provisions in respect to elections has been given to the Parliament by Article 327 of the Constitution, the power cannot be further delegated to the Commission. The opening words of Article 327 are 'subject to the provisions of this Constitution'. The above words indicate that any law made by the Parliament in exercise of powers conferred by Article 327 would be subject to the other provisions of the Constitution including Article 324. Article 324 as mentioned above provides that superintendence, direction and control of elections shall be vested in Election Commission. It, therefore, cannot be said that when the Commission issued direction, it does so not on its own behalf but as the delegate of some other

authority. It may also be mentioned in this context that when the Central Government issued Conduct of Elections Rules, 1961 in exercise of its powers under section 169 of the Representation of the People Act, 1951, it did so as required by that section after consultation with the Commission."

13. **The above decision upholds the power of the Commission to recognise political parties and to decide disputes arising amongst them or between splinter groups within a political party. It also upholds the power of the Commission to issue the Symbols Order. The Court has further observed that it could not be said that when the Commission issued the Symbols Order it was not doing so on its own behalf but as the delegate of some other authority. The power to issue the Symbols Order was held to be comprehended in the power of superintendence, direction and control of elections vested in the Commission.**

14. **Overruling the objection raised as to the validity of the Symbols Order on the ground that it was legislative in character and the Commission had no power to issue it in the absence of entrustment of the power to make a law in relation to elections, this Court observed in All Party Hill Leaders' Conference, Shillong v. M. A. Sangma, (1978) 1 SCR 393 at page 408 (AIR 1977 SC 2155 at p.2164) thus:**

"It is not necessary in this appeal to deal with the question whether the Symbols Order made by the Commission is a piece of legislative activity. It is enough to hold, which we do, that the Commission is empowered in its own right under Article 324 of the Constitution and also under rules 5 and 10 of the Rules to make directions in general in widest terms necessary and also in specific cases in order to facilitate a free and fair election with promptitude. It is, therefore, legitimate on the part of the Commission to make general provisions even in anticipation or in the light of experience in respect of matters relating to symbols. That would also inevitably require it to regulate its own procedure in dealing with disputes regarding choice of symbols when raised before it. Further that would also sometimes inevitably lead to adjudication of disputes with regard to recognition of parties or rival claims to a particular symbol. The Symbols Order is, therefore, a compendium of directions in the shape of general provisions to meet various kinds of situations appertaining to elections with particular reference to symbols. The power to make these directions, whether it is a legislative activity or not, flows from Article 324, as well as from Rules 5 and 10. It was held in Sadiq Ali (AIR 1972 SC 187) (supra) that 'if the Commission is not to be disabled from exercising effectively the plenary powers vested in it in the matter of allotment of symbol and for issuing directions in connection therewith, it is plainly essential that the Commission should have the power to settle a dispute in case claim for the allotment of the symbol of a political party is made by two rival claimants'. It has been held in Sadiq Ali (supra) that the Commission has been clothed with plenary powers by rule 5 and sub-rules (4) and (5) of rule 10 of the Rules in the matter of allotment of Symbols."

15. **In Roop Lal Sathi v. Nachhattar Singh (1983) 1 SCR 702: (AIR 1982 SC 1559) the same view is reiterated. The Court observed in this case at page 719 (of SCR): (at p.1565 of AIR) as follows:**

"The Symbols Order made by the Election Commission in exercise of its power under Article 324 of the Constitution read with Rules 5 and 10 of the Conduct of Elections Rules and all other powers enabling it in that behalf, are in the nature of general directions issued by the Election Commission to regulate the mode of

allotment of symbols to the contesting candidates. It is a matter of common knowledge that elections in our country are fought on the basis of symbols. It must but logically follow as a necessary corollary that the Symbols Order is an order made under the Act. Any other view would be destructive of the very fabric of our system of holding Parliamentary and assembly constituency elections in the country on the basis of adult suffrage."

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 Commr., New Delhi (1978) 2 SCR 272 : (AIR 1978 SC 851) and A.C. Jose v. Sivan Pillai (1984) 3 SCR 74 : (AIR 1984 SC 921).**

17. **We do not also find any substance in the contention that the Central Government which had been delegated the power to make rules under section 169 of the Act could not further delegate the power to make any subordinate legislation in the form of the Symbols Order to the Commission, without itself being empowered by the Act to make such further delegation. Any part of the Symbols Order which cannot be traced to Rules 5 and 10 of the Rules can easily be traced in this case to the reservoir of power under Article 324(1) which empowers the Commission to issue all directions necessary for the purpose of conducting smooth, free and fair elections. Our attention is not drawn by the learned counsel for the petitioner to any specific provision in the Symbols Order which cannot be brought within the scope of either rule 5 or rule 10 of the Rules or Article 324(1) of the Constitution and which is hit by the principle delegatus non potest delegare, i.e. a delegate cannot delegate, the Commission itself in this case being a donee of plenary powers under Article 324(1) of the Constitution in connection with the conduct of elections referred to therein subject of course to any legislation made under Article 327 and Article 328 of the Constitution read with Entry 72 in List I or Entry 37 in List II of the Seventh Schedule to the Constitution and the rules made thereunder. 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.**

18. **We are not satisfied with the submission that the several evils, malpractices etc. which are alleged to be existing amongst the political parties today are due to the Symbols Order which recognises political parties and provides for their registration etc. The reasons for the existence of such evils, malpractices, etc., are to be found elsewhere. The surer remedy for getting rid of those evils malpractices, etc., is to appeal to the conscience of the nation. We cannot, however, set aside the Symbols Order on the grounds alleged in the petition.**

19. **We dismiss the petition accordingly.**

Petition dismissed.

SUPREME COURT OF INDIA*

Civil Appeal No. 2774 (NCE) of 1985
(Decision dated 25.4.1986)

Azhar Hussain ***..Appellant***

Vs.

Rajiv Gandhi ***..Respondent***

SUMMARY OF THE CASE

The election of Shri Rajiv Gandhi, to the Lok Sabha from Amethi Parliamentary constituency held in December, 1984, was challenged before the Allahabad High Court by way of an election petition. The petitioner alleged the commission of various corrupt practices by the returned candidate. On the preliminary objection being raised as to the maintainability of the election petition for want of material facts and particulars, the High Court dismissed the election petition.

The Supreme Court also dismissed the election petition and the election appeal. The Supreme Court held that the election petition did not furnish material facts and particulars in regard to allegations of corrupt practices, which was a mandatory requirement of Section 83 of the Representation of the People Act, 1951. All the facts which are essential to clothe the petition with complete cause of action must be pleaded and failure to plead even a single material fact would amount to disobedience of the mandate of Section 83 (1) (a) of the said Act for which the election petition must be dismissed at the threshold itself. The Court also laid down what material facts should be disclosed and pleaded in the petition.

(A) Representation of the People Act (43 of 1951), Ss. 83, 86, 87 – Election petition – Dismissal of – It can be for non-compliance of provisions of S.83 i.e. for failure to incorporate in petition material facts and particulars relating to alleged corrupt practice – Power to dismiss can be exercised at threshold. (Civil P.C. (5 of 1908), O. 7, R.11)

An election petition can be and must be dismissed under the provisions of Civil P.C. if the mandatory requirements enjoined by Section 83 to incorporate the material facts and particulars relating to alleged corrupt practice in the election petition are not complied with. The Code of Civil Procedure applies to the trial of an election petition by virtue of section 87 of the Act. Since CPC is applicable, the Court trying the election petition can act in exercise of the powers of the Code including Order 6 Rule 16 and Order 7 Rule 11(a). Therefore that Section 83 does not find a place in Section 86 of the Act which authorises dismissal of election petitions in certain contingencies does not mean that powers under the CPC cannot be exercised. An election petition can be summarily dismissed if it does not furnish cause of action in exercise of the powers under the Civil P.C. and it is settled law that the omission of a single material fact would lead to an incomplete cause of action and that an election petition without the material facts relating to a corrupt practice is not an election petition at all.

(Paras 9, 11)

The contention that even if the election petition is liable to be dismissed ultimately it should be so dismissed only after recording evidence and not at the threshold is thoroughly misconceived and untenable.

(Para 12)

Even in an ordinary Civil litigation the Court readily exercises the power to reject a plaint if it does not disclose any cause of action or the power to direct the concerned party to strike out unnecessary, scandalous, frivolous or vexatious parts of the pleadings. Such being the position in regard to matters pertaining to ordinary Civil litigation, there is greater reason why in a democratic set-up, in regard to a matter pertaining to an elected representative of the people which is likely to inhibit him in the discharge of his duties towards the Nation, the controversy is set at rest at the earliest if the facts of the case and the law so warrant.

(Para 12)

(B) Representation of the People Act (43 of 1951), Ss. 83, 123(7) – Election petition – Corrupt practice – Material Facts and particulars – Allegation that gazetted officer appeared on govt. controlled news media and made speech praising elected candidate – Material facts and particulars that must be stated.

Where the corrupt practice alleged in the election petition was that a Gazetted Officer appeared on the Govt. controlled news media and made a speech praising the elected candidate and all that was stated was that services of the gazetted officer were procured and obtained by the elected candidate his agents and other persons with the consent of the candidate with a view to assist the furtherance of the prospects of his election, it could not be said that "essential facts which would clothe the petition with a cause of action and which will call for an answer from the returned candidate were pleaded." It was not mentioned as to who procured or obtained the services of the gazetted officer, in what manner he obtained the services and what were the facts which went to show that it was with the consent of the elected candidate. Nor was it shown which, if any, facts went to show that the speech was in furtherance of the prospects of the elected candidate's election. The petition also did not disclose the exact words used in the speech; or the time and date of making such a speech. Unless the relevant or offending passage from the speech is quoted, it cannot be said what exactly was said, and in what context, and whether it was calculated to promote the election prospects of the elected candidate.

(Para 18)

(C) Representation of the People Act (43 of 1951), Ss. 83, 123(7), 87 — Corrupt practice — Statement of material particulars — Allegation that objectionable slogans had been painted — Names of workers employed by the elected candidate or his agents who painted slogans not mentioned in petition — It amounts to failure to incorporate material particulars — Petition liable to be dismissed.

(Para 21)

(D) Representation of the People Act (43 of 1951), Ss. 83, 123(7) — Corrupt practice — Statement of material particulars — Allegation that returned candidate gave insinuating speeches — Time, date and place of speeches not given — Exact extract of speeches not quoted — Allegation that statements were in order to prejudice election of a candidate also absent — Held, essential ingredients of corrupt practice were not spelled out.

(Para 25)

(E) Representation of the People Act (43 of 1951), Ss. 83, 123(7) — Corrupt practice of displaying objectionable poster in constituency — Copy of the poster not produced — Names of workers of the returned candidate who put up poster and facts spelling out consent of returned candidate or his agent absent — Petition suffers from lack of material facts.

(Para 28)

(F) Representation of the People Act (43 of 1951), Ss. 83, 123 — Corrupt practice — Distribution by returned candidate of book containing objectionable statements in constituency — No averment to show that book was published with consent or knowledge of returned candidate — Facts showing that distribution of book was with consent of returned candidate, missing — Offending paragraphs not quoted in election petition — Petition suffers from lack of material particulars.

(Para 31)

(G) Representation of the People Act (43 of 1951), Ss. 83, 123(4) — Corrupt practice — Distribution of pamphlets relating to personal character of a candidate — No averment in petition as to by whom, where to whom they were distributed — Petition does not disclose cause of action for want of material particulars.

(Paras 34, 35)

(H) Representation of the People Act (43 of 1951), S.123 — Corrupt practice — Distribution of pamphlet casting aspersions on personal character of a candidate — Particulars as to who had printed, published or circulated the pamphlet, when, where and how it was circulated and facts to indicate returned candidate's consent to such distribution absent — Pleadings do not disclose a cause of action.

(Para 38)

(I) Representation of the People Act (43 of 1951), Ss. 83, 87, 81 – Civil P.C. (1908), O.7 R.11 — Elction petition filed on last day of limitation — Petition bereft of material facts and particulars relating to alleged corrupt practices — High Court dismissing it under O.7 R.11 as not disclosing any cause of action instead of rejecting it — Held fact, that High Court used expression 'dismissed' instead of 'rejected' did not make any difference as no fresh petition could have been filed within limitation.

(Para 40)

(J) Representation of the People Act (43 of 1951), S.123 — Corrupt practices — Expression is repulsive and offensive — Its replacement by neutral and unoffensive expression 'disapproved practices' suggested.

(Para 41)

Cases Referred : Chronological	Paras
AIR 1985 SC 89	**20**
AIR 1984 SC 309	**20**
AIR 1979 SC 234 : (1979) 2 SCC 221	**17**
AIR 1977 SC 744 : (1977) 1 SCC 511	**11**
AIR 1972 SC 515 : (1972) 2 SCR 742	**10, 14, 18**
(1970) 3 SCC 239 : 1970 UJ (SC) 753	**20, 21, 25, 28, 35**
AIR 1969 SC 734 : (1969) 3 SCR 217	**14, 18**

JUDGMENT

Present:- E.S. Venkataramiah and M.P. Thakkar. JJ.

THAKKAR, J.:—**An election petition having been dismissed on the ground that it did not comply with the mandatory requirement to furnish material facts and particulars enjoined by S.83 of the Representation of the People Act and that it did not disclose a cause of action, the election petitioner has appealed to this Court under S.116-A of the Representation of the People Act of 1951 (Act).**

2. **The respondent was elected as a Member of the Lok Sabha from the Amethi Constituency of Uttar Pradesh in the general elections held on 24th December, 1984 under Section 15 of the Act. Having secured the highest votes (3,65,041) the respondent was declared as elected on December 29, 1984. On 12th February, 1985, the last date for challenging the election, the appellant (who claims to be a worker of the Rashtriya Sanjay Manch), an elector from the Amethi constituency, filed the election petition giving rise to the present appeal.**

3. **The election of the returned candidate, respondent herein, was challenged on the ground of alleged corrupt practices as defined by the Act. Seventeen grounds set out in para 4(I to XVII) of the election petition were called into aid in support of the challenge. The respondent upon being served, instead of filing a written statement, raised preliminary objections to the maintainability of the petition on a number of grounds inter alia contending that the petition was lacking in material facts and particulars and was defective on that account, and that since it did not disclose any cause of action it deserved to be dismissed. The appellant on his part filed two applications for amendment of the election petition. (None of which was for supplying the material facts and particulars which were missing). All these applications were heard together and were disposed of by the judgment under appeal upholding the preliminary objection raised on behalf of the Respondent and dismissing the election petition. Hence this appeal.**

4. **In a democratic polity 'election' is the mechanism devised to mirror the true wishes and the will of the people in the matter of choosing their political managers and their representatives who are supposed to echo their views and represent their interest in the legislature. The results of the Election are subject to judicial scrutiny and control only with an eye on two ends. First, to ascertain that the 'true' will of the people is reflected in the results and second, to secure that only the persons who are eligible and qualified under the Constitution obtain the representation. In order that the "true will" is ascertained the Courts will step in to protect and safeguard the purity of elections, for, if corrupt practices have influenced the result, or the electorate has been a victim of fraud or deception or compulsion on any essential matter, the will of the people as recorded in their votes is not the 'free' and 'true' will exercised intelligently by deliberate choice. It is not the will of the people in the true sense at all. And the Courts would, therefore, it stands to reason, be justified in setting aside the election in accordance with law if the corrupt practices are established. So also when the essential qualifications for eligibility demanded by the constitutional requirements are not fulfilled, the fact that the successful candidate is the true choice of the people is a consideration which is totally irrelevant notwithstanding the fact that it would be virtually impossible to reenact the elections**

and reascertain the wishes of the people at the fresh elections the time scenario having changed. And also notwithstanding the fact that elections involve considerable expenditure of public revenue (not to speak of private funds) and result in loss of public time, and accordingly there would be good reason for not setting at naught the election which reflects the true will of the people lightly. In matters of election the will of the people must prevail and Courts would be understandably extremely slow to set at naught the will of the people truly and freely exercised. If Courts were to do otherwise, the Courts would be pitting their will against the will of the people, or countermanding the choice of the people without any object, aim or purpose. But where corrupt practices are established the result of the election does not echo the true voice of the people. The Courts would not then be deterred by the aforesaid considerations which in the corruption scenario lose relevance. Such would be the approach of the Court in an election matter where corrupt practice is established. But what should happen when the material facts and particulars of the alleged corrupt practices are not furnished and the petition does not disclose a cause of action which the returned candidate can under law be called upon to answer? The High Court has given the answer that it must be summarily dismissed. The appellant has challenged the validity of the view taken by the High Court.

5. **Learned counsel for the appellant has urged four submissions in support of this appeal viz:**

A – Since the Act does not provide for dismissal of an election petition on the ground that material particulars necessary to be supplied in the election petition as enjoined by Section 83 of the Act are not incorporated in the election petiition inasmuch as Section 86 of the Act which provides for summary dismissal of the petition does not advert to Section 83 of the Act there is no power in the Court trying election petitions to dismiss the petition even in exercise of powers under the Code of Civil Procedure.

B — Even if the Court has the power to dismiss an election petition summarily otherwise than under Section 86 of the Representation of the People Act, the power cannot be exercised at the threshold.

C — In regard to seven grounds of challenge embodied in paragraph 4 of the election petition viz. I, II (i, ii & iii), XIII, XIV and XV the High Court was not justified in dismissing the petition.

D — Even if the powers under the Code of Civil Procedure can be exercised by the Court hearing election petitions worse comes to worse, an election petition may be rejected under Order 7, Rule 11 of the Code of Civil Procedure, but in no case can it be dismissed.

GROUND A:

6. **In order to understand the plea, a glance at Sections 83 and 86 (1) in so far as material is called for:—**

“83. Contents of petition.— (1) an election petition —

a) shall contain a concise statement of the material facts on which the petitioner relies:

b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged

to have committed such corrupt practice and the date and place of the commission of each of such practice; and

c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition."

"86 Trial of election petitions.— (1) The High Court shall dismiss an election petition which does not comply with the provisions of section 82 or section 117.

Explanation — An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of section 98."

7. **The argument is that where the legislature wanted to provide for summary dismissal of the election petition, the legislature has spoken on the matter. The intention was to provide for summary dismissal only in case of failure to comply with the requirement of Sections 81, 82 and 117[1] and not Sec. 83.**

8. **The argument is that inasmuch as Section 83(1) is not adverted to in Section 86 in the context of the provisions, non-compliance with which entails dismissal of the election petition, it follows that non-compliance with the requirements of Section 83(1), even though mandatory, do not have lethal consequence of dismissal. Now it is not disputed that the Code of Civil Procedure (CPC) applies to the trial of an election petition by virtue of section 87 of the Act.[1] Since CPC is applicable, the court trying the election petition can act in exercise of the powers of the Code including Order 6 Rule 16 and Order 7 Rule 11(a) which read thus:**

Order 6, Rule 16: "Striking our pleadings. — The Court may at any stage of the proceedings order to be struck out or amend any matter in any pleading —

a) which may be unnecessary, scandalous, frivolous or vexatious, or

b) which may tend to prejudice, embarrass or delay the fair trial of the suit; or

c) which is otherwise an abuse of the process of the Court."

Order 7, Rule 11: "Rejection of plaint — The plaint shall be rejected in the following cases:—

a) where it does not disclose a cause of action:

XXX XXX XXX"

9. **The fact that Section 83 does not find a place in Section 86 of the Act does not mean that powers under the CPC cannot be exercised.**

10. **There is thus no substance in this point which is already concluded against the appellant in Hardwari Lal v. Kanwal Singh. (1972) 2 SCR 742: (AIR 1972 SC 515) wherein this Court has in terms negatived this very plea in the context of the situation that material facts and particulars relating to the corrupt practice alleged by the election petitioner were not incorporated in the election petition as will be evident from the following passage extracted from the judgment of A.N. Ray, J. who spoke for the three-judge Bench:**

"The allegations in paragraph 16 of the election petition do not amount to any statement of material fact of corrupt practice. It is not stated as to which kind or form of assistance was obtained or procured or attempted to obtain or procure. It is not stated from whom the particular type of assistance was obtained or procured or attempted to obtain or procure. It is not stated in what manner the assistance was for the furtherance of the prospects of the election. The gravamen of the charge of corrupt practice within the meaning of Section 123(7) of the Act is obtaining or procuring or abetting or attempting to obtain or procure any assistance other than the giving of vote. In the absence of any suggestion as to what that assistance was the election petition is lacking in the most vital and essential material fact to furnish a cause of action.

Counsel on behalf of the respondent submitted that an election petition could not be dismissed by reason of want of material facts because Section 86 of the Act conferred power on the High Court to dismiss the election petition which did not comply with the provisions of Section 81, or Section 82 or Section 117 of the Act. It was emphasized that Section 83 did not find place in section 86. Under Section 87 of the Act every election petition shall be tried by the High Court as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure 1908 to the trial of the suits. A suit which does not furnish cause of action can be dismissed."

11. **In view of this pronouncement there is no escape from the conclusion that an election petition can be summarily dismissed if it does not furnish cause of action in exercise of the powers under the Code of Civil Procedure. So also it emerges from the aforesaid decision that appropriate orders in exercise of powers under the Code of Civil Procedure can be passed if the mandatory requirements enjoined by Section 83 of the Act to incorporate the material facts in the election petition are not complied with. This Court in Samant's case (1969) 3 SCC 238: (AIR 1969 SC 1201) has expressed itself in no unclear terms that the omission of a single material fact would lead to an incomplete cause of action and that an election petition without the material facts relating to a corrupt practice is not an election petition at all. So also in Udhav Singh's case (1977) 1 SCC 511: (AIR 1977 SC 744) the law has been enunciated that all the primary facts which must be proved by a party to establish a cause of action or his defence are material facts. In the context of a charge of corrupt practice it would mean that the basic facts which constitute the ingredients of the particular corrupt practice alleged by the petitioner must be specified in order to succeed on the charge. Whether in an election petition a particular fact is material or not and as such required to be pleaded is dependent on the nature of the charge levelled and the circumstances of the case. All the facts which are essential to clothe the petition with complete cause of action must be pleaded and failure to plead even single material fact would amount to disobedience of the mandate of, Section 83(1)(a). An election petition therefore can be and must be dismissed if it suffers from any such vice. The first ground of challenge must therefore fail.**

GROUND B:

12. **Learned counsel for the petitioner has next argued that in any event the powers to reject an election petition summarily under the provisions of the Code of Civil Procedure should not be exercised at the threshold. In substance, the argument is that the court must proceed with the trial, record the evidence, and only after the**

trial of the election petition is concluded that the powers under the Code of Civil Procedure for dealing appropriately with the defective petition which does not disclose cause of action should be exercised. With respect to the learned counsel, it is an argument which it is difficult to comprehend. The whole purpose of conferment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court and exercise the mind of the respondent. The sword of Damocles need not be kept hanging over his head unnecessarily without point or purpose. Even in an ordinary Civil litigation the Court readily exercises the power to reject a plaint if it does not disclose any cause of action. Or the power to direct the concerned party to strike out unnecessary, scandalous, frivolous or vexatious parts of the pleadings. Or such pleadings which are likely to cause embarrassment or delay the fair trial of the action or which is otherwise an abuse of the process of law. An order directing a party to strike out a part of the pleading would result in the termination of the case arising in the context of the said pleading. The Courts in exercise of the powers under the Code of Civil Procedure can also treat any point going to the root of the matter such as one pertaining to jurisdiction or maintainability as a preliminary point and can dismiss a suit without proceeding to record evidence and hear elaborate arguments in the context of such evidence, if the Court is satisfied that the action would terminate in view of the merits of the preliminary point of objection. The contention that even if the election petition is liable to be dismissed ultimately it should be so dismissed only after recording evidence is a thoroughly misconceived and untenable argument. The powers in this behalf are meant to be exercised to serve the purpose for which the same have been conferred on the competent Court so that the litigation comes to an end at the earliest and the concerned litigants are relieved of the psychological burden of the litigation so as to be free to follow their ordinary pursuits and discharge their duties. And so that they can adjust their affairs on the footing that the litigation will not make demands on their time or resources, will not impede their future work, and they are free to undertake and fulfil other commitments. Such being the posiition in regard to matters pertaining to ordinary Civil litigation, there is greater reason for taking the same view in regard to matters pertaining to elections. So long as the sword of Damocles of the election petition remains hanging an elected member of the Legislature would not feel sufficiently free to devote his whole-hearted attention to matters of public importance which clamour for his attention in his capacity as an elected representative of the concerned constituency. The time and attention demanded by his elected office will have to be diverted to matters pertaining to the contest of the election petition. Instead of being engaged in a campaign to relieve the distress of the people in general and of the residents of his constituency who voted him into office, and instead of resolving their problems, he would be engaged in a campaign to establish that he has in fact been duly elected. Instead of discharging his functions as the elected representative of the people, he will be engaged in a struggle to establish that he is indeed such a representative, notwithstanding the fact that he has in fact won the verdict and the confidence of the electorate at the polls. He will have not only to win the vote of the people but also to win the vote of the Court in a long drawn out litigation before he can whole-heartedly engage himself in discharging the trust reposed in him by the electorate. The pendency of the election petition would also act as a hindrance if he be entrusted with some public office in his elected capacity. He may even have occasions to deal with the representatives of

foreign powers who may wonder whether he will eventually succeed and hesitate to deal with him. The fact that an election petition calling into question his election is pending may, in a given case, act as a psychological fetter and may not permit him to act with full freedom. Even if he is made of stern metal, the constraint introduced by the pendency of an election petition may have some impact on his subconscious mind without his ever being or becoming aware of it. Under the circumstances, there is greater reason why in a democratic set-up, in regard to a matter pertaining to an elected representative of the people which is likely to inhibit him in the discharge of his duties towards the Nation, the controversy is set at rest at the earliest if the facts of the case and the law so warrant. Since the Court has the power to act at the threshold the power must be exercised at the threshold itself in case the Court is satisfied that it is a fit case for the exercise of such power and that exercise of such power is warranted under the relevant provisions of law. To wind up the dialogue, to contend that the powers to dismiss or reject an election petition or pass appropriate orders should not be exercised except at the stage of final judgment after recording the evidence even if the facts of the case warrant exercise of such powers, at the threshold, is to contend that the legislature conferred these powers without point or purpose, and we must close our mental eye to the presence of the powers which should be treated as non-existent. The Court cannot accede to such a proposition. The submission urged by the learned counsel for the petitioner in this behalf must therefore be firmly repelled.

GROUND C :

13. **The learned counsel for the election petitioner has very fairly contended that out of the 17 grounds embedded in the election petition, grounds other than the seven mentioned by him cannot be pressed into service and that he would restrict his submissions to these seven grounds. It is therefore unnecessary to advert to grounds other than the seven grounds which have been urged in support of this petition. We will accordingly proceed to consider the plea urged to the effect that in regard to the aforesaid alleged corrupt practices, the High Court was not justified in dismissing the election petition.**

14. **Before we deal with these grounds seriatim, we consider it appropriate to restate the settled position of law as it emerges from the numerous decisions of this Court which have been cited before us in regard to the question as to what exactly is the content of the expression 'material facts and particulars', which the election petitioner shall incorporate in his petition by virtue of Section 83(1) of the Act.**

(1) What are material facts and particulars?

Material facts are facts which if established would give the petitioner the relief asked for. The test required to be answered is whether the Court could have given a direct verdict in favour of the election petitioner in case the returned candidate had not appeared to oppose the election petition on the basis of the facts pleaded in the petition. [(1969) 3 SCR 217: (AIR 1969 SC 734) — Manubhai Nandlal Amarsey v. Popatlal Manilal Joshi].

(2) In regard to the alleged corrupt practice pertaining to the assistance obtained from a Government servant, the following facts are essential to clothe the petition with a cause of action which will call for an answer from the returned candidate and must therefore be pleaded: [(1972) 2 SCR 742 : (AIR 1972 SC 515) — Hardwari Lal v. Kanwal Singh].

a) mode of assistance;

b) measure of assistance; and

c) all various forms of facts pertaining to the assistance.

(3) In the context of an allegation as regards procuring, obtaining, abetting or attempting to obtain or procure the assistance of Government servants in election it is absolutely essential to plead the following:

(a) kind or form of assistance obtained or procured;

(b) in what manner the assistance was obtained or procured or attempted to be obtained or procured by the election candidate for promoting the prospects of his election. [AIR 1972 SC 515]

(4) The returned candidate must be told as to what assistance he was supposed to have sought, the type of assistance, the manner of assistance, the time of assistance, the persons from whom the actual and specific assistance was procured [AIR 1972 SC 515].

(5) There must also be a statement in the election petition describing the manner in which the prospects of the election was furthered and the way in which the assistance was rendered. (AIR 1972 SC 515) (supra)

(6) The election petitioner must state with exactness the time of assistance, the manner of assistance, the persons from whom assistance was obtained or procured, the time and date of the same, all these will have to be set out in the particulars. (AIR 1972 SC 515) (supra).

15. **And having restated the settled position in regard to the content of the expression 'material facts', the time is now ripe to proceed to deal with the grounds on which the election of the returned candidate is assailed, seriatim.**

GROUND I :

16. **Alleged corrupt practice as incorporated in Ground I reads thus:—**

"The election of the respondent is liable to be set declared void because the respondent was guilty of the following corrupt practice as defined under Section 123(7) of the Representation of the People Act, 1951, read with Sections 100(1)(b) and 100(d)(ii) of the said Act, the said corrupt practice was committed with the consent of the respondent returned candidate and of other workers of his with his consent. In any event, it was committed by the respondent's agents in the interests of the returned candidate and the said corrupt practice has materially affected the result of the election in so far as it concerns the returned candidate. One M.H. Beg who at one time was the Chief Justice of the Supreme court of India and is a close friend of the Nehru family and is personally known to and friendly with the respondent, appeared on the government controlled news media and made a speech praising the respondent and comparing his entry into politics as the birth of new Arjuna, the insinuation being that the opposition were the Kauravas. His appearance on the television was relayed day after day on the government controlled media. Television sets had been installed in practically every election office of the respondent in Amethi constituency and throughout the election campaign thousands and thousands of voters were exposed to the television appearance and speech of the said Mr. Beg. Mr. Beg is a gazetted officer, being the Chairman of the Minorities Commission. His services were procured and obtained

by the respondent, his agents and other persons with the consent of the respondent with a view to assist the furtherance of the prospects of the respondent's election. Mr. Beg was seen and heard on the television as late as 21st December, 1984. Propaganda about Mr. Beg's was done particularly amongst the members of the Muslim community. Apart from being gross misuse of the office of Chairman of the Minorities Commission, the same constitutes a gross corrupt practice under the election law."

Why the High Court held that material facts and particulars are absent and did not disclose a cause of action?

17. **The High Court observed:—**

"The contention of the learned counsel for the respondent is that there is no pleading that Mr. Beg was "a person in the service of the government" as, according to the learned counsel, the Chairman of the Minorities Commission is not a person in the service of the government. Learned counsel for the petitioner says that the petitioner had specifically pleaded that Mr. Beg was a gazetted officer which implies a pleading that he was in the service of the government. Learned counsel for the respondent says that simply because a person is a gazetted officer, it is not necessary that he must also be a government servant because the appointment of so many persons is gazetted and yet some of them may not be government servants. Be that as it may, the fact remains that the petitioner had not stated in the pleading that Mr. Beg was a person in the service of the government as specifically required by Section 123(7) of the Act. This requirement is a requirement of the statute and is, therefore, a material fact within the meaning of Sec. 83(1)(a) of the Act. Similarly, the statement that the services of Mr. Beg were procured and obtained "by the respondent, his agents and other persons with the consent of the respondent" is clearly vague as discussed above. It was incumbent upon the petitioner to specify which of the three alternatives he meant to plead; in particular it was necessary for him to indicate the names of the respondent's agents and other persons to enable the respondent to know that what was the case which he was expected to meet. Learned counsel for the respondent further contended that the petitioner has not set out the exact words used by Mr. Beg in his speech; the expression "a speech praising the respondent" and comparing his "entry into politics as the birth of new Arjuna" is not what Mr. Beg might have said. In the case of K.M. Mani v. P.J. Antony (1979) 2 SCC 221: (AIR 1979 SC 234), the speech made by a Police Officer exhorting the electors in an election meeting to support a candidate was questioned. It was held that a mere statement of the making of the speech or exhortation was not enough, and that transcript of the alleged speech or contemporaneous record of the points or at least substance of the speech should have been made available. In these circumstances the proposed pleading in this paragraph does not set out the material facts and, therefore, constitutes an incomplete cause of action under Section 123(7) of the Act."

Whether the High Court was right in taking the aforesaid view:

18. **The averments contained in paragraph 4 pertaining to Ground No.1 do not satisfy the test prescribed in Manubhai Amarsey v. Popatlal Manilal Joshi (AIR 1969 SC 734) and Hardwari Lal v. Kanwal Singh (AIR 1972 SC 515) (supra). The most important test which remained unsatisfied is as regards the omission to satisfy**

in what manner the assistance was obtained and procured by the election candidate for promoting the prospects of his election. All that has been stated is:

"His services were procured and obtained by the respondent, his agents and other persons with the consent of the respondent with a view to assist the furtherance of the prospects of the respondent's election....."

It is not mentioned as to who procured or obtained the services of Shri Beg, in what manner he obtained the services and what were the facts which went to show that it was with the consent of the respondent. Unless these "essential facts which would clothe the petition with a cause of action and which will call for an answer from the returned candidate are pleaded" as per the law laid down in Manubhai Nandlal Amarsey v. Popatlal Manilal Joshi (AIR 1969 SC 734) (supra) it cannot be said that the petition discloses a cause of action in regard to this charge. In the absence of these material facts and particulars the Courts could not have rendered a verdict in favour of the election petitioner in case the returned candidate had not appeared to oppose the election petition. It is not sufficient to show that a Government servant had appeared on the public media to praise one of the candidates. It must also be shown that the assistance of the Government servant was obtained either by the respondent or his agent or by any other person with the consent of the election candidate or his election agent. The averments made in the petition do not show (i) who had obtained or procured the assistance from Shri Beg; (ii) how he had obtained or procured the assistance of Shri Beg; and (iii) how it was said that it was with the consent of the respondent or his election agent. Nor is it shown which, if any, facts went to show that it was in furtherance of the prospects of the respondent's election. In the absence of material facts and particulars in regard to these aspects, the petition would not disclose the cause of action. The High Court was therefore, perfectly justified in reaching this conclusion. The petition also does not disclose the exact words used in the speech; or the time and date of making such a speech. Now, unless the relevant or offending passage from the speech is quoted, it cannot be said what exactly Shri Beg had said, and in what context, and whether it was calculated to promote the election prospects of the respondent. Be that as it may, inasmuch as these material facts and particulars to show that the services of Shri Beg were procured by some one with the consent of the respondent or his election agent are not there, the averments pertaining to the charge do not disclose a cause of action. Unless the nexus between the appearance of Shri Beg on the media and the prior consent of the respondent or his election agent in regard to what he was going to say and the purposes for which he was going to say is set out in the material particulars it cannot be said that it disclosed a cause of action and the test laid down in Manubhai Nandlal's case, as also Hardwari Lal's case is satisfied. The High Court was therefore justified in taking the view that it has taken. We may, in passing, mention a point made by learned counsel for the respondent. It was submitted that the averment must also mention whether the interview was alive on telecast after the date of filing of the nomination. If it was one recorded prior to the said date it may not be of any consequence. This agrument also requires consideration but we do not propose to rest our conclusion on this aspect as it is not necessary to do so.

GROUND II (i):

19. **It has been set out in para 4 of the petition in the following terms:—**

"Throughout the petitioner's constituency in Amethi, worker employed by the respondent and/or is agents painted available space with two slogans. The first one was "Beti Hai Sardar Ki. Deshi Ke Gaddar Ki". Literally translated it implied one of the candidates i.e. Mrs. Maneka Gandhi is the daughter of a Sikh and that Sikhs including her father are traitors. The second slogan was "Maneka Tera Ye Abhiman. Banane Na Denge Khalistan". Literally translated it means Maneka this is your illusion. We will not allow Khalistan to be set up. The clear insinuation was that the said candidate i.e. Mrs. Maneka Gandhi had a vision of Khalistan being set up, that her election would mean the creation of Khalistan and that she was a supporter of the Khalistan demand. These slogans were also painted on some of the vehicles used by the respondent's workers during the course of campaign. On every occasion those slogans were uttered and broadcast from vehicles and from microphones used at public meetings and from the Congress (I) party office in the constituency of the respondent. The use of such slogans was the pet theme of almost every speech delivered in the constituency during the election campaign. The use of these objectionable slogans and posters harmful to newspapers and the respondent must have known to them. But for the fact that they had been used with his consent, he would have taken some steps to repudiate them or have their use discontinued. Photographs of walls, with the said slogans along with certificates will be filed as Exhibit-A."

Why the High Court held that material facts and particulars are absent and did not disclose a cause of action?

20. **In this context the High Court observed:—**

"..... The contention of learned counsel for the respondent is that this pleading suffers from lack of material facts because the names of the workers, employed by the respondent, or his agents, who painted the slogans or uttered them in speeches or broadcast from the vehicles, have not been indicated. It is pointed that the allegation regarding the painting of slogans is vague because it is stated to have been done by "workers.... and/or his agents" signifying that the petitioner himself did not know whether painting work was done by workers employed by the respondent or by his agents or by both. I have already pointed out that this kind of statement is vague and embarrassing and, therefore, is contrary to the concept of material facts. In the case of Nihal Singh v. Rao Birendra Singh (1970) 3 SCC 239 it was held that the allegation that at meetings in different villages, speeches were given on 5th and 12th May 1968 was vague in the absence of a specification of date and place of each meeting and evidence could not be permitted to be led in the matter. The allegation of consent of the respondent to the paintings of the slogans or to their utterances in the speeches of his workers is only inferential. There is a distinction between consent and connivance. The pleading is in the nature of a pleading of connivance and not of consent which is not enough, vide the case of Charan Lal Sahu v. Giani Zail Singh AIR 1984 SC 309. In the case of Surinder Singh v. Hardial Singh, AIR 1985 SC 89, it has been indicated in para 37 that consent is the life-line to link up the candidate with the action of the other person which may amount to corrupt practice unless it is specifically pleaded and clearly proved and proved beyond reasonable doubt, the candidate cannot be charged for the action of others."

Whether the High Court was right in taking the aforesaid view:-

21. **There is a glaring omission to mention the names of the workers said to have been employed by the respondent or his agents who have allegedly painted the slogans. So also no material particulars are given as regards the vehicles on which the said slogans have been said to have been painted. There are no material particulars or facts. We are of the view that inasmuch as the material facts and particulars in regard to this alleged practice were not mentioned and the High Court was justified in taking the view that it had taken. The averments contained in regard to this charge also do not satisfy the test laid down by the various decisions of this Court adverted hereinabove. A Division Bench of this Court in Nihal Singh v. Rao Birendra Singh, (1970) 3 SCC 239 speaking through Bhargava, J. has observed:—**

"....The pleading was so vague that it left a wide scope to the appellant to adduce evidence in respect of a meeting at any place on any date that he found convenient or for which he could procure witnesses. The pleading, in fact, was so vague and was wanting in essential particulars that no evidence should have been permitted by the High Court on this point.....

(see para 8)

22. **The principle laid down is that the pleading in regard to matters where there is scope for ascribing an alleged corrupt practice to a returned candidate in the context of a meeting of which dates and particulars are not given would tantamount to failure to incorporate the essential particulars and that inasmuch as there was a possibility that witnesses could be procured in the context of a meeting at a place or date convenient for adducing evidence, the High Court should not even have permitted evidence on that point. In other words, no amount of evidence could cure the basic defect in the pleading and the pleading as it stood must be construed as one disclosing no cause of action. In the light of the aforesaid principle laid down by the Supreme Court which has held the field for more than 15 years, the High Court was perfectly justified in reaching the conclusion called into question by the appellant.**

GROUND II (ii)

23. **Alleged corrupt practice as incorporated in Ground II (ii) reads as under:—**

"The respondent himself toured the constituency on the 12th and 13th December, 1984. On the night of the 11th as he was entering the constituency he was stopped by the petitioner's workers at Inhauna Kashah. The walls there bore these slogans. The petitioner' along with other workers stopped the respondent's vehicle and drew his attention to the so vulgar slogans. The respondent saw nothing objectionable in these slogans. He was requested to give instructions to the authorities that these should be removed and he contemptuously had the workers dismissed and dispersed. He declared that their leader (referring to Mrs. Maneka Gandhi) deserves nothing better. The respondent delivered several speeches during the course of his visit. In none of these speeches did he repudiate these slogans. He repeatedly referred to the assassination of his mother and to the Anandpur Resolution saying that the opposition had encouraged seccessionist and violent elements and that the opposition conclaves in the past had given rise to the emotion that had eventually taken the Prime Minister, his mother's life. He insinuated that the assassins were Sikhs and then asked the audience to make up their minds

whether they still wanted somebody from the same community to succeed in the election."

Why the High Court held that material facts and particulars are absent and did not disclose a cause of action?

24. **The High Court observed:**

"Learned counsel for the respondent correctly contends that these averments again are vague because they do not describe the petitioner's workers who stopped the respondent or furnish details of the speeches in which the respondent was expected to repudiate the slogans. He has also correctly urged that the so-called request, if any, to the respondent for 'instructions to the authorities' was misconceived and did not establish any obligation of the respondent to direct the authorities under any provision of the election law."

Whether the High Court was right in taking the aforesaid view:

25. **In this case also, no time, date and place of the speeches delivered by the respondent have been mentioned. No exact extracts from the speeches are quoted. Nor have the material facts showing that such statements imputed to the respondent were indeed made been stated. No allegation is made to the effect that it was in order to prejudice the election of any candidate or in order to further the prospects of the election of the respondent. The essential ingredients of the alleged corrupt practice have thus not been spelled out. So far as the meeting is concerned, the principle[1] laid down in Nihal Singh case (1970(3) SCC 239) (supra) discussed in the context of the charge contained in ground II (i) is attracted. The view taken by the High Court is therefore unexceptionable.**

GROUND II (iii)

26. **The alleged corrupt practice as incorporated in ground II (iii) reads as under:—**

"In line with the respondent's speeches, his workers with the knowledge and consent of the respondent and other agents of the respondent entrusted with the task of conducting the election campaign caused a poster of Hindi and Urdu to be affixed in all prominent places throughout the constituency. The said poster was in fact a page of the Blitz newspaper of 30-6-84 called the Id Special. The Id that year was on 1st July, 1984. The heading of the said poster which was underlined in red alleged conspiracy between the leader of the petitioner party and Bhindaranwale. Photographs of Mrs. Maneka Gandhi and Bhindaranwale appeared separately on left and right hand corners of the said advertisement. A literal English translation of the poster is given below:— A copy of the said poster will be filed as Exhibit B. The poster also purported to carry a fascimile copy of a letter dated the 10th September, 1983, purporting to be addressed by Shri Kalpnath Sonkar, a member of the Rashtriya Sanjay Manch, to Shri Bhindaranwale. The letter is a forgery and that it was forged was publicly stated by alleged author of the alleged letter and a criminal case is pending in the matter thereof. The letter was fabricated expressly for the express purpose of showing:—

(a) that Mrs. Maneka Gandhi was in secret conspiracy with Bhindaranwale.

(b) that Mrs. Maneka Gandhi illegally suplied arms to Bhindaranwale and other secessionists and terrorists.

(c) that Maneka Gandhi was in sympathy with the creation of Khalistan and the division of the country and the use of violence to achieve that end.

The said allegations are totally false and fabricated. The respondent knew them to be false. He did not and could not believe them to be true. That complaints were made to the District authorities about the obnoxious wall paintings and posters to which the attention of the respondent had been drawn. The said authorities while clearly admitting the R.S.M. election agents and workers as well as to the press correspondents that they were objectionable took no steps to remove or obliterate them. Prominent newspapers and press correspondents continued to draw attention to those slogans and posters but the respondent or his workers took no steps whatsoever to stop their exhibition, circulation and use. The respondent condoned and sanctioned the exhibition and circulation of this poster. He did nothing to stop the use thereof by his workers. The wall painting mentioned above and this poster were paid out of Congress (I) Party's. These were therefore, his own expenses sanctioned by himself. Cutting of some of the newspaper reports will be filed as Exhibit C."

Why the High Court held that material facts and particulars are absent and did not disclose a cause of action?

27. **The High Court held:**

".....It appears to me that if an averment of fact is an essential part of the pleading, it must be considered to be an integral part of the petition. If such an averment is not actually put in the election petition, the petition suffers from the lack of material facts and, therefore, the statement of cause of action would be incomplete. If it is stated in the election petition, either in the body of the petition itself or by way of annexure, but its copy is not furnished to the respondent, the election petition would be hit by the mischief of Section 81(3) read with Section 86(1) of the Act. In my opinion, the reference to the poster and its proposed translation in the election petition, which was never incorporated into it, are material facts under Section 83(1)(a) of the Act and their absence cannot now be made good by means of an amendment. The pleading as it stands, and even if it were permitted to be amended would suffer from lack of cause of action on this material fact and, therefore, is liable to be struck out. The newspaper cutting are not used by the petition as containing fact, but only as evidence to the extent amendment is allowed."

Whether the High Court was right in taking the aforesaid view?

28. **It will be noticed that in the election petition it has been mentioned that a copy of the poster would be subsequently filed, and the cuttings of some newspaper reports would also be filed later on. The election petitioner sought an amendment to delete the averments on both these aspects. The High Court rejected the prayer in regard to poster (Ex. B), but granted the prayer in respect of the cuttings. The High Court has taken the view that the poster was claimed to be an integral part of the election petition and since it was not filed (much less its copy furnished to the respondent) the pleading suffered from infirmity and non-compliance with Section 83(1) read with Section 86(1) of the Act. Non-filing of the poster is fatal to the election petition as in the absence thereof the petition suffers from lack of material facts and therefore the statement of cause of action would be incomplete. Nothing**

turns on the fact whether or not the words "a copy of the said poster would be filed as Exhibit B" are allowed to be retained in the election petition or are deleted as prayed for by the appellant. The fact remains that no copy of the poster was produced. It must also be realized that the election petitioner did not seek to produce the copy of the poster, but only wanted a reference to it deleted so that it cannot be said that the accompaniments were not produced along with the election petition. The fact remains that without the production of the poster, the cause of action would not be complete and it would be fatal to the election petition inasmuch as the material facts and particulars would be missing. So also it could not enable the respondent to meet the case. Apart from that the most important aspect of the matter is that in the absence of the names of the respondent's workers, or material facts spelling out the knowledge and consent of the respondent or his election agent, the cause of action would be incomplete. So much so that the principle enunciated by this Court in Nihal Singh's case, (1970 (3) SCC 239) (supra) would be attracted. And the Court would not even have permitted the election petitioner to lead evidence on this point. The High Court was therefore fully justified in taking the view that it has taken.

GROUND XIII:

29. **Alleged corrupt practice as incorporated in ground No.XIII reads as follows.—**

"That, in the latter half of June, 1983, a family friend of the respondent and a very close and intimate friend of the respondent's mother, Shri Mohammed Yunus, wrote a book called "Son of India". A committee called the Son of India committee published the book. It was printed by Virendra Printers of Karol Bagh, New Delhi. The Son of India committee consisted among others of Minister Narasimha Rao, M.P., the Executive President of the Congress(I) Shri Kamlapati Tripathi, Ministers Sitaram Kesari and Narain Dutt Tiwari. The book starts with a brief comment by the editor entitled "Pathakon Se Do Battein" (short dialogue with the readers) and is followed by a 22 page story of the two brothers, namely the respondent and his late brother Shri Sanjay Gandhi. This book was written, printed and published with the knowledge, consent and assistance of the respondent. The respondent by himself by the party, by his workers and through other persons acting with the consent of the respondent and or his election agent, distributed the said book in the Amethi constituency during the entire course of the election campaign. The said book contains statements which are false and which to the knowledge of the respondent were believed to be false. The said statements are in relation to the personal character and conduct of Mrs. Maneka Gandhi. The said statements were reasonably calculated to prejudice the prospects of the petitioner's election. All statements made in relation to the character or conduct of the petitioner are totally false. In particular, the petitioner says that the following statements made therein answer the description aforesaid and constitute a gross corrupt practice within the meaning of Section 123(4) of the Representation of the People Act, 1951. The said corrupt practice has been committed by the respondent, the returned candidate. It has also been committed by his election agents and by other persons with the consent of the respondent and or his election agents. A copy of the booklet entitled Son of India will be filed as Exhibit 'P'. It has also been committed in the interest of the respondent returned candidate and by his agents. The said corrupt practice

renders the election of the respondent liable to be set aside and declared void, as a result of Section 100(I)(b) of the said Act. Reproduced herebelow are some of the false statements contained in the said book "Son of India" relating to the personal character and conduct of Mrs. Maneka Gandhi one of the candidates in the said election.

(a) That Mrs. Maneka Gandhi utilised her marriage to the late Sanjay Gandhi as a means of enriching herself.

(b) She is spending so much money on herself and her various activities. Where does all this money come from? The insinuation is that the petitioner is possessed of wealth corruptly made which is now being spent.

(c) That she misused her marriage to increase her influence and amass wealth.

(d) That her married life was one of the constant friction with her husband.

(e) That due to her foolish action, her husband became more and more unhappy. It is as a result of domestic unhappiness created by her that Sanjay Gandhi to drown his sorrow took to flying. His flying in the plane which ultimately crashed and in which he died as a direct result of her misconduct.

(f) That she was totally indifferent to her hushand's death.

(g) That she left her mother-in-law's home because she was denied a Parliamentary Seat.

(h) That she had no love for her husband and she should be ashamed of herself.

Why the High Court held that material facts and particulars are absent and had not disclosed a cause of action?

30. **The High Court observed as under:-**

"In this connection learned counsel for the respondent has also referred to the averment that the said statement "were reasonably calculated to prejudice the prospects of the petitioner's election". Similarly, he refers to statements (b) contained in the paragraph wherein an observation is made that "the insinuation is that the petitioner is possessed of wealth corruptly made...." The contention is that these averments would apply to Smt. Maneka Gandhi personally as if she was the petitioner and not to Ch. Azhar Hussain the present petitioner. Ch. Azhar Hussain was not contesting the election, he was only a voter. The statement "that the petitioner's election was calculated to be prejudiced or that "the petitioner was possessed of wealth corruptly made" was wholly inapplicable to the petitioner Ch. Azhar Hussain and could certainly apply to Smt. Maneka Gandhi. It is, therefore, urged that this pleading is not made by the petitioner himself and, therefore, cannot be looked into. Realising the error the petitioner has applied for amendment to the petition to mention that the statements were calculated to prejudice the leader of the petitioner's political party and that regarding possession of wealth, it related to the leader of the petitioner's political party, namely, Smt. Maneka Gandhi. It appears to me that, as pointed out by the learned counsel for the respondent, the proposed amendment changes the entire nature of the pleading in this paragraph and is not merely a clerical mistake. It is an indication of the fact that the pleading has been made without an application of mind and it seems to me that it is hit by one of the principles set forth in Section 86(5) of the Act for which an amendment must not be

allowed. I am not satisfied that the proposed amendment could justly be allowed and therefore, must fail. On a consideration of all the matters, I would hold that the pleading in this paragraph is not sustainable, suffers from lack of material facts as a result of non-application of mind of the petitioner himself and is irrelevant."

Whether the High Court was right in taking the aforesaid view:-

31. **There is no averment to show that the publication was made with the knowledge or consent of the returned candidate when the book was publsihed in June, 1983. In fact, in 1983 there was no question of having acted in anticipation of the future elections of 1985 and in anticipation of the respondent contesting the same. In the election petition even the offending paragraphs have not been quoted. The petitioner has set out in paragraphs (a) to (h) the inferences drawn by him or the purport according to him. This apart, the main deficiency arises in the following manner. The essence of the charge is that this book containing alleged objectionable material was distributed with the consent of the respondent. Even so strangely enough even a bare or bald averment is not made as to:**

i) whom the returned candidate gave consent;

ii) in what manner and how; and

iii) when and in whose presence the consent was given.,

to distribute these books in the constituency. Nor does it contain any material particulars as to in which locality it was distributed or to whom it was distributed, or on what date it was distributed. Nor are any facts mentioned which taken at their face value would show that there was consent on the part of the returned candidate. Under the circumstances it is difficult to comprehend how exception can be taken to the view taken by the High Court.

GROUND XIV:

32. **Alleged corrupt practice as incorporated in ground No.XIV reads thus:—**

"That during the same campaign in the Amethi constituency, another booklet in Hindi with the photograph of the respondent on the cover page under the title "Rajiv Kyon" (Why Rajiv) purporting to be written by one Jagdish Pyush, was distributed in lacs by the respondent, his election agent and a large number of other persons with the consent of the respondent and or his election agent. On the third page of the said pamphlet occurs the following sentences:

"Amethi is the place where Rajiv's younger brother did his principal work. If Maneka was in sympathy with the desires of the late Sanjay Gandhi, why would she not run an orphanage in Amethi. Why would she not serve the helpless poor and why would she not employ her vast assets Arbon Ki Sampati (of hundreds of crores) in some constructive work.... The same conspiratorials and mischievous elements who had painted the hands of Sanjay Gandhi and Maneka yellow and the same foreign powers, disruptionists and enemies of the country who got Maneka out of her family home, are now wanting to make a Razia Sultan or Noor Jahan and seeing her in those roles. These people (obviously including the petitioner) not merely desired the partition of Smt. Gandhi's family, not only the partition of Amethi and Rai Bareilly, but also partition of the people and partition of the country. The very people who want another Pakistan in India, who want Khalistan are the very persons who are tinkering with the progress of Amethi and cannot

permit the widow of Sanjay Gandhi to be in the company of the country's loafers, because no family of India can permit its dauthters or daughers-in-law and the widow of its loved one to go about behaving like a vagabond. She is in acute distress about her late husband's property She is conducting her politics in his name. She is abusing her mother-in-law and her brother-in-law. Having kicked her family, she is now doing her dirty deeds (Gulchhade Uda Rahai Hai) in a house which costs Rs.80,000 annual rent.... Social reformers had not advocated the pursuit of ambitions by widows and in the same vein, the pamphlet proceeds to state in other context thereafter that the petitioner moved about in the company of traitors. She has exploited the person of her innocent child for political purpose. For power and pleasure, Maneka can do anything. The petitioner says that the entire trend of this pamphlet and the propaganda conducted on the basis thereof casts serious aspersions on the personal character of the candidate of his party. It accuses her of being possessed of corrupt wealth, disregard of her husband's wishes, breaking of family ties for political ambitions not conforming to the standard of conduct expected of a widow, keeping company with questionable characters capable of any immoral action for pleasure of the body and even exploiting her innocent child for her own advancement. All these aspersions were extensively published with the knowledge and consent of the respondent, as well as, with the knowledge and consent of his election agent and by other persons with the consent of the respondent and or his election agent. The publisher of this pamphlet is an important political worker of the Respondent. He is a member of his party and campaigned extensively for the respondent and his company the publication, printing and circulation thereof and the propaganda based thereon was in any event, done by the agents of the respondents and in the interest of the election of the respondent. Each of these statements is false. The respondent and others who made or repeated the same, believed them to be false. At any rate, they did not believe them to be true. These statements are in relation to the personal character or conduct of the candidate and they are in relation to her candidature. These statements were reasonably calculated to prejudice the prospects of her election. The election of the respondent is thus liable to be declared void under section 100(1)(b). This was also liable to be set aside under section 100(1)(d)(ii) inasmuch as the result of the election in so far as it concerned the returned candidate has been materially affected by this gross corrupt practice. A copy of the booklet Rajiv Kyon will be filed as Ex. 'Q'."

Why the High Court held that material facts and particulars are absent and had not disclosed a cause of action?

33. **In this connection, the High Court observed:—**

"While undoubtedly these allegations relate to the personal character and conduct of Smt. Maneka Gandhi, the elements of law required by Section 123(4) of the Act have not been specifically set out. As already held, it was the duty of the petitioner to make his choice of the particular person with whose consent the statement was made or distributed. According to the petitioner himself it was not made by the respondent but by one Jagdish Piyush. The petitioner instead of pinpointing the particular person who distributed the booklet or with whose consent it was distributed made a broad and vague statement that it was done by the respondent, his election agent, a large number of other persons with his consent and/or with the consent of his election agent. The date, time and place of

distribution, the names of the agents or persons who distributed it have not been indicated and, therefore, the pleading is vague and cannot be sustained."

Whether the High Court was right in taking the aforesaid view:—

34. **On a scrutiny of the averments made in the election petition it is evident that it is not pleaded as to who has distributed the pamphlets, when they were distributed, where they were distributed and to whom they were distributed, in whose presence they were distributed etc etc. Pleading is ominously silent on these aspects. It has not even been pleaded that any particular person with the consent of the respondent or his election agent distributed the said pamphlets. (In fact it has been stated by the learned counsel for the respondent that no election agent had been appointed by the respondent during the entire elections).**

35. **The pleading therefore does not spell out the cause of action. So also on account of the failure to mention the material facts, the Court could not have permitted the election petitioner to adduce evidence on this point. It would therefore attract the doctrine laid down in Nihal Singh's case (1970(3) SCC 239) and there would be nothing for the respondent to answer.**

GROUND NO. XV:

36. **Alleged corrupt practice as incorporated in ground No.XV reads as under:—**

"That during the course of the compaign the respondent, his election agent and his party brought into existence a propaganda committee to further the prospects of the respondent's election. This committee was called the "Amethi Matdata Parishad". Through the agency of this Committee, the respondent, his election agent and others with their consent and knowledge caused another pamphlet to be printed, published and circulated during the entire election campaign under the title. "How do Intelligent people think? who is an obstacle in the progress of Amethi"? The said pamphlet inter alia, contains the following statements:—

"That Maneka Gandhi is surrounded only by antisocial elements. She was also seen in the company of terrorists. Her whole campaign is based on money..... In my view, Maneka seems to have a big hand in the fire of Punjab. Maneka has no merit of her own. If she had anything in her, it would have come out before her marriage to Sanjay..... If she had any desire for leaderhip or service of the country, she would have co-operated with her husband. Politics is for her a pursuit of pleasure ("Shaukiya Dhandha"). Therefore, she is conducting her politics on the strength of people like Haji Masthan and Virendra Shai... A woman who could not protect the honour of a vast country like India.... Maneka is the destroyer of the country'.

The petitioner says that the entire trend of this pamphlet and the propaganda conducted on the basis thereof casts serious aspersions on the personal character of a candidate. Each of these statements is false to the knowledge of the respondent and others. The printing, publication and circulation of the said pamphlet and the propaganda based thereon was, in any event, done by the agents of the respondent and in the interests of the election of the Respondent. These statements are in relation to the personal character or conduct of a candidate and they are in relation to her candidature. These statements were reasonably calculated to prejudice the prospects of the petitioner's election. The election of the respondent is thus liable to be declared void under section 100(1)(b). This was also liable to be set aside under

Sec.100(1)(d)(ii), inasmuch as, the result of the election in so far as it concerned the returned candidate, has been materially affected by this gross corrupt practice.

In this pamphlet, the same Jagdish Piyush who is referred to in the pamphlet in the preceding paragraphs, is one of the contributors and in that contribution, he has referred to his publication mentioned in the previous paragraphs."

Why the High Court held that material facts and particulars are absent and did not disclose a cause of action?

37. **The High Court observed:—**

"The petitioner has set out specific statements from this pamphlet commenting adversely on the character and conduct of Smt. Maneka Gandhi where, inter alia, her association with terrorists and other persons of questionable antecedents was set out. It has been stated that these statements are false to the knowledge of the respondent and others and the pamphlet was distributed by the agents of the respondent in the interest of the election of the respondent and that the result, so far as the respondent is concerned, has been materially affected by the corrupt practice. Here also, the petitioner has made an omnibus statement of the printing, publication and circulation of the pamphlet by the respondent, his election agent and others with their consent and knowledge without trying to pinpoint the particular person who had done so. The places, dates where the pamphlets were distributed have also not been indicated. It was necessary for the petitioner to do so under the law as set out above. The pleading is, therefore, vague, embarrassing and lacks in material facts and, therefore, must fail. The petitioner's prayer for an amendment to delete the proposal to file a copy of the pamphlet is allowed as it is evidence and not integral part of the petition."

Whether the High Court was right in taking the aforesaid view?

38. **In view of the doctrine laid down in Nihal Singh's case (1970(3) SCC 239) (supra) as early as in 1970, the High Court was perfectly justified in taking the view that no cause of action was made out. For, in the absence of material particulars as to who had printed, published or circulated the pamphlet, when, where and how it was circulated and which facts went to indicate the respondent's consent to such distribution, the pleading would not disclose a cause of action. There would be nothing for the respondent to answer and the matter would fall within the doctrine laid down in Nihal Singh's case (supra). The learned counsel for the appellant is unable to show how the Court has committed any error in reaching this conclusion.**

39. **Thus there is no substance in the contentions urged by the learned counsel for the appellant in order to assail the judgment of the High Court in the context of the seven charges of alleged corrupt practices which the learned counsel wanted to call into aid in support of his submission.**

Last submission (Ground D Supra):

40. **Counsel for the appellant has taken exception to the fact that the High Court has dismissed the election petition in exercise of powers under Order 7 Rule 11 of the Code of Civil Procedure notwithstanding the fact that under the said provision if the petition does not disclose a cause of action it can only be rejected (and not dismissed). The contention urged by the learned counsel would have had some significance if the impugned order was passed before the expiry of the period of limitation for instituting the election petition. In the present case the election**

petition was filed on the last day on which the election petition could have been presented having regard to the rigid period of limitation prescribed by Sec. 81 of the Act. It could not have been presented even on the next day. Such being the admitted position, it would make little difference whether the High Court used the expression 'rejected' or 'dismissed'. It would have had some significance if the petition was 'rejected' instead of being 'dismissed' before the expiry of the limitation inasmuch as a fresh petition which contained material facts and was in conformity with the requirements of law and which disclosed a cause of action could have been presented 'within' the period of limitation. In this backdrop the High Court was perfectly justified in dismissing the petition. And it makes no difference whether the expression employed is 'dismissed' or 'rejected' for nothing turns on whether the former expression is employed or the latter. There is thus no valid ground to interfere with the order passed by the High Court, and the appeal must accordingly fail.

41. **But before the last word is said one more word needs to be said. The expression 'corrupt practice' employed in the Act would appear to be rather repulsive and offensive. Can it perhaps be replaced by a neutral and unoffensive expression such as 'disapproved practices'? Since this aspect occurred to us and there is an occasion to do so, we hint at it, and rest content at that.**

42. **And now the last word. The appeal is dismissed. No costs throughout.**

Appeal dismissed.

SUPREME COURT OF INDIA*

Civil Appeal No. 430 of 1982$
(Decision dated 11.5.1987)

Dhartipakar Madan Lal Agarwal .. ***Appellant***

Vs.

Shri Rajiv Gandhi ..***Respondent***

SUMMARY OF THE CASE

Shri Rajiv Gandhi was elected to the House of the People at a bye-election held on 14th June, 1981 from the Amethi Parliamentary Constituency in Uttar Pradesh to fill up the vacancy caused by the death of Shri Sanjay Gandhi. His election was challenged by one of the defeated candidates, Shri Madan Lal Dhartipakar, before the Allahabad High Court by filing an election petition on number of grounds, including allegations of corrupt practices and undue influence, hiring and procuring of vehicles for carrying voters, obtaining the assistance of Government servants and incurring election expenses in axcess of the permissible limit. On an application by Shri Rajiv Gandhi, the High Court dismissed the election petition on 12th October, 1981, holding that the various paragraphs contained in the petition did not contain sufficient averments to constitute any corrupt practices, and various paras of the petition were unnecessary, frivolous and vexatious within the meaning O. VI, R.16, CPC.

The present appeal was filed before the Supreme Court against the said order of the Allahabad High Court. During the pendency of the present appeal, another general election to the House of the People was held in 1984 and Shri Rajiv Gandhi was again elected to the House of the People from the same Amethi Parliamentary Constituency. The Supreme Court dismissed the present appeal, upholding in the High Court's judgment that the election petition did not disclose any cause of action or raise any triable issues. The Supreme Court also observed that the election of Shri Rajiv Gandhi to the House of the People in 1984 could not be set aside on the ground of the election petition filed in relation to his earlier election in 1981. However, the said election petition did not become infructuous, as charges of corrupt practices were alleged therein, which had to be investigated as proof thereof could result in disqualification for contesting elections in future. The Supreme Court, however, observed that Parliament should consider desirability of amending law to prescribe time limit for inquiring into allegations of corrupt practices or devise means to ensure that valuable time of Supreme Court was not consumed in election matters which by efflux of time were reduced to mere academic interest. The Supreme Court also expressed serious concern over the large number of independent candidates which caused confusion.

(A) Representation of the People Act (43 of 1951), Ss. 116A and 97 — Appeal to Supreme Court against decision dismissing election petition — Candidate returned in impugned election also returned in subsequent election — in so far as relief of setting aside election has become infructuous as subsequent election of candidate cannot be set aside on grounds raised in election petition impugning earlier election become academic — Yet, as charges of corrupt practice alleged in respect of earlier election have to be investigated in present state of law as proof thereof entails incurring of disqualificaitons

from contesting election, Supreme Court felt that Parliament should consider desirability of amending law to prescribe time limit for inquiry into allegations of corrupt practice or to devise means to ensure that valuable time of Supreme Court is not consumed in election matters which by efflux of time are reduced to mere academic interest.

(Paras 4, 6)

(B) Representation of the People Act (43 of 1951), Ss. 81, 83, 86 and 87 — Election petition — Procedure — Paras of petition not disclosing any cause of action — Can be struck off under O. 6, R. 16 of CP.C — No triable issues remaining to be considered after striking out pleadings — Court has power to reject petition under O.6, R. 11 of C.P.C. even before filing of written statement. AIR 1963 Madh Pra 356, Overruled, (Civil P.C. (5 of 1908), O.6, Rr. 11, 15 and 16).

On a combined reading of Ss. 81, 83, 86 and 87 of the Act, it is apparent that those paras of an election petition which do not disclose any cause of action, are liable to be struck off under O. VI, R. 15, C.P.C. as the Court is empowerd at any stage of the proceedings to strike out or delete pleading which is unnecessary, scandalous, frivolous or rexatious or which may tend to prejudice, embarrass or delay the fair trial of the petition or suit. It is the duty of the court to examine the plaint and it need not wait till the defendant files written statement and points out the defects. If the court on examination of the plaint or the election petition finds that it does not disclose any cause of action it would be justified in striking out the pleadings Order VI, Rule 15 itself empowers the Court to strike out pleadings at any stage of the proceedings which may even be before the filing of the written statement by the respondent or commencement of the trail. If the Court is satisfied that the election petition does not make out any cause of action and that the trial would prejudice, embarrass and delay the proceedings, the court need not wait for the filing of the written statement instead it can proceed to hear the preliminary objections and strike out the pleadings. If after striking out the pleadings the court finds that no triable issues remain to be considered. It has power to reject the election petition under O.VI. R. 11. AIR 1963 Madh Pra 356. Overruled.

(Para 8)

(C) Representation of the People Act (43 of 1951), Ss. 80, 83, 87 and 100 and 123 — Election petition — Corrupt practice — Allegations vague and general in that lacking in requisite facts and details and particulars of practice in question — Ground fails at threshold.

The Act is a complete and self contained Code within which any rights claimed in relation to an election or an election dispute must be found. The provisions of the Civil P.C. are applicable to the extent as permissible by S. 87. The Scheme of the Act would show that an election can be questioned under the statute as provided by S. 80 on the grounds as contained in S. 100. Section 83 lays down a mandatory provision in providing that an election petition shall contain a concise statement of material facts and set forthful particulars of corrupt practice. The pleadings are regulated by S. 83 and it makes it obligatory on the election petitioner to give the requisite facts, details and particulars of each corrupt practice with exactitude. If the election petition fails to make out a ground under S. 100 it must fail at the threshold. Allegations of corrupt practice are in the nature of criminal charges, it is necesary that there should be no vagueness in the allegations so that the returned candidate may know the case he has to meet. If the allegations are vague and

general and the particulars of corrupt practice are not stated in the pleadings, the trial of the election petition cannot proceed for want to cause of action. The emphasis of law is to avoid a fishing and roving inquiry.

(Para 14)

(D) Representation of the People Act (43 of 1951), S. 100 — Election — Grounds of challenge under — Allegation as to obstruction by police when petitioner wanted to file nomination paper by wearing only a 'langot' and further allegation that police were shadowing him and two policemen always kept Company with him — They do not make out any ground under S. 100.

(Para 15)

(E) Representation of the People Act (43 of 1951), Ss. 123 and 100 — Allegation that food was being given to workers of returned candidate at some place — It does not make out any case of corrupt practice.

(Para 15)

(F) Reprsentation of the People Act (43 of 1951), S. 123 — Corrupt practice of undue influence — Allegations that mother of returned candidate who was Prime Minister toured with the elected candidates and appealed to voters to vote for candidate — Appeal is legitimate and does not constitute corrupt practice of undue influences.

(Para 16)

(G) Representation of the People Act (43 of 1951), Ss. 123 and 100 — Corrupt practice — Allegation that on polling day a lady went to polling booth with one person and accompanying person affixed stamp on ballot paper and returned with her — These facts do not constitute any corrupt practice — Further, assuming that incident constituted violation of provisions of Act and rules, in view of magnitude of difference of votes between votes polled by returned candidate and petitioner, no question of election being materially affected by the incident arises.

(Para 17)

(H) Representation of the People Act (43 of 1951), Ss. 123(6), and 100 - Corrupt practice — Undue influence — Allegation as to distribution of 'batashas' and drinking water to voters — No allegation that distribution was with consent of returned candidate or that candidate spent money over it or that said action influenced voters or that it materially affected result of election — No corrupt practice is made out.

(Para 17)

(I) Representation of the People Act (43 of 1951), Ss. 123 and 100 — Allegations that workers of elected candidate helped voters to cast their votes in favour of elected candidate — Averments do not amount to any corrupt practice — They relate to irregularities and illegalities and would be relevant if there was further allegation that it materially affected result of election — Moreover, when term of candidate under election in question had already expired, allegations do not survive.

(Para 18)

(J) Representation of the People Act (43 of 1951), S. 123 — Corrupt practice — Allegations that petitioner did not appoint any counting agent but number of persons acted as counting agents of returned candidate in unauthorised manner and complaints made by petitioner were not considered — They do not make out any case of commission of corrupt practice.

(para 18)

(K) Representation of the People Act (43 of 1951), Ss. 123(6) and 77 — Corrupt practice of incurring or authorising expenditure beyond prescribed limit and of not keeping account of expenditure — Expenditure incurred by candidate's sympathisers or friends is not expenditure by candidate or his eleciton agent.

In order to constitute a corrupt practice as contemplated by Ss. 77 and 123(6) it is necessary to plead requisite facts showing authorisation or undertaking of reimbursement by the candidate or his election agent. A mere vague and general statement that the candidate and his workers with his consent spent money in election in excess of the permissible ceiling would not be sufficient to constitute corrupt practice. After the amendment of S. 77(1) any expenditure at the election by a political party, sympathisers or friends cannot be held to have been incurred by the candidate of his election agent unless it is shown that the money which they spent belonged to the candidate or his election agent or that he reimbursed the same. It is thus evident that unless the allegations are specific that the candidate or his election agent authorised the expenses before the money was actually spent and that the candidate or his election agent reimbursed or undertook to reimburse the same the necessary ingredient of corrupt practice would not be complete and it would provide no cause of action to plead corrupt practice. AIR 1985 SC 1133 Rel. on.

(Para 20)

Where the allegations merely alleged that a number of vehicles were plying with flags of party to which the elected candidate belonged and food was served in connection with the election meetings, there was, distribution of badges and leaflets but there was, however, no allegation that the elected candidate incurred or authorised incurring of expenditure for the aforesaid purposes, not keeping account of such expenditure would not amount to corrupt practice within contemplation of S. 77 read with S. 123(6).

(Para 19)

(L) Representation of the People Act (43 of 1951), S. 123(1)(a) — Corrupt practice — Bribery — Gift to voters — Completion of some developmental activity in progress, during election period — Does not amount to any gift or promise to voters.

(Para 23)

(M) Representation of the People Act (43 of 1951), S. 123 (1)(a)(2) — Corrupt practice of bribery and undue influence — Statement of promise by candidate, his workers and his mother who was leader of party besides being Prime Minister that candidate if elected, constituency would be developed — No corrupt practice of bribery or undue influence.

Where the allegations merely amounted to representation being made by the mother of the candidate who was the Prime Minister and the returned candidate and his workers that if the candidate was elected the constituency would be developed, such statement of promise being a legitimate one it did not fall within the definition of bribery or undue influence under S. 123(1)(a) or 123(2).

(Para 24)

(N) Representation of the People Act (43 of 1951), S. 123(5) — Corrupt practice of hiring or procuring of vehicle for free conveyance of voters — All the three ingredients must be specifically pleaded — No pleading regarding hiring or procuring of vehicle by elected candidate or his election agent — Corrupt practice of procuring or hiring of vehicle is not made out.

In order to constitute corrupt practice under S. 123(5) hiring or procuring of a vehicle by a candidate or his agent or any other person with his consent is the first essential ingredient of the corrupt practice, the second essential ingredient is that the hiring or procuring of the vehicle must be for conveyance of the voters to and from the polling station and the third necessary ingredient is that conveyance of electors is free from any charge. All the three ingredients must be pleaded to make out a case of corrupt practice under S. 123(5). If any of the three ingredients is not pleaded the charge of corrupt practice in question must fail. In the absence of any of the three ingredients being pleaded it would not be open to the election petitioner to adduce evidence to sustain the charge of corrupt practice. The hiring of a vehicle must be to procure the same for the purpose of conveyance of the voters free of cost. The hiring and procuring the vehicle is a necessary ingredient which must be pleaded before the charge can be tried.

(Para 26)

Where the allegations conspicuously did not contain any pleading regarding hiring and procuring of the vehicles by the elected candidate or any of his worker with his consent for conveyance of the voters to and from polling station free of cost and no particulars of any kind had been specified in the para in question, the para did not make out any charge of corrupt practice as contemplated by S. 123(5).

(Paras 15 and 28)

(O) Representation of the People Act (43 of 1951), S. 123(7) — Corrupt practice of procuring assistance from Govt. servants — Allegations that certain persons helped voters to cast votes and certain persons cast votes 100 to 200 times and their signatures were not taken — Case of corrupt practice contemplated by s. 123(7) not made out.

A corrupt practice as contemplated by S. 123(7) contemplates obtaining or procuring by a candidate or his election agent, assistance from the Government servants belonging to the classes specified in sub-s. (7) of S. 123 for the furtherance of the prospect of the candidate's election. In order to constitute a corrupt practice under S. 123(7), it is essential to clothe the petition with a cause of action which would call for an answer from the returned candidate and it should therefore plead mode of assistance, measure of assistance and all facts pertaining to the assistance.

(Para 28)

Where the paras containing allegations as regards corrupt practice under S. 123(7) referred to certain illegalities and irregularities alleged to have been committed by certain persons in helping voters to cast their votes and further alleged that some persons cast votes 100 or 200 times and their signatures were not obtained the allegations did not make out any charge of corrupt practice within the provisions of S. 123(7).

(Para 28)

(P) Representation of the People Act (43 of 1951), Ss. 123 and 100(1)(d)(i) — Corrupt practice — Allegation of failure to remove posters and propaganda material

displayed within 100 meters — Allegations do not make out any charge of corrupt practice — It could be a ground under S. 100(1)(d)(iv) for setting aside eleciton on ground of election being materially affected.

(Para 30)

(Q) Representation of the People Act (43 of 1951), Ss. 81 and 87 — Eletion petition — Amendment of, by insertion of new grounds after expiry of limitation for filing petition — Not permissible.

An order of amendment permitting a new ground to be raised beyond the time specified in S. 81 would amount to contravention of those provisions and beyond the ambit of S. 87. It necessarily follows that a new ground cannot be raised or inserted in an election petition by way of amendment after the expiry of the period of limitation.

(Para 31)

(R) Representation of the People Act (43 of 1951), Pre, — Election — Large number of persons contesting election as independent candidates — This leads to confusion.

In Parliamentary form of democrary political parties play vital role and occasionally they sponsor candidates of the election. But under the existing law it is open to any elector to contest election from any parliamentary constituency in the country and it is not necessary that the candidate should be sponsored by a political party. It is permissible for an elector to contest election on his own as an independent candidate. Some independent individuals contest election genuinely and some of them have succeeded also but experience has shown that a large number of independent candidates contest the election for the mere sake of contesting, with a view to make out grounds for challenging the election. Presence of a number of independent candidates results in confusion, for the millions of the illiterate and ignorant electors who exercise their electoral right on the basis of 'symbols' printed on the ballot papers. The presence of large number of independent candidates make the ballot paper of unmanageable size and ordinary elector is confused in the election booth while exercising his franchise. This leads to confusion.

(Para 32)

(S) Representation of the People Act (43 of 1951), S. 116A — Appeal before Supreme Court — Petitioner insisting on arguing petition only after being allowed to put on crown — Permission refused — Court observed that it would be wholly obnoxious to judicial propriety to allow litigants to appear in court wearing a crown to argue the case -— Court cannot be converted into a dramatic or theatrical stage.

(Para 32)

Cases Referred : Chronological Paras

AIR 1986 SC 1253 : 1986 All L.J. 625.	**4, 10, 28**
AIR 1986 SC 1534 : (1986) 4 SCC 78	**4,11**
AIR 1985 SC 1133 : 1985 Supp SCC 189 (Rel. on)	**21**
AIR 1984 SC 309 : (1984) 2 SCR 6	**10**
AIR 1984 SC 1516 : (1985) 1 SCR 11	**26**
AIR 1982 SC 983 : (1982) 3 SCR 318	**14**
AIR 1979 SC 882 : 1979 All L.J. 628	**26**
AIR 1979 SC 1701 : (1979) 2 SCR 1002	**12**

AIR 1978 SC 351 : (1978) 2 SCR 524	**26**
AIR 1976 SC 744 : (1976) 2 SCR 246	**10**
AIR 1976 SC 1187	**27**
AIR 1975 SC 308 : (1975) 2 SCR 259	**21**
AIR 1975 SC 667	**26, 27**
AIR 1975 SC 2299 : (1976) 2 SCR 347	**19**
AIR 1972 SC 515 : (1972) 2 SCR 742	**28**
AIR 1970 SC 211 : (1969) 3 SCR 813	**25**
AIR 1970 SC 2097 : (1971) 2 SCR 197	**25**
AIR 1969 SC 586 : (1969) 2 SCR 97	**26**
AIR 1963 Madh Pra 356 (Overruled)	**12**
AIR 1960 SC 770 : (1960) 3 SCR 91	**26, 27**
AIR 1958 SC 687 : 1959 SCR 583	**9**
AIR 1954 SC 210	**14**
AIR 1954 SC 749 : (1955) 1 SCR 671	**19**
AIR 1952 SC 14 : 1952 SCR 218	**14**
1944 AC 111 : (1944) 1 All ER 469 : 60 TLR 315, Sun Life Assurance Company of Canada v. Jervis	**4**

JUDGMENT

Present:- E.S. Venkataramiah and K.N. Singh. JJ.

Appellant-in-person: Dr. Y.S. Chitale, Sr. Advocate, Mr. N. Nettar, Mr. G.S. Narayan Rao and Mr. R.B. Datar, Advocates with him, for Respondent.

SINGH. J. :– **This appeal under S. 116A, Representation of the People Act, 1951 is directed against the order of the High Court of Allahabad (Lucknow Bench) dated 12-10-1981 rejecting the election petition filed by the appellant questioning the election of the respondent as member of the Lok Sabha.**

2. **A bye election was held on June 14, 1981 to fill up the vacancy to the Lok Sabha caused by the death of Sanjay Gandhi in the 25th Amethi Constituency in District Sultanpur in the State of Uttar Pradesh. The appellant, the respondent and 13 other candidates contested the election. On 15th June 1981 Rajiv Gandhi was declared elected having polled 258894 votes while the appellant polled 2728 votes only. The appellant filed an election petition under – S. 80, Representation of the People Act, 1951, (hereinafter referred to as the Act) questioning the validity of the respondent on a number of grounds, including the allegations of corrupt practice of undue influence, hiring and procuring of vehicles for carrying voters and obtaining the assistance of Government servants and incurring expenses at the election in excess of the permissible limit. The High Court issued notice to the respondent who appeared before it and made an application under O. VI, R. 16, Civil P.C. for striking out the pleadings contained therein as the same were vague, general unnecessary, frivolous and vexatious which did not disclose any cause of action. Respondent further prayed that the election petition be rejected under O, VII, R. 11 C.P.C read with S. 87 of the Act.**

3. **A learned single judge of the High Court before whom the preliminary objections were raised caused service of the copy of the objections on the appellant**

who was appearing in person and granted time to him to submit his reply. The appellant, however, did not submit any reply to the preliminary objections and in spite of date being fixed for hearing arguments in his presence he did not appear before the Court on the date fixed for arguments. The learned Judge after hearing the arguments advanced on behalf of the respondent passed an order on 12th October 1981 holding that the various paras contained in the petition were vague and the same did not contain sufficient averments to constitute any corrupt practice and the various paras of the petition were unnecessary, frivolous and vexatious within the meaning of O. VI, R. 16, Civil P.C. The learned Judge struck off paras 2 to 53, 55 to 57 and rejected the petition under O, VII, R, 11 read with S. 87 of the Act on the ground that the election petition did not disclose any cause of action. The appellant has preferred this appeal against the said order.

4. **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 held 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 v. Rajiv Gandhi, AIR 1986 SC 1253 and Bhagwati Prasad v. 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, 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 v. 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.**

5. **The main controversy raised in the present appeal regarding setting aside of the repondent's election has become stale and academic, but precious time of the apex court was consumed in hearing the appeal at length on account of the present state of law. Section 98 read with S. 99 indicates that once the machinery of the Act is moved by means of an election petition, charges of corrupt practice, if any, raised against the returned candidate must be investigated. On conclusion of the trial if the Court finds that a returned candidate or any of his election agent is guilty of commission of corrupt practice he or his elction agent, as the case may be, would be guilty of electoral offence incurring disqualification from contesting any subsequent**

election for a period of six years. In this state of legal position we had to devote considerable time to the present proceedings as the appellant insisted that even though six years period has elapsed and subsequent election has been held nonetheless if the allegations made by him make out a case of corrupt practice the proceedings should be remanded to the High Court for trial and if after the trial the Court finds him guilty of corrupt practice the respondent should be disqualified. If we were to remand the proceedings to the High Court for trial for holding inquiry into the allegations of corrupt practice, the trial itself may take couple of years, we doubt if any genuine and bona fide evidence could be produced by the parties before the Court, in fact, during the course of hearing the appellant himself stated before us more than once, that it would now be very difficult for him to produce evidence to substantiate the allegations of corrupt practice but nonethe-less he insisted for the appeal being heard on merit. Though the matter is stale and academic yet having regard to the present state of law, we had to hear the appeal at length.

6. **Before we consider the submissions on merit, we would like to say that Parliament should consider the desirability of amending the law to prescribe time limit for inquiry into the allegations of corrupt practice or to devise means to ensure that valuable time of this Court is not consumed in election matters which by efflux of time are reduced to mere academic interest. Election is the essence of democratic system and purity of elections must be maintained to ensure fair election. Election petition is a necessary process to hold inquiry into corrupt practice to maintain the purity of election. But there should be some time limit for holding this inquiry. Is it in public interest to keep sword of Damocles hanging on the head of the returned candidate for an indefinite period of time as a result of which he cannot perform his public duties and discharge his obligations to his constituents. We do not mean to say that the returned candidate should be permitted to delay proceedings and to plead later on the plea of limitation. Ways and means should be found to strike a balance in ascertaining the purity of election and at the same time in preventing waste of public time and moeny and in keeping the sword of Damocles hanging on the head of returned candidate for an indefinite period of time.**

7. **The appellant appeared in person and argued the case vehemently for a number of days. He made three submissions : (i) the High Court had no jurisdiction to entertain preliminary objections under O.VI, R. 16 or to reject the election petition under O, VII, R. 11, C.P.C. before the respondent had filed his written statement to the petition. In rejecting the petition under O, VII, R. 11 the High Court deprived the appellant opportunity of amending the petition by supplying material facts and particulars, (ii) allegations contained in various paras of the election petition constituted corrupt practice which disclosed cause of action within the meaning fo S. 100 of the Act. The High Court committed error in holding that the petition was defective, on the premise that it did not disclose any triable issue, (iii) the electin petition disclosed primary facts regarding corrupt practice and if there was absence of any particulars or details the High Court should have afforded opportunity to the appellant to amend the petition.**

8. **The first question which falls for our determination is whether the High Court had jurisdiction to strike out pleadings under O. VI, R. 16, C.P.C. and to reject the election petition under O. VII, R. 11 of the Code at the preliminary stage even though no written statement had been filed by the respondent. Section 80 provides that no election is to be called in question except by an election petition presented in accordance with the provisions of Part VI of the Act before the High Court. Section**

81 provides that an election petition may be presented on one or more of the grounds specified in S. 100 by an elector or by a candidate questioning the election of a returned candidate. Section 83 provides that an election petition shall contain a concise statement of material facts on which the petitioner relies and he shall set forth full particulars of any corrupt practice that he may alleged including full statement of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice Section 86 confers power on the High Court to dismiss an election petition which does not comply with the provisions of Ss. 81 and 82 or S. 117 Section 87 deals with the procedure to be followed in the trial of the election petition and it lays down that subject to the provisions of th Act and of any rules made thereunder, every election petition shall be tried by the High Court as nearly as may be in accordance with the procedure applicable to the trial of suits under the Code of Civil Procedure, 1908. Since provisions of Civil Procedure Code apply to the trial of an election petition, O. VI. R. 16 and O. VI, R. 17 are applicable to the proceedings relating to the trial of an election petition subject to the provisions of the Act. On a combined reading of Ss. 81, 83, 86 and 87 of the Act, it is apparrent that those paras of a petition which do not disclose any cause of action, are liable to be struck off under O, VI, R. 16, as the Court is empowered at any stage of the proceedings to strike out or delete pleading which is unnecessary, scandalous, frivolous or vexatious or which may tend to prejudice, embarrass or delay the fair trial of the petition or suit. It is the duty of the court to examine the plaint and it need not wait till the defendant files written statement and points out the defects. If the court on examination of the plaint or the election petition finds that it does not disclose any cause of action it would be justified in striking out the pleadings. Order VI, Rule 16 itself empowers the Court to strike out pleadings at any stage of the proceedings which may even be before the filing of the written statement by the respondent or commencement of the trial. If the Court is satisfied that the election petition does not make out any cause of action and that the trial would prejudice, embarrass and delay the proceedings, the court need not wait for the filing of the written statement instead it can proceed to hear the preliminary objections and strike out the pleadings. If after striking out the pleadings the court finds that no triable issues remain to be considered it has power to reject the election petition under O. VI, R. 11.

9. **In K. Kamaraja Nadar v. Kunju Thevar, 1959 SCR 583 : (AIR 1958 SC 687), the Election Tribunal and the High Court both refused to consider preliminary objections raised by the returned candidate at the initial stage on the ground that the same would be considered at the trial of the election petition. This Court set aside the order and directed that the preliminary objection should be entertained and a decision reached thereupon before further proceedings were taken in the election petition. Bhagwati, J. speaking for the Court observed thus (at p. 698 of AIR) :**

"We are of opinion that both the Election Tribunal and the High Court were wrong in the view they took. If the preliminary objection was not entertained and a decision reached thereupon, further proceedings taken in the Election Petition would mean a fullfledged trial involving examination of a large number of witnesses on behalf of the 2nd respondent in support of the numerous allegations of corrupt practices attributed by him to the appellant his agents or others working on his behalf; examination of a large number of witnesses by or on behalf of the appellant controverting the allegations made against him; examination of witnesses in support

of the recrimination submitted by the appellant against the 2nd respondent; and large number of visits by the appellant from distant places like Delhi and Bombay to Ranchi resulting in not only heavy expenses and loss of time and diversion of the appellant from his public duty in the various fields of activity including those in the House of the People. It would mean unnecessary harassment and expenses for the appellant which could certainly be avoided if the preliminary objection urged by him was decided at the initial stage by the Election Tribunal."

10. **In Udhav Singh v. Madhav Rao Scindia (1976) 2 SCR 246 : (AIR 1976 SC 744) this Court held that failure to plead even a single material fact leads to an incomplete cause of action and incomplete allegations of such a charge are liable to be struck off under O. VI R. 16, C.P.C. If the petition is based solely on those allegations which suffer from lack of material facts, the petition is liable to be summarily rejected for want of a cause of action. In Charan Lal Sahu v. Giani Zail Singh, (1984) 2 SCR 6 : (AIR 1984 SC 309) an eleciton petition challenging the election of Giani Zail Singh, President was rejected summarily at the initial stage by a Constitution Bench of this Court on the ground that the pleadings contained in the election petition even assuming to be true and correct did not disclose any cause of action for setting aside the election of the returned candidate. The precise question as raised by the appellant was considered at length by this Court in Azhar Hussain v. Rajiv Gandhi (AIR 1986 SC 1253) and this Court held that the High Court while dealing with the election petition has power to strike out pleadings under O. VI. R. 16 and to reject the election petition under O. VII R. 11 if the petition does not disclose essential facts to clothe it with complete cause of action. Failure to plead even a single material fact would amount to disobedience of the mandate of S. 83(1)(A) and election petition could therefore be and must be dismissed if it suffers from any such vice. The Court repelled the submission that the power to reject an election petition summarily under the Code of Civil Procedure should not be exercised at the threshold. The Court observed as under (at P. 1259 of AIR) :**

"In substance the argument is that the Court must proceed with the trial, record the evidence, and only after the trial of the eleciton petition is concluded that the powers under the Code of Civil Procedure for dealing appropriately with the defective petition which does not disclose cause of action should be exercised. With respect to the learned counsel, it is an argument which it is difficult to comprehend. The whole purpose of conferment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court and exercise the mind of the respondent.The sword of Damocles need not be kept hanging over his head unnecessarily without point or purpose. Even in an ordinary civil litigation the court readily exercises the power to reject a plaint if it does not disclose any cause of action. Or the power to direct the concerned party to strike out unnecessary, scandalous, frivolous or vexatious parts of the pleadings. Or such pleadings which are likely to cause embarrassment or delay the fair trial of the action or which is otherwise an abuse of the process of law. An order directing a party to strike out a part of the pleading would result in the termination of the case arising in the context of the said pleadings. The courts in exercise of the powers under the Code of Civil Procedure can also treat any point going to the root of the matter such as one pertaining to jurisdiciton or maintainability as a preliminary point and can dismiss a suit without proceeding to record evidence and hear elaborate arguments in the context of such evidence, if the court is satisfied that the action would terminate in view of the merits of the

preliminary point of objection. The contention that even if the election petition is liable to be dismissed ultimately it should be so dismissed only after recording evidence is a thoroughly misconceived and untenable argument. The powers in this behalf are meant to be exercised to serve the purpose for which the same have been conferred on the competent court so that the litigation comes to an end at the earliest and the concerned litigants are relieved of the psychological burden of the litigation so as to be free to follow their ordinary pursuits and discharge their duties. And so that they can adjust their affairs on the footing that the litigation will not make demands on their time or resources will not impede their future work, and they are free to undertake and fulfil other commitments. Such being the position in regard to matters pertaining to ordinary civil litigation there is greater reason for taking the same in regard to matters pertaining the elections."

11. **In Bhagwati Prasad Dixit 'Ghorawala' v. Rajiv Gandhi (AIR 1986 SC 1534) this Court again reiterated that in an election pleadings have to be precise, specific and unambiguous and if the election petition does not disclose a cause of action it should be rejected in limine. These authorities have settled the legal position that an election petition is liable to be dismissed in limine at the initial stage if it does not disclose any cause of action. Cause of action in questioning the validity of election must relate to the grounds specified in S. 100 of the Act. If the allegations contained in the petition do not set out grounds of challenge as contemplated by S. 100 of the Act and if the allegations do not conform to the requirement of Ss. 81 and 83 of th Act. the pleadings are liable to be struck off and the election petition is liable to be rejected under O. VII R. 11. A pleading of vague and general is embarrassing. If the allegation contained in the election petition even assuming to be true and correct do not make out any case of corrupt practice or any ground under S. 100 of the Act, the pleading would be unnecesary, frivolous and vexatious. It is always open to strike out the same. If after striking out defective pleadings the Court finds that no cause of action remains to be tried it would be duty bound to reject the petition under O. VII, R. 11, Civil P.C. If a preliminary objection is raised before the commencement of the trial, the court is duty bound to consider the same it need not postpone the consideration for subsequent stage of the trial.**

12. **The appellant placed reliance on the decision of this Court in Union of India v. Surjit Singh Atwal (1979) 2 SCR 1002 : (AIR 1979 SC 1701), in support of his submission that unless a plea is raised by the respondent in the written statement it is not open to the Court to strike out pleadings contained in the election petition. In Surjit Singh Atwal's case plaintiff had filed a suit for recovery of certain amount of money which he claimed to be due to him from the Union of India under a contract. The Union of India filed a written statement five years after the filing of the suit wherein they raised no plea that the contract between the parties was hit by failure to comply with the provisions of S. 175 (3), Government of India Act, 1935. More than a dozen years after the institution of the suit and eight years after the filing of the written statement, an application for amendment of the written statement was filed on behalf of the Union of India raising a "plea that the contract was hit by the failure to comply with the provisions of S. 175(3), Government of India Act. 1935. The trial court dismissed the suit in view of the additional plea raised in the written statement, but the High Court decreed the Court. On appeal by the Union of India, this Court upheld the order of the High Court and in that connection it observed that the illegality of the contract should have been specifically pleaded as required by O. VI R. 8 and O. VIII R. 2, Civil P.C. The decision has no relevance to the**

question under consideration. The appellant then placed reliance on a Division Bench decision of Madhya Pradesh High Court in Vidya Charan Shukla v. G.P. Tiwari, AIR 1963 Madh pra 356. In that case a Division Bench of the High Court held that the preliminary objections relating to non-maintainability of an election petition should not be allowed to be raised by mere applications without filing a complete written statement. We do not find any justification to uphold this view. As discussed earlier O. VI R. 16, CP.C., permits striking of pleadings at any stage of proceedings. It does not admit of any exception that the respondent must file written statement before the preliminary objections could be entertained. In view of this Court's decisions as discussed earlier the view taken by the Madhya Pradesh High Court in Vidya Charan Shukla's case is no longer a good law.

13. **The appellant's grievance that in entertaining the preliminary objections and rejecting the election petition under O.VII R. 11 the High Court deprived the appellant's opportunity to amend the petition and to make good the deficiencies by supplying the necessary particulars and details of the corrupt practice alleged in the petition, is devoid of any merit. Firstly, the appellant was free to file amendment application, but at no stage be expressed any desire to make any amendment, application nor he made any application to that effect before the High Court. It was open to the appellant to have made that application but the himself did not make any such application. The High Court was under no legal obligation to direct the appellant to amend pleadings or to suo motu grant time for the same. Secondly, the allegations of corrupt practice as required by S. 33 were not complete and the same did not furnish any cause of action any amendment made after the expiry of the period of limitation could not be permitted which would amount to raise a new ground of challenge. The question, however, does not arise as the appellant did not file any amendment application. During the course of hearing of this appeal before us the appellant has made applications for amendment of the election petition which we shall deal later.**

14. **Before we consider various paras of the election petition to determine the correctness of the High Court order we think it necessary to bear in mind the nature of the right to elect, the right to be elected and the right to dispute election and the trial of the election petition. Right to contest election or to question the election by means of an election petition is neither common law nor fundamental right instead it is a statutory right regulated by the statutory provisions of the Representation of the People Act, 1951. There is no fundamental or common law right in these matters. This is well settled by catena of decisions of this Court in N.P. Ponnuswami v. Returning Officer 1952 SCR 218 : (AIR 1952SC14), Jagan Nath v. Jaswant Singh AIR 1954 SC 210, Jyoti Basu v. Debi Ghosal (1982) 3 SCR 318 : (AIR 1982 SC 983). These decisions have settled the legal position that outside the statutory provisions there is no right to dispute an election. The Representation of the People Act is a complete and self contained Code within which any rights claimed in relation to an election or an election dispute must be found. The provisions of the Civil Procedure Code are applicable to the extent as permissible by S. 87 of the Act. The scheme of the Act as noticed earlier would show that an election can be qustioned under the statute as provided by S. 80 on the grounds as contained in S. 100 of the Act. Section 83 lays down a mandatory provision in providing that an election petition shall contain a concise statement of material facts and set forth full particulars of corrupt practice. The pleadings are regulated by S. 83 and it makes it obligatory on the election petitioner to give the requisite facts, details and particulars of each corrupt**

practice with exactitude. If the election petition fails to make out a ground under S. 100 of the Act it must fail at the threshold. Allegations of corrupt practice are in the nature of criminal charges, it is necessary that there should be no vagueness in the allegations so that the returned candidate may know the case he has to meet. If the allegations are vague and general and the particulars of corrupt practice are not stated in the pleadings, the trial of the election petition cannot proceed for want of cause of action. The emphasis of law is to avoid a fishing and roving inquiry. It is therefore necessary for the Court to scrutinise the pleadings relating to corrupt practice in a strict manner.

15. **Now we would consider the various paras of the election petition to determine as to whether the allegations contained therein disclose any cause of action. The election petition runs into 58 paras containing allegations of various corrupt practices known to the law. The averments contained in the various paras are in disjointed form and in order to ascertain true intention of the election petitioner, one has to read several paras and connect the same with the other to ascertain the correct import of the allegations. The allegations contained in paras 1 to 7 contain narration of facts as to when the election took place and the petitioner's desire to file his nomination paper by wearing only a "langot" and the obstruction raised by the authorities and the allegation that the police were shadowing the appellant and two of them always kept company to him. These paras do not make out any ground under S. 100 of the Act. In para 8, the appellant alleged that on 5th, 6th and 10th June he saw a number of jeeps plying in the Parliamentary Constituency of Amethi bearing flags of Congress (I) which are being used for electioneering purposes in support of Rajiv Gandhi. The allegations further state that the appellant noticed that food was being given to the workers of Rajiv Gandhi at the kothi of Sanjay Singh at Amethi. Assuming the allegations to be true, these do not make out any case of corrupt practice or any other ground of challenge under S. 100 of the Act. During the course of arguments the appellant urged that the allegations contained in para 8 indicate that Rajiv Gandhi had been using a large number of vehicles and feeding workers and thereby he had been incurring expenses beyond the permissible limit. The inference is not permissible as each and every corrupt practice must be clearly and specifically pleaded and it should be complete in itself. No corrupt practice can be inferred from reading one sentence here and the other sentence there. A corrupt practice as contemplated by S. 123(6) contemplates incurring or authorising expenditure beyond the prescribed limit. The allegations contained in para 8 do not contain any averment that the respondent incurred or authorised expenditure beyond the prescribed limit. Neither any details of incurring expenses or authorising it have been stated therein. Para 9 of the petition stated that on 5th June 1981 the appellant had seen a number of cars mentioned therein carrying Congress (I) flags. Similarly, allegations contained in paras 10, 11, 12, 13, 14, 15, 16, 17 18 and 19 stated that on the dates mentioned in those paras the election petitioner namely the appellant has seen a number of vehicles plying in the constituency carrying Congress (I) flags. These allegations merely show that a number of vehicles were plying with Congress (I) flags in the constituency which by itself do not constitute any corrupt practice. It appears that the appellant intended that the returned candidate had spent money over the plying of vehicles and thereby he exceeded the limit prescried by S. 123(6) read with S. 77 of the Act. In the absence of requisite allegations in the aforesaid paras the basic**

ingredients to make out a ground for challenging the election under S. 100 of the Act was totally lacking. These paras therefore disclosed no cause of action.

16. **In paras 20 to 21 the appellant stated that Smt. Indira Gandhi toured the constituency along with the respondent and in her speeches she appealed to the voters to vote for Rajiv Gandhi. We fail to appreciate how these allegations constitute any corrupt practice. It is always open to a candidate or his supporter to appeal to the electors to vote for a particular candidate for the development and progress of the area. This would be a legitimate appeal and in any view, it could not constitute undue influence or any other corrupt practice. The appellant further stated that the Station Officer of Amethi took him in a jeep to Munshi Ganj crossing on the pretext that Smt. Indira Gandhi had given time to see the appellant but later on the Station Officer left him there, these allegations are wholly irrelevant.**

17. **Allegations contained in paras 22 to 26 relate to the relationship between the appellant and one Ram Pal Singh whom he had appointed his election agent. These allegations refer to matters which do not make out any ground under S. 100 of the Act. In para 27 the appellant stated that he as well as his election agent both were being followed by police but it does not refer to any violation of law or rule or commission of any electoral offence by the returned candidate or his workers with his consent. In para 28 the appellant alleged that on the polling day a lady went to the polling booth along with a person, and the accompanying person affixed stamp on the ballot paper and returned with her. Even if that be so, we fail to understand as to how those facts would amount to any corrupt practice with consent of the returned candidate. Even assuming that this constitutes violation of provision of the Act and the Rules framed thereunder, there is no pleading that it materially affected the result of the election. In fact the difference of votes between the petitioner and the returned candidate was of such great magnitude, that there could be no question of election being materially affected on the basis of the aforesaid incident. In para 29 the appellant stated that on the polling day drinking water and 'batashas' were being distributed to the voters at the polling station in Amethi. There is no allegation that the water and batashas was being distributed with the consent of Rajiv Gandhi or that he spent money over it or that the said action influenced the voters or that it materially affected the result of the election. In the absence of any such allegations para 29 disclosed no cause of action.**

18. **Allegations contained in paras 31 to 35 relate to alleged irregularities committed on the polling day, according to these allegations, workers of the respondent helped voters to cast their vote in favour of the respondent. The averments contained therein do not amount to any corrupt practice, instead if at all these allegations relate to irregularities and illegalities alleged to have been committed on the polling day which would at best be relevant if there was furhter allegation that it materially affected the result of the election. Since respondent's term has already expired, and as his election cannot be set aside, these allegations do not survive and it is not necessary to consider them in detail. Similarly averments contained in paras 37-38 contain narration of facts which have no bearing on any corrupt practice. Allegations contained in paras 39 to 49 relate to the appointment of counting agents. In substance the appellant has alleged that neither he nor his election agent had appointed any counting agents but a number of persons had acted as the appellant's counting agents in an unauthorised manner and complaints made by him were not considered and the Returning Officer failed to perform his**

duty. These allegations if assumed to be true do not make out any case of commission of corrupt paractice.

19. **Allegations contained in paras 50, 51 and 53(1)(f) of the eleciton petition purport to state that Rajiv Gandhi and his workers with his consent spent money on the election in excess of the ceiling limit and major portion of which was not shown by him in his election expenses return. It was alleged that in all Rs. 3,15,500/- had been spent by Rajiv Gandhi in his election but he did not include the same in his return. Details of the expenditure is mentioned in the sub-paras (A) to (G) of para 50. In these paras the appellant alleged that Rajiv Gandhi used at least 100 jeeps for thirty days and his workers with his consent used 40 jeeps and spent money on propaganda badges, leaflets, making arrangements for holding meetings for Smt. Indira Gandhi throughout the Amethi constituency and money was spent in providing food to 100 workers of Rajiv Gandhi, in all the returned candidate and his workers with his consent spent a sum of Rs. 3,15,500/- but the same was not accounted for in the election return. The allegations contained in these paras relate to the corrupt practice under S. 123(6) of the Act read with S. 77. Section 123(6) provides that incurring or authorising of expenditure in contravention of S. 77 is a corrupt practice. Section 77 lays down that every candidate at the election shall keep a correct and separate account of all expenditure in connection with the election incurred or authorised by him or by his election agent between the date of nomination and the date of declaration of result. The account shall contain such particulars as prescribed by Rules. Sub-section (3) lays down that expenditure shall not exceed such amount as may be prescribed. Rule 90, Conduct of Election Rules, 1961, prescribed that the expenses shall not exceed a sum of Rs. 1 lakh for Lok Sabha election in the State of Uttar Pradesh. Section 77 and the Rules therefore prescribed a ceiling limit for election expenses and if any candidate incurs or authorises expenses in excess of the ceiling limit, he would be guilty of corrupt practice under S. 123(6) of the Act. The allegations contained in various sub-paras of para 50 merely allege that a number of vehicles were plying with Congress (I) flags and food was served in connection with the election meetings, distribution of badges and leaflets. There is however, no allegation that Rajiv Gandhi incurred or authorised incurring of expenditure for the aforesaid purposes. Any voluntary expense incurred by a political party, well-wishers, sympathisers or association of persons does not fall within the mischief of S. 123(6) of the Act. instead only that expenditure which is incurred by the candidate himself or authorised by him is material for the purpose of S. 77. In Rananjaya Singh v. Baijnath Singh (1955) 1 SCR 671 : (AIR 1954 SC 749), this Court pointed out that expenses must be incurred or authorised by the candidate or his election agent. In that case the Manager, the Assistant Manager, 20 Ziladar and their peons were alleged to have worked for the election of the returned candidate. This Court held that the employment of extra persons and the incurring or authorising of extra expenditure was not by the candidate or his election agent. It was further pointed out that persons who volunteer to work cannot be said to be employed or paid by the candidate or his election agent. In Smt. Indira Gandhi v. Raj Narain (1976) 2 SCR 347 : (AIR 1975 SC 2299), Ray, C.J. observed "Authorisation means acceptance of the responsibility. Authorisation must precede the expenditure. Authorisation means reimbursement by the candidate or election agent of the person who has been authorised by the candidate or by the election agent of the candidate to spend or**

incur. In order to constitute authorisation the effect must be that the authority must carry with it the right of reimbursement."

20. **Section 77 requires a candidate to keep a separate and correct account of all expendiure "in connection with the election incurred or authorised by him or by his election agent" between the date of his nomination and the date of declaration of the result of the election. The candidate is required to maintain account of only that expenditure which he or his election agent may have authorised before the expenditure was actually incurred, which would imply that the candidate or his election agent undertook to reimburse the expenses which may have been authorised by him or his election agent to be spent at the election. In order to constitute a corrupt practice as contemplated by Ss. 77 and 123(6) it is necessary to plead requisite facts showing authorisation or undertaking of reimbursement by the candidate or his election agent. A mere vague and general statement that the candidate and his workers with his consent spent money in election in excess of the permissible ceiling would not be sufficient to constitute corrupt practice.**

21. **In Kanwar Lal Gupta v. A.N. Chawla (1975) 2 SCR 259 : (AIR 1975 SC 308) this Court held that what S. 77(1) prescribed was not only the incurring but also the authorising of excessive expenditure and that such authorisation may be implied or express. The Court held that when a political party sponsoring a candidate incurs expenditure in connection with his election as distinguished from expenditure on a general party propaganda, and the candidate knowingly takes advantage of it or participates in the programme or activity or consents to it or acquiescence to it, it would be reasonable to infer that he impliedly authorised the political party to incur such expenditure and he could not escape the rigour of the ceiling by saying that he had not incurred the expenditure and the political party had done so. The result of the judgement was that the expenditure incurred by political party in connection with the general party propaganda was deemed to have been incurred by the candidate himself. The Parliament amended S. 77 by the Representation of the People (Amendment) Act. 1974 by adding two explanations to the Section. Explanation 1 lays down that any expenditure incurred or authorised in connection with the election of a candidate by a political party or by any association or body of persons or by any individual other than the candidate or his election agent shall not be deemed to be incurred or authorised by the candidate or his election agent. The validity of the Amending Act was upheld by a Constitution Bench of this Court in Dr. P. Nalla Thampy Terah v. Union of India, 1985 Supp. SCC 189 : (AIR 1985 SC 1133). After the amendment of S. 77(1) any expenditure at the election by a political party, sympathisers or friends cannot be held to have been incurred by the candidate or his election agent unless it is shown that the money which they spent belonged to the candidate or his election agent or that he reimbursed the same. It is thus evident that unless the allegations are specific that the candidate or his election agent authorised the expenses before the money was actually spent and that the candidate or his election agent reimbursed or undertook to reimburse the same the necessary ingredient of corrupt practice would not be complete and it would provide no cause of action to plead corrupt practice. In the instant case para 50 and its various sub-paras contain mere assertion of facts relating to expenditure but there is no allegation that the expenditure was incurred or authorised by Rajiv Gandhi or that he undertook to reimburse the same. The appellant made an attempt to jumble up various allegations regarding incurring of expenditure by the returned candidate**

and his workers. The allegations contained therein do not make out any case of corrupt practice and the High Court was justified in striking out the same.

22. **Allegations contained in para 52 disclose that the appellant had come to know that in villages in the constituency of Amethi, Rajiv Gandhi polled cent percent votes in his favour. This statement does not make out any corrupt practice or any ground of challenge under S. 100 of the Act. it was rightly struck off by the High Court.**

23. **Para 53 of the election petition stated that Rajiv Gandhi committed corrupt practice as set out in sub-paras (A) to (F). These paras are under the heading of "Grounds". It appears the appellant intended to challenge the election of the returned candidate on the grounds mentioned in various sub-paras of para 53, it is therefore necessary to consider the allegations contained in each of the sub-paras to ascertain as to whether any corrupt practice was pleaded which could disclose cause of action to maintain the petition. Para 53(1)(a) stated that Rajiv Gandhi "tried to make gift" to the voters in the following manner to make them vote in his favour which is illegal under S. 123(1)(a) of the Representation of the People Act. After making this general statement the appellant stated that on 15th June, 1981 prior to the declaration of election and also during the election period workers of Rajiv Gandhi with his consent speeded up the construction work of Amethi Railway Station, and this was done only to persuade the voters to cast their vote in his favour. This was a gift to the voters of the constituency. Besides that certain other works were also done which fall within the definition of gift to the voters of the constituency. The petition does not disclose any material fact or particular regarding the alleged corrupt practice of making gift which may amount to bribery within the meaning of S. 123 (1)(A) of the Act. The allegations merely disclose that Amethi Railway Station was being constructed and during the election its work was speeded up which persuaded the voters to cast their vote in favour of the returned candidate. There is no allegation that Rajiv Gandhi or his workers with his consent made any gift, offer or promise to any elector to vote or refrain from voting at an election. if some developmetnal activity was carried on in the constituency and if it was completed during the election period it could not amount to any gift or promise to the voters.**

24. **It would be noticed that the allegations contained in sub-para 53(1)(A) open with the qualification "Respondent No. 1 (Rajiv Gandhi) tried to make gift to the voters." which means that attempt was made to make gift to the voters and not that it was actually done. It indicates that the appellant who made the allegations was himself not sure that any corrupt practice had been committed. Sub-paras (A) and (C) of Para 53(1) of the election petition alleged that Rajiv Gandhi and Smt. Indira Gandhi and their workers with the consent of Rajiv Gandhi and Smt. Indira Gandhi made promise through newspapers, pamphlets and speeches that voters should cast their vote in favour of Rajiv Gandhi for the development of Amethi because his victory will ensure progress and development. Further Rajiv Gandhi and Smt. Indira Gandhi and the workers of Rajiv Gandhi in all their speeches and particularly Smt. Indira Gandhi in her speech on 11-6-1981 said that for the development of Amethi Constituency they should vote for Rajiv Gandhi. On account of these speeches voters could not cast their vote impartially, instead they cast their vote in favour of Rajiv Gandhi. Since Rajiv Gandhi and Smt. Indira Gandhi both attended the meetings together voters got the impression that as Smt. Indira Gandhi was Prime Minister and her son Rajiv Gandhi was a candidate, there**

was bound to be development of Amethi area if Rajiv Gandhi was elected. These allegations merely amount to representation being made by Smt. Indira Gandhi and the returned candidate and his workers that if Rajiv Gandhi was elected the constituency would be developed. Such a statement of promise is a legitimate one and it does not fall within the definition of bribery or undue influence under S. 123(1)(A) or 122(2) of the Act. A candidate, his workers and supporters have every right under the law to canvass for the success of a particular candidate saying that if elected he would work for the development of the constituency. Such a promise does not in any way interfere with the free exercise of electoral right to the electors. Smt. Indira Gandhi who was the leader of the party was entitled to ask the electors to vote for Rajiv Gandhi and the fact that she was the Prime Minister made no difference to her to make an appeal of that nature. There is no allegation that there was any element of bargaining or undue influence in making appeal to the voters for casting their vote in favour of Rajiv Gandhi. Section 123(2)(b) itself provides that a declaration of public policy, or a promise of public action or the mere exercise of a legal right without intent to interfere with the electoral right shall not be deemed to interference with the exercise of electoral right.

25. **In Shiv Kirpal Singh v. V.V. Giri, (1971) 2 SCR 197 : (AIR 1970 SC 2097) a Constitution Bench of this Court held that the expression "free exercise of the electoral right" does not mean that voter is not to be influenced. This expression has to be read in the context of an election in a democratic society and the candidates and their supporters must naturally be allowed to canvass support by all legitimate and legal means. This exercise of the right by a candidate or his supporters to canvass support does not interfere or attempt to interfere with the free exercise of the electoral right. What does amount to interfere with the exercise of an electoral right is "tyranny over the mind". Declaration of public policy or a promise of public action or promise to develop the constituency in general do not interfere with free exercise of electoral rights as the same do not constitute bribery or undue influence. In H.V. Kamath v. C.H. Nitraj Singh (1969) 3 SCR 813 : (AIR 1970 SC 211) the State Government during the election period issued an Ordinance granting exemption to certain agriculturists from payment of land revenue and during the election the Chief Minister announced increased dearness allowance to Government employees. Referring to these facts the election petitioner therein alleged that the same amounted to corrupt practice under S. 123(1)(A) of this Act. This Court repelled the contention and held that the Ordinance did not amount to a gift, offer or promise of any gratification within the meaning of S. 123(1)(A). Similarly, increase in dearness allowance could not be regarded as a gift, offer or promise of any gratification within the meaning of S. 123(1)(A). A general promise made by the Prime Minister or Minister to redress public grievance or to provide for public amenities for developing the constituency if elected, does not amount to corrupt practice. In para 53(1)(b) and (c) material facts relating to alleged "gift and promise and undue influence" have not been stated in the petition and for that reason also para 53(1)(b) and (c) were rightly struck off.**

26. **Para 53(1)(d) stated "the workers of Rajiv Gandhi with his consent on 14th June, 1981 at about 2 p.m. tried to bring voters in truck for casting votes and dropped them back at their houses. The appellant noted the number of such truck which is mentioned in the paragraph. This truck had brought about 20-22 voters to the junior High School Polling Centre of Amethi constituency and took them back**

without charging fare from them. The truck was used by Rajiv Gandhi and this amounted to corrupt practice. This para contains substantially the same allegations as contained in para 30 of the petition, it purports to convey that Rajiv Gandhi and with his consent his workers "tried to bring voters". In substance the allegation amounts to saying that Rajiv Gandhi and his workers made attempt to carry voters in a truck. He further alleged that they carried the voters. It appears that the appellant intended to lay charge of corrupt practice against Rajiv Gandhi under S. 123(5) of the Act of hiring or procuring of a truck for the use of same for free conveyance of electors to and from the polling station. The necessary particulars with regard to corrupt practice as contemplated by S. 123(5) are, however, totally lacking. The petition does not contain any material facts with regard to hiring or procuring of the vehicle. Further there is no allegation as to when the vehicle was hired or procured by whom, and at what place or that the said vehicle in furtherance of hiring or procuring was used for free conveyance of electors to and from polling station. The allegations made in para 30 and sub-para (d) of Para 53(1) merely show that some voters were brought to the polling station Amethi in a truck without charging any fare from them and the truck was used by the workers of Rajiv Gandhi. Does this make out a corrupt practice under S.123(5)? Section 123(5) reads as under:

"The hiring or procuring, whether on payment or otherwise, of any vehicle or vessel by a candidate or his agent or by any other person (with the consent of a candidate or his election agent) (or the use of such vehicle or vessel for the free conveyance) of any elector (other than the candidate himself, the members of his family or his agent) to or from any polling station provided under S.125 or a place fixed under sub-s. (1) of S.29 for the poll....

It would be noticed that hiring or procuring of a vehicle by a candidate or his agent or by any other person with his consent is the first essential ingredient of the corrupt practice, the second essential ingredient is that the hiring or procuring of the vehicle must be for conveyance of the voters to and from the polling station and the third necessary ingredient is that conveyance of electors is free from any charge. All the three ingredients must be pleaded to make out a case of corrupt practice under S.123(5). If any of the three ingredients is not pleaded there would be no pleading of corrupt practice. In Jasbhai Chunnibhai Patel v. Anwar Beg A. Mirza, (1969) 2 SCR 97: (AIR 1969 SC 586), Hidayatullah, C.J. speaking for the Court analysed this section and observed, "it will, therefore, appear that the section requires three things, (i) hiring or procuring of a vehicle; (ii) by a candidate or his agent etc; and (iii) for the free conveyance of an elector. It will be noticed that the section also speaks of the use but it speaks of the use of such vehicle which connects the two parts, namely, hiring or procuring of vehicle and its use. The requirement of the law therefore is that in addition to proving the hiring or procuring and the carriage of electors to and from any polling station, should also be proved that the electors used the vehicle free of cost to themselves." In Razik Ram v. J.S. Chouhan, AIR 1975 SC 667 the Court considered the decision of this Court in Balwan Singh v. Laxmi Narain, (1960) 3 SCR 91 : (AIR 1960 SC 770) and the effect of 1966 amendment and thereupon it held as under (at pp.670-671 of AIR):

"On analysis, Cl. (5) of S.123 falls into two parts. The requirements of the first part are: (i) the hiring or procuring whether on payment or otherwise, of any

vehicle or vessel for the free conveyance of voters, (ii) such hiring or procuring must be by a candidate or his election agent by any other person with the consent of a candidate or of his election agent. The second part envisages the "use of such vehicle or vessel for the free conveyance of any elector (other than the candidate himself, the members of his family, or his election agent) to or from any polling station." Two parts are connected by the conjunction "or" which is capable of two constructions. In one sense it is a particle coordinating the two parts of the clause and creating an alternative between them. In the other sense — which is akin to the sense of "and" — it can be construed as conjoining and combining the first part of the clause with the second. The latter construction appears to comport better with the aim and object of the amendment of 1966. In this connection, it is noteworthy that even before the amendment, this Court in Balwan Singh v. Laxmi Narain, (1960) 3 SCR 91 : (AIR 1960 SC 770), held that in considering whether a corrupt practice described in S.123(5) is committed, conveying of electors cannot be dissociated from the hiring of a vehicle. Even if the word "or" is understood as a coordinating conjunction introducing alternatives, then also a petitioner in order to succeed on the ground of a corrupt practice under the second part of the clause, must prove in addition to the use of the vehicle or vessel for the free conveyance of any elector to or from any polling station, the hiring or procuring of that vehicle or vessel. This is so because the word "such" in the phrase introduced by the 1966 amendment, expressly imports these elements of the first into the second part of the clause."

Same view was taken by this Court in Dadasaheb Dattatraya Pawar v. Pandurang Raoji Jagtap, (1978) 2 SCR 524: (AIR 1978 SC 351), and the Court emphasised that it was necessary for an election petitioner to prove (i) that any vehicle or vessel was hired or procured, whether on payment or otherwise, by the returned candidate or by his election agent or by any other person with the consent of the candidate or of his election agent; (ii) that it was used for the conveyance of the electors to or from any polling station; and (iii) that such conveyance was free of cost to the electors. Failure to substantiate any one of these ingredients leads to the collapse of the whole charge. Standard of proof required to establish a corrupt practice is strict, as imputation of corrupt practices, is quasi-criminal and the charge of corrupt practice under S.123(5) has to be scrutinised in a strict manner. In Dharmesh Prasad Verma v. Faiyazal Azam, (1985) 1 SCR 11: (AIR 1984 SC 1516) this Court again reaffirmed the aforesaid view. There is thus good authority for holding that if any of the three ingredients as noted earlier is not pleaded the charge of corrupt practice must fail. In the absence of any of the three ingredients, being pleaded it would not be open to the election petitioner to adduce evidence to sustain the charge of corrupt practice as was held by this Court in Rajendra Singh Yadav v. Chandra Sen, AIR 1979 SC 882.

27. **The appellant placed strong reliance on the decision of this Court in Balwan Singh v. Laxmi Narain, (AIR 1960 SC 770). This case was decided prior to the amendment of S.123(5) but even in that case this Court observed that the corrupt practice under S.123(5) being the hiring or procuring of a vehicle for the conveyance of the electors, full statement of the hiring or procuring must be given by the election petitioner. Balwan Singh's case was considered and discussed in Razik Ram v. J.S. Chouhan, (AIR 1975 SC 667). The appellant then placed reliance on the observations of this Court in Balwan Singh v. Prakash Chand, AIR 1976 SC 1187.**

We have perused the decision but we do not find any support for the appellant's contention that the pleadings contained in paras 30 and 53(1)(d) are sufficient to constitute charge of corrupt practice. In Balwan Singh v. Prakash Chand this Court interpreted the word "procure" to mean "to obtain, as by request, loan, efforts, labour, or purchase, get, gain come into possession of. Thus the hiring of a vehicle must be to procure the same for the purpose of conveyance of the voters free of cost. The hiring and procuring the vehicle is a necessary ingredient which must be pleaded before the charge can be tried. The allegations contained in paras 30 and 53 (1) (d) conspicuously do not contain any pleading regarding hiring and procuring of the vehicles by Rajiv Gandhi or any of his worker with his consent for conveyance of the voters to and from polling station free of cost. No particulars of any kind have been specified in the paras under consideration. The paras as they stand do not make out any charge of corrupt practice as contemplated by S.123(5) of the Act and the High Court was therefore justified in striking out the same.

28. **In para 53(1) E of the election petition the appellant stated "that as per S.123(7) of the Representation of the People Act, Rajiv Gandhi's workers with his consent took help from the Government officers and high police officers and people of Government departments and for securing votes of the electors. These officials flouted all rules and laws particulars of which are as under." Thereafter particulars of the help taken from the Government officers are detailed in subparas (1) to (8). A corrupt practice as contemplated by S.123(7) contemplates obtaining or procuring by a candidate or his election agent, assistance from the Government servants belonging to the classes specified in sub-s. (7) of S.123 for the furtherance of the prospect of the candidate's election. In order to constitute a corrupt practice under S.123(7), it is essential to clothe the petition with a cause of action which would call for an answer from the returned candidate and it should therefore plead mode of assistance, measure of assistance and all facts pertaining to the assistance. The pleading should further indicate the kind or form of assistance obtained and in what manner the assistance was obtained or procured or attempted to be procured by the candidate for promoting the prospect for his election. The election petitioner must state with exactness the time of assistance, the manner of assistance and the persons from whom assistance was obtained or procured by the candidate as held by this Court in Hardwari Lal v. Kanwal Singh, (1972) 2 SCR 742: (AIR 1972 SC 515) and Azhar Hussain v. Rajiv Gandhi, (AIR 1986 SC 1253). Allegations contained in sub-paras (1), (2) and (3) of Para 53(1)(b) raised a grievance that though the appellant had not appointed any counting agent but still certain persons acted as his counting agents and the Returning Officer did not hold any inquiry into his complaint. Sub-para (4) states that in the Amethi constituency, there was fear psychosis and "it looked as if the police and other Government officials wanted to help Rajiv Gandhi". Sub-paras (5) to (8) refer to certain illegalities and irregularities alleged to have been committed by certain persons on the polling day in helping voters to cast their votes and it further alleged that some persons cast votes 100 to 200 times and their signatures were not obtained. These allegations do not make out any charge of corrupt practice within the provisions of S.123(7) of the Act. As regards Para 53(1)(G) it purports to allege a corrupt practice under S.123(6) of the Act on the ground that Rajiv Gandhi spent Rs.3,15,500/- in excess of the amount permitted under the law. We have already discussed this matter earlier.**

29. **Para 53(2) of the petition is as under:**

"That Presiding Officer is duty bound under Ss. 27, 28 and 139 of the Representation of the People Act to ensure that the polling is fair, but it has not been so in this case. According to the rules, the Presiding Officer should have got removed the posters and other propaganda material from the polling booth. But the hand symbol was being displayed by every Presiding Officer, and other persons and the agents of the candidates and voters. By reason of this, the voters were influenced and Rajiv Gandhi got very many votes. The hand symbol influenced the voters to a great extent because Rajiv Gandhi's workers were trying to display the hand symbol in the polling booth as well as within 100 meters of the polling booth. The hand symbol was visible to every voter everywhere. This influenced the voters very much and they cast votes in favour of Rajiv Gandhi."

30. **The aforesaid allegations do not amount to any corrupt practice as contemplated by S.123 of the Act. At best these allegations raise a grievance that the presiding officers did not perform their duties in accordance with law inasmuch as they failed in their duty to remove the posters and other propaganda material from the polling booth and the hand which was the election symbol of Rajiv Gandhi and the same was displayed within 100 meters of the polling booth in violation of the rules. The allegations do not make out any charge of corrupt practice. If at all the allegations could be a ground under S.100(1)(d)(iv) of the Act for setting aside election on the ground of it being materially affected but no such plea was raised. Paras 54 to 58 do not deal with any corrupt practice.**

31. **The above scanning of the election petition would show that the appellant failed to plead complete details of corrupt practice which could constitute a cause of action as contemplated by S.100 of the Act and he further failed to give the material facts and other details of the alleged corrupt practices. The allegations relating to corrupt practice, even if assumed to be true as stated in the various paras of the election petition do not constitute any corrupt practice. The petition was drafted in a highly vague and general manner. Various paras of the petition presented disjointed averments and it is difficult to make out as to what actually the petitioner intended to plead. At the conclusion of hearing of the appeal before us appellant made applications for amending the election petition, to remove the defects pointed out by the High court and to render the allegations of corrupt practice in accordance with the provisions of S.33 read with S.123 of the Act. Having given our anxious consideration to the amendment applications, we are of the opinion that these applications cannot be allowed at this stage. It must be borne in mind that the election petition was presented to the Registrar of the High Court, at Lucknow Bench on the last day of the limitation prescribed for filing the election petition. The appellant could not raise any ground of challenge after the expiry of limitation. Order IV, Rule 17 no doubt permits amendment of an election petition but the same is subject to the provisions of the act. Section 87 prescribes a period of 45 days from the date of the election for presenting election petition calling in question, the election of a returned candidate. After the expiry of that period no election petition is maintainable and the High Court or this Court has no jurisdiction to extend the period of limitation. An order of amendment permitting a new ground to be raised beyond the time specified in S.81 would amount to contravention of those provisions and beyond the ambit of S.87 of the Act. It necessarily follows that a new ground cannot be raised or inserted in an election petition by way of amendment after the**

expiry of the period of limitation. The amendments claimed by the appellant are not in the nature of supplying particulars instead those seek to raise new ground of challenge. Various paras of the election petition which are sought to be amended do not disclose any cause of action, therefore, it is not permissible to allow their amendment after expiry of the period of limitation. Amendment applications are accordingly rejected.

32. **Before we close we could like to express our anxiety on a feature which of late has assumed great proportion. In Parliamentary form of democracy political parties play vital role and occasionally they sponsor candidates of the election. But under the existing law it is open to any elector to contest election from any parliamentary constituency in the country and it is not necessary that the candidate should be sponsored by a political party. It is permissible for an elector to contest election on his own as an independent candidate. Some independent individuals contest election genuinely and some of them have succeeded also but experience has shown that a large number of independent candidates contest the election for the mere sake of contesting, with a view to make out grounds for challenging the election. Presence of a number of independent candidates results in confusion, for the millions of the illiterate and ignorant electors who exercise their electoral right on the basis of 'symbols' printed on the ballot papers. The presence of large number of independent candidates makes the ballot paper of unmanageable size and ordinary elector is confused in the election booth while exercising his franchise. This leads to confusion. In the instant case out of 14 candidates who contested the election 11 of them including the appellant contested as independent candidates and they all polled only paltry number of votes. This shows the genuineness of the candidature of independent candidates. The appellant is a resident of Gwalior in Madhya Pradesh and he is a lawyer by profession. He contested election as an independent candidate and on the date of filing of nomination paper he insisted to file his nomination paper by stripping off himself completely and by putting on only a 'langot'. This caused consternation in the office of the Returning Officer, and it has also been raised as a ground of attack in the election petition. In fact the appellant has filed certain photographs before us showing himself in a 'langot' only. When his appeal came up for hearing before us the appellant insisted that he should be allowed to argue the case by putting on a crown (an artificial one) on his head. According to him without the crown he would not be able to make his submissions in a satisfactory manner. We refused to grant the permission to the great dissatisfaction of the appellant. A Court of law is a solemn place where proceedings are held in a solemn manner and the time of the Court especially in the apex Court is precious time which belongs to the people and it would be wholly obnoxious to judicial propriety to allow a litigant to appear in court wearing a crown to argue the case. The Court cannot be converted into a dramatic or theatrical stage. We accordingly refused to grant the permission to the appellant to wear his crown. During the arguments the appellant glibly stated that he had contested the election for the offices of President and Vice-President and that he would be contesting each and every election as an independent candidate with a view to reform the society and the election law. This is not uncommon as a number of other persons have been contesting elections as independent candidates for the high office and some of them filed election petition disputing the election. These factors have given cause for anxiety to us and we hope that the Parliament will take these matters into**

consideration to devise ways and means to meet the onslaught of independent candidates who are not quite serious about their business.

33. **In view of our discussion, we are of the opinion that the High Court rightly exercised its power in rejecting this petition under O. VII. R.11. The appeal fails and accordingly dismissed with costs which we quantify at Rs.2,000/-.**

Appeal dismissed.

SUPREME COURT OF INDIA*

Civil Appeal No. 2849 of 1987.$
(Decision dated 10.11.1987)

The Election Commission of India ***..Appellant***

Vs.

Shivaji and Others ***..Respondents***

SUMMARY OF THE CASE

The Governor of Maharashtra, by a notification dated 18th September, 1987 issued under Section 16 of the Representation of the People Act, 1951, called upon six local authorities' constituencies in the State of Maharashtra to elect one member each to the Maharashtra Legislative Council. The Osmanabad –cum-Latur-cum - Beed local authorities' constituency was one of the these six constituencies. One Shri Shivaji and 4 others challenged before the Bombay High Court (Aurangabad Bench), the notification calling the election in the above constituency on the ground that Zila Parishads of Osmanabad and Latur, which were within the constituency, had not been constituted and these Parishads were being run by the Administrators. The learned single Judge, who heard the writ petition on 26th September, 1987, issued notice on the writ petition and passed an interim order ex-parte postponing the last date for withdrawal of candidatures in the said constituency from 28th September, 1987 to 1st October, 1987. However, a Division Bench of the High Court heard the writ petition on 1st October, 1987 and dismissed the same. But, while the dismissing the writ petition, the High Court did not make any observation as to the effect of interim order passed by it on 26th September, 1987, on the election programme. 18 candidates withdrew their candidatures by 1st October, 1987, i.e., the last date for withdrawal of candidatures as per the interim order of the High Court. In the circumstances, the Election Commission considered it fair to postpone the date of poll from 18th October, 1987 (as originally notified) to 1st November, 1987 and notified the change of date of poll in the official Gazette on 15th October, 1987. On 16th October,1987, the said writ petitioners filed a review petition before the High Court seeking a direction to the effect that the election programme might be re-notified on the ground that clear 20 days' interval was not there between the last date for withdrawal of candidatures and the date of poll, which was originally fixed as 18th October, 1987. When the review petition came up for consideration on the 16th October, 1987, it was brought to the notice of the High Court that the date of poll had already been postponed to 1st November, 1987. Despite the same, the High Court issued notice and directed that the election fixed on 18th October, 1987 would have to be stayed till the High Court passed further order on 18th October, 1987.

Aggrieved by the aforesaid orders of the High Court, first postponing the last date for withdrawal of candidatures and then staying the holding of poll, the Election Commission filed the present appeal before the Supreme Court. The Commission's appeal came up for hearing in the Supreme Court on 27th October, 1987 and the Supreme Court stayed the orders of the High Court and permitted the Election Commission to proceed with the election process. The appeal was finally heard on 30th October, 1987 and the Supreme Court set aside the High Court's

both the orders, holding that the High Court had no jurisdiction, in view of Article 329 (b) of the Constitution, to interfere in the electoral process, and that both the interim orders were without jurisdiction. The Supreme Court also expressed its anguish over the manner in which the High Court interfered in the electoral process twice.

(A) Constitution of India, Arts. 327 and 329 (b) and 226 – Representation of the People Act (43 of 1951), S. 81 – Term 'election' in Art. 329 (b) connotes entire process culminating in a candidate being elected – High Court's jurisdiction under Art. 226 to entertain petition challenging election is taken away. Judgment of Bombay High Court, Reversed. (Words and Phrases-Election – Meaning of).

Article 329(b) of the Constitution provides that notwithstanding anything contained in the Constitution no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question 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. The disputes regarding the elections have to be settled in accordance with the provisions contained in Part VI of the Act. S. 80 of the Act states that no election shall be called in question except by an election petition presented in accordance with the provisions of Part VI of the Act. The expression 'election' is defined by S.2(d) of the Act as an election to fill a seat or seats in either House of Parliament or in the House or either House of the Legislature of a State other than the State of Jammu and Kashmir. Thus a dispute regarding election to the Legislative Council of a State can be raised only under the provisions contained in Part VI of the Act. S. 80A of the Act provides that the Court having jurisdiction to try an election petition shall be the High Court. An election petition has to be presented in accordance with S. 81 of the Act. In view of the non obstante clause contained in Art. 329 of the Constitution the power of the High Court to entertain a petition questioning an election on whatever grounds under Art. 226 of the Constitution is taken away. The word 'election' has by long usage in connection with the process of selection of proper representatives in democratic institutions acquired both a wide and a narrow meaning. In the narrow sense it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling, or a particular candidate being returned unopposed when there is no poll. In the wide sense, the word is used to connote the entire process culminating in a candidate being declared elected and it is in this wide sense that the word is used in Part XV of the Constitution which Art. 329 (b) occurs.

(Paras 5, 6).

Where the High Court entertained a writ petition challenging the notification fixing the calendar of events for the purpose of holding the elections to legislative council from certain local authorities constituency and, first, by an interim order, postponed the last date for withdrawal of candidatures and the High Court after itself dismissing the writ petition on the ground that it had no jurisdiction to interfere with the process of election

at that stage in view of the provisions of Art. 329(b) of the Constitution, entertained a review petition on the ground that 20 days clear interval was not there between the last date of withdrawal of candidatures and the date of poll and by interim order stayed the holding of election even though the Election Commission had postponed the date of poll to secure compliance of spirit of S. 30(d), both the interim orders, the one postponing the last date of withdrawal of candidatures and the other staying the poll were without jurisdiction. Judgment of Bombay High Court, Reversed.

(Para 8)

(B) Constitution of India, Arts. 226 and 329(b) – Writ petition – Costs – Parties challenging notification fixing calendar of events for election to Legislative Council – High Court interfering with election process once by postponing last date for withdrawal of candidatures and, secondly, by staying poll by entertaining review petition – Held, entire proceedings amounted to abuse of process of court – Petitioners saddled with costs of Rs. 5000/- each.

(Para 8)

Cases Referred: Chronological Paras

AIR 1985 SC 1233 : 1985 Supp (1) SCR 493	6
AIR 1984 SC 1911 : 1985 Supp (3) SCR 225	1,6
AIR 1978 SC 851 : (1978) 2 SCR 272	6
AIR 1952 SC 64 : 1952 SCR 218	6

JUDGMENT

Present:- E.S. Venkataramiah and K.N. Singh, JJ.

VENKATARAMIAH, J.:- We are very much disturbed by the manner in which the High Court of Bombay (Aurangabad Bench) has interfered not once but twice with the process of election which was being held under the provisions of the Representation of the People Act, 1951 (hereinafter referred to as 'the Act') to the Legislative Council of the State of Maharashtra from the Osmanabad-cum-Latur-cum-Beed Local Authorities Constituency. The Governor of Maharashtra by a notification dt. 18th Sept. 1987 issued under S. 16 of the Act called upon six local authorities constituencies in the State of Maharashtra to elect one members from each of the said constituencies in order to fill the vacancies in the Maharashtra Legislative Council which had been caused by the retirement of the members representing the said constituencies on the expiration of their terms of office. On the same day the Election Commission of India, the appellant herein, issued a notification under S. 30 of the Act fixing the calendar of events for the purpose of holding the elections accordingly. Osmanabad-cum-Latur-cum-Beed Local Authorities Constituency was one of the constituencies referred to above. According to the notification issued by the Election Commission, the last date for making nominations was 25th Sept. 1987. The date for the scrutiny of nominations

was 26th Sept. 1987. The last date for withdrawal of candidatures was 28th Sept. 1987 and the date on which the poll, if necessary, was to be taken was 18th Oct. 1987. The entire election process had to be completed within 21st October, 1987. Respondents 1 to 5 Shivaji son of Vishwanath Gangane, Prof. K.S. Shinde Prabhakar son of Bapurao Pudale, Shankarrao Madhavrao Mane and Ashok son of Rangnath Magar filed a writ petition under Art. 226 of the Constitution in Writ Petition No. 1459 of 1987 on Sept. 26, 1987 before the High Court of Bombay, (Aurangabad Bench) challenging the validity of the notification issued by the Election Commission on 18th Sept. 1987 on the ground that the notification was invalid because the Zilla Parishad of Osmanabad and the Zilla Parishad of Latur district which were within the constituency had not been constituted and the Administrators were appointed to run the said Zilla Parishads and therefore the members of the said Zilla Parishads who were entitled to take part in the said elections had been deprived of their right to participate in the said election. Along with the writ petition and application was made for an interim order and the counsel moved the said application just prayed for the postponement of the last date for withdrawal of candidatures from 28th September, 1987 to 1st Oct. 1987. It is not clear why such a prayer was made. The learned single Judge before whom the writ petition came up for consideration however passed an order on Sept. 26, 1987 issuing notice on the writ petition and passing an interim order ex-parte directing the postponement of the last date of withdrawal of candidatures from 28th Sept. 1987 to 1st Oct., 1987. A Division Bench of the High Court which was presided over by the learned single Judge who had issued the interim order earlier heard the writ petition on Oct. 1st, 1987 and dismissed it by the order passed on the same day. In the course of its order, the Division Bench relied on the decision in Inderjit Barua v. Election Commission of India, (1985) Supp. 3 SCR 225:AIR 1984 SC 1911, which had laid down that the validity of an election process under the Act could be challenged only in an election petition filed under the Act as provided by Art. 329(b) of the Constitution. While dismissing the writ petition the High Court did not make any observation as to the effect of the interim order passed by it earlier on the election programme. 18 candidates withdrew their candidatures by 1st Oct. 1987 which was the last date for withdrawal of candidatures as per the interim order passed by the High Court. In the circumstances the Election Commission considered it fair to postpone the date of poll from 18th Oct. 1987 (as originally notified) to some later date in order to secure compliance with the spirit underlying S. 30 (d) of the Act which contemplated an interval of 20 days between the last date for withdrawal of candidatures and the date of poll. Ordinarily a week's postponement would have been in the opinion of the Election Commission adequate in the present case but as the postponement of one week would have led to the date of poll falling during the festival season the Election Commission revised the date of poll as 1st Nov. 1987 and notified the change of the date of poll in the Official Gazette on 15th Oct. 1987. The Election Commission also notified under the same notification the date before which the election had to be completed as 4th November, 1987 instead of 21st Oct.,

1987 which was the date fixed for the purpose originally. But on 16-10-1987 respondents 1 to 5 filed a Review Petition in Civil Application for Review No. 2035 of 1987 before the High Court seeking a direction to the effect that the election programme might be renotified on the ground that clear 20 days interval was not there between the last date of withdrawal of candidatures and the date of poll which had been originally fixed as 18th Oct. 1987. The said Review Petition came up for consideration on the 16th Oct. 1987 before the very same Bench which had dismissed the Writ Petition earlier on 1st Oct. 1987. On that occasion it is alleged that it was brought to the notice of the High Court by the learned counsel appearing for the State of Maharashtra, Collector, Osmanabad and the Returning Officer for the Osmanabad-Latur Beed Local Authority Constituency and the District Returning Officer for Maharashtra Legislative Council Constituency No. 26, Osmanabad-Latur-Beed Local Authority Constituency, Osmanabad, that the Election Commission had on 15-10-1987 already postponed the date of poll from 18th Oct. 1987 to the 1st Nov. 1987. Despite the above submission made by the said counsel the High Court was pleased to make the following order on 16th Oct. 1987:

"Notice before admission. In this matter, the election fixed for the 18th Oct. 1987 will have to be stayed till we pass further order on 26th Oct. 1987, looking to the mandatory provision of S. 30 of the Representation of the People Act, S.O. Till 26.10.1987."

2. The case was adjourned to Oct. 26, 1987 for hearing. Aggrieved by the interim order passed in the writ petition postponing the last date of withdrawal of the candidatures from 28th Sept. 1987 to October 1, 1987and by the interim order passed on Oct. 16, 1987 in the Review Petition the Election Commission has filed this appeal by special leave.

3. The Special Leave Petition filed in the above case came up for hearing on Oct. 27, 1987. On that date this Court directed issue of notice on the Special Leave Petition and also ordered stay of the operation of the stay order which had been passed by the High Court. The Election Commission was permitted to proceed with the election process. The contesting respondents took notice of the petition in the Court through their counsel. The case was adjourned to 30th Oct. 1987 for final hearing. On 30th Oct. 1987 the case was heard and the Court passed the following order:

"Special leave granted. The appeal is heard. We allow the appeal, set aside the order dt. 16-10-1987 passed by the High Court of Bombay at Aurangabad and dismiss the Review Petition No. 2035 of 1987 in Writ Petition No. 1459 of 1987. The Election Commission shall proceed with the election in accordance with law. Respondents 1 to 5 shall pay Rs. 5000/- by way of costs to the appellant. Reasons will follow."

4. The appeal was accordingly allowed with costs. The following are the reasons for allowing the appeal.

5. Part XV of the Constitution contains the provisions relating to the elections. Art. 324(1) of the Constitution vests 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 President and the Vice President under the Constitution in the Election Commission. Article 327 of the Constitution 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 the 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 each House or Houses. In exercise of the power granted under Art. 327 of the Constitution, Parliament has enacted the Act to provide for the conduct of elections to the either House of Parliament, to the House or either House of the Legislature of each State, qualifications and disqualifications for membership of those Houses, 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. Article 329(b) of the Constitution provides that notwithstanding anything contained in the Constitution no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question 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.

6. The disputes regarding the election have to be settled in accordance with the provisions contained in Part VI of the Act. S. 80 of the Act states that no election shall be called in question except by an election petition presented in accordance with the provisions of Part VI of the Act. The expression 'election' is defined by S. 2(d) of the Act as an election to fill a seat or seat either House of Parliament or in the House or either House of the Legislature of a State other than the State of Jammu and Kashmir. Thus, a dispute regarding election to the Legislative Council of a State can be raised only under the provisions contained in Part-VI of the Act. Section 80A of the Act provides that the Court having jurisdiction to try an election petition has to be presented in accordance with S. 81 of the Act. In view of the non-obstante clause contained in Art 329 of the Constitution, the power of the High Court to entertain a petition questioning an election on whatever grounds under Article 226 of the Constitution is taken away. The word 'election' has by long usage in connection with the process of proper representatives in democratic institution acquired both a wide and a narrow meaning. In the narrow sense it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling, or a particular candidate being returned unopposed when there is no poll. In the wide sense, the word is used to connote the entire process culminating in a candidate being declared elected and it is in this wide sense that the word is used in Part XV of the Constitution in which Art. 329(b) occurs. In N.P. Ponnuswami V. Returning Officer, Namakkal Constituency, 1952 SCR 218: (AIR 1952 SC 64) this Court held that, the scheme of Part XV of the Constitution and the Act seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an

appropriate manner before a special Tribunal and should not be brought up at an intermediate stage before any court.

Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplated, one of them being any dispute relating to the pre polling stage. In the above decision this Court ruled that having regard to the important functions which the legislatures have to perform in democratic countries, it had always been recognised to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections were over so that the election proceedings might not be unduly retarded or protracted. Hence 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 elections has to wait till the election is over and institute a petition in accordance with S. 81 of the Act calling in question the election of the successful candidate within forty-five days from the date of election of the returned candidate but not earlier than the date of election. This view has been reaffirmed by this Court in Lakshmi Charan Sen v. A.K.M. Hassan Uzaman. 1985 Supp (1) SCR 493 : AIR 1985 SC 1233) and in Inderjit Barua v. Election Commission of India (AIR 1984 SC 1911) (supra). Realising the effect of Art 329 (b) of the Constitution the High Court even though it had by oversight issued an interim order in Writ Petition No. 1459 of 1987 on 26.9.1987 postponing the last date for withdrawal of candidatures to 1st Oct. 1987, dismissed the petition by its judgment dt. 1.10.1987. The relevant part of its judgment reads as follows:

"The challenge must fail mainly on two grounds. First on the ground that the stage has reached of withdrawals of nominations for the said election which was in fact, fixed on 30th but has been postponed because of our orders as on today. Article 329(b) bars every challenge to any election including all the election process which commences from the date of notification in the official Gazette, except by way of election petition under the Representation of the People Act. Mr. Chapalgaonkar appearing for the respondent has relied upon a decision reported in AIR 1984 S.C. 1911 to support this plea that all election including every election process must be challenged only by way of election petition under the Representation of the People Act."

Having thus dismissed the petition on 1-10-1987 the Court committed a serious error in entertaining a Review Petition in the very same writ petition on 16-10-1987 and passing an order staying election which had been earlier fixed for 18-10-1987 till further orders "looking to the mandatory provisions of S. 30 of the Representation of the People act." The High Court failed to recall to its mind that it was not its concern under Art. 226 of the Constitution to rectify any error even if there was an error committed in the process of election at any stage prior to the declaration of the result of the election notwithstanding the fact that the error in question related to a mandatory provision of the statute relating to the conduct of the election. If

there was any such error committed in the course of the election process the Election Commission had the authority to set it right by virtue of power vested in it under Art. 324 of the Constitution as decided in Mohinder Singh Gill v. Chief Election Commissioner, New Delhi (1978) 2 SCR 272 : (AIR 1978 SC 851) and to see that the election process was completed in a fair manner.

7. It is true that the Zilla Parishads of Osmanabad and the Latur districts had not been constituted and administrators were functioning in their place. The total voters in that local authorities constituency in question were 577 out of which 533 were members of Municipal Councils and 44 were members of the Zilla Parishads. Even if the Zilla Parishads of Osmanabad and Latur Districts had been in existence the total number of their members would not have exceeded above 110. As such more than 3/4th of the voters entitled to vote in the constituency in question were in existence. The Election Commission had a guideline that if at least 75% of the local authorities in a local authority constituency were functioning and again at least 75% of the voters in the total electorate were available, then the electorate should be asked to elect their representative to the Legislative Council. In the instant case, 75% of the total electorate (including the number of members of the Zilla Parishads of Osmanabad and Latur districts who would have been voters had the said Zilla Parishad been constituted) were entitled to participate. Since the existing position in the constituency satisfied the guideline prescribed by the Election Commission, the election from the said constituency had been ordered. It was only on account of the interim order passed by the High Court on 26-9-1987 postponing last date for withdrawal of candidatures from 28-9-1987 to 1-10-1987 and not on account of any mistake committed by the Election Commission the interval between the last date of withdrawal and the date of poll which had been originally fixed as 18-10-1987 fell short of the period of twenty days prescribed by cl. (d) of S. 30 of the Act. After the judgment of the High Court was pronounced dismissing the writ petition on 1-10-1987 in order to ensure that there was an interval of 20 days between the last date for the withdrawal of candidatures and the date of poll, the Election Commission had on its own postponed the date of poll to 1-11-1987 and had published a notification in the Official Gazette of the State Government even before the Court passed another interim order on 16-10-1987 in the Review Petiton. All these changes in the calendar of events of the election in question came about because of the earlier interim order of the High Court. It has to be stated here that it is not the law that every non-compliance with the provisions of the Act or of the Constitution will vitiate an election. It is only when it is shown that the result of the election was materially affected by such non-compliance the High court would have jurisdiction to set aside an election in accordance with S. 100(1) (d) (iv) of the Act. The High Court was in error in thinking that it alone had the exclusive power to protect the democracy. The success of democracy is dependent upon the co-operation of the Legislature, the Executive, the Judiciary, the Election Commission, the press, the political parties and above all the citizenry and each of them discharging the duties assigned to it. Every member of the body politic should play his legitimate role for the success of the democracy. Some

times the success of democracy also depends upon the observance of restraint on the part of the constitutional functionaries.

8. We are constrained to observe the High Court grievously erred entertaining the review petition and in passing an interim order on 16-10-1987. We are of the view that both the interim orders the one passed on 26-9-1987 postponing the last date of the withdrawal of candidatures from 28-9-1987 to 1-10-1987 and the other passed on 16-10-1987 were without jurisdiction. There was hardly any justification for entertaining review petition in the circumstances of this case and for issuing notice thereon particularly after the High Court itself had rejected the writ petition on the ground that it had no jurisdiction to interfere with the process of election at that stage in view of the provision of Art. 329 (b) of the Constitution. The review petition filed before the High Court was liable to be dismissed. We directed respondents 1 to 5 to pay Rs. 5,000/- to the appellant by way of costs since the entire proceedings of High Court amounted to a clear abuse of the process of law. These are the reasons for order passed on 30.10.1987 allowing the appeal.

Appeal allowed

SUPREME COURT OF INDIA*

Civil Appellate Jurisdiction Special Leave Petition (C)
No. 2127 of 1991$
(Decision dated 18-2-1991)

B. Sundra Rami Reddy ***.. Petitioner***

Vs.

Election Commission of India & Others ***.. Respondents***

SUMMARY OF THE CASE

After the general election to the Andhra Pradesh Legislative Assembly held in November, 1989, an election petition was filed before the Andhra Pradesh High Court challenging the election of Shri B.Sundra Rami Reddy from Atmakur Asssembly Constitutency, by a defeated candidate, Shri K.Anjaneya Reddy. In the election petition, the petitioner challenged the validity of the Election Commission's order declaring the poll at Bhogesamudram polling station as void and directing re-poll at that polling station. He impleaded the Election Commission of India as one of respondents to the election petition. On an application by the Commission, the High Court deleted the name of the Election Commission from the array of parties.

The above order of the High Court was challenged before the Supreme Court in the present appeal. The Supreme Court dismissed the appeal, holding that only those may be joined as respondents to an election petition who are mentioned in Sections 82 and 86 (4) of the Representation of the People Act, 1951 (i.e., candidates) and, no others, and therefore the Election Commission could not be impleaded as a party to an election petition.

ORDER

This petition under Article 136 of the Constitution is directed against the order of a learned single Judge of the High Court of Andhra Pradesh dated 13.11.1990 holding that the *Election Commission of India is not a necessary* or proper party to the election petition.

The petitioner was declared elected as a Member of the Andhra Pradesh Legislative Assembly from Atmakur Constituency of Nellore District in the elections held on November 29, 1989 K. Anjaneya Reddy, respondent No. 2, the unsuccessful candidate filed an election petition before the High Court of Andhra Pradesh at Hyderabad calling in question of petitioner's election. In

the election petition the respondent No. 2 challenged validity of the order of the Election Commission dated 22.11.1989 declaring the polling at Bhogasamudram polling station as void and directing re-poll at that polling station. The respondent No.2 impleaded the Election Commission of India as one of the respondent to the election petition. The Election Commission made application before the High Court for deleting it from array of the parties on the ground that it was not a necessary. The petitioner contested the application of the Election Commission. The High Court by its order dated 13.11.1990 held that the Election Commission was neither necessary nor a proper party, accordingly, it issued direction for the deletion of the Election Commission of India from the array of parties. The petitioner has challenged the order of the High Court by means of this petition.

After hearing learned counsel for the petitioner we do not find any merit in the petition. Section 82 of the Representation of the People Act, 1951 specifies the persons who are required to be joined as respondents to an election petition. Under this provision the returned candidate is a necessary party as a respondent and where relief for a declaration is claimed that the election petitioner, or any other candidate be duly elected, all the contesting candidates are necessary to be impleaded as respondents to the petition. No other person or authority except as aforesaid is required to be impleaded as a respondent to an election petition under the Act. The Election Commission of India is therefore not a necessary party to an election petition.

Learned counsel for the petitioner urged that even if the Election Commission may not be a necessary party, it was a proper party since its orders have been challenged in the election petition. He further urged that since Civil Procedure Code 1908 is applicable to trial of an election petition the concept of proper party is applicable to the trial of election petition. We find no merit in the contention. Section 87 of the Act lays down that subject to the provisions of the Act and any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure 1908 to the trial of suits. Provisions of the Civil Procedure Code have thus been made applicable to the trial of an election petition to a limited extent as would appear from the expression *"subject to the provisions of this Act"*. Since Section 82 designates the persons who are to be joined as respondents to the petition, provisions of the Civil Procedure Code 1908 relating to the joinder of parties stand excluded. Under the Code even if a party is not necessary party, is required to be joined as a party to a suit or proceedings if such person is a proper party, but the Representation of the People Act, 1951 does not provide for joinder of a proper party to an election petition. The concept of joining a proper a party to an election petition is ruled out by the provisions of the Act. The concept of joinder of a proper party to a suit or proceeding underlying Order I of the Civil Procedure code can not be imported to the trial of election petition, in view of the express provisions of Section 82 and 87 of the Act. The Act is a self contained Code which does not contemplate joinder of a person or authority to an election petition on the ground of proper party. In K.

Venkateswara Rao & Anr. v. Bekkam Narasimha Reddi and Ors. This Court while discussing the application of Order I Rule 10 of the Civil Procedure Code to an election petition held that there could not be any addition of parties in the case of an election petition except under the provisions of Sub-section (4) of Section 86 of the Act. Again in Jyoti Basu & Ors. v. Debi Ghosal & Ors, This Court held that there concept of 'proper party' is and must remain alien to an election dispute under the Representation of the People Act, 1951. Only those may be joined as respondents to an election petition who are mentioned in Section 82 and Section 86 (4) and no others. However, desirable and expedient it may appear to be, none else shall be joined as respondents.

We are, therefore, of the opinion that the view taken by the High Court is correct and it does not call for any interference. The petition fails and it is, accordingly, dismissed.

New Delhi
February 18, 1991.

SUPREME COURT OF INDIA*

Transfer Petition (Civil) No. 40 of 1991$
(Decision dated 18.2.1992)

Shri Kihota Hollohon ***.. Petitioner***

Vs.

Mr. Zachilhu and Others ***.. Respondents***

SUMMARY OF THE CASE

Some members of the Nagaland Legislative Assembly were disqualified by the Speaker of the Assembly under the Tenth Schedule to the Constitution of India, as inserted by the Constitution (Fifty-Second Amendment) Act, 1985, on the ground of defection. They challenged the order of the Speaker before the High Court of the State. Several other similar orders of the Speakers of the Legislative Assemblies of Manipur, Meghalaya, Madhya Pradesh, Gujarat and Goa were also under challenge before the various High Courts. The Supreme Court transferred all those matters to it and decided them in the present case.

The petitioners had challenged the constitutional validity of the Tenth Schedule to the Constitution on several grounds. In particular, para 7 of the Tenth Schedule was challenged on the ground that that para had taken away the jurisdiction of all Courts, including the Supreme Court, to review the order of the Speaker under that Schedule.

The Supreme Court, by the present order, struck down para 7 of the Tenth Schedule on the ground that it made, in terms and in effect, changes in Articles 136, 226 and 227 of the Constitution and, therefore, should have been ratified by the

specified number of State Legislatures under the proviso to Clause (2) of Article 368 of the Constitution, which had not been done. The Supreme Court, by majority decision (3:2), upheld the validity of the remaining paragraphs of the Tenth Schedule, holding that the order of the Speaker under the Tenth Schedule was justiciable and subject to judicial review by the High Courts and Supreme Court under Articles 226 and 227 and 136 of the Constitution.

(A) Constitution of India, Sch. 10, Para 2 (as introduced by 52nd Amendment), Articles. 105, 194, 19 — Political defections — Disqualification — Provisions under Sch. 10 — Not violative of freedom of speech, freedom of vote and conscience of members of Parliament and legislatures of State — Not also violative of Arts. 105, 194.

Political defection — Disqualification of members of Parliament and Legislatures of State — Provisions as to — Validity.

Majority view — The Paragraph 2 of the Tenth Schedule to the Constitution is valid. Its provisions do not suffer from the vice or subverting democratic rights of elected members of Parliament and the Legistatures of the States. It does not violate their freedom of speech, freedom of vote and conscience. The provisions of Paragraph 2 do not violate any rights or freedom under Arts. 105 and 194 of the Constitution.

The provisions are salutary and are intended to strengthen the fabric of Indian Parliamentary democracy by curbing unprincipled and unethical political defections.

The plea that the provisions of the Tenth Schedule, even with the exclusion of Paragraph 7, violate the basic structure of the Constitution in that they affect the democratic rights of elected Members and, therefore violative of the principles of Parliamentary democracy is unsound. (Paras 3, 21)

The freedom of speech of a member is not an absolute freedom. That apart, the provisions of the Tenth Schedule do not purport to make a Member of a House liable in any 'Court' for anything said or any vote given by him in Parliament. It cannot be said that Art 105.(2) is a source of immunity from the consequences of unprincipled floor-crossing Democracy is a basic feature of the Constitution. Whether any particular brand or system of Government by itself, has the attributes 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. From that it does not necessarily follow that the rights and immunities under sub-Art. (2) of Art. 105 of the Constitution, are elevated into fundamental rights and that the Tenth Schedule would have to be struck down for its inconsistency with Art. 105(2). (Para 18)

The underlying premise in declaring an individual act of defection as forbidden is that lure of office or money could be presumed to have prevailed. Legislature has made this presumption on its own perception and assessment of the extent standards of political properties and morality. At the same time legislature envisaged the need to provide for such "floor-crossing" on the basis of honest dissent. That a particular course of conduct commended itself to a number of

elected representatives might, in itself, lend credence and reassurance to a presumption of bona fides. The presumptive impropriety of motives progressively weakens according as the numbers sharing the action and there is nothing capricious and arbitrary in this legislative perception of the distinction between 'defection' and 'split'. Therefore, the attack on the statutory distinction between "defection" and "split" under Tenth Schedule would not be tenable. (Para 21)

(B) Constitution of India, Sch. 10, Para 7 (as introduced by 52nd Amendment), Articles 136, 226, 227, 368(2), Proviso — Scope — Para 7 of Sch.10 bring about a change in operation and effect of Arts. 136, 226 and 227 — Constitution (Fifty-second Amendment) Act introducing Sch. 10 requires to be ratified in accordance with Art.368(2) Proviso.

Majority view — Having regard to the background and evolution of the principles underlying the Constitution (52nd Amendment) Act, 1985, in so far as it seeks to introduce the Tenth Schedule in the Constitution of India, the provisions of Paragraph 7 of the Tenth Schedule of the Constitution in terms and in effect bring about a change in the operation and effect of Arts. 136, 226 and 277 of the Constitution of India and, therefore, the amendment would require to be ratified in accordance with the proviso to sub-Art(2) of Article 368. (Paras 3, 24)

Minority view — The extinction of the remedy of judicial review alone without curtailing the right, since the question of disqualification of a member on the ground of defection under the Tenth Schedule does require adjudication on enacted principles, results in making a change in Art. 136 in Chapter IV in Part V and Arts. 226 and 227 in Chapter V in Part VI of the Constitution. On this conclusion, it is undisputed that the proviso to clause (2) of Art. 368 is attracted requiring ratification by the specified number of State Legislatures before presentation of the Bill seeking to make the constitutional amendment to the President for his assent. (Paras 5,85,86)

There can thus be no doubt that para 7 of the Tenth Schedule which seeks to make a change in Art. 136 which is a part of Chapter IV of Part V and Art. 226 and 227 which form part of Chapter V of Part VI of the Constitution, has not been enacted by incorporation in a Bill seeking to make the Constitutional Amendment in the manner prescribed by clause (2) read with the proviso therein of Art. 368. Para 7 of the Tenth Schedule is, therefore, unconstitutional and to that extent at least the Constitution does not stand amended in accordance with the Bill seeking to make the Constitutional Amendment. (Para 94)

(C) Constitution of India, Art. 368(2), Proviso, Sch.10 (as introduced by 52nd Amendment) — Validity — Applicability of doctrine of severability — Para 7 of Schedule requiring ratification, not ratified — Same severable from other provisions of Sch.10 — Latter not rendered unconstitutional due to non-ratification of para 7.

Doctrine of severability — Applicability to Constitutional amendments.

Majority view (Sharma and Verma JJ. Contra) — There is nothing in the proviso to Art. 368(2) which detracts from the severability of a provision on account of the inclusion of which the Bill containing the Amendment requires ratification from the rest of the provisions of such Bill which do not attract and require such ratification. Having regard to the mandatory language of Article 368(2) that "thereupon the Constitution shall stand amended" the operation of the proviso should not be extended to constitutional amendments in a Bill which can stand by themselves without such ratification. Accordingly, the Constitution (52nd

Amendment) Act, 1985, in so far as it seeks to introduce the Tenth Schedule in the Constitution of India, to the extent of its provisions which are amendable to the legal sovereign of the amending process of the Union Parliament cannot be overborne by the proviso which cannot operate in that area. There is no justification for the view that even the rest of the provisions of the Constitution (52nd Amendment) Act, 1985, excluding Paragraph 7 of the Tenth Schedule become constitutionally infirm by reason alone of the fact that one of its severable provisions which attracted and required ratification under the proviso to Art. 368(2) was not so ratified.

Paragraph 7 of the Tenth Schedule contains a provision which is independent of, and stands apart from, the main provisions of the Tenth Schedule which are intended to provide a remedy for the evil of unprincipled and unethical political defections and, therefore, is a severable part. The remaining provisions of the Tenth Schedule can and do stand independently of Paragraph 7 and are complete in themselves workable and are not truncated by the excision of Paragraph 7. (Paras 3,32)

It is salutary that the scope of the proviso is confined to the limits prescribed therein and is not construed so as to take away the power in the main part of Art. 368(2). An amendment which otherwise fulfils the requirements of Art.368(2) and is outside the specified cases which required ratification cannot be denied legitimacy on the ground alone of the company it keeps. The main part of Art.368(2) directs that when a Bill which has been passed by the requisite special majority by both the Houses has received the assent of the President "the Constitution shall stand amended in accordance with the terms of the Bill". The proviso cannot have the effect of interdicting this constitutional declaration and mandate to mean that in a case where the proviso has not been complied — Even the amendments which do not fall within the ambit of the proviso also become abortive. The words "the amendment shall also require to be ratified by the legislature" indicate that what is required to be ratified by the legislatures of the States is the amendment seeking to make the change in the provisions referred to in clauses (a) to (e) of the proviso. The need for and the requirement of the ratification is confined to that particular amendment alone and not in respect of amendments outside the ambit of the proviso. The proviso can have, therefore, no bearing on the validity of the amendments which do not fall within its ambit. (Para 29)

The principle of severability can be equally applied to a composite amendment which contains amendments in provisions which do not require ratification by States as well as amendment in provisions which require such ratification and by application of the doctrine of severability, the amendment can be upheld in respect of the amendments which do not require ratification and which are within the competence of Parliament alone. Only these amendments in provisions which require ratification under the proviso need to be struck down or declared invalid.

The test of severability requires the Court to ascertain whether the legislature would at all have enacted the law if the severed part was not the part of the law and whether after severance what survives can stand independently and is workable. If the provisions of the Tenth Schedule are considered in the background of the legislative history, namely, the report of the 'Committee on Defections' as well as the earlier Bills which were moved to curb the evil of defection it would be evident that the main purpose underlying the constitutional amendment and introduction of the Tenth Schedule is to curb the evil of defection which was causing immense mischief

in our body-politic. The ouster of jurisdiction of Courts under Paragraph 7 was incidental to and to lend strength to the main purpose which was to curb the evil of defection. It cannot be said that the constituent body would not have enacted the other provisions of the Tenth Schedule if it had known that Paragraph 7 was not valid. Nor can it be said that the rest of the provisions of the Tenth Schedule cannot stand on their own even if Paragraph 7 is found to be unconstitutional. The provisions of Paragraph 7 can, therefore, be held to be severable from the rest of the provisions. (Paras 31,32).

Minority view — It is not para 7 alone but the entire Tenth Schedule of the Constitution (Fifty-Second Amendment) Act, 1985 itself which is rendered unconstitutional being an abortive attempt to so amend the Constitution. It is the entire Bill and not merely para 7 of the Tenth Schedule therein which required prior ratification by the State Legislatures before its presentation to the President for his assent, it being a joint exercise by the Parliament and State Legislatures. The stage for presentation of Bill to the President for his assent not having reached, the President's assent was non est and it could not result in amendment of the Constitution in accordance with the terms of the Bill. Severance of Para 7 of the Tenth Schedule could not be made for the purpose of ratification or the President's assent and therefore, no such severance can be made even for the ensuing result. If the President's assent cannot validate para 7 in the absence of prior ratification, the same assent cannot be accepted to bring about a different result with regard to the remaining part of the Bill.

On this view, the question of applying the Doctrine of Severability to strike down para 7 alone retaining the remaining part of Tenth Schedule does not arise since it presupposes that the Constitution stood so amended on the President's assent. The Doctrine does not apply to a still born legislation. (Paras 5, 95, 96)

Para 7 alone is not severable to permit retention of the remaining part of the Tenth Schedule as valid legislation. The settled test whether the enactment would have been made without para 7 indicates that the legislative intent was to make the enactment only with para 7 therein and not without it. This intention is manifest throughout and evident from the fact that but for para 7 the enactment did not require the discipline of Art. 368 and exercise of the constituent power. Para 7 follows para 6 the contents of which indicate the importance given to para 7 while enacting the Tenth Schedule. The entire exercise as reiterated time and again in the debates, particularly the Speech of the Law Minister while piloting the Bill in the Lok Sabha and that of the Prime Minister in the Rajya Sabha, was to emphasise that total exclusion of judicial review of the Speaker's decision by all courts including the Supreme Court, was the prime object of enacting the Tenth Schedule. The entire legislative history shows this. How can the Doctrine of Severability be applied in such a situation to retain the Tenth Schedule striking down para 7 alone? This is a further reason for inapplicability of this doctrine. (Para 102)

(D) Constitution of India, Sch.10, Para6(1) (as introduced by 52nd Amendment) Art. 122(1), 212(1) — Political defection — Disqualification disputed — Power to resolve, vested in Speaker or Chairman — Is judicial power — Judicial review of order of Speaker/Chairman under Arts. 136, 226, 227 — Confined to jurisdictional errors only — Decision of Speaker/Chairman under para 6(1) — Not immune from Judicial scrutiny under Arts. 122, 212.

Per Venkatachaliah, J. (for himself and on behalf of K. Jayachandra Reddy, S.C. Agrawal, JJ.):– The Tenth Schedule does not, in providing for an additional grant for disqualification and for adjudication of disputed disqualifications, seek to create a non-justiciable constitutional area. The power to resolve such disputes vested in the Speaker or Chairman is a judicial power.

Paragraph 6(1) of the Tenth Schedule, to the extent it seeks to impart finality to the decision of the Speakers/Chairman is valid. But the concept of statutory finality embodied in Paragraph 6(1) does not detract from or abrogate judicial review under Arts. 136, 226 and 227 of the Constitution in so far as infirmities based on violations or constitutional mandates, mala fides, on-compliance with Rules of Natural Justice and perversity, are concerned.

The deeming provision in Paragraph 6(2) of the Tenth Schedule attracts an immunity analogous to that in Arts. 122(1) and 212(1) of the Constitution as understood and explained in 1965(1) SCR 413 to protect the validity of proceedings from mere irregularities of procedure. The deeming provision, having regard to the words "be deemed to be proceedings in Parliament" or "proceedings in the Legislature of a State" confines the scope of the fiction accordingly.

The Speakers/Chairmen while exercising powers and discharging functions under the Tenth Schedule act as Tribunal adjudicating rights and obligations under the Tenth Schedule and their decisions in that capacity are amenable to judicial review.

However, having regard to the Constitutional Schedule in the Tenth Schedule, judicial review should not cover any stage prior to the making of a decision by the Speakers/Chairmen. Having regard to the constitutional intendment and the status of the repository of the adjudicatory power, no quia timet actions are permissible, the only exception for any interlocutory interference being cases of interlocutory disqualifications or suspensions which may have grave, immediate and irreversible repercussions and consequence. (Paras 3, 42)

The scope of judicial review under Articles 136, 226 and 227 of the Constitution in respect of an order passed by the Speaker/Chairman under paragraph 6 would be confined to jurisdictional errors only viz., infirmities based on violation of constitutional mandate, mala fides, noncompliance with rules of natural justice and perversity.

In view of the limited scope of judicial review that is available on account of the finality clause in paragraph 6 and also having regard to the constitutional intendment and the status of the repository of the adjudicatory power i.e. Speaker/Chairman, judicial review cannot be available at a stage prior to the making of a decision by the Speaker/Chairman and a quia timet action would not be permissible. Nor would interference be permissible at an interlocutory stage of the proceedings. Exception will, however, have to be made in respect of cases were disqualification or suspension is imposed during the tendency of the proceedings and such disqualification or suspension is likely to have grave, immediate and irreversible repercussion and consequence. (Para 41)

It is 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 fiction in Paragraph 6(2), indeed, places it in the first clause of Art. 122 or 212, as the case may be. The words "proceedings in

Parliament" or "proceedings in the legislature of a State" in Paragraph 6(2) have their corresponding expression in Arts. 122(1) and 212(1) respectively. This attracts an immunity from mere irregularities of procedures. That apart, even after 1986 when the Tenth Schedule was introduced, the Constitution did not avince any intention to invoke Art. 122 or 212 in the conduct or resolution of disputes as to the disqualification of members under Articles 191(1) and 102(1). The very deeming provision implies that the proceedings of disqualification are, in fact, not before the House; but only before the Speaker as a specially designated authority. The decision under paragraph 6(1) is not the decision of the House, nor is it subject to the approval by the House. The decision operates independently of the House. A deeming provision cannot by its creation transcend its own power. There is, therefore, no immunity under Arts. 122 and 212 from judicial scrutiny of the decision of the Speaker or Chairman exercising power under Paragraph 6(1) of the Tenth Schedule. (Paras 38, 39)

The Speaker or the Chairman, acting under paragraph 6(1) of the Tenth Schedule is a Tribunal. (Para 40)

The finality clause in paragraph 6 does not completely exclude the jurisdiction of the courts under Arts. 136, 226 and 227 of the Constitution. But it does have the effect of limiting the scope of the jurisdiction. The principle that is applied by the courts is that in spite of a finality clause it is open to the court to examine whether the action of the authority under challenge is ultra vires the powers conferred on the said authority. Such an action can be ultra vires for the reason that it is in contravention of a mandatory provision of the law conferring on the authority the power to take such an action. It will also be ultra vires the powers conferred on the authority if it is vitiated by mala fides or is colourable exercise of power based on extraneous and irrelevant considerations. While exercising their certiorari jurisdiction, the courts have applied the test whether the impugned action falls within the jurisdiction of the authority taking the action or it falls outside such jurisdiction. An ouster clause confines judicial review in respect of actions falling outside the jurisdiction of the authority taking such action but precludes challenge to such action on the ground of an error committed in the exercise of jurisdiction vested in the authority because such an action cannot be said to be an action without jurisdiction. An ouster clause attaching finality to a determination, therefore, does oust certiorari to some extent and it will be effective in ousting the power of the court to review the decision of an inferior tribunal by certiorari if the inferior tribunal has not acted without jurisdiction and has merely made an error of law which does not affect its jurisdiction and if its decision is not a nullity for some reason such as breach of rule of natural justice. (Para 41)

Per J.S. Verma, J. (For himself and on behalf of L.M. Sharma, J.) — It cannot be doubted in view of the clear language of sub-paragraph (2) of para 6 that it relates to clause (1) of both Arts. 122 and 212 and the legal fiction cannot, therefore, be extended beyond the limits of the express words used in the fiction. In construing the fiction it is not to be extended beyond the language of the Section by which it is created and its meaning must be restricted by the plain words used. It cannot also be extended by importing another fiction. The fiction in para 6(2) is a limited one which serves its purpose by confining it to clause (1) alone of Arts. 122 and 212 and, therefore, there is no occasion to enlarge its scope by reading into it words which are not there and extending it also to clause (2) of these Articles. Moreover, it does

appear that the decision relating to disualification of a member does not relate to regulating procedure or the conduct of business of the House provided for in clause (2) of Arts. 122 and 212 and taking that view would amount to extending the fiction beyond its language and importing another fiction for this purpose which is not permissible. That being so, the matter falls within the ambit of clause (1) only of Arts. 122 and 212 as a result of which it would be vulnerable on the ground of illegality and perversity and, therefore, justiciable to that extent. Therefore the objection of jurisdiction on the finality clause or the legal fiction created in para 6 of the Tenth Schedule cannot be upheld when justiciability of the clause is based on a ground of illegality or perversity. (Paras 71, 72, 73)

(E) Constitution of India, Sch.10 (as introduced by 52nd Amendment) — Political defections — Disqualifications — Investiture of determinative jurisdiction in Speaker — Not violative of basic feature of democracy.

Majority view (Sharma and Verma, JJ. Contra) — The vesting of adjudicatory functions in the Speakers/Chairmen under Schedule 10 would not by itself vitiate the provision on the ground of likelihood of political bias. The Speaker/Chairman hold a pivotal position in the scheme of Parliamentary democracy and are guardians of the rights and privileges of the House. They are expected to and do take for reaching decisions in the functioning of Parliamentary democracy. Vestiture or power to adjudicate questions under the Tenth Schedule in such a constitutional functionaries should not be considered exceptionable. It would, indeed, be unfair to the high tradition of that great office to say that the investiture in it of determinative jurisdiction under Sch. 10 would be vitiated for violation of a basic feature of democracy. It is inappropriate to express distrust in the high office of the Speaker, merely because some of the Speakers are alleged, or even found, to have discharged their functions not in keeping with the great traditions of that high office. (Paras 3, 47, 46)

Minority view — In the Tenth Schedule, the Speaker is made not only the sole but the final arbiter of such dispute with no provision for any appeal or revision against the Speaker's decision to any independent out-side authority. This departure in the Tenth Schedule is a reverse trend and violates a basic feature of the Constitution since the Speaker cannot be treated as an authority contemplated for being entrusted with this function by the basic postulates of the Constitution, notwithstanding the great dignity attaching to that office with the attribute of impartiality.

It is the Vice-President of India who is ex-officio Chairman of the Rajya Sabha and his position, being akin to that of the President of India, is different from that of the Speaker. Nothing said herein relating to the office of the Speaker applies to the Chairman of the Rajya Sabha, that is the Vice-President of India. However, the only authority named for the Lok Sabha and the legislative Assemblies in the Speaker of the House and entrustment of this adjudicatory function fouls with the constitutional scheme and, therefore, violates a basic feature of the Constitution. Remaining part of the Tenth Schedule also is rendered invalid notwithstanding the fact that this defect would not apply to the Rajya Sabha alone whose Chairman is the Vice-President of India, since the Tenth Schedule becomes unworkable for the Lok Sabha and the State Legislatures. The Statutory exception of Doctrine of Necessity has no application since designation of authority in the Tenth Schedule is

made by choice while enacting the Legislation instead of adopting the other available options.

Since the conferment of authority is on the Speaker and that provision cannot be sustained for the reason given, evenwithout para 7, the entire Tenth Schedule is rendered invalid in the absence of any valid authority for decision of the dispute.

Thus, even if the entire Tenth Schedule cannot be held unconstitutional merely on the ground of absence of ratification of the Bill, assuming it is permissible to strike down para 7 alone, the remaining part of the Tenth Schedule is rendered unconstitutional also on account of violation of the aforesaid basic feature. Irrespective of the view on the question of effect of absence of ratification, the entire Tenth Schedule must be struck down as unconstitutional. (Paras 5, 107 to 110)

(F) Constitution of India, Sch.10 Para 2(1)(b) (as introduced by 52nd Amendment) – Scope – Expression "any direction" in para 2(1)(b) – Meaning of – Words should be construed harmoniously – Wider meaning should not be given to said words.

Intepretation of Statutes – Harmonious construction – Wider meaning.

Majority view — Words "any direction" require to be construed harmoniously with the other provisions and appropriately confined to the objects and purposes of the Tenth Schedule. Those objects and purposes define and limit the contours of its meaning. The assignment of a limited meaning is not to read it down to promote its constitutionality but because such a construction is a harmonious construction in the context. There is no justification to give the words the wider meaning. The disqualification imposed by Paragraph 2 (1)(b) must be so construed as not to unduly impinge on the said freedom or speech of a member. This would be possible if Paragraph 2(1)(b) is confined in its scope by keeping in view the object underlying the amendments contained in the Tenth Schedule, namely, to curb the evil or mischief of political defections motivated by the lure of office or other similar considerations. The said object would be achieved if the disqualification incurred on the ground of voting or abstaining from voting by a member is confined to cases where a change of Government is likely to be brought about or is prevented, as the case may be, as a result of such voting or abstinence or when such voting or abstinence is on a matter which was a major policy and programme on which the Political party to which the member belongs went to the polls. For this purpose the direction given by the political party to a member belonging to it, the violation of which may entail disqualificaion under paragraph 2(1)(b) would have to be limited to a vote on motion of confidence or no confidence in the Government or where the motion under consideration relates to a matter which was an integral policy and programme of the political party on the basis of which it approached the electorate. The voting or abstinence from voting by a member against the dirction by the political party on such a motion would amount to disapproval of the programme on the basis of which he went before the electorate and got himslf elected and such voting or abstinence would amount to a breach of the trust reposed in him by the electorate.

Keeping in view the consequences of the disqualification i.e.,termination of the membership of a House; it would be appropriate that the direction or whip which results in such disqualification under Para. 2(1)(b) is so worded as to clearly indicate that voting or abstaining from voting contrary to the said direction would result in incurring the diqualification under Paragaph 2(1)(b) of the Tenth Schedule

so that the member concerned has fore-knowlede of the consequences flowing from his conduct in voting or abstaining from voting contrary to such a direction. (Paras 5, 49)

(G) Constitution of India, Arts. 32, 226 — Writ petition — Interlocutory orders — Passing of — Purpose is to preserve in status quo the rights of the parties so that, the proceedings do not become infructuous by any unilateral overt acts by one side or the other during its pendency. (Majoriy view)

Interlocutory order — Purpose of passing. (Para 51)

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JUDGMENT

Present:- Lalit Mohan Sharma, M.N. Venkatachalian, J.S. Verma, K. Jayachandra Reddy and S.C. Agrawal, JJ.*

(Operative Conclusions in the Majority Opinion) (PER VENKATACHALIAH, K. JAYACHANDRA REDDY AND AGRAWAL, JJ.) :—

The Writ Petitions, Transfer Petitions, Civil Appeals, Special Leave Petitions and other connected matters raising common questions as to the constitutional validity of the Constitution (52nd Amendment) Act, 1985, in so far as it seeks to introduce the Tenth Schedule in the Constitution of India, were heard together. Some of these matters involve investigation and determination of factual controversies and of the extent of applicability to them of the conclusions reached on the various constitutional issues. That exercise shall have to be undertaken in the individual cases separately.

The present judgement is pronounced in the Transfer Petition No. 40 of 1991 seeking the transfer of the Writ Petition, Rule No. 2421/90 on the file of the High Court of Guwahati to this Court.

2. **The Transfer Petition is allowed and the aforesaid Writ Petition is withdrawn to this court for the purpose of deciding the constitutional issues and of declaring the law on the matter.**

3. **For the reasons to be set out in the detailed judgement to follow, the following are the operative conclusions in the majority opinion on the various constitutional isseus :**

A) That having regard to the background and evolution of the principles underlying the Constituion (52nd Amendment) Act, 1985, in so far as it seeks to

introduce the Tenth Schedule in the Constitution of India, the provisions of Paragraph 7 of the Tenth Schedule of the Constitution in terms and in effect bring about a change in the operation and effect of Arts. 136, 226 and 227 of the Constitution of India and, therefore, the amendment would require to be ratified in accordance with the proviso to sub-Art. (2) of Art. 368 of the Constitution of India.

B) That there is nothing in the said proviso to Art. 368(2) which detracts from the severability of a provision on account of the inclusion of which the Bill containing the Amendment requires ratification from the rest of the provisions of such Bill which do not attract and require such ratification. Having regard to the mandatory language of Article 368(2) that "thereupon the Constituion shall stand amended" the operation of the proviso should not be extended to constitutional amendments in a Bill which can stand by themselves without such ratification.

C) That, accordingly, the Constitution (52nd Amendment) Act, 1985, in so far as it seeks to introduce the Tenth Schedule in the Constitution of India, to the extent of its provisions which are amenable to the legal sovereign of the amending process of the Union Parliament cannot be overborne by the proviso which cannot operate in that area. There is no justification for the view that even the rest of the provisions of the Constitution (52nd Amendment) Act, 1985, excluding Paragraph 7 of the Tenth Schedule become constitutionally infirm by reason alone of the fact that one of its severable provisions which attracted and required ratification under the proviso to Art. 368(2) was not so ratified.

D) That Paragraph 7 of the Tenth Schedule contains a provision which is independent of, and stands apart from, the main provisions of the Tenth Schedule which are intended to provide a remedy for the evil of unprincipled and unethical political defections and, therefore, is a severable part. The remaining provisions of the Tenth Schedule can and do stand independently of Paragraph 7 and are complete in themselves workable and are not truncated by the excision of Paragraph 7.

E) That the Paragraph 2 of the Tenth Schedule to the Constitution is valid. Its provisions do not suffer from the vice of subverting democratic rights of elected Members of Parliament and the Legislatures of the States. It does not violate their freedom of speech, freedom of vote and conscience as contended.

The provisions of Paragraph 2 do not violate any rights of Freedom under Arts. 105 and 194 of the Constitution.

The provisions are salutary and are intended to strengthen the fabric of Indian parliamentary democracy by curbing unprincipled and unethical political defections.

F) The contention that the provisions of the Tenth Schedule, even with the exclusion of Paragraph 7, violate the basic structure of the Constitution in that they affect the democratic rights of elected members and, therefore, of the pronciples of Parliamentary democracy is unsound and is rejected.

G) The Speakers/Chairmen while exercising powers and discharging functions under the Tenth Schedule act as Tribunal adjudicating rights and obligations under

the Tenth Schedule and their decisions in that capacity are amenable to judicial review.

However, having regard to the Constitutional Scheme in the Tenth Schedule, judicial review should not cover any stage prior to the making of a decision by the Speakers/Chairmen. Having regard to the Constitutional intendment and the status of the repository of the adjudicatory power, no quia timet actions are permissible, the only exception for any interlocutory interference being cases of interlocutory disqualifications or suspensions which may have grave, immediate and irreversible repurcussions and consequence.

H) That Paragraph 6(1) of the Tenth Schedule, to the extent it seeks to impart finality to the decision of the Speakers/Chairmen is valid. But the concept of statutory finality embodied in Paragraph 6(1) does not detract from or abrogate judicial review under Arts. 136, 226 and 227 of the Constitution in so far as infirmities based on violations of constitutional mandates, malafides, non-compliance with Rules of Natural Justice and perversity are concerned.

I) That the deeming provision in Paragraph 6(2) of the Tenth Schedule attracts an immunity analogous to that in Arts. 122(1) and 212(1) of the Constitution as understood and explained in Keshav Singh's case (Spl. Ref. No. 1, (1965) 1 SCR 413 : (AIR 1965 SC 745), to protect the validity of proceedings from mere irregularities of procedure. The deeming provision, having regard to the words "be deemed to be proceedings in Parliament" or "proceedings in the Legislature of a State" confines the scope of the fiction accordingly.

J) The contention that the investiture of adjudicatory functions in the Speakers/Chairmen would by itself vitiate the provision on the ground of likelihood of political bias is unsound and is rejected. The speakers/chairmen hold a pivotal position in the scheme of Parliamentary democracy and are guardians of the rights and privileges of the House. They are expected to and do take far-reaching decisions in the functioning of Parliamentary democracy. Vestiture of power to adjudicate questions under the Tenth Schedule in such a constitutional functionaries should not be considered exceptionable.

K) In the view we take of the validity of Paragraph 7 it is unnecessary to pronounce on the contention that judicial review is a basic structure of the Constitution and Paragraph 7 of the Tenth Schedule violates such basic structure.

4. **The factual controversies raised in the Writ Petition will, however, have to be decided by the High Court applying the principles declared and laid down by this judgement. The Writ Petition is, accordingly, remitted to the High Court for such disposal in accordance with law.**

(Operative Conclusions in the Minority Opinion) (PER SHARMA AND VERMA, JJ.) :—

For the reasons to be given in our detailed judgement to follow, our operative conclusions in the minority opinion on the various constitutional issues are as follows :

1. **Para 7 of the Tenth Schedule, in clear terms and in effect excludes the jurisdiction of all courts, including the Supreme Court under Art. 136 and the High**

Courts under Arts. 226 and 227 to entertain any challenge to the decision under para 6 on any ground even of illegality or perversity, not only at an interim stage but also after the final decision on the question of disqualification on the ground of defection.

2. **Para 7 of the Tenth Schedule, therefore, in terms and in effect, makes a change in Art. 136 in chapter IV of part V and Arts. 226 and 227 in Chapter V of Part VI of the Constitution, attracting the proviso to clause (2) of Art. 368.**

3. **In view of para 7 in the Bill resulting in the Constitution (Fifty-Second Amendment) Act, 1985 it was required to be ratified by the Legislature of not less than one-half of the States as a condition precedent before the Bill could be presented to the President for assent, in accordance with the mandatory special procedure prescribed in the Praviso to clause (2) of Art. 368 for exercise of the constituent powers. Without ratification by the specified number of State Legislatures, the stage for presenting the Bill for assent of the President did not reach and, therefore, the so-called assent of the President was non est and did not result in the Constitution standing amended in accordance with the terms of the Bill.**

4. **In the absence of ratification by the specified number of State Legislature before presentation of the Bill to the President for his assent, as required by the Proviso to clause (2) of Art. 368, it is not merely para 7 but, the entire Constitution (Fifty-second Amendment) Act, 1985 which is rendered unconstitutional, since the constituent power was not exercised as prescribed in Art. 368, and therefore, the Constitution did not stand amended in accordance with the terms of the Bill providing for the amendment.**

5. **Doctrine of Severability cannot be applied to a Bill making a constitutional amendment where any part thereof attracts the Proviso to clause (2) of Art. 368.**

6. **Doctrine of Severability is not applicable to permit striking down para 7 alone saving the remaining provisions of the Bill making the Constitutional Amendment on the ground that para 7 alone attracts the proviso to clause (2) of Article 368.**

7. **Even otherwise, having regard to the provisions of the Tenth Schedule of the Constitution inserted by the Constitution (Fifty-Second Amendment) Act, 1985, the Doctrine of Severability does not apply to it.**

8. **Democracy is a part of the basic structure of the Constitution and free and fair elections with provision for resolution of disputes relating to the same as also for adjudication of those relating to subsequent disqualification by an independent body out-side the House are essential features of the democratic system in our Constitution. Accordingly, an independent adjudicatory machinery for resolving disputes relating to the competence of Members of the House is envisaged as an attribute of this basic feature. The tenure of the Speaker who is the authority in the Tenth Schedule to decide this dispute is dependent on the continuous support of the majority in the House and, therefore, he (the Speaker) does not satisfy the requirement of such an independent adjudicatory authority; and his choice as the sole arbiter in the matter violates an essential attribute of the basic feature.**

9. **Consequently, the entire Constitution (Fifty-Second Amendment) Act, 1985 which inserted the Tenth Schedule together with clause (2) in Articles 102 and 191, must be declared unconstitutional or an abortive attempt to so amend the Constitution.**

10. **It follows that the decisions rendered by the several Speakers under the Tenth Schedule must also be declared nullity and liable to be ignored.**

11. **On the above conclusions, it does not appear necessary or appropriate to decide the remaining questions urged.**

VENKATACHALIAH. J. (For himself and on behalf of K. Jayachandra Reddy, S.C. Agrawal, JJ.) (Majority view) :—

5A. **In these petitions the constitutional validity of the Tenth Schedule of the Constitution introduced by the Constitution (Fifty-second Amendment) Act, 1985, is assailed. These two cases were amongst a batch of Writ Petitions, Transfer Petitions, Civil Appeals, Special Leave Petitions and other similar and connected matters raising common questions which were all heard together. On 12.11.1991 we made an order pronouncing our findings and conclusions upholding the constitutional validity of the amendment and of the provisions of the Tenth Schedule, except for Paragraph 7 which was declared invalid for want of ratification in terms of and as required by the proviso to Article 368(2) of the Constitution. In the order dated 12.11.1991 our conclusions were set out and we indicated that the reasons for the conclusions would follow later. The reasons for the conclusions are now set out.**

5B. **This order is made in Transfer Petition No. 40 of 1991 and in Writ Petition No. 17 of 1991. We have not gone into the factual controversies raised in the Writ-Petition before the Gauhati High Court in Rule No. 2421 of 1990 from which Transfer Petition No. 40 of 1991 arises. Indeed, in the order of 12th November, 1991 itself the said Writ Petition was remitted to the High Court for its disposal in accordance with law.**

5C. **Shri F.S. Nariman, Shri Shanti Bhushan, Shri M.C. Bhandare, Shri Kapil Sibal, Shri Sharma and Shri Bhim Singh, learned counsel addressed arguments in support of the petitions. Learned Attorney-General, Shri Soli J. Sorabjee, Shri R.K. Garg and Shri Santhosh Hegde sought to support the constitutional validity of the amendment. Shri Ram Jethmalani has attacked the validity of the amendment for the same reasons as put forward by Shri Sharma.**

5D. **Before we procced to record our reasons for the conclusions reached in our order dated 12th November, 1991, on the contentions raised and argued, it is necessary to have a brief look at the provisions of the Tenth Schedule. The Statement of Objects and Reasons appended to the Bill which was adopted as the Constitution (Fifty-Second Amendment) Act, 1985 says:**

"The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of our democracy and the principles which sustain it. With this object, an assurance was given in the Address by the President to Parliament that the Government intended to introduce in the current session of Parliament an anti-defection Bill. This Bill is meant for outlawing defection and fulfilling the above assurance."

On December 8, 1967, the Lok Sabha had passed an unanimous Resolution in terms following:

"a high-level committee consisting of representatives of political parties and constitutional experts be set up immediately by Government to consider the problem of legislators changing their allegiance from one party to another and their

frequent crossing of the floor in all its aspects and make recommendations in this regard."

The said Committee known as the "Committee on Defections" in its report dated January 7, 1969, inter-alia, observed:

"Following the Fourth General Election, in the short period between March 1967 and February, 1968, the Indian political scene was characterised by numerous instances of change of party allegiance by legislators in several States. Compared to roughly 542 cases in the entire period between the First and Fourth General Election, at least 438 defections occurred in these 12 months alone. Among Independents, 157 out of a total of 376 elected joined various parties in this period. That the lure of office played a dominant part in decisions of legislators to defect was obvious from the fact that out of 210 defecting legislators of the States of Bihar, Haryana, Madhya Pradesh, Punjab, Rajasthan, Uttar Pradesh and West bengal, 116 were included in the Council of Ministers which they helped to bring into being by defections. The other disturbing features of this phenomenon were: multiple acts of defections by the same person or set of persons (Haryana affording a conspicuous example); few resignations of the membership of the legislature or explanations by individual defectors, indifference on the part of defectors to political proprieties, constituency preference or public opinion; and the belief held by the people and expressed in the press that corruption and bribery were behind some of these defections".

[Emphasis supplied]

The Committee on Defections recommended that a defector should be debarred for a period of one year or till such time as he resigned his seat and got himself re-elected from appointment to the office of a Minister including Deputy Minister or Speaker or Deputy Speaker, or any post carrying salaries or allowances to be paid from the Consolidated Fund of India or of the State or from the funds of Government Undertakings in public sector in addition to those to which the defector might be entitled as legislator. The Committee on Defections could not, however, reach an agreed conclusion in the matter of disqualifying a defector from continuing to be a Member of Parliament/State Legislator.

Keeping in view the recommendations of the Committee on Defections, the Constitution (Thirty-Second Amendment) Bill, 1973 was introduced in the Lok Sabha on May 16, 1973. It provided for disqualifying a Member from continuing as a Member of either House of Parliament or the State Legislature on his voluntarily giving up his membership of the political party by which he was set up as a candidate at such election or of which he became a Member after such election, or on his voting or abstaining from voting in such House contrary to any direction issued by such political party or by any person or authority authorised by it in this behalf without obtaining prior permission of such party, person or authority. The said Bill, however, lapsed on account of dissolution of the House. Thereafter, the Constitution (Forty-eight Amendment) Bill, 1979 was introduced in the Lok Sabha which also contained similar provisions for disqualification on the ground of defection. This Bill also lapsed and it was followed by the Bill which was enacted into the Constitution (Fifty-Second Amendment) Act, 1985.

5E. **This brings to the fore the object underlying the provisions in the Tenth Schedule. The object is to curb the evil of political defections motivated by lure of office or other similar considerations which endanger the foundations of our democracy. The remedy proposed is to disqualify the Member of either House of Parliament or of the State Legislature who is found to have defected from continuing as a Member of the House. The grounds of disqualification are specified in Paragraph 2 of the Tenth Schedule.**

Paragraph 2(1) relates to a Member of the House belonging to a political party by which he was set up as a candidate at the election. Under Paragraph 2(1) (a) such a Member would incur disqualification if he voluntarily gives up his membership of such political party. Under clause (b) he would incur the disqualification if the votes or abstains from voting in the House contrary to "any direction" issued by the political party to which he belongs or by any person or authority authorised by it in this behalf without obtaining, in either case, prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention. This sub para would also apply to a nominated Member who is a Member of a political party on the date of his nomination as such Member or who joins a political party within six months of his taking oath.

Paragraph 2 (2) deals with a Member who has been elected otherwise than as a candidate set up by any political party and would incur the disqualification if he joins any political party after such election. A nominated Member of a House would incur his disqualification under sub para (3) if he joins any political party after the expiry of six months from the date of which he takes his seat.

6. **Paragraphs 3 and 4 of the Tenth Schedule, however, exclude the applicability of the provisions for disqualification under para 2 in cases of "split" in the original political party or merger of the original political party with another political party.**

These provisions in the Tenth Schedule give recognition to the role of political parties in the political process. A political party goes before the electorate with a particular programme and it sets up candidates at the election on the basis of such programme. A person who gets elected as a candidate set up by a political party is so elected on the basis of the programme of that political party. The provisions of Paragraph 2(1) (a) proceed on the premise that political propriety and morality demand that if such a person, after the election, changes his affiliation and leaves the political party which had set him up as a candidate at the election, then he should give up his Membership of the legislature and go back before the electorate. The same yard stick is applied to a person who is elected as an Independent candidate and wishes to join a political party after the election.

Paragraph 2(1) (b) deals with a slightly different situation i.e. a variant where dissent becomes defection. If a Member while remaining a Member of the political party which had set him up as a candidate at the election, votes or abstains from voting contrary to "any direction" issued by the political party to which he belongs or by any person or authority authorised by it in this behalf he incurs the disqualification. In other words, it deals with a Member who expresses his dissent from the stand of the political party to which he belongs by voting or abstaining from voting in the House contrary to the direction issued by the political party.

Paragraph 6 of the Tenth Schedule reads:

"6 (1) If any question arises as to whether a Member of a House has become subject to disqualification under this Schedule the question shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such house and his decision shall be final:

Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be referred for the decision of such Member of the House as the House may elect in this behalf and his decision shall be final.

(2) All proceedings under sub-paragraph (1) of this Paragraph in relation to any question as to disqualification of a Member of a House under this Schedule shall be deemed to be proceedings in Parliament within the meaning of Article 122 or, as the case may be, proceedings in the Legislature of a State within the meaning of Article 212."

Paragraph 7 says:

"7. Bar of jurisdiction of courts: Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a Member of a House under this Schedule."

7. **The challenge to the constitutional validity of the Amendment which introduces the Tenth Schedule is sought to be sustained on many grounds. It is urged that the constitutional Amendment introducing Paragraph 7 of the Tenth Schedule, in terms and in effect, seeks to make a change in Chapter IV of part V of the Constitution in that it denudes the jurisdiction of the Supreme Court under Article 136 of the Constitution of India an in Chapter V of part VI in that it takes away the jurisdiction of the High Courts under Article 226 and that, therefore, the legislative Bill, before presentation to the President for assent, would require to be ratified by the Legislature of not less than one half of the States by resolution to that effect. In view of the admitted position that no such ratification was obtained for the Bill, it is contended, the whole Amending Bill --- not merely Paragraph 7 --- fails and the amendment merely remains an abortive attempt to bring about an amendment. It is further contended that the very concept of disqualification for defection is violative of the fundamental values and principles underlying Parliamentary democracy and violates an elected representative's freedom of speech, right to dissent and freedom of conscience and is, therefore, unconstitutional as destructive of a basic feature of the Indian constitution. It is also urged that the investiture in the Speaker or the Chairman, of the power to adjudicate disputed defections would violate an important incident of another basic feature of the Constitution, viz., Parliamentary democracy. It is contended that an independent, fair and impartial machinery for resolution of electoral disputes is an essential and important incident of democracy and that the vesting of the power of adjudication in the Speaker or the Chairman -- who, in the Indian Parliamentary system are nominees of political parties and are not obliged to resign their party affiliations after election -- is violative of this requirement.**

It is alternatively contended that if it is to be held that the amendment does not attract the proviso to Article 368(2), then Paragraph 7 in so far as it takes away the

power of judicial review, which, in itself, is one of the basic features of the Constitution is liable to be struck down.

8. **There are certain other contentions which, upon a closer examination, raise issues more of construction than constitutionality. For instance, some arguments were expended on the exact connotations of a "split" as distinct from a "defection" within the meaning of Paragraph 3. Then again, it was urged that under Paragraph 2(b) the expression "any direction" is so wide that even a direction, which if given effect to and implemented might bring about a result which may itself be obnoxious to and violative of constitutional ideals and values would be a source of disqualification. These are, indeed, matters of construction as to how, in the context in which the occasion for the introduction of the Tenth Schedule arose and the high purpose it is intended to serve, the expression "any direction" occurring in Paragraph 2(b) is to be understood. Indeed, in one of the decisions cited before us (Prakash Singh Badal v. Union of India & Ors. AIR 1987 Punjab and Haryana 263 FB) this aspect has been considered by the High Court. The decision was relied upon before us. We shall examine it presently.**

9. **Supporting the constitutionality of the Amendment, respondents urge that the Tenth Schedule creates a non-justiciable constitutional area dealing with certain complex political issues which have no strict adjudicatory disposition. New rights and obligations are created for the first time uno-flatu by the Constitution and the Constitution itself has envisaged a distinct constitutional machinery for the resolution of those disputes. These rights, obligations and remedies, it is urged, which are in their very nature and innate complexities are in political thickets and are not amenable to judicial processes and the Tenth Schedule has merely recognised this complex character of the issues and that the exclusion of this area is constitutionally preserved by imparting a finality to the decisions of the Speaker or the Chairman and by deeming the whole proceedings as proceedings within Parliament or within the Houses of Legislature of the States envisaged in Article 122 and 212, respectively, and further by expressly excluding the Courts' jurisdiction under Paragraph 7.**

Indeed, in constitutional and legal theory, it is urged, there is really no ouster of jurisdiction of courts or of Judicial Review as the subject-matter itself by its inherent character and complexities is not amenable to but outside judicial power and that the ouster of jurisdiction under Paragraph 7 is merely a consequential constitutional recognition of the non-amenability of the subject-matter to the judicial power of the State, the corollary of which is that the Speaker or the chairman, as the case may be, exercising powers under Paragraph 6(1) of the Tenth Schedule function not as a statutory Tribunal but as a part of the State's Legislative Department.

It is, therefore, urged that no question of the ouster of jurisdiction of Courts would at all arise inasmuch as in the first place, having regard to the political nature of the issues, the subject-matter is itself not amenable to judicial power. It is urged that the question in the last analyses pertains to the constitution of the House and the Legislature is entitled to deal with it exclusively.

10. **It is further urged that Judicial Review -- apart from Judicial Review of the legislation as inherent under a written constitution -- is merely a branch of administrative law remedies and is by no means a basic feature of the Constitution**

and that, therefore, Paragraph 7, being a constitutional provision cannot be invalidated on some general doctrine not found in the Constitution itself.

11. **On the contentions raised and urged at the hearing the questions that fall for consideration are the following:**

(A) The Constitution (Fifty-Second Amendment) Act, 1985, in so far as it seeks to introduce the Tenth schedule is destructive of the basic structure of the Constitution as it is violative of the fundamental principles of Parliamentary democracy, a basic feature of the Indian constitutionalism and is destructive of the freedom of speech, right to dissent and freedom of conscience as the provisions of the Tenth Schedule seek to penalise and disqalify elected representatives for the exercise of these rights and freedoms which are essential to the sustenance of the system of parliamentary democracy.

(B) Having regard to the legislative history and evolution of the principles underlying the Tenth Schedule, Paragraph 7 thereof in terms and in effect, brings about a change in the operation and effect of Articles 136, 226 and 227 of the Constitution of India and, therefore, the Bill introducing the amendment attracts the proviso to Article 368(2) of the Constitution and would require to be ratified by the legislatures of the States before the Bill is presented for Presidential assent.

(C) In view of the admitted non-compliance with the proviso to Article 368(2) not only Paragraph 7 of the Tenth Schedule, but also the entire Bill resulting in the Constitution (Fifty-Second Amendment) Act, 1985, stands vitiated and the purported amendment is abortive and does not in law bring about a valid amendment.

Or whether, the effect of such non-compliance invalidates Paragraph 7 alone and the other provisions which, by themselves, do not attract the proviso do not become invalid.

(D) That even if the effect of non-ratification by the legislature of the States is to invalidate Paragraph 7 alone, the whole of the Tenth Schedule fails for non-severability. Doctrine of severability, as applied to ordinary statutes to promote their constitutionality, is inapplicable to constitutional Amendments.

Even otherwise, having regard to legislative intent and scheme of the Tenth Schedule, the other provisions of the Tenth Schedule, after the severance and excision of Paragraph 7, become truncated, and unworkable and cannot stand and operate independently. The Legislature would not have enacted the Tenth Schedule without Paragraph 7 which forms its heart and core.

(E) That the deeming provision in Paragraph 6 (2) of the Tenth Schedule attracts the immunity under Articles 122 and 212. The Speaker and the Chairman in relation to the exercise of the powers under the Tenth Schedule shall not be subjected to the jurisdiction of any Court.

The Tenth Schedule seeks to and does create a new and non-justiciable area of rights, obligations and remedies to be resolved in the exclusive manner envisaged by the Constitution and is not amenable to, but constitutionally immune from curial adjudicative processes.

(F) That even if Paragraph 7 erecting a bar on the jurisdiction of Courts is held inoperative, the Courts' jurisdiction is, in any event, barred as Paragraph 6(1) which imparts a constitutional 'finality' to the decision of the Speaker or the Chairman, as the case may be, and that such concept of 'finality' bars examination of the matter by the Courts.

(G) The concept of free and fair elections as a necessary concomitant and attribute of democracy which is a basic feature includes an independent impartial machinery for the adjudication of the electoral disputes. The Speaker and the Chairman do not satisfy these incidents of an independent adjudicatory machinery.

The investiture of the determinative and adjudicative jurisdiction in the speaker or the Chairmen, as the case may be, would, by itself, vitiate the provision on the ground of reasonable likelihood of bias and lack of impartiality and therefore denies the imperative of an independent adjudicatory machinery. The Speaker and chairman are elected and hold office on the support of the majority party and are not required to resign their Membership of the political party after their election to the office of the Speaker or Chairman.

(H) That even if Paragraph 7 of the Tenth Schedule is held not to bring about a change or affect Articles 136, 226 and 227 of the Constitution, the amendment is unconstitutional as it erodes and destroys judicial review which is one of the basic features of the Constitution.

12. Re: Contention (A):

The Tenth Schedule is part of the Constitution and attracts the same canons of construction as are applicable to the expounding of the fundamental law. One constitutional power is necessarily conditioned by the others as the Constitution is one "coherent document". Learned counsel for the petitioners accordingly say that the Tenth Schedule should be read subject to the basic features of the Constitution. The Tenth Schedule and certain essential incidents of democracy, it is urged, cannot co-exist.

In expounding the processes of the fundamental law, the Constitution must be treated as a logical-whole. Westel Woodbury Willoughby in the "Constitutional law of the United States" states:

"The Constitution is a logical whole, each provision of which is an integral part thereof, and it is, therefore, logically proper, and indeed imperative, to construe one part in the light of the provisions of the other parts.

(2nd Edn: Vol. 1 page 65)

A constitutional document outlines only broad and general principles meant to endure and be capable of flexible application to changing circumstances - a distinction which differentiates a statute from a Charter under which all statutes are made. Cooley on "Constitutional Limitations" says:

"Upon the adoption of an amendment to a constitution, the amendment becomes a part thereof; as much so as if it had been originally incorporated in the Constitution; and it is to beconstrued accordingly."

[8th Edn. Vol. 1 page 129]

13. **In considering the validity of a constitutional amendment the changing and the changed circumstances that compelled the amendment are important criteria. The observations of the U. S. Supreme Court in Maxwell v. Dow (44 Lawyer's Edition 597 at page 605) are worthy of note:**

"..... to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen and then to construe it, if there be therein any doubtful expressions, in a way sofar as is reasonably possible, to forward the known purpose or object for which the amendment was adopted....."

The Report of the Committee on Defections took note of the unprincipled and unethical defections induced by considerations of personal gains said :

"..... what was most heartening was the feeling of deep concern over these unhealthy developments in national life on the part of the leaders of political parties themselves. Parliament mirrored this widespread concern....."

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14. **It was strenuously contended by Shri Ram Jethmalani and Shri Sharma that the provisions of the Tenth Schedule constitute a flagrant violation of those fundamental principles and values which are basic to the sustenance of the very system of parliamentary democracy. The Tenth Schedule, it is urged, negates those very foundational assumptions of Parliamentary democracy; of freedom of speech; of the right to dissent and of the freedom of conscience. It is urged that unprincipled political defections may be an evil, but it will be the beginning of much greater evils if the remedies, graver than the disease itself, are adopted. The Tenth Schedule, they say, seeks to throw away the baby with the bath-water. Learned counsel argue that "crossing the floor", as it has come to be called, mirrors the meanderings of a troubled conscience on issues of political morality and to punish an elected representative for what really amounts to an expression of conscience negates the very democratic principles which the Tenth Schedule is supposed to preserve and sustain. Learned counsel referred to the famous Speech to the Electors of Bristol, 1774, where Edmund Burke reportedly said:**

"It ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinion, high respect; their business, unremitted attention. It is his duty to sacrifice his repose, his pleasures, his satisfaction to theirs --- and above all, ever, and in all cases, to prefer their interest to his own. But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living.... Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion."

[See: Parliament Functions, Practice & Procedures by JAG Griffith and Michael Ryle 1989 Edn. page 70]

15. **Shri Jethmalani and Shri Sharma also relied upon certain observations of Lord Shaw in Amalgamated Society of Railway Servants v. Osborne [1910 A.C. 87] to contend that a provision which seeks to attach a liability of disqualification of an elected Member for freely expressing his views on matters of conscience, faith and political belief are indeed restraints on the freedom of speech -- restraints opposed**

to public policy. In that case a registered trade union framed a rule enabling it to levy contributions on the Members to support its efforts to obtain Parliamentary representation by setting up candidates at elections. It also framed a rule requiring all such candidates to sign and accept the conditions of the Labour Party and be subject to its whip. The observations in the case relied upon by learned counsel are those of Lord Shaw of Dunfermline who observed:

"Take the testing instance: should his view as to right and wrong on a public issue as to the true line of service to the realm, as to the real interests of the constituency which has elected him, or even of the society which pays him, differ from the decision of the parliamentary party and the maintenance by it of its policy, he has come under a contract to place his vote and action into subjection not to his own convictions, but to their decisions. My Lords, I do not think that such a subjection is compatible either with the spirit of our parliamentary constitution or with that independence and freedom which have hitherto been held to lie at the basis of representative government in the United Kingdom."

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"For the people having reserved to themselves the choice of their representatives, as the fence to their properties, could do it for no other end but that they might always be freely chosen, and so chosen freely act and advise, as the necessity of the commonwealth and the public good should upon examination and mature debate be judged to require....."

[pate 113]

Still further, in regard to the Member of Parliament himself, he too is to be free; he is not to be the paid mandatory of any man, or organization of men, nor is he entitled to bind himself to subordinate his opinions on public questions to others, for wages, or at the peril of pecuniary loss; and any contract of this character would not be recognized by a Court of Law, either for its enforcement or in respect of its breach....."

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It is relevant to observe here that the rule impugned in that case was struck down by the Court of Appeal -- whose decision was upheld by the House of Lords -- on grounds of the Society's competence to make the rule. It was held that the rule was beyond its powers. Lord Shaw, however, was of the view that the impugned rule was opposed to those principles of public policy essential to the working of a representative Government. The view expressed by Lord Shaw was not the decision of the House of Lords in that case.

But, the real question is whether under the Indian constitutional scheme is there any immunity from constitutional correctives against a legislatively perceived political evil of unprincipled defections induced by the lure of office and monetary inducements?

16. **The points raised in the petitions are, indeed, far-reaching and of no small importance - invoking the 'sense of relevance of constitutionally stated principles to unfamiliar settings'. On the one hand there is the real and imminent threat to the very fabric of Indian democracy posed by certain levels of political behaviour conspicuous by their utter and total disregard of well recognised political**

proprieties and morality. These trends tend to degrade the tone of political life and, in their wider propensities, are dangerous to and undermine the very survival of the cherished values of democracy. There is the legislative determination through experimental constitutional processes to combat that evil.

On the other hand, there are, as in all political and economic experimentations, certain side-effects and fall-out which might affect and hurt even honest dissenters and conscientious objectors. These are the usual plus and minus of all areas of experimental legislation. In these areas the distinction between what is constitutionally permissible and what is outside it is marked by a 'hazy gray-line' and it is the Court's duty to identify, "darken and deepen" the demarcating line of constitutionality --- a task in which some element of Judges' own perceptions of the constitutional ideals inevitably participate. There is no single litmus test of constitutionality. Any suggested sure decisive test, might after all furnish a "transitory delusion of certitude" where the "complexities of the strands in the web of constitutionality which the Judge must alone disentangle" do not lend themselves to easy and sure formulations one way or the other. It is here that it becomes difficult to refute the inevitable legislative element in all constitutional adjudications.

17. **All distinctions of law -- even Constitutional law -- are, in the ultimate analyses, "matters of degree". At what line the 'white' fades into the 'black' is essentially a legislatively perceived demarcation.**

In his work "Oliver Wendell Holmes - Free Speech and the Living Constitution" (1991 Edition: New York University Publication) Pohlman says:

"All distinctions of law, as Holmes never tired of saying, were therefore "matters of degree." Even in the case of constitutional adjudication, in which the issue was whether a particular exercise of power was within or without the legislature's authority, the judge's decision "will depend on a judgment or intuition more subtle than any articulate major premise." As the particular exertion of legislative power approached the hazy gray line separating individual rights from legislative powers, the judge's assessment of constitutionality became a subtle value judgment. The judge's decision was therefore not deductive, formal, or conceptual in any sense.

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(Emphasis supplied)

Justice Holmes himself had said:

"Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn a little further to the one side or to the other."

[Emphasis supplied]

[See: "Theory of Torts" American Law Review 7 (1873)]

The argument that the constitutional remedies against the immorality and unprincipled chameleon-like changes of political hues in pursuit of power and pelf suffer from something violative of some basic features of the Constitution, perhaps, ignores the essential organic and evolutionary character of a Constitution and its flexibility as a living entity to provide for the demands and compulsions of the changing times and needs. The people of this country were not beguiled into believing that the menace of unethical and unprincipled changes of political affiliations is something which the law is helpless against and is to be endured as a necessary concomitant of freedom of conscience. The onslaughts on their sensibilities by the incessant unethical political defections did not dull their perception of this phenomenon as a canker eating into the vitals of those values that make democracy a living and worth-while faith. This is preeminently an area where Judges should defer to legislative perception of and reaction to the pervasive dangers of unprincipled defections to protect the community. "Legislation may begin where an evil begin". Referring to the judicial philosophy of Justice Holmes in such areas Pohlman again says:

"A number of Holmes's famous aphorisms point in the direction that judges should defer when the legislature reflected the pervasive and predominant values and interests of the community. He had, for example, no "practical" criterion to go on except "what the crowd wanted." He suggested, in a humorous vein that his epitaph

.....No judge ought to interpret a provision of the Constitution in a way that would prevent the American people from doing what it really wanted to do. If the general consensus was that a certain condition was an "evil" that ought to be corrected by certain means, then the government had the power to do it: "Legislation may begin where an evil begins"; "constitutional law like other mortal contrivances has to take some chances." "Some play must be allowed to the joints if the machine is to work." All of these rhetorical flourished suggest that Holmes deferred to the legislature if and when he though it accurately mirrored the abiding beliefs, interests, and values of the American public."

(Emphsis supplied)

[See: Justice Oliver Wendell Holmes - Free speech and the Living Constitution by H. L. Pohlman 1991 Edn. page 233]

18. **Shri Sharma contends that the rights and immunities under Article 105(2) of the Constitution which according to him are placed by judicial decisions even higher than the fundamental-right in Article 19(1) (a), have violated the Tenth Schedule. There are at least two objections to the acceptability of this contention. The first is that the Tenth Schedule does not impinge upon the rights or immunities under Article 105(2). Article 105(2) of the Constitution provides:**

"105. Powers, privileges, etc., of the Houses of Parliament and of the Members and committees thereof. - (1).....

(2) No Member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so

liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings."

The freedom of speech of a Member is not an absolute freedom. That apart, the provisions of the Tenth Schedule do not purport to make a Member of a House liable in any 'Court' for anything said or any vote given by him in Parliament. It is difficult to conceive how Article 105(2) is a source of immunity from the consequences of unprincipled floor-crossing.

Secondly, on the nature and character of electoral rights this court in Jyoti Basu v. Debi Ghosal & Ors. [1982 (3) S. C. R. 318 AIR 1982 SC 983] observed:

"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."

[page 326 of SCR] (at p.986 of AIR)

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. From that it does not necessarily follow that the rights and immunities under sub-article (2) of Article 105 of the Constitution, are elevated into fundamental rights and that the Tenth Schedule would have to be struck down for its inconsistency with Article 105 (2) as urged by Shri Sharma.

19. **Parliamentary democracy envisages that matters envolving implementation of policies of the Government should be discussed by the elected representatives of the people. Debate, discussion and pursuasion are, therefore, the means and essence of the democratic process. During the debates the Members put forward different points of view. Members belonging to the same political party may also have, and may give expression to, differences of opinion on a matter. Not unoften the views expressed by the Members in the House have resulted in substantial modification, and even the withdrawal, of the proposals under consideration. Debate and**

expression of different points of view, thus, serve an essential and healthy purpose in the functioning of Parliamentary democracy. At times such an expression of views during the debate in the House may lead to voting or abstenance from voting in the House otherwise than on party lines.

But a political party functions on the strength of shared beliefs. Its own political stability and social utility depends on such shared beliefs and concerted action of its Members in furtherance of those commonly held principles. Any freedom of its Members to vote as they please independently of the political party's declared policies will not only embarrass its public image and popularity but also undermine public confidence in it which, in the ultimate analysis, is its source of sustenance - nay, indeed, its very survival. Intra-party debates are of course a different thing. But a public image of disparate stands by Members of the same political party is not looked upon, in political tradition, as a desirable state of things. Griffith and Ryle on "Parliament, Functions, Practice & Procedure" (1989 Edn. page 119) say:

"Loyalty to party is the norm, being based on shared beliefs. A divided party is looked on with suspicion by the electorate. It is natural for Members to accept the opinion of their Leaders and spokesmen on the wide variety of matters on which those Members have no specialist knowledge. Generally Members will accept majority decisions in the party even when they disagree. It is understandable therefore that a Member who rejects the party whip even on a single occasion will attract attention and more criticism than sympathy. To abstain from voting when required by party to vote is to suggest a degree of unreliability. To vote against party is disloyalty. To join with others in abstention or voting with the other side smacks of conspiracy." (emphasis supplied)

Clause (b) of sub-para (1) of Paraghaph 2 of the Tenth Schedule gives effect to this principle and sentiment by imposing a disqualification on a Member who votes or abstains from voting contrary to "any directions" issued by the political party. The provision, however, recognises two exceptions : one when the Member obtains from the political party prior permission to vote or abstain from voting and the other when the Member has voted without obtaining such permission but his action has been condoned by the political party. This provision itself accommodates the possibility that there may be occasions when a Member may vote or abstain from voting contrary to the direction of the party to which he belongs. This, in itself again, may provide a clue to the proper understanding and construction of the expression "Any Direction" in clause (b) of Paragraph 2(1) -- whether really all directions or whips from the party entail the statutory consequences or whether having regard to the extraordinary nature and sweep of the power and the

very serious consequences that flow including the extreme penalty of disqualification the expression should be given a meaning confining its operation to the contexts indicated by the objects and purposes of the Tenth Schedule. We shall deal with this aspect separately.

20. **The working of the modern Parliamentary democracy is complex. The area of the inter-se relationship between the electoral constituencies and their elected representatives has many complex features and overtones. The citizen as the electorate is said to be the political sovereign. As long as regular general elections occur, the electorate remains the arbiter of the ultimate composition of the representative legislative body to which the Government of the day is responsible. There are, of course, larger issues of theoretical and philosophical objections to the legitimacy of a representative Government which might achieve a majority of the seats but obtains only minority of the electoral votes. It is said that even in England this has been the phenomenon in every general elections in this century except the four in the years 1900, 1918, 1931 and 1935.**

But in the area of the interrelationship between the constituency and its elected representative, it is the avowed endeavour of the latter to requite the expectations of his voters. Occasionally, this might conflict with his political obligations to the political party sponsoring him which expects - and exacts in its own way -- loyalty to it. This duality of capacity and functions are referred to by a learned author thus :

"The functions of Members are of two kinds and flow from the working of representative government. When a voter at a general election, in that hiatus between parliaments, puts his cross against the name of the candidate he is [most often] consciously performing two functions : seeking to return a particular person to the house of commons as Member for that constituency; and seeking to return to power as the government of the country a group of individuals of the same party as that particular person. The voter votes for a representative and for a government. He may know that the candidate he votes has little chance of being elected ....."

"When a candidate is elected as a Member of the House of Commons, he reflects those two functions of the voter. Whatever other part he may play, he will be a constituency M.P. As such, his job will be to help his constituents as individuals in their dealings with the departments of State. He must listen to their grievances and often seek to persuade those in authority to provide remedies. He must have no regard to the political leanings of his constituents for he represents those who voted against him or who did not vote at all as much as those who voted for him. Even if he strongly disagree

with their complaint he may still seek to represent it, those the degree of enthusiasm with which he does so is likely to be less great."

[See : Parliament - Functions, Practice and Procedures by JAG Griffith and Ryle - 1989 Edn. page 69]

So far as his own personal views on freedom of conscience are concerned, there may be exceptional occasions when the elected representative finds himself compelled to consider more closely how he should act. Referring to these dilemmas the authors say :

".... The first is that he may feel that the policy of his party whether it is in office or in opposition, on a particular matter is not one of which he approves. He may think this because of his personal opinions or because of its special consequences for his constituents or outside interests or because it reflects a general position within the party with which he cannot agree. On many occasions, he may support the party despite his disapproval. But occasionally the strength of his feeling will be such that he is obliged to express his opposition either by speaking or by abstaining on a vote or even by voting with the other side. Such opposition will not pass unnoticed and, unless the matter is clearly one of conscience, he will not be popular with the party whips.

The second complication is caused by a special aspect of parliamentary conduct which not frequently transcends party lines. Members, who are neither Ministers nor front-bench Opposition spokesmen, do regard as an important part of their function the general scrutiny of Governmental activity. This is particularly the role of select committees which have, as we shall see, gained new prominence since 1979. No doubt, it is superficially paradoxical to see Members on the Government side of the House joining in detailed criticism of the administration and yet voting to maintain that Government in office. But as one prominent critic of government has said, there is nothing inherently contradictory in a Member sustaining the Executive in its power or helping it to overcome opposition at the same time as scrutinising the work of the executive in order both to improve it and to see that power is being exercised in a proper and legitimate fashion."

(pages 69 and 70)

Speaking of the claims of the political party on its elected Member Rodney Brazier says :

"Once returned to the House of Commons the Member's party expects him to be loyal. This is not entirely unfair or improper, for it is the price of the party's label which secured his election. But the question is whether the balance of a Member's obligationns has tilted too far in favour of the requirments of party. The nonsense that a Whip - even a three-line whip -- is no more than a summons to

attend the House, and that, once there, the Member is completely free to speak and vote as he thinks fit, was still being put about, by the Parliamentary Private Secretary to the Prime Minister, as recently as 1986. No one can honestly believe that. Failure to vote with his party on a three-line whip without permission invites a party reaction. This will range (depending on the circumstances and whether the offence is repeated) from a quiet word from a Whip and appeals to future loyalty, to a ticking-off or a formal reprimand (perhaps from the Chief Whip himself), to any one of a number of threats. The armoury of intimidation includes the menaces that the Member will never get ministerial office, or go on overseas trips sponsored by the party, or the nominated by his party for Commons committee Memberships, or that he might be deprived of his party's whip in the House, or that he might be reported to his constituency which might wish to consider his behaviour when reselection comes round again ..... Does the Member not enjoy the Parliamentary privilege of freedom of speech? How can his speech be free in the face of such party threats? The answer to the inquiring citizen is that the whip system is part of the conventionally established machinery of political organisation in the house, and has been ruled not to infringe a Member's parliamentary privilege in any way. The political parties are only too aware of the utility of such a system, and would fight in the last ditch to keep it."

[See; Constitutional Refrom - Reshaping the British Political System by Rodney Brazier, 1991 Edn. pages 48 and 49]

The learned author, referring to cases in which an elected Member is seriously unrepresentative of the general constituency opinion, or whose personal behaviour falls below standards acceptable to his constituents commands that what is needed is some additional device to ensure that a Member pays heed to constituents' views. Brazier speaks of the efficacy of device where the constituency can recall its representative. Brazier says :

"What sort of conduct might attract the operation of the recall power? First, a Member might have misused his Membership of the House, for example to further his personal financial interests in a manner offensive to his constituents. They might consider that the action taken against him by the house (or, indeed, lack of action) was inadequate ..... Thirdly, the use of a recall power might be particularly apt when a Member changed his party but declared to resign his seat and fight an immediate by-election. It is not unreasonable to expect a Member who crosses the floor of the House, or who joins a new party, to resubmit himself quickly to the electors who had returned him in different colours. Of course, in all those three areas of controversial conduct the ordinary process of reselection might well result in the Member being dropped as his party's candidate (and obviously would definitely have that result in

the third case). But that could only occur when the time for reselection came; and in any event the constituency would still have the Member representing them until the next general election. A cleaner and more timely parting of the ways would be preferable. Sometimes a suspended sentence does not meet the case."

[p. 52 and 53]

Indeed, in a sense an anti-defection law is a statutory variant of its moral principle and justification underlying the power of recall. What might justify a provision for recall would justify a provision for disqualification for defection. Unprincipled defection is a political and social evil. It is perceived as such by the legislature. People, apparently, have grown distrustful of the emotive political exaltations that such floor-crossings belong to the sacred area of freedom of conscience, or of the right to dissent or of intellectual freedom. The anti-defection law seeks to recognise the practical need to place the proprieties of political and personal conduct --whose awkward erosion and grotesque manifestations have been the base of the times -- above certain theoretical assumptions which in reality have fallen into a morass of personal and political degradation. We should, we think, defer to this legislature wisdom and perception. The choices in constitutional adjudication quite clearly indicate the need for such deference. "Let the end be legitimate, let it be within the scope of the Constitution and all means which are appropriate, which are adopted to that end..." are constitutional. [See Kazurbach vs. Morgan: 384 US 641].

21. **It was then urged by Shri Jethmalani that the distinction between the conception of "defection" and "split" in the Tenth Schedule is so thin and artificial that the differences on which the distinction rests are indeed an outrageous defiance of logic. Shri Jethmalani urged that if floor-crossing by one member is an evil, then a collective perpetration of it by 1/3rd of the elected Members of a party is no better and should be regarded as an aggravated evil both logically and from the part of its aggravated consequences. But the Tenth Schedule, says Shri Jethmalani, employs its own inverse ratiocination and perverse logic to declare that where such evil is perpetrated collectively by an artificially classified group of not less than 1/3rd Members of that political party that would not be a "defection" but a permissible "split" or "merger".**

This exercise to so hold-up the provision as such crass imperfection is performed by Shri Jethmalani with his wonted forensic skill. But we are afraid what was so attractively articulated, on closer examination, is, perhaps, more attractive than sound. The underlying premise in declaring an individual act of defection as forbidden is that lure of office or money could be presumed to have prevailed. Legislature has made this presumption on its own

perception and assessment of the extant standards of political proprieties and morality. At the same time legislature envisaged the need to provide for such "floor-crossing" on the basis of honest dissent. That a particular course of conduct commended itself to a number of elected representatives might, in itself, lend credence and reassurance to a presumption of bona fides. The presumptive impropriety of motives progressively weakens according as the numbers sharing the action and there is nothing capricious and arbitrary in this legislative perception of the distinction between 'defection' and 'split'.

Where is the line to be drawn? What number can be said to generate a presumption of bona fides? Here again the Courts have nothing else to go by except the legislative wisdom and, again, as Justice Holmes said, the Court has no practical criterion to go by except "What the crowd wanted". We find no substance in the attack on the statutory distinction between "defection" and "split".

Accordingly we hold :

"that the Paragraph 2 of the Tenth Schedule to the Constitution is valid. Its provisions do not suffer from the vice of subverting democratic rights of elected Members of Parliament and the Legislatures of the States. It does not violate their freedom of speech, freedom of vote and conscience as contended.

The provisions of Paragraph 2 do not violate any rights or freedom under Articles 105 and 194 of the Constitution.

The provisions are salutory and are intended to strengthen the fabric of Indian parliamentary democracy by curbing unprincipled and unethical political defections.

The contention that the provisions of the Tenth Schedule, even with the exclusion of Paragraph 7, violate the basic structure of the Constitution in that they affect the democratic rights of elected Members and, therefore Sic, of the principles of Parliamentary democracy is unsound and is rejected."

22. Re : Contention (B) :

The thrust of the point is that Paragraph 7 brings about a change in the provisions of Chapter IV of Part V and Chapter V of Part VI of the Constitution and that, therefore, the amending Bill falls within proviso to Article 368(2). We might, at the outset, notice Shri Sibal's submissions on a point of construction of Paragraph 7. Shri Sibal urged that Paragraph 7, properly construed, does not seek to oust the jurisdiction of Courts under Articles 136, 226 and 227 but merely prevents an interlocutory intervention or a quia-timet action. He urged that the words "in respect of any matters connected with the disqualification of a Member" seek to bar jurisdiction only till the matter is finally decided by the Speaker or Chairman, as the case

may be, and does not extend beyond that stage and that in dealing with the dimensions of exclusion of the exercise of judicial power the broad considerations are that provisions which seek to exclude Courts' jurisdiction shall be strictly construed. Any construction which results in denying the Courts is, it is urged, not favoured. Shri Sibal relied upon the following observations of this Court in H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur v. Union of India (1971) (1) SCC 85 AIR 1971 SC 530].

"..... The proper forum under our Constitution for determining a legal dispute is the Court which is by training and experience, assisted by properly qualified advocates, fitted to perform that task. A provision which purports to exclude the jurisdiction of the Courts in certain matters and to deprive the aggrieved party of the normal remedy will be strictly construed, for it is a principle not to be whittled down that an aggrieved party will not, unless the jurisdiction of the Courts is by clear enactment or necessary implication barred, be denied his right to seek recourse to the Courts for determination of his rights.....".

"The Court will avoid imputing to the Legislature an intention to enact a provision which flouts notions of justice and norms of fairplay, unless a contrary intention is manifest from words plain and unambiguous. A provision in a statue will not be construed to defeat its manifest purpose and general values which animate its structure. In an avowedly democratic polity, statutory provisions ensuring the security of fundamental human rights including the right to property will, unless the contrary mandate be precise and unqualified, be construed liberally so as to uphold the right. These rules apply to the interpretation of constitutional and statutory provisions alike."

[pages 94-95 (of SCC) : (at p 576 of AIR]

It is true that the provision which seeks to exclude the jurisdiction of Courts is strictly construed. (See also : Secretary of State Mask & Co., v. AIR 1940 P.C. 105)

But the rules of construction are attracted where two or more reasonably possible constructions are open on the language of the statute. But, here both on the language of Paragraph 7 and having regard to the legislative evolution of the provision, the legislative intent is plain and manifest. The words "no Court shall have any jurisdiction in respect of any matter connected with the disqualification of a member" are of wide import and leave no constructional options. This is reinforced by the legislative history of the anti-defection law. The deliberate and purposed presence of Paragraph 7 is clear from the history of the previous proposed legislations on the subject. A comparison of the provisions of the Constitution (Thirty-second Amendment) Bill, 1973 and the

Constitution (Forty-eight Amendment) Bill, 1978, (both of which had lapsed) on the one hand and the Constitution (52nd Amendment) Bill, 1985, would bring-out the avowed and deliberate intent of Paragraph 7 in the Tenth Schedule. The previous Constitution (38th and 48th Amendment) Bills contained similar provisions for disqualification on grounds of defection, but, these Bills did not contain any clause ousting the jurisdiction of the Courts. Determination of disputed disqualifications was left to the Election Commission as in the case of other disqualifications under Articles 102 and 103 in the case of Members of Parliament and Articles 191 and 192 in the case of Members of Legislature of the States. The Constitution (Fifty-second Amendment) Bill for the first time envisaged the investiture of the power to decide disputes on the Speaker or the Chairman. The purpose of the enactment of Paragraph 7, as the debates in the House indicate, was to bar the jurisdiction of the Courts under Articles 136, 226 and 227 of the Constitution of India. Shri Sibal's suggested contention would go against all these overwhelming interpretative criteria apart from its unacceptability on the express language of Paragraph 7.

23. **But it was urged that no question of change in Articles 136, 226 and 227 of the Constitution within the meaning of clause (b) of the proviso to Article 368 (2) arises at all in view of the fact that the area of these rights and obligations being constitutionally rendered non-justifiable, there is no judicial review under Articles 136, 226 and 227 at all in the first instance so as to admit of any idea of its exclusion. Reliance was placed on the decisions of this Court in Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar [1952 SCR 89]: (AIR 1951 SC 458) and Sajjan Singh vs. State of Rajasthan (1965 (1) SCR 933 : (AIR 1965 SC 845).**

24. **In Sankari Prasad's case, (AIR 1951 SC 458) the question was whether the Amendment introducing Articles 31A and 31B in the Constitution required ratification under the said proviso. Repelling this contention it was observed:**

"It will be seen that these articles do not either in terms or in effect seek to make any change in Article 226 or in Articles 132 and 136. Article 31A aims at saving laws providing for the compulsory acquisition by the State of a certain kind of property from the operation of Article 13 read with other relevant articles in Part III, while Article 31B purports to validate certain specified Acts and Regulations already passed, which, but for such a provision, would be liable to be impugned under Article 13. It is not correct to say that the powers of the High Court under Article 226 to issue writs "for the enforcement of any of the rights conferred by Part III" or of this Court under Articles 132 and 136 to entertain appeals from orders issuing or refusing such writs are in any way affected. They remain just the same as they were before : only a certain class of case has

been excluded from the purview of Part III and the courts could no longer interfere, not because their powers were curtailed in any manner or to any extent, but because there would be no occasion hereafter for the exercise of their power in such cases."

[1982 SCR 89 at 108 AIR 1951 SC 458 at p.464]

In Sajjan Singh's case, (1965 (1) SCR 933: AIR 1965 SC 845) a similar contention was raised against the validity of the Constitution (17th Amendment) Act, 1964 by which Article 31A was again amended and 44 statutes were added to the IX Schedule to the Constitution. The question again was whether the amendment required ratification under the proviso to Article 368. This Court noticed the question thus:

"The question which calls for our decision is : what would be the requirement about making an amendment in a constitutional provision contained in Part III, if as a result of the said amendment, the powers conferred on the High Courts under Article 226 are likely to be affected?.

[p. 940 (of SCR): cat p.851 of AIR)]

Negativing the challenge to the amendment on the ground of non-ratification, it was held :

"..... Thus, if the pith and substance test is applied to the amendment made by the impugned Act, it would be clear that Parliament is seeking to amend fundamental rights solely with the object of removing any possible obstacle in the fulfilment of the socio-economic policy in which the party in power believes. If that be so, the effect of the amendment on the area over which the High Courts' powers prescribed by Article 226 operate, is incidental and in the present case can be described as of an insignificant order. The impugned Act does not purport to change the provisions of Article 226 and it cannot be said even to have that effect directly or in any appreciable measure. That is why we think that the argument that the impugned Act falls under the proviso, cannot be sustained ....."

[p. 944 (of SCR : (at p.853 of AIR)]

The propositions that fell for consideration in Sankari Prasad Singh's (AIR 1951 SC 458) and Sajjan Singh's AIR 1965 SC 845 cases are indeed different. There the jurisdiction and power of the Courts under Articles 136 and 226 were not sought to be taken away nor was there any change brought about in those provisions either "in terms or in effect", since the very rights which could be adjudicated under and enforced by the Courts were themselves taken away by the Constitution. The result was that there was no area for the jurisdiction of the Courts to operate upon. Matters are entirely different in the context of paragraph 7. Indeed the aforesaid cases,

by necessary implication support the point urged for the petitioners. The changes in Chapter IV of Part V and Chapter V of Part VI envisaged by the proviso need not be direct. The change could be either "in terms of or in effect". It is not necessary to change the language of Articles 136 and 226 of the Constitution to attract the proviso. If in effect these Articles are rendered ineffective and made inapplicable where these articles could otherwise have been invoked or would, but for Paragraph 7, have operated there is 'in effect' a change in those provisions attracting the proviso. Indeed this position was recognised in Sajjan Singh's case AIR 1965 SC 845 where it was observed:

"If the effect of the amendment made in the fundamental rights on Article 226 is direct and not incidental and is of a very significant order, different considerations may perhaps arise."

[p. 944 (of SCR : at p.853 of AIR)]

In the present cases, though the amendment does not bring in any change directly in the language of Articles 136, 226 and 227 of the Constitution, however, in effect paragraph 7 curtails the operation of those Articles respecting matters falling under the Tenth Schedule. There is a change in the effect in Articles 136, 226 and 227 within the meaning of clause (b) of the proviso to Article 368(2), Paragraph 7, therefore, attracts the proviso and ratification was necessary.

Accordingly, on Point B, we hold :

"That having regard to the background and evolution of the principles underlying the Constitution (52nd Amendment) Act, 1985, in so far as it seeks to introduce the Tenth Schedule in the Constitution of India, the provision of Paragraph 7 of the Tenth Schedule of the Constitution in terms and in effect bring about a change in the operation and effect of Articles 136, 226 and 227 of the Constitution of India and, therefore, the amendment would require to be ratified in accordance with the proviso to sub-Article (2) of Article 368 of the Constitution of India."

25. Re : Contentions 'C' and 'D':

The criterion for determining the validity of a law is the competence of the law-making authority. The competence of the law-making authority would depend on the ambit of the legislative power, and the limitations imposed thereon as also the limitations on mode of exercise of the power. Though the amending power in a constitution is in the nature of a constituent power and differs in content from the Legislative power, the limitations imposed on the constituent power may be substantive as well as procedural. Substantive limitations are those which restrict the field of exercises of the amending power and exclude some areas from its ambit.

Procedural limitations are those which impose restrictions with regard to the mode of exercise of the amending power. Both these limitations, however, touch and affect the constituent power itself, disregard of which invalidates its exercise.

26. **The Constitution provides for amendment in Articles 4, 169, 368, paragraph 7 of Fifth Schedule and paragraph 21 of Sixth Schedule. Article 4 makes provisions for amendment of the First and the Fourth Schedules, Article 169 provides for amendment in the provision of the Constitution which may be necessary for abolition or creation of Legislative Councils in States, paragraph 7 of the Fifth Schedule provides for amendment of the Fifth Schedule and paragraph 21 of Sixth Schedule provides for amendment of the Sixth Schedule. All these provisions prescribe that the said amendments can be made by a law made by Parliament which can be passed like any other law by a simple majority in the Houses of Parliament. Article 368 confers the power to amend the rest of the provisions of the Constitution. In sub-Article (2) of Article 368, a special majority -- two-thirds of the members of each House of Parliament present and voting and majority of total membership of such House -- is required to effectuate the amendments. The proviso to sub-article (2) of Article 368 imposes a further requirement that if any change in the provisions set out in clauses (a) to (e) of the proviso, is intended it would then be necessary that the amendment be ratified by the legislature of not less than one-half of the States.**

Although there is no specific enumerated substantive limitation on the power in Article 368, but as arising from very limitation in the word 'amend', a substantive limitation is inherent on the amending power so that the amendment does not alter the basic structure or destroy the basic features of the Constitution. The amending power under Article 368 is subject to the substantive limitation in that the basic structure cannot be altered or the basic features of the Constitution destroyed. The limitation requiring a special majority is a procedural one. Both these limitations impose a fetter on the competence of Parliament to amend the Constitution and any amendment made in disregard of these limitations would go beyond the amending power.

27. **While examining the constitutional validity of laws the principle that is applied is that if it is possible to construe a statute so that its validity can be sustained against a constitutional attack it should be so construed and that when part of a statute is valid and part is void, the valid part must be separated from the invalid part. This is done by applying the doctrine of severability. The rationale of this doctrine has been explained by Cooley in the following words:**

"It will sometimes be found that an act of the legislature is opposed in some of its provisions to the constitution, while others,

standing by themselves, would be unobjectionable. So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others. In any such case the portion which conflicts with the constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute must also be adjudged void because of the association must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. A statute, it has been said, is judicially held to be unconstitutional, because it is not within the scope of legislative authority; it may either propose to accomplish something prohibited by the constitution, or to accomplish some lawful, and even laudable object, by means repugnant to the Constitution of the United States or of the State. A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional."

[Cooley's Constitutional Limitations; 8th Edn. Vol. I, p. 359-360]

In R.M.D. Chamarbaugwalla vs. Union of India (1957 SCR 930: (AIR 1957 SC 628), this Court has observed:

"The question whether a statute, which is void in part is to be treated as void in toto, or whether it is capable of enforcement as to that part which is valid is one which can arise only with reference to laws enacted by bodies which do not possess unlimited powers of legislations, as, for example, the legislatures in a Federal Union. The limitation on their powers may be of two kinds : It may be with reference to the subject-matter on which they could legislate, as, for example, the topics enumerated in the Lists in the Seventh Schedule in the Indian Constitution, ss. 91 and 92 of the Canadian Constitution, and s. 51 of the Australian Constitution; or it may be with reference to the character of the legislation which they could enact in respect of subjects assigned to them, as for example, in relation to the fundamental reghts guaranteed in Part III of the Constitution and similar constitutionally protected rights in the American and other Constitutions. When a legislature whose authority is subject to limitations aforesaid enacts a law which is wholly in excess of its powers, it is entirely void and must be completely ignored. But where the legislation falls in part within the area allotted to it and in part outside it, it is undobutadly void as to the latter; but does it on that account become necessarily void in its entirety? The answer to this question must depend on whether what

is valid could be separated from what is invalid, and that is a question which has to be decided by the court on a consideration of the provisions of the Act." (p. 940 (of SCR) : at p.633 of AIR)

The doctraine of severability has been applied by this Court in cases of challenge to the validity of an amendment on the ground of disregard of the substantive limitations on the amending power, namely, alteration of the basic structure. But only the offending part of the amendment which had the effect of altering the basic structure was struck down while the rest of the amendment was upheld [See: Shri Kesavananda Bharti Sripadagalavaru] vs. State of Kerala, 1973 Supp. SCR 1 (AIR 1973 SC 1461): Minerva Mills Ltd. vs. Union of India 1981 (1) SCR 206 (AIR 1980 SC 1789); P.Sambhamurthy vs. State of Andhra Pradesh 1987 (1) SCR 879 AIR 1987 SC 663].

28. Is there anything in the procedural limitation imposed by sub-Article (2) of Article 368 which excludes the doctrine of severability in respect of a law which violates the said limitations? Such a violation may arise when there is a composite Bill or what is in statutory context or Jargon called a 'Rag-Bag' measure seeking amendments to several statutes under one amending measure which seeks to amend various provisions of the Constitution some of which may attract clauses (a) to (e) of the proviso to Article 368 (2) and the Bill, though passed by the requisite majority in both the Houses of Parliament has received the assent of the President without it being sent to States for ratification or having been so sent fails to receive such ratification from not less than half the States before the Bill is presented for assent. Such an Amendment Act is within the competence of Parliament insofar as it relates to provisions other than those mentioned in clauses (a) to (e) of proviso to Article 368(2) but in respect of the amendments introduced in provisions refered to in clauses (a) to (e) of proviso to Article 368(2), Parliament alone is not competent to make such amendments on account of some constitutionally recognised federal principle being invoked. If the doctrine of severability can be applied it can be upheld as valid in respect of the amendments within the competence of Parliament and only the amendments which Parliament alone was not competent to make could be declared invalid.

29. Is there anything compelling in the proviso to Article 368(2) requiring it to be construed as excluding the doctrine of severability to such an amendment? It is settled rule of statutory construction that "the proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case" and that where "the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms". [See: Madras & Southern Mahratta Railway Company vs. Bezwada Municipality, (1944) 71 I.A. 113 at p. 122 (AIR 1944 PC 71 at p.73); Commissioner of Income Tax, Mysore vs.

Indo-Mercantile Bank Ltd., 1959 Supp. (2) SCR 256 at p. 266 (AIR 1959 SC 713 at pp.717-18)].

The proviso to Article 368(2) appears to have been introduced with a view to giving effect to the federal principle. In the matter of amendment of provisions specified in clauses (a) to (e) relating to legislative and executive powers of the States vis-a-vis the Union, the Judiciary, the election of the President and the amendment power itself, which have bearing on the States, the proviso imposes an additional requirement of ratification of the amendment which seeks to effect a change in those provisions before the Bill is presented for the assent of the President. It is salutary that the scope of the proviso is confined to the limits prescribed therein and is not construed so as to take away the power in the main part of Article 368(2). An amendment which otherwise fulfils the requirements of Article 368(2) and is outside the specified cases which require ratification cannot be denied legitimacy on the ground alone of the company it keeps. The main part of Article 368(2) directs that when a Bill which has been passed by the requisite special majority by both the Houses has received the assent of the President "the Constitution shall stand amended in accordance with the terms of the Bill". The proviso cannot have the effect of interdicting this constitutional declaration and mandate to mean that in a case where the proviso has not been complied -- even the amendments which do not fall within the ambit of the proviso also become abortive. The words "the amendment shall also require to be ratified by the legislature" indicate that what is required to be ratified by the legislatures of the States is the amendment seeking to make the change in the provisions referred to in clauses (a) to (e) of the proviso. The need for and the requirement of the ratification is confined to that particular amendment alone and not in respect of amendments outside the ambit of the proviso. The proviso can have, therefore, no bearing on the validity of the amendments which do not fall within its ambit. Indeed the following observations of this Court in Sajjan Singh case (1965(1) SCR 933: AIR 1965 SC 845) (supra) are apposite:

"In our opinion, the two parts of Art. 368 must on a reasonable construction be harmonised with each other in the sense that the scope and effect of either of them should not be allowed to be unduly reduced or enlarged."

[p.940 (of SCR) : (at p.851 of AIR)]

30. During the arguments reliance was placed on the words "before the Bill making provision for such amendment is presented to the President for assent" to sustain the argument that these words imply that the ratification of the Bill by not less than one-half of the States is a condition-precedent for the presentation of the Bill for the assent of the President. It is further argued that a Bill which seeks to make a change in the provisions referred to in clauses (a) to (e) of the proviso cannot be presented before the President for his assent without such ratification and if assent is given by the President in the absence of such ratification, the amending Act would be void and ineffective in its entirety.

A similar situation can arise in the context of the main part of Article 368(2) which provides: "when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the Members of that House present and voting, it shall be presented to the President". Here also a condition is imposed that the Bill shall be presented to the President for his assent only after it has been passed in each House by the prescribed special majority. An amendment in the First and Fourth Schedules referable to Article 4 can be introduced by Parliament by an ordinary law passed by simple majority. There may be a Bill which may contain amendments made in the First and Fourth Schedules as well as amendments in other provisions of the Constitution excluding those referred to in the proviso which can be amended only by a special majority under Article 368(2) and the Bill after having been passed only by an ordinary majority instead of a special majority has received the assent of the President. The amendments which are made in the First and Fourth Schedules by the said amendment Act were validly made in view of Article 4 but the amendments in other provisions were in disregard to Article 368(2) which requires a special majority. Is not the doctrine of severability applicable to such an amendment so that amendments made in the First and Fourth Schedules may be upheld while declaring the amendments in the other provisions as ineffective? A contrary view excluding the doctrine of severability would result in elevating procedural limitation on the amending power to a level higher than the substantive limitations.

31. In Bribery Commissioner vs. Pedrick Ransinghe (1965 A.C. 172), the Judicial Committee has had to deal with a somewhat similar situation. This was a case from Ceylon under the Ceylon (Constitution) Order of 1946. Clause (4) of section 29 of the said Order in Council contained the amending power in the following terms:

"(4) In the exercise of its power under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of Her Majesty in Council in its application to the Island:

Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of Members of the House (including those not present).

Every certificate of the Speaker under this sub-section shall be conclusive for all purposes and shall not be questioned in any court of law."

[p.194)

In that case, it was found that section 41 of the Bribey Amendment Act, 1958 made a provision for appointment of a panel by the Governor-General on the advice of the Minister of Justice for selecting members of the Bribery Tribunal while section 55 of the Constitution vested the appointment, transfer, dismissal and disciplinary control of judicial officers in the Judicial

Service Commission. It was held that the legislature had purported to pass a law which, being in conflict with section 55 of the Order in Council, must be treated, if it is to be valid, as an implied alteration of the Constitutional provisions about the appointment of judicial officers and could only be made by laws which comply with the special legislative procedure laid down in section 29(4). Since there was nothing to show that the Bribery Amendment Act, 1951 was passed by the necessary two-third majority, it was held that "any Bill which does not comply with the condition precedent of the proviso, is and remains, even though it receives the Royal Assent, invalid and ultra virus". Applying the doctrine of severability the Judicial Committee, however, struck down the offending provision, i.e. section 41 alone. In other words passing of the Bill by a special majority was the condition precedent for presentation of the Bill for the assent. Disregard of such a condition precedent for presenting a Bill for assent did not result in the entire enactment being vitiated and the law being declared invalid in its entirety but it only had the effect of invalidation of a particular provision which offended against the limitation on the amending power. A comparison of the language used in clause (4) of section 29 with that of Article 368(2) would show that both the provisions bear a general similarity of purpose and both the provisions require the passing of the Bill by special majority before it was presented for assent. The same principle would, therefore, apply while considering the validity of a composite amendment which makes alterations in the First and Fourth Schedules as well as in other provisions of the Constitution requiring special majority under Article 368(2) and such a law, even though passed by the simple majority and not by special majority, may be upheld in respect of the amendments made in the First and Fourth Schedules. There is really no difference in principle between the condition requiring passing of the Bill by a special majority before its presentation to the President for assent contain in Article 368(2) and the condition for ratification of the amendment by the legislatures of not less than one-half of the States before the Bill is presented to the President for assent contained in the proviso. The principle of severability can be equally applied to a composite amendment which contains amendments in provisions which do not require ratification by States as well as amendment in provisions which require such ratification and by application of the doctrine of severability, the amendment can be upheld in respect of the amendments which do not require ratification and which are within the competence of Parliament alone. Only these amendments in provisions which require ratification under the proviso need to be struck down or declared invalid.

32. The test of severability requires the Court to ascertain whether the legislature would at all have enacted the law if the severed part was not the part of the law and whether after severance what survives can stand independently and is workable. If the provisions of the Tenth Schedule are considered in the background of the legislative history, namely, the report of the 'Committee on Defections as well as the earlier Bills which were moved to curb the evil of defection it would be evident that the main purpose underlying the constitutional amendment and introduction of the Tenth

Schedule is to curb the evil of defection which was causing immense mischief in our body-politic. The ouster of jurisdiction of Courts under Paragraph 7 was incidental to and to lend strength to the main purpose which was to curb the evil of defection. It cannot be said that the constituent body would not have enacted the other provisions in the Tenth Schedule if it had known that Paragraph 7 was not valid. Nor can it be said that the rest of the provisions of the Tenth Schedule cannot stand on their own even if Paragraph 7 is found to be unconstitutional. The provisions of Paragraph 7 can, therefore, be held to be severable from the rest of the provisions.

We accordingly hold on contentions 'C' and 'D':

"That there is nothing in the said proviso to Article 368(2) which detracts from the severability of a provision on account of the inclusion of which the Bill containing the Amendment requires ratification from the rest of the provisions of such Bill which do not attract and require such ratification. Having regard to the mandatory language of Article 368 (2) that "thereupon the Constitution shall stand amended" the operation of the proviso should not be extended to constitutional amendments in a Bill which can stand by themselves without such ratification.

That, accordingly, the Constitution (52nd Amendment) Act, 1985, in so far as it seeks to introduce the Tenth Schedule in the Constitution of India, to the extent of its provisions which are amenable to the legal-sovereign of the amending process of the Union Parliament cannot be overborne by the proviso which cannot operate in that area. There is no justification for the view that even the rest of the provisions of the Constitution (52nd Amendment) Act, 1985, excluding Paragraph 7 of the Tenth Schedule become constitutionally infirm by reason alone of the fact that one of its severable provisions which attracted and required ratification under the proviso to Article 368(2) was not so ratified.

That Paragraph 7 of the Tenth Schedule contains a provision which is independent of, and stands apart from, the main provisions of the Tenth Schedule which are intended to provide a remedy for the evil of unprincipled and unethical political defections and, therefore, is a severable, part. The remaining provisions of the Tenth Schedule can and do stand independently of Paragraph 7 and are complete in themselves workable and are not truncated by the excision of Paragraph 7."

33. Re: Contentions 'E' and 'F':

These two contentions have certain over-lapping areas between them and admit of being dealt with together. Paragraph 6(1) of the Tenth Schedule seeks to impart a statutory finality to the decision of the Speaker or the Chairman. The argument is that, this concept of 'finality' by itself, excludes Courts' jurisdiction. Does the word "final" render the decision of the Speaker immune from Judicial Review? It is now well-accepted that a finality clause is not a legislative magical incantation which has that effect of telling off Judicial Review. Statutory finality of a decision presupposes and is subject to

its consonance with the statute. On the meaning and effect of such finality clause, Prof. Wade in 'Administrative Law' 6th Edn. at page 720 says:

"Many statutes provides that some decision shall be final. That provision is a bar to any appeal. But the courts refuse to allow it to hamper the operation of judicial review. As will be seen in this and the following sections, there is a firm judicial policy against allowing the rule of law to be undermined by weakening the powers of the court. Statutory restrictions on judicial remedies are given the narrowest possible construction, sometimes even against the plain meaning of the words. This is a sound policy, since otherwise administrative authorities and tribunals would be given uncontrollable power and could violate the law at will. 'Finality is a good thing but justice is a better.

"If a statute says that the decision 'shall be final' or 'shall be final and conclusive to all intents and purposes' this is held to mean merely that there is no appeal: judicial control of legality is unimpaired. "Parliament only gives the impress of finality to the decisions of the tribunal on condition that they are reached in accordance with the law. This has been the consistent doctrine for three hundred years."

Learned Professor further says:

"The normal effect of a finality clause is therefore to prevent any appeal. There is no right of appeal in any case unless it is given by statute. But where there is general provision for appeals, for example, from quarter sessions to the High Court by case stated, a subsequent Act making the decision of quarter session final on some specific matter will prevent an appeal. But in one case the Court of Appeal has deprived a finality clause of part even of this modes content, holding that a question which can be resolved by certiorari or declaration can equally well be the subject of a case stated, since this is only a matter of machinery. This does not open the door to appeals generally, but only to appeals by case stated on matters which could equally well be dealt with by certiorari or declaration, i.e., matters subject to judicial review.

"A provision for finality may be important in other contexts, for example when the question is whether the finding of one tribunal may be reopened before another, or whether an interlocutory order is open to appeal....."

[page 721]

Lord Devlin had said "Judicial interference with the executive cannot for long greatly exceed what Whitehall will accept'" and said that a decision may be made un-reviewable "And that puts the lid on". Commenting on this Prof. Wade says: "But the Anisminic case showed just the opposite, when the House of Lords removed the lid and threw it away." [See: Constitutional Fundamental, the Hamlyn Lectures, 1989 Edn. p. 881].

In Durga Shankar Mehta v. Raghuraj Singh [AIR 1954 SC 520] the order of the Election Tribunal was made final and conclusive by s. 105 of the

Representation of the People Act, 1951. The contention was that the finality and conclusiveness clauses barred the jurisdiction of the Supreme Court under Article 136. This contention was repelled. It was observed:

"..... but once it is held that it is a judicial tribunal empowered and obliged to deal judicially with disputes arising out of or in connection with election, the overriding power of this Court to grant special leave, in proper cases, would certainly be attracted and this power cannot be excluded by any parliamentary legislation.

..... But once that Tribunal has made any determination or adjudication on the matter, the powers of this Court to interfere by way of special leave can always be exercised.

..... The powers given by Article 136 of the Constitution, however, are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law, in cases where the needs of justice demand interference by the Supreme Court of the land.....

Section 105 of the Representation of the People Act certainly gives finality to the decision of the Election Tribunal so for as that Act is concerned and does not provide for any further appeal but that cannot in any way cut down or affect the overriding powers which this court can exercise in the matter of granting special leave under Art. 136 of the Constitution."

[p. 522]

34. Again, in Union of India v. Jyothi Prakash Mitter [1971] (3) SCR 483 : (AIR 1971 SC 1093)] a similar finality clause in Article 217(3) of the Constitution came up for consideration. This court said:

"..... The President acting under Article 217(3) performs a judicial function of grave importance under the scheme of our Constitution. He cannot act on the advice of his Ministers. Notwithstanding the declared finality of the order of the President the Court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral considerations or the rules of natural justice were not observed, or that the President's judgment was coloured by the advice or representation made by the executive or it was founded on no evidence....."

[p. 505 (of SCR) : (at p.1106 of AIR)]

Referring to the expression "final" occurring in Article 311(3) of the Constitution this Court in Union of India vs. Tulsiram Patel Ors. [(1985)] Supp. 2 SCR 131 at page 274 (AIR 1985 SC 1416 at p.1481) held:

"..... The finality given by clause (3) of Article 311 to the disciplinary authority's decision that it was not reasonably practicable to hold the inquiry is not binding upon the court. The court will also examine the charge of mala fides, if any, made in the writ petition. In examining the relevancy of the reasons, the court will consider the situation which according to the disciplinary authority made it come to the conclusion that it was not reasonably prcticable to hold the inquiry. If the court finds that the reasons

are irrelevant, then the recording of its satisfaction by the disciplinary authority would be an abuse of power conferred upon it by clause (b)....."

35. If the intendment is to exclude the jurisdiction of the superior Courts, the language would quite obviously have been different. Even so, where such exclusion is sought to be effected by an amendment the further question whether such an amendment would be destructive of a basic feature of the Constitution would arise. But comparison of the language in Article 363(1) would bring out in contrast the kind of language that may be necessary to achieve any such purpose.

In Brundaban Nayak vs. Election Commission of India [1965 (3) SCR 53 : (AIR 1965 SC 1892)], in spite of finality attached by Article 192 to the decision of the Governor in respect of disqualification incurred by a member of a State Legislature subsequent to the election, the matter was examined by this Court on an appeal by special leave under Article 136 of the Constitution against the decision of the High Court dismissing the writ petition filed under Article 226 of the Constitution. Similarly in Union of India vs. Jyoti Prakash Mitter (1971 (3) SCR 483 : (AIR 1971 SC 1093), in spite of finality attached to the order of the President with regard to the determination of age of Judge of the High Court under Article 217 (3) of the Constitution, this Court examined the legality of the order passed by the President during the tendency of an appeal filed under Article 136 of the Constitution.

There is authority against the acceptability of the argument that the word "final" occuring in Paragraph 6(1) has the effect of excluding the jurisdiction of the Courts in Articles 136, 226 and 227.

36. The cognate questions are whether a dispute of the kind envisaged by Paragraph 6 of the Tenth Schedule is in a non-justiciable area and that, at all events, the fiction in Paragraph 6(2) that all proceedings under Paragraph 6(1) of the Tenth Schedule be deemed to be "proceedings in Parliament" or "Proceedings in the Legislature of a State" attracts immunity from the scrutiny by Courts as under Article 122 or 212, as the case may be.

Implicit in the first of these postulates is the premise that questions of disqualification of members of the House are essentially matters pertaining to the Constitution of the House and, therefore, the Legislature is entitled to exert its exclusive power to the exclusion of the judicial power. This assumption is based on certain British legislature practices of the past in an area which is an impalpable congeries of legal rules and conventions peculiar to and characteristic of British Parliamentary traditions. Indeed, the idea appears to have started with the proposition that the Constitution of the House was itself a matter of privilege of the House. Halsbury contains this statement:

"1493. Privilege of the House of Commons in relation to its constitution: In addition to possessing a complete control over the regulation of its own proceedings and the conduct of its members, the House of Commons claims

the exclusive right of providing, as it may deem fit, for its own proper constitution."

[emphasis supplied]

[See: Halsbury's Laws of England, 4th Edn. vol. 34 pages 603 & 604]

But in the Indian Constitutional dispensation the power to decide a disputed disqualification of an elected member of the House is not treated as a matter of privilege and the power to resolve such electoral disputes is clearly judicial and not legislative in nature. The fact that election disputes were at some stage decided by the House of Commons itself was not conclusive that even their power was legislative. The controversy, if any, in this area is put at rest by the authoritative earlier pronouncements of this court.

37. In Indira Nehru Gandhi v. Raj Narain [1976] (2) SCR 347 : (AIR 1975 SC 2299) Beg. J., referring to the historical background relating to the resolution of electoral disputes by the House of Commons said:

"I do not think that it is possible to contend, by resorting to some concept of a succession to the powers of the medieval "High Court of Parliament" in England, that a judicial power also devolved upon our Parliament through the Constituent Assembly, mentioned in Sec.8 of the Indian Independence Act of 1947. As already indicated by me, the Constituent Assembly was invested with law making and not judicial powers. Whatever judicial power may have been possessed once by English kings, sitting in Parliament, constituting the highest Court of the realm in medieval England, have devolved solely on the House of Lords as the final court of appeal in England. "King in Parliament" had ceased to exercise judicial powers in any other way long before 1950. And, the House of Commons had certainly not exercised a judicial power as a successor to the one time jurisdiction of the "King in Parliament" with the possible exception of the power to punish for its contempts....."

[p. 627 & 628 (of SCR) : (at p.2448 of AIR]

In the same case, Justice Mathew made these observations as to the imperative judicial nature of the power to resolve disputes:

"The concept of democracy as visualised by the Constitution presupposes the representation of the people in Parliament and State Legislatures by the method of election. And, before an election machinery can be brought into operation, there are three requisites which require to be attended to, namely, (1) there should be a set of laws and rules making provisions with respect to all matters relating to, or in connection with, elections, and it should be decided as to how these laws and rules are to be made; (2) there should be an executive charged with the duty of securing the due conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections..."

[p. 504 (of SCR) : (at pp.2372-73 off AIR)]

"In whichever body or authority, the jurisdiction is vested, the exercise of the jurisdiction must be judicial in character. This court has held that in adjudicating an election dispute an authority is performing a judicial function and a petition for leave to appeal under Article 136 of the Constitution would lie to this Court against the decision notwithstanding the provisions of Article 329(b)."

[Emphasis supplied]

[p. 506 (of SCR) : (at p.2373 of AIR)]

It is also useful to recall the following observations of Gajendragadkar. J., on the scope of Article 194(3) of the Constitution, which is analogous to Article 105(3) in Special Reference No.1 of 1964 (1965) (1) SCR 413 : (AIR 1965 SC 745):

"This clause requires that the powers, privileges and immunities which are claimed by the House must be shown to have subsisted at the commencement of the Constitution, i.e., on January 26, 1950. It is well-known that out of a large number of privileges and powers which the House of Commons claimed during the days of its bitter struggle for recognition, some were given up in course of time, and some virtually faded out by desuetude; and so, in every case where a power is claimed, it is necessary to enquire whether it was an existing power at the relevant time. It must also appear that the said power was not only claimed by the House of Commons, but was recognised by the English Courts. It would obviously be idle to contend that if a particular power which is claimed by the House was claimed by the House of Commons but was not recognised by the English Courts, it would still be upheld under the latter part of clause (3) only on the ground that it was in fact claimed by the House of Commons. In other words, the inquiry which is prescribed by this clause is: is the power in question shown or proved to have subsisted in the House of Commons at the relevant time?"

(See page 442 of CSR) : (at p.761 of AIR)

This question is answered by Beg, J. in Indira Nehru Gandhi's case (1976(2) SCR 347 : AIR 1975 SC 2299):

"I think, at the time our Constitution was framed, the decision of an election dispute had ceased to be a privilege of the House of Commons in England and therefore, under Article 105(3), it could not be a privilege of Parliament in this country."

[p. 505 (of SCR) : (at p.2373 of AIR)]

38. Indeed, in dealing with the disqualifications and the resolution of disputes relating to them under Articles 191 and 192 or Articles 102 and 103, as the case may be, the Constitution has evinced a clear intention to resolve electoral-disputes by resort to the judicial power of the State. Indeed, Justice Khanna in Indira Nehru Gandhi's case said:

"Not must argument is needed to show that unless there be a machinery for resolving an election dispute and for going into the allegations that elections were not free and fair being vitiated by malpractices, the provision that a candidate should not resort to malpractices would be in the nature of a mere pious wish without any legal sanction. It is further plain that if the validity of the election declared to be valid only if we provide a forum for going into those grounds and prescribe a law for adjudicating upon those grounds....." (See page 468).

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 classic exposition of Justice Issacs J., in Australian Boot Trade Employees Federation v. Whybrow & Co., [([1910) 10 C L R 266 at page 317], as to what distinguishes a judicial power from a legislative power was referred to with the approval of this Court in Express Newspaper Ltd. v. Union of India (AIR 1958 SC 578 at 611). Issacs J. stated:

"If the dispute is as to the relative rights of parties as they rest on past or present circumstances, the award is in the nature of a judgment, which might have been the decree of an ordinary judicial tribunal acting under the ordinary judicial power. There the law applicable to the case must be observed. If, however, the dispute is as to what shall in the future be the mutual rights and responsibilities of the parties - in other words, if no present rights are asserted or denied, but a future rule of conduct is to be prescribed, thus creating new rights and obligations, with sanctions for nonconformity then the determination that so prescribes, call it an award, or arbitration, determination, or decision or what you will, is essentially of a legislative character, and limited only by the law which authorises it. If, again, there are neither present rights asserted, nor a future rule of conduct prescribed, but merely a fact ascertained necessary for the practical effectuation of admitted rights, the proceeding, though called an arbitration, is rather in the nature of an appraisement or ministerial act.".

In the present case, the power to decide disputed disqualification under Paragraph 6(1) is preeminently of a judicial complexion.

39. The fiction in Paragraph 6(2), indeed, places it in the first clause of Article 122 or 212, as the case may be. The words "proceedings in Parliament" or "proceedings in the legislature of a State" in Paragraph 6(2) have their corresponding expression in Articles 122(1) and 212(1) respectively. This attracts an immunity from mere irregularities of procedures.

That apart, even after 1986 when the Tenth Schedule was introduced, the Constitution did not evince any intention to invoke Article 122 or 212 in the conduct of resolution of disputes as to the disqualification of members under Articles 191(1) and 102(1). The very deeming provision implies that the proceedings of disqualification are, in fact, not before the House; but only before the Speaker as a specially designated authority. The decision under

paragraph 6(1) is not the decision of the House, nor is it subject to the approval by the House. The decision operates independently of the House. A deeming provision cannot by its creation transcend its own power. There is, therefore, no immunity under Articles 122 and 212 from judicial scrutiny of the decision of the Speaker or Chairman exercising power under Paragraph 6(1) of the Tenth Schedule.

40. But then is the Speaker or the Chairman acting under Paragraph 6(1) a Tribunal? "All tribunals are not courts, though all Courts are Tribunals". The word "Courts" is used to designate those Tribunals which are set up in an organised State for the Administration of Justice. By Administration of Justice is meant the exercise of judicial power of the State to maintain and uphold rights and to punish "wrongs". Whenever there is an infringement of a right or an injury, the Courts are there to restore the vinculum juries, which is disturbed. (See: Harinagar Sugar Mills Ltd. v. Shyam Sunder Jhunjhunwala [1962 (2) SCR 339]. In that case Hidayatullah, J. said:

"..... By "courts" is meant courts of civil judicature and by "tribunals", those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. Broadly speaking, certain special matters go before tribunals, and the residue goes before the ordinary courts of civil judicature. Their procedures may differ, but the functions are not essentially different. What distinguishes them has never been successfully established. Lord Stamp said that the real distinction is that the courts have "an air of detachment". But this is more a matter of age and tradition and is not of the essence. Many tribunals, in recent years, have acquitted themselves so well and with such detachment as to make this test insufficient."

[p. 362]

Where there is a list - an affirmation by one party and denial by another - and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is a exercise of judicial power. That authority is called a Tribunal, if it does not have all the trappings of a Court. In associated Cement Companies Ltd. vs. P.N. Sharma. [1965(2) SCr 366, this Court said:

"..... The main and the basic test, however, is whether the adjudicating power which a particular authority is empowered to exercise, has been conferred on it by a statute and can be described as a part of the State's inherent power exercised in discharging its judicial function. Applying this test, there can be no doubt that the power which the State Government exercises under R.6(5) and R. 6(6) is a part of the State's judicial power..... There is, in that sense, a lis; there is affirmation by one party and denial by another, and the dispute necessarily involves the rights and obligations of the

parties to it. The order which the State Government ultimately passes is described as its decision and it is made final and binding ....."

[p. 363 and 387]

By these well-known and accepted tests of what constitute a Tribunal, the Speaker or the Chairman, acting under paraghaph 6(1) of the Tenth Schedule is a Tribunal.

41. In the operative conclusions we pronounced on 12th November, 1991 we indicated in clauses G and H therein that judicial review in the area is limited in the manner indicated. If the adjudicatory authority is a tribunal, as indeed we have held it to be, why, then, should its scope be so limited? The finality clause in paragraph 6 does not completely exclude the jurisdiction of the courts under Articles 136, 226 and 227 of the Constitution. But it does have the effect of limiting the scope of the jurisdiction. The principle that is applied by the courts is that in spite of a finality clause it is open to the court to examine weather the action of the authority under challenge is ultra vires the powers conferred on the said authority. Such an action can be ultra vires for the reason that it is in contravention of a mandatory provision of the law conferring on the authority the power to take such an action. It will also be ultra vires the powers conferred on the authority if it is vitiated by mala fides or is colourable exercise of power based on extraneous and irrelevant considerations. While exercising their certiorari jurisdiction, the courts have applied the test whether the impugned action falls within the jurisdiction of the authority taking the action or it falls outside such jurisdiction. An ouster clause confines judicial review in respect of actions falling outside the jurisdiction of the authority taking such action but precludes challenge to such action on the ground of an error committed in the exercise of jurisdiction vested in the authority because such an action cannot be said to be an action without jurisdiction. An ouster clause attaching finality to a determination, therefore, does oust certiorari to some extent and it will be effective in outsting the power of the court to review the decision of an inferior tribunal by certiorari if the inferior tribunal has not acted without jurisdiction and has merely made an error of law which does not effect its jurisdiction and if its decision is not a nullity for some reason such as breach of rule of natural justice. [See : Administrative Law by H.W.R. Wade, 6th Edn., pp. 724-726; Anisminic Ltd. vs. Foreign Compensation Commission, 1969 (2) AC 147; S.E. Asia Fire Bricks vs. Non-Metallic Products, 1981 A.C. 363.]

In Makhan Singh vs. State of Punjab [1964 (4) SCR 797], while considering the scope of judicial review during the operation of an order passed by the President under Article 359 (1) suspending the fundamental right guaranteed under Article 21 of the Constitution, it has been held that the said order did not preclude the High Court entertaining a petition under Article 226 of the Constitution where a detenue had been detained in violation of the mandatory provisions of the detention law or where the detention has been ordered malafide. It was emphasised that the exercise of a

power malafide was wholly outside the sope of the Act conferring the power and can always be successfully challenged. (p. 828)

Similarly in State of Rajasthan vs. Union of India [1978 (1) SCR 1], decided by a seven-judge Bench, this court was considering the challenge to the validity of a proclamation issued by the President of India under Article 356 of the Consitution. At the relevant time under clause (5) of Article 356 the satisfaction of the President mentioned in clause (1) was final and conclusive and it could not be questioned in any court on any ground. All the learned judges have expressed the view that the proclamation could be open to challenge if it is vitiated by malafides. While taking this view, some of the learned judges have made express reference to the provisions of clause (5).

In this context, Bhagwati, J (as the learned Chief Justice then was) speaking for himself and A.C. Gupta, J. has stated:

"Of course by reason of cl. (5) of Art. 356, the satisfaction of the President is final and conclusive and cannot be assailed on any ground but this immunity from attack cannot apply where the challenge is not that the satisfaction is improper or unjustified, but that there is no satisfaction at all. In such a case it is not the satisfaction arrived at by the President which is challenged, but the existence of the satisfaction itself. Take, for example, a case where the President gives the reason for taking action under Art. 356, cl. (1) and says that he is doing so, because the Chief Minister of the State is below five feet in height and, therefore, in his opinion a situation has arisen where the Government of the State cannot be carried on in accordance with the provisions of the Constitution. Can the so called satisfaction of the President in such a case not be challenged on the ground that it is absurd or perverse or mala fide or based on a wholly extraneous and irrelevant ground and is, therefore, no satisfaction at all." (pp. 82-83).

Untwalia, J. has held as follows:

"I, however, must hasten to add that I cannot persuade myself to subscribe to the view that under no circumstances an order of proclamation made by the President under Article 356 can be challenged in a Court of Law. And, I am saying so notwitstanding the provision contained in clause (5) of the said Article introduced by the Constitution (38th Amendment) Act, 1975." (p. 94).

"But then, what did I mean by saying that a situation may arise in a given case where the jurisdiction of the Court is not completely ousted? I mean this. If, without entering into the prohibited area, remaining on the fence, almost on the face of the impunged order or the threatened action of the President it is reasonably possible to say that in the eye of law it is no order or action as it is in flagrant violation of the very words of a particulars Article, justifying the conclusion that the order is ultra virus, wholly illegal or passed mala fide, in such a situation it will be tantamount in law to be no order at all. Then this Court is not powerless to interfere with such an order and may, rather, must strike it down." (p. 95)

Similarly, Fazal Ali, J. has held:

"Even if an issue is not justiciable, if the circumstances relied upon by the executive authority are absolutely extraneous and irrelevant, the Courts have the undoubted power to scrutinise power. Such a judicial scrutiny is one which comes into operation when the exercise of the executive power is colourable or mala fide and based on extraneous or irrelevant considerations." (p. 116)

"It is true that while an order passed by the President under Article 356 is put beyond judicial scrutiny by cl. (5) of Art. 356, but this does not mean that the Court possesses no jurisdiction in the matter at all. Even in respect of cl. (5) of Art. 356, the Courts have a limited sphere of operation in that on the reasons given by the President in his order if the Courts find that they are absolutely extraneous and irrelevant and based on personal and illegal considerations the Courts are not powerless to strike down the order on the ground of mala fide if proved." (p 120)

In Union of India vs. Jyoti Prakash Mitter (supra), dealing with the decision of the President under Article 217 (3) on the question as to the age of a judge of the High Court, requiring a judicial approach it takes held that the field of judicial review was enlarged to cover violation of rules of natural justice as well as an order based on no evidence because such errors are errors of jurisdiction.

In Union of India vs. Tulsiram Patel (supra) this Court was dealing with Article 311 (3) of the Constitution which attaches finality to the order of the disciplinary authority on the question whether it was reasonably practicable to hold an inquiry. It was observed that though the 'finality' clause did not bar jurisdiction it did indicate that the jurisdiction is limited to certain grades.

In the light of the decisions referred to above and the nature of function that is exercised by the Speaker/Chairman under paragraph 6 the scope of judicial review under Articles 136, and 226 and 227 of the Constitution in respect of an order passed by the Speaker/Chairman under paragraph 6 would be confined to jurisdictional errors only viz., infirmities based on violation of constitutional mandate, mala fides, non-compliance with rules of natural justice and perversity.

In view of the limited scope of judicial review that is available on account of the finality clause in paragraph 6 and also having regard to the constitutional intendment and the status of the repository of the adjudicatory power i.e. Speaker/Chairman, judicial review cannot be available at a stage prior to the making of a decision by the Speaker/Chairman and a quia timet action would not be permissible. Nor would interference be permissible at an interlocutory stage of the proceedings. Exception will, however, have to be made in respect of cases where disqualification or suspension is imposed during the pendency of the proceedings and such disqualification or suspension is likely to have grave, immediate and irreversible repercussions and consequence.

42. In the result, we hold on contentions E and F:

That the Tenth Schedule does not, in providing for an additional grant for disqualification and for adjudication of disputed disqualifications, seek to create a non justiciable constitutional area. The power to resolve such disputes vested in the Speaker or Chairman as a judicial power.

That Paragraph 6 (1) of the Tenth Schedule, to the extent it seeks to impart finality to the decision of the Speakers/Chairman is valid. But the concept of statutory finality embodied in Paragraph 6 (1) does not detract from or abrogate judicial review under Articles 136, 226 and 227 of the Constitution in so far as infirmities based on violations of constitutional mandates, mala fides, non-compliance with Rules of Natural Justice and perversity, are concerned.

That the deeming provision in Paragraph 6 (2) of the Tenth Schedule attracts an immunity analogous to that in Articles 122 (1) and 212 (1) of the Constitution as understood and explained in Keshav Singh's Case (Spl. Ref. No. 1, (1965 (1) SCR 413) to protect the validity of proceedings from mere irregularities of procedure. The deeming provision, having regarding to the words "be deemed to be proceedings in Parliament" or "proceedings in the Legislature of a State" confines the scope of the fiction accordingly.

The Speakers/Chairmen while exercising powers and discharging functions under the Tenth Schedule act as Tribunal adjudicating rights and obligations under the Tenth Schedule and their decisions in that capacity are amenable to judicial review.

However, having regard to the Constitutional Schedule in the Tenth Schedule, judicial review should not cover; any stage prior to the making of a decision by the Speakers/Chairmen. Having regard to the constitutional intendment and the status of the repository of the adjudicatory power, no quia timet actions are permissible, the only exception for any interlocutory interference being cases of interlocutory disqualifications or suspensions which may have grave, immediate and irreversible repurcussions and consequence.

43. Re : Contention (G) :

The argument is that an independent adjudicatory machinery for resolution of electoral disputes is an essential incident of democracy, which is a basic feature of Indian constitutionalism. It is urged that investiture of the power of resolving such disputes in the Speaker or the Chairman does not answer this test of an independent, impartial quality of the adjudicatory machinery. It is, therefore, urged that Paragraph 6 (1) of the Tenth Schedule is violative of a basic feature.

It is also urged that a Speaker, under the Indian Parliamentary tradition is not required to resign his membership of the political party on whose strength he gets elected and that inevitably the decision of the Speaker is not free from the tugs and pulls of political polarisations. It is urged that the Speaker who has not resigned his membership of the political party cannot be

impartial and, at all events, his functioning will not be free from reasonable likelihood of bias.

44. The Tenth Schedule breaks away from the constitutional pattern for resolution disqualifications envisaged in Articles 103 and 192 of the Constitution which vest jurisdiction in this behalf in the President or the Governor acting according to the opinion of Election Commission. The disqualifications for defection could very well have been included in Article 102 (1) or 191 (1) as a ground, additional to the already existing grounds under clauses (a) to (e) in which event, the same dispute resolution machinery would have dealt with the disqualifications for defections also. But the Tenth Schedule, apparently, attempted a different experiment in respect of this particular ground of disqualification.

45. The question is, whether the investiture of the determinative jurisdiction in the Speaker would by itself stand vitiated as denying the idea of an independent adjudicatory authority. We are afraid the criticism that the provision incurs the vice of unconstitutionality ignores the high status and importance of the office of the Speaker in a Parliamentary democracy. The office of the Speaker is held in the highest respect and esteem in Parliamentary traditions. The evolution of the institution of Parliamentary democracy has as its pivot the institution of the Speaker. 'The Speaker holds a high, important and ceremonial office. All questions of the well being of the House are matters of Speaker's concern'. The Speaker is said to be the very embodiment of propriety and impartiality. He performs wide ranging functions including the performance of important functions of a judicial character.

Mavalankar, who was himself a distinguished occupant of that high office, says :

"In parliamentary democracy, the office of the Speaker is held in very high esteem and respect. There are many reasons for this. Some of them are purely historical and some are inherent in the concept of parliamentary democracy and the powers and duties of the Speaker. Once a person is elected Speaker, he is expected to be above parties, above politics. In other words he belongs to all the members or belongs to none. He holds the scales of justice evenly irrespective of party or person, though no one expects that he will do absolute justice in all matters; because, as a human being he has his human drawbacks and shortcomings. However, everybody knows that he will intentionally do no injustice or show partiality. "Such a person is naturally held in respect by all."

[See : G.V. Mavalankar : The Office of Speaker, Journal of Parliamentary Information, April 1956, Vol. 2, No. 1, p.331]

Pandit Nehru referring to the office of the Speaker said :

".... The Speaker represents the House. He represents the dignity of the House, the freedom of the House and because the House represents the nation, in a particular way, the Speaker becomes the symbol of the nation's

freedom and liberty. Therefore, it is right that should be an honoured position, a free position and should be occupied always by men of outstanding ability and impartiality".

[See : HOP. Deb. Vol. IX (1954), CC 3447-48]

Referring to the Speaker, Erskine May says :

"The Chief characteristics attaching to the office of Speaker in the House of Commons are authority and impartiality. As a symbol of his authority he is accompanied by the Royal Mace which is borne before him when entering and leaving the chamber and upon state occasions by the Serjeant at Arms attending the House of Commons, and is placed upon the table when he is in the chair. In debate all speeches are addressed to him and he calls upon Members to speak – a choice which is not open to dispute. When he rises to preserve order or to give a ruling on a doubtful point he must always be heard in silence and no Member may stand when the Speaker is on his feet. Reflections upon the character or actions of the Speaker may be punished as breaches of privilege. His action cannot be criticised incidentally in debate or upon any form of proceeding except a substantive motion. His authority in the chair is fortified by many special powers which are referred to below. Confidence in the impartiality of the Speaker is an indepensable condition of the successful working of procedure, and many conventions exist which have as their object not only to ensure the impartiality of the Speaker but also to ensure that his impartiality is generally recognised...."

[See : Erskine May - Parliamentary Practice - 20th edition p.234 and 235] and M.N. Kaul and S.L. Shakdher in 'Practice and Procedure of Parliament' 4th Edition, say:

"The all important conventional and ceremonial head of Lok Sabha is the Speaker. Within the walls of the House his authority is supreme. This authority is based on the Speaker's absolute and unvarying impartiality – the main feature of his office, the law of its life. This obligation of impartiality appears in the constitutional provision which ordains that the Speaker is entitled to vote only in the case of equality of votes. Moreover, his impartiality within the House is secured by the fact that he remains above all considerations of party or political career, and to that effect he may also resign from the party to which he belonged."

[p. 104]

46. It would, indeed, be unfair to the high traditions of that great office to say that the investiture in its of this jurisdiction would be vitiated for violation of a basic feature of democracy. It is inappropriate to express distrust in the high office of the Speaker, merely because some of the Speakers are alleged, or even found, to have discharged their functions not in keeping with the great traditions of that his office. The Robes of the Speaker do change and elevate the man inside.

47. Accordingly, we hold that the vesting of adjudicatory functions in the Speakers/Chairman would not by itself vitiate the provision on the ground of likelihood of political bias is unsound and is rejected. The Speakers/Chairman hold a pivotal position in the scheme of Parliamentary democracy and are guardians of the rights and privileges of the House. They are expected to and do take far reaching decisions in the functioning of Parliamentary democracy. Vestiture of power of adjudicate questions under the Tenth Schedule in such a constitutional functionaries should not be considered exceptionable.

48. Re : Contention H :

In the view we take of the validity of paragraph 7 it is unnecessary to pronounce on the contention whether judicial review is a basic feature of the Constitution and paragraph 7 of the Tenth Schedule violates such basic structure.

49. We may now notice one other contention as to the construction of the expression 'any direction' occurring in paragraph 2(1)(b). It is argued that if the expression really attracts within its sweep every direction or whip of any kind whatsoever it might be unduly restrictive of the freedom of speech and the right of dissent and that, therefore, should be given a meaning limited to the objects and purposes of the Tenth Schedule. Learned counsel relied upon the commended to us the view taken by the minority in the Full Bench decision of Punjab and Haryana High Court in Parkash Singh Badal v. Union of India [AIR 1987 Punjab and Haryana 263] where such a restricted sense was approved. Tewatia J said :

"If the expression: "any direction" is to be literally construed then it would make the people's representative a wholly political party's representative, which decidedly he is not. The Member would virtually lose his identity and would become a rubber stamp in the hands of his political party. Such interpretation of this provision would cost it, its constitutionality, for in that sense it would become destructive of democracy/parliamentary democracy, which is the basic feature of the Constitution. Where giving of narrow meaning and reading down of the provision can save it from the vice of unconstitutionality the Court should read it down particularly when it brings the provisions in line with the avowed legislative intent....."

"..... the purpose of enacting paragraph 2 could be no other than to insure stability of the democratic system, which in the context of Cabinet/Parliamentary form of Government on the one hand means that a political party or a coalition of political parties which has been voted to power, is entitled to govern till the next election, and on the other, that opposition has a right to censure the functioning of the Government and even overthrow it by voting it out of power if it had lost the confidence of the people, then voting or abstaining from voting by a Member contrary to any direction issued by his party would by necessary implication envisage voting or abstaining from voting in regard to a motion or proposal, which if failed, as a result of lack of requisite support in the House, would result in voting the Government out of power, which consequence necessarily follows due to well

established constitutional convention only when either a motion of no confidence is passed by the House or it approves a cut-motion in budgetary grants. Former because of the implications of Article 75(3) of the Constitution and latter because no Government can function without money and when Parliament declines to sanction money, then it amounts to an expression of lack of confidence in the Government. When so interpreted the clause (b) of sub-paragraph (1) of paragraph 2 would leave the Members free to vote according to their views in the House in regard to any other matter that comes up before it."

[p 313 & 314]

The reasoning of the learned judge that a wider meaning of the words "any direction" would 'cost it its constitutionality' does not commend to us. But we approve the conclusion that these words require to be construed harmoniously with the other provisions and appropriately confined to the objects and purposes of the Tenth Schedule. Those objects and purposes define and limit the contours of its meaning. The assignment of a limited meaning is not to read it down to promote its constitutionality but because such a construction is a harmonious construction in the context. There is no justification to give the words the wider meaning.

While construing Paragraph 2(1)(b) it cannot be ignored that under the Constitution members of Parliament as well as of the State Legislature enjoy freedom of speech in the House though this freedom is subject to the provisions of the Constitution and the rules and standing orders regulating the Procedure of the House [Art. 105(1) and Art. 194 (1)]. The disqualification imposed by Paragraph 2(1)(b) must be so construed as not to unduly impinge on the said freedom of speech of a member. This would be possible if Paragraph 2(1)(b) is confined in its scope by keeping in view the object underlying the amendments contained in the Tenth Schedule, namely, to curb the evil or mischief of political defections motivated by the lure of office or other similar considerations. The said object would be achieved if the disqualification incurred on the ground of voting or abstaining from voting by a member is confined to cases where a change of Government is likely to be brought about or is prevented, as the case may be, as a result of such voting or abstinence or when such voting or abstinence is on a matter which was a major policy and programme on which the political party to which the member belongs went to the polls. For this purpose the direction given by the political party to a member belonging to it, the violation of which may entail disqualification under Paragraph 2(1)(b), would have to be limited to a vote on motion of confidence or no confidence in the Government or where the motion under consideration relates to a matter which was an integral policy and programme of the political party on the basis of which it approached the elaborate. The voting or abstinence from voting by a member against the direction by the political party on such a motion would amount to disapproval of the programme on the basis of which he went before the electorate and got himself elected and such voting or abstinence would amount to a breach of the trust reposed in him by the electorate.

Keeping in view the consequences of the disqualification i.e., termination of the membership of a House; it would be appropriate that the direction or whip which result in such disqualification under Paragraph 2(1)(b) is so worded as to clearly indicate that voting or abstaining from voting contrary to the said direction would result in incurring the disqualification under Paragraph 2(1)(b) of the Tenth Schedule so that the member concerned has fore-knowledge of the consequences flowing from his conduct in voting or abstaining from voting contrary to such a direction.

50. There are some submissions as to the exact import of a "split" – whether it is to be understood an instantaneous, one time event or whether a "split" can be said to occur over a period of time. The hypothetical poser was that if one-third of the members of a political party in the legislature broke-away from it on a particular day and a few more members joined the splinter group a couple of days later, would the latter also be a part of the 'split' group. This question of construction cannot be in vacua. In the present cases, we have dealt principally with constitutional issues.

The meaning to be given to "split" must necessarily be examined in a case in which the question arises in the context of its particular facts. No hypothetical predications can or need be made. We, accordingly, leave this question open to be decided in an appropriate case.

51. Before parting with the case, we should advert to one other circumstance. During the interlocutory stage, the constitution bench was persuaded to make certain interlocutory orders which addressed as they were to the Speaker of the House, (though, in a different capacity as an adjudicatory forum under the Tenth Schedule) engendered complaints of disobedience culminating in the filing of petitions for initiation of proceedings of contempt against the Speaker. It was submitted that when the very question of jurisdiction of the Court to deal with the matter was raised and even before the constitutionality of Paragraph 7 had been pronounced upon, self restraint required that no interlocutory orders in a sensitive area of the relationship between the legislature and the Courts should been made.

The purpose of interlocutory order is to preserve in status-quo the rights of the parties, so that, the proceedings do not become infructuous by any unilateral overt acts by one side or the other during its pendency. One of the contentions urged was as to the invalidity of the amendment for non-compliance with the proviso to Article 368(2) of the Constitution. It has now been unanimously held that Paragraph 7 attracted the proviso to article 368(2). The interlocutory orders in this case were necessarily justified so that, no land-slide changes were allowed to occur rendering the proceedings ineffective and infrustructuous.

52. With the finding and observations as aforesaid W.P. No. 17 of 1991 is dismissed. Writ petition in Rule No. 2421 of 1990 in the High Court of Gauhati is remitted back to the High Court for disposal in accordance with law and not inconsistent with the findings and observations contained in this order.

VERMA, J. (For himself and on behalf of L.M. SHARMA, J.) (Minority view):–

53. This matter relating to disqualification on the ground of defection of some members of the Nagaland Legislative Assembly under the Tenth Schedule inserted by the Constitution (Fifty-Second Amendment) Act, 1985, was heard along with some other similar matters relating to several Legislative Assemblies including those of Manipur, Meghalaya, Madhya Pradesh, Gujarat and Goa, since all of them involved the decision of certain constitutional questions relating to the constitutional validity of para 7 of the Tenth Schedule and consequently the validity of the Constitution (Fifty Second Amendment) Act, 1985 itself. At the hearing, several learned counsel addressed us on account of which the hearing obviously took some time. Even during the course of the hearing, the actions of some speakers tended to alter the *status quo,* in some cases resulting in irreversible consequences which could not be corrected in the event of para 7 of the Tenth Schedule being held invalid or the impugned orders of the Speakers being found justiciable and, on merits illegal and, therefore, the urgency increased of deciding the questions debated before us at the earliest. For this reason, we indicated during the course of the hearing that we would pronounce our operative conclusions soon after conclusion of the hearing with reasons therefore to follow. Accordingly, on conclusion of the hearing on November 1, 1991, we indicated that the operative conclusions would be pronounced by us at the next sitting of the Bench when it assembled on November 12, 1991 after the Diwali Vacation. The operative conclusions of the majority (Venkatachaliah, Reddy and Agrawal, JJ.) as well as of the minority (Lalit Mohan Sharma and J.S. Verma, JJ.) were thus pronounced on November 12, 1991. We are now indicating herein our reasons for the operative conclusions of the minority view.

54. The unanimous opinion according to the majority as well as the minority is that para 7 of the Tenth Schedule enacts a provision for complete exclusion of judicial review including the jurisdiction of the Supreme Court under Article 136 and of the High Courts under Articles 226 and 227 of the Constitution and, therefore, it makes in terms and in effect a change in Articles 136, 226 and 227 of the Constitution which attracts the proviso to clause (2) of Article 368 of the Constitution; and, therefore, ratification by the specified number of State Legislatures before the Bill was presented to the President for his assent was necessary, in accordance therewith. The majority view is that in the absence of such ratification by the State Legislatures, it is para 7 alone of the Tenth Schedule which is unconstitutional; and it being severable from the remaining part of the Tenth Schedule, para 7 alone is liable to be struck down rendering the Speaker's decision under para 6 that of a judicial tribunal amenable to judicial review by the Supreme Court and the High Courts under Articles 136, 226 and 227. The minority opinion is that the effect of invalidity of para 7 of the Tenth Schedule is to invalidate the entire Constitution (Fifty-Second Amendment) Act, 1985 which inserted the Tenth Schedule since the President's assent to the Bill without prior

ratification by the State Legislatures is *non est*. The minority view also is that para 7 is not severable from the remaining part of the Tenth Schedule and the Speaker not being an independent adjudicatory authority for this purpose as contemplated by a basic feature of democracy, the remaining part of the Tenth Schedule is in excess of the amending powers being violative of a basic feature of the Constitution. In the minority opinion, we have held that the entire Constitution (Fifty-Second Amendment) Act, 1985 is unconstitutional and an abortive attempt to make the Constitutional Amendment indicated therein.

55. Before proceeding to give our detailed reasons, we reproduce the operative conclusions pronounced by us on November 12, 1991 in the minority opinion (Lalit Mohan Sharma and J.S. Verma, JJ.) as under:

"For the reasons to be given in our detailed judgment to follow, our operative conclusions in the minority opinion on the various constitutional issues are as follows:

1. Para 7 of the Tenth Schedule, in clear terms and in effect, excludes the jurisdiction of all courts, including the Supreme Court under Article 136 and the High courts under Articles 226 and 227 to entertain any challenge to the decision under para 6 on any ground even of illegality or perversity, not only at an interim stage but also after the final decision on the question of disqualification on the ground of defection.

2. Para 7 of the Tenth Schedule, therefore, in terms and in effect, makes a change in Article 136 in Chapter IV of Part V; and Articles 226 and 227 in Chapter V of Part VI of the Constitution attracting the proviso to clause (2) of Article 368.

3. In view of para 7 in the Bill resulting in the Constitution (Fifty-Second Amendment) Act, 1985, it was required to be ratified by the Legislature of not less than one-half of the States as a condition precedent before the Bill could be presented to the President for assent, in accordance with the mandatory special procedure prescribed in the proviso to clause (2) of Article 368 for exercise of the constituent power. Without ratification by the specified number of State Legislatures, the stage for presenting the Bill for assent of the President did not reach and, therefore, the so-called assent of the President was non est and did not result in the Constitution standing amended in accordance with the terms of the Bill.

4. In the absence of ratification by the specified number of State Legislatures before presentation of the Bill to the President for his assent, as required by the proviso to clause (2) of Article 368, it is not merely para 7 but, the entire Constitution (Fifty-Second Amendment) Act, 1985 which is rendered unconstitutional, since the constituent power was not exercised as prescribed in Article 368, and, therefore, the Constitution did not stand amended in accordance with the terms of the Bill providing for the amendment.

5. Doctrine of Severability cannot be applied to a Bill making a constitutional amendment where any part thereof attracts the proviso to clause (2) of Article 368.

6. Doctrine of Severability is not applicable to permit striking down para 7 alone saving the remaining provisions of the Bill making the Constitutional Amendment on the ground that para 7 alone attracts the proviso to clause (2) of Article 368.

7. Even otherwise, having regard to the provisions of the Tenth Schedule of the Constitution inserted by the Constitution (Fifty Second Amendment) Act, 1985 the Doctrine of Severability does not apply to it.

8. Democracy is a part of the basic structure of the Constitution and free and fair elections with provision for resolution of disputes relating to the same as also for adjudication of those relating to subsequent disqualification by an independent body outside the House are essential features of the democratic system in our Constitution. Accordingly, an independent adjudicatory machinery for resolving disputes relating to the competence of Members of the House is envisaged as an attribute of this basic feature. The tenure of the Speaker who is the authority in the Tenth Schedule to decide this dispute is dependent on the continuous support of the majority in the House and, therefore, he (the Speaker) does not satisfy the requirement of such an independent adjudicatory authority; and his choice as the sole arbiter in the matter violates an essential attribute of the basic feature.

9. Consequently, the entire Constitution (Fifty-Second Amendment) Act, 1985 which inserted the Tenth Schedule together with clause (2) in Articles 102 and 191, must be declared unconstitutional or an abortive attempt to so amend the Constitution.

10. It follows that all decisions rendered by the several Speakers under the Tenth Schedule must also be declared nullity and liable to be ignored.

11. On the above conclusions, it does not appear necessary or appropriate to decide the remaining questions urged."

56. It is unnecessary in this judgment to detail the facts giving rise to the debate on the constitutional issues relating to the validity of the Tenth Schedule, more particularly para 7 therein, introduced by the Constitution (Fifty-Second Amendment) Act, 1985. Suffice it to say that these matters arise out of certain actions of the Speakers of several Legislative Assemblies under the Tenth Schedule. Arguments on these questions were addressed to us by several learned counsel, namely, the learned Attorney General, S/Shri A.K. Sen, Shanti Bhushan, M.C. Bhandare, F.S. Nariman, Soli J. Sorabjee, R.K. Garg, Kapil Sibal, M.R. Sharma, Ram Jethmalani, N.S. Hegde, O.P. Sharma, Bhim Singh and R.F. Nariman. It may be mentioned that some learned counsel modified their initial stand to some extent as the hearing progressed by advanced alternative arguments as well. Accordingly, the several facets of each constitutional issue debated before us were fully focused during the hearing. The main debate, however, was on the

construction of paras 6 and 7 of the Tenth Schedule and the validity of the Constitutional Amendment. Arguments were also addressed on the question of violation, if any, of any basic feature of the Constitution by the provisions of the Tenth Schedule.

57. The points involved in the decision of the constitutional issues for the purpose of our opinion may be summarised broadly as under:-

(A) Construction of para 6 of the Tenth Schedule. Its effect and the extent of exclusion of judicial review thereby.

(B) Construction of para 7 of the Tenth Schedule. Its effect and the extent of exclusion of judicial review thereby.

(C) In case of total exclusion of judicial review including the jurisdiction of Supreme Court under Article 136 and the High Courts under Articles 226 and 227 of the Constitution by the Tenth Schedule, does para 7 make a change in these Articles attracting the proviso to clause (2) of Article 368 of the Constitution?

(D) The effect of absence of prior ratification by the State Legislatures before the Bill making provisions for such amendment was presented to the President for assent, on the constitutional validity of the Tenth Schedule.

(E) Severability of para 7 from the remaining part of the Tenth Schedule and its effect on the question of constitutional validity of the Tenth Schedule.

(F) Violation of basic feature of the Constitution, if any, by the Tenth Schedule as a whole or any part thereof and its effect on the constitutionality for this reason.

(G) Validity of the Tenth Schedule with reference to the right of dissent of members with particular reference to Article 105.

58. As indicated by us in our operative conlusions pronounced earlier, we need not express our concluded opinion on the points argued before us which are not necessary for supporting the conclusion reached by us that the entire Tenth Schedule and consequently the Constitution (Fifty-Second Amendment) Act, 1985 is unconstitutional on the view we have taken on the other points. We are, therefore, giving our reasons only in respect of the points decided by us leading to the conclusion we have reached.

59. At this stage, it would be appropriate to mention the specific stand of the Speakers taken at the hearing. The learned counsel who appeared for the several Speakers clearly stated that they were instructed to apprise us that the Speakers did not accept the jurisdiction of this Court to entertain these matters in view of the complete bar on jurisdiction of the courts enacted in para 7 read with para 6 of the Tenth Schedule. Accordingly, they abstained from addressing us on the merits of the impugned orders which led to these matters being brought in this Court in spite of our repeated invitation to them to also address us on merits in each case, which all the other learned

counsel did. No doubt, this Court's jurisdiction to decide the constitutional validity of the Tenth Schedule was conceded, but no more.

60. It is in these extraordinary circumstances that we had to hear these matters. We need not refer herein to the details of any particular case since the merits of each case are dealt separately in the order of that case. Suffice it to say that the unanimous view of the Bench is that the Speakers' decision disqualifying a member under the Tenth Schedule is not immune from judicial scrutiny. According to the majority it is subject to judicial scrutiny on the ground of illegality or perversity while in the minority view, it is a nullity liable to be so declared and ignored.

61. We considered it opposite in this context to recall the duty of the Court in such delicate situations. This is best done by quoting Chief Justice Marshall in *Cohens* Vs. *Virginia,* (1821) 6 Wheat 264, 404, 5 L.Ed. 257, 291 (1821), wherein he said:

"It is most true, that this Court will not take jurisdiction if it should not: but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do, is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.

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... If the question cannot be brought in a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. <u>But if, any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend...."</u>

(emphasis supplied)

62. More recently, Patanjali Sastri, CJ, while comparing the role of this Court in the constitutional scheme with that of the U.S. Supreme Court, pointed out in the <u>State of Madras</u> v. <u>V.G. Row</u> (1952 SCR 597) that the duty of this Court flows from express provisions in our Constitution while such power in the U.S. Supreme Court has been assumed by the interpretative process giving a wide meaning to the "due process" clause. Sastri, CJ at p. 605, spoke thus:

"Before proceeding to consider this question, we think it right to point out, what is sometimes overlooked, that our Constitution contains express provisions for judicial review of legislation as to its conformity with Constitution, unlike as in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted 'due process' clause in the Fifth and Fourteenth Amendments. If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the 'fundamental rights', as to which this Court has been assigned the role of a sentinel on the quivive. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the courts in the new set up are out to seek clashes with the legislatures in the country.".

(Emphasis supplied)

63. We are in respectful agreement with the above statement of Sastri, CJ, and wish to add that even though such an obvious statement may have been necessary soon after the Constitution came into force and may not be a necessary reminder four decades later at this juncture, yet it appears opposite in the present context to clear the lingering doubts in some minds. We have no hesitation in adding further that while we have no desire to clutch at jurisdictions, at the same time we would not be deterred in the performance of this constitutional duty whenever the need arises.

64. We would also like to observe the unlike England, where there is no written Constitution and Parliament is supreme, in our country there is a written Constitution delineating the spheres of jurisdiction of the legislature and the judiciary where under the power to construe the meaning of the provisions in the Constitution and the laws is entrusted to the judiciary with finality attached to the decision of this Court inter alia by Article 141 about the true meaning of any enacted provision and Article 144 obliges all authorities in the country to act in aid of this court. It is, therefore, not permissible in our constitutional scheme for any other authority to claim that power in exclusivity, or in supersession of this Court's verdict. Whatever be the controversy prior to this Court entertaining such a matter, it must end when the court is seized of the matter for pronouncing its verdict and it is the constitutional obligation of every person and authority to accept its binding effect when the decision is rendered by this Court. It is also to be remembered that in our constitutional scheme based on democratic principles which include governance by rule of law, every one has to act and perform his obligations according to the law of the land and it is the constitutional obligation of this Court to finally say what the law is. We have no doubt that the Speakers and all others sharing their views are alive to this constitutional scheme, which is as much the source of their jurisdiction as it is of this Court and also conscious that the power given to each wing is for the

performance of a public duty as a constitutional obligation and not for self-aggrandisement. Once this perception is clear to all, there can be no room for any conflict.

65. The Tenth Schedule was inserted in the Constitution of India by the Constitution (Fifty-Second Amendment) Act, 1985 which came into force with effect from 1.3.1985 and is popularly known as the Anti-Defection Law. The Statement of Objects and Reasons says that this amendment in the Constitution was made to combat the evil of political defections which has become a matter of national concern and unless combated, is likely to undermine the very foundations of our democratic system and the principles which sustained it. This amendment is, therefore, for outlawing defection to sustain our democratic principles. The Tenth Schedule contains eight paras. Para 1 is the interpretation clause defining 'House' to mean either House of Parliament or the Legislative Assembly or, as the case may be, either House of the Legislature of a State. The expressions 'legislature party' and 'original political party' which are used in the remaining paras are also defined. Para 2 provides for disqualification on ground of defection. Para 3 provides that disqualification on ground of defection is not to apply in case of split indicating therein the meaning of 'split'. Para 4 provides that disqualification on ground of defection is not to apply in case of merger. Para 5 provides exemption for the Speaker or the Deputy Speaker of the House of the People or of the Legislative Assembly of the State, the Deputy Chairman of the Council of States or the Chairman or the Deputy Chairman of the Legislative Council of a State from the applicability of the provisions of the Tenth Schedule. Para 8 contains the rule making power of the Chairman or the Speaker.

66. For the purpose of deciding the jurisdiction of this Court and the justiciability of the cause, it is paras 6 and 7 which are material and they read as under:

"6. Decision on questions as to disqualification on ground of defection:-

(1) If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final:

Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be referred for the decision of such member of the House as the House may elect in this behalf and his decision shall be final.

(2) All proceedings under sub-paragraph (1) of this paragraph in relation to any question as to disqualification of a member of a House under this Schedule shall be deemed to be proceedings in Parliament within the meaning of Article 122 or, as the case may be, proceedings in the Legislature of a State within the meaning of Article 212.

7. Bar of jurisdiction on courts:-

Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule."

67. We shall now deal with the points involved enumerated earlier.

Points 'A' & 'B' – Paras 6 & 7 of Tenth Schedule

68. In support of the objection raised to the jurisdiction of this Court and the justiciability of the Speaker's decision relating to disqualification of a member, it has been urged that sub-paragraph (1) of para 6 clearly lays down that the decision of the Chairman or, as the case may be, the Speaker of such House shall be final and sub-paragraph (2) proceeds to say that all proceedings under sub-paragraph (1) 'shall be deemed to be proceedings in Parliament .... or, ... proceedings in the Legislature of a State' within the meaning of Article 122 or Article 212, as the case may be. It was urged that the clear provision in para 6 that the decision of the Chairman/Speaker on the subject of disqualification under this Schedule shall be final and the further provision that all such proceedings 'shall be deemed to be proceedings in Parliament... or,... proceedings in the Legislature of a State', within the meaning of Article 122 or Article 212, as the case may be, clearly manifests the intention that the jurisdiction of all courts including the Supreme Court is ousted in such matters and the decision on this question is not justiciable. Further argument is that para 7 in clear words thereafter reiterates that position by saying that 'notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule'. In other words, the argument is that para 6 by itself provides for ouster of the jurisdictions of all courts including the Supreme Court and para 7 is a remanifestation of that clear intent in case of any doubt arising from para 6 alone. On this basis it was urged that the issue raised before us is not justiciable and the Speaker or the Chairman, as the case may be, not being "Tribunal" within the meaning of that expression used in Article 136 of the Constitution, their decision is not open to judicial review.

69. In reply, it was urged that the finality Clause in sub-paragraph (1) of para 6 does not exclude the jurisdiction of the High Courts under Articles 226 and 227 and of this Court under Article 136. Deeming provision in sub-paragraph (2) of para 6, it was urged, has the only effect of making it a 'proceedings in Parliament' or 'proceedings in the Legislature of a State' to bring it within the ambit of clause (1) of Article 122 or 212 but not within clause (2) of these Articles. The expression 'proceedings in Parliament' and 'proceedings in the Legislature of a State' are used only in clause (1) of Articles 122 and 212 but not in clause (2) of either of these Articles, on account of which the scope of fiction cannot be extended beyond the limitation implicit in the specific words used in the legal fiction. This being so, it was argued that immunity extended only to 'irregularity of procedure' but not to illegality as held Keshav Singh. (1965) 1 S.C.R. 413. In respect of para 7, the reply is that the expression 'no court' therein must be similarly construed to

refer only to the courts of ordinary jurisdiction but not the extraordinary jurisdiction of the High Courts under Articles 226 & 227 and the Plenary jurisdiction of Supreme Court under Article 136. It was also argued that the Speaker/Chairman while deciding the question of disqualifications of member under para 6 exercise a judicial function of the State which otherwise would be vested in the courts and, therefore, in this capacity he acts as "Tribunal" amenable to the jurisdictions under Articles 136, 226 and 227 of the Constitution. Shri Sibal also contended that the bar in para 7 operates only at the interim stage, like other election disputes, and not after the final decision under para 6.

70. The finality clause in sub-paragraph (1) of para 6 which says that the decision of the Chairman or, as the case may be, the Speaker of such House shall be final is not decisive. It is settled that such finality clause in a statute by itself is not sufficient to exclude the jurisdiction of the High Courts under Articles 226 and 227 and the Supreme Court under Article 136 of the Constitution, the finality being for the statute alone. This is apart from the decision being vulnerable on the ground of nullity. Accordingly, sub-paragraph (1) alone is insufficient to exclude the extraordinary jurisdiction of the High Courts and the plenary jurisdiction of this Court. The legal fiction in sub-paragraph (2) of para 6 can only bring the proceedings under sub-paragraph (1) thereof within the ambit of clause (1) of Article 122 or clause (1) of Article 212, as the case may be, since the expressions used in sub-paragraph (2) of para 6 of the Tenth Schedule are 'shall be deemed to be proceedings in Parliament' or 'proceedings in the Legislature of a State', and such expressions find place both in Articles 122 and 212 only in clause (1) and not clause (2) thereof. The ambit of the legal fiction must be confined to the limitation implict in the words used for creating the fiction and it cannot be given an extended meaning to include therein something in addition. It is also settled that a matter falling within the ambit of clause (1) of either of these two Articles is justiciable on the ground of illegality or perversity in spite of the immunity it enjoys to a challenge on the ground of 'irregularity of procedure'.

71. **To overcome this result, it was argued that such matter would fall within the ambit of Clause(2) of both Articles 122 and 212 because the consequence of the order of disqualification by the Speaker/Chairman would relate to the conduct of business of the House. In the first place, the two separate clauses in Articles 122 and 212 clearly imply that the meaning and scope of the two cannot be identical even assuming there be some overlapping area between them. What is to be seen is the direct impact of the action and its true nature and not the further consequences flowing therefrom. It cannot be doubted in view of the clear language of sub-paragraph (2) of para 6 that it relates to clause (1) of both Articles 122 and 212 and the legal fiction cannot, therefore, be extended beyond the limits of the express words used in the fiction. In construing the fiction it is not to be extended beyond the language of the Section by which it is**

created and its meaning must be restricted by the plain words used. It cannot also be extended by importing another fiction. The fiction in para 6(2) is a limited one which serves its purpose by confining it to clause (1) alone of Articles 122 and 212 and, therefore, there is no occasion to enlarge its scope by reading into it words which are not there and extending it also to clause (2) of these Articles. (See Commissioner of Income-tax v. Ajax Products Ltd. — (1965) 1 SCR 700.

72. **Moreover, it does appear to us that the decision relating to disqualification of a member does not relate to regulating procedure or the conduct of business of the House provided for in clause (2) of Articles 122 and 212 and taking that view would amount to extending the fiction beyond its language and importing another fiction for this purpose which is not permissible. That being so, the matter falls within the ambit of Clause (1) only of Articles 122 and 212 as a result of which it would be vulnerable on the ground of illegality and perversity and, therefore, justifiable to that extent.**

73. **It is, therefore, not possible to uphold the objection of jurisdiction on the finality clause or the legal fiction created in para 6 of the Tenth Schedule when justiciability of the clause is based on a ground of illegality or perversity (see Keshav Singh — (1965) 1 S.C.R. 413). This in our view is the true construction and effect of para 6 of the Tenth Schedule.**

74. **We shall now deal with para 7 of the Tenth Schedule.**

75. **The words in para 7 of the Tenth Schedule are undoubtedly very wide and ordinarily mean that this provision supersedes any other provision in the Constitution. This is clear from the use of the non obstante clause 'notwithstanding anything in this Constitution' as the opening words of para 7. The non obstante clause followed by the expression 'no court shall have any jurisdiction' leave no doubt that the bar of jurisdiction of courts contained in para 7 is complete excluding also the jurisdiction of the Supreme Court under Article 136 and that of the High Courts under Articles 226 and 227 of the Constitution relating to matters covered by para 7. The question, therefore, is of the scope of para 7. The scope of para 7 for this purpose is to be determined by the expression 'in respect of any matter connected with the disqualification of a member of a House under this Schedule'.**

76. **One of the constructions suggested at the hearing was that this expression covers only the intermediate stage of the proceedings relating to disqualification under para 6 and not the end stage when the final order is made under para 6 on the question of disqualification. It was suggested that this construction would be in line with the construction made by this Court in its several decisions relating to exclusion of Courts' jurisdiction in election disputes at**

the intermediate stage under Article 329 of the Constitution. This construction suggested of para 7 does not commend to us since it is contrary to the clear and unambiguous language of the provision. The expression 'in respect of any matter connected with the disqualification of a member of a House under this Schedule' is wide enough to include not merely the intermediate stage of the proceedings relating to disqualification but also the final order on the question of disqualification made under para 6 which is undoubtedly such a matter. There is thus express exclusion of all courts' jurisdiction even in respect of the final order.

77. **As earlier indicated by virtue of the finality clause and the deeming provision in para 6, there is exclusion of all courts' jurisdiction to a considerable extent leaving out only the area of justiciability on the ground of illegality or perversity which obviously is relatable only to the final order under para 6. This being so, enactment of para 7 was necessarily made to bar the jurisdiction of courts also in respect of matters falling outside the purview of the exclusion made by para 6. Para 7 by itself and more so when read along with para 6 of the Tenth Schedule, leaves no doubt that exclusion of all courts' jurisdiction by para 7 is total leaving no area within the purview, even of the Supreme Court or the High Courts under Articles 136, 226 and 227. The language of para 7 being explicit, no other aid to construction is needed. Moreover, the speech of the Law Minister who piloted the Bill in the Lok Sabha and that of the Prime Minister in the Rajya Sabha as well as the debate on this subject clearly show that these provisions were enacted to keep the entire matter relating to disqualification including the Speakers' final decision under para 6 on the question of disqualification, wholly outside the purview of all courts including the Supreme Court and the High Courts. The legislative history of the absence of such a provision excluding the courts' jurisdiction in the two earlier Bills which lapsed also re-inforces the conclusion that enactment of para 7 was clearly to provide for total ouster of all courts' jurisdiction.**

78. **In the face of this clear language, there is no rule of construction which permits the reading of para 7 in any different manner since there is no ambiguity in the language which is capable of only one construction, namely, total exclusion of the jurisdiction of all courts including that of the Supreme Court and the High Courts under Articles 136, 226 and 227 of the Constitution in respect of every matter connected with the disqualification of a member of a House under the Tenth Schedule including the final decision rendered by the Speaker/Chairman, as the case may be. Para 7 must, therefore, be read in this manner alone.**

79. **The question now is of the effect of enacting such a provision in the Tenth Schedule and the applicability of the proviso to clause(2) of Article 368 of the Constitution.**

80. **Point 'C' — Applicability of Article 368(2) Proviso**

The above construction of para 7 of the tenth Schedule gives rise to the question whether it thereby makes a change in Article 136 which is in Chapter IV of Part V and Articles 226 and 227 which are in Chapter V of Part VI of the Constitution. If the effect of para 7 is to make such a change in these provisions so that the proviso to clause (2) of Article 368 is attracted, then the further question which arises is of the effect on the Tenth schedule of the absence of ratification by the specified number of State Legislatures, it being admitted that no such ratification of the Bill was made by any of the State Legislatures.

81. **Prima facie it would appear that para 7 does seek to make a change in Articles 136, 226 and 227 of the Constitution inasmuch as without para 7 in the Tenth Schedule a decision of the Speaker/Chairman would be amenable to the jurisdiction of the Supreme Court under Article 136 and of the High Courts under Articles 226 and 227 as in the case of decisions as to other disqualifications provided in clause (1) of Article 102 or 191 by the President/Governor under Article 103 or 192 in accordance with the opinion of the Election Commission which was the Scheme under the two earlier Bills which lapsed. However, some learned counsel contended placing reliance on Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar (1952 S.C.R. 89) and Sajjan Singh v. State of Rajasthan (1965 (1) S.C.R. 933) that the effect of such total exclusion of the jurisdiction of the Supreme Court and the High Courts does not make a change in Articles 136, 226 and 227. A close reading of these decisions indicates that instead of supporting this contention, they do in fact negative it.**

82. **In Sankari Prasad, the challenge was to Articles 31A and 31B inserted in the Constitution by the Constitution (First Amendment) Act, 1951. One of the objections was based on absence of ratification under Article 368. While rejecting this argument, the Constitution Bench held as under:—**

"It will be seen that these Articles do not either in terms or in effect seek to make any change in Article 226 or in Articles 132 and 136. Article 31A aims at saving laws providing for the compulsory acquisition by the State of a certain kind of property from the operation of Article 13 read with other relevant Articles in part III, while Article 31B purports to validate certain specified Acts and Regulations already passed, which, but for such a provision, would be liable to be impugned under Article 13. It is not correct to say that the powers of the High Court under Article 226 to issue writs "for the

enforcement of any of the rights conferred by Part III" or of this Court under Articles 132 and 136 to entertain appeals from orders issuing or refusing such writs are in any way affected. They remain just the same as they were before: only a certain class of case has been excluded from the purview of Part III and the courts could no longer interfere, not because their powers were curtailed in any manner or to any extent, but because there would be no occasion hereafter for the exercise of their powers in such cases."

(emphasis supplied)

83. **The test applied was whether the impugned provisions inserted by the Constitutional Amendment did 'either in terms or in effect seek to make any change in Article 226 or in Articles 132 and 136'. Thus the change may be either in terms i.e. explicit or in effect in these Articles to require ratification. The ground for rejection of the argument therein was that the remedy in the courts remained unimpaired and unaffected by the change and the change was really by extinction of the right to seek the remedy. In other words, the change was in the right and not the remedy of approaching the court since there was no occasion to invoke the remedy, the right itself being taken away. To the same effect is the decision in Sajjan Singh, wherein Sankari Prasad was followed stating clearly that there was no justification for reconsidering Sankari Prasad.**

84. **Distinction has to be drawn between the abridgement or extinction of a right and restriction of the remedy for enforcement of the right. If there is an abridgement or extinction of the right which results in the disappearance of the cause of action which enables invoking the remedy and in the absence of which there is no occasion to make a grievance and invoke the subsisting remedy, then the change brought about is in the right and not the remedy. To this situation, Sankari Prasad and Sajjan Singh apply. On the other hand, if the right remains untouched so that a grievance based thereon can arise and, therefore, the cause of action subsists, but the remedy is curtailed or extinguished so that the cause of action cannot be enforced for want of that remedy, then the change made is in the remedy and not in the subsisting right. To this latter category, Sankari Prasad and Sajjan Singh have no application. This is clear from the above-quoted passage in Sankari Prasad which clearly brings out this distinction between a change in the right and a change in the remedy.**

85. **The present case, in unequivocal terms, is that of destroying the remedy by enacting para 7 in the Tenth Schedule making a total exclusion of judicial review including that by the Supreme Court under Article 136 and the High Courts under Articles 226 and 227 of the Constitution. But for para 7 which deals with the remedy and not the right, the jurisdiction of the Supreme Court under Article 136**

and that of the High Courts under Articles 226 and 227 would remain unimpaired to challenge the decision under para 6, as in the case of decisions relating to other disqualifications specified in clause (1) of Articles 102 and 191, which remedy continues to subsist. Thus, this extinction of the remedy alone without curtailing the right, since the question of disqualification of a member on the ground of defection under the Tenth Schedule does require adjudication on enacted principles, results in making a change in Article 136 in Chapter IV in Part V and Articles 226 and 227 in Chapter V in Part VI of the Constitution.

86. **On this conclusion, it is undisputed that the proviso to clause (2) of Article 368 is attracted requiring ratification by the specified number of State Legislatures before presentation of the Bill seeking to make the Constitutional amendment to the President for his assent.**

87. **Point 'D' — Effect of absence of ratification**

The material part of Article 368 is as under:

"368. Power of Parliament to amend the Constitution and Procedure therefor—(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill, for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article, the amendment shall also require to be ratified by the Legislature of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent."

(emphasis supplied)

It is clause (2) with its proviso which is material. The main part of clause (2) prescribes that a constitutional amendment can be initiated only by the introduction of a Bill for the purpose and when the Bill is passed by each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill. In short, the Bill on being passed by the required majority is presented to the President for his assent to the Bill and on giving of the assent, the Constitution stands amended accordingly. Then comes, the proviso which says that 'if such an amendment seeks to make any change' in the specified provisions of the Constitution, the amendment shall also require to be ratified by the Legislature of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent. In other words, the proviso contains a constitutional limitation on the amending power; and prescribes as a part of the special procedure, prior assent of the State Legislatures before presentation of the Bill to the President for his assent in the case of such Bills. This is a condition interposed by the proviso in between the passing of the Bill by the requisite majority in each House and presentation of the Bill to the President for his assent, which assent results in the Constitution automatically standing amended in accordance with the terms of the Bill. Thus, the Bills governed by the proviso cannot be presented to the President for his assent without the prior ratification by the specified number of State Legislatures or in other words, such ratification is a part of the special procedure or a condition precedent to presentation of the Bill governed by the proviso to the President for his assent. It logically follows that the consequence of the Constitution standing amended in accordance with the terms of the Bill on assent by the President, which is the substantive part of Article 368, results only when the Bill has been presented to the President for his assent in conformity with the special procedure after performance of the conditions precedent, namely, passing of the Bill by each House by the requisite majority in the case of all Bills; and in the case of Bills governed by the proviso, after the Bill has been passed by the requisite majority in each House and it has also been ratified by the Legislature of not less than one-half of the States.

88. **The constituent power for amending the Constitution conferred by Article 368 also prescribes the mandatory procedure in clause (2) including its proviso, for its exercise. The constituent power cannot, therefore, be exercised in any other manner and non-**

compliance of the special procedure so prescribed in Article 368(2) cannot bring about the result of the Constitution standing amended in accordance with the terms of the Bill since that result ensure only at the end of the prescribed mandatory procedure and not otherwise. The substantive part of Article 368 which provides for the resultant amendment is the consequence of strict compliance of the mandatory special procedure prescribed for exercise of the constituent power and that result does not ensue except in the manner prescribed.

89. **The true nature and import of the amending power and procedure under Article 368 as distinguished from the ordinary legislative procedure was indicated in Kesavananda Bharati (1973) Supp. S.C.R. 1 at pp.561, 563 & 565:**

"...Under Article 368

However, a different and special procedure is provided for amending the Constitution. A Bill has to be introduced in either House of Parliament and must be passed by each House separately by a special majority. It should be passed not only by 2/3rd majority of the members present and voting but also by a majority of the total strength of the House. No joint sitting of the two Houses is permissible. In the case of certain provisions of the Constitution which directly or indirectly affect interstate relations, the proposed amendment is required to be ratified by the Legislatures which is not a legislative process of not less than one half of the States before the Bill proposing the amendment is presented to the President for his assent. The procedure is special in the sense that it is different and more exacting or restrictive than the one by which ordinary laws are made by Parliament. Secondly in certain matters the State Legislatures are involved in the process of making the amendment. Such partnership between the Parliament and the State Legislatures in making their own laws by the ordinary procedure is not recognised by the Constitution. It follows from the special provision made in Article 368 for the amendment of the Constitution that our Constitution is a 'rigid' or 'controlled' Constitution because the Constituent Assembly has "left a special direction as to how the Constitution is to be changed. In view of Article 368, when the special procedure is successfully followed, the proposed amendment automatically becomes a part of the Constitution or, in other words, it writes itself into the Constitution."

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"...But when it comes to the amendment of the Constitution, a special procedure has been prescribed in Article 368. Since the result of following the special procedure under the Article is the amendment of the Constitution the process which brings about the result is known as the exercise of constituent power by the bodies

associated in the task of the amending the Constitution. It is, therefore, obvious, that when the Parliament and the State Legislatures function in accordance with Article 368 with a view to amend the Constitution, they exercise constituent power as distinct from their ordinary legislative power under Articles 245 to 248. Article 368 is not entirely procedural. Undoubtedly part of it is procedural. But there is a clear mandate that on the procedure being followed the 'proposed amendment shall become part of the Constitution, which is the substantive part of Article 368. Therefore, the peculiar or special power to amend the Constitution is to be sought in Article 368 only and not elsewhere."

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"... The true position is that the alchemy of the special procedure prescribed in Article 368 produces the constituent power which transport the proposed amendment into the Constitution and gives it equal status with the other parts of the Constitution."

(emphasis supplied)

90. **Apart from the unequivocal language of clause (2) including the proviso therein indicating the above result of prior ratification being a part of the special procedure or condition precedent for valid assent of the President, the same result is reached even by another route. The ordinary role of a proviso is to carve out an exception from the general rule in the main enacting part. The main enacting part of clause (2) lays down that on a Bill for a constitutional amendment being passed in each House by a requisite majority, it shall be presented to the President for his assent and on the assent being given, the Constitution shall stand amended in accordance with the terms of the Bill. The proviso then carves out the exception in case of Bills seeking to make any change in the specified Articles of the Constitution prescribing that in the case of those Bills, prior ratification by the Legislatures of not less than one-half of the States is also required before the Bill is presented to the President for assent. This means that a Bill falling within the ambit of the proviso is carved out of the main enactment in clause (2) as an exception on account of which it cannot result in amendment of the Constitution on the President's assent without prior ratification by the specified number of State Legislatures. The proviso in clause (2) is enacted for and performs the function of a true proviso by qualifying the generality of the main enactment in clause (2) in providing an exception and taking out of the main enactment in clause (2) such Bills which but for the proviso would fall within the main part. Not only the language of the main enactment in clause (2) and the proviso thereunder is unequivocal to give this clear indication but the true role of a proviso, the form in which the requirement of prior ratification if such a Bill by the State**

Legislatures is enacted in Article 368 lend further assurance that this is the only construction of clause (2) with its proviso which can be legitimately made. If this be the correct constructions of Article 368(2) with the proviso, as we think it is, then there is no escape from the logical conclusion that a Bill to which the proviso applies does not result in amending the Constitution in accordance with its terms on assent of the President if it was presented to the President for his assent and the President gave his assent to the Bill without prior ratification by the specified number of the State Legislatures. This is the situation in the present case.

91. **Thus the requirement of prior ratification by the State Legislatures is not only a condition precedent forming part of the special mandatory procedure for exercise of the constituent power and a constitutional limitation thereon but also a requirement carving out an exception to the general rule of automatic amendment of the Constitution on the President's assent to the Bill.**

92. **In other words, clause (2) with the proviso therein itself lays down that the President's assent does not result in automatic amendment of the Constitution in case of such a Bill it was not duly ratified before presentation to the President for his assent. Nothing more is needed to show that not only para 7 of the Tenth Schedule but the entire Constitution (Fifty-Second Amendment) Act, 1985 is still born or an abortive attempt to amend the Constitution for want of prior ratification by the State Legislatures of the Bill before its presentation to the President for his assent.**

93. **The result achieved in each case is the same irrespective of the route taken. If the route chosen is for construing the language of clause (2) with the proviso merely a part of it, the requirement or prior ratification is a condition precedent forming part of the special mandatory procedure providing that the constituent power in case of such a Bill can be exercised in this manner alone, the mode prescribed for other Bills being forbidden. If the route taken is of treating the proviso as carving out an exception from the general rule which is the normal role of a proviso, then the result is that the consequence of the Constitution standing amended in terms of the provisions of the Bill on the President's assent as laid down in the main part of clause (2) does not ensue without prior ratification in case of a Bill to which the proviso applies.**

94. **There can thus be no doubt that para 7 of the Tenth Schedule which seeks to make a change in Article 136 which is a part of Chapter IV of Part V and Articles 226 and 227 which form part of Chapter V of Part VI of the Constitution, has not been enacted by incorporation in a Bill seeking to make the Constitutional Amendment in the manner prescribed by clause (2) read with the proviso therein of Article 368. Para 7 of the Tenth Schedule is,**

therefore, unconstitutional and to that extent at least the Constitution does not stand amended in accordance with the Bill seeking to make the Constitutional Amendment. The further question now is: its effect on the validity of the remaining part of the Tenth Schedule and consequently the Constitution (Fifty-Second Amendment) Act, 1985 itself.

95. **Point 'E' — Severability of para 7 of Tenth Schedule**

The effect of absence of ratification indicated above suggests inapplicability of the Doctrine of Severability. In our opinion, it is not para 7 alone but the entire Tenth schedule nay the Constitution (Fifty-Second Amendment) Act, 1985 itself which is rendered unconstitutional being an abortive attempt to so amend the Constitution. It is the entire Bill and not merely para 7 of the Tenth Schedule therein which required prior ratification by the State Legislatures before its presentation to the President for his assent, it being a joint exercise by the Parliament and State Legislatures. The stage for presentation of Bill to the President for his assent not having reached, the President's assent was non-est and it could not result in amendment of the Constitution in accordance with the terms of the Bill for the reasons given earlier. Severance of para 7 of the Tenth Schedule could not be made for the purpose of ratification or the President's assent and, therefore, no such severance can be made even for the ensuing result. If the President's assent cannot validate para 7 in the absence of prior ratification, the same assent cannot be accepted to bring about a different result with regard to the remaining part of the Bill.

96. **On this view, the question of applying the Doctrine of Severability to strike down para 7 alone retaining the remaining part of Tenth Schedule does not arise since it presupposes that the Constitution stood so amended on the President's assent. The Doctrine does not apply to a still born legislation.**

97. **The Doctrine of Severability applies in a case where an otherwise validly enacted legislation contains a provision suffering from a defect of lack of legislative competence and the invalid provision is severable leaving the remaining valid provisions a viable whole. This doctrine has no application where the legislation is not validly enacted due to non-compliance of the mandatory legislative procedure such as the mandatory special procedure prescribed for exercise of the constituent power. It is not possible to infuse life in a still born by any miracle of deft surgery even though it may be possible to continue life by removing a congenitally defective part by surgical skill. Even the highest degree of surgical skill can help only to continue life but it cannot infuse life in the case of still birth.**

98. **With respect, the contrary view does not give due weight to the effect of a condition precedent forming part of the special procedure and the role of a proviso and results in rewriting the proviso to mean that ratification is not a condition precedent but merely an additional requirement of such a Bill to make that part effective. This also fouls with the expression 'Constitution shall stand amended...' On the assent of President which is after the stage when the amendment has been made and ratified by the State Legislatures as provided. The historical background of drafting the proviso also indicates the significance attached to prior ratification as a condition precedent for valid exercise of the constituent power.**

99. **We are unable to read the Privy Council decision in The Bribery Commissioner vs. Pedrick Ranasinghe (1965 AC 172) as an authority to support applicability of the Doctrine of Severability in the present case. In Kesavananda Bharati, the subsance of that decision was indicated by Mathew, J., at p. 778 of S.C.R., thus:**

"...that though Ceylon Parliament has plenary power of ordinary legislation, in the exercise of its constitution power it was subject to the special procedure laid down in s.29(4)....."

While section 29(4) of Ceylon (Constitution) Order was entirely procedural with no substantive part therein, Article 368 of the Indian Constitution has also a substantive part as pointed out in Kesavananda Bharati. This distinction also has to be borne in mind.

100. **The challenge in Ranasinghe was only to the legality of a conviction made under the Bribery Act, 1954 as amended by the Bribery Amendment Act, 1958 on the ground that the Tribunal which had made the conviction was constituted under section 41 of the Amending Act which was invalid being in conflict with section 55 of the Constitution and not being enacted by exercise of constituent power in accordance with section 29(4) of the Ceylon (Constitution) Order. Supreme Court of Ceylon quashed the conviction holding section 41 of the Amending Act to be invalid for this reason. The Privy Council affirmed that view and in this context held that section 41 could be severed from rest of the Amending Act. Ranasinghe was not a case of a Bill passed in exercise of the constituent power without following the special procedure of section 29(4) but of a Bill passed in exercise of the ordinary legislative power containing other provisions which could be so enacted, and including therein section 41 which could be made only in accordance with the special procedure of section 29(4) of the Constitution. The Privy Council made a clear distinction between legislative and constituent powers and reiterated the principle thus:**

"...The effect of section 5 of the Colonial Laws Validity Act, which is framed in a manner somewhat similar to section 29(4) of the Ceylon Constitution was that where a legislative power is given

subject to certain manner and form, that power does not exist unless and until the manner and form is complied with. Lord Sankey L.C. said:

"A Bill, within the scope of sub-section (6) of section 7A, which received the Royal Assent without having been approved by the electors in accordance with that section, would not be a valid act of the legislature. It would be ultra vires section 5 of the Act of 1865."

101. **The Bribery Amendment Act, 1958, in Ranasinghe, was enacted in exercise of the ordinary legislative power and therein was inserted section 41 which could be made only in exercise of the constituent power according to the special procedure prescribed in section 29(4) of the Ceylon (Constitution) Order. In this situation, only section 41 of the Amending Act was held to be invalid and severed because the special procedure for the constituent power was required only for that provision and not the rest. In the instant case the entire Tenth Schedule is enacted in exercise of the constituent power under Article 368, not merely para 7 therein, and this has been done without following the mandatory special procedure prescribed. It is, therefore, not a case of severing the invalid constituent part from the remaining ordinary legislation. Ranasinghe could have application if in an ordinary legislation outside the ambit of Article 368, a provision which could be made only in exercise of the constituent power according to Article 368 had been inserted without following the special procedure, and severance of the invalid constituent part alone was the question. Ranasinghe is, therefore, distinguishable.**

102. **Apart from inapplicability of the Doctrine of Severability to a Bill to which the proviso to clause (2) of Article 368 applies, for the reasons given, it does not apply in the present case to strike down para 7 alone retaining the remaining part of the Tenth Schedule. In the first place, the discipline for exercise of the constituent power was consciously and deliberately adopted instead of resorting to the mode of ordinary legislation in accordance with sub-clause (e) of clause (1) of Articles 102 and 191, which would render the decision on the question of disqualification on the ground of defection also amenable to judicial review as in the case of decision on questions relating to other disqualifications. Moreover, even the test applicable for applying the Doctrine of Severability to ordinary legislation as summarised in R.M.D. Chamarbaughwalla v. The Union of India (1957) S.C.R. 930, indicates that para 7 alone is not severable to permit retention of the remaining part of the Tenth Schedule as valid legislation. The settled test whether the enactment would have been made without para 7 indicates that the legislative intent was to make the enactment only with para 7 therein and not without it. This intention is manifest throughout and evident from the fact that but for para 7 the enactment did not require the**

discipline of Article 368 and exercise of the constituent power. Para 7 follows para 6 the contents of which indicate the importance given to para 7 while enacting the Tenth Schedule. The entire exercise, as reiterated time and again in the debates, particularly the Speech of the Law Minister while piloting the Bill in the Lok Sabha and that of the Prime Minister in the Rajya Sabha, was to emphasise that total exclusion of judicial review of the Speaker's decision by all courts including the Supreme Court, was the prime object of enacting the Tenth Schedule. The entire legislative history shows this. How can the Doctrine of Severability be applied in such a situation to retain the Tenth Schedule striking down para 7 alone? This is a further reason for inapplicability of this doctrine.

103. **Point 'F' — Violation of basic features**

The provisions in the Tenth Schedule minus para 7, assuming para 7 to be severable as held in the majority opinion, can be sustained only if they do not violate the basic structure of the Constitution or damage any of its basic features. This is settled by Kesavananda Bharati — (1973) Supp. S.C.R. 1. The question, therefore, is whether there is violation of any of the basic features of the Constitution by the remaining part of the Tenth Schedule, even assuming the absence of ratification in accordance with the proviso to clause (2) of Article 368 results in invalidation of para 7 alone.

104. **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 provision for resolution of election disputes as also adjudication of disputes relating to subsequent disqualifications by an independent authority. It is only by a fair adjudication of such disputes relating to validity of elections and subsequent disqualifications of members that true reflection of the electoral mandate and governance by rule of law essential for democracy can be ensured. In the democratic pattern adopted in our Constitution, not only the resolution of election dispute is entrusted to a judicial tribunal, but even the decision on questions as to disqualification of members under Articles 103 and 192 is by the President/Governor in accordance with the opinion of the Election Commission. The constitutional scheme, therefore, for decision on questions as to disqualification of members after being duly elected, contemplates adjudication of such disputes by an independent authority outside the House, namely, President/Governor in accordance with the opinion of the Election Commission, all of whom are high constitutional functionaries with security of tenure independent of the will of the House. Sub-clause (e) of clause (1) in Articles 102 and 191 which provide for enactment of any law by the Parliament to prescribe any disqualification other than those prescribed in the earlier sub-clauses of clause (1), clearly indicates that all**

disqualifications of members were contemplated within the scope of Articles 102 and 191. Accordingly, all disqualifications including disqualification on the ground of defection, in our constitutional scheme, are different species of the same genus, namely, disqualification, and the constitutional scheme does not contemplate any difference in their basic traits and treatment. It is undisputed that the disqualification on the ground of defection could as well have been prescribed by an ordinary law made by the Parliament under Articles 102(1)(e) and 191(1)(e) instead of by resort to the constituent power of enacting the Tenth schedule. This itself indicates that all disqualifications of members according to the constitutional scheme were meant to be decided by an independent authority outside the House such as the President/Governor, in accordance with the opinion of another similar independent constitutional functionary, the Election Commission of India, who enjoys the security of tenure of a Supreme Court Judge with the same terms and conditions of office. Thus, for the purpose of entrusting the decision on the question of disqualification of a member, the constitutional scheme envisages an independent authority outside the House and not within it, which may be dependent on the pleasure of the majority in the House for its tenure.

105. **The Speaker's office is undoubtedly high and has considerable aura with the attribute of impartiality. This aura of the office was even greater when the Constitution was framed and yet the framers of the Constitution did not choose to vest the authority of adjudicating disputes as to disqualification of members to the Speaker; and provision was made in Articles 103 and 192 for decision of such disputes by the President/Governor in accordance with the opinion of the Election Commission. The reason is not far to seek.**

106. **The Speaker being an authority within the House and his tenure being dependent on the will of the majority therein, likelihood of suspicion of bias could not be ruled out. The question as to disqualification of a member has adjudicatory disposition and, therefore, requires the decision to be rendered in consonance with the scheme for adjudication of disputes. Rule of law has in it firmly entrenched, natural justice, of which, Rule against Bias is a necessary concomitant; and basic postulates of Rule against Bias are; Nemo judex in causa sua — 'A Judge is disqualified from determining any case in which he may be, or may fairly be suspected to be, biased'; and 'it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.' This appears to be the underlying principle adopted by the framers of the Constitution in not designating the Speaker as the authority to decide election disputes and questions as to disqualification of members under Articles 103, 192 and 329 and**

opting for an independent authority outside the House. The framers of the Constitution had in this manner kept the office of the Speaker away from this controversy. There is nothing unusual in this scheme if we bear in mind that the final authority for removal of a Judge of the Supreme Court and High Court is outside the judiciary in the Parliament under Article 124(4). On the same principle the authority to decide the question of disqualification of a member of legislature is outside the House as envisaged by Articles 103 and 192.

107. **In the Tenth Schedule, the Speaker is made not only the sole but the final arbiter of such dispute with no provision for any appeal or revision against the Speaker's decision to any independent outside authority. This departure in the Tenth schedule is a reverse trend and violates a basic feature of the Constitution since the Speaker cannot be treated as an authority contemplated for being entrusted with this function by the basic postulates of the Constitution, notwithstanding the great dignity attaching to that office with the attribute of impartiality.**

108. **It is the Vice-President of India who is ex-officio Chairman of the Rajya Sabha and his position, being akin to that of the President of India, is different from that of the Speaker. Nothing said herein relating to the office of the Speaker applies to the Chairman of the Rajya Sabha, that is, the Vice-President of India, However, the only authority named for the Lok Sabha and the Legislative Assemblies is the Speaker of the House and entrustment of this adjudicatory function fouls with the constitutional scheme and, therefore, violates a basic feature of the Constitution. Remaining part of the Tenth Schedule also is rendered invalid notwithstanding the fact that this defect would not apply to the Rajya Sabha alone whose Chairman is the Vice-President of India, since the Tenth Schedule becomes unworkable for the Lok Sabha and the State Legislatures. The statutory exception of Doctrine of Necessity has no application since designation of authority in the Tenth Schedule is made by choice while enacting the legislation instead of adopting the other available options.**

109. **Since the conferment of authority is on the Speaker and that provision cannot be sustained for the reason given, even without para 7, the entire Tenth Schedule is rendered invalid in the absence of any valid authority for decision of the dispute.**

110. **Thus, even if the entire Tenth Schedule cannot be held unconstitutional merely on the ground of absence of ratification of the Bill, assuming it is permissible to strike down para 7 alone, the remaining part of the Tenth Schedule is rendered unconstitutional also on account of violation of the aforesaid basic feature. Irrespective of the view on the question of effect of absence of**

ratification, the entire Tenth Schedule must be struck down as unconstitutional.

111. **Point 'G' — Other contentions**

We have reached the conclusion that para 7 of the Tenth Schedule is unconstitutional; that the entire Tenth Schedule is constitutionally invalid in the absence of prior ratification in accordance with the proviso to clause (2) of Article 368; that the Doctrine of Severability does not apply in the present case of a constitutional amendment which suffers from the defect of absence of ratification as required by the proviso to clause (2) of Article 368; that the remaining part of the Tenth Schedule minus para 7 is also unconstitutional for violation of a basic feature of the Constitution; and that the entire Tenth Schedule is, therefore, constitutionally invalid rendering the Constitution (Fifty-Second Amendment) Act, 1985 still born and an abortive attempt to amend the Constitution. In view of this conclusion, it is not necessary for us to express our concluded opinion on the other grounds of challenge to the constitutional validity of the entire Tenth Schedule urged at the hearing on the basis of alleged violation of certain other basic features of the Constitution including the right of members based on Article 105 of the Constitution.

112. **These are our detailed reasons for the operative conclusions pronounced by us earlier on November 12, 1991.**

Order accordingly

SUPREME COURT OF INDIA*

Writ Petition (Civil) No. 47 of 1992
(Decision dated 5.2.1993)

Rama Kant Pandey ***..Petitioner***

Vs.

Union of India, ***.. Respondent***

SUMMARY OF THE CASE

Section 52 of the Representation of the People Act, 1951 was amended by the Representation of the People (Amendment) Ordinance, 1992 (1 of 1992) to provide that the election in a constituency shall be countermanded on the death of a candidate, set up by a recognised political party only, and not on the death of any candidate as was the law prior to the amendment. Further, section 30 of the said Act was also amended by another Ordinance, namely, Representation of the People (Second Amendment) Ordinance, 1992 (2 of 1992), whereby the minimum period between the last date for the withdrawal of candidatures and the date of poll was reduced from 20 to 14 days.

The petitioner, Shri R.K.Pandey, challenged the constitutional validity of the both the above mentioned Ordinances, before the Supreme Court in the present writ petition, on the ground of violation of Articles 14 and 19 of the Constitution of India. He particularly contended that the distinction made by the impugned amendment to section 52 between a candidate set up by a recognised political party and any other candidate was artificial, inconsistent with the spirit of election law and discriminatory.

The Supreme Court dismissed the writ petition, holding that the candidates set up by recognised political parties constitute a class separate from the other candidates, and that there was no violation of Article 14 of the Constitution in so far as the amendment to Section 52 of the Representation of the People Act, 1951 was concerned. The Supreme Court also held that the period of 14 days for election campaign could not be said to be inadequate and inappropriate, especially in the changed circumstances which are prevailing in the country.

(A) Constitution of India, Art. 14 - Representation of the People Act (1951), S.52 (as amended in 1992) - Countermanding of Election - Same in even of death of contesting candidate - Restricting thereof to death of party candidate by amendment - it is not discriminatory on that count.

Restricting of countermanding of election in the event of death of a contesting candidate only to death of candidate set up by political

party by amendment it not violative of Art. 14 of the Constitution for giving differential treatment to candidates set up by parties.

(Para 11)

What is to be noticed in aforesaid connection is that in England where democracy has prevailed for longer than in any other country in recent times, the Cabinet system of Government had been found to be most effective. In the other democratic countries also the party system has been adopted with success. It has been realised that for a strong vibrant democratic Government, it is necessary to have a parliamentary majority as well as a parliamentary minority, so that the different points of view on controversial issues are brought out and debated on the floor of the parliament. This can be best achieved by the party system, so that the problems of the nation may be discussed, considered and resolved in a constructive spirit. To abolish or ignore the party system would be to permit a chorus of discordant notes to replace an organised discussion. It is, therefore, idle to suggest that for establishing a true democratic society, the party system should be ignored. Constitution has clearly recognised the importance of this system, which was further emphasized by the addition of the 10th Schedule to it. The Election Symbols (Reservation and Allotment) Order is also a step in that very direction. It cannot also be said that candidates set up by political parties should not receive any special treatment. Candidates set up by political parties constitute a class separate from the other candidates.

(Paras 9-10)

(B) Representation of the People Act (1951), S. 30(d) – Reduction of period of 20 days to 14 in S. 30(d) providing that date of poll shall not be earlier than the twentieth day after last date for withdrawal of condidature – Not violative of Art. 14 of Constitution – Reduced period cannot be said to be indequate in the changed circumstances prevailing in the country.

(Para 11)

Cases Referred :	**Chronological Paras**
AIR 1987 SC 1577 : 1987 Suppl SCC	**93**
	10
AIR 1985 SC 1133 : 1985 Suppl SCC	**189**
	10
AIR 1982 SC 983	**8**
AIR 1974 SC 2192 : (1975) 1 SCR 814 :	**1974**
Lab IC 1380	**9**
AIR 1954 SC 210	**8**

JUDGMENT

Present:- Lalit Mohan Sharma, C.J.I. S. Mohan and S.P. Bharucha, JJ.

SHARMA, C.J.I. **:– By the present application under Article 32 of the Constitution of India the petitioner has challenged the constitutional validity of the Representation of People (Amendment) Ordinance, 1992 (Ordinance No. 1 of 1992) and the Representation of the People (Second Amendment) Ordinance 1992 (Ordinance No. 2 of 1992), on grounds of violation of Articles 14, 19 & 21. By the first Ordinance, Section 52 of Representation of the People Act, 1951 (the Act) providing for countermanding elections in certain circumstances has been amended. By the second Ordinance the period of 20 days in Section 30 of the Act has been reduced to 14 days. Later, when the Parliament, the amendments were incorporated by an amending Act.**

2. **The provisions of Section 52, as they stood before the amendment, provided for countermanding the election in either of 2 contingencies – (i) if a candidate whose nomination was found valid on scrutiny under Section 36 or who has not withdrawn his candidature under Section 37 died and a report of his death was received before the publication of the list of contesting candidates under Section 38, (ii) if a contesting candidates died and a report of his death was received before the commencement of the poll. On Countermanding the Returning Officer will have to report the fact to the Election Commission; and all proceedings with reference to the election will have to be commenced de novo in all respects as if for a new election. By the first Ordinance, the area attracting the provisions of countermanding has been narrowed down by confining the provisions only to such cases where a candidate of a recognised political party dies.**

3. **Section 30 deals with appointment of dates for nomination, scrutiny and the holding of poll, and in clause (d) it is provided that the date of poll shall not be earlier than the twentieth day after the last date for the withdrawal of candidatures. With a view to expedite the whole process the words "twentieth day" have been substituted by the words "fourteenth days" in the said clause by the impugned Ordinance.**

4. **Learned Counsel for the petitioner has strenuously contended that the distinction made by the impugned amendment between a candidate set up by a recognised political party and any other candidate is artificial, inconsistent with the spirit of the election law and discriminatory. The Constitution does not confer on a candidate set up by a registered political party any special right, and treats all**

candidates similarly. It does not recognise any categorisation. It is, therefore, argued that the difference which is being introduced by the impugned amendment is contrary to the scheme of the Constitution and violative of the equality clause in Article 14. According to the learned Counsel, this will also infringe the guarantee under Article 19(1)(a) in respect of freedom of speech and expression.

5. **Elaborating his argument, the learned Counsel contended that the right to choose its representative belongs to the voters of a particular constituency, and this should not be whittled down by amendments which have a tendency to undermine this element. Lack of wisdom in giving importance to recognised political parties was emphasised by saying that such parties almost always impose their choice of candidates in their own interest and at the cost of the welfare of the constituencies. By introducing this imbalance in the Act, it is stated, the republican character of the Constitution is jeopardised. The sum and substance of the argument on behalf of the petitioner is that no distinction can be made between one candidate and another purely depending on recognition as a political party.**

6. **So far the second Ordinance is concerned, the objection is that the period of 14 days, substituted by the amendment, is too short and the reduction from the period of 20 days is arbitrary and prejudicial to the larger interest for which elections are held.**

7. **In reply, Mr. Altaf Ahmad, Additional Solicitor General, appearing on behalf of the Union of India has strongly relied upon the statements made in the counter-affidavit filed on behalf of the respondent stating that on account of increase in terrorism and physical violence in several parts of the country combined with the phenomenal increase in the number of independent candidates, the danger of disruption of the election process has been fast growing and the problem was, therefore, taken up for serious consideration. The issue was examined by the Electoral Reforms Committee set up in 1990 under the Chairmanship of the then Minister of Law and Justice, late Dinesh Goswami. After studying the problem deeply and considering various points of view presented in this regard the Committee made its recommendation and accordingly, the impugned amendment was made. Explaining the urgency of introducing the amendment by an Ordinance (when Parliament was not in session) the counter-affidavit states that it had then been decided to hold the General Elections to the House of People from the State of Punjab as also the election to the State Legislature of that State and having regard to the law and order situation prevailing in the State, it was considered essential to curb the danger of disruption of the election process by amending Section 52 immediately. With the same object in view, the period of 20 days mentioned in Section 30 was substituted by 14 days.**

8. **Before proceeding to examine the merits of the argument addressed on behalf of the petitioner it will be useful to note that the right to vote or to stand as a candidate for election is neither a fundamental nor a civil right. In England also it has never been recognised as a common law right. In this conncetion, we may usefully refer to the following observations in Jyoti Basu V. Debi Ghosal, AIR 1982 SC 983 and 986, which reads as under (paras 7 & 8) :**

"The nature of the right to elect, the right to be elected and the right to dispute an election and the scheme of the constitutional and statutory provisions in relation to these rights have been explained by the Court in N.P. Ponnuswami V. Returing Officer, Namakkal Constituency, 1952 SCR 218 : (AIR 1952 SC 64) and Jagan Nath v. Jaswant Singh, AIR 1954 SC 210. We proceed to state what we have gleaned from what has been said, so much as necessary for this case.

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 an 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."

The objcetion raised by the petitioner, therefore, must be examined in this background.

9. **The challenge of the petitioner is directed against the differential treatment which the election law in India gives to candidates set up by political parties. The main thrust of the argument of the learned Counsel is that the party system and the recognition of political parties is itself detrimental to the cause of real democracy. In any event, no additional advantage ought to have been allowed to candidates set up by political parties. This stand runs counter to the constitutional scheme adopted by the nation. It have firmlly been established that the Cabinet System of Government has been envisaged by our Constitution and that the same is on the British pattern. (See Shamsher Singh v. State of Punjab (1975) 1 SCR 814 at p. 827 : (AIR 1974 SC 2192 at p. 2198). In England where democracy has prevailed longer than in any other country in recent times, the Cabinet system of Government has been found to be most effective. In the other democratic countries also the party system has been adopted with success. It has been realised that for a strong vibrant democratic Government, it is a necessary to have a parliamentary majority as well as a parliamentary minority, so that the different points of views on controversial issues are brought out and debated of the floor of the Parliament. This can be best achieved by the party system, so that the problems of the nation may be discussed, considered and resolved in a constructive spirit. To abolish or ignore the party system would be to permit a chorus of**

discordant notes to replace an organised discussion. In his book "Cabinet Government" (2nd Edition, page 160) Sir lvor Jennings has very rightly said, "Party warfare is thus essential to the working of the democratic system". It is therefore, idle to suggest that for establishing a true democratic society, the party system should be ignored. Our Constitution has clearly recognised the importance of this system, which was further emphasized by the addition of the10th Schedule to it. The Election Symbols Reservation and Allotment) order is also a step in that very direction.

10. **There is also no merit whatsoever in contention that candidates set up by the political parties should not receive any special treatment. The fact that candidates set up by political parties constitute a class separate from the other candidates has been recognised by this Court in numerous cases. In paragraph 14 of the judgment in the case of Dr. P.N. Thampy Terah v. Union of India, (1985) Suppl SCC 189 : (AIR 1985 SC 1133). The Constitution Bench observed thus:–**

"It is the political parties which sponsor candidates, that are in a position to incur large election expenses which often run into astronomical figures . We do not consider that preferring political parties for exclusion from the sweep of monetary limits on election expenses is so unreasonable or arbitrary as to justify the preference being struck down upon that ground."

In D.M.L. Agarwal v. Rajiv Gandhi, 1987 Suppl SCC 93 : (AIR 1987 SC 1577), a Division Bench of this Court took note of and emphasized the vital role of political parties in a parliamentary form of democracy and anxiety was expressed about the growing number of independent candidates.

11. **For the reasons indicated above, we do not find any substance in the argument of the learned Counsel for the petitioner challenging the constitutional validity of the impugned amendment of Section 52. The argument against the reduction of the period of 20 days to 14 days in Section 30 is equally without any merit. The learned Counsel could not suggest any good reason for holding that the period of 14 days would be inadequate or inappropriate, especially in the changed circumstances which are prevailing in the country. Consequently, this writ petition is dismissed with costs assessed at Rs. 2,500 – payable to the respondent Union of India.**

Petition dismissed.

SUPREME COURT OF INDIA*

Writ Petition Civil No. 731 of 1994, with Civil Appeal No. 1319 of 1995$ (arising out of SLP (C) No. 21961 of 1994) and W.P. (C) No. 56 of 1995

(Decision dated 6.2.1995)

Lal Babu Hussain and Others ***..Petitioners***

Vs.

Electoral Registration Officer and Others ***..Respondents***

With

Husain Dalwai and Others ***..Appellants***

Vs.

Union of India and Others ***..Respondents***

And

P.U.C.L. and Others ***..Petitioners***

Vs.

Electoral Registration Officer and Others ***..Respondents***

SUMMARY OF THE CASE

Three Writ Petitions were filed in the Bombay High Court challenging the directive of the Election Commission issued on 21st August, 1992, directing Collectors of Districts in India to determine if any person was or was not foreigner, for the purposes of preparation and revision of electoral rolls. According to the said directive, the information collected by the enumerators during the house-to-house enumeration of electors had to be consolidated and furnished to the Collectors, who in turn were expected to get the same verified by the police/intelligence agencies and then to decide the question whether the persons concerned were citizens of India so as to be eligible for inclusion in the electoral rolls. The Electoral Registration Officers were then expected to prepare a proper electoral roll on the basis thereof and publish it for inviting claims and objections. This directive was followed by yet another directive dated 9th September, 1994, by which the Electoral Registration Officers were directed to identify and declare the names of foreign nationals and delete their names from the electoral rolls. In pursuance of these directives of the Election Commission, extensive search was undertaken in 39 polling station areas of Greater Bombay and as many as 1.67 lakhs persons were called upon by the police to produce documentary evidence in support of their claims as citizens of India. This police action was challenged in the aforesaid three

Writ Petitions in the Bombay High Court. The High Court dismissed the writ petitions on the basis of certain clarifications and concessions made by the Advocate General, Maharashtra in regard to the above mentioned verification proceedings by the police authorities. The petitioners still felt aggrieved and filed the present appeal before the Supreme Court.

Two writ petitions were moved before the Supreme Court also, on more or less small allegations relating to the verification proceedings being undertaken by the Electoral Registration Officer of Motia Khan in Pahar Ganj Areas and Sanjay Amar Jhugi Jhompri Colony in Matia Mahal Assembly Constituency in Delhi.

The Supreme Court went into the directives issued by the Election Commission so as to delete the names of foreigners on the electoral rolls. The Court, however, found that the names of a large number of persons on the electoral rolls were being deleted without giving the persons concerned an adequate opportunity of presenting their cases and without disclosing the evidence in possession of Electoral Registration Officers against the persons concerned on the basis of which their names were sought to be deleted. On a suggestion from the Supreme Court, the learned Counsel for the Election Commission, Electoral Registration Officers and for the petitioners submitted a set of guidelines to be followed by the electoral registration authorities, for consideration of the Court. The Court after taking into consideration the guidelines suggested by either side, issued its own set of guidelines for the Electoral Registration Officers in the matter of enrolment and deletion of names of persons suspected to be foreign nationals. The Supreme Court struck down all the proceedings which had been initiated against the suspected foreign nationals and directed fresh proceedings to be initiated taking into consideration the guidelines laid down by the Supreme Court.

(A) Constitution of India, Arts. 5, 11 – Citizenship Act (57 of 1955), S. 9 – Citizenship – Question about – Determination even for limited purpose of some other law – Has to be done by authority in light of constitutional provisions and provisions of 1955 Act.

(Para 6)

(B) Constitution of India, Arts. 324, 14 – Representation of the People Act (43 of 1950), S. 22 – Registration of Electors Rules (1960). R. 21A – Electoral role – Deletion of name from – Opportunity of hearing – Deletion on ground of suspicion about citizenship – Hearing would not be meaningful unless basis for the suspicion is disclosed.

Section 22 empowers the Electoral Registration Officer for a constituency to delete any entry already made if on enquiry he is satisfied that it is erroneous or defective in any particular or needs to be transposed to another place in the roll or the concerned person

has died or has ceased to be ordinarily resident in that constituency or that he is otherwise not entitled to be registered. Of course before any such action is taken the person concerned, except in the case of death, must be given an opportunity to be heard. Similar is the provision in Rule 21 A of the 1960 Rules which empowers the registration officer before final publication of the roll to delete the name or names of any person or persons which have been entered owing to inadvertence or error if the person concerned is dead or has ceased to be ordinarily resident in that constituency or is otherwise not entitled to be registered. Where the name already entered is required to be deleted, since the name is already entered, it must be presumed that before entering his name the concerned officer must have gone through the procedural requirements under the statute. This would be so even under Section 114(e) of the Evidence Act. But then possibilities of mistakes cannot be ruled out. These mistakes, if any would have to be corrected even if it is assumed that the words "is otherwise not entitled to be registered in that roll" used in Section 22 of the 1950 Act or Rule 21 A of the 1960 Rules are wide enough to cover the question relating to citizenship, the issue would have to be decided after giving the concerned person a reasonable opportunity of being heard. If the opportunity of being heard before deletion of the name is to be a meaningful and purposive one, the concerned person whose name is borne on the roll and is intended to be removed must be informed why a suspicion has arisen in regard to his status as a citizen of India so that he may be able to show that the basis for the suspicion is ill-founded. Unless the basis for the doubt is disclosed, it would not be possible for the concerned person to remove the doubt and explain any circumstance or circumstances responsible for the doubt.

(Para 6)

(C) Constitution of India, Art. 324 — Representation of the People Act (43 of 1950), S. 22 — Electoral roll — Deletion of names — Inhabitants of certain constituencies treated as suspected foreigner — Police help taken for verification — Electoral Registration officer acting on police report — Proof of citizenship limited to only certain documents — Copies of police report not supplied to concerned persons — Held proceedings for deletion of name were liable to be quashed.

Inhabitants of certain constituencies in Bombay and Delhi were treated as suspect foreigners and enumerators were appointed to verify if persons residing in certain polling stations were not citizens. The police was employed for this purpose in Bombay they addressed as many as 1.67 lakh notices calling upon the addressees to produce (i) birth certificates (ii), Indian passports, if any, (iii) citizenship certificates and/or (iv) extracts of entry made in the register of citizenship. In Delhi also similar notices were addressed to hundreds of residents requiring them to produce the afforestated

documents. The time given was short and requests for extension of time were refused presumably because the work had to be completed within a given time-frame. Except the documents stated in the notice, no other proof, documentary or otherwise, was entertained. The fact that the addressees were by and large uneducated and belonged to the working class, particularly those who lived in jhuggi jhopris (huts) was overlooked. The police refused to accept any other document and prepared stereotype reports which betray non-application of mind and the Electoral Registration Officers abdicated their functions and merely superadded their seals to such reports. This notwithstanding the fact that these persons were voters in previous elections and hence it would ordinarily appear that their cases were verified before their names were entered in the electoral rolls. The atmosphere was fairly charged and because of the statements made time and again by the Election Commission the police went about its task with a mind-set which gave practically no opportunity to the addressees to place the relevant material for whatever it was worth because no other documentary evidence, save and except that mentioned in the show cause notice, was entertained. Even the Electoral Registration Officers merely acted on the police report, copies whereof were admittedly not supplied to the addressees thereby making a mockery of the reasonable opportunity of being heard requirement contemplated under the 1950 Act and the 1960 Rules. The proceedings initiated for deletion of names from electoral role were liable to be set aside.

(Para 13)

The court issued guidelines for the officers dealing with cases of deletion of name from electoral roll on basis of doubt about citizenship. The directive issued by the Election Commission on prohibiting the Officer from entertaining certain documents was quashed.

(Para 13)

(D) Constitution of India, Art. 324 Representation of the People Act (43 of 1950) Electoral roll — Deletion of name — reason suspicion about citizenship — Registration Officer while enquiring shall give adequate probative value to fact that name of person concerned was included in preceding electoral role after following requisite procedure.

(Para 13)

Cases Referred :	Chronological Paras
AIR 1971 SC 1382 : (1971) 2 SCC 113 : 1971 Cri LJ 1103	**5**
AIR 1962 SC 1778 : 1962 Supp (3) SCR 288	**5**

JUDGMENT

Present:- A.M. Ahmadi. C.J.I., N.P. Singh and Mrs. Sujata V. Manohar. JJ

Mr. K.T.S. Tulsi, Addl. Solictor General, Mr. Soli J. Sorabjee, Mr. S.B. Wad, and Mr. G. Ramaswamy, Sr. Advocates, Ms. Neeti Dixit, Mr. Gopal Jain, Mr. Mukul Mudgal, Ms. Usha Reddy, Ms. J.S. Wad, Mr. Prashant Bhushan, Mr. Hemant Sharma, Mr. S.N. Terdol, Mr. P. Parmeshwar, Mr. A. Subba Rao, Ms. Shomona Khanna, Mr. Niranjan Reddy and Mr. S. Murlidhar, Advocates with them for the appearing parties.

AHMADI, C.J.I. :— **These three cases, two writ petition under Article 32 and one special leave petition under Article 136 of the Constitution of India, raise certain vital issues regarding an individual's eligibility for inclusion of his/her name in the electoral rolls of a given constituency. Article 325 of the Constitution envisages one general electoral roll for every territorial constituency for election to either House of Parliament or the Legislature of a State and under Article 326 elections to the House of the People and to the Legislative Assembly of every State must be on the basis of adult suffrage; that its to say, every person who is a 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. Articles 327 and 328 empower Parliament/State Legislatures respectively to inter alia make provision with respect to all matters relating to, or connected with the preparation of electoral rolls by enacting an appropriate law. The superintendence, direction and control of the preparation of the electoral rolls has been vested in the Election Commission by virtue of Article 324 of the Constitution. These are the relevant constitutional provisions bearing on the question of preparation of the electoral rolls and elegibility of every person to be included therein to which our attention was drawn.**

2. The Representation of the People Act, 1950 (hereinafter called 'the 1950 Act'), inter alia, provides for the preparation of electoral rolls, qualification of voters etc. Part III thereof comprising Sections 14 to 25A provides for Electoral rolls for Assembly Constituencies. Section 15 envisages an electoral roll for every Assembly Constituency. Section 16 prescribes the disqualifications for registration in an electoral roll. It says : 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. It further provides for striking off the name of any person who becomes disqualified after registration but if the disqualification is removed at any subsequent point of time, the proviso lays down that the name of such person shall forthwith be reinstated in that roll. Section 19 lays down the conditions of registration. It inter alia provides that every person who is not less than 18 years of age on the qualifying date and is ordinarily resident in a constituency, shall be entitled to be registered in the electoral roll for that constituency. Section 20 gives the meaning to the expression "ordinarily resident." Then comes Section 21 which provides for the preparation and revision of electoral rolls. It envisages that the electoral roll of each constituency shall be prepared in the prescribed manner and shall come into force immediately upon its final publication. It contemplates revision of the electoral roll before each general election to the House of the People or to the Legislative Assembly of a State and before each bye-election to fill a casual vacancy in a seat allotted to the constituency. It further provides for the revisions of the electoral roll in any year in the prescribed manner if such revision has been directed by the Election Commission. The proviso to that sub-section lays down that if the electoral roll is not revised the validity or continued operation of the said electoral roll shall not thereby be affected. Sub-section (3) of Section 21 which begins with a non obstance clause says that the Election Commission may at any time, for recorded reasons, direct a special revision of the electoral roll for any constituency or part of a constituency in such manner as he may think fit. Section 22 deals with the correction of entries in electoral rolls. According to that section if the Electoral Registration Officer for a constituency is satisfied after inquiry that any entry in the electoral roll of the constituency is erroneous or defective in any particular or it is necessary to be transposed to another place in the roll on account of the person concerned having changed his place of ordinary residence within the constituency or is required to be deleted because the person concerned is dead or has ceased to be ordinarily resident in the constituency or is otherwise not entitled to be registered in that roll, the Electoral Registration Officer shall, subject to such general or special directions, if any, given by the Election Commission in that behalf, amend, transpose or delete the entry. The proviso to that section introduces the principle of natural justice, in that, it enjoins the Electoral Registration Officer to give the person concerned a reasonable opportunity of being heard in respect of the action proposed to be taken in relation to him. Section 23 provides for the inclusion of names in electoral rolls. It says that any person whose name is not included in the electoral roll of a constituency may apply to the Electoral Registration Officer for the inclusion of his name in that roll. On receipt of such an application, the Electoral Registration Officer is enjoined by subsection (2)

thereof to direct his name to be included therein on being satisfied that the applicant is entitled to be registered in the electoral roll. An appeal is provided against the decision of the Electoral Registration Officer under Section 22 or 23 to the Chief Electoral officer. Lastly, Section 28 empowers the Central Government to make rules. These are some of the provisions of the 1950 Act which have a bearing on the questions at issue.

3. Reference may now be made to the Registration of Electrors Rules, 1960 (hereinafter called 'the 1960 Rules'), which can into force on January 1, 1961. Part II thereof concerns 'Electoral rolls for Assembly Constituencies'. Rule 5 provides that the roll shall be divided into conveniently parts. Rules 10 and 11 contemplate the publication of draft rolls in the first place and inviting of objections, if any, thereto. Rules 12 to 16 deal with the lodging of claims and objections to the draft rolls. Rule 17 provides that claims or objections not lodged within the time allowed or in the specified form and manner shall be rejected. Rule 18 provides for acceptance of claims and objections without any inquiry if the registration officer is satisfied about the validity of an claim or objection. In all other cases, Rule 19 enjoins giving of notice of hearing, Rule 20 envisages a summary inquiry into the claims and objections in respect of which show cause notice under Rule 19 had been given, recording of evidence and then recording of decision thereon. Rule 21 provides for inclusion of names inadvertently omitted in the rolls. Rule 21 A as amended with effect from 3rd September, 1987, lays down that if it appears at any time that owning to inadvertence or error or otherwise, the names of dead persons or person who have ceased to be, or are not entitled to be registered in the rolls, have been included therein, the registration officer shall exhibit the names, etc, of such electors on the notice board and also publish them in the manner prescribed and after considering the objections, decide whether or not the names of all or any of them should be deleted from the roll. This decision must be taken only after the concerned person has been accorded a reasonable opportunity to show cause against the proposed action. After all these requirements are over, Rule 22 contemplates the publication of the final list together with amendments. On such publication, the roll together with the list of amendments shall be the electoral roll of the constituency. Rule 23 provides for an appeal from any decision of the registration officer taken on the claims or objections filed against the draft list. Rule 25 says that the roll of every constituency shall be revised either intensively or summarily or partly intensively and partly summarily, as the Election Commissioner may direct. This, in brief, is the procedure laid down for the preparation of the electoral rolls.

4. It may also be advantageous to notice the provisions in regard to citizenship at this stage. Articles 5 to 7 of the Constitution read as under.

"5. Citizenship at the commencement of the Constitution — At the commencement of this Constitution every person who has his domicile in the territory of India and

— (a) who was born in the territory of India or

(b) either of whose parents was born in the territory of India or

(c) who has been ordinarily resident in the territory of India for not less that five years immediately preceding such commencement shall be a citizen of India.

6. Rights of citizenship of certain persons who have migrated to India from Pakistan. — Notwithstanding anything in Article 5, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if —

(a) he or either of his parents or any of his grand parents was born in India as defined in a Government of India Act. 1935 (as originally enacted); and

(b) (i) in the case where such person has so migrated before the nineteenth day of july 1948, he has been ordinarily resident in the territory of India since the date of his migration, or

(ii) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefore to such officer before the commencement of this Constitution in the form and manner prescribed by that Government.

Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately proceeding the date of his application.

7. Rights of citizenship of certain migrants to Pakistan — Notwithstanding anything in Articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India.

Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (b)

of Article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948."

Article II empowers Parliament to regulate citizenship rights by law.

5. The Citizenship Act, 1955 was enacted to provide for the acquisition and determination of Indian citizenship. It received the assent of the President on 30th December, 1955 and was published in the Gazette on the same day. Sections 3 to 7 thereof provide for acquisition of citizenship. Section 3 says that every person born in India on or after 26th January, 1950 but before the commencement of the Citizenship (Amendment) Act, 1986 and those born in India on or after such commencement and either of whose parents is a citizen of India at the of his birth, shall be a citizen of India by birth. Sub-section (2) of that section, however, states that the person shall not be such a citizen by virtue of this section if at the time of his birth his father possesses such immunity from suits or legal process as is accorded to an envoy of a foreign sovereign power accredited to the President of India and is not a citizen of India or his father is an enemy alien and the birth occurs in a place then under occupation by the enemy. Section 4 provides for citizenship by descent. This section (which has undergone changes) as it presently stands provides that a person born out side India on or after 26th January, 1950 but before the commencement of the Citizenship (Amendment) Act, 1992 shall be a citizen of India by descent if his father is a citizen of India at the time of his birth or a person born outside India on or after such commencement shall be a citizen of India by descent if either of his parents is a citizen of India at the time of his birth provided that in the latter case if either of the parents of such a person was a citizen of India by descent only, that person shall not be a citizen of India by virtue of this provision unless his birth is registered at an Indian Consulate within the given time frame or either of his parents is, at the time of his birth, in service under Government of India. Section 5 deals with citizenship by registration. It empowers the prescribed authority to register a person as a citizen of India who is not already such citizen by virtue of the Constitution or any other provisions of the Citizenship Act and belongs to any one of the five categories set out in Clauses (a) to (e) thereof. Section 6 deals with citizenship by naturalisation. Section 6A was enacted by Act 65 of 1985 to give effect to the Assam Accord. Section 7 is also not relevant for our purpose as it provides for citizenship by incorporation of territory. Sections 8 to 10 provides for termination of citizenship. Sections states that if any citizen of India who is also a citizen or national of another country, makes a declaration renouncing his Indian citizenship, the declaration shall be registered whereupon the person shall cease to be a citizen of India. Section 9 is relevant and may be reproduced:

"9. Termination of citizenship — (1) Any citizen of India who by naturalisation, registration or otherwise voluntarily acquires, or has at any time between the 26th January, 1950 and the commencement of this Act voluntarily acquired, the citizenship of another country shall, upon such acquisition or as the case may be, such commencement, cease to be a citizen of India.

Provided that nothing in this sub-section shall apply to a citizen of India who, during any war in which India may be engaged, voluntarily acquires the citizenship of another country, until the Central Government otherwise directs.

(2) If any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence, as may be prescribed in this behalf."

Section 10 provides that a citizen of India who is such by naturalisation or by virtue of marriage to a citizen of India or by registration otherwise than under clause b(ii) of Article 6 of the Constitution or clause (a) of sub-section (1) of section 5 of the Act shall cease to be a citizen of India if he is deprived of the citizenship by an order of the Central Government under this section. It will be seen from sub-section (2) of Section 9 that if any question arises as to whether, when and how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner and having regard to such rules of evidence as may be prescribed in that behalf. If we turn to the Citizenship Rules 1966 we find detailed provisions in regard to the procedure to be followed for the acquisition of citizenship and for the termination thereof. It will thus be seen that if a person has acquired citizenship of India and a question arises whether or not he/she has lost the citizenship by acquisition of citizenship of another country, that question has to be resolved by the authority prescribed under the Act. Thus, the question whether a person is a foreigner is a question of fact which would require careful scrutiny of evidence since the enquiry is quasi-judicial in character. This question has to be determined by the Central Government vide Government of Andhra Pradesh v. Syed Mohd Khan 1962 Supp (3) SCR 288 : (AIR 1962 SC 1778) and State of U.P. v. Rehamatullah (1971) 2 SCC 113: (AIR 1971 SC 1382).

6. From the resume of the aforementioned provisions of the Constitution and the Citizenship Act, it becomes clear that whenever any authority is called upon to decide even for the limited purpose of another law, whether a person is or is not a citizen of India, the authority must carefully examine the question in the context of the constitutional provisions and the provisions of the Citizenship Act extracted hereinbefore. In the instant case Article 325 of the Constitution provides for one general electoral roll for every

territorial constituency, so does Section 15 of the 1950 Act. This has to be done under the superintendence, direction and control of the Election Commission as per the mandate of Article 324 of the Costititution. Section 16 of the 1950 Act in terms states that a person shall be disqualified for registration in an electoral roll if he is not a citizen of India. But positively a person must be a citizen of India to be entitled to inclusion in the electoral roll. Sub sec. (2) of the said section empowers striking off the name of a person who incurs a disqualification set out in clause (1), (b) or (c) of sub-section (1) after his name is entered in the register of electoral rolls. Otherwise every person who is not less than 18 years of age on the qualifying date and is ordinarily resident in a given constituency is entitled to be registered. Section 22 empowers the Electoral Registration Officer for a constituency to delete any entry already made if on enquiry he is satisfied that it is erroneous or defective in any particular or needs to be transposed to another place in the roll or the concerned person has died or has ceased to be ordinarily resident in that constituency or that he is otherwise not entitled to be registered. Of course before any such action is taken the person concerned, except in the case of death, must be given an opportunity to be heard. Similar is the provision in Rule 21 A of the 1960 Rules which empowers the registration officer before final publications of the roll to delete the name or names of any person or persons which have been entered owing to inadvertence or error if the person concerned is dead or has ceased to be ordinarily resident in that constituency or is otherwise not entitled to be registered. The procedure for exercise of the said power is set out therein and conforms to the requirements of the principles of natural justice. It is obvious from the above that two situations arise; the first where the name is to be entered on the rolls for the first time and the second where the name already entered is required to be deleted. In the first mentioned situation before the name is entered on the rolls, the concerned officer must be satisfied that the person seeking to have his name entered is not disqualified by reason of his not being a citizen of India. Therefore, he would be justified in requiring the concerned person to show evidence that he is a citizen of India. In the second situation, since the name is already entered, it must be presumed that before entering his name the concerned officer must have gone through the procedural requirements under the statute. This would be so even if we invoke 114 (e) of the Evidence Act. But then possibilities of mistakes cannot be ruled out. These mistakes, if any, would have to be corrected. Even if we are to assume (without deciding) that the words "is otherwise not entitled to be registered in that roll" used in Section 22 of the 1950 Act or Rule 21 A of the 1960 rules are wide enough to cover the question relating to the citizenship, the issue would have to be decided after giving the concerned person a reasonable opportunity of being heard. If the

opportunity of being heard before deletion of the name is to be a meaningful and purposive one, it goes without saying that the concerned person whose name is borne on the roll and is intended to be removed must be informed why a suspicion has arisen in regard to his status as a citizen of India so that he may be able to show that the basis for the suspicions is ill-founded. Unless the basis for the doubt is disclosed, it would not be possible for the concerned person to remove the doubt and explain any circumstance or circumstances responsible for the doubt.

7. We may now briefly deal with the factual matrix of each case.

SLP (C) No. 21961 of 1994:

8. Three writ petitions bearing Nos. 2429, 2452 and 2330 of 1994 were filed in the Bombay High Court challenging the directive of the Election Commission dated 21st August, 1992 empowering Collectors of all Districts in India to determine if any person was or was not a foreigner. According to the said directive the information collected by the enumerators had to be consolidated and furnished to the Collectors who in turn were expected to get the same verified through the police/intelligence agencies or the like and then decide the question whether the person or persons concerned were citizens of India. The Electoral Registration Officers were then expected to prepare a draft electoral roll on the basis thereof and publish it inviting objections, if any. Any person enumerated but not entered in the roll could apply for the inclusion of his name in the roll. The Electoral Registration Officer was to consider the request for inclusion of his name in the roll and decide thereon. This was followed by yet another directive dated 9th September, 1994 by which power was vested in the Electoral Registration Officer to identify and declare the names of foreign nationals and delete their names from the electoral roll. It was stated in the guidelines of the Election Commission that the onus of proof of citizenship shall lie on the person seeking to have his name in the electoral roll pursuant to the directives of the Election Commission, extensive search was undertaken in 39 police stations of Greater Bombay and letters were issued by the police to as many as 1.67 lakh persons calling upon them to produce (i) birth certificate (ii) Passport issued by the Government of India (iii) certificate of citizenship and (iv) entry made in the register of citizenship by the Government of India. This led to a virtual commotion, more particularly because it was believed to be a move to harass the minority community and to defranchies them. Thereupon the aforesaid writ petitions came to be filed challenging to police action. In the course of the hearing of these petitions several concessions were made by the learned Advocate General to save the action and even the Commissioner of Police filed an affidavit clarifying the fact that it was not the function of the police to delete any name from the draft electoral roll

on the ground that the concerned person is not a citizen of India. That was the function of the Electoral Registration Officer under Rule 21A of the 1960 rules. However, it was conceded that pursuant to the directives of the Election Commission, the police had identified the areas having substantial presence of foreign nationals on the basis of intelligence reports. The notices issued to the persons suspected to be foreigners carried a statement to the effect that the addressee was or was not a citizen of India. The learned Advocate General clarified that in all letters issued in future such a statement will not be printed or typed on the reverse of the notice. It was also clarified that the documents in support of proof of citizenship will not be confined to those mentioned hereinabove. Other documents having a bearing on the question of citizenship would also be entertained. The submission that a Ration Card cannot be received in evidence was spurned by the Division Bench. On the basis of these concessions the Division Bench of the High Court dismissed the writ petition. Against the said order the petitioners of Writ Petition No. 2452 of 1994 have preferred this petition seeking special leave to appeal. We grant special leave.

9. **The other two writ petitions have been moved on more or less similar allegations. In Writ Petition No. 731 of 1994 the petitioners are residents of the area known as Motia Khan, Paharganj, New Delhi. They are poor, ignorant and illiterate slum-dwellers. Their grievance is that members of the minority community have been called upon by the Electoral Registration Officer, Delhi, by communication dated 10th October, 1994 to prove their Indian citizenship. The petitioners contend that they and other residents of the said slum are migrants from U.P. and Bihar who came to Delhi in search of livelihood and have settled in the said area since a number of years and although they may not have the documents required to be produced as per the communication, they have several other documents, such as, ration card, electoral rolls of the past elections, school records, etc., to show that they are bona fide residents of the said locality but they have been brushed aside with the oblique motive of deleting their names as voters. They have questioned the authority of the Election Commission to undertake any such exercise. The specimen copy of the notice issued to the petitioners and other similarly situated dated 10th October, 1994 has been produced and reads as under: —**

"NOTICE

Whereas a report has been received indicating that you may not be a citizen of India and as such your name appears to be fit for deletion from Electoral Rolls of this Assembly Constituency.

You are, therefore, hereby called upon to appear in person with such evidence as you may like to adduce in proof of your being an

Indian Citizen before the undersigned on 13-10-1994 at 'D' Block, Vikas Bhawan, New Delhi – 110 002.

Sd/-
K.C. Agarwal
Electoral Registration Officer
69, Ram Nagar (SC) Assembly Constituency, 'D' Block, Vikas Bhawan, New Delhi-110 002"

It is clear that the doubt regarding the petitioner's citizenship is based on a report. Admittedly, a copy of the said report was not furnished to the addressee. The action proposed is to delete the name from the electoral rolls. The petitioners who had sought more time as they had to collect material from their villages were not granted time as in the opinion of the Electoral Registration Officer nearly a month's time could not be said to be inadequate. It is further observed that the verification report prepared by the police 'is generally reliable', it was for the addressee to prove that they were India citizens and ordinary residents of the constituency. The order of 25th October, 1994 shows that even though the police had not reported the time of the visit or the names of the independent witnesses or neighbours examined, the Electoral Registration Officer placed implicit reliance on the said document and raised a presumption in regard to its correctness. It will, thus, be seen that the Electoral Registration Officer totally abdicated in favour of what the police had done during verification. No effort was made to evaluate the evidence produced by the petitioners. Instead, without holding any enquiry worth the name, total and absolute reliance was placed on the police report which did not even indicate the time of visit the witness examined, etc. That too when the said officer himself had felt the necessity of re-verification which the police expressed it inability to undertake. Could the fate of a voter whose name had figured in the earlier rolls be sealed on such evidence? That is the moot question.

10. **Writ Petition No., 56 of 1995 has been filed by a few residents of Sanjay Amar Jhuggi Jhompri Colony also falling within the Matia Mahal constituency representing 18,000 residents of that locality. They too contend that they had shifted to Delhi in search of livelihood from U.P. and Bihar more than a decade back. They have been voters in this constituency for the last over 10 years. They contend that in the process of making the electoral rolls and the issuance of voters 'identity cards', the Electoral Registration Officer of Matia Mahal constituency issued a general notice stating that all the residents of that colony were suspected to be foreigners and called upon them to appear with concrete proof in support of their claim of citizenship. They contend that when they went to the office of the Electoral Registration Officer with documentary evidence**

such as ration cards, identity cards issued by the Delhi Administration, certificates from their village Pradhans and affidavits, they were told that these documents were of no avail. The petitioners and their colleagues thereafter approached the Peoples Union for Civil Liberties, Delhi pointing out their difficulties. The said body sent a representation on behalf of the residents to the said Officer as well as the Chief Election Commissioner protesting against what they described as a wholly humiliating, unfair and unreasonable demand but received no reply to the said representation. Some of the residents had filed claims in Form No. 6 for the inclusion of their names in the electoral roll. They were asked to appear before the Electoral Registration Officer on 16th and 17th December, 1994 with proof of their being Indian nationals. On their re-appearing before the said officer with the afore-mentioned documentary evidence, once again they were told that the same were of no avail. On the petitioners' learning that the revised electoral rolls had been published and out of 18,000 voters registered in the previous electoral rolls in polling stations Nos. 87-108 names of only 300 persons figured thus, leaving out almost 98% of the voters thereby depriving them of their democratic right to elect their representatives. Thereupon the present petitions came to be filed.

11. **If we turn to the specimen notice dated 20th September, 1994, it shows that all persons included in the draft electoral rolls of Matia Mahal AC 58 polling stations Nos. 87-108 were suspected not to be citizens of India. The notice contemplated an inquiry under Rule 21A of the 1960 Rules and required the persons concerned to appear on the dates mentioned in the schedule. Some of these persons had, as stated earlier submitted their claim in Form No. 6 for inclusion of their names in the electoral roll. As stated earlier they produced documentary evidence in the form of ration cards, identity cards issued by the Delhi Administration. Certificate of Registrar of Societies, affidavits, etc., but to no avail. Left with no alternative, they filed the present writ petition of invoking this Court's jurisdiction under Article 32 of the Constitution.**

12. **Like in the previous case, in the present case also the claims were rejected solely on the report of the police without furnishing copies. It will be seen from the above averments that the notice under Rule 21A of the 1960 Rules was a sweeping notice covering the entire populace of the area without there being any inquiry as to the citizenship of an individual.**

13. **From what we have stated hereinbefore it is clear that inhabitants of certain constituencies in Bombay and Delhi were treated as suspect foreigners and enumerators were appointed to verify if persons residing in certain polling stations were not citizens. The police was employed for this purpose and as observed earlier in Bombay they addressed as many as 1.67 lakh notices**

calling upon the addressees to produce (i) birth certificates (ii) Indian passports, if any, (iii) citizenship certificates and/or (iv) extracts of entry made in the register of citizenship. In Delhi also similar notices were addressed to hundreds of residents of Matia Mahal constituencies requiring them to produce the aforestated documents. The time given was short and requests for extension of time were refused presumably because the work had to be completed within a given time frame. Except the documents Stated in the notices, no other proof, documentary or otherwise, was entertained. The fact that the addressees were by and large uneducated and belonged to the working class, particularly those who lived in Jhuggi Jhompris, was overlooked. Perhaps the instructions issued from time to time by the office of the Election Commission created an atmosphere which gave wrong signals that the verification had to be completed within the time frame failing which they would incur the displeasure of the Election Commission exposing them to disciplinary action. This is evident from the fact that the police refused to accept any other document and prepared stereotype reports which betray non application of mind and the Electoral Registration Officers abdicated their functions and merely superadded their seals to such reports. This, notwithstanding the fact that these persons were voters in previous elections and hence it would ordinarily appear that their cases were verified before their names were entered in the electoral rolls. That is because it may be presumed that official action performed under the provisions of the 1950 Act or 1960 Rules were regularly done. Their names were already on the rolls and since they were sought to be removed by undertaking a special revision. Whether intensive or otherwise, the procedure for removal had to be followed. Besides, as stated earlier the atmosphere was fairly charged and because of the statements made time and again by the Election Commission the police went about its task with a mind-set which gave practically no opportunity to the addressees to place the relevant material for whatever it was worth because no other documentary evidence, save and except that mentioned in the show cause notices, was entertained. Even the Electoral Registration Officers merely acted on the police report, copies whereof were admittedly not supplied to the addressees thereby making a mockery of the reasonable opportunity of being heard requirement contemplated under the 1950 Act and the 1960 Rules. Since neither Mr. Tulsi nor Mr. Ramaswamy for the Election Commission and the Chief Election Commissioner even attempted to defend the action impugned in these proceedings we need not dilate on the question. In fact, at the very first hearing on 16th January, 1995, Mr. Tulsi very fairly stated that a fresh exercise under revised guidelines would have to be undertaken. We had on that occasion requested Mr. Tulsi to come up with a draft of the proposed guidelines for the perusal of the court. The petitioners 'appellants'

counsel were also requested to apply their minds and suggest broad guidelines. Accordingly at the last hearing on 25th January, 1995 Mr. Tulsi came cup with the proposed guidelines prepared in consultation with the Election Commission Mr. Soli J. Sorabjee, learned counsel in Writ Petition No. 731 of 1994 also submitted a set of guidelines for consideration. We heard Mr. Tulsi and Mr. G. Ramaswamy on the draft guidelines submitted by Mr. Tulsi and heard their submissions on the guidelines presented by Mr. Sorabjee. We also heard Mr. Wad senior counsel for the appellants and Mr. Prashant Bhushan, counsel for the petitioners in the other writ petitions on the proposed guidelines. Having taken the guidelines suggested by either side into considerations and having heard counsel, we proceed to dispose of all the three matters by giving the following directions.

1. **We allow the appeal arising from SLP(C) No. 21961 of 1994 and set aside the impugned judgment and order of the Division Bench of the Bombay High Court dated 17th November, 1994, except the undertaking given by the learned Advocate General;**

2. **In all the three cases we quash the proceedings and direct that the Election Commission may, if so desired, initiate fresh proceedings by issuance of a notice under the relevant provision disclosing the material on the basis whereof he has reason to suspect that the person concerned is not a citizen of India;**

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 factor before issuance of notice and in subsequent proceedings:**

4. **The Officer holding the enquiry shall bear in mind that the enquiry being quasi-judicial nature, he must entertain all such evidence, documentary or otherwise, the concerned affected person may like to tender in evidence and disclose all such material on which he proposes to place reliance, so that the concerned person has had a reasonable opportunity of rebutting such evidence. The concerned person, 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 considerations 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);

7. **The directive issued by the Election Commission on 9th September, 1994 prohibiting the Officer for entertaining certain documents will stand quashed and the documents will be received, if tendered, and its evidentiary value assessed and applied in decision-making;**

8. **These guidelines not being exhaustive, the Officer concerned must, where special situations arise, conduct themselves fairly and in a manner consistent with the principles of natural justice and should not appear to be acting on any pre-conceived notions; and;**

9. We deem it appropriate to clarify that the final electoral roll with regard to others whose names were not sought to be deleted on the suspicion that they were not citizens of India shall remain undisturbed but in respect of the petitioners and other similarly situated, these being petitions in the nature of public interest litigations, if the revision of the roll is not possible on account of paucity of time, they will be governed by the previous roll.

14. **The appeal and the two writ petitions will stand disposed of accordingly with no order as to cost.**

Order accordingly.

SUPREME COURT OF INDIA*

Civil Original Jurisdiction
Writ Petition (Civil) No. 805 of 1993
(Decision dated 14.7.1995)

T.N. Seshan ***.. Petitioner***
Chief Election Commissioner of India

Vs.

Union of India & Others ***..Respondents***

With

Writ Petition (Civil) No. 791 of 1993

Cho S. Ramaswamy ***.. Petitioner***

Vs.

Union of India & Others ***..Respondents***

With

Writ Petition (Civil) No. 825 of 1993$

B.K. Rai & Another ***..Petitioner***

Vs.

Union of India & Others ***..Respondents***

With

Writ Petition No. 268 of 1994

Common Cause
A Registered Society ***..Petitioner***

Vs.

Union of India & Others ***.. Respondents***

SUMMARY OF THE CASE

On 1st October, 1993, the President of India, in exercise of powers conferred by clause (2) of Article 324 of the Constitution, fixed, until further orders, the number of Election Commissioners (other than the Chief Election Commissioner) at two. By a further notification of even date, the President was pleased to appoint Dr. M.S.Gill and Shri G.V.G.Krishnamurty as Election Commissioners with effect from 1st October, 1993.

Simultaneously, the President also promulgated an Ordinance entitled the Chief Election Commissioner and other Election Commissioners (Conditions of Service) Amendment Ordinance, 1993 (32 of 1993) to amend the "Chief Election Commissioner and other Election Commissioners (Conditions of Service) Act, 1991". By this amending Ordinance, the Chief Election Commissioner and other Election Commissioners were, inter alia, placed at par in the matter of their salary and allowances (which were to be the same as admissible to a Judge of the Supreme Court of India), the term of the Chief Election Commissioner and other Election Commissioners was fixed as 6 years from the date of their appointment, subject to the maximum age limit of 65 years. The Ordinance further made provisions for transaction of business of the multi-member Election Commission and provided, inter alia, that the Chief Election Commissioner and other Election Commissioners shall have equal powers in the matter of decision making and in the case of any difference of opinion amongst them, the matter would be decided by the opinion of the majority. The Ordinance also renamed the principal Act of 1991[Chief Election Commissioner and other Election Commissioners (Conditions of Service) Act, 1991] as the "Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991". This Ordinance was later on replaced by a Parliamentary Act (4 of 1994) on 4th January, 1994, without any change.

The aforesaid amendments made by the above mentioned Ordinance were challenged by Shri T.N.Seshan, the then Chief Election Commissioner, as being unconstitutional, before the Supreme Court, by way of the present writ petition. He also challenged the appointment of Dr. M.S.Gill and Shri G.V.G. Krishnamurty, alleging malafides against the Government.

A Constitution Bench of the Supreme Court, by its landmark judgment dated 14th July, 1995, dismissed the writ petition of Shri T.N.Seshan, fully upholding the constitutional validity of the impugned Ordinance and the Act, and also upholding the appointment of Dr. M.S.Gill and Shri G.V.G.Krishnamurty as Election Commissioners.. The Court also made some adverse observations about the conduct of Shri T.N.Seshan as Chief Election Commissioner.

(A) Chief Election Commissioner and Other Election Commissioners (Conditions of Service) Amendment Ordinance, 1993 (later replaced by Act 4 of 1994) — Constitutionality — Amending the principal Act of 1991 by providing a multi-member Election Commission, making Chief Election Commissioner (CEC) on a par with other Election Commissioners (ECs) and providing that business of the Commission would be transacted on the basis of unanimous decisions of the Commission, and in case of difference of opinion, on the basis of opinion of the majority — Held, the amending Ordinance/Act is in consonance with the scheme of Art. 324, and that Ss.9 and 10, introduced by it in the principal Act, regarding transaction of business of the Commission neither arbitrary nor unworkable nor amount to fraud on the Constitution, nor vitiated by mala fides — Accordingly, notifications issued by President of India under Art.324 fixing the number of ECs at two and appointing two persons as ECs also, held, valid — Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991, Ss. 2(b), 3, 4, 9 and 10 (as amended by the Ordinance and Act 4 of 1994) — Constitution of India, Arts. 324 and 14

(Paras 6 to 8 and 36)

MULTI-MEMBER ELECTION COMMISSION

(B) Constitution of India — Art. 324 — Scheme — Held, provides for a multi-member Commission — Hence provision in that regard in the amending Ordinance/Act not unconstitutional

Held:

The scheme of Article 324 is that there shall be a permanent body to be called the Election Commission with a permanent incumbent to be called the CEC. The Election Commission can therefore be a single-member body or a multi-member body if the President considers it necessary to appoint one or more ECs. The argument that a multi-member Election Commission would be unworkable and should not, therefore, be appointed must be stated to be rejected as acceptance of should not, therefore, be appointed must be stated to be rejected as acceptance of such argument would tantamount to destroying or nullifying clauses (2) and (3) of Article 324.

(Paras 13)

S.S. Dhanoa* v. *Union of India,* (1991) 3 SCC 567, 584 para 26, *referred to

STATUS OF CEC VIS-A-VIS ECs & RCs

(C) Constitution of India — Art. 324 — CEC and ECs alone constitute the Election Commission — RCs are appointed after consulting the Commission merely to assist the Commission and therefore, would rank next to CEC and ECs

(Para 15)

(D) Constitution of India — Art.324 — CEC and ECs — Status — Treated on a par — No superior status conferred on CEC — Special provisions made under cl. (5) for CEC as office of CEC intended to be made a permanent body — Therefore, the amending Ordinance/Act treating CEC on a par with ECs not unconstitutional

Held:

The CEC does not enjoy a status superior to ECs. Though it is only in the case of the CEC that the first proviso to clause (5) of Article 324 lays down that conditions of service cannot be varied to the disadvantage of the CEC after his appointment, whereas such a protection is not extended to the ECs, but by virtue of the Ordinance the CEC and the ECs are placed on a par in the matter of salary, etc. The absence of such provision for ECs does not make the CEC superior to ECs. Similarly, in the case of the CEC he can be removed from office in like manner and on the like ground as a Judge of the Supreme Court whereas the ECs can be removed on the recommendation of the CEC, but that is not an indicia for conferring a higher status on the CEC. Article 324 envisages a permanent body to be headed by a permanent incumbent, namely, the CEC. Therefore, in order to preserve and safeguard his independence, he had to be treated differently because there cannot be an Election Commission without a CEC. That is not the case with other ECs. They are not intended to be permanent incumbents. Since the Election Commission would have a staff of its own dealing with matters concerning the superintendence, direction and control of the preparation of electoral rolls, etc., that staff would have to function under the direction and guidance of the CEC and hence it was in the fitness of things for the Constitution-makers to provide that where the Election Commission is a multi-member body, the CEC shall act as its Chairman. That would also ensure continuity and smooth functioning of the Commission.

(Paras 16 and 17)

This aspect of the matter escaped the attention of the learned Judges who decided *Dhanoa case.* The comparison with the functioning of the executive under Articles 74 and 163 of the Constitution in paragraph 17 of the judgment cannot also be said to be apposite.

(Para 16)

S.S. Dhanoa* v. *Union of India,* (1991) 3 SCC 567, 576, 579, 580, paras 10,11, 17, *overruled on this point

(E) Constitution of India — Art. 324 — CEC — Status of — Not that of Supreme Court Judge merely because his conditions of service are akin to those of Supreme Court Judge — Therefore, on that basis he cannot claim higher rank in Warrant of Precedence — Govt. should not interfere with Warrant of Precedence of any person whose conditions of service are akin to Supreme Court or High Court Judge if it affects position of such Judge without first obtaining views of CJI

Held:

In the instant case some of the service conditions of the CEC are akin to those of the Supreme Court Judges, namely, (i) the provision that he can be removed from office in like manner and on like grounds as a Judge of the Supreme Court and (ii) his conditions of service shall not be varied to his disadvantage after appointment. So far as the first is concerned instead of repeating the provisions of Article 124(4), the draftsman has incorporated the same by reference. The second provision is

similar to the proviso to Article 125(2). But that does not confer the status of a Supreme Court Judge on the CEC. 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 realising the distinction between constitutional and statutory functionaries. The Government should not confer equivalence or interfere with the Warrant of Precedence, if it is likely to affect the position of High Court and Supreme Court Judges, however pressing the demand may be, without first seeking the views of the Chief Justice of India.

(Para 34)

ROLE OF CEC IN MULTI-MEMBER COMMISSION AND FUNCTIONS OF THE COMMISSION

(F) Constitution of India — Art. 324 — CEC as Chairman of a multi-member Commission — Role of — CEC is only a functionary of the Commission and has to act as its Chairman — Function of 'Chairman' in the context explained — But his role is not higher than that of the ECs in decision-making — In absence of unanimity among CEC and ECs, majority opinion must prevail — This is the purport of S.10 of the principal Act, as introduced by the amending Ordinance/Act — This is in consonance with democratic principles — ECs' function is not merely advisory —Words and phrases — 'Chairman'

(G) Constitution of India — Art. 324 — Election Commission — Nature of functions of — It discharges public functions — Its functions are administrative as well as quasi-judicial

(H) Administrative Law — Administrative bodies — Institution discharging public function — Incumbents of the institution, being its creature, cannot be higher than the institution

Held:

By clause (1) of Article 324, the Constitution-makers entrusted the task of conducting all elections in the country to a Commission referred to as the Election Commission and not to an individual. It may be that if it is a single-member body the decisions may have to be taken by the CEC but still they will be the decisions of the Election Commission. They will go down as precedents of the Election Commission and not the individual. It would be wrong to project the individual and eclipse the Election Commission. Nobody can be above the institution which he is supposed to serve. He is merely the creature of the institution, he can exist only if the institution exists. To project the individual as mightier than the institution would be a grave mistake. Therefore, even if the Election Commission is a single-member body, the CEC is merely a functionary of that body; to put it differently, the alter ago of the Commission and no more. And if it is a multi-member body the CEC is obliged to act as its Chairman. Having regard to the meaning of the word 'Chairman', it has been variously defined in dictionaries as a person chosen to preside over meetings or a presiding officer, etc. Therefore the function of the Chairman would be to preside over meetings, preserve order, conduct the business of the day, ensure that precise decisions are taken and correctly recorded and do all that is necessary for smooth transaction of business. The nature and duties of this office may vary depending on the nature of business to be transacted but by and

large these would be the functions of a Chairman. He must so conduct himself at the meetings chaired by him that he is able to win the confidence of his colleagues on the Commission and carry them with him. This a Chairman may find difficult to achieve if he thinks that others who are members of the Commission are his subordinates. The functions of the Election Commission are essentially administrative but there are certain adjudicative and legislative functions as well. The Election Commission has to lay down certain policies, decide on certain administrative matters of importance as distinguished from routine matters of administration and also adjudicate certain disputes, e.g., disputes relating to allotment of symbols. Therefore, besides administrative functions it may be called upon to perform quasi-judicial duties and undertake subordinate legislation-making functions as well.

(Para 19)

***Mohinder Singh Gill* v. *Chief Election Commr.*, (1978) 1 SCC 405 : (1978) 2 SCR 272, relied on**

Concise Oxford Dictionary; Black's Law Dictionary,* 6th Ed., p. 230; *Ballentine's Law Dictionary,* 3rd Ed., pp. 189-190; *Webster's New Twentieth Century Dictionary,* Unabridged, 2nd Ed., p.299 and *Aiyer's Judicial Dictionary,* 11th Ed., p.238, *relied on

The Election Commission discharges a public function. ECs form part of the Election Commission unlike the RCs. Therefore, they must have a say in decision-making. If the CEC is considered to be a superior in the sense that his word is final, he would render the ECs non-functional or ornamental. Such an intention is difficult to cull out from Article 324. It is not possible to accept the argument that the ECs' function is only to tender advice to the CEC.

(Para 20)

The variation in the salary, etc., cannot be a determinative factor otherwise that would oscillate having regard to the fact that the executive or the legislature has to fix the conditions of service under clause (5) of Article 324. The only distinguishing feature that survives for consideration is that in the case of the CEC his conditions of service cannot be varied to his disadvantage after his appointment whereas there is no such safeguard in the case of ECs. That is presumably because the posts are temporary in character. But even if it is not so, that feature alone cannot lead to the conclusion that the final word in all matters lies with the CEC. Such a view would render the position of the ECs to that of mere advisers which does not emerge from the scheme of Article 324.

(Para 21)

The Constitution-makers preferred to remain silent as to the manner in which the Election Commission will transact its business, presumably because they thought it unnecessary and perhaps even improper to provide for the same having regard to the level of personnel it had in mind to man the Commission. They must have depended on the sagacity and wisdom of the CEC and his colleagues. By virtue of sub-sections (1) and (2) of Section 10 the Commission will be able to take decisions with one voice. But just in case that hope is belied the rule of majority must come into play. That is the purport of Section 10 of the Act. The submission that the said two sections are inconsistent with the scheme of Article 324 inasmuch

as they virtually destroy the two safeguards, namely, (i) the irremovability of the CEC and (ii) prohibition against variation in service conditions to his disadvantage after his appointment, does not cut ice.

(Para 22)

Grindley* v. *Barker,* 126 ER 875: 1 Bos & Pul 229, *relied on

Halsbury's Laws of England,* 4th Ed. (Re-issue), Vol. 7(1), footnote 6 at p. 657, *relied on

The argument that the impugned provisions constitute a fraud on the Constitution inasmuch as they are designed and calculated to defeat the very purpose of having an Election Commission is begging the question. While in a democracy every right-thinking citizen should be concerned about the purity of the election process it is difficult to share the inherent suggestion that the ECs would not be as concerned about it.

(Para 23)

The Election Commission is not the only body which is a multi-member body. The Constitution also provides for other public institutions to be multi-member bodies. They also function by rule of majority. And it is difficult to accept the broad contention that a multi-member Commission is unworkable. It all depends on the attitude of the Chairman and its members. If they work in cooperation, appreciate and respect each other's point of view, there would be no difficulty, but if they decide from the outset to pull in opposite directions, they would by their conduct make the Commission unworkable and thus fail the system.

(Para 24)

(I) Constitution of India — Art. 324(5) second provision — Removal of ECs from office on recommendation of CEC — Held, recommendation must be based on intelligible and cogent considerations

Held:

The provision that the ECs and the RCs once appointed cannot be removed from office before the expiry of their tenure except on the recommendation of the CEC ensures their independence. Of course, the recommendation for removal must be based on intelligible, and cogent considerations which would have relation to efficient functioning of the Election Commission. That is so because this privilege has been conferred on the CEC to ensure that the ECs and the RCs are not at the mercy of political and executive bosses of the day. This check on the executive's power to remove is built into the second proviso to clause (5) to safeguard the independence of not only these functionaries but the Election Commission as a body. If, therefore, the power were to be exercisable by the CEC as per his whim and caprice, the CEC himself would become an instrument of oppression and would destroy the independence of the ECs and the Rcs if they are required to function under the threat of the CEC recommending their removal. Therefore, the CEC must exercise this power only when there exist valid reasons which are conductive to efficient functioning of the Election Commission.

(Para 11)

AMENDMENTS IF VITIATED BY MALA FIDES

(J) Chief Election Commissioner and Other Election Commissioners (Conditions of Service) Amendment Ordinance, 1993 (later replaced by Act 4 of 1994) — Introducing Ss. 9 and 10 in the principal Act regarding transaction of business of the Commission — Held, not vitiated by mala fides — Amendment justified stands by the fact situation in respect of the present CEC

Held:

It cannot be said that the idea of having multi-member Commission was suddenly pulled out of a bag. Assuming the present CEC had taken certain decisions not palatable to the ruling party at the Centre as alleged by him, it is not permissible to jump to the conclusion that was the cause for the Ordinance and the appointments of the ECs. If such a nexus is to weigh, the CEC would continue to act against the ruling party to keep the move for a multi-member Commission at bay. It cannot be said that the decision to constitute a multi-member Commission was actuated by malice. Therefore, even though it is not permissible to plead malice, examining the contention, no merit could be found in it. It is wrong to think that the two ECs were pliable persons who were being appointed with the sole object of eroding the independence of the CEC.

(Para 29)

It may be incidentally mentioned that the decisions taken by the present CEC from time to time postponing elections at the last moment, of which he made mention in his petition, evoked mixed reactions. The CEC used them to lay the foundation for his contention that the entire exercise was mala fide. Some of his other decisions were so unsustainable that he could not support them when tested in court. His public utterances at times were so abrasive that the Supreme Court had to caution him to exercise restraint on more occasions than one. This gave the impression that he was keen to project his own image. That he has very often been in the newspapers and magazines and on television cannot be denied. In this backdrop, if the Government thought that a multi-member body was desirable, the Government certainly was not wrong and its action cannot be described as mala fide. Subsequent events would suggest that the Government was wholly justified in creating a multi-member Commission. The CEC had been seen in a commercial on television and in newspaper advertisements. The CEC had addressed the Press and is reported to have said that he would utilise the balance of his tenure to form a political party to fight corruption and the like. Serious doubts may arise regarding his decisions if it is suspected that he has political ambitions, in the absence of any provision, such as, Article 319 of the Constitution. The present CEC is, it would appear, totally oblivious to the sense of decorum and discretion that his high office requires even if the cause is laudable.

(Para 30)

LEGISLATIVE COMPETENCE

(K) Chief Election Commissioner and Other Election Commissioners (Conditions of Service) Amendment Ordinance, 1993 (later replaced by Act 4 of 1994) — Introducing Ss. 9 and 10 in the Principal Act regarding transaction of business of the Commission — Held, Parliament competent to legislate — Even assuming that the Commission alone is competent to prescribe the procedure, it would be required to follow the same pattern as prescribed in S. 10

It was contended that since Article 324 is silent, Parliament expected the Commission itself to evolve its own procedure for transacting its business and since the CEC was the repository of all power to be exercised by the Commission falling within the scope of its activity, it did not see the need to engraft any procedure for transacting its business. If the Election Commission at any time saw the need for it, it would itself evolve its procedure but Parliament cannot do so and hence Sections 9 and 10 are unconstitutional. Except the legislation specifically permitted by clauses (2) and (5) of Article 324 and Articles 327 and 328, Part XV of the Constitution does not conceive of a law by Parliament on any other matter and hence the impugned legislation is unconstitutional.

Held:

There is no merit in the contention. Both clauses (2) and (5) of Article 324 contemplate a statute for the appointment of ECs and for their conditions of service. The impugned law provides for both these matters and provisions to that effect cannot be challenged as unconstitutional since they are expressly permitted by the said clauses (2) and (5). Once the provision for the constitution of a multi-member Commission is unassailable, provisions incidental thereto cannot be challenged. It was urged that the legislation squarely fell within Entry 72 of List I of the Seventh Schedule. If, as argued, the scope of this entry is relatable and confined to clauses (2) and (5) of Article 324 and Articles 327 and 328 only, it would be mere tautology. Even if it is assumed that the normal rule is of unanimity, sub-sections (1) and (2) of Section 10 provide for unanimity. It is only if there is no unanimity that the rule of majority comes into play under sub-section (3). Therefore, even if it is assumed that the Commission alone was competent to lay down how it would transact its business, it would be required to follow the same pattern as is set out in Section 10.

(Para 32)

Advocates who appeared in this case:

Milon K. Banerjee, Attorney General for India, M. Chandrasekharan, Additional Solicitor General, G. Ramaswamy, N.A. Palkhivala, Ram Jethmalani, O.P. Sharma, P.P. Rao, Soli J. Sorabjee, K.K. Venugopal, K. Parasaran and A.K. Ganguli, Senior Advocates (G. Rajgopal, S. Muralidhar, Sanjay Hegde, N.L. Ganapathi, S. Walia, Mohit Mathur, H. Devarajan, Niranjan Reddy, Shimona Khanna, Abha R. Sharma, Ms Kamini Jaiswal, Ranjan Dwivedi, R.S. Sharma and H.D. Shourie (in person with them); M.M. Kashyap, N.N. Gooptu, H.K. Puri, A.V. Rangam, A. Ranganadhan, Sumant Bhardwaj, A.S. Bhasme, S.K. Ningomban, Sunil Dogra, E.R. Kumar, Gopal Jain. W.C. Chopra, Pankaj Chopra, A. Mariarputham, Aruna Mathur, P.R. Seetharaman, Ms Neeta Agrawal, N. Janardhan, K.R. Nagaraja, E.C. Agarwala, Mahesh Agarwal, Atul Sharma, Purnima Bhat Kak, A.V. Palli, Dr. Subramanian Swamy (in person), Mukul Mudgal, Ms Indu Malhotra, Ms Shirin Khajuria, Ms A. Subhashini, P. Parameswaran, Sushil Prakash, A. Subbarao, Navin Prakash, R.B. Misra and K.V. Vishwanathan, Advocates, for the appearing parties.

JUDGMENT

Present :- A.M. Ahmadi, CJI, J.S. Verma, N.P. Singh, S.P. Bharucha, M.K. Mukherjee, JJ.

AHMADI, CJI

The President of India, in exercise of powers conferred upon him by clause (1) of Article 123 of the Constitution of India, promulgated an Ordinance (No. 32 of 1993) entitled "The Chief Election Commissioner and other Election Commissioners (Condition of Service) Amendment Ordinance, 1993" (hereinafter called 'The Ordinance') to amend "The Chief Election Commissioner and other Commissioners (Condition of Service) Act., 1991" (hereinafter called 'The Act'). This Ordinance was published in the Gazette of India on October 1, 1993. Before we notice the amendments made in the 1991 Act. by the said Ordinance it may be appropriate to notice the provisions of the 1991 Act. As the long title of the Act suggests it lays down the conditions of service of the Chief Election Commissioner (hereinafter called 'The CEC' and Election Commissioners (hereinafter called 'The ECs') appointed under Article 324 of the Constitution of India. Section 3(1) provides that the CEC shall be paid a salary which is equal to the salary of a judge of the Supreme Court of India. Section 3(2) says that an EC shall be paid a salary which is equal to the salary of a judge of a High Court. Section 4 lays down the term of office of the CEC and ECs to be six years from the date on which the incumbent assumes charge of his office provided that the incumbent shall vacate his office on his attaining, in the case of the CEC, the age of 65 years and the EC the age of 62 years, notwithstanding the fact that the term of office is for a period of six years. Section 8 extends the benefit of travelling allowance, rent free residence, exemption from payment of income-tax on the value of such rent free residence, conveyance facility, sumptuary allowance, medical facilities, etc., as applicable to a judge of the Supreme Court or a Judge of the High Court to the CEC and the EC, respectively. By the Ordinance the title of the Act was sought to be amended by substituting the words "and to provide for the procedure for transaction of business by the Election Commission and for Matters" for the words "and for Matters". By the substitution of these words the long title to the Act got further elongated as an Act to determine the conditions of service of the CEC and other ECs and to provide for the procedure for transaction of business by the Election Commission and for matters connected therewith or incidental thereto. In section 1 of the Principal Act, for the words and brackets "the Chief Election Commissioner and other Election Commissioners (Condition of Service)" the words and brackets "the Election Commission (Conditions of Service of Election Commissioners and Transaction of Business)" came to be substituted with the result that the amended provision read as the Election Commission (Condition of Service of Election Commissioners and Transaction of Business) Act., 1991. The definition clause in section 2 also underwent a change, in that, the extant, clause (b) came to renumbered as clause (c) and a new clause (b) came to be substituted by which the expression "Election Commission" came to be defined as Election Commission referred to in Article 324 of the Constitution of India. Consequent changes were also made elsewhere. In subsection (1) of section 3, after the words "Chief Election Commissioner", the words "and other Election Commissioners" came to be inserted with the result they came to be placed at par in regard to salary payable to them and sub-section (2) came to be omitted. In section 4 the first proviso came to be substituted as under:

> **"Provided that where the Chief Election Commissioner or an Election Commissioner attains the age of 65 years before the expiry of the said term**

of six years, he shall vacate his office on the date on which he attains the said age."

Thus the age of superannuation of both the CEC and the ECs was fixed at 65 years. If they attain the age of 65 years before completing their tenure of six years they would in view of the proviso have to vacate office on attaining the age of 65 years. In Section 6, subsection (2), after the words "Chief Election Commissioner" the words "or an Election Commissioner" came to be inserted and for the words "sub-section (4)" the words "sub-section (3)" came to be substituted. It further provided for the deletion of sub-section (3) and for renumbering sub-section (4) as sub-section (3) and provided that in clause (b) the words "or as the case may be, 62 years" shall be omitted. After section 8 in the Principal Act, by the Ordinance a new Chapter came to be inserted comprising of two provisions, namely, Sections 9 and 10. The new Chapter so inserted is relevant for our purpose and may be reproduced at this stage.

CHAPTER III

TRANSACTION OF BUSINESS OF ELECTION COMMISSION

9. The business of the Election Commission shall be transacted in accordance with the provisions of this Act.

10. (1) The Election Commission may, by unanimous decision, regulate the procedure for transaction of the business as also allocation of the business amongst the Chief Election Commissioner and other Election Commissioners.

(2) Save as provided in sub section (1) all business of the Election Commission shall, as far as possible, be transacted unanimously.

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

2. On the day of publication of the Ordinance, 1st October, 1993, the President of India, in exercise of powers conferred by clause 2 of Article 324 of the Constitution of India, fixed, until further orders, the number of Election Commissioners (other than the CEC) at two. By a further notification of even date the President was pleased to appoint Mr. M.S. Gill and Mr. G.V.G. Krishnamurthy as Election Commissioners with effect from 1st October, 1993.

The first salvo was fired by Cho. S. Ramaswamy, a journalist, on 13th October, 1993. By a Writ Petition (Civil) No. 791 of 1993 he prayed for a declaration that the ordinance was arbitrary, unconstitutional and void and for issuance of a writ of certiorari to quash the notifications fixing the number of Election Commissioners at two and the appointments of Mr. M.S. Gill and Mr. G.V.G.

Krishnamurthy made thereunder. This was followed by Writ. Petition No. 805 of 1993 by the incumbent CEC himself claiming similar reliefs on 26th October, 1993. Two other writ petitions were also filed questioning the validity of the Ordinance and the notifications referred to earlier. Three of these writ petitions came up for preliminary hearing on November 15, 1993. While admitting the writ petitions and directing rule to issue in all of them, in the writ petition filed by the CEC notice on the application for interim stay as well as for production of documents was ordered to issue and an adinterim order to the following effect was passed:

> **"Until further orders, to ensure smooth and effective working of the Commission and also to avoid confusion both in the administration as well as in the electoral process, we direct that the Chief Election Commissioner shall remain in complete overall control of the Commission's work. He may ascertain the views of other Commissioners or such of them as he chooses, on the issues that may come up before the Commission from time to time. However, he will not be bound to their views. It is also made clear that the Chief Election Commissioner alone will be entitled to issue instructions to the Commission's staff as well as to the outside agencies and that no other Commissioner will issue such instructions."**

By a subsequent. order dated 15.12.1993, after hearing the learned Attorney General for the Union of India and the learned Advocates General for the states of Maharashtra and West Bengal, the court directed that all the state governments who want to be heard will be heard through their counsel and further directed that the interim order shall continue till further orders. Lastly, it observed that since questions involved related to the interpretation of Article 324 in particular, the matters should be placed before a Constitution Bench.

4. During the pendency of the aforesaid Writ Petitions, the ordinance became an Act (Act No. 4 of 1994) on 4th January 1994 without any change.

5. Before we proceed further it would be proper to notice Article 324 of the Constitution. It 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) 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 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 binenial 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 the 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 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 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 Commission by clause (1).”

The abridged factual matrix on which the constitutional validity of the Ordinance (now Act) and the consequential orders and appointments of the ECs have been questioned in the above petitions may be broadly indicated at this stage as follows:

The present CEC claims that after his appointment on 12.12.1990 he insisted on strict compliance with the model code of conduct by

all political parties and candidates for election and took stern action against infractions thereof regardless of the political party or candidate involved. The ruling party at the centre was irked as a few of the bye-elections of the ruling party leaders/cabinet ministers were put off for the Government's failure to deploy sufficient staff and police force for the elections and the ruling party lost the elections in Tripura on account of strict action taken by the CEC against erring officials & consequent postponement of elections. The ruling party made attempts to influence the CEC but could not do so as he did not allow the emissaries of the party to meet him. The CEC also filed a writ petition in the Supreme Court for enforcing the constitutional right of the Election Commission for staff and force. The CEC declined to postpone elections for four State Assemblies despite requests from the ruling party. The ruling party, including the Prime Minister, got irritated with such unbending attitude of the CEC. The ruling party, therefore, with a view to freeze the powers of the CEC and to prevent him from taking any action against violation of code of conduct chose to amend the law and misused the power of the President under Article 324(2) of the Constitution by issuing the notification dated 1st October, 1993 fixing the number of ECs at two and simultaneously appointing Mr. M.S. Gill & Mr. G.V.G. Krishnamurthy as the other two Ecs.

7. The CEC not only imputes malafides for the issuance of the aforesaid notifications & appointments but also alleges that the intention behind issuing the ordinance was to sideline the CEC and to erode his authority so that the ruling party at the centre could extract favourable orders by using the services of the newly appointed ECs.

8. Sections 9 & 10 of the Ordinance (now Act) are challenged as ultra vires the Constitution on the plea that they are inconsistent with the scheme underlaying Article 324 of the Constitution, in that, and said Article 324 did not give any power to the Parliament to frame rules for transaction of business of the Election Commission. Section 10 is also challenged on the ground that it is arbitrary and unworkable. So also the notification fixing the number of other ECs at two is challenged as arbitrary and violative of Article 14 of the Constitution.

9. The writ petitions are resisted by the respondents, viz., the Union of India and the two other ECs, Mr. M.S. Gill & Mr. G.V.G. Krishnamurthy as wholly misconceived. It is contended on behalf of the Union Government that various advisory bodies had from time to time called for a multi member Election Commission. It denies the allegation that the decision to convert the Election Commission into a multi member body had any connection with the alleged discomfiture of the ruling party at the Centre on account of the stiff attitude of the CEC. It is further stated that the multi member body

would not have been able to function without a supporting statute providing for dealing with different situations likely to arise in the course of transaction of business. The ordinance was framed keeping in view the observations made in this regard by this court in the case of *S.S. Dhanoa Vs. Union of India* (1991) 3 SCC 567. It is strongly denied that the changes in the law were made malafide with a view to taming the CEC into submission or to erode his authority by providing that in the event of a difference of opinion, the majority view would prevail. It is contended that the plain language of Article 324(2) envisages a multi member Commission and therefore, any exercise undertaken to achieve that objective would be consistent with the scheme of the said constitutional provision and could, therefore, never be branded as malafide or ultra vires the Constitution. A provision to the effect that in the event of a difference of opinion between the three members of the Election Commission, the majority view should prevail is consistent with democratic principles and can never be described as arbitrary or ultravires Article 14 of the Constitution. The Union of India, has, therefore, contended that the writ petitions are wholly misconceived and deserve to be dismissed with costs.

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 opinion 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 the election process it was thought by our Constitution-makers that the responsibility to hold free and fair elections in the country should be entrusted to an independent body which would be insulated from political and/or executive interference. It is inherent in a democratic set up that the agency which is entrusted the task of holding elections to the legislatures should be fully insulated so that it can function as an independent agency free from external pressures from the party in power or executive of the day. This objective is achieved by the setting up of an Election Commission, a permanent body, under Article 324(1) of the Constitution. The superintendence, direction and control of the entire election process in the country has been vested under the said clause in a commission called the Election Commission. Clause (2) of the said Article then provides for the constitution of the Election Commission by providing that it shall consist of the CEC and such number of ECs, if any, as the President may from time to time fix. It is thus obvious from the plain language of this clause that the Election Commission is composed of the CEC and, when they have been appointed, the ECs. The office of the CEC is envisaged to be a permanent fixture but that cannot be said of the ECs as is made manifest from the use of

the words "if any". Dr. Ambedkar while explaining the purport of this clause during the debate in the Constituent Assembly said:

> **"Sub-clause (2) says that there shall be a Chief Election Commissioner and such other Election Commissioner as the President may, from time to time appoint. There were two alternatives before the Drafting Committee, namely, either to have a permanent body consisting of four or five members of the Election Commission who would continue in office throughout without any break, or to permit the President to have an ad hoc body appointed at the time when there is an election on the anvil.**
>
> **The Committee has steered a middle course. What the Drafting Committee proposes by sub-clause (2) is to have permanently in office one man called the Chief Election Commissioner, so that the skeleton machinery would always be available."**

It is crystal clear from the plain language of the said clause (2) that our Constitution makers realised the need to set up an independent body or commission which would be permanently in session with atleast one officer, namely, the CEC, and left it to the President to further add to the Commission such number of ECs as he may consider appropriate from time to time. Clause (3) of the said Article makes it clear that when the Election Commission is a multi member body the CEC shall act as its Chairman. What will be his role as a Chairman has not been specifically spelt out by the said article and we will deal with this question hereafter. Clause (4) of the said Article further provides for the appointment of RCs to assist the Election Commission in the performance of its functions set out in clause (1). This, in brief, is the scheme of Article 324 insofar as the constitution of the Election Commission is concerned.

11. We may now biefly notice the position of each functionary of the Election Commission. In the first place, clause (2) states that the appointment of the CEC and other ECs shall, subject to any law made in that behalf by Parliament, be made by the President. Thus the President shall be the appointing authority. Clause (5) provides that subject to any law made by Parliament, the conditions of service and the tenure of office of the ECs and the RCs shall be such as may be determined by rule made by the President. Of course the RCs do not form part of the Election Commission but are appointed merely to help the Commission, that is to say, the CEC and the ECs, if any. As we have pointed out earlier the tenure, salaries, allowances and other perquisites of the CEC and ECs had been fixed under the Act as equivalent to a judge of the Supreme Court and the High Court, respectively. This has undergone a change After the Ordinance which has so amended the Act as to place them on par. However, the

proviso to clause (4) of Article 324 says (i) the CEC shall not be removed from his office except in like manner and on the like grounds as a judge of the Supreme Court and (ii) the conditions of service of the CEC shall not be varied to his disadvantage after his appointment. These two limitations on the power of Parliament are intended to protect the independence of the CEC from political and/or executive interference. In the case of ECs as well as RCs, the second proviso to clause (5) provides that they shall not be removed from office except on the recommendation of the CEC. It may also be noticed that while under clause (4), before the appointment of the RCs, consultation with the Election Commission (not CEC) is necessary, there is no such requirement in the case of appointments of ECs. The provision that the ECs and the RCs once appointed cannot be removed from office before the expiry of their tenure except on the recommendation of the CEC ensures their independence. The scheme of Article 324 in this behalf is that after insulating the CEC by the first proviso to clause (5), the ECs and the RCs have been assured independence of functioning by providing that they cannot be removed except on the recommendation of the CEC. Of course, the recommendation for removal must be based on intelligible, and cogent considerations which would have relation to efficient functioning of the Election Commission. That is so because this privilege has been conferred on the CEC to ensure that the ECs as well as the RCs are not at the mercy of political or executive bosses of the day. It is necessary to realise that this check on the executive's power to remove is built into the second proviso to clause (5) to safeguard the independence of not only these functionaries but the Election Commission as a body. If, therefore, the power were to be exercisable by the CEC as per his whim and caprice, the CEC himself would become an instrument of oppression and would destroy the independence of the ECs and the RCs if they are required to function under the threat of the CEC recommending their removal. It is, therefore, needless to emphasise that the CEC must exercise this power only when there exist valid reasons which are conductive to efficient functioning of the Election Commission. This, briefly stated, indicates the status of the various functionaries constituting the Election Commission.

12. The concept of plurality is writ large on the face of Article 324, clause (2) whereof clearly envisages a multi-member Election Commission comprising the CEC and one or more ECs. Visualising such a situation, clause (3) provides that in the case of a multi-member body the CEC will be its Chairman. If a multi member Election Commission was not contemplated where was the need to provide in clause (3) for the CEC to act as its Chairman? There is, therefore, no room for doubt that the Election Commission could be a multi-member body. If Article 324 does contemplate a multi-

member body, the impugned notifications providing for the other two ECs cannot be faulted solely on that ground. We may here quote, with approval, the observations of a two judge bench of this court in *S.S. Dhanoa v. Union of India* vide paragraph 26: (SCC p.584)

> **"There is no doubt that two heads are better than one, and particularly when an institution like the Election Commission is entrusted with vital functions, and is armed with exclusive uncontrolled powers to executive them, it is both necessary and desirable that the powers are not exercised by one individual, however, all-wise he may be. It ill conforms the tenets of the democratic rule. It is true that the independence of an institution depends upon the persons who man it and not on their number. A single individual may sometimes prove capable of withstanding all the pulls and pressures, which many may not. However, when vast powers are exercised by an institution which is accountable to none, it is politic to entrust its affairs to more hands than one. It helps to assure judiciousness and want of arbitrariness. The fact, however, remains that where more individuals than one, man an institution, their roles have to be clearly defined, if the functioning of the institution is not to come to a naught."**

It must be realised that these observations were made, notwithstanding the fact that the learned judges were alive to and aware of the circumstances in which the President was required in that case to rescind the notifications creating two posts of ECs and appointing the petitioner Dhanoa and another to them.

13. There can be no dispute and indeed there never was, that the Election Commission must be an independent body. It is also clear from the scheme of Article 324 that the said body shall have the CEC as a permanent incumbent and under clause (2) such number of other ECs, if any, as the President may deem appropriate to appoint. The scheme of Article 324, therefore, is that there shall be a permanent body to be called the Election Commission with a permanent incumbent to be called the CEC. The Election Commission can therefore be a single-member body or a multi member body if the President considers it necessary to appoint one or more ECs. Upto this point there is no difficulty. The argument that a multi member Election Commission would be unworkable and should not, therefore, be appointed must be stated to be rejected, Our Constitution makers have provided for a multi member body. They saw the need to provide for such a body. If the submission that a multi member body would be unworkable is accepted it would tantamount to destroying or nullifying clauses (2) and (3) of Article 324 of the Constitution. Strong reliance was, however, placed on

Dhanoa's case **to buttress the argument. The facts of that case were just the reverse of the facts of the present case. In that case the President by a notification issued in pursuance of clause (2) of Article 324 fixed the number of ECs, besides the CEC, at two and a few days thereafter by a separate notification appointed the petitioner and one another as ECs. By yet another notification issued under clause (5) of Article 324 the President made rules to regulate their tenure and conditions of service. After watching the functioning of the multi member body for about a couple of months, the President issued two notifications rescinding with immediate effect the notification by which the two posts of ECs were created and the notification by which the petitioner and one another were appointed thereto. The petitioner S.S. Dhanoa challenged the notifications rescinding the earlier notifications firstly on the ground that once appointed an EC continues in office for the full term determined by rules made under clause (5) of Article 324 and, in any event, the petitioner could not be removed except on the recommendation of the CEC. At the same time it was also contended that the notifications were issued malafide under the advise of the CEC to get rid of the petitioner and his colleague because the CEC was from the very beginning ill-disposed or opposed to the creation of the posts of ECs. According to the petitioner, there were differences of opinion between the CEC on the one had and the ECs on the other and since the CEC desired that he should have the sole power to decide he did not like the association of the ECs.**

14. The principal question which the Division Bench of this court was called upon to decide was whether the President was justified in rescinding the earlier notifications creating two posts of ECs and the subsequent appointments of the petitioner and his colleague as ECs. The court found as a fact that there was no imminent need to create two posts of ECs and fill them up by appointing the petitioner and his colleague. The additional work likely to be generated on account of the lowering of the voting age from 21 years to 18 years could have been handled by increasing the staff rather than appoint two ECs. So the Court took the view that from the inception the Government had committed an error in creating two posts of ECs and filling them up. We do not at the present desire to comment on the question whether this aspect of the matter was justiciable. It was further found as a fact that the petitioner's and his colleague's attitude was not cooperative and had it not been for the sagacity and restraint shown by the CEC, the work of the Commission would have come to a standstill and the Commission would have been rendered inactive. It is for this reason that the Court observed that no one need shed tears on the posts being abolished (vide paragraphs 20, 23, 24 and 25 of the judgment). The court, therefore, upheld the Presidential notifications rescinding the creation of the two posts of ECs and the

appointments of the petitioner and his colleague thereon. Notwithstanding this bitter experience the division bench made the observations in paragraph 26 extracted hereinbefore with which we are in respectful agreement. We cannot overlook the fact that when the Constitution makers provided for a multi-member Election Commission they were not oblivious of the fact that there may not be agreement on all points, but they must have expected such high ranking functionaries to resolve their differences in a dignified manner. It is the constitutional duty of all those who are required to carry out certain constitutional functions to ensure the smooth functioning of the machinery without the clash of egos. This should have put an end to the matter, but the Division Bench proceeded to make certain observations touching on the status of the CEC vis-a-vis the ECs, the procedure to be followed by a multi-member body in decision making in the absence of rules in that behalf, etc., on which considerable reliance was placed by counsel for the petitioners.

15. We have already highlighted the salient features regarding the composition of the Election Commission. We have pointed out the provisions regarding the tenure, conditions of service, salary, allowances, removability, etc., of the CEC, the ECs and the RCs. The CEC and the ECs alone constitute the Election Commission whereas the RCs are appointed merely to assist the Commission. The appointment of the RCs can be made after consulting the Election Commission since they are supposed to assist that body in the performance of the functions assigned to it by clause (1) of Article 324. If that be so there can be no doubt that they would rank next to the CEC and the ECs. That brings us to the question regarding the status of the CEC vis-a-vis that ECs. It was contended by the learned counsel for the petitioners that the CEC enjoyed a status superior to the ECs for the obvious reason that (i) the CEC has been granted conditions of service on par with a judge of the Supreme Court which was not the case with the conditions of service of ECs before the Ordinance (ii) the CEC has been given the same protection against removal from service as available to a judge of the Supreme Court whereas the ECs can be removed on the CEC's recommendation (iii) the CEC's conditions of service cannot be altered or varied to his disadvantage after his appointment (iv) the CEC has been conferred the privilege to act as Chairman of the multi-member Commission and (v) the CEC alone is the permanent incumbent whereas the ECs could be removed, as happened in the case of Dhanoa. Strong reliance was placed on the observations in paragraphs 10 and 11 of Dhanoa's case in support of the argument that the CEC enjoys a higher status vis-a-vis the ECs while functioning as the Chairman of the Election Commission. The observations relied upon read thus: (SCC p.576)

"10. However, in the matter of the conditions of service and tenure of office of the Election Commissioners, a distinction is made between the Chief Election Commissioner on the one hand and Election Commissioners and Regional Commissioners on the other. Whereas the conditions of service and tenure of office of all are to be such as the President may, by rule determine, a protection is given to the Chief Election Commissioner in that his conditions of service shall not be varied to his disadvantage after his appointment, and he shall not be removed from his office except in like manner and on the like grounds as a judge of the Supreme Court. These protections are not available either to the Election commissioners or to the Regional Commissioners. Their condition of service can be varied even to their disadvantage after their appointment and they can be removed on the recommendation of the Chief Election Commissioner, although not otherwise. It would thus appear that in these two respects not only the Election Commissioners are not on par with the Chief Election Commissioner, but they are placed on par with the Regional Commissioners although the former constitute the Commission and the latter do not and are only appointed to assist the Commission.

11. It is necessary to bear these features in mind because although caluse (2) of the Article states that the Commission will consist of both the Chief Election Commissioner and the Election Commissioners if and when appointed, it does not appear that the framers of the Constitution desired to give the same status to the Election Commissioners as that of the Chief Election Commissioner. The Chief Election Commissioner does not, therefore appear to be primes inter partes, i.e., first among the equals, but is intended to be placed in a distinctly higher position. The conditions that the President may increase or decrease the number of Election Commissioners according to the needs of the time, that their service conditions may be varied to their disadvantage and that they may be removed on the recommendation of the Chief Election Commissioner militate against their being of the same status as that of the Chief Election Commissioner..."

16. While it is true that under the scheme of Article 324 the conditions of service and tenure of office of all the functionaries of the Election Commission have to be determined by the President unless determined by law made by Parliament, it is only in the case of the CEC that the first proviso to clause (5) lays down that they cannot be varied to the disadvantage of the CEC after his appointment. Such a protection is not extended to the ECs. But it

must be remembered that by virtue of the Ordinance the CEC and the ECs are placed on par in the matter of salary, etc. Does the absence of such provision for ECs make the CEC superior to the ECs? The second ground relates to removability. In the case of the CEC he can be removed from office in like manner and on the like ground as a judge of the Supreme Court whereas the ECs can be removed on the recommendation of the CEC. That, however, is not an indicia for conferring a higher status on the CEC. To so hold is to overlook the scheme of Article 324 of the Constitution. It must be remembered that the CEC is intended to be a permanent incumbent and, therefore, in order to preserve and safeguard his independence, he had to be treated differently. That is because there cannot be an Election Commission without a CEC. That is not the case with other ECs. They are not intended to be permanent incumbents. Clause (2) of Article 324 itself suggests that the number of ECs can vary from time to time. In the very nature of things, therefore, they could not be conferred the type of irremovability that is bestowed on the CEC. If that were to be done, the entire scheme of article 324 would have to undergo a change. In the scheme of things, therefore, the power to remove in certain cases had to be retained. Having insulated the CEC from external political or executive pressures, confidence was reposed in this independent functionary to safeguard the independence of his ECs and even RCs by enjoining that they cannot be removed except on the recommendation of the CEC. This is evident from the following statement found in the speech of Shri K.M. Munshi in the Constituent Assembly when he supported the amended draft submitted by Dr. Ambedkar:

> **"We cannot have an Election Commission sitting all the time during those five years doing nothing. The Chief Election Commissioner will continue to be a whole-time officer performing the duties of his office and looking after the work from day to day but when major elections take place in the country, either Provincial or Central, the Commission must be enlarged to cope with the work. More members therefore have to be added to he Commission. They are no doubt to be appointed by the President. Therefore, to that extent their independence is ensured. So there is no reason to believe that these temporary Election Commissioners will not have the necessary measure of independence."**

Since the other ECs were not intended to be permanent appointees they could not be granted the irremovability protection of the CEC, a permanent incumbent, and, therefore, they were placed under the protective umbrella of an independent CEC. This aspect of the matter escaped the attention of the learned judges who decided Dhanoa's case. We are also of the view that the comparison

with the functioning of the executive under Articles 74 and 163 of the Constitution in paragraph 17 of the judgement, with respect, cannot be said to be apposite.

17. Under clause (3) of Article 324, in the case of a multi-member Election Commission, the CEC 'shall act' as the Chairman of the Commission. As we have pointed out earlier, Article 324 envisages a permanent body to be headed by a permanent incumbent, namely, the CEC. The fact that the CEC is a permanent incumbent cannot confer on him a higher status than the ECs for the simple reason that the latter are not intended to be permanent appointees. Since the Election Commission would have a staff of its own dealing with matters concerning the superintendence, direction and control of the preparation of electoral rolls, etc., that staff would have to function under the direction and guidance of the CEC and hence it was in the fitness of things for the Constitution-makers to provide that where the Election Commission is a multi-member body, the CEC shall act as its chairman. That would also ensure continuity and smooth functioning of the Commission.

18. That brings us to the question what role has the CEC to play as the Chairman of a multi-member Election Commission? Article 324 does not throw any light on this point. The debates of the Constituent Assembly also do not help. Although there had been a multi-member Commission in the past no convention or procedural arrangement had been worked out then. It is this situation which compelled the Division Bench of this Court in Dhanoa's case to inter alia observe that in the absence of rules to the contrary, the members of a multi-member body are not and need not always be on par with each other in the matter of their rights, authority and powers. Proceeding further in paragraph 18 it was said: (SCC p.580)

> **"18. It is further an acknowledged rule of transacting business in a multi-member body that when there is no express provision to the contrary, the business has to be carried on unanimously. The rule to the contrary such as the decision by majority, has to be laid down specifically by spelling out the kind of majority — whether simple, special, of all the members or of the members present and voting etc. In a case as that of the Election Commission which is not merely an advisory body but an executive one, it is difficult to carry on its affairs by insisting on unanimous decisions in all matters. Hence, a realistic approach demands that either the procedure for transacting business is spelt out by a statute or a rule either prior to or simultaneously with the appointment of the Election Commissioners or that no appointment of Election Commissioners is made in the**

absence of such procedure. In the present case, admittedly, no such procedure has been laid down."

We must hasten to add that the accuracy of the statement that in a multi-member body the rule of unanimity would prevail in the absence of express provision to the contrary was doubted by counsel for the respondents-ECs. At the same time, counsel for the Union of India and the contesting ECs contended that the Ordinance was promulgated by the President strictly in conformity with the view expressed in Dhanoa's case.

19. From the discussion upto this point what emerges is that by clause (1) of Article 324, the Constitution makers entrusted the task of conducting all elections in the country to a Commission referred to as the Election Commission and not to an individual. It may be that if it is a single-member body the decisions may have to be taken by the CEC but still they will be the decisions of the Election Commission. They will go down as precedents of the Election Commission and not the individual. It would be wrong to project the individual and eclipse the Election Commission. Nobody can be above the institution which he is supposed to serve. He is merely the creature of the institution, he can exist only if the institution exists. To project the individual as mightier than the institution would be a grave mistake. Therefore, even if the Election Commission is a single-member body, the CEC is merely a functionary of that body; to put it differently, the alter ego of the Commission and no more. And if it is a multi-member body the CEC is obliged to act as its chairman. 'Chairman' according to the Concise Oxford Dictionary means a person chosen to preside over meetings, e.g., one who presides over the meetings of the Board of Directors. In Black's Law Dictionary, 6th Edition, page 230, the same expression is defined as a name given to a Presiding Officer of an Assembly, public meeting, convention, deliberative or legislative body, board of directors, committee, etc. Similar meanings have been attributed to that expression in Ballentine's Law Dictionary, 3rd Edition, pages 189-190, Webster's New Twentieth Century Dictionary, Unabridged, 2nd Edition, page 299, and Aiyer's Judicial Dictionary, 11th Edition, page 328. The function of the Chairman would, therefore, be to preside over meetings, preserve order, conduct the business of the day, ensure that precise decisions are taken and correctly recorded and do all that is necessary for smooth transaction of business. The nature and duties of this office may vary depending on the nature of business to be transacted but by and large these would be the functions of a chairman. He must so conduct himself at the meeting chaired by him that he is able to win the confidence of his colleagues on the Commission and carry them with him. This a chairman may find difficult to achieve if he thinks that others who are members of the Commission are his subordinates. The functions of the Election

Commission are essentially administrative but there are certain adjudicative and legislative functions as well. The Election Commission has to lay down certain policies, decide on certain administrative matters of importance as dislinguished from routine matters of administration and also adjudicate certain disputes, e.g., disputes relating to allotment of symbols. Therefore, besides administrative functions it may be called upon to perform quasi-judicial duties and undertake subordinate legislation making functions as well. See *M.S. Gill* vs. *Chief Election Commissioner'* (1978) 1 SCC 405 : (1978) 2 SCR 272. We need say no more on this respect of the matter.

20. There can be no doubt that the Election Commission discharges a public function. As pointed out earlier, the scheme of Article 324 clearly envisages a multi-member body comprising the CEC and the ECs. The RCs may be appointed to assist the Commission. If that be so the ECs cannot be put on par with the RCs. As already pointed out, ECs form part of the Election Commission unlike the RCs. Their role is, therefore, higher than that of RCs. If they form part of the Commission it stands to reason to hold that they must have a say in decision-making. If the CEC is considered to be a superior in the sense that his word is final, he would render the ECs non-functional or ornamental. Such an intention is difficult to cull out from Article 324 nor can be attribute it to the Constitution-makers. We must reject the argument that the ECs' function is only to tender advise to the CEC.

21. We have pointed out the distinguishing features from Article 324 between the position of the CEC and the ECs. It is essentially on account of their tenure in the Election Commission that certain differences exist. We have explained why in the case of ECs the removability clause had to be different. The variation in the salary, etc., cannot be a determinative factor otherwise that would oscillate having regard to the fact that the executive or the Legislature has to fix the conditions of service under clause (5) of Article 324. The only distinguishing feature that survives for consideration is that in the case of the CEC his conditions of service cannot be varied to his disadvantage after his appointment whereas there is no such safeguard in the case of ECs. That is presumably because the posts are temporary in character. But even if it is not so, that feature alone cannot lead us to the conclusion that the final word in all matters lies with the CEC. Such a view would render the position of the ECs to that of mere advisers which does not emerge from the scheme of Article 324.

22. As pointed out earlier, neither Article 324 nor any other provision in the Constitution expressly states how a multi-member Election Commission will transact its business nor has any

convention developed in this behalf. That is why in Dhanoa's case **[(1991) 3 SCC 567] this Court thought the gap could be filled by an appropriate statutory provision. Taking a clue from the observations in that connection in the said decision, the President promulgated the Ordinance whereby a new chapter comprising sections 9 and 10 was added to the Act indicating how the Election Commission will transact its business. Section 9 merely states that the business of the Commission shall be transacted in accordance with the provisions of the Act. Section 10 has three Sub-sections. Sub-section (1) says that the Election Commission may, by unanimous decision, regulate the procedure for transaction of its business and for allocation of its business among the CEC and the ECS. It will thus be seen that the legislature has left it to the Election Commission to finalise both the matters by a unanimous decision. Sub-section (2) says that all other business, save as provided in sub-section (1), shall also be transacted unanimously, as far as is possible. It is only when the CEC and the ECs cannot reach a unanimous decision in regard to its business that the decision has to be by majority. It must be realised that the Constitution-makers preferred to remain silent as to the manner in which the Election Commission will transact its business, presumably because they thought it unnecessary and perhaps even improper to provide for the same having regard to the level of personnel it had in mind to man the Commission. They must have depended on the sagacity and wisdom of the CEC and his colleagues. The bitter experience of the past, to which a reference is made in Dhanoa's case, made legislative interference necessary once it was also realised that a multi-member body was necessary. It has yet manifested the hope in sub-sections (1) and (2) that the Commission will be able to take decisions with one voice. But just in case that hope is belied the rule of majority must come into play. That is the purport of section 10 of the Act. The submission that the said two sections are inconsistent with the scheme of Article 324 inasmuch as they virtually destroy the two safeguards, namely, (i) the irremovability of the CEC and (ii) Prohibition against variation in service conditions to his disadvantage after his appointment, does not cut ice. In the first place, the submission proceeds on the basis that the other two ECs will join hands to render the CEC non-functional, a premise which is not warranted. It betrays the CEC's lack of confidence in himself to carry his colleagues with him. In every multi-member commission it is the quality of leadership of the person heading the body that matters. Secondly, the argument necessarily implies hat the CEC alone should have the power to take decisions which, as pointed out earlier, cannot be accepted because that renders the ECs' existence ornamental. Besides, there is no valid nexus between the two safeguards and Sections 9 and 10; in fact the submission is a repetition of the argument that a multi-member commission cannot function, that it would be wholly**

unworkable and that the Constitution-makers had erred in providing for it. Tersely put, the argument boils down to this: erase the idea of a multi-member Election Commission from your minds or else give exclusive decision making power to the CEC. We are afraid such an attitude is not condusive to democratic principles. Foot Note 6 at page 657 of Halsbury's Laws of England, 4th Edition (Re-issue), Vol. 7(1) posits:

> **"The principle has long been established that the will of a Corporation or body can only be expressed by the whole or a majority of its principles, and the act of a majority is regarded as the act of the whole. (See Shakelton on the Law and Practice of Meetings, Eighth Edition, Compilation of AG, page 116)"**

The same principle was reiterated in Grindley **vs.** Barker **126 English Reporter 875, 879 & 882 : Bos & Pub 229. We do not consider it necessary to go through various decisions on this point.**

23. The argument that the impugned provisions constitute a fraud on the Constitution inasmuch as they are designed and calculated to defeat the very purpose of having an Election Commission is begging the question. While in a democracy every right thinking citizen should be concerned about the purity of the election process - this court is no less concerned about the same as would be evident from a series of decisions. It is difficult to share the inherent suggestion that the ECs would not be as concerned about it. And to say that the CEC would have to suffer the humilitation of being overridden by two civil servants is to ignore the fact that the present CEC was himself a civil servant before his appointment as CEC.

24. The Election Commission is not the only body which is a multi-member body. The Constitution also provides for other public institutions to be multi-member bodies. For example, the Public Service Commission. Article 315 provides for the setting up of a Public Service Commission for the Union and every State and Article 316 contemplates a multi-member body with a chairman. Article 338 provides for a multi-member National Commission for SC/ST comprising a Chairman, Vice-Chairman and other members. So also there are provisions for the setting up of certain other multi-member Commissions or Parliamentary Committees under the Constitution. These also function by the rule of majority and so we find it difficult to accept the broad contention that a multi-member Commission is unworkable. It all depends on the attitude of the chairman and its members. If they work in co-operation, appreciate and respect each other's point of view, there would be no difficulty, but if they decide from the outset to pull in opposite directions, they would by their conduct make the Commission unworkable and thus fail the system.

25. That takes us to the question of mala fides. It is in two parts. The first part relates to events which preceded the Ordinance and the second part to post-Ordinance and notification events. On the first part the CEC contends that since, after his appointment, he had taken various steps with a view to ensuring free and fair elections and was constrained to postpone certain elections which were to decide the fate of certain leaders belonging to the ruling party at the Centre, i.e., the National Congress (I), he had caused considerable discomfiture to them. His insistence on strict observance of the Model Code of Conduct had also disturbed the calculations of the ruling party. According to him, he had postponed the elections in Kalka Assembly Constituency, Haryana, because the Chief Minister of Haryana, belonging to the ruling party at the Centre, had flouted the guidelines. So also he had postponed the elections in the State of Tripura which ultimately led to the dismissal of the Government headed by the Chief Minister belonging to the ruling party at the centre. The postponement of the bye-elections involving Shri Sharad Pawar and Shri Pranab Mukherjee also upset the calculations of the said party. He had also postponed the election in Ranipet Assembly constituency, Tamil Nadu, as the Chief Minister of the State had flouted the Model Code of Conduct by announcing certain projects on the eve of the elections. Shri Santosh Mohan Dev, Union Minister, belonging to the ruling party, was also upset because the CEC took disciplinary action against officials who were found present at his election meetings. The ruling party was also unhappy with his decision to announce general elections for the State Assemblies for Madhya Pradesh, Uttar Pradesh, Rajasthan, Himachal Pradesh and the National Capital Territory of Delhi as the party was not ready for the same. According to the CEC he had also spurned the request made through the Lieutenant Governor of Delhi by the said party for postponement of the Delhi elections. According to him, emissaries were sent by the said party at the Centre to him but he did not oblige and he even took serious exception regarding the conduct of the Governor of Uttar Pradesh, Shri Moti Lal Vohra, for violating the Model Code of Conduct. Since the ruling party at the Centre failed in all its attempts to prevail upon to him, it decided to convert the Election Commission into a multimember body and, after having the Ordinance issued by the President, the impugned notifications appointing the two ECs were issued. The extraordinary haste with which all this was done while the CEC was at Pune and the urgency with which one of the appointees Shri M.S. Gill was called to Delhi by a special aircraft betrayed the keenness on the part of the ruling party to install the two newly appointed ECs. The CEC describes in detail the post appointment events which took place at the meeting of 11th October, 1993 in paragraphs 18 (c) to (f) and (g) of the writ petition. According to him, by the issuance of the Ordinance and the notifications the ruling party is trying to achieve indirectly that

which it could not achieve directly. These, in brief, are the broad counts on the basis whereof the contends that the ruling party at the Centre was keen to dislodge him.

26. On behalf of the Union of India it is contended that the allegation that the power to issue an Ordinance was misused for collateral purpose, namely, to impinge on the independence of the Election Commission, is wholly misconceived since it is a known fact that the demand for a multi-member Commission had been raised from time to time by different political parties. The Joint Committee of both Houses of Parliament had submitted a report in 1972 recommending a multi-member body and the Tarkunde Committee appointed on behalf of the Citizens for Democracy also favoured a multi-member Election Commission in its report submitted in August, 1974. Similarly, the Committee on electoral reforms appointed by the Janata Dal Government, in its report in May, 1990, favoured a three member Election Commission. Various Members of Parliament belonging to different political shades had also raised a similar demand from time to time. The Advocates General of various States in their meeting held on 26th September, 1993 at New Delhi had made a similar demand. It was, therefore, not correct to contend that the decision to constitute a multi-member Election Commission was abruptly taken with a mala fide intention, to curb the activities of the present CEC. The allegation that the decision was taken because the ruling party at the Centre was irked by the attitude of the CEC in postponing elections on one ground or the other is denied. The issue regarding the constitution of a multi-member Election Commission was a live issue and the same was discussed at various fora and even the Supreme Court in Dhanoa's case had indicated that vast discretionary powers, with virtually no checks and balances, should not be left in the hands of a single individual and it was desirable that more than one person should be associated with the exercise of such discretionary powers. It was, therefore, in public interest that the Ordinance in question was issued and two ECs were appointed to associate with the CEC. The deponent contends that this was a bona fide exercise and it was unfortunate that a high ranking official like the CEC had alleged that one of the ECs had been appointed because he was a close friend of the Prime Minister, an allegation which was unfounded. It is therefore denied that the Ordinance and the subsequent notifications appointing the two ECs were intended to sideline the CEC and erode his authority. The Government bona fide followed the earlier reports and the observations made in Dhanoa's case to which a reference has already been made. It is, therefore, contended that Sections 9 and 10 do not suffer from any vice as alleged by the CEC. The two ECs have also filed their counter affidavits denying these allegations. Shri G.V.G. Krishnamurthy, respondent No.3 in the CEC's petition, has pointed

out that the CEC had made unprecedented demands, for example, (i) to be equated with Supreme Court Judges, and had pressurised the Government that he be ranked along with Supreme Court Judges in the Warrant of Precedence, (ii) the powers of contempt of court be conferred upon the Election Commission, (iii) the CEC had refused to participate in meetings as ex-officio member of the Delimitation Commission headed by Mr. Justice A.M. Mir, Judge of the High Court of J & K, on the ground that his position was higher, he having been equated with judges of the Supreme Court, (iv) the CEC be exempted from personal appearance in Court, (v) the Election Commission be exempted from the purview of the UPSC so far as its staff was concerned, etc.

27. The learned Attorney General pointed out that no mala fides can be attributed to the exercise of legislative power by the President of India under Article 123 of the Constitution. He further pointed out that having regard to the express language of Article 324(2) of the Constitution, it was perfectly proper to expand the Election Commission by making appropriate changes in the extant law. The question whether it is necessary to appoint other ECs besides the CEC is for the Government to decide and that is not a justiciable matter. The demand for a multi-member Commission was being voiced for the last several years and merely because it was decided to make an amendment in the statute through an Ordinance, it is not permissible to infer that the decision was actuated by malice. It was lastly contended that Article 324 nowhere stipulates that before ECs are appointed, the CEC will be consulted. In the absence of an express provision in that behalf, it cannot be said that the failure to consult the CEC before the appointments of the two ECs vitiates the appointment.

28. One of the interveners, the petitioner of SLP No. 16940 of 1993, has filed written submissions through his counsel wherein, while supporting the action to constitute the multi-member Commission, he has criticised the style of functioning of the CEC and has contended that his actions have, far from advancing the cause of free and fair elections, resulted in hardships to the people as well as the system. It has been pointed out that several rash decisions were taken by the CEC on the off-chance that they would pass muster but when challenged in court he failed to support them and agreed to withdraw his orders. It is, therefore, contended that the style of functioning of the present CEC itself is sufficient reason to constitute a multi-member Commission so that the check and balance mechanism that the Constitution provides for different institutions may ensure proper decision-making.

29. There is no doubt that when the Constitution was framed the Constitution-makers considered it necessary to have a permanent

body headed by the CEC. Perhaps the volume of work and the complexity thereof could be managed by a single-member body. At the same time it was realised that with the passage of time it may become necessary to have a multimember body. That is why express provision was made in that behalf in clause (2) of Article 324. It seems that for about two decades the need for a multi-member body was not felt. But the issue was raised and considered by the Joint Committee which submitted a report in 1972. Since no action was taken on that report the Citizens for Democracy, a non-governmental organisation, appointed a committee headed by Shri Tarkunde, a former Judge of the Bombay High Court, which submitted its report in August 1974. Both these bodies favoured a multi-member Commission but no action was taken and, after a lull, when the Janata Dal came to power, a committee was appointed which submitted a report in May 1990. That committee also favoured a multi-member body. Prior to that, in 1989 a multi-member Commission was constituted but we know its fate (see Dhanoa's case). But the issue was not given up and demands continued to pour in from Members of Parliament of different hues. These have been mentioned in the counter of the Union of India. It cannot, therefore, be said that this idea was suddenly pulled out of a bag. Assuming the present CEC had taken certain decisions not palatable to the ruling party at the Centre as alleged by him, it is not permissible to jump to the conclusion that was the cause for the Ordinance and the appointments of the ECs. If such a nexus is to weigh, the CEC would continue to act against the ruling party to keep the move for a multi-member Commission at bay. We find it difficult to hold that the decision to constitute a multi-member Commission was actuated by malice. Therefore, even though it is not permissible to plead malice, we have examined the contention and see no merit in it. It is wrong to think that the two ECs were pliable persons who were being appointed with the sole object of eroding the independence of the CEC.

30. We may incidentally mention that the decisions taken by the CEC from time to time postponing elections at the last moment, of which he has made mention in his petition, have evoked mixed reactions. This we say because the CEC uses them to lay the foundation for his contention that the entire exercise was mala fide. Some of his other decisions were so unsustainable that he could not support them when tested in Court. His public utterances at times were so abrasive that this Court had to caution him to exercise restraint on more occasions than one. This gave the impression that he was keen to project his own image. That he has very often been in the newspapers and magazines and on television cannot be denied. In this backdrop, if the Government thought that a multi-member body was desirable, the Government certainly was not wrong and its

action cannot be described as malafide. Subsequent events would suggest that the Government was wholly justified in creating a multimember Commission. The CEC has been seen in a commercial on television and in newspaper advertisements. The CEC has addressed the Press and is reported to have said that he would utilise the balance of his tenure to form a political party to fight corruption and the like (Sunday Times (Bombay) dated June 25, 1995 page 28). Serious doubts may arise regarding his decisions if it is suspected that he has political ambitions, in the absence of any provision, such as, Article 319 of the Constitution. The CEC is, it would appear, totally oblivious to sense of decorum and discretion that his high office requires even if the cause is laudable.

31. That takes us to the question of legislative competence. The contention is that since Article 324 is silent, Parliament expected the Commission itself to evolve its own procedure for transacting its business and since the CEC was the repository of all power to be exercised by the Commission falling within the scope of its activity, it did not see the need to engraft any procedure for transacting its business. If the Election Commission at any time saw the need for it, it would itself evolve its procedure but Parliament cannot do so and hence Sections 9 and 10 are unconstitutional. Except the legislation specifically permitted by clauses (2) and (5) of Article 324 and Article 327 and 328, Part XV of the Constitution does not conceive of a law by Parliament on any other matter and hence the impugned legislation is unconstitutional.

32. Now it must be noticed at he outset that both clauses (2) and (5) of Article 324 contemplate a statute for the appointment of ECs and for their conditions of service. The impugned law provides for both these matters and provisions to that effect cannot be challenged as unconstitutional since they are expressly permitted by the said clauses (2) and (5). Once the provision for the constitution of a multi-member Commission is unassailable, provisions incidental thereto cannot be challenged. It was urged that the legislation squarely fell within Entry 72 of List I of the Seventh Schedule. That entry refers to "Elections to Parliament, to Legislatures of States and to the Offices of President and Vice-President; the Election Commission". If, as argued, the scope of this entry is relatable and confined to clauses (2) and (5) of Article 324 and Articles 327 and 328 only, it would be mere tautology. If the contention that the CEC alone has decisive power is not accepted, and we have not accepted it, and even if it is assumed that the normal rule is of unanimity, sub-sections (1) (2) of Section 10 provide for unanimity. It is only if there is no unanimity that the rule of majority comes into play under sub-section (3). Therefore, even if we were to assume that the Commission alone was competent to lay down how it would transact

its business it would be required to follow the same pattern as is set out in Section 10. We, therefore, see no merit in this contention also.

33. We would here like to make it clear that we should not be understood to approve of the ratio of Dhanoa's case in its entirety. We have expressly approved it where required.

34. One of the matters to which we must advert is the question of the status of an individual whose conditions of services are akin to those of the judges of the Supreme Court. This seems necessary in view of the reliance placed by the CEC on this aspect to support his case. In the instant case some of the service conditions of the CEC are akin to those of the Supreme Court Judges, namely, (i) the provision that he can be removed from office in like manner and on like grounds as a Judge of the Supreme Court and (ii) his conditions of service shall not be varied to his disadvantage after appointment. So far as the first is concerned instead of repeating the provisions of Article 124(4), the draftsman has incorporated the same by reference. The second provision is similar to the proviso to Article 125(2). But does that confer the status of a Supreme Court Judge on the CEC? It appears from the D.O. No. 193/34/92 dated July 23, 1992 addressed to the then Home Secretary, Shri Godbole, the CEC had suggested that the position of the CEC in the Warrant of Precedence needed reconsideration. This issue he seems to have raised in his letter to the Prime Minister in December 1991. It becomes clear from Shri Godbole's reply dated July 25, 1992, that the CEC desired that he be placed at No.9 in the Warrant of Precedence at which position the Judges of the Supreme Court figured. It appears from Shri Godbole's reply that the proposal was considered but it was decided to maintain the CEC's position at No.11 along with the Comptroller and Auditor General of India and the Attorney General of India. However, during the course of the hearing of these petitions it was stated that the CEC and the Comptroller and Auditor General of India were thereafter placed at No.9A. At our request the learned Attorney General placed before us the revised Warrant of Precedence which did reveal that the CEC had climbed to position No.9A along with the Comptroller and Auditor General of India. Maintenance of the status of Judges of the Supreme Court and the High Courts is highly desirable in the national interest. We mention this because of late we find that even personnel belonging to other fora claim equation with High Court and Supreme Court Judges merely because certain jurisdictions earlier exercised by those Courts are transferred to them not realising the distinction between constitutional and statutory functionaries. We would like to impress on the Government that it should not confer equivalence or interfere with the Warrant of Precedence, if it is likely to affect the position of High Court and Supreme Court Judges, however pressing the demand may be without first seeking the views of the Chief Justice

of India. We may add that Mr. G. Ramaswamy, learned counsel for the CEC, frankly conceded that the CEC could not legitimately claim to be equated with Supreme Court Judges. We do hope that the Government will take note of this and do the needful.

35. We have deliberately avoided going into the unpleasant exchanges that took place in the chamber of the CEC on 11th October, 1993, to which reference has been made by the CEC in paragraph 18 (c to f and g) of his petition. These allegations have been denied by Shri Krishnamurthy and Shri Gill does not support the CEC when he says he was abused. Although these allegations and counter allegations found their way into the Press, we do not think any useful purpose will be served by washing dirty linen in public except showing both the CEC and Shri Krishnamurthy in poor light. The CEC and the ECs are high level functionaries. They have several years of experience as civil servants behind them. All of them have served in responsible positions at different levels. It is a pity they did not try to work as a team. The efforts of Shri Gill to persuade the other two to forget the past and to get going with the job fell on deaf ears. Unfortunately, suspicion and distrust got the better of them. We hope they will forget and forgive, start on a clean slate of mutual respect and confidence and get going with the task entrusted to them in a sporting spirit always bearing in mind the fact that the people of this great country are watching them with expectation. For the sake of the people and the country we do hope they will eschew their egos and work in a spirit of comaraderie.

36. In the result, we uphold the impugned Ordinance (now Act 4 of 1994) in its entirety. We also uphold the two impugned notifications dated 1st October, 1993. Hence, the writ petitions fail and are dismissed. The interim order dated 15th November, 1993 will stand vacated. If, as is reported, the incumbent CEC has proceeded on leave, leaving the office in charge of Shri Bagga, Shri Bagga will forthwith hand over charge to Shri Gill till the CEC resumes duty. The IAs will stand disposed of. In the facts and circumstances of the case, we direct parties to bear their own costs. If the CEC has incurred the costs of his petition from the funds of the Election Commission, the other two ECs will be entitled to the same from the same source.New Delhi;

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SUPREME COURT OF INDIA*

Civil Appeal No. 1629 (NCE) of 1993
(Decision dated 23.11.1995)

Janata Dal (Samajwadi) ***..Appellant***

Vs.

Election Commission of India ***..Respondent***

SUMMARY OF THE CASE

The Janata Dal (Samajwadi) was recognised by the Election Commission as a National party under the provisions of the Election

Symbols (Reservation & Allotment) Order, 1968, on 16th April, 1991. The Election Commission reviewed the poll performance of the party at the general elections to the Lok Sabha and to the Legislative Assemblies of certain States held in April-June, 1991. On the basis of such review, the Commission found that the party had failed to fulfil the conditions for continued recognition as a National party under the provisions of said Symbols Order. Thereupon, the Election Commission, after hearing the party, withdrew its recognition as a National party, by its order 21.2.1992.

Aggrieved by the above order of the Election Commission, the party filed the present appeal before the Supreme Court. The Supreme Court dismissed the appeal, holding that once the Commission is satisfied that a political party recognised as a National party has ceased to fulfil the conditions prescribed in paragraph 6(2) of the Symbols Order as a result of any election, it can de-recognise such a political party as National party. The Supreme Court also held that the provisions of section 21 of the General Clauses Act are also applicable in the case of such orders issued by the Election Commission under the Symbols Order.

Representation of the People Act (43 of 1951), S. 29(A) — Election Symbols (Reservation and Allotment) Order (1968) Paras 6, 7 — Recognition of political party as national party — Withdrawal of — Election Commission is competent — It cannot be said that said power can be exercised only after general election — Party can be derecognised if it ceases to be party at least in four States.

General Clauses Act (10 of 1897), S.21.

Paragraph 2(2) of Symbols Order specifically provides that the General Clauses Act, 1897 shall as far as may be applicable in relation to the interpretation of the said order as it applies in relation to the interpretation of a Central Act. Thus S.21 of General Clauses Act, would also become applicable testing power in the Election Commission which had issued the order recognising the political party as a national party to rescind the said order as said political party in the elections to the Legislative Assemblies of the States ceased to fulfil the conditions prescribed in paragraph 6(2) of the Order read with Para 7(1) thereof.

(Para 6)

The plea that Election Commission can exercise the power of derecognising a national party only after the general election which means when elections are held in all the States within the Union of India and not only in some of the States, would not be tenable. If for purpose of recognising a political party as a national party the performance of such party in four or more States has to be examined in accordance with paragraphs 6 and 7 then it cannot be urged that for withdrawing such recognition it must await till elections are held

in all the States within Union of India. Once the Election Commission is satisfied that a political party recognised as a national party, has ceased to fulfil the conditions prescribed in paragraph 6(2) of the Symbols Order not even in four States as result of any election, it can derecognise such a political party as a national party. After any election such party must continue to be a recognised political party at least in four States, otherwise the Election Commission has to derecognise it as a national party.

Cases	Referred :	Chronological	Paras
AIR 1986 SC 111			**8**
AIR 1984 SC 921			**8**
AIR 1978 SC 851			**8**

JUDGMENT

Present:- J.S. Verma, N. P. Singh and K. Venkataswami, JJ.

Mr Prashant Kumar, Advocate, for Mr. A.M. Khanwilkar and Mr. Yatender Sharma, Advocate, for Appellant; Mr. W.C. Chopra, Advocate, for Respondent.

N. P. SINGH, J.:—**The validity of an order dated 21-2-1992 passed by the Chief Election Commissioner of India withdrawing the recognition of Janata Dal (Samajwadi) as a national party, in exercise of the power vested in the Election Commission under paragraphs 6 and 7 of the Election Symbols (Reservation and Allotment) Order, 1968 (hereinafter referred to as the 'Symbols Order') is being questioned in this appeal.**

2. **The appellant was recognised as a national political party on 16.4.1991. The general elections to the Lok Sabha and to the legislative Assemblies of the States of Assam, Haryana, Kerala, Tamil Nadu, Uttar Pradesh, West Bengal and the Union Territory of Pondicherry were held in the months of April-June, 1991. A statement showing the number of votes polled by the appellant at the aforesaid general elections held in the months of April-June, 1991 showing the performance of the appellant at the poll was prepared by the Election Commission and thereafter a show cause notice dated 4-12-1991 was issued to the appellant by the Election Commission as to why the recognition of the appellant as a national party should not be withdrawn under the provisions of the Symbols Order. The General Secretary of the appellant responded to the aforesaid notice by his letter dated 15.1.1992 seeking three months time to submit the reply on behalf of the appellant, as the party was collecting information from its State units. The time for filing the reply to the show cause notice was extended. It was filed on 5.2.1992. A stand was taken on behalf of the appellant that once recognition has been given to the party as a national party there was no**

provision in the Symbols Order for withdrawal of the said recognition. It was also asserted that the performance of a party for purpose of recognition or derecognition has to be judged when the elections are held in all the States within Union of India and not only on basis of elections held in only some of the States. It was pointed out that no elections have been held in respect of State Assemblies of several States like Andhra Pradesh, Bihar, Goa, Orissa, etc. However, the impugned order was passed by the Election Commission withdrawing the recognition of the appellant as a national party and forfeiting the right of the party for the exclusive use of the symbol "Woman carrying pot on her head", which had earlier been reserved for the appellant. The Election Commission held in the impugned order that a party once recognised cannot claim the recognition in perpetuity and it has to show a minimum electoral support for continued recognition in terms of paragraphs 6 and 7 of the Symbols Order.

3. **Paragraph 2(h) of the Symbols Order defines "political party" to mean an association or body of individual citizens of India registered with the Commission as a political party under Section 29(A) of the Representation of the People Act. 1951. Paragraph 3 requires every association or body of individual citizens of India to make an application to the Commission for its registration as a political party under Section 29(A) of the aforesaid Act. Symbol is to be allotted to a contesting candidate in accordance with the provisions of the said Order. Paragraphs 6 and 7 which are relevant for the present dispute are reproduced below:—**

"6. Classification of political parties —

(1) For the purposes of this Order and for such other purposes as the Commission may specify as and when necessity therefor arises, political parties are either recognised political parties or unrecognised political parties.

(2) A political party shall be treated as a recognised political party in a State, if and only if either the conditions specified in clause (A) are, or the condition specified in clause (B) is, fulfilled by that party and not otherwise, that is to say—

(A) that such party—

(a) has been engaged in political activity for a continuous period of five years; and

(b) has, at the general election in that State to the House of the People, or, as the case may be, to the Legislative Assembly, for the time being in existence and functioning returned—

either (i) at least one member to the House of the People for every twenty-five members of that House or any fraction of that number elected from that State:

or (ii) at least one member to the Legislative Assembly of a that State for every thirty members of that Assembly or any fraction of that number:

(B) that the total number of valid votes by all the contesting candidates set up by such party at the general election in the State to the House of the People, or as the case may be, to the Legislative Assembly for the time being in existence and functioning (excluding the valid votes of each such contesting candidate in a constituency as has not been elected and has not polled at least one-twelfth of the total number of valid votes polled by all the contesting candidates in that constituency) is not less than four per cent of the total number of valid votes polled by all the contesting candidates at such general election in the State (including the valid votes of those contesting candidates who have forfeited their deposits).

(3) For the removal of doubts it is hereby declared that the condition in clause (A) or (B) of sub-paragraph (2) shall not be deemed to have been fulfilled by a political party if a member of the House of the People or the Legislative Assembly of the State becomes a member of that political party after his election to that House, or, as the case may be, that Assembly.

"7. Two categories of recognised political parties—(1) If a political party is treated as a recognised political party in accordance with paragraph 6 in four or more States, it shall be known as, and shall have and enjoy the status of, a "National party" throughout the whole of India; and if a political party is treated as a recognised political party in accordance with that paragraph in less than four States, it shall be known as, and shall have and enjoy the status of, a "State party" in the State or States in which it is a recognised political party.

(2) Notwithstanding anything contained in subparagraph (1), every political party which immediately before the commencement of this Order is a multi-State party shall, on such commencement, be a National party and shall continue to be so until it ceases to be a National party on the result of any general election held after such commencement.

(3) Notwithstanding anything contained in subparagraph (1), every political party which immediately before the commencement of this Order is in a State a recognised political party, other than a multi-State party as aforesaid shall, on such commencement, be a State party in that State and shall continue to be so until it ceases to be a State party in that State on the result of any general election held after such commencement."

4. **In view of the paragraph 6(2) a political party shall be treated as a recognised political party in a State, if and only if either the condition specified in Clause (A) or the condition specified in Clause**

(B) is fulfilled by the party. Clause (A) requires such party to have been engaged in political activity for a continuous period of five years and has at the general election in that State to the House of the People, or, as the case may be, to the Legislative Assembly, for the time being in existence and functioning returned at least one member to the House of the People for every twenty-five members of that House or any fraction of that number elected from that State or at least one member to the Legislative Assembly of that State for every thirty members of that Assembly or any fraction of that number. The alternative condition as specified in clause (B) is regarding the total number of valid votes specified in the said Clause (B) polled at the General Election in the State to the House of the People or to the Legislative Assembly for time being in existence and functioning. The conditions for being recognised as a 'national party' or 'state party' have been specified in paragraph 7(1), saying that if a political party is treated as a recognised political party in accordance with paragraph 6 aforesaid in four or more States, it shall be known as, and enjoy the status of a "National party" throughout the whole of India; on the other hand if a political party is treated as a recognised political party in accordance with paragraph 6 aforesaid in less than four States, it shall be known as, and shall have and enjoy the status of, a "State party" in the State or States in which it is a recognised political party.

5. **There is no dispute that when the appellant was recognised as a national party on 16-4-1991 it fulfilled the conditions prescribed in paragraphs 6(2) and 7(1) of the Symbols Order. It is also an admitted position that when the show cause notice was given by the Election Commission to the appellant as to why it should not be derecognised as a national party on the basis of the election results of the Legislative Assemblies in the States mentioned above in the months of April-June. 1991, the appellant did not fulfil the conditions prescribed in paragraphs 6(2) and 7(1) for being recognised as a national party. As such the question which is to be answered is as to whether once a political party is recognised as a national party having fulfilled conditions prescribed for the same in the Symbols Order can it be derecognised as a national party under the provisions of the same Symbols Order?**

6. **It is true that there is no specific provision under the Symbols Order vesting power in the Election Commission after having recognised a political party as a national party to declare that such political party has ceased to be a national party, not being entitled to the exclusive use of the symbol allotted to it. But at the same time, it cannot be conceived that a political party having been recognised as a national party or State party as the case may be on having fulfilled the conditions prescribed in paragraph 6(2) shall continue as such in perpetuity although it has forfeited the right to be recognised as a**

national party or a State Party. In paragraph 2(2) of the said Symbols Order it has been specifically provided that the General Clauses Act, 1897 shall as far as may be applicable in relation to the interpretation of the said order as it applies in relation to the interpretation of a Central Act. Section 21 of the General Clauses Act provides that 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. As paragraph 2(2) of the order in clear and unambiguous term makes provision of the General Clauses Act applicable to the Symbols Order, it need not be impressed that provisions of Section 21 of the General Clauses Act, also become applicable vesting power in the Election Commission which had issued the aforesaid order dated 16-4-1991 recognising the appellant as a national party to rescind the said order as appellant in the elections to the Legislative Assemblies of the States mentioned above ceased to fulfil the conditions prescribed in paragraph 6(2) of the Order read with para 7(1) thereof.

7. **The learned counsel, appearing on behalf of the appellant, submitted that even if it is assumed that Election Commission can exercise the power of derecognising a national party after it has ceased to fulfil the conditions prescribed in paragraph 6(2) that power can be exercised only after the general election which means when elections are held in all the States within the Union of India and not only in some of the States, as was the situation in the months of April-June 1991. This argument appears to be attractive specifically in view of the expression "General Election" as defined in paragraph 2(f) and used in paragraph 6(2), but on proper analysis and scrutiny, according to us, it cannot be accepted. The General Elections in all the States at one time in India has now become a matter of history. For one reason or other the elections are being held in group of States under different situations prevailing from time to time. Apart from that as the condition prescribed in paragraph 7(1) for recognising a political party as a national party is that it should be treated as a recognised political party in accordance with paragraph 6, in four or more States; then for purpose of withdrawing such recognition also it has to be examined as to whether after elections the said political party can be treated as a recognised political party as a national party the performance of such party in four or more States has to be examined in accordance with paragraphs 6 and 7 then it cannot be urged that for withdrawing such recognition it must await till elections are held in all the States within Union of India. If this stand is accepted then even for recognising a political party as a national party, such recognition should await till elections are held in all the States in**

India. Can recognition of a political party as a national party be not given, no sooner it fulfils the conditions specified in paragraph 6(2), in four or more States in view of paragraph 7(1) of the Symbols Order? If for purpose of recognition of a political party as a national party the conditions of paragraph 6(2) have to be fulfilled only in four or more States, then on the same principle even for withdrawing the said recognition the question has to be examined in the light of paragraph 6(2) on the basis of the results in four or more States. Once the Election Commission is satisfied that a political party recognised as a national party, has ceased to fulfil the conditions prescribed in paragraph 6(2) of the Symbols Order not even in four States as a result of any election, it can derecognise such a political party as a national party. After any election such party must continue to be a recognised political party at least in four States, otherwise the Election Commission has to derecognise it as a national party. There is no dispute that in the months of April, June, 1991 elections were held in more than four States and on the basis of the results in those elections, the appellant could not be held to be a recognised political party in terms of paragraph 6(2) of the Symbols Order in at least four States. The Election Commission was justified in passing the impugned order in the light of paragraphs 6(2) and 7(1).

8. **This Court has examined the nature of the provisions of the Symbols Order in the case of Kanhiya Lal Omar v. R.K. Trivedi. AIR 1986 SC 111: (1985) 4 SCC 628. It was said that the Election Commission was empowered to recognise political parties and to decide disputes arising amongst them or between splinter groups within a political party. It was further said that the Election Commission was empowered to issue the aforesaid Symbols Order because the said power was comprehended in the power of superintendence, direction and control of elections vested by Article 324 of the Constitution in the Commission. In that connection it was observed (Para 16 of AIR):**

"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) 2 SCR 272 : AIR 1978 SC 851 and A.C. Jose v. Sivan Pillai, (1984) 3 SCR 74 : AIR 1984 SC 921."

9. **The Election Commission on the materials produced before it rightly came to the conclusion that the appellant had ceased to be a**

national party or a State party and as such shall not be entitled to the exclusive use of the symbol "Woman carrying pot on her head" earlier reserved for the appellant. We find no reason to take a different view. Accordingly, the appeal fails and it is dismissed. In the facts and circumstances of the case, there shall be no orders as to costs.

Appeal dismissed.

SUPREME COURT OF INDIA*

Civil Extra Ordinary Jurisdiction
Writ Petition (Civil) No. 24 of 1995
(Decision dated 4.4.1996)

Common Cause
A Registered Society .. ***Petitioner***

Vs.

Union of India & Others .. ***Respondents***

SUMMARY OF THE CASE

In this writ petition filed by the Common Cause, a registered society, as public interest litigation, it was alleged that the political parties were not submitting their accounts to the Income Tax authorities as required under Section 13A of the Income Tax Act, 1961. It was also alleged that crores of rupees were being spent on elections by candidates and political parties without indicating the source of the money so spent and far in excess of the limits of election expenses prescribed under Section 77 of the Representation of the People Act, 1951, and that political donations were being made by companies in violation of Section 293 A of the Companies Act, 1956.

On examination, the Supreme Court found that most of the political parties were in default of filing their annual returns under the Income Tax Act, and that the Income Tax authorities were also wholly remiss in the performance of their statutory duties under the law. The Court directed the Ministry of Finance and the Income Tax authorities to ensure strict compliance by the political parties with the provisions of the Income Tax Act.

The Court also clarified the provisions of Section 77 of the Representation of the People Act, 1951, and held that a candidate shall be presumed to have authorised or incurred all expenditure in connection with his election and that, if he claimed any exemption under Explanation (1) to Section 77, the burden lay on him to show that any part of such expenditure was not incurred or authorised by him but by the party to which he belongs or by any other association or body of persons or individual. Further, such party or association or individual should have filed his income tax return. Furthermore , the Election Commission also has the power under Article 324 of the Constitution to require the political parties to submit, for its scrutiny, the details of the expenditure incurred or authorised by them in connection with the election of their candidates.

(A) Representation of the People Act (43 of 1951), S.77 Explanation-I—Election—Expenditure incurred by Political Party in terms of Explanation-I to S.77—Shall be presumed to be authorised by the candidate himsef — But said presumption would be rebuttable.

A candidate in the election who wants to take the benefit of Explanation 1 to S.77 — in any proceedings before the Court — must prove that the said expenditure was in fact incurred by the political party and not by him. Any expenditure in connection with the election of a candidate which according to him has been incurred by his political party shall be presumed to have been authorised by the candidate or his election agent. But the presumption is rebutable. The candidate shall have to show that the said expenditure was in fact inccurred by a political party and not by him. The candidate shall have to rebut the presumption by the evidentiary — standard as applicable to rebuttable presumption under the law of evidence. An entry in the books of account of a political party maintained in accordance with Section 13A of the Income-tax Act showing that the party has incurred expenditure in connection with the election of a candidate may be itself be sufficient to rebut the presumption. On the other hand, the ipse dixit of the candidate or writing at the bottom of the pamphlet, poster, cut-out, hoarding, wall painting, advertisement and newspaper etc. that the same were issued by the political party may not by itself be sufficient to rebut the presumption. Therefore, the expenditure (including that for which the candidate is seeking protection under Explanation I to Section 77 of R.P. Act) in connection with the election of a candidate—to the knowledge of the candidate or his election agent — shall be presumed to have been authorised by the candidate or his election agent. It shall, however, be open to the candidate to rebut the presumption in accordance with law and to show that part of the expenditure or whole of it was in fact incurred by the political party to which he belongs or any other association or body of persons or by an individual (Other than the candidate or his election agent).

(Paras 19, 24)

(B) Representation of the People Act (43 of 1951), S.77 — Election — Expenditure incurred or authorised by political party in respect of general propaganda or for propagation of its election manifesto — Would not be considered an expenditure to be incurred in connection with election of candidate/candidates belonging to the said party.

(Para 20)

(C) Constitution of India, Art.324—Expression "conduct of electiion" — Powers of Election Commissioner — It can direct political parties to submit details of expenditure incurred or authorised by them in connection with election of their respective candidates.

The expression "conduct of election" in Article 324 of the Constitution of India is wide enough to include in its sweep, the power of the Election Commission to issue — in the proposed of the conduct of elections — directions to the effect that the political parties shall submit to the Commission for its scrutiny, the details of the expenditure incurred or authorised by the political parties in connection with the election of their respecting candidates.

(Paras 21, 22, 24)

(D) Income-tax Act (3 of 1961), Ss. 13-A, 276-CC — Return — Filing of — It is obligatory for Politial Party to file return of income in respect of each assessment year in accordance with provisions of Act — Default by Political Parties — Secretary, Ministry of Finance, directed to have an investigation/inquiry conducted against each of defaulter political parties and initiate necessary action in accordance with law including penal action under S.276-CC.

(Para 24)

(E) Income-tax Act (43 of 1961), Ss.13-A, 276-CC — Return — Filling of, by Political Parties — Default — Non-enforcement of mandatory provisions under Act by Authorities — Inquiry directed to be conducted — Any officer/officers found responsible and remiss in inquiry directed to be suitably dealt with in accordance with rules.

(Para 24)

(F) Representation of the People Act (43 of 1951), S.77 — Explanation-I — Election expenditure — Political party not maintaining audited and authenticated accounts — not filed return of income for relevant period — Cannot be permitted to say that it has incurred or authorised expenditure in connection with the election of its candidates in terms of Explanation 1 to S.77.

(Para 24)

Cases Referred : Chronological Paras

AIR 1978 SC 851 : (1978) 1 SCC 405 **20**

AIR 1973 SC 1461 **20**

JUDGMENT

Present :- Kuldip Singh and Faizan Uddin, JJ.

KULDIP SINGH, J.

Common cause - a society registered under the Societies Registration Act, 1860 which takes up various matters of general public interest/importance for redress before the courts - through its Director Mr. H.D. Shourie, has filed this public interest petition under Article 32 of the Constitution of India. The primary contention raised in the petition is that the cumulative effect of the three statutory provisions, namely, Section 293A of the Companies Act 1956, Section 13A of the Income-tax Act 1961 and Section 77 of the Representation of People Act 1950 is, to bring transparency in the election-funding. People of India must know the source of expenditure incurred by the political parties and by the candidates in the process of election. It is contended that the mandatory provisions of law are being violated by the political parties with impunity. During the elections crores of rupees are spent by the political parties without indicating the source of the money so spent. According to Mr. Shourie the elections in this country are fought with the help of money-power which is gathered from black-sources. Once elected to power, it becomes easy to collect tons of black-money which is used for retaining power and for re-election. The vicious circle, according to Mr. Shourie, has totally polluted the basic democracy in the country.

2. Section 293A of the Companies Act, 1956 (the Companies Act) is as under:

"293A (1) Notwithstanding anything contained in any other provisions of this Act

(a) no Govt-Company; and

(b) no other company which has been in existence for less than three financial years.

shall contribute any amount or amounts, directly or indirectly,

(i) to any political party; or

(ii) for any political purpose to any person.

(2) A company, not being a company referred to in clause (a) or clause (b) of sub-section (1), may contribute any amount or amounts, directly or indirectly,

(a) to any political party; or

(b) for any political purpose to any person:

Provided that the amount, or as the case may be, the aggregate of the amounts which may be so contributed by a company in any financial year

shall not exceed five percent of its average net profits determined in accordance with the provisions of sections 349 and 350 during the three immediately preceding financial years.

Provided further that no such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making and the acceptance of the contribution authorised by it.

Explanation: Where a portion of a financial year of the company falls before the commencement of the Companies (Amendment) Act, 1985, and a portion falls after such commencement, the latter portion shall be deemed to be a financial year within the meaning, and for the purpose, of this sub-section:

(3) .....

(4) Every company shall disclose in its profit and loss account any amount or amounts contributed by it to any person during the financial year to which that account relates, giving particulars of the total amount contributed and the name of the party or person to which or to whom such amount has been contributed."

Section 13A of the Income-tax Act, 1961 (the Income-tax Act) is reproduced hereunder:

"13A Any income of a political party which is chargeable under the head 'Income from house property' or Income from other sources' or any income by way of voluntary contributions received by a political party from any person shall not be included in the total income of the previous year of such political party:-

Provided that:-

(a) such political party keeps and maintains such book of account and other documents as would enable the [Assessing] Officer to properly deduct its income therefrom;

(b) in respect of each such voluntary contribution in excess of ten thousand rupees, such political party keeps and maintains a record of such contribution and the name and address of the person who has made such contribution; and

(c) the accounts of such political party are audited by an accountant as defined in the Explanation below sub-section (2) of Section 288.

Explanation....."

Section 77 of the Representation of the People Act, 1950 (the R.P. Act) is in the following term:-

"77. Account of election expenses and maximum thereof. - (1) Every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the

election incurred or authorised by him or by his election agent between [the date on which he has been nominated] and the date of declaration of the result thereof, both dates inclusive.

[Explanation 1. - Notwithstanding any judgement, order or decision of any court to the contrary, any expenditure incurred or authorised in connection with the election of a candidate by a political party or by any other association or body of persons or by any individual (other than the candidate or his election agent) shall not be deemed to be, and shall not ever be deemed to have been, expenditure in connection with the election incurred or authorised by the candidates or by his election agent for the purposes of this subsection."

3. It is averred in the petition that most of the political parties in the country - registered and recognised by the Election Commission - have, for many years, been flouting the provisions of the Income Tax Act so much so that they have not been maintaining accounts as required under Section 13A of the Income Tax Act. Most of the political parties have not been filing returns of income in violation of the mandatory provisions of law. According to the petitioner it is a matter of common knowledge that political parties receive large amounts of money by way of donations/contributions from companies on a quid pro quo basis. The companies invest to seek favours when the party is in power. Neither the companies nor the political parties show the contributions/donations in their account-books. The donations and contributions received by the political parties are obviously out-of-account and in the nature of black money which would not figure in the balance sheets of the companies concerned. There is, thus, patent violation of Section 293A of the Companies Act and Section 13A of the Income Tax Act.

4. The Union of India has filed counter affidavit dated October 7, 1995. Supplementary affidavit has also been filed on February 13, 1996. We may at this stage indicate the position regarding filing of returns of income by the political parties as disclosed by the Union of India in the two counter affidavits.

4A. All India Forward Block did not file any return of income. The department served notices under Section 142(1) of the Income Tax Act on the party on September 21, 1995 and November 30, 1995. The party has not filed any return despite notices.

5. Bhartiya Janta Party did not file any return till December 28, 1995 when in response to the notice issued by the Income Tax Department on December 4, 1995 the party filed return of income for the assessment year 1995-96. The party also furnished information as required by the department for the accounting period ending March 31, 1993 and March 31, 1994. According to the department the returns of income filed by the party suffered from infirmities as it did not include accounts of the State units.

6. The Communist Party of India and the communist Party of India (Marxist) have been filing their returns of income regularly.

7. The Indian National Congress did not file any return of income. The income tax department issued notice dated December 3, 1995 and letters dated November 30, 1995 and January 17, 1996. Shri Sita Ram Kesri, Treasurer of the Party, has filed an affidavit dated February 16, 1996 stating that the returns of income relating to the assessment years 1993-94, 1994-95 and 1995-96 have been filed on December 14, 1995.

8. The Janta Dal did not file any return of income for all these years. Despite notices issued by the department on September 21, 1995 and January 17, 1996 the return of income has not been filed.

9. The Janata Party (JP) and the Revolutionary Socialist Party have not been filing returns of income.

10. All India Anna Dravida Munnetra Kazagam (AIADMK) has filed returns of income for the assessment years 1979-80 to 1986-87. The party has not filed the returns for the years 1987-88 to 1995-96, however, the party has filed on January 10, 1996 a list of donations of Rs. 10,000 or more received during the period relevant to the assessment years 1988-89 to 1995-96.

11. Dravida Munnetra Kazagam (DMK) has filed the returns of income from 1979-80 till 1995-96. Some of the returns, however, are not valid and some were filed belatedly.

12. Section 13A of the Income Tax Act was introduced by way of amendment which came into force on April 1, 1979. The political parties were required to file return of income for every assessment year from 1979-80 onwards. Except the Communist Party of India, the Communist Party of India (Marxist), the DMK and the AIADMK, no other party has been filing returns of income as required under law. Notices were issued to the political parties some time in the year 1990 calling for returns of income for the assessment years 1986-87 and onwards. There is nothing on the record to show, why the income tax department did not issue notices to the political parties for the period prior to 1986-87. The political parties have failed to file returns for all the years from April 1, 1979 till the assessment year 1990-91 and thereafter till-date. The reason given by the Union of India, in the counter affidavit, for not taking any action against the parties is as under:-

"I submit that most of the State and National level political parties have not been filing their returns of income, and statutory notices issued have not been complied with as mentioned above. In some cases, in reply to statutory notices issued by the Assessing Officer, some political parties took a stand that they do not have any income which is liable to be taxed and their sources of income are only those which are specifically exempted by section 13A of the Income Tax Act and that, therefore, they are not required to file returns of their income. In cases where notices were issued as stated above, since there was no definite information available to the assessing officers that the parties were having incomes above taxable limits as per the provisions of the Income Tax Act, the proceedings initiated by issue of statutory notices were dropped with the observation that in case any information or additional facts come to

the notice to the authorities concerned, action under Section 147 of the Income Tax Act would be taken."

13. It is obvious that there has been total in-action on the part of the Government to enforce the provisions of the Income Tax Act relating to the filing of a return of income by a political party. The provisions of Section 13A of Income-tax Act with Section 293A of the Companies Act clearly indicate the legislative scheme the object of which is to ensure that there is transparency in the process of fund-collecting and incurring expenditure by the political parties. The requirement of maintaining audited accounts by the political parties is mandatory and has to be strictly enforced. It was obligatory for the income tax authorities to have strictly enforced the statutory provisions of the Income Tax Act. We may refer to Sections 139 (4B), 142(1) and 276 CC of the income tax which are relevant:-

139. (4B) The chief executive officer (whether such chief executive officer is known as Secretary or by any other designation) of every political party shall, if the total income in respect of which the political party is assessable (the total income for this purpose being computed under this Act without giving effect to the provisions of section 13A) exceeds the maximum amount which is not chargeable to income-tax, furnish a return of such income of the previous year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and all the provisions of this Act, shall, so far as may be, apply as if it were a return required to be furnished under subsection (1).]

Inquiry before the assessment.

142. (1) For the purpose of making an assessment under this Act, the [Assessing] Officer may serve on any person who has made a return under section 139 [or in whose case the time allowed under sub-section (1) of that section for furnishing the return has expired] a notice requiring him, on a date to be therein specified-

[(i) where such person has not made a return [with the time allowed under sub-section (1) of section 139] to furnish a return of his income or the income of any other person in respect of which he is assessable under this Act, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed or]

[(ii)] to produce, or cause to be produced, such accounts or documents as the [Assessing] Officer may require, or

[(iii)] to furnish in writing and verified in the prescribed manner information in such form and on such points or matter (including a statement of all assets and liabilities of the assessee, whether included in the accounts or not) as the [Assessing] Officer may require: Provided that-

(a) the previous approval of the [Deputy] Commissioner shall be obtained before requiring the assessee to furnish a statement of all assets and liabilities not included in the accounts;

(b) the [Assessing] Officer shall not require the production of any accounts relating to a period more than three years prior to the previous year.

Failure to furnish return of income 276CC. If a person wilfully fails to furnish in due time the return of income which he is required to furnish under sub-section (1) of section 139 or by notice given under [clause (i) of sub-section (1) of section 142] or section 148, he shall be punishable-

(i) in a case where the amount of tax, which would have been evaded if the failure had not been discovered, exceeds one hundred thousand rupees, with rigorous imprisonment for term which shall not be less than six months but which may extend to seven years and with fine;

(ii) in any other case, with imprisonment of a term which shall not be less than three months but which may extend to three years and with fine:

Provided that a person shall not be proceeded against under this section for failure to furnish in due time the return of income under sub-section (1) of section 139-

(i) for any assessment year commencing prior to the 1st day of April, 1975; or

(ii) for any assessment year commencing on or after the 1st day of April, 1975, if-

(a) the return is furnished by him before the expiry of the assessment year; or

(b) the tax payable by him on the total income determined on regular assessment, as reduced by the advance tax, if any, paid, and any tax deducted at source, does not exceed three thousand rupees.]"

The political parties, therefore, are under a statutory obligation to furnish a return of income for each assessment year. To be eligible for exemption from income-tax they have to maintain audited accounts and comply with the other conditions envisaged under Section 13A of the Income-tax Act. Admittedly most of the parties have done neither. It is not a matter where the parties have overlooked to file a return of income by accident once or twice. The political parties have-in patent violation of law neither maintain audited accounts nor paid tax since 1979-80. Sub-section 4B of Section 139 of the Income Tax Act makes it obligatory for the Chief Executive Officer of every political party to furnish a return of income for each year in accordance with the provisions of the Income Tax Act. Section 142(1) provides for inquiry before assessment. It is not disputed that notices under Section 142(1) were issued by the income tax authorities to the defaulting political parties but despite that the returns of income have not been filed by the said parties. Failure to furnish a return of income has been made a criminal offence punishable under Section 276 CC of the Income Tax Act. It leaves no leeway. The mandatory provisions on the law have to be enforced. It is common knowledge that there is ostentatious use of money by political parties in the elections to further the prospects of candidates set up by them. Display of huge cut-outs etc. of political leaders on road-sides, crossings, street corners,

etc. and setting up of arches, gates, hoardings, etc. at prominent places and printing of posters and pamphlets are some of the ways in which money-power is displayed by the parties. In many cases large scane advertisements are also given in newspapers by political parties.

14. The General Elections - to decide who rules over 850 million Indians - are staged every 5/6 years since independence. It is an enormous exercise and a mammoth venture in terms of money spent. Hundreds and thousands of vehicles of various kinds are pressed on to the roads in the 543 parliamentary constituencies on behalf of thousands of aspirants to power, many days before the general elections are actually held. Millions of leaflets and many millions of posters are printed and distributed or pasted all over the country. Banners by the lakhs are hoisted. Flags go up, walls are painted, and hundreds of thousands of loud speakers play out the loud exhortations and extravagant promises. VIPs and VVIPs come and go, some of them in helicopters and air-taxis. The political parties in their quest for power spend more than one thousand crores 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.

15. Mr. R.V. Pandit - a writer, and an economic analyst - has intervened in this petition. Along with his intervention application, he has annexed an article written by him and published in the "Imprint" of September, 1988. In the said article, he highlights the corruption in this country in the following words:-

"I maintain a Savings Bank account, and from this account drew crossed Account Payee cheques of varying sums of money towards election expenses of candidates I felt would serve the public cause. Armed with my Bank Pass Book, I have discussed the question of elections and corruption with almost all important office holders since Jawaharlal Nehru. From these discussions, I have drawn the conclusion that most politicians are not interested in honest money funding for elections. Honest money entails accountability. Honest money restricts spending within legally sanctioned limits (which are ridiculously low). Honest money leaves little scope for the candidate to steal from election funds. Honest money funding is limiting. While the politicians want money for election, more importantly, they want money for themselves - to spend, to hoard, to get rich. And this they can do only if the source of money is black..... The corruption in quest of political office and the corruption in the mechanic of survival in power has thoroughly vitiated our lives and our times. It has sullied our institutions..... The corrupt politician groomed to become the corrupt minister, and, in turn, the corrupt minister set about seducing the bureaucrat ..... THINK OF ANY problem our society or the country is facing today, analyse it, and you will inevitable conclude, and rightly that corruption is at the root of the problem. Prices are

high. Corruption is the cause. Quality is bad. Corruption is the cause. Roads are pockmarked. Corruption is the cause. Nobody does a good job. Corruption is the cause. Hospitals kill. Corruption is the cause. Power-failures put homes in darkness, businesses into bankruptcy. Corruption is the cause. Cloth is expensive. Corruption is the cause. Bridges collapse. Corruption is the cause. Educational standards have fallen. Corruption is the cause. We have no law and order. Corruption is the cause. People die from poisoning, through food, through drink, through medicines. Corruption is the cause. The list is endless. The very foundation of our nation, of our society, is now threatened. And corruption is the cause."

16. According to Mr. Pandit the above quoted scenario has not improved, it has rather become worse. The General Elections bring into motion the democratic polity in the country. When the elections are fought with unaccounted money, the persons elected in the process can think of nothing except getting rich by amassing black money. They retain power with the help of black money and while in office collect more and more to spend the same in the next election to retain the seat of power. Unless the statutory provisions meant to bring transparency in the functioning of the democracy are strictly enforced and the election funding is made transparent, the vicious circle cannot be broken and the corruption cannot be eliminated from the country.

17. We have no hesitation in holding that the political parties who have not been filing returns of income for several years have violated the statutory provisions of Income Tax Act. The income tax authorities have been wholly remiss in the performance of their statutory duties under law. It was mandatory for the income tax authorities to have put in motion the statutory machinery against the defaulting political parties. The reasons for not doing so — as disclosed in the counter affidavits – are wholly extraneous and unjustified. The political parties are not above law and are bound to follow the same.

18. A political party which is not maintaining, audited and authentic accounts and is not filing the return of income before the income tax authorities cannot justifiably plead that it has incurred or authorised any expenditure in connection with the election of a party candidate. The expenditure "incurred or authorised in connection with the election of a candidate by a political party" can only be the expenditure which as a transparent source. Explanation 1 to Section 77 of the Income Tax Act does not give protection to the expenditure which comes form an unknown or black source. Bulk of income of a political party by way of contributions/donations is from companies. Section 293A of the Companies Act makes it mandatory that such contributions/donations are made in a transparent manner as provided under the said section. Similarly, Section 13A of the Income-tax Act lays down that all income derived from contributions/donations is exempt from income tax, only if a political party satisfies that (i) it keeps and maintains such books of accounts and other documents as would enable the assessing officer to properly deduce its income there from; (ii) it keeps and

maintains a record of each voluntary contribution in excess of Rs. 10,000 and of the names and addresses of persons who have made such contributions; and (iii) the accounts of political party are audited by a chartered accountant or other qualified accountant. Sub-section 4B has been inserted in Section 139 of the Income Tax Act by Taxation Laws (Amendment) Act, 1978 under which every political party is obliged to file every year a return of total income voluntarily. The total income for this purpose is to be computed without giving effect to the provisions of Section 13A of the Income Tax Act. If such total income exceeds the maximum amount which is not chargeable to tax, the liability of the political party to file return of income voluntarily arises. It is thus, obvious that Section 293A of the Companies Act read with Section 13A and other provisions of the Income Tax Act are with an avowed object of bringing transparency in the accounts and expenditure of the political parties. If a political party deliberately chooses to violate or circumvent these mandatory provisions of law and goes through the election process with the help of black and unaccounted money the said party, ordinarily, cannot be permitted to say that it has incurred or authorised expenditure in connection with the election of its candidates in terms of Explanation I to Section 77 of the R.P. Act.

19. Adverting to Section 77 of the Income Tax Act, Mr. Kapil Sibal, learned counsel for the Election Commission has contended that the expenditure incurred by a political party in terms of Explanation I to Section 77 of the RP Act shall be presumed to be authorised by the candidate himself but the said presumption would be rebuttable. The onus lies on the candidate to prove that the expenditure was in fact incurred/authorised by the party and it was not incurred by the candidate himself. We see considerable force in the contention of the learned counsel. There can be no dispute that the expenditure incurred by a candidate himself would squarely fall under Section 77(1) of the RP Act. There can also be no dispute with the proposition that the expenditure actually incurred and spent by a political party in connection with the election of a candidate cannot be treated to be the expenditure under Section 77(1) of the Act. The question, however, for determination is what rule of evidence is to be followed to attract the provisions of Explanation I to Section 77 of the RP Act? The said Explanation is in the nature of an exception to sub-Section I of Section 77. A candidate in the election who wants to take the benefit of Explanations 1 to Section 77 of the RP Act - in any proceedings before the Court- must prove that the said expenditure was in fact incurred by the political party and not by him. Any expenditure in connection with the election of a candidate which according to him has been incurred by his political party shall be presumed to have been authorised by the candidate or his election agent. But the presumption is rebuttable. The candidate shall have to show that the said expenditure was in fact incurred by a political party and not by him. The candidate shall have to rebut the presumption by the evidentiary - standard as applicable to rebuttable presumptions under the law of evidence. An entry in the books of account of a political party maintained in accordance with Section 13A of the Income Tax Act showing that the party has incurred expenditure in

connection with the election of a candidate may be itself be sufficient to rebut the presumption. On the other hand, the ipse-dixit of the candidate or writing at the bottom of the pamphlet, poster, cutout, hoarding, wall painting, advertisement and newspaper etc. that the same were issued by the political party may not by itself be sufficient to rebut the presumption. We, therefore, hold that the expenditure (including that for which the candidate is seeking protection under Explanation I to Section 77 of RP Act) in connection with the election of a candidate - to the knowledge of the candidate or his election agent - shall be presumed to have been authorised by the candidate or his election agent. It shall, however, be open to the candidate to rebut the presumption in accordance with law and to show that part of the expenditure or whole of it was in fact incurred by the political party to which he belongs or any other association or body persons or by an individual (other than the candidate or his election agent). A constitution bench of this Court in Dr. P. Nalla Thampy Terah vs. Union of India 1985 (Supp) SCC 189 : (AIR 1985 SC 1133), speaking through Chandrachud, C.J. Interpreted Explanation I to Section 77 as under at pp. 1141-42 of AIR:

"While we are on this question, we would like to point out that if an expenditure which purports to have been incurred, for example, by a political party, has in fact been incured by the candidate or his election agent, Explanation 1 will not be attracted. It is only if the expenditure is in fact incurred or authorised by a political party or any other association or body of persons, or by an individual (other than the candidate or his election agent) that the Explanation will come into play. The candidate cannot place his own funds in the power or possession of a political party, or a trade union or some other person and plead for the protection of Explanation 1. The reason is that, in such a case, the incurring of the expenditure by those others, is a mere facade. In truth and substance, the expenditure is incurred by the candidate himself because, the money is his. What matters for the purpose of Explanation 1 is not whose hand it is that spends the money. The essence of the matter is, whose money it is. It is only if the money expended by a political party, for example, is not laid at its disposal by the candidate or his election agent that explanation 1 would apply. In other words, it must be shown, in order that Explanation 1 may apply, that the source of the expenditure incurred was not the candidate or his election agent. What is important is to realise that Explanation 1 does not create a fiction. It deals with the realities of political situations. It does not provide that the expenditure in fact incurred or authorised by a candidate or his election agent, shall not be deemed to be incurred or authorised by them, if the amount is defrayed by a political party. That would be tantamount to creating a fiction. The object of the Explanation is to ensure that the expenditure incurred, for example, by a political party on its own, that is, without using the funds provided by the candidate or his election agent shall not be deemed to be expenditure incurred or authorised by the candidate or his election agent. If the expenditure is incurred from out of the funds provided by the candidate or his election agent Section 77(1) and not Explanation 1 would apply."

(Emphasis supplied)

20. Before parting with the point under discussion we make it clear that any expenditure incurred or authorised by a political party in respect of general propaganda or for the propagation of its election manifesto shall not be considered an expenditure to be incurred in connection with the election of the candidate/candidates belonging to the said party.

21. The second contention of Mr. Sibal is based on Article 324 of the Constitution of India. The said Article provides that the superintendence, directions and control of the preparation of the electoral rolls for, and the conduct of elections to Parliament and to the legislature of every state shall be vested in the Election Commission. According to Mr. Sibal the entire gamut of election is under the supervision and control of the Election Commission. The Commission can issue suitable directions to maintain the purity of election and in particular to bring transparency in the process of election. According to Mr. Sibal the purity of election is fundamental to democracy. The precise contention of Mr. Sibal is that contemporaneous details-during the period when the process of election is on-of the expenditure incurred by a political party in connection with the election of its candidates can be asked for by the Commission and should be filed by the political party before the Commission. We are inclined to agree with Mr. Sibal. This Court in Mohinder Singh Gill Vs. The Chief Election Commissioner New Delhi (1978) 1 SCC 405 : (AIR 1978 SC 851) speaking through Krishna Iyer, J interpreted Article 324 as under (at pp. 869-70 of AIR):

"We decide two questions under the relevant article, not arguendo, but as substantive pronouncements on the subject. They are:

(a) What, in its comprehensive connotation, does the 'conduct' of elections mean or, for that matter, the 'superintendence, direction and control' of elections?

(b) since the text of the provision is silent about hearing before acting, is it permissible to import into Article 324(1) an obligation to act in accord with natural justice?

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 the 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. After all as Mathew, J. has observed in Indira Gandhi (supra) (p. 523) (SCC p. 136, paras 335-6):

In the opinion of some of the judges constituting the majority in Bharati's case (AIR 1973 SC 1461). Rule of Law is a basic structure of the Constitution apart from democracy.

The rule of law postulates the pervasiveness of the spirit of law throughout the whole range of government in the sense of excluding arbitrary official action in any sphere.

And the supremacy of valid law over the Commission argues itself. No one is an imperium in imperio in our constitutional order. It is reasonable to hold that the Commissioner cannot defy the law armed by Article 324. Likewise, his functions are subject to the norms of fairness and he cannot act arbitrarily. Unchecked power is alien to our system.

Even so, situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it 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. Myriad maybes, too mystic to be precisely presaged, may call for prompt action to reach the goal of free and fair election. It has been argued that this will create a constitutional despot beyond the pale of accountability; a Frankenstein's monster who may manipulate the system into elected depotism - instances of such phenomena are the tears of history. To that the retort may be that the judicial branch, at the appropriate stage, with the potency of its benignant power and within the leadings strings of legal guidelines, can call the bluff, quash the action and bring order into the process. Whether we make a triumph or travesty of democracy depends on the man as much as on the Great National Parchment. Secondly, when a high functionary like the Commissioner is vested with wide powers the law expects him to act fairly and legally, Article 324 is geared to the accomplishment of free and fair elections expeditiously. Moreover, as held in Virendra and Harishankar discretion vested in a high functionary may be reasonably trusted to be used properly, not perversely. If it is misused certainly the Court has power to strike down the act. This is well established and does not need further case law confirmation. Moreover, it is useful to remember the warning of Chandrachud, J:

But the electorate lives in the hope that a sacred power will not so flagrantly be abused and the moving finger of history warns of the consequences that inevitably flow when absolute power has corrupted absolutely. The fear of perversion is no test of power.

The learned Addl. Solicitor General brought to our notice rulings of this Court and of the High Courts which have held that Article 324 was a plenary power which enabled the Commission to act even in the absence of specific legislation though not contrary to valid legislation. Ordering a repoll for a whole constituency under compulsion of circumstances may be directed for the conduct of elections and can be saved by Article 324 - provided it is

bonafide necessary for the vindication of the free verdict of the electorate and the abandonment of the previous poll was because it failed to achieve that goal. While we repel Sri Rao's broadside attack on Article 324 as confined to what the Act has conferred, we concede that even Article 324 does not exalt the Commission into a law unto itself. Broad authority does not bar scrutiny into specific validity of the particular order.

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."

22. 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 an 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.

23. We are informed that the Election Commission of India has from time to time issued instructions which have been published in the Compendium of Instructions on Conduct of Elections (1996). The Election Commission would be justified in asking a political party to file before it the account of expenditure incurred or authorised by a political party in connection with the election of its candidates during the course of general election/election.

24. We, therefore, hold and direct as under:

(1) That the political parties are under a statutory obligation to file return of income in respect of each assessment year in accordance with the provisions of the Income Tax Act. The political parties - referred to by us in the judgment - who have not been filing returns of income for several years have prima facie violated the statutory provisions of the Income Tax Act as indicated by us in the judgment.

(2) That the Income-tax authorities have been wholly remiss in the performance of their statutory duties under law. The said authorities have for along period failed to take appropriate action against the defaulter political parties.

(3) The Secretary, Ministry of Finance, Department of Revenue, the Government of India shall have an investigation/inquiry conducted against each of the defaulter political parties and initiate necessary action in accordance with law including penal action under Section 276CC of the Income Tax Act.

(4) The Secretary, Ministry of Finance, Department of Revenue, Government of India shall appoint an inquiring body to find out why and in what circumstances the mandatory provisions of the Income Tax Act regarding filing of return of income by the political parties were not enforced.

Any officer/officers found responsible and remiss in the inquiry be suitably dealt with in accordance with the rules.

(5) A political party which is not maintaining, audited and authenticated, accounts and has not filed the return of income for the relevant period, cannot, ordinarily, be permitted to say that it has incurred or authorised expenditure in connection with the election of its candidates in terms of Explanation 1 to Section 77 of the RP Act.

(6) That the expenditure, (including that for which the candidate is seeking protection under Explanation I to Section 77 of the RP Act) in connection with the election of a candidate - to the knowledge of the candidate or his election agent -shall be presumed to have been authorised by the candidate or his election agent. It shall, however, be open to the candidate to rebut the presumption in accordance with law and to show that part of the expenditure or whole of its was in fact incurred by the political party to which he belongs or by any other association or body of persons or by an individual (other than the candidate or his election agent). Only when the candidate discharges the burden and rebuts the presumption he would be entitled to the benefit of Explanation 1 to Section 77 of the RP Act.

(7) The expression "conduct of election" in Article 324 of the Constitution of India is wide enough to include in its sweep, the power of the Election Commission to issue - in the process of the conduct of elections - directions to the effect that the political parties shall submit to the Commission for its scrutiny, the details of the expenditure incured or authorised by the political parties in connection with the election of their respective candidates.

25. The writ petition is allowed with costs in the above terms. We quantify the costs as Rs. 20,000 to be paid by the Union of India.

Petition allowed.

PATNA HIGH COURT*

Civil Writ Jurisdiction Case No. 436 of 1990
(Decision dated 12.2.1990)

Kanhaiya Prasad Sinha .. ***Appellant***

Vs.

The Union of India & Others .. ***Respondents***

SUMMARY OF THE CASE

In connection with the general elections to the Lok Sabha and Legislative Assemblies of certain States, including Bihar,to be held in 1989-90, the Election Commission issued certain directions from 26th July, 1989 onwards to the State Governments concerned that the Officers and Staff, who were connected with the conduct of elections, should not be transferred, till elections were over. The petitioner, who was posted as Sub Divisional Officer of Muzaffarpur West Sub Division, was transferred by the State Government's order dated 6th January, 1990, i.e, after the general election to the Lok Sabha was over in December, 1989, but before the general election to Bihar Legislative Assembly which was then due in February / March, 1990. The Election Commission received certain reports that its direction placing ban on transfers of Election Officers was not being observed in some States, including Bihar. The Election Commission reiterated its directions on the subject to all State Governments concerned. The Government of Bihar informed the Commission on 15th January, 1990 that no officer connected with election work shall be transferred without prior approval of the Election Commission and that all unimplemented transfer orders shall be kept pending and implemented only if considered essential, after taking approval of the Commission. The State Government also stated that all transfer orders issued after the 24th December, 1989 and which had been implemented shall be placed before the Commission for post-facto approval. The Commission gave its post-facto approval to the transfer orders already implemented, observing that re-transfer of the officers to their original post would further dislocate the election work, causing all round inconvenience. The petitioner insisted that his transfer was in violation of the Election Commission's directives and should be set aside by the Court.

The full Bench of the High Court, by three separate but concurring judgements, dismissed the writ petition in view of the stand taken by the Commission. The High Court, however, observed that the directions issued by the Commission under Article 324 of the Constitution, even if some were considered as directory in nature, must be respected and implemented by all the authorities concerned. A healthy convention must develop in the country to respect the directions issued from time to time by the Election Commission. It has to be remembered that office of the Election Commission is one of the most sacred institutions under the

Constitution, since the democracy can only be achieved through proper functioning of the said institution. The State Governments are constitutionally obliged to respect and comply with the instructions issued by the Election Commission and not to disregard or ignore them. The Court expressed a hope that in future the authorities concerned would act with greater caution and circumspection so that such lapses may not occur in future.

Constitution of India, Arts. 324, 226, 311 – Directions issued by Election Commission under Act. 324 imposing ban on transfer of Officers and Staff connected with the conduct of elections to Parliament and Assemblies – Mere violation of directions does not give the concerned officer locus standi to challenge his transfer – Petition challenging transfer order as violative of directions – Respondent-Commission itself stating that re-tranfer of the officer to his original post would further dislocate the election work – Petition is liable to be dismissed.

Transfer – Govt. servant – Transfer in contravention of directions of Election Commissioner.

In a petition challenging the transfer order as violative of directions issued by the Election Commission under Art. 324 of the Constitution the question as to whether the directions are mandatory or directory is not very material because even if they are directory in nature they cannot be easily ignored. They have to be respected and implemented. In case the directions so issued by the Commission are not respected then in appropriate cases the Court may examine the same and pass appropriate orders. This is a matter purely between the Commission and the concerned States and that too for the purpose of only conducting elections in a fair and smooth manner. But mere violation, if at all, does not and cannot give handle to a person to challenge his transfer on the ground that the same has been made in violation of the directions issued by the Commission.

(Paras 5, 6, 8)

There may be a case where the officer challenges his transfer on the ground of violation of the instructions issued by the Commission at a stage when the actual election process has commenced and he has been assigned specific role by the Commission in the conduct of the election. Such a case may be an exception to the general rule and the High Court would feel inclined to interfere in an application under Art. 226 of the Constitution. However, where in a petition challenging the transfer order as violative of diretions the respondent Commission itself says that retransferring the officer to his original post would further dislocate the election work the application is liable to be dismissed as having no merit.

(Para 5, 6, 7)

Cases Referred : Chronological Paras

AIR 1973 SC 1461

JUDGMENT

Present:- S. Ali Ahmad. J., B.B-Sanyal, J., Ram Nandan Prasad, J.

Chandramauli Kumar Prasad, Bipin Kumar Sinha and Sujeet Kumar Sinha, for petitioner; K.P. Verma, Advocate General, R.N. Roy, Govt. Pleader No.3, and Prabhat Ranjan, Jr. Counsel to Advocate General for the State; Sudhir Kumar Katriar, for Respondent Nos. 1, 2 and 4

S. ALI AHMED, J.

The petitioner was posted as Subdivisionsal Officer of Muzaffarpur West Subdivision. By the order dated 6.1.1990 (Annexure 5), he was transferred to report in the department of Personnel and another officer, namely, Badri Nath Prasad Verma, respondent no. 7, was posted as Subdivisional Officer, Muzaffarpur West. The petitioner has challenged the order of transfer on the ground that it is in violation of the direction issued by the Election Commission.

2. **The Election Commission issued directions from time to time under Article 324 of the Constitution of India asking the State Government not to transfer its officers and staff, who were connected with the conduct of the election. The first direction in the series was Annxure 1 a letter dated 26th July, 1989, written by the Secretary to the Commission to the Chief Secretaries of all the States and Union Territories. This letter, inter alia, states that since the elections to the Lok Sabha and Legislative Assemblies, in some of the States, including Bihar, were due, therefore, a ban should be imposed on the transfers of officers and staff connected with the conduct of election. In the said communication, the classes of officers and staff, who could be said to have connection with the conduct of election, were identified. The Chief Secretary of the State consequently issued letters to all the Heads of Departments and concerned authorities drawing their attention to the letter contained in Annexure 1 (sent by the Secretary to the Election Commission) and requested them to comply with the directions. Although there are some more communications between the Election Commission and the State Government on the subject before the Lok Sabha Elections were over, but they are not relevant for the purpose of this case as the petitioner was not transferred prior to the conclusion of the Lok Sabha Election. The petitioner, as we have said above, was transferred by Annexure 5, an order dated 6.1.1990. Before 6.1.1990 and after the Lok Sabha Elections another direction contained in Annexure 3 was received. The directions were sent to the State Government by telex. It reads as follows :–**

"General Election to Legislative Assemblies 1990 in pursuance of decision taken at the meeting of Chief Electoral Officers held on 14th

Dec., 1989 in Commission Secretariat, the ban on transfer of officers which was imposed-vide Commission's letter No. 434/1/89 dated 26th July, 1989 may be treated as reimposed till the general elections to legislative Assemblies due in February-March, 1990 are completed. All other instructions contained in Commission's letter of 26th July, 1989 will be followed..... A copy of the said letter is enclosed with post copy".

The Election Commission, it appears, received certain reports that the directions issued by it were not being observed. It, therefore, sent another letter dated 26th December, 1989, to several State Government drawing their attention to Article 324 of the Constitution of India and saying that the violation of the instructions without clearance from the Commission will be viewed as violation of not only Article 324 but also an attempt to interfere with the process of free and fair election. This letter is contained in Annexure 4. The petitioner says that in spite of the directions issued by the Election Commission contained in Annexures 3 and 4 and also Annexure 2, the State Government transferred the petitioner as mentioned in Annexure 5.

3. **It appears that the petitioner did not hand over charge in pursuance of Annexure 5, the order of transfer. An Order as contained in Annexure 7 dated 17th January, 1990 was issued by the District Magistrate, Muzaffarpur saying that the petitioner will be deemed to have been relieved in the forenoon of 18th January, 1990 even if he did not hand over charge. As a result of this order, the petitioner stood relieved from the post of Subdivisional Officer, Muzaffarpur West, with effect from forenoon of 18th January, 1990. This position is, however, not accepted by the petitioner, who says that he did not hand over charge and as such continues to be the Subdivisional Officer, Muzaffarpur West. I am not impressed by this stand taken by the petitioner. The order contained in Annexure 7 is quite clear. Further, the counter-affidavit filed on behalf of the State also makes it clear the respondent No. 7 had taken charge of the post of the Subdivisional Officer, Muzaffarpur West. Be that as it may, the question that arises in this application is as to whether the transfer order as contained in Annexure 5 should be quashed. It will also be not out of place to mention certain more facts which are as follows :–**

The Chief Electoral Officer, Bihar sent a telex message to the Secretary, Election Commission on 15th January, 1990. It, inter alia, stated that no officer connected with election work shall be transferred without the prior approval of the Election Commission and that all unimplemented transfer orders shall be kept pending and in case it is considered essential to get them implemented then the approval of the Commission shall be taken. It also stated that all transfer orders issued after 20th December, 1989, and which have been implemented shall be placed before the Commission through

the Chief Electoral Officer for post facto approval. The telex message further shows that the lists of Distinct Magistrates and Superintendent of Police, who were transferred after the 20th of December had already been sent to the Commission and that the lists of Subdivisional Officers and Additional District Magistrates, who were also returning officers was to be sent later on that very day. It is stated by Mr. Advocate General on behalf of the State that the lists were consequently sent for post facto approval of transfers of officers and staff connected with the conduct of elections.

4. **Mr. Chandramauli appearing in support of the application came armed with a number of decisions. He contended that directions issued under Article 324 of the Constitution of India were mandatory in nature and any violation of that should be seriously viewed. He says that this was necessary for free and fair conduct of elections. He accordingly urged that since the instructions have been violated, therefore, the transfer of the petitioner as per Annexure 5 should be quashed. We asked Mr. Katariar, who appeared on behalf of the Commission, as to whether the Commission still insists that the transfer of the petitioner should not be implemented as it was in violation of the direction issued by it. Mr. Katariar informed us that he has received instruction to state that the Commission does not intend to appear in this case. We recorded this fact in our order dated 6.2.1990. We also asked Mr. Katariar to get in touch with the Commission and to take positive instruction as to whether it approves the transfer of the petitioner or that it wants status quo ante as existed prior to the forenoon of 18th January, 1990 to be restored. Mr. Katariar today produced before us a letter from the Joint Chief Electoral Officer, Bihar and Joint Secretary to the Government dated 11th February, 1990 addressed to him. The letter is a longish one. It mentions in short about different communications made by the Commission on the subject. It shows that the Commission on a consideration of all matters said : "thereupon the Commission further considered the matter and came to the view that retransferring the officers to their original posts would further dislocate the election work apart from causing all round inconvenience and as such would not be in the interest of smooth and orderly conduct of elections". It, accordingly, decided not to pursue the matter further.**

5. **The Constitution provides for a Parliamentary form of Government and the onerous task of conducting free and fair election has been assigned to the Election Commission. But the Election Commission does not have its own independent machinery to conduct elections to the Parliament and to the different Legislatures of the States. It has to take help and assistance from the officers and staff of the State Governments. The Constitution, therefore, under Article 324 gives powers to the Commission to issue**

directions for placing officers and staff of the Government at its disposal so that a fair election can be conducted in a peaceful manner. It can also for the same purpose impose a ban on transfer of officers staff, who are connected with the conduct of the election. Unless, therefore, the directions for the purpose are implemented, it may not be possible to conduct election with the result that there will be no proper constitution of Parliament and State Legislatures. The question as to whether the directions issued under Article 324 of the Constitution are mandatory or directory is not very material because even if they are directory in nature they cannot be easily ignored. They have to be respected and implemented. In case the directions so issued by the Commission are not respected then in appropriate cases the Court may examine the same and pass appropriate orders. But this is a matter purely between the Commission and the concerned States and that too for the purposes of only conducting elections in a fair and smooth manner. But more violation, if at all, does not and cannot give handle to a person to challenge his transfer on the ground that the same has been made in violation of the directions issued by the Commission. There may, however, be the case where the officer challenges his transfer on the ground of violation of the instructions issued by the Commission at a stage when the actual election process has commenced and he has been assigned specific role by the Commission in the conduct of the election. Such a case may be an exception to the general rule and I am not expressing any opinion as to whether in such a situation the concerned officer will have no locus standi to challenge his transfer and the Commission insists on revocation of the transfer. In this case, I find that the Commission itself says that retransferring the officers to their orginal posts would further dislocate the election works. I quite appreciate the stand taken by the Election Commission. I, therefore, do not feel inclined to interfere in this case.

I may also bring on record the insistence of Mr. Chandramauli to decide the scope, sweep and effectiveness of the directions issued under Article 324 of the Constitution of India, but in view of the stand taken by the Commission I do not think it necessary in this case. I accordingly dismiss the application as having no merit.

S.B. SANYAL. J.

6. **I agree to the order now dectated by my learned brother Ali Ahmed, J., but I would like to add few words. On 26th November, 1949, the people of India solemnly resolved to constitute India into Sovereign Democratic Republic. In order to achieve the said and, the institution of the Chief Election Commissioner was constituted by the founding fathers. The Chief Election Commissioner has been assigned a very responsible and solemn duty to conduct elections to Parliament and Assemblies, which, needless to say, is required to be**

free and fair. Article 324 (1) of the Constitution has conferred the powers on the Chief Election Commissioner to superintend and to issue direction to achieve the said end. Article 324 (1) of the Constitution is the reservoir of the powers of the Election Commission to get election conducted in a purest manner. No specific law, rule or regulation is further required to be conferred for exercise of those powers. The directions issued for the said purpose is meant to be respected and obeyed. Whether the directions issued are directory or mandatory is beside the point. The Court reserves its opinion on this for an appropriate case. Suffice it to say that disobedience of lawful directions may lead to a break down of constitutional machinery. The direction may be issued for conduct of election as well as preparation connected with conduct of election. Imminence of election sets the ball rolling even though the conduct of election starts from the date of the publication of notification under section 14 and 15 of the Representation of People Act. Judicial review is basic structure of our constitution. Therefore, any authority going haywire can be subdued by Courts. A healthy convention must develop in the country to respect the directions issued from time to time by the Election Commission. In order to effectuate the wishes of the people of India, who solemnly resolved to constitute a democratic republic, it has to be remembered that the office of the Election Commission is one of the most sacred institution under the Constitution since the democracy can only be achieved through proper functioning of the said institution. The office of the Election Commission cannot be viewed to be week because of no express punitive power conferred upon it for disobedience of its lawful directions. Strength of the power is implicit because the entire edifice of our democratic Constitution is founded upon the proper functioning of this institution. Therefore, all concerned authorities must act in co-operation and consultation with each other in getting free and fair election held. Election must not only be pure, free and fair but it must also appear to be so to the people of India. It is for this reason, all the State Government Officers, staff and for that matter, the citizens of the country must conduct themselves in a manner befitting the sprit and requirements of the Constitution as also the wishes of the people of India who have resolved to constitute India into sovereign, socialist, secular democratic republic.

RAM NANDAN PRASAD, J.

7. **While agreeing with my learned Brothers Ali Ahmad, J. and Sanyal, J., I am briefly stating my own views on the subject.**

8. **The republican and democratics form of Government is a basic feature of our Constitution as held by the Supreme Curt in the famous Keshwanand Bharti Case (A.I.R. 1973 S.C. 1461) and in order**

to sustain this polity, the Election Commission has been given the solemn responsibility of conducting free and fair elections to the Union and State Legislatures. Towards that end, the Election Commission under Article 324 has been empowered to issue directions and instructions to the State Governments and other authorities mentioned in the Article. The State Government is constitutionally obliged to respect and comply with the instructions issued by the Election Commission and not to disregard or ignore them. When the elections to the State Assembly became imminent, the Election Commission issued its Telex message dated 20th December, 1989 (Annexure 3) reiterating its instructions contained in the letter of 26th July, 1989 (Annexure 1) and stating that the ban on transfer of officers may be treated as reimposed. It appear that transfers were made in this State even thereafter in disregard of these instructions, because the very fact that post-facto approval of the Commission had to be taken implies that the instructions of the Commission had not been fully complied with. When this fact came to the notice of the Commission, it sent a further Telex message No. 434/1/89/10750 dated 26th December, 1989 (Annexure 4) in which it was constrained to state as follows:–

"These instructions are also to be treated as in the nature of minimum basic norms of electoral ethics for ensuring free and fair, poll. Accordingly and violations of these instructions without clearance from the Commission will be viewed by the Commission as violation of not only Article 324 of the Constitution but also as attempts to interfere with the process of true and fair elections."

9. **It is expected that in future the authorities concerned will act with greater caution and circumspection so that such lapses may not occur in future.**

Application dismissed.

HIGH COURT OF ANDHRA PRADESH*

Writ Petition Nos. 20130 & 20283 of 1994
(Decision Dated 17.11.1994)

N. Kristappa ***..Petitioner***

Vs.

Chief Election Commissioner and Others ***..Respondents***

SUMMARY OF THE CASE

General election to the Andhra Pradesh Legislative Assembly was called by the Governor's notification dated 1.11.1994 under Section 15(2) of the Representation of the People Act, 1951. According to the time table notified by the Election Commission under Section 30 of that Act, 8th November, 1994 was the last date for making nominations in all Assembly Constituencies. On that day, the Election Commission received reports from the State Government and election authorities that one of the intending candidates sponsored by a recognised National party for 163–Gorantla Assembly Constituency was abducted, while on his way to the office of the Returning Officer for filing his nomination paper, and was thereby prevented from filing his nomination within the stipulated period. After an inquiry, the Commission was satisfied about the fact of abduction of the said candidate and was of the view that the election process had been irretrievably sullied and would not be reflective of true choice of electorate of that constituency. The Commission, therefore, recommended to the Governor of Andhra

Pradesh to rescind his notification dated 1.11.94, in so far as it related to the above constituency. Accordingly, the Governor, by his notification dated 11.11.94, cancelled his notification dated 1.11.94 in so far as the election from the above mentioned constituency was concerned.

The above acts of the Governor and Election Commission were challenged before the Andhra Pradesh High Court by the present two Writ Petitions. The petitioners contended that the election process once started could not be stopped even by the Election Commission and that the Governor having once issued the notification became functus officio. It was also contended that Section 21 of the General Clauses Act, 1897 was not applicable in this case and that the Commission could only extend the date of completion of election under Section 153 of the R. P. Act, 1951.

A learned single Judge of that High Court dismissed both the petitions on 17.11.1994, rejecting the abovementioned contentions of the petitioners.

(A) Constitution of India, Art. 324 – Election Commission – Can issue directions to Governor to rescind election notification.

The Election Commission is sufficiently clothed with the power though not vested under the Act, but even by invoking the plenary powers conferred on it under Art. 324 and issue appropriate directions for the conduct of free and fair elections in a given case. The Election Commission can issue directiosn rescinding the election notification.

AIR 1952 SC 64 : AIR 1978 SC 851 Followed. (Paras 18,19)

(B) Constitution of India, Art. 324 – Election – Candidate of political party adbucted – Preventing him from filing nomination papers – Direction by Election Commission to rescind election notification – Not mala fide or arbitrary.

Where the purity of election process was irretrievably sullied at the threshold itself as a candidate of the political party was abducted and prevented from filing his nomination papers, the action of the election commission in recommending the rescission of election notification cannot be said to be arbitrary or mala fide. (Para 30)

The rescission of election process in the constituency is not without valid reasons inasmuch as a candidate of a political party was abducted and prevented from filing his nomination papers. The Election Commission felt that in the given circumstances, it is not conducive to allow the election process to go on as the atmosphere is vitiated and the election if allowed to continue, would not reflect the true choice of the electorate. Moreover the election process in the constituency was not rescinded once for all. It was only deferred for

the time being. The plea that the Election Commission has acted arbitrarily and with a mala fide intention in canvassing for the cause of a particular political party cannot be accepted. The action of Election Commission is recommending the rescission of election process in the constituency cannot be looked in isolation in respect of a particular political party's point of view, but has to be looked in the overall facts and circumstances of the case. When a high functionary like the Election Commissioner is vested with wide powers, the law expects him to act fairly and legally. Art. 324 is geared to the accomplishment of free and fair elections expenditiously. Moreover, discretion vested in a high functionary may be reasonably trusted to be used properly, not perversly. If it is misused certainly the Court has power to strike down the act. (Paras 26, 27)

(C) Constitution of India, Art. 324 – Election Commission – Powers – Candidate abducted and prevented from filing nomination papers – No provision made in Act to meet such contingency – Election Commission can invoke its plenary powers under Art. 324.

Representation of the People Act (43 of 1951), Pre.

At times, when a candidate of certain recognised political party dies during the election process, election to the particular constituency is countermanded. When natural calamity occurs, polling is re-scheduled. The Representation of the People Act has met these contingencies by incorporating necessary provision in the Act. No provision is contemplated either in the Representation of the People Act or the rules made thereunder to meet a contingency arising out of a situation where a candidate has been abducted and prevented from filing his or her nomination papers. And therefore, in the absence of any specific provision to meet a contingency of this nature, the Election Commission invokes its pleanary power vested in it under Art. 324 of the Constitution of India. Situation may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it is that the Constitution has made comprehensive provision in Art. 324 to take care of surprise situation. Art 324 of the Constitution of India 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. (Paras 23, 27)

(D) Constitutin of India, Arts. 32, 324, – Election Commission – Orders passed to ensure free and fair election – Not to be ordinarily interfered with by Courts. (Para 31)

(E) Constitution of India, Art. 226 – Order of statutory functionary based on certain grounds – Validity to be judged by reasons so mentioned – Fresh reasons cannot be supplemented (Para 26)

Cases Referred : Chronological Paras

AIR 1978 SC 851 : (1978) 1 SCC 405 (Followed.) 16, 17

AIR 1952 SC 64 : 1952 SCR 218 (Followed.) 16

JUDGMENT

Present:- Motilal B. Naik, J.

S. Ramchandra Rao, For Petitioner in W.P. 20130/94; C. Kodanda Ram, for Petitioner in W.P. 20283/94; C.P. Sarathy, for Respondents No. 1 in both W.Ps. Advocate General, for Respondents 2 to 4 in W.P. 20130/94 and for Respondents 2 to 5 in W.P. 20283/94.

ORDER :– **In these two Writ Petitions, subtle but interesting proposition of law has fellen for consideration before this Court and, therefore, these two Writ Petitions are disposed of by a common judgment.**

2. **Writ Petition No. 20130/94 is filed by a Telugu Desam Party candidate and petitioners in Writ Petition No. 20283/94 are the independent candidtes who have filed their nominations to 163-Gorantla Assembly Constituency of Ananthapur District in Andhra Pradesh State.**

3. **The Facts which amanate from these two Writ Petitions are as under :–**

4. **The notification for General Elections to the Legislative Assembly for the State of Andhra Pradesh in terms of Clause (2) of Section 15 of the Representation of the People Act. 1951 (hereinafter referred to as "the act") was issued by the Governor of Andhra Pradesh in Notification No. 597/Elec.F/94, General Administration (Elec. F) Department, dated 1-11-1994 calling upon all the Assembly Constituencies in the State to elect members in accordance with the provisions of the Act. After the issuance of Election Notification by the Governor of Andhra Pradesh, the election process in the State is set in motion. As per the Election Notification, 8-11-1994 is the last date for making nominations, 9-11-1994 is the date for scrutiny of the nominations, 11-11-1994 is the last date for the withdrawal of the candidatures, 1-12-1994 is the date on which a poll, if necessary, shall be taken, 9-12-1994 is the date of counting of votes and 13-12-1994 is the date before which the election shall be completed in the aforementioned 163-Gorantla Assembly Constituency.**

5. **While so, one Sri Siddaiah, a candidate of Congress-I, is said to have been abducted in the morning of 8-11-1994 by his rival group with an intention to prevent him from filing his nomination papers. Said Siddaiah was freed on the next day i.e., on 9-11-1994. The resultant effect of the said abduction is that said Siddiah could not**

file his nomination papers on 8-11-1994 which is the last date for filing the nominations.

6. **Intimation was sent to the first respondent by the second respondent vide Fax Message No. 1360/L. & O. I/94-2, dated 10-11-1994 about the incident of abduction of said Siddaiah. The second respondent further intimated to the first respondent that he instructed the District Collector, Anantapur District – Third respondent herein and requested the Chief Secretary and District Superintendent of Police. Anantapur to locate the abducted person before 3.00 p.m. on 8-11-1994, which was the last date of filing nomination papers. The Election Commission directed the Chief Secretary of Andhra Pradesh State and Chief Electoral Officer of Andhra Pradesh through Fax Message dated 9-11-1994 to ascertain whether Sri Siddaiah and his proposer were ultimately prevented from filing nomination papers and whether the nomination papers were in personal possession of Siddaiah at the time of his alleged abduction. The information sought by the first respondent was furnished by the other respondents. Basing on the information available the first respondent was of the view that the purity of the election process has been irrestrievably sullied in 163 – Gorantla Assembly Constituency in the State of Andhra Pradesh and in the given circumstances the result of the election in the said constituency cannot reflect the true choice of the electorate of the constituency. Therefore, the first respondent in exercise of the powers conferred under Article 324 of the Constitution of India and under Section 30 and 153 of the Act read with Section 21 of the General Clauses Act. 1897 has recommended to the Governor of Andhra Pradesh that he be pleased to rescind the aforesaid notification No. 597/Elec. F/94-1, General Administration (Elec. F) Department, dated 1-11-1994 issued by him under Section 15(2) of the Act, in so far as it relates to calling upon the said 163-Gorantla Assembly Constituency to elect its member to the Andhra Pradesh Legilative Assembly so that the entire election process in the said constituency can be commenced anew in all respects. Pursuant to the recommendations of the first resondent, the Governor of Andhra Pradesh issued the notification dated 11-11-1994 rescinding the notification No. 597/Elec. F/94-1, General Administration (Elec. F.) Department, dated 1-11-1994 in sofar as it relates to calling upon 163-Gorantla Assembly Constituency to elect its member of the Andhra Pradesh Legislative Assembly, so that the entire election process in the said constituency can be commenced anew in all respects in the said constituency.**

7. **Aggrieved by the said notification dated 11-11-1994 issued by the Governor of Andhra Pradesh rescinding the notification dated 1-11-1994 insofar as it relates to 163-Gorantla Assembly contituency, these two Writ Petitions are filed.**

8. **The bone of contentions of Sr. S. Ramachandra Rao, learned counsel for the petitioner in W.P. No. 20130/-94 and Sri Seshagiri Rao, learned Senior Counsel appearing on behalf of Sri C. Kodanda Ram, counsel for the petitioner in W.P. No. 20283/94 are on two folds. Firstly, it is contended that the first respondent is not vested with any powers for recommending rescission of election notification insofar as it relates to 163-Gorantla Assembly Constitutency when once the election process is set in motion. Secondly, the first respondent has exercised power unfairly and in an arbitraly manner based on the biased reports of the second respondent and as such, the action of the respondent in recommending to the Government of Andhra Pradesh to rescind the notification dated 1-11-1994 insofar as it relates to 163-Gorantla Assembly Constituency, is vitiated. The further contention made on behalf of the petitioners is that in the absence of any specific provision either in the Respresentatin of the People Act, 1951 or under any rule to meet the contingency of this nature, the first respondent is not clothed with any power to recommend for rescission of election to 163-Gorantla Assembly Constituency.**

9. **To meet these contentions, the learned Advocate General, representing respondents 2 to 4 justified the action of the respondents in issuing notification dated 11-11-1994 rescinding the notification dated 1-11-1994 insofar it relates to the election of 163-Gorantla Assembly Constituency. The learned Advocate General contended that when a candidate of a particular political party was not allowed to file even his nomination papers, the electorates of that constituency are denied of an opportunity of electing the candidate of their choice. Despite this, if the election process is allowed to continue in a contigence of this nature, the Advocate General contended that, such an election cannot reflect the true choice of the electorate of the constiuency.**

10. **Sri. C.P. Sarathy, learned counsel appearing on behalf of the Chief Election Commissioner – first respondent herein has raised preliminary objections on the question of maintainability of these Writ Petitions in view of the bar under Article 329 of the Constitution of India and contended that the present Writ Petitions are to be thrown at the threshold itself. The further preliminary submissions made by Sr. C.P. Sarathy, learned counsel for the respondent No. 1 are that without issuing notice to the first respondent, no election petition could be filed and no exparte order could be passed. The learned counsel also defended the action of the first respondent in recommending to the Governor of Andhra Pradesh to rescind the election notification dated 1-11-1994 insofar as it relates to 163-Gorantla Assembly Constituency is concerned. Sri C.P. Sarathy, learned counsel for the first respondent further contended that when a candidate of a particular political party was**

abducted and was prevented from filing his nomination papers, and notwithstanding the said fact, if election process is allowed to be completed in the said constituency, the purity of election process would disappear and therefore, justified the action of the first respondent in this regard.

11. **I have heard at length the arguments of Sr. S. Ramachandra Rao, learned counsel for the petitioner in W.P. No. 20130/94 and Sri Seshagiri Rao, learned Senior Counsel respresenting Sr. C. Kodanda Ram counsel representing the petitioners in W.P. No. 20283/94 and Sri C.P. Sarathy, learned counsel for respondent No. 1 and the learned Advocate General, appearing on behalf on respondents 2 to 4 and also Sri K. Ramakrishna Reddy, learned Advocate who has been asked to assist this Court as amicuscurae.**

12. **Two question prominetly emanate from the above submissions, for consideration before this Court. viz.,**

(1) Whether the first respondent is vested with the power to recommend the Governor of Andhra Pradesh to rescind the election Notification insofar as it relates to 163–Gorantla Assembly Constituency is concerned? And

(2) Whether the action of the first respondent would amount to arbitrary exercise of power attributable to mala fides?

13. **The election process for State Assemblies as well as Parliamentary Constituenecies is contemplated under the Representation of the People Act, 1950 and 1951 (for short "the Act). The election process for the respective State Assemblies is set in motion by the issuance of notification under Section 15(2) of the Act by the Governor/Administrator of respective States. Thereupon, other requirments have been prescribed in terms of various provisions of the Act to be complied with for conducting elections. The entire election process is manned by a competent agency called "Electins. Commission". Article 324 of the Constitution of India postulates the superintendence, direction and control of election to be vested in an "Election Commission". Clause (1) of Article 324 specially deals with the 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 and of elections of the offices of President and Vice-President held under this Constitution shall be vested in a Commission referred to in the Constitution as "Election Commissin."**

14. **Clause (6) of Article 324 provides 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 Commissin by Clause (1).**

15. **Thus, Article 324 of the Constitution of India makes provisions for a Centralised Election machinery. The Election Commission is empowered to issue all necessary directions for the purpose of conducting smooth, free and fair elections.**

16. **Article 329(b) of the Constitution of India postulates the bar to interference by Courts in electoral matters. The embargo imposed under Article 329 barring interference and the powr of Election Commission under Article 324 have been extensively considered by the Supreme Court of India in N.P. Ponnuswami v. The Returning Officer, AIR 1952 SC 64 and Mohinder Singh Gill v. The Chief Election Commission, AIR 1978 SC 851.**

17. **Dealing with the powers of the Election Commission under Article 324, the Supreme Court of India in the decision cited supra, has held:**

"Functions as referred to in Article 324 (6) include powers as well as duties. It is incomprehensible that a person or body can discharge any function without exercising powers. Powers and duties are integrated with function. The Chief Electin Commissioner has to pass appropriate orders on receipt of reports from the returning officer with regard to any situation arising in the course of an election and power cannot be denied to him to pass appropriate orders. Moreover, the power has to exercised with promptitude. Whether an order passed in wrong, arbitary or is otherwise invalid, relates to the mode of exercising the power and does not touch upon the existence of the power in him if it is there either under the Representation of the People Act or the rules made in that behalf or under Article 324(1).

The Commission is entitled to exercise certain powers under Article 324 itself on its own right, in an area not covered by Representation of the People Act and the rules..... It is true that in exercise of powers under Article 324(1) the Election Commission cannot do something impining upon the power of the President in making the notification under Section 14 of the Representation of the People Act. But after the notification has been issued by the President, the entire electoral process is in the charge of the Election Commission and the Commission is exclusively responsible for the conduct of the election without reference to any outside agency. There is no limitation in that when the law made under Article 327 or the relevant rules made thereunder do not provide for the mechanism of dealing with a certain extra ordinary situation, the hands of the Election Commission are tied and it cannot independently decide for itself what to do in a matter relating to an election. The Election Commission is competent in an appropirate case to order re-poll of an entire constituency when necessary. It will be an exercise of power within the embit of its functions under Article 324."

18. **The authoritative pronouncements of the Apex Court referred to above undoubtedly, lay down that the Election Commission is sufficiently clothed with the power though not vested under the Act, but every invoking the plenary powers conferred on it under Article 324 and issue appropriate directions for the conduct of free and fair elections in a given case.**

19. **Having regard to these pronouncements of the Apex Court, I am not persuaded to hold that the Election Commission is not vested with the power to issue directions rescinding the election notification of 163-Gorantla Assembly Constituency.**

20. **The first question is accordingly answered.**

Now, the next question that falls for consideration is whether the Chief Election Commissioner, the first respondent herein, while recommending the rescission of election process in the 163-Gorantla Assembly Constituency has acted arbitrarily and such an action could be attributable to mala fides?

21. **The pillars of democracy rest on the system of free and fair elections to the Assembly or to the Parliamentary constituencies. The will of the people is expressed through their elected representatives. To ensure free and fair election, a special machinery is provided to man the election process. Article 324 makes provision for a centralised electoral machinery. Necessary legislation have been enacted in the nature of Reprentation of the People Act, 1950 and 1951. Once the entire election process has been brought under the purview and control of the Election Commission, an authority constituted under Article 324, it is the responsibility of that authority to device ways and means for conduct of free and fair elections wherever necessary.**

22. **In the State of Andhra Pradesh, notification for conduct of elections to the State Assembly was issued by the Governor of Andhra Pradesh on 1-11-1994. The election process is set in motion by the issuance of notifiction and the last date for filing nominations is fixed as 8-11-1994. Aspirants who wished to contest elections representing various political parties also were to file their nominations on or before the said date. Sri Sadaiah said to be the nominee of the Congress-I party, was to file his nomination on 8-11-1994. Circumstances indicate that he was abducted and was prevented from filing his nomination papers on the said date i.e., 8-11-1994. The process of scrutiny and with-drawal was subsequently completed and the final list of contesting candidates who also announced. As I said earlier, the pillars of democracy rest on the election process by people participating in electing the representatives of their choice, peaceful and conducive atmosphere is warranted for the people to exercise their franchise without fear or favour.**

23. **Instances are glaring when the election process is thwarted by musclemen by booth-capturing and destroying ballot boxes. At times, when a candidate of certain recognised political party dies during the election process, election to the particular constituency is countermanded. When natural calamity occurs, polling is re-scheduled. The Representation of the People Act has met these contingencies by incorporating necessary provisions in the Act. No provision is contemplated either in the Representation of the People Act or the rules made thereunder to meet a contingency arising out of a situation where a candidate has been abducted and prevented from filing his or her nomination papers. And therefore, in the absence of any specific provision to meet a contingency of this nature, the Election Commission invokes its plenary power vested in it under Article 324 of the Constitution of India.**

24. **Here is a case where a candidate of a political party has been abducted by the rival group and was prevented from filing nomination papers. The resultant effect is that Sri Siddaiah the abducted candidate could not file his nomination on the last date of filing nominations i.e., on 8-11-1994. In a situation where candidates representing political parties are prevented from filing nomination papers and if the election process is allowed to be completed, could see that election process be called free and fair? And whether the results of such an election would truly reflect the will of the people of that particular constituency? This is a million dollar question. When a candidate of a political party is prevented from filling his nomination by certain elements, would the guillible electorate of 163-Gorantla Assembly Constituency be free to exercise their franchise. It is not the case that the electorate enmasse exercise their franchise in favour of one candidate only. It is immaterial to which party a candidate belong to. But the electorates are handicapped in chosing a candidate of their choice when some candidates are whisked away from the arena of contest. In this view of the matter, what is to be seen is whether purity in electoral process could be achieved. When candidates are abducted and prevented from filing nominations, could it be presumed that ordinary voter would be free to exercise his franchise in favour of a candidate of his choice. These are all some of the ground realities and Courts cannot ignore these realities.**

25. **The object of providing a Centralised Election Machinery is only in such direction to ensure purity in electoral process. In a contingency of this nature, could it be said that the first respondent is helpless and has to be a silent spectator? To my mind, the first respondent is not without power to remedy the situation. Article 324(1) of the Constitution of India confers powers of superintendence, direction and control on the Election Commission. The Election Commission is entitled to exercise certain powers**

under Art. 324 itself on its own right, in an area not covered by Representation of the People Act and the Rules. In this case, the first respondent on the basis of the reports received from respondents 2 and 3, in exercise of plenary powers vested in him under Art. 324 of the Constitution of India read with Ss.30 and 153 of the Representation of the People Act, 1951 has recommended the Governor of Andhra Pradesh State to rescind the election process insofar as it relates to 163-Gorantla Assembly Constituency, with a promise that the election would be commenced afresh.

26. **When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. The argument advanced by Sri S. Ramachandra Rao counsel for the petitioner in W.P. No. 20130/94 and Sri Seshagiri Rao, learned senior counsel appearing on behalf of the petitioner's counsel Sri C. Kodanda Ram in W.P. No.20283/94 that the first respondent has acted arbitrarily and with a malafide intention in canvassing for the cause of a particular political party is not acceptable to this Court. The action of the first respondent in recommending the rescission of election process in 163-Gorantla Assembly Constituency cannot be looked in isolation in respect of a particular political party's point of view, but has to be looked in the overall facts and circumstances of the case. In the given circumstances, the first respondent felt that the purity of the election process has been irretrievably sullied in 163-Gorantla Assembly Constituency and if the election process is allowed to be completed in the said constituency, it cannot reflect the true choice of the electorate of the Constituency. Therefore, no mala fides could be attributed to the first respondent in as much as he recommended rescission of the election process in 163-Gorantla Assembly Constituency as the circumstances are not conducive to allow the election process in the said constituency. After all, the first respondent did not rescind the election process in 163-Gorantla Assembly Constituency once for all. It is made clear in the notification issued by the Governor of Andhra Pradesh, dated 11-11-1994 that election process in the said constituency would be commenced anew. Therefore, I see no force in the contention of Sri S. Ramachandra Rao, learned counsel for the petitioner in W.P. No. 20130/94 that the electorate of 163-Gorantla Assembly Constituency are denied from exercising their franchise. The rescissions of election process in the said constituency is not without valid reasons in as much as a candidate of a political party was abducted and prevented from filing his nomination papers. The first respondent felt that in the given circumstances, it is not conducive to allow the election process to go on as the atmosphere is vitiated and the election if allowed to continue, would not reflect the choice of the electorate. In all probably election process to 163-Gorantla Assembly**

Constituency, is deferred for the time being in view of the volatile situation prevelant in said Assembly constituency.

27. **Situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it is that the Constitution has made comprehensive provision in Art. 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 notifiation nor existing legislation. More is not necessary to specify; less is insufficient to leave unsaid. Article 324 of the Constitution of India, to my mind, 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. When a high functionary like the Election Commission is vested with wide powers, the law expects him to act fairly and legally. Article 324 is geared to the accomplishment of free and fair elections expeditiously. Moreover, discretion vested in a high functionary may be reasonably trusted to be used properly, not perversly. If it is misused, certainly the Court has power to strike down the act.**

28. **It is relevant to extract the words of Lord Denning, which are instructive:**

"Law does not stand still. It moves continually. Once this is recognised, 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, 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 civilised society itself depends."

29. **The words of Lord Denning are so aspiring and pragmatic. The Courts are to be pragmatic in adjudicating a dispute by consciously seeking to mould the law so as to serve the needs of the time.**

30. **The facts and circumstances of the case on record, undoubtedly, disclose that the purity of election process was irretrievably sullied in 163-Gorantla Assembly Constituency at the threshold itself as a candidate of a political party was abducted and prevented from filing his nomination papers. Therefore, in my view, the action of the first respondent in recommending the rescission of election notification dated 1-11-1994 insofar as it relates to 163-Gorantla Assembly Constituency cannot be held to be exercising of power arbitrarily and with a mala fide intention.**

31. **The Supreme Court has, time and again, held that the actions or directions in conduct of elections in a free and fair manner shall**

be left to the Election Commission and Courts shall not, ordinarily, interfere in an order passed by the Election Commission, unless it is brought to the notice of the Courts that the Election Commission has exercised the power which it was not vested with, or it acted in arbitrary manner.

32. **As discussed above, in the overall object of achieving the purity of the election process to remain intact, I am not persuaded to hold that the first respondent has acted arbitrarily or with any mala fide intention while recommending the Governor of Andhra Pradesh to rescind the election process insofar as it relates to 163-Gorantla Assembly Constituency of Anantapur District. The second question is accordingly, answered.**

33. **In the view I have taken, I do not find any merits in these two writ petitions and they are accordingly dismissed at the stage of admission itself.**

34. **Since I have dismissed these two writ petitions, I do not propose to go into the arena of preliminary objections raised by the learned counsel for the first respondent on the question of maintainability of the writ petitions in the light of Art. 329 of the Constitution of India.**

35. **Before parting with this judgment, this Court places its appreciation on record for the valuable assistance rendered by Sri K. Ramakrishna Reddy, Advocate of this Court as amicus curiae in this case.**

Petitions dismissed.

HIGH COURT OF ANDHRA PRADESH

Writ Appeal No. 1395 of 1994.
(Decision dated 29.11.1994)

(Writ Appeal under/Clause 15 of the Letters Pageat against the Order in W.P. No. 20283/94 dt. 17.11.94 on the file of the High Court.)

1. **P. Ravindra Reddy**
2. **P. Indrajit Reddy**
3. **P. Bayyapa Reddy** .. **Appellants**

–Versus–

1. **The Election Commission, represented by its Secretary, Nirvachan Sadan, New Delh–1.**
2. **The Chief Electoral Officer, Andhra Pradesh, Secretariat, Hyderabad.**
3. **The District Election Officer-District Collector, Anantapur District, Anantapur.**
4. **The Returning Officer-cum-Revenue Divisional Officer, 163, Gorantla Assembly Constituency, Penukonda, Anantapur District.**
5. **The State of Andhra Pradesh, represented by the Chief Secretary, Secretariat, Hyderabad.** .. **Respondents.**

Counsel for Appellants : .. **M/s Seshagiri Rao & C. Kodanda Kam, & R. Sudheer.**

Counsel for Respondent No. 1 .. **Mr. C.P. Sarathy, Advocate.**

Counsel for Respondents 2 to 5 .. **Advocate-General**

The Court delivered the following Judgment:-

Oral Judgment: (Per the Hon'ble the Chief Justice) :

SUMMARY OF THE CASE

Constitution of India – **Article 324 – Election Commission retains its plenary powers, except in respect of matters for which specific provision made in Parliamentary enactments- abduction of a candidate to prevent him from filing his nomination is a situation not foreseen in the Representation of the People Act, 1951 and Article 324 applies.**

Representation of the People Act, 1951 – **sections, 15 30 and 153- Governor empowered to rescind notification issued under section 15 on recommendation of Election Commission – Commission's powers not circumscribed by sections 30 and 153.**

General Clauses Act, 1897 – **section 21 – applicable in relation to notification issued by Governor under section 15 of the Representation of the People Act, 1951.**

General election to the Andhra Pradesh Legislative Assembly was called by the Governor's notification dated 1.11.1994 under Section 15(2) of the Representation of the People Act, 1951. According to the time table notified by the Election Commission under Section 30 of that Act, 8th November, 1994 was the last date for making nominations in all Assembly Constituencies. On that day, the Election Commission received reports from the State Government and election authorities that one of the intending candidates sponsored by a recognised National party for 163–Gorantla Assembly Constituency was abducted, while on his way to the office of the Returning Officer for filing his nomination paper, and was thereby prevented from filing his nomination within the stipulated period. After an inquiry, the Commission was satisfied about the fact of abduction of the said candidate and was of the view that the election process had been irretrievably sullied and would not be reflective of true choice of electorate of that constituency. The Commission, therefore, recommended to the Governor of Andhra Pradesh to rescind his notification dated 1.11.94, in so far as it related to the above constituency. Accordingly, the Governor, by his notification dated 11.11.94, cancelled his notification dated 1.11.94 in so far as the election from the above mentioned constituency was concerned.

2. The above acts of the Governor and Election Commission were challenged before the Andhra Pradesh High Court by two Writ

Petitions. The petitioners contended that the election process once started could not be stopped even by the Election Commission and that the Governor having once issued the notification became functus officio. It was also contended that Section 21 of the General Clauses Act, 1897 was not applicable in this case and that the Commission could only extend the date of completion of election under Section 153 of the R. P. Act, 1951.

3. A learned single Judge of that High Court dismissed both the petitions on 17.11.1994, rejecting the above mentioned contentions of the petitioners.

4. On appeal, to a Division Bench of the High Court, the Division Bench held:

(i) Under Article 324 of the Constitution, the Election Commission is clothed with very wide powers. Parliament has enacted the Representation of the People Act, 1950 and the Representation of the People Act, 1951. But this does not mean that the Commission on account of the aforesaid two parliamentary enactments is divested of its powers of superintendence, direction and control of preparation of electoral rolls or conduct of elections to Parliament and State Legislatures. The Commission still retains its jurisdiction as also its plenary powers under Article 324, except in respect of matters for which specific provision has been in the Acts made by Parliament.

(ii) The abduction of a candidate is a situation which is not foreseen by any of the provisions contained in Representation of the people Act, 1951 or the Rules made thereunder, and therefore, when the Commission recommended to the Governor to cancel the notification dated 1.11.1994, it purported to operate in a field which was not covered by any Parliamentary legislation.

(iii) Since the power to issue a notification by the Governor under section 15 of the Representation of the People Act, 1951 is available under the Central Act, the provisions of section 21 of the General Clauses Act would be available to the Governor in rescinding the notification. There is nothing in section 15 or any other provision of the Representation of the People Act which, by context or by implication, excludes the availment of power conferred by section 21 of the General Clauses Act. On the other hand, the exercise of power under section 21 in a case of this nature advances the purposes of the enactment dealing with election.

JUDGMENT

Present:- The Honourable Mr. S.S. Ahmad, Chief Justice and The Honourable Mr. Justice : P. Venkatarama Reddi

This Writ Appeal arises out of a common judgment dated 17th November, 1994, passed by Mr. Justice Motilal B.Naik, by which Writ Petition Nos. 20130 and 20283 of 1994 were dismissed at the admission stage.

In order to constitute a new Legislative Assembly for the State of Andhra Pradesh, the Governor of Andhra Pradesh issued a Notification No. 597/Elec. F/94 dated 1-11-1994 under Sec. 15 of the Representation of People Act, 1951 calling upon all the Assembly Constituencies of Andhra Pradesh including 163, Gorantla Assembly Constituency, to elect their members for the State Assembly.

This was followed by the Notification issued by the Election Commission of India under Section 30 of the Act setting out the following election programme for the Assembly elections in Andhra Pradesh:

8-11-1994	**: Last date for making nomination;**
9-11-1994	**: Scrutiny of nominations;**
11-11-1994	**: Last date for withdrawal of candidature;**
1-12-1994	**: Date of Poll;**
9-12-1994	**: Counting of Votes.**

Many persons filed their nominations for contesting the election to the State Assembly from 163-Gorantla Assembly Constituency. On 8-11-1994 a Fax Message was sent by the Chief Electoral Officer, Andhra Pradesh, to the Secretary, Election Commission of India, that he, namely, the Chief Electoral Officer, was informed by the Collector and District Election Officer, Anantapur, on phone that a complaint had been lodged with him, namely, the Collector, that the official Congress (I) candidate, Siddaiah, for 163-Gorantla Assembly Constituency was kidnapped in the morning by the rebel Congress faction with the intention of preventing him from filling his nomination paper and that, he was being searched for by the police so that he could file his nomination before 3-00 P.M. on that day which was the last day for filing nominations. The Chief Electoral Officer further stated in his Fax Message that he had instructed the Collector and had also made a request to the Chief Secretary and the Director General of Police to locate the kidnapped person, namely, Sri Siddaiah, so that he could file his nomination paper before 3-00 P.M. on that day. It was also recited in the Fax Message that a more detailed report would be submitted on receipt of report from the Collector. The next day, i.e., on 9-11-1994, the Secretary, Election Commission of India, issued a Fax Message to the Chief Secretary, Government of Andhra Pradesh, saying that the message of the Chief Electoral Officer, the message of the District Election Officer and the

message of the Superintendent of Police quoted in the message of the District Election Officer, did not clearly and specifically state whether Sri Siddaiah and his proposer were ultimately prevented from filing the nomination paper. The Commission also wanted to know through Fax message whether nomination papers were in the personal possession of Sri Siddaiah at the time of kidnapping, and wanted a more detailed report whether Sri Siddaiah was physically prevented from filing his nomination paper either personally or through his proposer. Thereupon, the Chief Secretary, by Fax message dated 10-11-1994 informed the Commission that the Collector and District Election Officer, Anantapur, had reported that Sri Siddaiah did not carry the nomination paper with him at the time of kidnapping, but he was to go to the office of the Mandal Revenue Officer, Gorantla, to obtain the blank nomination paper and after filling up the same he was to hand over the nomination papers to the Asst. Returning Officer at Gorantla, but this could not be done on account of his kidnapping and he could not reach the office of the Mandal Revenue Officer, nor could he file the nomination paper.

The Superintendent of Police, Sri A. Sivanarayana, IPS submitted a report about the incident of 8-11-1994 and set out therein that Sri K.Siddaiah who was a practising Advocate of Anantapur, was given Congres(I) Ticket to contest from 163, Gorantla Assembly Constituency and the sitting M.L.A., Sri Ravindra Reddy of Pamudurthi who was aspiring for Congress(I) Ticket, could not get it. He, therefore, decided to file his nomination as an independent candidate and for that purpose he and his followers assembled at the office of Mandal Revenue Officer on 8-11-1994. In the meantime, at about 1-00 P.M. on 8-11-1994, Inspector of Police, Sri Satya Sai Rural Circle, got information that Sri K. Siddaiah, Congress(I) candidate, along with his followers, while proceeding from Anantapur to Gorantla via Puttaparthi to file his nomination paper was got abducted at about 11-30 A.M. by Sri P. Ravindra Reddy, sitting M.L.A who could not get Congress(I) Ticket, by his men who took him and his follower Sri G.Narasimhulu, Advocate, away to unknown destination. This information was passed on to superior officers and District S.B. Control on VHF Set and a case was registered as crime No. 93/1994 under Sections 147, 148, 342, 323, 365 and 149, I.P.C. at Police Station, Gorantla, at 1–15 P.M. on 8-11-1994. All border Police Stations were alerted and search parties were deputed to different directions. During the course of investigation, it was ascertained that Commander Jeep No. AP 04 6336 was used in abducting the Congress(I) candidate and his follower. The Jeep was traced at 1-00 A.M. on 9-11-1994 near Gorantla Town and was seized. In the meantime information was received by the police in the early hours of 9-11-1994 that both the abducted persons had reached their houses at Anantapur at about mid-night. Sri K.Siddaiah and his friend and

follower Sri G. Narasimhulu were examined by the Deputy Superintendent of Police, Penukonda, and they stated that they were abducted on the instigation of Sri P. Ravindra Reddy, sitting M.L.A. by his men and were detained in the hillocks of Pamudurthi hilly area from 1-00 P.M. to 7-00 P.M., which prevented Sri K.Siddaiah from filing his nomination paper by 3-00 P.M. on 8-11-1994.

The above report of Superintendent of Police, Anantapur, was considered by the Election Commission of India on 10-11-1994 and being of the view that the purity of the election process was irretrievably sullied in 163, Gorantla Assembly Constituency in the State of Andhra Pradesh, and in those circumstances the result of the election in the said Constituency would not be reflective of the true choice of the electorate of that constituency, it recommended to the Governor of the State to rescind the notification dated 1-11-1994 issued by him under Section 15(2) of the Representation of the People Act, 1951 in so far as it related to 163, Gorantla Assembly Constituency, so that the entire election process may be commenced anew in that Constituency. Acting upon the above recommendation, the Governor of Andhra Pradesh, by notification dated 11-11-1994, cancelled the notification dated 1-11-1994 issued under Section 15(2) of the Act. The notification dated 11-11-1994 was challenged by means of two writ petitions, namely, W.P. No. 20130/1994 (N.Kristappa Vs. The Chief Election Commissioner & others) and W.P.No. 20283/1994 (P.Ravindra Reddy Vs. Election Commissioner & others), filed in this Court on the ground, inter alia, that the Election Commission was not vested with any power to recommend recession of the notification issued under Section 15(2) of the Act by which the election process was initiated in the State and that, the power, in any case, had been exercised in an unfair and arbitrary manner on the biased reports of the Chief Electoral Officer, Andhra Pradesh and, therefore, its recommendation to rescind the notification dated 1-11-1994 is vitiated. The writ petitions were dismissed by a common judgment and order dated 17-11-1994, and the present appeal is directed against this judgment.

Sri Seshagiri Rao, appearing on behalf of the appellants has contended that rescission of a notification issued under Section 15 of the Act, by which the election process was set in motion, is not contemplated by the Act and, therefore, the Election Commission was in error in recommending to the Governor that the said notification may be rescinded. It is also contended that the Election Commission has to act within the ambit and scope of the Representation of the People Act, 1950 and the Representation of the People Act, 1951 as both the Acts have been made by Parliament under Article 327 of the Constitution and provide for all matters relating to, or in connection with elections to either House of Parliament or either House of the Legislature of a State. It is

contended that the Election Commission cannot traverse beyond the scope of the aforesaid two enactments, and since recommendation to rescind the notification issued under Section 15 of the Act is not covered by any provision of the Act nor is contemplated by the Act, the impugned Notification issued by the Governor in pursuance of the said recommendation was liable to be set aside and the earlier notification issued under Section 15 was liable to be restored, so that the electorate of 163, Gorantla Constituency could also exercise their franchise in the General Elections proposed to be held in December 1994 for constituting a new State Legislative Assembly.

The relevant provision of Article 324 of the Constitution is 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 the Election Commission).

(2)	**xxx**	**xxx xxx**
(3)	**xxx**	**xxx xxx**
(4)	**xxx**	**xxx xxx**
(5)	**xxx**	**xxx xxx**
(6)	**xxx**	**xxx xxx**

Articles 327, 328 and 329 which are also relevant for purposes of the present case, are also quoted below:

"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".

"328. Power of Legislature of a State to make provision with respect to elections to such Legislature:

Subject to the provisions of this Constitution and in so far as provision in that behalf is not made by Parliament, the Legislature of a State may from time to time by law make provision with respect to all matters relating to, or in connection with, the elections to the

House or either House of the Legislature of the State including the preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses".

"329. Bar to interference by courts in electoral matters:

Notwithstanding anything in this Constitution–

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any court;

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question 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".

Learned Advocate-General appearing on behalf of the respondents, as also Sri C.P. Sarathy, appearing on behalf of the Commission, have contended that the writ petition was not maintainable on account of the bar to interference by Court created by Article 329 of the Constitution and, therefore, this appeal which is continuation of the writ petition, is also liable to be dismissed at the threshold as not maintainable. It is contended that on account of the provisions contained in Article 329 this Court need not go into the merits of the question raised in the writ petition or in this Writ Appeal, and that the appeal may be dismissed at the admission stage itself.

Since all the parties are represented before us, we propose to hear and dispose of the appeal at the initial stage itself as the usual exercise of first admitting the appeal and then allowing it to come up for hearing in its turn in the normal course would unnecessarily delay the disposal of a matter which requires to be disposed of at the earliest, so that the question whether the electorate of 163, Gorantla Constituency will at all exercise their right of franchise in the present election may be settled before the date of the poll which, we are informed, will be held either on 1st of December or on 5th of December, 1994. In disposing of the appeal on merits we would also, if necessary, consider the question of maintainability of the writ petition as also this appeal, at the appropriate stage of this judgment.

A perusal of Article 324 extracted earlier will show that the Election Commission is clothed with very wide powers. In the matter of elections to Parliament and to the State Legislatures, as also to the offices of the President and Vice-President, it has vested in it the superintendence, direction and control of the preparation of electoral rolls. The power to conduct all the above elections is also vested in it. The Commission has also the power to advise the

President or the Governor of a State, as the case may be, on the question of disqualification of any Member of Parliament or of a State Legislature. While superintendence, direction and control of the preparation of the electoral rolls and the conduct of all elections to Parliament and State Legislatures are vested in the Commission, the Parliament, under Article 327, has been given the power to make law for all matters relating to, or in connection with, election to either House of Parliament or to either House of the Legislature of a State. In exercise of the power under this Article, the Parliament has, as already pointed out earlier, enacted the Representation of the People Act, 1950 and the Representation of the People Act, 1951. But this does not mean that the Commission, on account of the aforesaid two Parliamentary enactments, is divested of its power of superintendence, direction or control of preparation of electoral rolls, or conduct of all elections to Parliament or State Legislatures or to the offices of the President and the Vice-President of India.

The effect of the law made by Parliament under Article 327 or by the State Legislature under Article 328 was considered by the Supreme Court in MOHINDER SINGH GILL & ANOTHER VS. CHIEF ELECTION COMMISSIONER & OTHERS (1), and it was laid down that:

".... Article 324 (1) vests in the Election Commission 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 the President and Vice-President held under the Constitution, Article 324(1) is thus couched in wide terms. Power in any democratic set up, as is the pattern of our polity, is to be exercised in accordance with law. That is why Articles 327 and 328 provide for making of provisions with respect to all matters relating to or in connection with elections for the Union Legislatures and for the State Legislatures respectively. When appropriate laws are made under Art. 327 by Parliament as well as under Article 328 by the State Legislatures, the Commission has to act in conformity with those laws and the other legal provisions made thereunder. Even so, both Articles 327 and 328 are "subject to the provisions" of the Constitution which include Art. 324 and Art. 329. 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 heading in Art. 324. The Commission may be required to cope with some

situation which may not be provided for in the enacted laws and the rules. That seems to be the raison d'etre for the opening clause in Articles 327 and 328 which leaves the exercise of powers under Article 324 operative and effective when it is reasonably called for in a vacuous area. There is, however, no doubt whatsoever that the Election Commission will have to conform to the existing laws and rules in exercising its powers and performing its manifold duties for the conduct of free and fair elections....".

It is thus clear that the Election Commission still retains its jurisdiction as also all its plenary powers under Article 324, except in respect of matters for which specific provisions have been made in the Act made either by Parliament under Article 327, or by a State Legislature under Article 328.

It may be stated that in MOHINDER SINGH GILL'S Case (Supra) election to a particular Constituency was cancelled and re-poll was ordered by the Commission, which was challenged before the Supreme Court, and the Supreme Court held that the Commission, notwithstanding the law made by the Parliament in the form of the Representation of the People Act, 1950 and that of 1951, still had the jurisdiction and the power under Article 324 to cancel an election and to order re-poll in a situation which was not foreseen by the Act and for which no provision was made therein. The Election Commission is, therefore, entitled to exercise its plenary power under Article 324 in an area not covered by the Act, or the Rules made thereunder.

In A.C. JOSE VS. SIVAN PILLAI & OTHERS (2) it was held that when there is no Parliamentary or State legislation, or where there does exist a Parliamentary or State legislation or the Rules made thereunder but they are silent with regard to a particular situation, the Election Commission will have plenary power to give appropriate directions in respect of the conduct of election. It was also held that the Commission cannot override the express provisions in the Act, or to pass orders in direct disobedience to their mandate. The Supreme Court observed that the Commission's powers are meant to supplement, and not supplant the law. In ELECTION COMMISSION OF INDIA Vs. STATE OF HARYANA (3), it was laid down by the Supreme Court that the ultimate decision whether at a given time it would be possible and expedient to hold the elections must rest with the Election Commission. It was also laid down that the Election Commission has also the power to review its decision as to the expendiency of holding the poll on the notified date. It was also provided that it was the duty and obligation of the Commission to keep the situation under constant scrutiny so as to adjust the decision to the realities of the ground situation, and until the elections are held the Commission has jurisdiction, for good reasons, to alter its decision to hold the poll on a particular day.

In view of the above decisions of the Supreme Court it is clear that the law with regard to the power of the Commission under Article 324 has not undergone any change from the date of first decision in N.P. PONNUSWAMI VS. RETURNING OFFICER, NAMAKKAL (4) till the more recent decisions on the point.

We have already set out the facts leading to the issuance of the impugned notification in the earlier part of this judgment, which would show that the Commission had intervened in the matter only on being satisfied that the candidate set up by a National political party had been abducted so as to prevent him from filing his nomination paper. The Commission was of the opinion that election, if held, would not be reflective of the true will of the people and, therefore, it decided to recommend to the Governor to issue a fresh notification for cancelling the notification dated 1-11-1994 issued under Section 15 of the Act, so as to discontinue the process of election in 163, Gorantla Assembly Constituency and pave way for initiation of a fresh process of election. The abduction of a candidate is a situation which is not foreseen by any of the provisions contained in the Representation of the People Act, 1951 or the Rules made thereunder and, therefore, when the Commission recommended to the Governor of Andhra Pradesh to cancel the notification dated 1-11-1994, it purported to operate in a field which was not covered by any Parliamentary legislation. It could therefore exercise its plenary power under Article 324 for getting the process of election stalled or cancelled altogether by appropriate action.

Learned counsel for the appellants has contended that once the process of election is commenced by issuing the requisite notification under Section 15 of the Act, it cannot be stopped or interfered with at any subsequent stage by any Authority including the Election Commission, as the process is irreversible under law. He has, in this connection, drawn our attention to Section 153 of the Act which provides that it shall be competent for the Election Commission, for reasons which it considers sufficient, to extend the time for the completion of an election by making necessary amendments in the notification issued by it under Section 30, or sub-section (1) of Section 39, and has contended that if a situation as happened in 163, Gorantla Assembly Constituency occurs, the Election Commission can extend the time fixed in the notification issued under Section 30 of the Act, but it cannot altogether cancel the process of election commenced by the notification issued under Section 15 of the Act. Section 153 contains an enabling provision which empowers the Election Commission to extend the time for the completion of any election. Under Section 30, or for that matter, under Section 39 of the Act, various dates constituting the election programme are fixed by the Election Commission. The purport of Section 153 is only to give power to the Commission to alter that

programme by extending the time for the completion of the election. Under Section 52 of the Act, a poll can be countermanded on the death of a candidate if other conditions set out in the Section are fulfilled.

Section 57 contemplates adjournment of poll in certain situations, while Section 58 contemplates fresh poll in case of destruction etc. of ballot-boxes. A situation arising out of abduction of a prospective candidate so as to prevent him from filing the nomination paper is not contemplated by the provisions referred to above, or any other provision in the Act. So far as the statutory provisions, to which a reference has already been made, are concerned, the Election Commission cannot transgress over those provisions, nor can it act in defiance or disobedience or in violation of the said provisions. But, where the statutory provisions are silent, as in the case of abduction of a prospective candidate, the Commission can exercise its plenary power under Article 324 and issue appropriate directions, or make recommendation to the Governor for the cancellation of the notification requiring the Assembly constituency concerned to elect its representative. In doing so, it would not over-step any statutory provision, nor would such a direction or recommendation be in defiance thereof.

In view of the above situation, the learned Single Judge was, in our opinion, justified in holding that the Election Commission was justified in recommending to the Governor to cancel the notification issued under Section 30 by the impugned notification dated 11-11-1994.

Learned Counsel for the appellants contended that by holding that in order to overcome a situation caused by the abduction of a prospective candidate; the Commission could recommend cancellation of the process of election, learned Single Judge has added or legislated a new provision in the Representation of the People Act which is not permissible, as laid down by the Supreme Court in S. NARAYANASWAMI Vs. G. PANNEERSELVAM (5), and DHOOM SINGH Vs. PRAKASH CHANDRA SETHI & OTHERS (6). In the first Supreme Court decision, it was laid down that what was not in the statute could not be supplemented, while in the second case the Supreme Court held that, on the principles of interpretation of statutes, a statute cannot be extended to meet a case for which provision has clearly and undoubtedly not been made. Both these decisions are not applicable to the particular circumstances of the present case.

In the instant case, we are considering the scope, width and extent of the power of the Election Commission available to it under Article 324 of the Constitution. Apart from Article 324 the Parliament by making laws under Article 327 has invested the Commission with

many other powers, and we have found that, if the statute made by Parliament under Article 327 is silent with regard to a particular situation, the Commission can exercise its powers under Article 324 and issue appropriate directions. It is not a case where the source of power was available only under the Representation of the People Act, 1951 and not under the Constitution. The learned Single judge by his decision has not added to the Parliamentary legislation, as is contended by the learned counsel for the appellants, but has held, and in our opinion, correctly, that apart from the provisions of the Representation of the People Act, 1951, the Commission still had the power under Article 324 to issue appropriate directions in relation to the election in question. Nor has the learned Single Judge extended the provision of any statute to meet a situation for which no provision was made in the statute. Once it was noticed by the learned Single Judge that the situation as created by the abduction of the candidate was not covered by the Representation of the People Act, he immediately adverted his mind to the plenary powers of the Commission under Article 324 of the Constitution and held that, in the aforesaid situation, the Commission could appropriately take necessary action. Learned Counsel for the appellants then contended that the impugned notification has been issued with the aid of Section 21 of the General Clauses Act, and since the provisions of General Clauses Act cannot be invoked in the instant case, the notification is liable to be quashed. Elaborating his arguments, learned counsel contended that the Governor becomes functus officio on issuing a notification under Section 15 of the Act and his powers are exhausted. The Governor having set in motion the election process cannot legally retreat his steps and interfere with the election process by issuing a subsequent notification.

By a notification issued under Section 15 of the Act, the Governor calls upon the constituencies in the State to elect their representatives for constituting new Assembly. Sub-Section (2) of Section 15, which is the relevant provision, is quoted below:

"15. Notification for general election to a State Legislative Assembly:

(1) xxx xxx xxx

(2) For the said purpose, the Governor or Administrator, as the case may be, shall, by one or more notification 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".

The provision contemplates that the Governor can call upon all the constituencies to elect new members either by one notification or by more than one notification. The provision also contemplates recommendation of the Commission as to the date or dates when such notifications are to be published.

The Representation of the People Act is a Central Act made by Parliament under which the Governor of the State, as pointed out earlier, has been given the power to issue notification calling upon the constituencies to elect new representatives. Since the power to issue notification is available under the Central Act, the provisions of Section 21 of the General Clauses Act, which is quoted below, would be available to the Governor in rescinding the notification, as it is specifically provided that:

"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, rule or bye-laws so issued".

It requires no effort of interpretation to understand the meaning of Section 21 of the Act, as the provisions are clear and specific and there is no ambiguity involved. The power to issue a notification also includes the power to vary or rescind such notification provided the conditions for the exercise of that power, while issuing that notifications, are complied with at the time of issuing the notification of rescission.

There is nothing in Section 15 or any other provisions of the Representation of the People Act which, by context or by implication excludes the availment of power conferred by Section 21 of the General Clauses Act. On the other hand, the exercise of power under Section 21 in a case of this nature advances the purpose of the enactment dealing with elections.

The notification under Section 15 was issued by the Governor on 1-11-1994 on the recommendation of the Election Commission. The impugned notification dated 11-11-1994 by which the earlier notification was rescinded has also been issued on the recommendation of the Election Commission which was of the opinion that the kidnapping and subsequent prevention from filing nomination by Sri K.Siddaiah was proved and that, the purity of the election process had been irretrievably sullied in 163, Gorantla Constituency. Thus, all the conditions which were required to be

complied with at the time of issuance of notification under Section 15 have also been complied with at the time of issuance of the impugned notification for rescinding the earlier notifications.

Learned Counsel for the appellants referred to us to a decision of the Madhya Pradesh High Court in THAKUR VISHWESHWR SHARAN SINGH Vs. STATE TRANSPORT APPELLATE TRIBUNAL, GWALIOR (7), in which it was laid down that if an Act is brought into force by notification issued by the State Government, the latter, namely, the Government cannot cancel or modify the notification so as to repeal a provision of the Act which has been brought into force. This decision, in our opinion, does not apply to the facts of the case. In that decision certain provisions of the Motor Vehicles Act were amended which were enforced from a particular date by a Notification issued under Section 1(2) of the Act by the State Government. This notification was subsequently sought to be modified by a subsequent notification, and it was in that connection held by the Madhya Pradesh High Court that no other notification could be issued with the aid of Section 21 of the General Clauses Act, as it would have the effect of repealing the amended provision of the Act brought into force by the earlier notification.

In the instant case, the substantive provisions of the Representation of the People Act, 1951 are not affected, and it is only the direction issued to the constituency to elect its representative which has been withdrawn with the promise to start the election process anew in 163, Gorantla Constituency.

Lastly we shall advert to an argument advanced by the learned Counsel for the appellants that Sri Siddaiah was not nominated as a candidate, that he does not come within the definition of 'candidate' and therefore the powers under Article 324 of the Constitution and Section 21 of the General Clauses Act should not have been invoked to protect the interest of a non-candidate. Assuming that he is not a candidate within the meaning of the Act or the Conduct of Election Rules, undisputedly he is a person who was authorised to contest the election on behalf of a National party. The physical disability of such candidate to file nomination by reason of his abduction is certainly a factor which has inevitable bearing on the purity and fairness of election. It cannot be said that in the circumstances, the power has been exercised for any extraneous purpose, particularly as the Commission had acted after obtaining full details of the incident from various sources and had proceeded in the matter only on being satisfied that the election process in 163, Gorantla Constituency had been irretrievably sullied.

No other point was urged before us. Since we have found on the merits of the case that the impugned notification does not suffer from any of the defects pointed out by the learned counsel for the

appellants and we are of the opinion that the said notification was properly issued by the Governor of the State, we need not decide the preliminary objection raised by the learned Advocate-General as also by Sri C.P. Sarathy on behalf of the Election Commission that the present petition, or for that matter, the present appeal is not maintainable in view of Article 329 of the Constitution.

The appeal is dismissed, without any order as to costs.

Appeal dismissed

HIGH COURT OF JUDICATURE AT ALLAHABAD

(LUCKNOW BENCH)

Writ Petition No. 1995 (MB)/1996
(Decision dated 8.10.1996)

Om Prakash Srivastava alias Babloo Srivastava ***..Petitioner***

Vs.

The Election Commission and Others. ***.. Respondent***

And

Writ Petition No. 3015 (MB) / 1996

Kunwar Raghuraj Pratap Singh alias Raja Bhaiya ***..Petitioner***

Vs.

The Returning Officer, Kunda Legislative Assembly Constituency, District Pratapgarh, and Others. ***.. Respondent***

SUMMARY OF THE CASE

In connection with the general election to the Uttar Pradesh Legislative Assembly held in September/October, 1996, the petitioner, Shri Om Prakash alias Babloo Srivastava, filed his nomination paper from 103-Lucknow Central Assembly Constituency on 13.9.1996. The Returning Officer accepted his nomination paper on the date of scrutiny (14.9.96) and he was allotted the election symbol 'Car' on 16.9.1996 after the last date for withdrawal of candidatures was over. Later on, the particulars of the proposers of Shri Babloo Srivastava were investigated by the SSP, Lucknow and it transpired that out of 10 proposers, 6 proposers denied to have signed his nomination paper. The nomination paper of Shri Srivastava was re-examined by the Returning Officer and he came to the conclusion that his nomination paper was not validly subscribed by the required number of proposers and was liable to be rejected. The Returning Officer then sent a report to the Election Commission for its direction. The Election Commission, on the basis of the said report of the Returning Officer, was satisfied that the name of Shri Srivastava was wrongly included in the list of contesting candidates, and directed under Article 324 of the Constitution that his name be deleted from the contesting candidates' list.

Aggrieved by that order of the Election Commission, the present petition was filed before the Allahabad High Court by Shri Babloo Srivastava. He contended that the Returning Officer, having once accepted his nomination paper, had no power under the law to

re-examine his nomination paper and that the Election Commission could not have directed the deletion of his name from the list of contesting candidates.

The High Court dismissed the writ petition, holding that the Election Commission had rightly exercised its plenary powers under Article 324 of the Constitution in the facts of the present case, as such situation or contingency was not contemplated in the Representation of the People Act, 1951 and rules framed thereunder. The Court also held that it could not interfere with the order of the Election Commission in view of Article 329 (b) of the Constitution, as the election was still in progress.

JUDGMENT

Present:- Hon'ble S.H.A. Raza, J, Hon'ble Dr. Maithli Sharan. J, (Delivered by Hon'ble S.H.A. Raza.J)

One would have thought that after the decision of a Constitutional Bench of Hon'ble Supreme Court in the case of N.P. Ponnuswami vs. Returning Officer, Namakkal Constituency and others (Union of India and State of Madhya Bharat (Interveners) reported in Supreme Court Reports Vol. III 1952 page - 218, amplified in the case of Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi and other: reported in AIR 1978 Vol. 65 SC 851 : such writ petitions would not have been filed. In a developing society like India, law must keep pace with the changing social, economic and political scenario. Hon'ble Supreme Court during the last four decades made several strides in interpreting the law in various fields but what remained unchanged, unaltered and unruffled, is the election law; may be for the reason that the edifice of the democracy is based on election which can be assailed only in accordance with the Constitutional provisions.

With this prelude, before looking into the factual matrix of the case, we may point out that the fate of these writ petitions hinges upon the reply to two questions; firstly; whether the Election commission of India, in exercise of its power conferred under Art. 324 (1) of the Constitution of India, has the power to eliminate a candidate from contesting the election by rejecting his nomination even after the nomination was found to be valid after scrutiny, and symbol was allotted to him, secondly; as to whether the provisions of Article 329 of the Constitution of India, puts a blanket ban or set up an ambrargo upon the right of the Courts to interfere into the matters, pertaining to the conduct of elections, when the wheel of the process of election has been set into motion after the issue of the notification.

Om Prakash Srivastava alias Babloo Srivastava, who at present is lodged within the four walls of Tihar Jail, being aggrieved against

the decision of the Returning Officer rejecting his nomination paper, in pursuance of the directions of the Election Commission of India, has invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India, praying that the decision of the Returning Officer as well as the Election Commission of India be quashed and the petitioner may be allowed to contest the election and in that regard, if necessary, a date other than 9th October, 1996 be fixed for holding the election of the Central Legislative Assembly Constituency, Lucknow.

The petitioner Om Prakash Srivastava Alias Babloo Srivastava, filed his nomination paper from 103–Lucknow Centre Legislative Assembly Constituency, on 13.09.1996. The petitioner's nomination paper was accepted by the Returning Officer on the date of scrutiny i.e. 14.9.1996, and he was allotted an election symbol e.g. 'Car'. On the date of withdrawal, he did not withdraw his candidature, and his name was included in the list of contesting candidates by the Returning Officer.

Later on, the particulars of the proposal of candidatures of Om Prakash Srivastava, were investigated by the SSP, Lucknow and it transpired that out of 10 proposals 6 proposals denied to have signed his nomination paper. The nomination paper of the petitioner was re-examined by the Returning Officer, and after the re-examination of the nomination paper of the petitioner, and after considering the report of the inquiry conducted by the CB, CID, the Returning Officer came to the conclusion that the nomination paper of the said candidate (the petitioner) was not validly subscribed by the electors – proposers as required under the law. The Returning Officer after a finding that the nomination paper of the said candidate was liable to be rejected, sent a report to the Election Commission of India.

The Election Commission of India, on the basis of the report of the Returning Officer, was satisfied that the name of Om Prakash Srivastava alias Babloo Srivastava, was wrongly included in the list of contesting candidates, and that this will vitiate the poll, if taken on the basis of such list. The Election Commission thereafter directing under the powers of super intendence, direction and control, inter-alia, of the conduct of elections to Parliament and State Legislatures conferred on it, under Article 324 of the Constitution of India that from the list of contesting candidates prepared by the Returning Officer for 103– Lucknow Central Assembly Constituency on 16th September, 1996 under section 38 of the Representation of the People Act, 1951, the name of Sri Om Prakash Srivastava alias Sri Babloo Srivastava be deleted and a fresh list of contesting candidates be prepared by the Returning Officer for 103–Lucknow Central Assembly Constituency and published as required under the law.

That order of the Election Commission was passed on 01.10.1996. In pursuance of the said directions issued by the Election Commission of India under Article 324 of the Constitution of India, the Returning Officer, on 5.10.96 not only deleted the name of the petitioner from the list of the eligible candidates, to contest the Assembly Election for the Constituency hereinbefore mentioned, but he (the Returning Officer) changed the date of election from 3rd October, 1996 to 9th October, 1996, may be for the reason that fresh ballot papers had to be printed.

This writ petition has been filed by the petitioner on 4th October, 1996. A mention was made that as the matter is urgent, the Court should dispense with the rules regarding taking the petition on the next date. The prayer was granted. The petition could come up, three minutes before 3.00p.m. when the Bench consisting of one amongst us (Hon. S.H.A. Raza, J) and Hon'ble Shobha Dixit, J, was to split up at 3.00 p.m., to hear the other cases. On the request of the learned counsel for the petitioner the writ petition was ordered to come up today before this Court, a day before the polling day.

The election for the Central Legislative Assembly Constituency as well as the West Constituency of Lucknow which were to be held on 3.10.1996, due to some disturbances and riots, beside the aforesaid reason in the Constituency in question, could not be held on 3.10.1996 and were postponed for 9th October, 1996. In the trouble water of the Gomti, the petitioner wants to sail his boat, staking a claim before this Court, to be allowed to contest the election, either on 9th October, 1996 or on any other subsequent date, which this Court may fix. On 9.10.1996, if the petitioner will be allowed to contest, there would exist no possibility of the polling taking place on that date, because the ballot papers which had been printed, did not show the name of the petitioner, hence the Court will have to advanced the date of the poll to any other date.

The next question which requires consideration before this Court is as to whether the Court can change the schedule of polling which power is vested on the Election Commission of India.

As far as the other writ petition bearing No. 3015 (MB) of 1996 is concerned which has been filed by Kunwar Raghuraj Pratap Singh alias Raja Bhaiya who is a candidate from 114-Kunda Legislative Assembly Constituency, it covers a different province. The petitioner in the previous assembly election secured a victory by a margin of 67,000 votes. His grievance rests mainly on the question that the District Magistrate of district Pratapgarh, who has been arrayed as the respondent No. 5 has hatched a conspiracy at the behest of Ms. Ratna Singh, a member of Parliament and Sri Pramod Tewari, a member of the 12th dissolved legislative assembly not to allow the polling agents of the petitioner to enter into the polling booths, with

a view to capture the booths, for bogus voting in favour of a particular candidate of a political party, so the rival of the petitioner be elected and according to the petitioner the respondent No. 5 will adopt unfair and corrupt practices not only during the time of the polling but even on the counting date.

The petitioner prays in his writ petition bearing number 3015(MB) of 1996, that a writ in the nature of mandamus be issued to the Returning Officer, the District Election Officer/D.M., to allow the petitioner to contest the election by permitting his agents and supporters to discharge their duties as per rules under the Representation of the People Act, 1951, Conduct of Election Rules, Model Code of Conduct and any other instructions issued thereinunder, and the right of the petitioner to contest the election be not jeopardised and the Election be held in a fair and impartial manner.

It was submitted that the eligible voters have a right to exercise their franchise in a just and proper manner without undue influence or pressure and the right of the electors to elect their representatives be not circumvented due to the machination of respondent No. 5. The Court should not only rescue the right of the petitioner, but also protect the right of the voters so as to enable them to exercise their right of franchise freely.

Before dealing with the questions which are involved in the present writ petition it has to be traced out as to what right the petitioner possesses. It is well settled that the right to elect or to be elected is not a fundamental right of any person. That right has been derived from the statutes; meaning thereby, that it is a statutory right. The view which we have taken, has consistently been adopted by the Hon'ble Supreme Court which was elaborated in Gujanand Krishnaji Bapat Vs. Dattaji Raghobaji Meghe (1995) 5 SCC 347 wherein it was observed as under:

"The right to elect and the right to be elected are statutory rights. These rights do not inhere in a citizen as such and in order to exercise the right certain formalities as provided by the Act and the Rules made thereunder are required to be strictly complied with. The statutory requirements of election law are to be strictly observed because the election contest is not an action at law or a suit in equity but it is a purely statutory proceeding unknown to the common law. The Act is a complete code in itself for challenging an election and an election must be challenged only in the manner provided for by the Act." (emphasis ours)

Mr. N.K. Seth and Mr. I.B. Singh, luminaries of the Bar, have made a thrust to asail the action or inaction of the Election Commission of India and its officers who are manning the elections in the aforesaid two constituencies on the following grounds:

(a) After the process of the scrutiny is over and a candidate is allotted an election symbol, and his name is included in the list of the contesting candidates, no authority much less the Election Commission of India or the Returning Officer, can delete the name of such a candidates from the list of the candidates or reject the nomination paper which was earlier found to be in order.

(b) According to clause 5 of Section 36 of the Representation of People Act, 1951, any objection to the validity or invalidity of the nomination paper can only be taken at the time of scrutiny but after its validity has been adjudged, the nomination paper cannot be rejected. It is assumed that if can be rejected, then it cannot be done without an opportunity being given to the candidate to show cause against the same.

(c) The power of judicial review in such matters cannot be frustrated, simply for the reason that the highest authority, responsible for controlling and supervising and directing the election, has passed an order, but if that authority has exceeded its jurisdiction or its action suffers from colourable exercise of power, or discriminatory or arbitrary, then the Court would not throw out the petition only because of the provisions contained in Article 324 and 329 of the Constitution of India.

(d) The right powers of the Election Commission relating to direction and control, must be traceable to some of the existing law and cannot violate the provision of any law life Representation of People Act, or the Rules framed thereunder.

(e) The superintendence control of the elections vests a power to the Election Commission to hold an election in a fair and just manner and if the Election Commission fails to fulfil its obligation under Article 324 of the Constitution of India, a direction may be issued by this Court in exercise of its powers conferred under Article 226 of the Constitution of India.

More than four decades have passed but the golden words of Hon'ble Fazl Ali, J. still echoes in the Court's Room. Inspite of the sweep of Hon'ble Supreme Court in every branch of law, N.P. Ponnuswami (supra) still read and followed. The following observations of Hon'ble Fazl Ali, J. on behalf of his esteemed colleagues of the Constitutional Bench, will guide us to decide the controversy involved in both of the writ petitions:

"The scheme of Part XV of the Constitution and the Representation of the People Act, 1951, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any court. Under the election law the only significance

which the rejection of a nomination paper has, consists in the fact that it can be used as a ground to call the election in question. Article 329(b) was apparently enacted to prescribe the manner in which and the stage at which this ground, and other grounds which may be raised under the law to call the election in question, could be urged. It follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other court. If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any, are rectified, there will be no meaning in enacting a provision like article 329(b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplated, one of them being that confliction views may be expressed by the High Court at the pre-polling stage and by the election tribunal which is to be an independent body, at the stage when the matter is brought up before it. Therefore, questioning the rejection of a nomination paper is "questioning the election" within the meaning of article 329(b) of the Constitution and section 80 of the Representation of the People Act 1951."

Before dealing with the provisions of Article 329 of the Constitution of India, it will be appropriate and proper to glace over the powers of the Election Commission of India, contained in Article 324(1), which 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)."

The opening words, "superintendence, direction and control of preparation of electoral rolls conferred and conduct of election (emphasis ours) including the powers as well as duties hence, apart from the powers conferred by Representation of the People Act 1951 and the rules made thereunder, the Election Commission has ample power to pass any order for the proper conduct of the election. In short Article 324(1) vest with the Election Commission vest functions including the power and duties essentially administrative and marginally judicative and legislative. The words 'superintendence, direction and control' empowers the Election Commission to act in contingency not provided for by-law and to pass necessary orders for the conduct of the Election including to deduct a nomination paper. This constitutional power vested to Election Commission, is independent to other rights or authority,

duties and obligations given to the Election Commission under any other law.

The view which we have taken, is fortified by the judgment of Hon'ble Supreme Court in Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi and other (supra). Wherein N.P. Ponnuswami (supra) was further amplified by Hon'ble Supreme Court. Hon'ble V.R. Krishna Iyer, J in his usual prosaic style speaking on behalf of his esteemed colleagues at the Bench, Hon'ble M.H. Beg, Hon'ble P.N. Bhagwati, Hon'ble P.K. Goswami and Hon'ble P.N. Shinghal, JJ, laid down the following principles in paragraph – 91 of the report :–

"1(a) Article 329(b) is a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of the result (emphasis ours)

(b) Election, in this context, has a very vide 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 of 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 Art, 324 is a reserve of power to act for the avowed purpose of. Not divorced from, pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice in so far as conformance to such canons can reasonably and realistically be required of it as fair-play-action in a most important area of the constitutional order, viz, elections. Fairness does import an obligation to see that no wrong-doer candidate benefits by his own wrong. To put the matter beyond doubt, natural justice enlivened and applies to the specific case order for total re-poll, although not in full panoply but in flexible practicability. Whether it has been complied with is left open for the Tribunal's adjudication." (emphasis ours).

In paragraph-114 of the report it was further observed:

"The Chief Election Commissioner has thus to pass appropriate orders on receipt of reports from the returning officer with regard to

any situation arising in the course of an election and power cannot be denied to him to pass appropriate orders, Moreover, the power has to be exercised with promptitude. (emphasis ours) Whether an order passed is wrong, arbitrary or is otherwise invalid, relates to the mode of exercising the power and does not touch upon the existence of the power in him if it is there either under the Act or the rules made in that behalf, or under Article 324(1)." (emphasis ours)

The aforesaid proposition was further explained in the concluding portion of paragraph–115 of the report, wherein it was observed:

"... The Commission is, therefore, entitled to exercise certain powers under Article 324 itself on its own right, in an area not covered by the Acts and the rules. Whether the power is exercised in an arbitrary or capricious manner is a completely different question."

It was further explained in the concluding portion of paragraph-121 of the report:

"... Even if it is a wrong order it does not cease to be an order passed by a competent authority charged with the conduct of elections with the aim and object of completing the elections although that is not always decisive, the impugned order itself shows that it has been passed in the exercise of power under Art. 324(1) and Section 153 of the Act. That is also the correct position. Such an order, relating, as it does, to election within the width of the expression as interpreted by this Court, cannot be questioned except by an election petition under the Act."

Thus, the jurisdiction of the High Court to issue a writ in such matters, has been sealed, by Hon'ble Supreme Court in the matter pertaining to the powers exercised by the Election Commission under Article 324(1) and the challenge of any alleged wrong, before this Court regarding the conduct of elections, particularly, after the issuance of the notification. This Court in exercise of its power under Article 226 of the Constitution of India, cannot break upon the seal, because it would amount to exercising a power not warranted under Article 141 of the Constitution which provides that the law declared by the Hon'ble Supreme Court shall be binding on all Courts within the Territory of India.

It was vehemently urged by the learned counsel for the petitioner, that when the Returning Officer found the nomination paper filed by the petitioner valid and included the name of the petitioner into the list of the candidates, neither Election Commission nor the Returning Officer can resile from its decision by deleting the name of the petitioner from the list or rejecting the nomination paper of the candidates. In that regard, the learned counsel for the petitioner

has cited certain precedents i.e., Natwar Lal Vs. Bhartendu 5 ELR 408 and 6 ELR 204; AIR 1957 (Vol. 44) Brij Sunder Sharma Vs. Election Tribunal Jaipur and others wherein it was held that after the Returning Officer accepted the nomination paper of a candidate on the date of the scrutiny and put his name into the list of the candidates, he becomes functus officio and cannot reject the nomination.

There might have been some substance in the aforementioned argument, if the nomination paper would have been rejected by the Returning Officer only, but in the instant case, it was the Election Commission of India, in exercise of the power vested to it under Art. 324(1) of the Constitution which has passed the order. If it is assumed that the Election Commission has passed a wrong order, it can only be challenged into a election petition.

There is another aspect of the matter, which deserves consideration. The precedents which have been cited before us relates to the decisions of the Election Tribunal, wherein rejection of the nomination paper was assailed by way of the election petition not by a writ petition under Article 226 of the Constitution of India.

We have already pointed out that the Article 324 vests vast powers to the Election Commission, which are essentially administrative marginally judicative or legislative. These powers are apart from the powers conferred by the Representation of the People Act and the Rules framed threunder. The Election Commission may exercise its powers in certain contingencies which are not provided in any act or the law for the time being in force.

If the contention of Mr. N.K. Seth, is accepted that the Election Commission's power to give any direction is circumscribed to the provisions of Representation of the People Act only, then the Election Commission shall have no power to make an order or direction to use the electronic machine at the time of polling or issue identity cards to every voter etc. as no such power exists anywhere under the Representation of the People Act. Such powers have been exercised by the Election Commission under Article 324(1) of the Constitution of India. Needless to mention that the use of electronic machine for recording the votes was upheld by the Kerala High Court in Mathew vs. Election Commission (AIR 1982 Kerala-265) In similar fashion, the Election Commission, under Article 324(1), itself can pass appropriate orders as to the conduct of the election e.g. cancellation of poll, ordering re-poll according to exigencies in particular polling stations or Constituencies. The validity of such order cannot be challenged.

In view of the aforesaid situation, it cannot be said that the Election Commission apart from the power conferred under any Act,

cannot exercise its Constitutional power, enshrinded under Article 324(1) of the Constitution of India.

As the Returning Officer rejected the nomination paper of the petitioner in compliance with the directions issued by the Election Commission of India in exercise of its constitutional powers, hence it cannot be said that the Returning Officer became functus officio after accepting the nomination paper of the petitioner. He was duty bound to follow the directions of the Election Commission of India, in passing such an order.

The case of Surendra Kaur vs. State of Punjab and Ors. (1996) 2 SCC-210, relied by the petitioners, covers a different field. In that case, the appellant was a candidate for the election to the office of Sarpanch of Gram Panchayat. She was prevent by a rival candidate for filing the nomination paper. The High Court passed an order staying the election process. The polling was to start at 3. p.m. but the order was communicated at 3.30 p.m. on the same day. Even after having knowledge of the stay order, the Returning Officer instead of staying the poll and awaiting the decision of the High Court continued the process of Polling till 4.p.m. The respondent was declared elected. In the circumstances, it was held that the conduct of election was not valid. It was observed that it being a case of unlawful prevention of the appellant from contesting the election, the election to the office of Sarpanch was in violation of law. Hence, election of respondent was set aside. In the present case, the petitioner was not prevented by a private person who was also a candidate. The petitioner was prevented to contest the election by the Election Commission of India in exercise of the constitutional power under Article 324(1) of the Constitution of India. We are of the view that the observation made in Ms. Surendra Kaur vs. State of Punjab (Supra), are not applicable to the present case.

It is also pertinent to mention here that after the process of election was over Ms. Surendra Kaur had filed the petition, but in the present case, the process of election is yet to be over. It will be over after the polling and the declaration of the result.

In Boddula Krishnaiah and another vs. State Election Commissioner, A.P. and others (1996) 3 SCC-416. the following observation was relied upon:–

"Thus, it would be clear that once an election process has been set in motion, though the High Court may entertain or may have already entertained a writ petition, it would not be justified in interfering with the election process giving direction to the election officer to stall the proceedings or to conduct the election process afresh, in particular when election has already been held in which the voters were allegedly prevented from exercising their franchise. As seen,

that dispute is covered by an election dispute and remedy is thus, available at law for redressal."

We are unable to understand as to how the observation in the for-going paragraph, favour the petitioner, Actually, the pronouncement is against the petitioner.

Ponnuswami vs. Returning Officer, Namakkal Constituency (AIR 1952 SC-64) (supra), actually amounted to the Bible of election law as culled out from interpretation of the provisions of Article 324 to 329 of the Constitution of India and were expended further in Mohinder Singh Gill's case (Supra), which was again relied upon in A.C. Jose vs. Sivan Pillai and others AIR 1984 SC-92;

It was argued before the Bench that under Article 324 (1) gives an unbridled and uncannalised power in the hand of Election Commission without providing any guide lines, which will destroy the basic structure of the Rule of law. It was suggested that if the Commission is armed with such unlimited and arbitrary powers and if it ever happens that the person manning Commission shares 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. Hon'ble Mr. Justice Murtiza Fazal Ali, speaking for the Bench observed;

"It is manifest that such a disastrous consequence could never have been contemplated by the Constitution maker for such an interpreatation as suggested by the counsel for the respondent, would be far from attaining the goal of purity and sanctity of the electoral process, Hence, we must construe article 324 to 329 as an integral part of the same scheme collaborating rather than colliding with one and other. Moreover, a perusal of Art. 324 to 329, would repeal that the legislative powers in respect of matters relating to Parliament or the State legislature vest in Parliament and in no other body. The Commission would come into the picture only if no provision has been made by Parliament in regard to the election to the Parliament or State legislature. Further more, the power under Art. 324 relating to superintendence, direction and control was actually vesting of merely all the executive powers and not the legislative power. In other words, the legislative power of Parliament or of the legislature of a State being made subject to Art, 324 only means that no law made by Parliament under Art. 327 or by a State legislature under Art. 328, can power in regard to matters entrusted to it viz. superintendence, direction and control of election. The right to file an election petition, directly flows from Art, 329 and cannot be effected in any manner by the exercise of executive power by the Commission under Art, 324.

Hon'ble Supreme Court thereafter, summed up legal and constitutional position in the following words:

(a) When there is no Parliament Legislation or rule made under the said legislation, the Commission is free to pass any order in respect of the conduct of elections.

(b) where there is an Act and express Rules made thereunder, it is not open to the Commission to over ride the Act or the Rules and pass order in direct disobedience to the mandate contained in the Act or the Rule. In other words; the power of the Commission are meant to supplement rather than supplant the law (both statute and Rules) in the matter of superintendence, direction and control as provided by Article 324.

(c) where a particular direction by the Commission is submitted to the Government for approval, as required by the Rules, it is not open to the Commission to go ahead with implementation of it as its own sweet will even if the approval of the Government is not given."

In the recent years, we have noticed as to how the Apex Court of this Country strengthened the democratic process in this Country by not allowing the Chief Election Commissioner to become a despotic authority. When the office of Chief Election Commissioner was transformed as a three members Election Commission with a view to clip the wings of the Chief Election Commissioner the action was assailed, before Hon'ble Supreme Court and the Hon. Supreme Court directed that the three members Election Commission would function like a Bench. The Apex Court is conscious enough to see that the depotism does not become a rule in the field of administration, Whenever the executive, legislative, constitutional or even judicial bodies, transgressed their authority or jurisdiction, they were cribbed or cabined within the frame work of law. The apprehension of the petitioners that accumulation of such vast powers within the Election Commission, without any proper guide line, would lead to the totalitarian tendencies, which could be fatal to democracy, is misconceived because the Constitution is based on the principle of 'checks and balances'. No authority, how so strong or powerful, in the scheme of the Constitution, can be allowed to run like a wild horse.

The contention of Mr. N.K. Seth, that the Election Commission of India, cannot by-pass or violate the provisions of the Representation of People Act or Rules framed thereunder or the code of Conduct by exercising the powers under Art. 324 of the Constitution of India cannot be disputed. But the counsel for the petitioners : failed to show any provision contained in Representation of People Act or the rules made thereunder, to meet such a contingency, which had arisen in the present case. Such situation or the contingency is no where contemplated in the Act or the Rules framed thereunder.

Statutory provisions are silent in that regard. Hence, it is only the Election Commission, which can exercise its plenary power under Article 324(1) of the Constitution of India and issue appropriate direction.

In Election Commission of India vs. State of Haryana 1984 AIR SC–1406, it was held that the ultimate decision, whether at a given time, it would be possible and expedient to hold the elections, must rest with the Election Commission. Election Commission is vested with the power to review its earlier decision as to the expediency of holding a poll on a notified date. It was further observed that it was the duty and obligation of the Commission to keep situation under constant scrutiny so as to adjust the decision to the reality of the ground situation and until, the elections are held, the Commission has the jurisdiction for good reason, to alter its decision to hold the poll on a particular day.

It is evident from the aforesaid observation that it is the Commission, which has to fix or alter the date of holding an election. This Court, has no jurisdiction to alter, change a date of the poll fixed by the Election Commission.

The only argument of Mr. N.K. Seth, which remains to be considered, is the violation of the principle of natural justice in the present case. We need not delve into that question because it has been the consistent view of Hon'ble Supreme Court as well as this Court that the principle of 'audi alteram partem' is not "straight jacket formulae". This principle of equity has not been embodied as a Rule, but it is being attracted, whenever by means of any order, substantive right of a person is affected. It always depends upon the facts and the circumstances of the case where the principle "Hear the other side", should be adhered to or followed. The election process, which has been set into motion after the issuance of the notification, cannot be stalled, if a person is not given an opportunity to show-cause before rejecting his nomination paper. Such an opportunity is available, according to the rule, at the time of scrutiny, but there is no provision any where in the Representation of the People Act, to provide such an opportunity, after the nomination paper was accepted and the name of the eligible candidate is brought on the list of the candidates. No power has been vested any where in the Representation of the People Act, to reject the nomination paper after it was validly accepted. As the law on the question is silent, the Election Commission of India, invoked the provision, of Article 324(1) of the Constitution of India. As the process of election is to be completed with promptitude, notice to a person affected which is not provided any where, would delay the declaration of the result. In such a situation, if the principle of 'audi alteram partem' has not been followed, it cannot be said that the order of Election Commission of India, suffers from any infirmity.

Although, we have indicated in the foregoing paragraph that the principle of natural justice in such a situation, is not attracted, but in the present case, the Court was informed that the election agent of the petitioner, Anjani Kumar Sinha was given an opportunity to show-cause and after hearing him, the Returning Officer, in pursuance of the order passed by the Election Commission of India, rejected the nomination paper of the petitioner. The order of the Returning Officer, which was placed by learned standing counsel, was kept on record.

As far as the contention of Mr. I.B. Singh, learned counsel for the petitioner is concerned, we have already indicated that under Article 324 of the Constitution of India, the Election Commission has been vested with vast powers to see that the election takes place in fair and just manner and it would be the obligation and duty of the Election Commission to allow the voters to exercise their franchise without fear or favour. This Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India, cannot look into the factual aspect of the matter and confine, itself by observing that it will be the duty of the respondents to see that the responsibilities, which have been reposed upon them by the Constitution as well as the Representation of the People Act, would be fulfilled by the authorities, who are mannig the election in the Kunda constituency of District Pratapgarh, for which no direction from this Court is necessary.

With the aforesaid observation both the writ petitions are dismissed. As regards the prayer for grant of special leave to appeal, we are off the view that the case does not involve a substantial question of law which needs to be decided by Hon'ble Supreme Court. Prayer is rejected.

Sd/- S.H.A. RAZA
Sd/- Maithli Sharan
08.10.96

HIGH COURT OF PUNJAB & HARYANA

AT CHANDIGARH

Civil Writ Side
Civil Writ Petition No. 270 of 1997

(Decision dated 27.5.1997)

Harbans Singh Jalal, Ex-MLA .. ***Petitioner***
S/o S. Mehar Singh, R/o Shri Jalal Ashram,
Harbans Nagar, Bathinda (Punjab)

Vs.

1. **Union of India, through Secretary,** ..***Respondents***
   Ministry of Home Affair, New Delhi
2. **State of Punjab through Secretary (Home)**
   Chandigarh.
3. **Election Commission of India, New Delhi**
4. **Mr. M. S. Gill, Chief Election Commissioner**
   Ashoka Road, New Delhi
5. **Mr. KVS Ramamurthy, Election Commissioner**
   New Delhi

SUMMARY OF THE CASE

The Election Commission announced the programme for the general election to the Punjab Legislative Assembly on 30th December, 1996. Simultaneously, the Commission informed the State Government and all other authorities concerned that the Model Code of Conduct would come into effect from the date of announcement of the election schedule by the Commission (i.e. on 30th December, 1996). Prior to the announcement of the election schedule by the Election Commission, the political party in power in the Sate, namely, Indian National Congress, had announced certain welfare measures and schemes at a State level conference on 22nd December, 1996. These welfare measures and schemes were to be implemented with effect from 1st January, 1997. Enforcement of Model Code of Conduct from 30th December, 1996 affected the implementation by the State Government of the said welfare schemes from 1st January, 1997. The present writ petition was filed before the Punjab and Haryana High Court contending , inter alia, that the Model Code of Conduct could be brought into force only from the date of actual notification of the election by the Governor of the State and not from the date of announcement of the election schedule by the Election Commission and that the Election Commission could not control the activities of the Government during the period between the announcement of the election schedule and the notification of the election by the Governor.

The High Court dismissed the writ petition, holding that the Election Commission is entitled to take necessary steps for the conduct of a free and fair election, even anterior to the date of issuance of notification of election by the Governor, and from the

date of announcement of the election by the Commission. While doing so, the Model Code of Conduct adopted to be followed by all political parties, can be directed by the Commission to be followed from the date of announcement of election schedule by it.

Writ Petition under Article 226 of the Constitution of India Prayed that this court be pleased to call for the record of this case and after perusal may pleased to

a) **Issued a writ, order or direction quashing the instructions issued by the Election Commission by way of fax message whereby State Govt. has been restrained from implementing welfare measures for the general public at large;**

b) **Issue a writ order or direction commaning the State Govt to implement the welfare measures announced for welfare of general public at large, ignoring the illegal and unconstitutional restrictions imposed by Election Commission;**

c) **Dispense with service of advance notice on respondents;**

d) **exempt filing of certified copies of annexures;**

e) **award cost of the petition in favour of the petitioner.**

It is further prayed that during the pendency of this petition, the operation of the instructions issued by the Election Commission (p-4 & 5) may be stayed.

Dated the 27th May, 1997

JUDGMENT

Present:- The Hon'ble The Chief Justice K. Sreedharan,
The Hon'ble Mr. Justice Swatantar Kumar

For the Petitioner : Mr. R. S. Randhawa, Advocate with
Mr. G. S. Chahal, Advocate

For the Respondents : Mr. Arun Nehra, Advocate for Respondent No. 1, Mr. G. S. Grewal, Advocate-General, Punjab with Mr. D. S. Dhillon,

Deputy Advocate-General For Respondent No. 2

Mr. M. L. Sarin, Senior Advocate with

Mr. Hemant Sarin, Advocate for Respondents 3 to 5

K. SREEDHARAN, C. J.

An issue of far reaching consequences is raised in this writ petition. It is whether; Election Commission can control the activities of Government during the period subsequent to the announcement of

election to the Parliament or the Legislative Assembly of a State before notification in that regard is issued by the President of India or the Governor of a State, as the case may be?

Short facts, necessary for disposal of this case are as follows. Petitioner was a former Convenor of Kisan Dal which is a Wing of Shiromani Akali Dal, in short, SAD. He claims to be a public man and states that he is aggrieved by the illegal and unconstitutional action of the Election Commission in imposing the restrictions on the Government of Punjab on the eve of the general elections to the Punjab State Legislature. The term of the then Assembly was to expire on March 15, 1997. SAD Party had announced free electricity to agricultural sector; abolition of octroi and Inspector Raj and other welfare measures. The Party then in power, namely, Congress also announced various welfare measures for the people of the State. Virtually, the policies announced by the parties are same, aimed to the welfare of the common people, Ruling party announced various ameliorative measures for the benefit of agriculturists, trade and industrial sector; for the welfare of women; for the welfare of people belonging to economically backward classes; war widows; pensioners; students; Food and supplies sector and Transport sector etc. They were so announced in a State level conference held on December 22, 1996, at Ludhiana. Majority of the schemes announced are unobjectionable, aimed to uplift the common man.

The ruling party also announced that some of the schemes formulated by them would be implemented with effect from January 1, 1997. It is stated by the petitioner that the office bearers of SAD approached the Election Commission to prevent the Government from proceeding with the implementation of the schemes. Even though Election Commission had no legal or constitutional authority to interfere with the working of the Government in power, the Chief Election Commissioner announced the poll dates on December 30, 1996. Thereupon, he started exercising control to stall the implementation of policies announced by the State Government on Dec. 22, 1996. Immediately on the announcement of the poll dates, the Commission caused to send Annexure p-5 fax message to the Chief Secretary and the Chief Electoral officer stating that the Model code of conduct and ban on transfer of election related officers will be applicable in the State. Any violation of instructions regarding non-transfer of officers, payment of grants out of discretionary funds and guidelines enumerated in Model code of conduct for political parties and candidates will be viewed very seriously and necessary action as deemed appropriate would be taken on each case of violation. Annexure p-4 Press Note issued by Election Commission on December 30, 1996, stated that Commission has to recommend to the Governor of Punjab to issue notification under section 15 of the Representation of the People Act, 1951 (hereinafter referred to as the

Act), for issuing the requisite notification for the election to Punjab Legislative Assembly. Governor was to issue the notification on January 13, 1997, and the poll to take place on February 6, 1997. When the notification was to be issued by the Governor on January 13, 1997, it is the petitioner's contention, that Election Commission had no authority to impose any restriction whatsoever in the functioning of the Government in power with effect from the date of announcement of election up to the date of issue of notification. The argument of the petitioner is that unless a notification is issued by the Governor, as contemplated by section 30 of the Act, Election Commission cannot exercise any power, or rule in the conduct of election. Pursuant to the notification issued under section 15 of the Act, Election commission shall issue notification under section 30 of the Act, fixing dates for making nomination; their scrutiny; for their withdrawal by the candidates; date of poll and date before which election shall be completed. Prior to issue of such a notification, the Election Commission cannot have any superintendence over the activities of the Government. Election Commission has the power of superintendence of the conduct and control of elections from the date of issue of notification by the Governor and not from any earlier date. Viewed in this light, it is contended that the action of the Election Commission by directing the State Government, as per Annexure p-5 fax message, to adhere to the Model code of conduct, and other directions, is illegal and beyond their jurisdiction. Attempt on the part of the Election Commission to restrain the Government from implementing the welfare measures announced by Government, is totally beyond jurisdiction; hence unconstitutional. The Model code of conduct is not having any statutory backing. It is not mandatory either. Implementation of such a code of conduct, if at all, can be resorted to by the Commission only after the issuance of the notification by the Governor. Before the issuance of such a notification, Commission cannot assume powers which are available to them in regard to the conduct of elections. On these bases, petitioner prayed for the issuance of a writ of certiorari quashing the instructions given to Government of Punjab in Annuxure p-5 message. He also prayed for the issuance of a writ of mandamus directing the State Government to implement the welfare measures announced by them ignoring the message Annexure p-5 sent by the Election Commission.

First respondent, the Union of India, filed written statement supporting the contention that neither Article 324 of the constitution of India nor any other provision of the Constitution or any election law empowers the Election Commission to legally enforce the Model Code of Conduct or their other standing instructions that are impugned in the writ petition. According to Government of India, Election Commission has been of the view that under Article 324 of

the Constitution, it is empowered to enforce the provisions of Model Code of Conduct and other instructions like bar on transfer of officials connected with the election work, bar on making payments from the discretionary funds etc. from the date it announced election. The said view of the Election Commission is not having any statutory backing and as such no legal consequences would follow from the breach of those provisions. Though the Model Code of Conduct was formulated by the Election Commission in 1968 in consultation with political parties for their guidance, the Central Government or the State Governments, were not parties in formulation of that code of conduct. The Model Code of Conduct was intended to be followed voluntarily by political parties so as to maintain election campaign on healthy lines to ensure peace and order during the campaign period. Central Government has categorically stated that the jurisdiction of the Election Commission under Article 324 of the Constitution in relation to general elections to the Assembly of a State begins only with issue of notification under section 15 of the Act. Article 324 of the Constitution vests in Election Commission the superintendence, direction and control of conduct of elections, as would be necessary for the performance of the above functions only.

On behalf of State of Punjab, second respondent, Joint Secretary to Government, Punjab, Department of Home Affairs and Justice, filed written statement dated January 13, 1997. After admitting receipt of Annexure p-5 fax message sent by the Election Commission on December 30, 1996, it is contended that though the notification for poll was to be issued on January 13, 1997, the Commission enforced restrictions on the administration with effect from December 31, 1996. By the above action. Election Commission has interfered with the administration of the State and has prohibited the implementation of various social schemes which the State Government were under obligation to fulfil, Election Commission should not have interfered with the implementation of the schemes announced prior to the commencement of election process, which commenced only by the issue of notification by the Governor. According to the State Government, Election Commission is competent to exercise its powers and to issue guidelines for enforcement of the Model Code of Conduct only from the date of issue of the notification till the declaration of the result of the election. It was further submitted that the State of Punjab did fully comply with all instructions issued by the Election Commission in keeping with the sanctity of the constitutional body.

On behalf of the Election Commission, a detailed written statement has been filed. According to them, the Government of Kerala took steps to cvolve a code of conduct for observance by organised political parties prior to the general election of 1960. The

code was discussed and approved by representatives of leading political parties. In December, 1966, the same code was adopted at a conference of the representatives of political parties in Kerala. In 1966, that model code was accepted by the political parties in the States of Madras, Andhra Pradesh and West Bengal. In 1968, Election Commission circulated that code to all recognised political parties in India and to the State Governments. On acceptance by the political parties, it was extended throughout the country. In 1996, a series of meetings were held by the Commission with recognised political parties at National and State levels. All stressed need for observance of the model code of conduct and appreciated the efforts of the Commission to ensure its compliance. Some of the national parties even desired that the model code of conduct should be enforced at least three months prior to the date of election so that the party in power may not misuse the governmental machinery and its power for its partisan ends. The model code of conduct was not framed by the Commission unilaterally, but by the consensus of all political parties. Its implementation is necessary for the conduct of free and fair election and to ensure that no political party gets an unfair advantage by virtue of its being in power at the time of election. Announcement of election is made prior to the issuance of statutory notification, as contemplated by section 15 of the Act. If implementation of the model code of conduct is postponed to the date of notification, it will defeat the very purpose of the said code of conduct. No political party has, till date, come forward, to challenge the adherence of the model code of conduct by the Commission. Challenge now put forth by the petitioner in his individual capacity is only to be dismissed. If the model code of conduct is not followed simultaneously with the announcement of election, it would give political parties and candidates opportunity to violate the same in between the dates of announcement of election and issuance of statutory notification. That will give opportunity to parties and candidates to resort to evil practices, if not corrupt practices. If the petitioner's contentions are accepted. Election Commission will have to remain a mute spectator to blatant violations of the code of conduct and the elections will turn out to be a farce. It is to avoid such a situation that the model code of conduct provides that it shall come into force from the date of announcement of election. Apex court has, on many occasions, critically commented on the laxity of the election laws concerning election expenses as well as misuse of official machinery for the purpose of electioneering. Dilute the principle of free and fair election principle of free and fair election which is a corner-stone of our democracy. Use of official machinery for furthering election prospectus in some cases will fall outside the net of corrupt practices mentioned in section 123 of the Act, but will certainly vitiate the atmosphere of free and fair elections. Philosophy underlying the model code of conduct is that unfair

advantage should not be taken by the ruling party because of its being in power to tilt the views of the electrorate on the eve of election. The present writ petition has been filed purporting it to be in public interest. Actually, this writ petition is aimed at defeating the purpose of holding a free and fair election. In this view, it is contended that writ petition has only to be dismissed.

Chief Election Commissioner, Dr. M. S. Gill, has been impleded in these proceedings by name as fourth respondent. Allegations of mala fides have been made against him. So, he has filed a separate written statement denying those allegations. According to him, Election Commission is a multimember body, he being only a member. All its members took the decision and announced the election. He has no mala fide intention to interfere with the functioning of any Government.

Election to Punjab Legislature took place on February 7, 1997. Notification of that election was issued by the Governor of Punjab on January 13, 1997. Election Commission announced the election to the Punjab Legislative Assembly on December 30, 1996, by issuing Annexure p-4 Press Note. Side by side with the Press Note, Annexure p-5, fax message was sent to the Chief Secretary to Government, Punjab requiring them to follow the model code of conduct. State Government in their written statement admitted that they have duly complied with the instructions issued by the Election Commission in view of the sanctity of the Constitutional body. Thus, all the directions given by the Election Commission in Annexure p-5 were complied with from the date of announcement of election i.e., from Dec. 30, 1996, and the Election has been properly held on February 7, 1997. So, the issues raised in this writ petition have become academic. Even so, learned counsel appearing on either side wanted to have an authoritative pronouncement regarding the powers of the Election Commission between the dates of announcement and notification for the conduct of free and fair election. Therefore, we have heard counsel at length and we are passing this judgement.

One of the contentions raised by the counsel representing petitioner is that the Election Commission announced the election to the Punjab Legislative Assembly on December 30, 1996. When its term was to expire on March 15, 1997. The announcement made virtually two and a half months prior to the date of expiry of the term was improper and it will go to substantive the contention that Election Commission was bent upon stalling the welfare measures announced by Government in power, on December 22, 1996. Annexure p-4 is the Press Note issued by the Election Commission announcing the election to the State Legislative Assembly. Along with election to the Punjab State Legislative Assembly, bye-elections to the Houses of the People/State Legislative Assemblies and State

Legislative Councils were announced. Reasons for making the announcement early, are stated in the notification.

As per Section 15 of the Act, Election Commission is bound to hold the election for the purpose of constituting a new Legislative Assembly. In Punjab, general election was to be held otherwise than on dissolution of the existing Legislative Assembly. So, general election could be held at any time within a period of six months immediately preceding the date of expiry of the term of the Legislative Assembly. The term of the elected Legislative Assembly was to expire on March 15, 1997. So, at any time, within six months, preceding March 15, 1997, general election to the Punjab Legislative Assembly could be held. The announcement made on December 30, 1996 of the election to be notified on January 13, 1997 falls within the period of six months mentioned in Section 15 of the Act. Therefore, it cannot be said that notification violated any statutory provision.

Reasons for making the announcement for an early election are also stated in the Press Note. One such reason is presentation of Union budget and the presentation of the budgets of various States during the last week of February. According to Commission, holding of elections nearer to the date of presentation of budget will cause difficulties to the Government. The said reason is reasonable one and we do not find any ground to doubt its bona fides. Further, the Press Note states that bye-election to three Parliamentary Constituencies; biennial election to fill 13 vacancies in the Legislative Council of Uttar Pradesh; bye-election to fill one seat in the Legislative Council for Karnataka, were also announced as per Annexure p-4 Press Note. After considering all relevant factors, Commission announced general election to the Punjab Legislative Assembly; bye-election to three seats of Lok Sabha; 17 seats to various State Legislative Assemblies; one seat to Karnataka Legislative Council and 13 seats to the Legislative Council of Uttar Pradesh. The announcement of election to various bodies cannot be termed as mala fide on the basis that election to Punjab Legislative Assembly was stated to be held a few days prior to the expiry of its term. In these circumstances, we are clear in our mind that the allegation of mala fides made by the petitioner against the fourth respondent has only to be rejected and we do so.

Before proceeding further, learned counsel representing Election Commission has fairly and rightly submitted that Election Commission's actions are subject to judicial review by the High Court in exercise of the powers under Article 226 of the Constitution; that Election Commission has never tried to interfere with day to day administration of any Government and that the election process starts only on the issue of a notification contemplated by section 15 of the Act.

The short question now to be dealt with is: whether the Election Commission has any authority to direct the Government to follow model code of conduct, adopted by various political parties? The fact that a model code of conduct has been adopted by all recognised political parties, is not in dispute. As per the said code of conduct, certain norms are to be followed by the political parties and the party in power which faces election. On the eve of election, it has been agreed among the political parties that no action is to be taken to influence the electorate. The party in power is not to make use of governmental machinery for the betterment of its prospects in the ensuing elections. It is also provided that Ministers and other authorities shall not sanction grant or payment out of discretionary funds from the time the elections are announced by the Commission. So, the date of announcement by the Commission has been accepted by all political parties as a date to be reckoned for following the model code of conduct.

The argument advanced by the counsel representing the petitioner and the Central Government is that under Article 324 of the Constitution, Commission has the power of superintendence, to issue directions and to control the conduct of all elections. The conduct of election, according to the learned counsel starts only by issuance of a notification under section 15 of the Act. In support of this argument, reliance has been placed on the decisions in N. P. Punnuswami v. Returning Officer, Namkkal, A.I.R. 1952 Supreme Court 64. Hari Vishnu Kamath v. Ahmad Ishaque, A.I.R. 1995 Supreme Court 233; Mohinder Singh Gill, v. The Chief Election Commissioner, New Delhi, A.I.R. 1978 Supreme Court 851 and Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman, A.I.R. 1985 Supreme Court 1233. In the first case, appellant filed nomination for election to the Madras Legislative Assembly. Returning Officer, on scrutiny, rejected the same. He moved the High Court under Article 226 of the Constitution for the issuance of a writ of certiorari to quash the order of the Returning Officer. High court dismissed that application in view of the provisions contained in Article 329 (b) of the Const}tution. While upholding decision rendered by the High Court, their lordships took the view that the word "election" used in Part XV of the Constitution should take in the entire process to be gone through to return a candidate to the legislature and that it should have the same meaning wherever that word is used in the said part of the Constitution. In Hari Vishnu Kamath's case arising out of an election petition, their lordships followed the view expressed in N. P. Pannuswami' case (supra) that the word "election" in Article 329 (b) was used in a comprehensive sense as including the entire process of election commencing with the issue of a notification and terminating with the declaration of election of a candidate. In Mohinder Singh Gill's case (supra) also, their lordships reiterated the view that

election has a very wide notation commencing from the issue of the notification calling upon the electrorate to elect, and culminating in the final declaration of the returned candidate. Goswami, J., in his concurring judgment opined, –-

".....it is well-settled that election covers the entire process from the issue of the notification under section 14, to the declaration of result under section 66 of the Act....."

The above view has been followed in the latter decisions as well. On the basis of this statement of law made by their lordships, it is contended by counsel representing petitioner that Election Commission can give any direction to Government only after the issuance of a notification under section 15 of the Act. At no point of time prior to the issuance of the notification can the Election Commission issue any direction to any authority, it is argued.

In N. P. Punnuswami's case (supra) the Constitution Bench, quoted with approval, the following passage from Halsbury's Laws of England Edition 2, volume 12 under the heading "Commencement of the Election",---

"Although the first formal step in every election is the issue of a writ the election is considered for some purpose to begin at an early date. It is a question of fact in each case when an election begins in such a way as to make the parties concerned responsible for breaches of election law, the test being whether the contest is 'reasonably imminent'. Neither the issue of the writ nor the publication of the notice of election can be looked to as fixing the date when an election begins from this point of view. Nor, again, does the nomination day afford any criterion. The election will usually begin at least earlier than the issue of the writ. The question when the election begins must be carefully distinguished from that as to when 'the conduct and management of' an election may be said to begin. Again, the question as to when a particular person commences to be a candidate is a question to be considered in each case."

The 'writ' mentioned therein, according to us, can be the notification, contemplated by section 15 of the Act. The conduct and management of the election may start from the date of issue of notification, but it is to be considered that the election begins earlier to the date of the notification. Parties to the election will begin their activities prior to the date of notification. It can safely be held that such activities will begin from the date of announcement of the date by the Election Commission. Activities of parties during the time log between the date of announcement and the date of publication of the notification, should necessarily have effect in the ensuing election. Actions resorted to by the parties during this period may tend to

influence the electorate. Are such actions of the candidates to be curbed by the Election Commission?

In Halbury's Laws of England, Fourth Edition, volume, 15 under the heading, "684. Meaning of 'candidate." it is observed that a candidate may be guilty of bribing or treating and election expenses may be incurred on his behalf even though the bribery or treating takes place, or expenses are incurred, before he comes within the statutory definition of candidate. One becomes a candidate only on filing the nomination pursuant to the notification, but law states that his actions prior to his becoming a candidate within the statutory definition are also to be taken note of for deciding the issue as to whether he is guilty of the offence under the election law. In paragraph, 712 of the same book, it is observed that a person can incur election expenses before he has been formally adopted by a party as a candidate. An election has been held to begin for the purpose of election expenses at periods varying from four months to thirty months before the date of the poll. It states,.----

"The necessity for determining when an election begins has been criticised on the ground that the real test laid down by the statute is not one of time but of motive; expenditure must be in reference to the conduct or management of the election. As the statute expressly recognises that election expenses may be incurred before the election, it seems that the real issue in the cases considered above was the date when a particular candidate began the conduct or management of the election. This date might, at the same election, be different for different candidates."

As per this, it is crystal clear that the conduct and management of election cannot be decided with reference to the date of notification of the election. It can apply to the conduct and management of the election anterior to the date of notification.

It is the common case that Election Commission is duty bound to ensure free and fair election. For the said purpose, Election Commission is clothed with the powers emanating from Article 324 of the Constitution. According to their lordships of the Supreme Court 'A.I.R. 1978 Supreme Court 851), Constitution has made comprehensive provision in Article 324 to take care of surprise situations. Their lordships observed, ---

"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."

Goswami, J. in his concurring judgment in that decision observed,-

"The Commission may be required to cope with some situation which may not be provide for in the enacted laws and the rules. That seems to be the raison d' etre for the opening clause in Article 327 and 328 which leaves the exercise of powers under.

Article 324 operative and effective when "it is reasonably called for in a vacuous area. There is, however, no doubt whatsoever that the Election Commission will have to conform to the existing laws and rules in exercising its powers and performing its manifold duties for the conduct of free and fair elections."

In A. Neelalohithadasan Nadar v. George Mascrene, 1994 Supp (2) Supreme Court Cases 619 their lordships stated that the principle of purity of election must have its way. The Election Commission is not only to see that free and fair election is to be held, but the purity of election should also be observed. What is a meant by purity of election? According to us, it means the election should not only be free from corrupt practices but also free from evil practices. In Ghasi Ram v. Dal Singh, A.I.R. 1968 Supreme Court 1191, Hidayatullah, J., (as his lordship then was), observed, ---

"Election is something which must be conducted fairly. To arrange to spend money on the eve of elections in different constituencies, although for general public good, is when all is said and done an evil practice, even if it may not be corrupt practice. The dividing line between an evil practice and a corrupt practice is a very thin one. It should be understood that energy to do public good should be used not on the eve of elections but much earlier and that even slight evidence might change this evil practice into corrupt practice. Payments from discretionary grants on the eve of elections should be avoided."

From this statement of law, it is evident that activities on the eve of election should also be for the conduct of a free and fair election. "Eve of election" can only be the period prior to the date of notification of election. By the date of notification, the process of election starts. It is not with reference to the date after process of commencement of election, their lordships referred to the period 'on the eve of election'. So, according to us, during the eve of election also, the Election Commission should ensure that nothing which tends to interfere with the conduct of free and fair election, takes place. Viewed in this light, we are of the considered view that Election Commission should take necessary steps for conduct of free and fair election even before the date of the issue of the notification.

Petitioner has no case that Election Commission acted against any statutory provision. Their action in directing the Government to follow model code of conduct did not amount to issuing direction to act against any provision of law. When it is seen that the Election Commission has been entrusted with the responsibility to have a free

and fair election which should be pure, and the source of their power is Article 324 of the Constitution, we are clear in our mind that the action taken by them in issuing Annexure p-5 is not at all illegal or arbitrary.

The existence of political parties and their participation in election cannot be denied by any one. In the present democratic system prevailing in India, political parties play a vital role in the administration of the country. Leaders of the political parties, in their wisdom, evolved a model code of conduct, to be followed by them in election. That was so framed by them under the auspices of the Election Commission. That code does not contain any provision contrary or derogatory to any enactment. Such a code of conduct when it is seen that it does not violate any of the statutory provisions, can certainly be adopted by the Election Commission for the conduct of free and fair election which should be pure as well.

On the eve of election, political parties or candidates may come forward with tempting offers to the electorate to win their favour. If such a course is allowed to be resorted to by the parties or the candidates contesting the elections, it will certainly undermine the purity of elections. In such a situation, if Election Commission took steps to implement the code of conduct which in no way infringes any of the laws, this Court, in exercise of the powers under Article 226 of the Constitution, is not to interfere.

Election Commission has not taken any step to prevent activities of the party which is in power during the period prior to the date of announcement of the election. Knowing the situation, Election Commission announced the election more than three weeks prior to the issuance of the notification under section 15 of the Act. This period of three weeks is to apprise the political parties of the ensuing elections, for enabling them to prepare for the election. The said period intervening between the date of announcement and date of notification, is not at all unreasonable. During the short period preceding the notification, the Election Commission compels the political parties, the party in power and the candidates to behave in a manner which will not undermine conduct of free and fair election.

On the basis of the observations made by the Supreme Court regarding payments from the discretionary grants at the disposal of the Ministers on the eve of election, Election Commission suggested law to be passed on the issue. Government of India, after considering that suggestion, took a decision that instead of making provisions in the rules regulating the disbursements from the discretionary grants, a convention should be adopted that for a period of three months immediately prior to the polling no expenditure should ordinarily be incurred from the Ministers' discretionary grants. So also, the Government of India in their communication dated October

28, 1969, took the view that instead of making any specific provision in the rules regulating disbursement from discretionary grants, a convention should be evolved that for a period of three months immediately prior to the polling, no expenditure should ordinarily be incurred from a Minister's discretionary grant. These decisions taken by the Government show that Government was inclined to have conventions on these matters and not to have statutory provisions. In such a situation, the action on the part of the Election Commission in directing Governments to follow the model code of conduct adopted by the various national parties appears to be quite legal and proper.

Election Commission has categorically stated that they have not interfered with the day to day decisions of the State Government. They only wanted officers connected with election to be retained as their respective places. They also wanted to ensure the conduct of free and fair election without interference by officers as well. If permanent executives of the State took into their heads that some of the actions which the political executive wanted to implement, as violative of directions given by the Election Commission, the Election Commission cannot be faulted. No direction of the Election Commission having the effect of interfering with the day to day decisions of the Government, has been brought to our notice either. In such a situation, we are not in a position to find any illegality in the action resorted to by the Election Commission.

In view of what has been stated above, we are clear in our mind that the Election Commission are entitled to take necessary steps for the conduct of a free and fair election even anterior to the date of issuance of notification, from the date of announcement of the election. While doing so, the model code of conduct adopted to be followed by all political parties including the political party in Government, can be directed to be followed by the Election Commission. Action of the Commission in this regard cannot be faulted, for the said model code of conduct adopted by the political parties does not go against any of the statutory provisions. It only ensures the conduct of a free any fair election which should be pure.

Writ petition fails. It is accordingly dismissed.

Sd/-

K. SREEDHARAN,
CHIEF JUSTICE.

Sd/-

SWATANTER KUMAR,
JUDGE.

May 27, 1997.

HIGH COURT OF ANDHRA PRADESH

AT HYDERABAD

(Special Original Jurisdiction)

Writ Petition No. 3408 of 1998

(Decision dated 12.2.1998)

Kotha Dass Goud ***..Petitioner***

Vs.

1. **The Returning Officer, 41,** ***.. Respondents***
   Nalgonda Parliamentary Constituency
   and District Election Officer,
   Nalgonda, Nalgonda Dist., Andhra Pradesh
2. **The Election Commissioner of India,**
   New Delhi

SUMMARY OF THE CASE

Shri Kotha Dass Goud was convicted for certain offences under the Indian Penal Code and sentenced to undergo two years imprisonment. He was released from jail on 17.12.1994 after serving out the sentence. He was thus disqualified under Section 8 (3) of the Representation of the People Act, 1951 for a further period of 6 years since his release on 17.12.1994. Yet, he filed his nomination paper for the election to the House of the People from 41- Nalgonda Parliamentary Constituency in Andhra Pradesh on 21st August, 1998, suppressing the fact of his conviction and imprisonment, and filed a false affidavit before the Returning Officer. For want of information about the conviction of Shri Goud and on the basis of false information furnished by him, the Returning Officer accepted his nomination paper and included his name in the list of contesting candidates. Subsequently, the Returning Officer received information from the Commissioner of Police, Hyderabad about the conviction of Shri Goud. Thereupon, in consultation with and as per the direction of the Election Commission, he gave a notice to Shri Goud on 6th February, 1998 as to why his nomination paper should not be treated as invalid, and fixed a hearing for the purpose on 7th February, 1998. Shri Goud failed to appear before the Returning Officer and the latter rejected his nomination paper on 7th February, 1998 and removed his name from the list of contesting candidates. Against this order of the Returning Officer, the present writ petition was filed by Shri Goud, contending, inter alia, that the Returning Officer and the Election Commission had no power whatsoever to delete his name from the list of contesting candidates once his nomination had been accepted and his name included in the said list.

The High Court dismissed the writ petition, holding that in the facts and circumstances of the case, the respondents acted well within their powers in ordering deletion of petitioner's name from the list of contesting candidates by rejecting his nomination in view of Article 324 of the Constitution. The Court also held that the High Court could not interfere in the present case in view of Article 329 (b) of the Constitution, as the election process was still on.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed herein the High Court will be pleased to issue an appropriate writ or order or direction under Article 226 of the Constitution of India, declaring the action of the respondents herein i.e. the returning officer, 41, Nalgonda Parliamentary constituency and District Election Officer, Nalgonda and the Election Commissioner of India, New Delhi, in removing the name of the petitioner from the contestants of 41-Nalgonda Parliamentary Constituency as one without jurisdiction, unjust, arbitrary after calling for the records.

JUDGMENT

Present :- The Honourable Mr. Justice D. Reddeppa Reddi and The Honourable Mr. Justice A. Hanumantru

For the peitioner: Mr. Prattipari Venkateswarlu, Advocate

For the Respondent No. 1: Advocate General

For the Respondent No. 2: Mrs. C. Jayashree Sarathy (SC for E.C.).

The Court made the following order:-

W.P. No. 3408/98

ORDER

(PER THE HON'BLE SRI JUSTICE D. REDDEPPA REDDI)

One of the contesting candidates, viz., Sri Kotha Dass Goud, from 41-Nalgonda Parliamentary Constituency, the election of which is scheduled to be held on 22nd February, 1998 is the petitioner herein. Admittedly, he was convicted for offences under Sections, 450, 395, 397, 326, 324 R/W Sec. 149 of the Indian Penal Code and sentenced to undergo two years imprisonment. He was released from jail on 17-12-1994 after serving out the sentence. Yet, he filed his nomination before the first respondent, the Returning Officer of the above referred constituency, on 28-1-1998, suppressing the fact of his conviction and undergoing imprisonment for a period of two years in the affidavit and the proforma for furnishing information under Sec. 8 of the Representation of People Act, 1951(for short 'the Act') he has signed and filed along with his nomination papers. The scrutiny of all the nominations filed was conducted on 29-1-1998. However, for want of information about the conviction of the petitioner and on the basis of information furnished by him the first respondent included his name in the list of contesting candidates and allotted him 'Arrow' symbol. Subsequently, she received information from the Commissioner of Police, Hyderabad about the petitioner's conviction. Thereupon, in consultation with and as per the directions of the second respondent, viz., Election Commission of India, she caused a notice dt. 6-2-1998 on the petitioner to show cause why his nomination paper should not be treated as invalid and rejected as he suffered disqualification under Sub-section (3) of Sec. 8 of the Act at 11 A.M. on 7.2.1998. It is stated that the petition submitted his explanation through his agent on 7-2-1998. But, it does not appear to have been received by the 1st respondent. Therefore, she recorded that the petitioner failed to appear before her at the time and date specified in the show cause notice and passed the order in proceedings No. C4/1119/98 ordering rejection of petitioner's nomination and removal of his name from the list of contesting candidates from 41-Nalgonda Parliamentary Constituency. Even before the receipt of the said order, the petitioner filed this writ petition on 9-2-1998 and it came up for admission on 10-2-1998. After hearing the preliminary arguments, we adjourned the matter to 11-2-1998, ordering notice to the learned Advocate General. Then, the matter was heard at length on 11-2-1998.

Sri M.V. Ramana Reddy, the learned Senior Counsel appearing for the petitioner, is fair enough to admit that the petitioner suffers disqualification prescribed under Sec. 8(3) of the Act. Yet, he strenuously contends that once a candidate's name is included in the list of contesting candidates the respondents have no power whatsoever to delete his or her name from the list of contesting candidates or reject his or her nomination paper. According to him, there is no provision either in the Constitution of India or in the Act and the Rules made thereunder, conferring such power on the respondents. In opposition, it is contended by the learned Advocate General that the provisions of Art. 324(1) of the Constitution of India confer such power on the respondents. It is also his submission that there is embargo upon this court to entertain this writ petition in view of the provisions of Art. 329(b) of the Constitution of India. Sri C.P. Sarathy, learned Senior Counsel, appearing for the respondents, supplemented the arguments of the learned advocate general by placing before us a copy of the order of Division Bench of Allahabad High Court in W.P.Nos. 2990(MB)/1996 and 3015(MB)/1996. In view of these rival contentions, the questions that arise for our consideration may be formulated as under:

1. Whether the Election Commission of India in exercise of its powers conferred under Art. 324(1) of the Constitution of India has the power to order deletion of name of a candidate from the list of contesting candidates notified as per rules by rejecting his nomination; and

2. Whether the provisions of Art. 329(b) of the Constitution of India place an embargo on the power of this court to interfere into the matters pertaining to the conduct of elections after the process of election has been set into motion consequent on issuance of an election notification.

Both the questions are no longer rest integral in view of the law declared by the Apex Court in N.P. PONNUSWAMI Vs. RETURNING OFFICER, NAMAKKAL (1) and MOHINDER SINGH Vs. CHIEF ELECTION COMMISSIONER (2)

In Ponnuswamy case (1 supra) Fazl Ali, J, speaking for the Constitution Bench, referring to various decisions and Halsbury's Law of England as to the meaning to be given to the word 'election' as used in Art 329(b) observed as under:

"..... That word has by long usage in connection with the process of selection of proper representatives in democratic institutions, acquired both a wide and a narrow meaning. In the narrow sense, it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling or a particular candidate being returned unopposed when there is no poll. In the wide sense, the word is used to connote the entire process culminating in a candidate being declared elected. In SRINIVASULU V. KUPPUSWAMI, AIR (15) 1928 Mad. 253 at P. 255 the learned Judges of the Madras High Court after examining the question, expressed the opinion that the term 'election' may be taken to embrace the whole procedure whereby an 'elected member' is returned, whether or not it be found necessary to take a poll. With this view, my brother, Mahajan J, expressed his agreement in SAT

NARAIN V HANUMAN PARSHAD, AIR (33) 1946 Lah. 85; and I also find myself in agreement with it. It seems to me that the word 'election' has been used in Part XI of the Constitution in the wide sense that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature. The use of the expression' conduct of elections' in Art 324 specifically points to the wide meaning, and that meaning can also be read consistently into the other provisions which occur in Part XV including Art. 329(b). That the word 'election' bears this wide meaning whenever we talk of elections in a democratic country, is borne out by the fact that is most of the books on the subject and in several cases dealing with the matter, one of the questions mooted is, when the election begins. The subject is dealt with quite concisely in Halsbury's Law of England in the following passage see p. 237 of Halsbury's Laws of England, Edn. 2, Vol. 12 under the heading commencement of the Election":

'Although the first formal step in every election is the issue of the writ, the election is considered for some purposes to begin at an earlier date. It is a question of fact in each case when an election begins in such a way as to make the parties concerned responsible for breaches of election law, the test being whether the contest is 'reasonably imminent'. Neither the issue of the writ nor the publication of the notice of election can be looked to as fixing the date when an election begins from this point of view. Nor, again, does the nomination day afford any criterion. The election will usually begin at least earlier than the issue of the writ. The question when the election begins must be carefully distinguished from that as to when the conduct and management of an election may be said to begin. Again, the question as to when a particular person commences to be a candidate is a question to be considered in each case."

The discussion in this passage makes it clear that the word election can be and has been appropriately used with reference to the entire process which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process." (para 7)

In Mohinder Singh's case (2 supra) the Apex Court declared:

"Article 324(1) vests in the Election Commission 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 the President and Vice-President held under the Constitution. Article 324(1) is thus couched in wide terms..." (para 113)

".... It is true that in exercise of powers under Article 324(1) the Election Commission cannot do something impinging upon the power of the President in making the notification under Sec. 14 of the Act. But after the notification has been issued by the President, the entire electoral process is in the charge of the Election Commission and the Commission is exclusively responsible for the conduct of the election without reference to any outside agency. We do not find any limitation in Art 324(1) form which it can be held that where the law made under Art. 327 or the relevant rules made thereunder do not provide for the mechanism of dealing with a certain extraordinary situation,

the hands of the Election Commission are tied and it cannot independently decide for itself what to do in a matter relating to an election. We are clearly of opinion that the Election Commission is competent in an appropriate case to order re-poll of an entire constituency where necessary. It will be an exercise of power within the ambit of its functions under Article 324." (para 119)

In view of the above, we have no hesitation to conclude that in the facts and circumstances of this case the respondents acted well within their power in ordering deletion of petitioner's name from the list of contesting candidates by rejecting his nomination.

On the next question also, the law is clear and categorical. In Ponuswami's case (1 supra) this question is answered in the following terms.

"The question now arises whether the law of elections in this country contemplates 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 an other after they have been completed by means of an election petition. In my opinion, to affirm such a position would be contrary to the scheme of Part XV of the Constitution and the Representation of the People Act, which as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any Court. It seems to me that under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. Article 329(b) was apparently enacted to prescribe the manner in which and the stage at which this ground, and other grounds which may be raised under the law to call the election in question, could be urged. I think it follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other court. If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any, rectified, there will be no meaning in enacting a provision like Art. 329(b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by the High Court at the pre-polling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought up before it! (para 9)

The same views was reiterated in Mohinder Singh's case (2 supra) in the following terms:

"The plenary bar of Art. 329(b) rests on two principles: (1) The peremptory urgency of prompt engineering of the whole election process without intermediate interruptions by way of legal proceedings challenging the steps and stages in between the commencement and the conclusion. (2) The

provision of a special jurisdiction which can be invoked by an aggrieved party at the end of the election excludes other form, the right and remedy being creatures of statues and controlled by the Constitution....." (para 30)

"Diffusion, even more elaborate discussion, tends to blur the precision of the conclusion in a judgment and so it is met that we synopsize the formulations. Of course, the condensed statement we make it for convenience, not for exclusion of the relevance or attenuation of the binding impact of the detailed argumentation. For this limited purpose, we set down our holdings:

1. (a) Article 329(b) is a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of the result.

(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."

In the decision of the Division Bench of Allahabad High Court referred to supra, the facts are almost similar. They were also cases where the Returning Officer eliminated the candidates from contesting election by rejecting their nominations after their names were found to be valid and symbols were allotted to them. However, following the dicta laid down in Ponnuswami's case (1 supra) and Mohinder Singh's case (2 supra) the Bench dismissed the writ petitions, with the following prelude:

"One would have thought that after the decision of a Constitutional Bench of Hon'ble Supreme Court in the case of N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and others (Union of India and State of Madhya Bharat (Interveners) reported in Supreme Courts Reports Vol. III 1952 Page 218, amplified in the case of Mohinder Singh Gill and another Vs. The Chief Election Commissioner, New Delhi and others reported in AIR 1978 Vol 65 SC 851 such writ petitins would not have been filed.

In the light of the above discussion, we have no option but to dismiss the writ petition as not maintainable. It is, accordingly, dismissed. No costs.

Immediately after the pronouncement of the Order, the learned counsel for the petitioner made an oral request seeking permission for grant of special leave to appeal to the Supreme Court. But we reject the same as we are of the view that this case does not involve a substantial question of law of general importance which needs to be decided by the Honourable Supreme Court.

Petition dismissed.

ELECTION COMMISSION OF INDIA

BEFORE

Hon'ble	Hon'ble	Hon'ble
Shri G.V.G. Krishnamurty	**Shri T.N. Seshan**	**Dr. M.S. Gill**
Election Commissioner	**Chief Election Commissioner**	**Election Commissioner**

In Re : INDIAN NATIONAL CONGRESS

Dispute Case No. 1 of 1996 : Under Para 15 of the Election Symbols (Reservation and Allotment Order, 1968.

BETWEEN

Arjun Singh .. ***Petitioner***

And

The President Indian National Congress .. ***Respondent***

SUMMARY OF THE CASE

The Indian National Congress is registered as a political party with the Election Commission under Section 29A of the Representation of the People Act, 1951. It is also recognised by the Election Commission as a National party under the Election Symbols (Reservation and Allotment) Order, 1968 and the Symbol "Hand" is reserved for it throughout India.

A split took place in the party in 1995, resulting in the formation of two groups headed by Shri P.V. Narasimha Rao and Shri N.D.Tiwari respectively. On 16th January, 1996, a petition was filed by Shri Arjun Singh, claiming to be the working President of Indian National Congress, before the Election Commission under para 15 of the Symbols Order, praying for a declaration that the group headed by Shri N.D.Tiwari was the real Indian National Congress. The petitioner prayed, in the alternative, that the said group may be recognised as All India Indira Congress and allotted a new Symbol. The matter was heard by the Commission on 12th & 13th February, 1996. Applying the test of majority as upheld by the Supreme Court in the case of Sadiq Ali Vs. Election Commission and Others (AIR 1972 SC 187), the Commission, by a majority decision (2:1), decided on 12th March, 1996 that the group headed by Shri P.V.Narasimha Rao was the Indian National Congress, as it enjoyed superior majority support both in the orgnisational and legislature wings of the party. The Commission also rejected the case of the petitioner that the other group was not functioning according to the provisions of the party constitution.

The Commission, however, observed that the Indian National Congress, as well as a large number of other political parties, had failed to hold their organisational elections for years and had been functioning on ad-hoc basis. The Commission, therefore, decided to issue independent notices to all such parties to ensure that they complied with the provisions of their party constitutions to hold regular periodic organisational elections.

Having rejected the main prayer of the petitioners to declare their group as the Indian National Congress, the Commission, however, registered and recognised that group as a separate National party under the name of All India Indira Congress. [The Commission subsequently reserved the symbol " Lady Offering Flowers" for that party. Its name was also changed as "All India Indira Congress (Tiwari)" following a direction of the Supreme Court.]

Advocates for Petitioner : **Mr. D.D. Thakur Senior Counsel and Messers, Lalit Bhasin, Aswini Kumar, Neeraj Sharma, N.M. Bhatt, M.K. Singh, Iqbal Siddique, Jaspal Singh and Ms. Nina Gupta and Ms. Kiran Bharadwaj.**

Advocates for Respondents : **Messers Devendra Dwivedi, O.P. Sharma, B.A. Desai Senior Counsel & Messers Ranji Thomas, W.A. Noomani, G. Seshagiri Rao, Ashok Bhan, and Nanda Kumar.**

UPON having heard the submissions made by the respective counsel for the parties on 12 and 13 the documents available on record and also the facts and circumstances and propositions of law placed before and the written submissions filed by both the parties on 16th February, 1996, the Elecion Commission of India is pleased to pass the following order:—

ORDER

PER: G.V.G. KRISHNAMURTY AND M.S. GILL ELECTION COMMISSIONERS (MAJORITY)

The "Indian National Congress" is a registered and recognised National Party from 22.9.1989 and the symbol 'Hand' is reserved for it under the Election Symbols (Reservation and Allotment) Order, 1968 (hereinafter refered to as the 'Symbols Order'), as per the records of the Election Commission of India (hereinafter referred to as 'Commission').

2. **On 16.1.1996 Shri Arjun Singh claiming to be the Working President of the Indian National Congress, filed a petition under para 15 of the Symbols Order, praying for declaration that the group headed by Shri N.D. Tiwari is the real Indian National Congress. The Petitioner submitted that since February, 1994, the Indian National Congress headed by Shri P.V.N. Rao has been functioning in gross violation of the party Constitution and alleged that a coterie of functionaries at the helm of party's affairs had subverted the party Constitution, in order to retain control over the party and continue to run the same in an arbitrary and ad-hoc manner. No elections had been held to elect members to the various party organs as provided for under the party constitution since 1994 when they were due, resulting in denying the primary and active members of the party of their right to express and effect their will and elect the office bearers of the party. The Petitioner's Group consisting of party's members from all levels of the party organisational and legislative wings had sought to revive the party's Constitution and the intra-party democracy.**

3. **The petitioner stated that the results of these efforts by the petitioner's group was to earn the wrath of the coterie entrenched in power and culminated in the expulsion of the petitioner i.e. Shri Arjun Singh on 30th January, 1995. Further, he stated that on 19th May, 1995 at a convention of 3,00,000 Congress Workers held in Delhi, vindicating the stand taken by the petitioner's group, Shri N.D. Tiwari was elected as Congress President. According to the**

petitioner, as a retaliatory measure, Shri N.D. Tiwari was also expelled from the party on 20.05.1995. Therefore, the Petitioner submits that his group led by a constitutionally elected leader, became the real 'Indian National Congress'. Drawing the attention of the Commission to para 16A of the Symbols Order, the petitioner also submitted that the Indian National Congress represented by Shri P.V.N. Rao is liable to face the consequences of its failure to act in consonance with the Party Constitution and as such it may have to lead to the freezing or withdrawl of symbol 'Hand' allotted to it by the Commission.

4. **In view of the foregoing, the applicant appealed that the Commission may be pleased to allot the 'Hand' symbol to the All India Indira Congress led by Shri N.D. Tewari; and declare that the applicant group and/or 'All India Indira Congress' as it would like to be called, is the real and legally constituted "Indian National Congress".**

5. **The petitioner also stated that the Congress Workers Convention of 03.12.1995 held at New Delhi decided that the name of the Party be changed to "All India Indira Congress" in order to avoid any legal complications, as elections were round the corner. It was also resolved at this convention that a new party be formed as a measure of abundant caution alternatively and that an application for registration be filed under Section 29A of the Representation of the People Act, 1951 before the Election Commission. However, this would be without prejudice to its continuing to be the real "Indian National Congress" and it is only a precautionary step to avoid any complications which may arise. The petitioner also stated, in the alternative, that if his plea that his Group is the real Indian National Congress is not found acceptable, for any reason, then his group also satisfies the requirements of paragraphs 6 and 7 of the Symbols Order and hence requested that it may be registered and recognised as a National Party in the name "All India Indira Congress" as members of the applicant group have polled more than 4% of the votes cast in the last election held, in more than four States in India. The Petitioner enclosed a list of members of the working Committee of the Congress who attended the meeting on May 26, 1995 presided by Shri N.D. Tiwari and also the resolutions passed at that meeting.**

6. **The petitioner in his interim application on the same day i.e. 16th January, 1996, prayed for an interim order for the following:**

"a) grant the election symbol 'Hand' to the real Indian National Congress, headed by the applicant herein, and now known as the All India Indira Congress as per the application under Section 29A of the Representation of People Act, pending before this Hon'ble Commission, till the disposal of the aforesaid application under Para 15 of the Election Symbols (Reservation & Allotment) Order, 1968;

b) in alternative, to freeze the 'Hand' Symbol;

c) in alternative to prayer(a) above, grant any of the following free symbols as a common symbol in the given order of preference:

1) Pair of Bullocks

2) Folded Hands (Namaste)"

7. **The Commission issued notice on 30.1.1996 to both the petitioner and respondents who were informed that written pleadings on their side, if any, should be sent so as to reach the Commission before 6.2.1996. A copy of the application filed under para 15 of the Symbols Order by Shri Arjun Singh was also sent to the Indian National Congress headed by Shri P.V.N. Rao alongwith the Notice.**

8. **The Commission fixed 9.2.1996 as the date for hearing both the parties. In the meanwhile, on 7.2.1996 Shri Ranji Thomas, Advocate on behalf of the Indian National Congress headed by Shri P.V. Narasimha Rao filed an application for the grant of two weeks' time for filing appropriate reply/written submission in the matter on the ground that as the applicant has moved an application alongside for being registered as a political party under section 29A of the Representation of the People Act, 1951 under the name 'All India Indira Congress' and as points of facts or law are interlinked all the applications may be taken up together.**

9. **The Commission, after considering the matter and also taking into account the urgency involved in giving an early decision and also keeping in mind the ensuing elections to Lok Sabha and to Legislative Assemblies in Six States due in the first half of 1996, decided to hold the hearings in the dispute as scheduled.**

10. **Accordingly, the parties were heard by the full Commission on 9.2.1996 in the matter of registration under Section 29A of the Representation of the People Act, 1951 and in the matter under para 15 of Symbols order on 12.02.1996 & 13.02.1996. The Petitioner and the Respondent filed their written statements on 8.2.1996. A rejoinder was also filed by the petitioner on 11.02.1996.**

11. **After examining the respective please and averments it could be seen that three issues mentioned below, are there before the Commission for determination under Para 15 of the Symbols Order.**

1. **WHETHER THE PETITIONER'S GROUP HEADED BY SHRI N.D. TIWARI IS THE REAL 'INDIAN NATIONAL CONGRESS'. AS CLAIMED?**
2. **IF NOT, WHETHER THE SAID GROUP IS ENTITLED, AS PRAYED ALTERATIVELY, TO BE DECLARED AND RECOGNISED AS "ALL INDIA INDIRA CONGRESS", AND**

ALLOTED A NEW SYMBOL EITHER "TWO BULLOCKS" OR "FOLDED HANDS" (NAMASTE)?

3. **WHETHER ANOTHER ALTERNATIVE PRAYER OF THE PETITIONER TO FREEZE THE SYMBOL "HAND" OF THE RESPONDENT "INDIAN NATIONAL CONGRESS" IS JUSTIFIED, IN THE FACTS AND CIRCUMSTANCES OF THE CASE?**

We, after having carefully examined and analysed all the facts and circumstances of the case, the documents and evidence furnished by both the groups in support of their respective claims and also having heard the detailed submissions made by the learned Senior Counsel Shri D.D. Thakur for the Petitioner and learned Senior Counsel Shri Devendra Dvivedi for the Respondents, would like to examine the issues seriatum.

FIRST ISSUE

WHETHER THE PETITIONER'S GROUP HEADED BY SHRI N.D. TIWARI IS THE REAL "INDIAN NATIONAL CONGRESS" AS CLAIMED?

12. **The gravamen of the Petitioner's group is that the 'Indian National Congress' under Shri P.V. Narasimha Rao has failed on its part to hold elections for posts in the party since 1994 and ignored the importance of restoration of democracy in the internal matters of the Congress Party. It was submitted that the Constitution of the party did not permit extension of the term of the President and office bearers neither directly nor indirectly which 'ordinarily' is for a term of two years and that has to be interpreted and implemented very judiciously. In any case, the Constitution is silent on as to who could extend the term of the President or the working committee itself. If a political party flouts the provisions of its Constitution and evades its mandate, it loses its legitimacy. For this reason alone, the Commission is well within its competence to invoke the principle of 'quawarranto' in determining the status of this group vis-a-vis the respondents.**

13. **In view of this, it was submitted by the learned Counsel, Shri D.D. Thakur, that the principle laid down by the Hon. Supreme Court (Sadiq Ali & another vs. Election Commission of India and others (AIR 1972 S.C. 187) that numerical strength in the party and the legislature should be the criteria for determining the legitimacy of a group as the real party, would not be applicable in the instant case to determine as to which of the groups represents the real party. The learned Counsel has endeavoured to draw a distinction between where (a) split occurs because of majority allegiance and (b)**

division in the party as a result of gross violation of the provisions of the Party's constitution. The learned counsel Shri D.D. Thakur also stated that in regard to the members of the State Legislature and Parliament, the respective strength has to be considered in the light of the Tenth Schedule of the Constitution and that the circumstances of the case warrant recognising the group led by Shri N.D. Tiwari as 'Indian National Congress'. The members of Legislature would constitutionally be recognised as members of that party once his plea is accepted by the Commission.

14. **In regard to the maintainability of the petition under para 15 of Symbols order, while paralelly having moved an application for registration under Section 29A of the Representation of the People Act, 1951, it was mentioned by Shri Thakur that a similar relief was granted by the Commission in 'Dispute case No.7 of 1991' in the matter of Janata Dal (Samajwadi). The learned counsel also submitted that regardless of the question of whether the petitioner group is entitled to claim 'Hand' Symbol or not, it is entitled to recognition as a National Party under Para 7 of the Symbols Order, as it fulfilled the requirements of Para 6(2)(B) of the Symbols Order, of having more than 4 per cent of the total number of valid votes polled by all contesting candidates in the last general elections in the States of Punjab, Tamil Nadu, Delhi and Nagaland which entitled the party to secure the status of a "National Party" under the Symbols Order.**

15. **The learned counsel Shri Thakur was also at pains to posit that the test of numerical strength is not applicable in the instant case as the Respondent group is no longer a democratic set up having lost its mandate by flux of time. Further he submitted that in terms of the Commission's own order dated 16.10.1994 (in the Dispute No.1 of 1994) the Respondent group, because of its failure, despite being put on prior notice by the Commission to constitute the various governing bodies/committees and elect their office bearers in accordance with the party Constitution, to do so is liable to be derecognised in terms of Para 16A of the Symbols Order resulting in the loss of its reserved Symbol "Hand".**

16. **On behalf of the Respondent group, the learned counsel Shri D.N. Dwivedi, emphatically stated that the interpretation sought to be placed by the petitioner that the ratio in Sadiq Ali's Case is not applicable in the instant dispute and such submission is in derogation of the law laid down by the apex court which not only governs and binds the parties but the Commission as well. Accordingly, he submitted that there have to be separate cases filed and an opportunity for the Respondent to be heard has to be given in that proceeding, as and when filed under section 29A of Representation of the People Act, 1951 or Para 16A of Symbols Order 1968. The question of the proposed penal action under para**

16A cannot be invoked in a proceeding under para 15 of the Symbols Order, he submitted.

17. **It has been contended by the learned Counsel, Shri Dwivedi that any acceptance of the plea for derecognition of the Indian National Congress would hit the Fundamental Right guaranteed under Article 19 and that any constraints on the party can be put only by law made by legislature under Article 19 clause 2 and not by an administrative order. He reiterated that the Commission can at best be said to possess powers of looking into the alleged violations by the political party of its constitution only under section 29A of the 1951 Act and not under para 15 of the Symbols Order. These are two separate provisions of law and the remedies available are separate and can not be heard and disposed of together nor mixed.**

18. **It has further been contended that Indian National Congress as a recognised National political party has conducted its affairs through a history of a long tradition of various usages, conventions and customs governing the working of the party. The Congress Working Committee extended the term of various Committees and office-bearers vide Resolution dated 4.4.1994 and authorised the Congress President to reconstitute the various Committees after consultation. The eventuality of declaring that neither of the rival sections or groups is the recognised party can arise only in an extreme case where the party gets sharply divided vertically and the rival sections are so evenly balanced that it would be unjust and iniquitous, for the members and the voters alike, to decide that one or other of the two rival sections of the party is the real party. Such a case does not exist in the instant dispute.**

19. **The Learned Counsel has further submitted that if the arguments of the Commission's observations in its order in the George Fernandes case are accepted, it would tantamount to rewriting para 15 and making it redundant and inoperative. Such proposition could lead to a few members of a party staking claim for recognition under para 15 through unscrupulous means and that would encourage mercenaries creating chaos in the political ecology thereby causing havoc in the party system in our country, which is grossly injurious to democracy. Further, the observations referred to in para 44 to 54 of the Janata Dal case decided by the Election Commission are not part of the ratio of the case and, therefore, they can not be taken to be the basis on which the Commission arrived at its findings in that case. Any action proposed in terms of para 52 of the Commission's order of 16.10.1994 will require, as condition precedent, prior individual notice to be served to each party and separate proceeding should be held. It was urged by the learned Counsel that the Petitioner's group was very much a party to such alleged non-compliance of the provisions of the Party constitution and they should have used the forums available within the party.**

The provisions of the constitution of the Party should be read in a contextual rather than textual sense.

20. **Therefore, the learned counsel for Respondents prayed that the Petition be dismissed in view of the fact that the Petitioner failed to produce any evidence in support of his case and thus having miserably failed in justifying his case. He also failed in satisfying the tests laid down by the Supreme Court of India Sadiq Ali's case which covers fully all the matters of the present dispute. The case stands as the law of the land and is binding on all the Courts and tribunals.**

21. **The Commission has given careful anxious consideration to the various points raised and submissions made before the Commission by the Learned Counsel on both sides.**

The applicability of the ratio of the test of majority of numerical strength being determinative of the legitimacy of one of the sections being the real party, was laid down by the Supreme Court in 'Sadiq Ali and another vs. Election Commission of India and others (AIR 1972 SC 187)', which is a landmark judgement on the subject. The Hon'ble Court observed:

> **"As Congress is democratic organisation, the test of majority and numerical strength, in our opinion, was a very valuable and relevant test. Whatever might be the position in another system of Government or Organisation, numbers have a relevance and importance in a democratic system of Government or political set up and it is neither possible nor permissible to lose sight of them. Indeed it is the view of the majority which in the final analysis proves decisive in a democratic set up."**

22. **In the very judgement, the Supreme Court has also pointed out the difficulties in ascertaining the details of primary membership because of possible factions and bogus membership and the necessity for finding the truth within a short span of time. It has been laid down that under para 15, "the Commission has to act with a certain measure of promptitude and has to see that the inquiry does not get bogged down in a quagmire." The difficulty of ascertaining the wishes of the primary members has also been highlighted in the judgement. Having regard to the above, the Court has held that test of majority and numerical strength "is not only a germane and relevant but a very valuable test and it cannot gainsaid that in deciding which group is the party, the Commission has to decide as to which group constitutes the party".**

23. **In this view of the matter, the Commission has no hesitation, whatsoever, in holding that the Supreme Court judgment in Sadiq Ali which lays down the test of majority is eminently applicable in the present case and is binding. And according to the facts, it is the**

only criteria that should be taken into account as per the Supreme Court's decision. By their own admission, the petitioner group has not staked any claim of numerical majority in the legislative wing, either in Parliament or in State Legislative Assemblies nor has produced any evidence in the matter. Instead, what has been sought to be admitted to be shown through the annexure to their letter dated 11th February, 1996 is that the petitioner group has secured more than 4% votes out of total valid votes polled in respect of Parliament in the States of Haryana, Punjab, Tamil Nadu and Tripura, while securing a similar percentage in the last State Assembly elections in the States of Madhya Pradesh, Delhi and Nagaland. The affidavits filed by the party sworn by the members of the State Legislatures or Parliament indicating their allegiance to the group is not in regard to the fact of establishing their numerical majority but to place before the Commission of the percentage of votes polled by such persons which is adequate for the group to secure recognition under para 6 of the Symbols Order as prayed by them alternatively. In regard to the organisational position, the Petitioner's party has claimed a support of 3,00,000 primary members on the basis of the Congress Workers Convention held on May, 1995.

24. **The petioner who averred that in the Congress Workers Convention held on 19.5.95 nearly 3 Lakhs primary members participated, has not even produced the list of names of members of AIIC, PCCs and DCCs who attended and voted in the proceedings and resolutions on the date. The petitioner party has also not been able to produce any evidence in regard to its numerical superiority over the respondent group in the organisational or the legislative wings of the party nor any affidavits to that effect have been filed before the Commission.**

25. **It was decided by the Supreme Court that the Election Commission is a "Tribunal" within the meaning of Art. 136(7) of the Constitution of India. Hence an appeal lies to the Supreme Court, by Special leave, from a decision of the Election Commission — recognising or de-recognising a political party or which group, within a particular party, constitutes that party, for being entitled to the election symbol allotted to that party, where the party has been divided into groups or factions owing to defection, each claiming to constitute that party (Sadiq Ali and another Vs. Election Commission of India and others (AIR 1972 S.C. 187) & A.P.H.L.C. vs. Capt. W.A. Sangma and others (AIR 1977 S.C. 2155). It was also held by the Supreme Court that "Tribunal" referred to under Art. 136 of the Constitution does not mean the same thing as Court but includes all adjudicating bodies constituted by the State and are invested with judicial as distinguished from purely administrative or executive, functions. (AIR 1954 S.C. 520; AIR 1965 S.C. 1595).**

26. **As a tribunal, the Election Commission, in deciding a symbol dispute under the Symbols Order, is required to accept and judge the evidence before them (AIR 1971 S.C. 2939). It has also to give the parties opportunity to be heard in accordance with principles of natural justice, while following the norms of the law of Evidence. According to such norms contained in The Evidence Act, 1872, the burden of proof in a case lies on the petitioner and not the respondent.**

The Sections are as follows:

> **Section: 101. Burden of Proof— Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.**
>
> **When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.**
>
> **Section : 102. On whom burden of proof lies — The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**

27. **In support of their case, the petitioner submitted that since the respondents failed to hold organisational elections from early 1994, the office bearers ceased to exit and therefore, the organisation is guilty of violation of the party constitution. It was admitted by the petitioners that even though such elections were not held in the past the petitioner and all other leaders in the group including its President were parties to several meetings of the working committee and other committees and they actively participated in them, even after the expiry of due date. Therefore, it is not open now to the petitioners to call such meetings illegal and without authority. The petitioners also admit that there were no elections in the party earlier for 20 years from 1972 to 1992 and they participated in the organisation and activities without demur. The alleged guilt of party violating its constitution in not holding elections in time for various posts has to be shared by both the petitioner and respondents. The settled maxim in law which is applicable here is, "In pari delicto portioris conditio defendentis" (In case of equal guilt the condition of the defendent is more favourable) Ref. Wharton's Law Lexicon.**

28. **Having been a party also to the violation of the Congress Party's constitutional provisions for sometime, the petitioner is now estopped from arguing that the party ceased to exist due to exclusive guilt of the respondent. In their view of the matter, the submission of the petitioner can not be accepted on that ground for granting the relief sought in the petition and, therefore, the submission of the petitioner that the party ceased to exist can not be accepted as a ground for the relief sought in the petition.**

29. **It is true that democracy and its spirit must pervade all institutions of the country for all times to come according to the preamble and parliamentary democracy avowed by the people in the Constitution of India. In that light we stand by the obiter dicta made by the Commission, in Janata Dal case on 16.10.94 and we hope all political parties would elect their office bearers at the earliest according to democratic norms incorporated in their consitutions.**

30. **In this context, we would like to take this occasion to emphasise the imperative need for the political parties, which form the base of the pyramid of democratic structure, to ensure themselves to be the first, not the last to practise inner-party democracy. There cannot be democracy without political parties; nor can there be political parties without politicians. When we talk of a politician, he is expected essentially to be a person whom the people choose as their leader, firstly to render service to society in social economic and political fields; secondly to represent their interests, if elected, in the legislature endeavouring to uphold the values the people cherish, and expect from him to follow them by discharging his duties for promoting positive values in national life. Obviously, political parties have their ideals. In any democratic system, they are entitled to propagate such ideals through their manifestos from time to time. If a political party violates its professed ideals, society is bound to express its distrust at some point or the other, and reject the parties being unsuitable to represent its interests.**

31. **Democracy means the right of the people, either to select or reject political parties and candidates. In a country, which is committed to democracy as a philosophy of national life, Sovereign power is vested in the people to elect their representatives for a specified period. Such elections have to be based on the bedrock of the electorate's faith in the elected representatives. It is necessary and incumbent for politicians, therefore, to ensure that their demeanour and conduct are such that they do not lead to, or result in, a crisis of confidence, either in them, or in the political parties, to which they belong, or with democratic system itself as a whole. Therefore, when elections are conducted in any democracy, the people have a right to reject or select the group of leaders who come forward before them to lead the country or the State. It is significant to note that according to the Register of the Election Commission, there are 7 National Parties, 35 State Parties (registered and recognised) and 445 registered parties in the country. Thus the total number of political parties registered with the Commission in the whole country would come to a large figure of 487.**

32. **According to Section 29A of the Representation of the People Act, 1951 political parties seeking registration are enjoined under the law to bear true faith and allegience to the Constitution of India, and to the principles of socialism, secularism and democracy, and**

also to commit in writing, that they would uphold the sovereignty, unity and integrity of India (vide, sub-section 5). Therefore, they are committed to conducting the affairs of their organisation as per their Constitution, and in accordance with the fundamental norms of democracy and its practices. If political parties, in spite of being reminded by its members, fail to hold elections periodically, and in turn fail to uphold the principles of inner-party democracy, such parties can hardly expect the nation to believe, that they would promote, encourage and practise democracy, when their leaders are elected either to Parliament or to the State Legislatures, or other elected bodies or organisations. This Commission which had the occasion to go into the failures of the political parties in having inner-party democracy, has rightly observed in its order dated 16th October, 1994 in Dispute case No.1 of 1994 regarding Janata Dal as follows:—

> **"...Non-holding of organisational elections at periodic intervals as provided for in the constitution and as and when they become due is noting but negation of the right of participation to the primary members in the decision making of the party and depriving them of their right of effective say in the running of the party's affairs. This gives rise to 'bossism' and 'personality cult' and small coteries hijack the parties. Those refusing to follow the dictates of party bosses or towing their line are thrown out of the party organisation unceremoniously and without following the provisions of the party constitution regulating the taking of disciplinary action against erring members."**

> **"...The Commission cannot remain a mute spectator for all time to come to these unsavoury happenings in political parties registered with it and specially those which are recognised by it as National or State Parties and which entitles them to several benefits under the election law at the cost of the public exchequer, like the grant of two free copies of electoral rolls at the time of draft publication and again after publication, facilities of political broadcast over AIR and telecasts over Doordarshan during general elections, privilege of exclusive allotment of their reserved symbols to their candidates, preference in the matter of seating arrangements for their polling agents and counting agents in the polling stations and counting halls and so on. While there is an obligation on the part of all registered political parties to abide by their party constitution, it is even more so on the part of the recognised parties to scrupulously observe the same, particularly in the matter of their democratic functioning."**

"...The Commission, therefore, by and through this order puts all political parties, specially those recognised by it under the Symbols Order as National or State Parties, on prior notice and on the alert that they should constitute their various governing bodies/committees and elect their office bearers at different levels in accordance with their own party constitutions within a reasonable time, say, the next four months commencing from the date of this order. Any dispute brought before the Commission thereafter under para 15 of the Symbols Order may result in a declaration that none of the rival sections or groups is the recognised party which it claims to be should the Commission observe that the organisational elections have not been conducted in accordance with the party constitution and affairs of the party are being run on adhoc basis and adhoc arrangements are the order rather than the exceptions in its organisational set up.

33. **Now, that this Commission has had the occasion to examine the delay in compliance, and in some cases total non-compliance, of the provisions of the party constitutions, in holding the elections due in the party, it would like to re-emphasise and stress in its constitutional capacity, of being the custodian of democratic processes in this country and reiterate that it would not be a mute and helpless spectator of the political parties (which are registered with the Election Commission), when they wilfully and blatantly, violate their constitution, and fail in electing office bearers in time as expected, according to the norms of innerparty democracy. Therefore, the Commission having noticed that a large number of political parties, have failed to hold elections for years and have been functioning on adhoc basis, we have, therefore, decided to issue independent notices shortly, to all the political parties registered with the Commission, to send us latest information, regarding their elected office bearers, as per provisions and procedure in their respective constitutions, alongwith all material and documentary evidence not later than 01-01-1997.**

If any political party fails to do so, the Commission may be left with no choice except to consider such legal measurers as are available, necessary and appropriate.

34. **We would also suggest, that Parliament, which is the ultimate law-making authority in the country, committed to uphold democracy as a way of life, and also ensure that it breaths in all the veins and arteries of our polity, to consider incorporating suitable provisions and amendments in the law contained in the Representation of the People Act, 1951, providing for suitable action against erring political parties, which either have not followed their constitutions or have violated them wilfully or due to negligence or**

indifference in the course of the conduct of their activities at the national and state levels. The nation and the coming generations, would be grateful to Parliament, for doing a signal service by enacting such legislation by translating its commitment to uphold democratic values, as per the Constitution into reality.

35. **We after carefully considering all the facts and circumstances, evidence and submissions placed before us, have come to the conclusion that the Petitioner's group has failed to prove and establish their case and therefore, decide the issue against the petitioner. Consequently we hold expressly that the petitioner group is not the real "Indian National Congress", as claimed. In the circumstances, the Respondent's rights would remain in tact and undisturbed.**

SECOND ISSUE

> **"If not, whether the said group is entitled, as prayed alternatively, to be declared and recognised as "All India Indira Congress" and allotted a new symbol either "Two Bullocks" or "Folded Hands-(Namaste)".**

36. **Now that we have decided the first issue holding that the petitioner's group is not the 'real' "Indian National Congress", we would like to examine their alternative prayer that they be recognised as "All India Indira Congress".**

37. **The Petitioner's group is headed by a team of leaders who actively participated in the Respondent 'Indian National Congress' and held in the past important offices in the Govt. of India and States for decades which is public knowledge and is not disputed. It is also, established that a Convention of Congress Workers was held in New Delhi on 19.5.1995 and elected Shri N.D. Tiwari as President and Shri Arjun Singh as Executive President along with other office bearers in the name of the party known as "All India Indira Congress". The petitioner has also provided a list of members, permanent invities and special invities who were present at the meeting of their working committee held on May 26, 1995. They have also annexed copies of the resolutions passed by them. Along with those documents the petitioner, has also annexed the Resolutions passed at the Congress Workers Convention held in New Delhi on 19.5.1995, together with copies of Political and Economic Documents presented at the convention.**

38. **The petitioners have also filed charts, Statements and a large number of affidavits claiming their strength which consists of Members of Parliament and Legislative Assemblies who owe allegience to them in the States of Haryana, Punjab, Tripura, Tamil-Nadu, Delhi, Madhya Pradesh and Nagaland. They have also filed documents to the effect that they have polled more them 4% of votes**

in various states which is the minimum required to make them eligible to seek recognition from the Commission as a National Party. The documents alongwith the performance of the Members of Parliament and State Legislative Assemblies owing allegiance to the petitioners group in the general elections to the House of the People/State Legislative Assemblies has been examined. It emerges that the petitioners group, based on this performance, qualifies for being treated as a recognised political party in the States of Punjab, Tamil Nadu and Tripura under Para 6 (2) (A) of the Symbols Order if the benefit of their performance as Members of Indian National Congress is given to them and in the State of Nagaland if similar benefit is accorded to them, under Para 6(2)(B) of the Symbols Order. Thus, the party would enjoy the status of a recognised political party in the States of Punjab, Tamil Nadu, Tripura and Nagaland. Since the party can be treated to be eligible to be recognised as political party in accordance with the Para 6 Symbols Order in four above mentioned States, the benefit of the status of a "National Party" throughout the whole of India is also admissible to them.

39. **The petitioner also referred to several precedents where the Commission accorded similar reliefs of recognition to parties in symbol dispute cases in exercise of their powers, in the larger in interests of democracy. They are as follows:**

1. 1971 – Indian National Congress (Jagjivan Ram & Nijalingappa)

2. 1979 & 80 – Janata Party (Secular) & BJP.

3. 1987 – Congress (J) – EC order dated 19.02.1987 (K.C. Bhalla).

4. 1989 – Congress (J) – EC order dated 27.10.1989 (Balraj Trikha)

5. 1991 – Janata Dal (Ch. Devi Lal) – EC order dated 16.04.1991 in Dispute case 7/1991.

6. 1993 – Janata Dal (Ajit) – EC order dated 14.01.1993.

40. **We do not see any reason to doubt the bonafides of the facts and, figures presented by the Petitioners group seeking recognisition as a Natinal Party and also allotment of a symbol for the party, by this Commission, in exercise of its powers under Para 29-A of the R.P. Act, 1951 read with Rules 6, 7, 15 and 18 of the Symbols Order.**

41. **The petitioners have already filed separately an application for registration as a party in the name and style of "All India Indira Congress" and sought recognition as a National Party, and the matter is pending decision before this Comission. In that case, the Respondent is a caveator and both the parties were heard by the, Full Commission separately. A decision is due shortly on the matter from the Commisson.**

42. **In the interest of justice to the parties, we do not propose to withhold our views and decision on the petitioner's prayer in regard**

to their request to accord recognition and also allot a symbol, on the ground that the decision of the Commission in regard to their registration is yet to be pronounced.

43. **After examining all the facts, circumstances, evidence and submissions placed before us, we hold that the Petitioner's Group headed by Shri N.D. Tiwari as President and Shri Arjun Singh as Executive President is found eligible to be registered and recognised as a National Party in the name and style of "All India Indira Congress", subject to the decision of the Commission, under Section 29-A of Representation of the People Act, 1951 which is due to be given shortly. It is also found to be qualified for recognition as a National Party and allotment of a symbol under Paras 6 and 7 of Symbols Order 1968.**

44. **Now let us deal with the second part of the prayer to allot the Petitioner Group a new symbol either "Two Bullocks" or "A pair of Hands (Namaste)" in that order.**

The Commission has considered this prayer carefully. In regard to the prayer of allotment of "Two Bullocks" as the symbol, the Commission has taken cognisance of the fact that at one time it was a symbol allotted to National Party and later it was frozen. In the circumstances, it was felt it would not be proper to allot that symbol to any new Party. In regard to the prayer of the petitioner to allot "a Pair of Hands" (Namaste)" as symbol, the Commission considered the view that this is a familiar and accepted way of conveying "National Greetings" in the country and therefore, it would not be appropriate to allot it as a symbol to the petitioners or, for that matter, to any National or Regional Party in the country. Therefore both the prayers of the petitioner in regard to allotment of "Two Bullocks" and "A pair of Hands Namaste" to them are not acceptable to the Commission and therefore turned down.

45. **In the circumstances, it is open to the petitioner's group to make another request to allot them any other symbol chosen from the list of free symbols.**

46. **We would now like to examine and consider the third issue.**

THIRD ISSUE

WHETHER ANOTHER ALTERNATIVE PRAYER OF THE PETITIONER TO FREEZE THE SYMBOL "HAND" OF THE RESPONDENT "INDIAN NATIONAL CONGRESS" IS JUTIFIED IN THE FACTS AND CIRCUMSTANCES OF THE CASE?

47. **We have held earlier in this order on the first issue that petitioner and his group is not the real "Indian National Congress", as claimed.**

48. **Further, in the course of this order, while deciding issue No.2, we have held that the petitioner's group is entitled to be registered and recognised as a new National Party with a new symbol. Such order stands on its own, independent of any other factor. Obviously, consequent upon the rejection of the case of the petitioner, the Respondent retains all that he was entitled to undisputed and untouched, as per settled principles of law. Further, according to the Supreme Court, even "where the circumstances are such that the Court will refuse to assist either party, the party in possession will not be disturbed. (Naman Shrinivas Kini vs Rati Lal AIR 1959 S.C. 689).**

49. **In this context, it would be appropriate to refer to the decision of a Full Bench of the Supreme Court, which had the occasion to examine the powers of the Election Commission in regard to Symbols under the Election Symbols (Reservation and Allotment) Order 1968. (A.P.H.L. Conference vs Captain W.A. Sangma and others (AIR 1977 S.C. 2155). It was observed therein:—**

> **"For the purpose of holding elections, allotment of a symbol will find a prime place in a country where illiteracy is still very high. It has been found from experience that symbol as a device for casting votes in favour of a candidate of one's choice has proved an invaluable aid. Apart from this, just as people develop a sense of honour, glory and patriotic pride for a flag of one's country, similarly great favour and emotions are generated for a symbol representing a politial party. This is particularly so in a parliamentary democracy which is conducted on party lines People after a time identify themselves with symbol and the flag. These are unifying insignia which can not all of a sudden be effaced".**

50. **It may be important to note that in that case, the Supreme Court reversed the decision of the Election Commission to freeze "flower", a reserved symbol of the APHLC, and restored the same to that party.**

51. **Exercise of any power by Election Commission to "freeze" a reserved symbol of a party may arise in very rare cases, that too consequent upon hearing an application for deregistration and derecognition of a political party. In such a case a separate proceeding has to be initiated under Sec. 29A of the 1951, Act or under Para 16A of the Symbols Order. We, therefore, hold no such relief can be accorded, while deciding a petition under Para 15 of the said order.**

52. **To be fair to the petitioner's group, it is necessary to mention, that they did not make such prayer in the main petition. Obviously, anticipating delay in the final hearing, the petitioner also made an interim application, on the same date 16.1.1996, in which he made**

such prayer, to freeze the symbol "Hand" of the Respondent, as an interim measure. During hearing as well, he has not pressed for the same.

53. **Lastly, it would be pertinent to mention that this Comission headed by the present Chief Election Commissioner (before the other Election Commissioners were appointed) in its order dated 19.2.92 in the petitions filed by Shri Arjun Singh and Others under Para 15 of Symbols order, seeking de-registration/de-recognition of the Bhartiya Janata Party as political party, and/or freezing of its reserved symbol "Lotus", observed as follows.**

> **"a party recognised as National or State party under the provisions of Symbols Order cannot be de-recognised and its reserved symbol cannot be withdrawn or frozen on the ground that the party is not functioning in accordance with the provisions of Section 29A(5), so long as its registration under the said Act continues".**

54. **The aforementioned views of the Commission had also been upheld by the Supreme Court in its dismissal of Special Leave Appeal (Civil) No.8738 of 1992 (Arjun Singh Vs. Bhartiya Janata Party and Anr.) dated 28.8.92.**

55. **In view of the above, we, after having considered the facts and circumstances, and the law inforce, and judgements of courts, reject the prayer of the petitioner's group to freeze the reserved symbol "Hand" of the Indian National Congress, the Respondent herein.**

56. **Consequently, we declare that the Respondent, "Indian National Congress" is entitled to the continuance of its rights and privileges as a registered and recognised National Party, which would remain in tact and undisturbed, as they stood before the filing, during the pendency, and the disposal of this petition.**

ORDERED ACCORDINGLY

THIS DAY THE TWELFTH MARCH NINETEEN HUNDRED NINETYSIX

(M.S. GILL)	**(G.V.G. KRISHNAMURTY)**
ELECTION COMMISSIONER	**ELECTION COMMISSIONER**

ORDER

PER:- T.N. SESHAN, CHIEF ELECTION COMMISSIONER (MINORITY)

This is the third occasion that the jurisdiction of the Election Commission has been invoked under Para 15 of the Election Symbols (Reservation and Allotment) Order, 1968 (Symbols Order for short) for determining the question as to who constitute the Indian National Congress. The Indian National Congress is a registered and recognised National Party under the Symbols Order and at present, the symbol 'Hand' is reserved for it in all States and Union Territories by the Commission.

2. Ever since India achieved Independence and had its "tryst with destiny" on that historic night of 14th-15th August, 1947 and later proclaimed itself to be a Sovereign Socialist Secular Democratic Republic on the 26th January, 1950, the Indian National Congress has been the ruling party at the Centre except for short breaks in 1977-79 and 1989-91. The Party has also been in power in most of the States for most of the post-independence years. During this period, the party had the first schism in 1969 when it got divided into factions. The party had another split in 1978 when it got further divided into two factions. On each of these occasions, the split in the party was attributed to the non-observance of the party constitution by those who were then at the helm of the party affairs and by their not allowing the party to be run in accordance with its own constitution. On both those occasions it was the petitioner group led by late. Smt. Indira Gandhi who had approached the Commission who succeeded in securing the verdict in their favour.

3. This, third time also, the grievance of the petitioner group led by Shri Arjun Singh and Shri Narayan Dutt Tewari is very similar, namely, that Shri P.V. Narasimha Rao who was elected as the Party President in February, 1992, and some others close to him had given the party constitution a complete go-by and were unconstitutionally occupying posts in the party hierarchy. It is best to describe their grievance in their own very words as made out in their petition dated 19.1.96:

> "This application under paragraph 15 of the Election Symbols (Reservation & Allotment) Order, 1968 is being filed in view of the fact that since February, 1994 the Indian National Congress has been functioning in gross violation of the Party constitution. A coterie of functionaries at the helm of party affairs had subverted the Party Constitution in order to retain their control over the party and continue to run the same in an arbitrary and ad-hoc manner.
>
> 2. That it is a matter of public knowledge that no elections had been held to elect members to the various party organs and bodies as provided for under the party constitution. Moreover, these bodies have either not been convened at all or have not met at the frequency provided for under the constitution and rules. These practices had resulted in denying the primary and active members of the party their right to express and effect their will. This absence of intra-party democracy was enforced by a section of the party leadership with a view to retain their control over the organisation without being accountable to its members.

3. That elections to party posts at all levels were replaced by the practice of nominating those in favour and who in turn then had a vested interest in keeping all democratic practices at bay. Thus, issues of vital national importance such as religious and communal harmony and dealing with communal forces, criminalisation of the political system, corruptions at high places, rising prices, unemployment, etc. were never discussed or debated at any party forum or body which enjoyed the support and confidence of the party's primary members. No member had therefore any opportunty to express his view on any issue whatsoever and writ of a small section of the party was thrust upon an organisation whose members are spread across the length and breadth of the country. A table showing some of the important bodies where elections are over due and how many times they have been convened as opposed the constitutional provisions is Annexed hereto as Annexure A (not annexed to this order)

4. That against this background, the applicant group consisting of party members from all levels of the party's organisational and legislative wings, had sought to revive the party's Constitution and enforce intra-party democracy. However, the result of these efforts by the applicant group was to earn the wrath of the coterie entrenched in power. This struggle culminated in the expulsion of Shri Arjun Singh on 30.1.1995. On 19.5.1995, a Convention of 3,00,000 Congress workers in Delhi vindicated the stand taken up by the applicant group and elected Shri N.D. Tiwari as Congress President. As a retaliatory measure, Shri N.D. Tiwari was also expelled from the Party on 20.5.1995.

5. That in view of these developments, the applicant group led by a constitutionally elected leaders, became the real Indian National Congress. And received the support and confidence of the majority of not only the Indian National Congress's primary and active members, but also a substantial number of those who held positions prior to 19.5.1995 in the organs and bodies of the party. The applicant group also satisfies the requirements of paragraph 6 and 7 of the Symbols Order and will continue to be recognised as a National Party. Members of the applicant group have polled more than 45 (sic) of the votes cast in the last election held in more than four States in India.

6. It is further submitted that the claim of Indian National Congress led by Shri P.V.N. Rao with respect to the Hand Symbol is hit by paragraph 16A of the Election Symbol (Reservation & Allotment) Order, 1968. The Election Commission under the powers vested in it under the above said provision had issued notice vide its order dated 16.10.1994 in Dispute Case No. 1 of 1994 to all political parties at all levels that failure on their part to function in consonance with their constitution would render them liable to have their recognition suspended or withdrawn. The consequences of such an action by the Commission against the political parties would necessarily lead to freezing or withdrawal of allotment of such political parties election symbol.

7. It is beyond dispute that the Indian National Congress led by Shri P.V.N. Rao has failed to abide by this direction and is liable to face either of the above consequences. It is also not disputed that the Applicant Group in order to restore primacy of the constitution, has conducted such an exercise in accordance with the constitution of the Indian National Congress on 19th May 1995 and when Shri N.D. Tiwari was elected President by 3,00,000 primary and active members of the Indian National Congress. This above-mentioned congregation, which assembled in Delhi also proved that the current leadership of the Indian National Congress manifest in bodies such as the AICC, PCC, CWC etc. no longer enjoyed the support and confidence of its members. And this section of active and primary members having resolved to commit itself to the social, economic and political principles formulated by Mahatma Gandhi, Pt. Nehru, Maulana Azad, Lal Bahadur Shastri, Indira Gandhi and Rajiv Gandhi and further resolved to furthering the same.

8. That thereafter on 03.12.1995 at the Congress Workers Connvetion held at Delhi, this Commissions correspondence to the effect that there is no party by the name of Indian National Congress (Indira) registered with it was discussed. The Convention decided that the name of the Party be changed to All India Indira Congress as measure of abundant caution in order to avoid any legal implications as elections were round the corner. It was also resolved at this convention that a new party be formed as a measure of abundant caution and that an application for registration be filed under Section 29A of the Representation of People's Act before the Election Commission. However, this would be without prejudice to its continuing to be the real Indian National Congress and only a cautionary step to avoid and complications which may arise. Copies of the various resolutoins adopted by the applicant group are annexed herewith as Annexure B (collectively) (not annexed to this order).

9. In view of the aforesaid facts and circumstance, the applicant group claims, as a right, to be recognised as and representative of the real Indian National Congress, now known as the All India Indira Congress

PRAYER

It is, therefore, prayed that this Hon'ble Commission be pleased to:

a) allot the 'Hand' symbol to the All India Indira Congress led by Shri N.D. Tiwarijji;

b) declare that the applicant group and/or All India Indira Congress is the real and legally constituted Indian National Congress".

4. The respondent group has denied these allegations of the petitioner group. They also question the locus stand of the petitioners. They say that the petitioner group is a separate party and by the very act of filing an application on 15.12.1995 for registration of their party as a separate party under Section 29A of the Representation of People Act, 1951 are stopped from calling themselves as a rival group in the Indian National Congress within the meaning of para 15 of the Symbols Order. This is what they have mainly

to say in their reply of 9.2.1996 to the petitioner's application dated 19.1.1996:

.....

3. That the petition under reply is not maintainabale in terms of paragraph 15 of the Symbols Order, 1968 in as much as no dispute or genuine conflict can be said to have arisen as to which if the two groups is recognised political party known as the INDIAN NATIONAL CONGRESS for the purpose of the symbols order, 1968. It is only when there are two rival sections or group of a political party, each claiming to be that party, that a dispute or conflict can be said to arise. The group led by Shri Narayan Dutt Tewari can by no stretch of imagination be called or regarded in the eyes of the law as a rival faction or claimants or group as the term rival even in ordinary usage means "one that equals another in the possession of desired qualities or aptitude" or "someone or something that reaches the same standard as another person or thing". Rivalry implies a certain comparability. It is submitted that the group headed by Shri Narayan Dutt Tewari cannot, on the basis of any known norm or criteria under law be regarded as a rival group as against the Indian National Congress headed by Shri P.V.Narasimha Rao. There is no sufficient material or evidence adduced along with the petition even on the preliminary point that a dispute has arisen between the group headed by Shri Narain Dutt Tewari and the Indian National Congress of which Shri P.V. Narasima Rao is the president.

4. That unlike in 1969 and 1978, when a sizeable number of MPs State Legislators, AICC Members and PCC Delegates had parted company, there has been no split in the Indian National Congress in the instant case. Only a microscopic minority of members have joined the faction led by Shri Narain Dutt Tiwari. To give a broad example out of 261 Lok Sabha Members, only nine have joined the Tiwari Group while 252 Lok Saba Members continue to allegiance to the Indian National Congress. Similarly out of 6205 PCC members only 180 have proclaimed their loyalty to the group of Shri Narain Dutt Tewari. Out of 594 DCCs only 3 DCCs Presidents have joined the Tiwari's faction. Thus an overwhelming majority of the total number of members returned on Congress tickets to the two Houses of Parliament as well as to the State Legislators owe their allegiance to the Indian National Congress headed by Shri P.V. Narasimha Rao. So is the case with the AICC members and PCC delegates. In view of the foregoing, it is, therefore, abundantly clear that the group headed by Shri Narain Dutt Tiwari, cannot be said to have any claim nor do they have any credentials or any right to lay any claim to be Indian National Congress. The petition, therefore is frivolous and has no substance, and therefore, on this ground alone is liable to be dismissed.

.....

PRELIMINARY SUBMISSIONS

6. That the Indian National Congress is a recognized national party under the Election Symbols (Reservation & Allotment) Order, 1968 and has as its symbols "HAND" for the purposes of elections. The Indian National Congress is a voluntary political organisation having Constitution and the rules made thereunder for regulating the party's affairs and working at different levels and of different organs of the Party. The Indian National Congress has played a pivotal and dominant role in political life of the country freedom struggle as well as in the affairs of the Indian State since after independence. It has been Continuously in power at the centre since independence except for a short span of time between 1977-79 and latter between 1989-91. In most of the States also the Indian National Congress has played a predominate role. In this way, the Indian National Congress has lent strength and continuity to the Party system in India.

7. That historically the most important role that the Indian National Congress has performed in the Nation's life is to impart stability and legitimacy to the key institutions of Indian democracy. This was possible largely and only because the Indian National Congress has all through its existence run its own affairs in accordance with the democratic principle and the provisions of its constitution. The constitution of Indian National Congress is most democratic of its kind and its various committees at the National, State and District levels - such as AICC/CWC, PCC/State executive and DCC have been fashioned and have evolved parallel to the key representative institutions of democracy at the National, State and district levels. The Indian national Congress has always ensured and constitutes to ensure active involvement and participation of its functionaries and the members of the various committees in the decision making process regarding important policy and party matters falling in their domain. Every members enjoyes freedom to express his views as well as grievances freely in the party fora. On their part its members are duty bound to function as per the discipline of the Party and breach of discipline by any individual or committee attracts disciplinary action as per the relevant provisions of the constitution.

8. As per the Constitution of the Indian National Congress the working committee is the highest executive authority of the Congress and was the power to carry out the policies and programmes laid down by the AICC and shall be responsible to the AICC. It is the final authority in all matters regarding interpretation and application of the provisions of the Constitution. The Congress Working Committee also has the power to take such disciplinary action as it may deem fit by the following a set procedure.

.....

9. That elections to the various Committee have been held periodically in the past. In spite of the fact that after the tragic assassination of Shri Rajiv Gandhi, the Party was in a state of shock and demoralisation, the Congress Leadership under the Presidentship of Shri P.V. Narasima Rao

took immediate steps to start the process of elections to the various committees from bottom to top. There was a national-wide drive for enrollment for primary as well as active members in which process millions of members were enrolled throughout the country. Then a process was set in motion in which elections were completed from the block level Committee upto the highest constitutional body i.e. Congress Working committee as well as that of the Congress President. Mr. P.V. Narasimha Rao was again elected unanimously as the President of the Indian National Congress. This elective process found its culmination in holding the Party's preliminary (sic) session at Tirupati on 14th, 15th, and 16th of April, 1992 in which the Members of CWC were duly elected. Under the Constitution the term of various committees is orginarily for two years. Therefore on 5th April, 1994 the CWC in accordance with the provisions of the Constitution authorised the Congress President to reorganise and restructure the various committees wherever he deemed fit.

.....

11. That unfortunately certain disgruntled elements consumed by personal ambitions started acting in manner prejudicial to the interests, of the Indian national Congress. The Petitioner Mr. Arjun Singh, in particular, engaged in an open defiance of the party discipline and even while he was a member of the CWC and the Union Cabinet he embarked upon maligning the Congress policies, encouraging and abetting dissidence in the Party and making public utterance distorting party's policies and ideaology. The Congress President, therefore, in exercise of the power, vested in him under rule 3A of the Disciplinary Rules under article xix(f) of the constitution of the Indian National Congress placed Shri Arjun Singh under suspension. A show cause notice was subsequently served on behalf of the disciplinary committee which met under the Chairmanship of Shri K.V. Bhaskar Reddy, considered the reply of Shri Arjun Singh, the latter was removed from the primary membership and membership of all the committees of Indian National Congress with immediate effect for six years for anti-party activities.

12. That after the disciplinary action had been taken against him, the Petitioner, Shri Arjun Singh, in league with certain other disgruntled elements, having realised that they were not getting any response in the Congress Party, proceeded to carry on the propaganda and campaign against the policies as well as leadership of the Party from outside the Indian National Congress. In pursuance of this objective, certain leaders called a convention styling itself as congress convention in utter disregard and in total contravention of the provisions of the Constitution of the Indian National Congress which specifically lays down a clear procedure for convening the meetings of the various committees such as CWC, AICC and plenary session. The aforesaid gathering was nothing but an amorphous mass of individuals and a motley crowd consisting of people who had nothing to do with the Indian National Congress. The so-called convention which got converted in the form of an unruly public meeting

(the proceedings of which were televised) is said to have elected Shri Narain Dutt Tewari as President in place of Shri P.V. Narasimha Rao. The meeting was neither a meeting of the Indian National Congress nor of its any constitutionally recognized bodies nor had it been convened in accordance with any provision of the Constitution of Indian National Congress. The whole exercise was nothing but a farce and a fraud on the nation's political process and party system. Even the narration of events in the petition manifestly shows that those who conducted the meeting intended to severe their links from the Indian National Congress. After the so-called election of Shri N.D.Tiwari by the meeting as President of the "Indian National Congress", Shri Tiwari, was expelled from the primary membership of the party for his anti-party activities by the Congress President Shri P.V. Narsimha Rao, in exercise of his powers conferred by the Constitution.

13. That in view of the foregoing, it is abundantly clear that (a) there cannot be said to be any conflict or dispute in the eyes of law warranting an enquiry to determine which of the two groups is the Indian National Congress; (b) there has been no split in the Party and (c) the group led by Shri Narain Dutt Tewari has no legal or moral right to claim to be the Indian National Congress. It is respectfully submitted that for the purpose of para 15 of the Symbols Order, 1968, the Party of which Shri P.V. Narasimha Rao is the President and which has its headquarters at 24, Akbar Road, New Delhi, alone is the Indian National Congress.

.....

PARAWISE REPLY:

16. The allegations made in para 3 are denied. The working of the Indian National Congress has always been marked by democratic norms and it was this democratic procedure which enable persons like Mr. Narain Dutt Tiwari and Mr. Arjun Singh to become Members of the AICC and CWC. It may be pertinent to point out here that before their expulsion from the Party for their anti-party activities, which was done in strict compliance with Constitutional provisions, the two leaders played a leading role in the formulation and the shaping of the key policies of the Party. The two leaders were called upon to move the important resolutions such as the political and economic resolutions in which they not only explained but strongly defended the policies laid down by the various party fora. It is a matter of charge in that after having been associated with the Party policies in this manner, they should now choose to malign the Party. Their allegations are false and an unsuccessful attempt to dissociate themselves from decisions to which they have been a party. The poor and negligible response that the group led by Shri Narain Dutt Tiwari got from the Members of the Indian National Congress from all over the country speaks volumes about the false nature of their allegations.

17. The contents of para 4 and 5 are false and are a self-serving interpretation and projection of certain activities and action taken by the

group led by Shri Narain Dutt Tiwari which were in total defiance and in contravention of all democratic norms as well as the provisions of the Indian National Congress. What happened on 19th May, 1995 is public knowledge and certain proceedings of the so-called convention were even televised. The meeting held on the 19th May was illegal in which rank outsiders participated in what was a big farce. Every action taken in that meeting was illegal, invalid and totally unconnected with normal activities of the Indian National Congress. The so-called election of Shri Narain Dutt Tiwari was illegal and if he was really elected President of a body such a body was other than the Indian National Congress. The said meeting may have been of a group of people called from the general public to fraudulently deceive and confuse the people. The petitioners have not provided with any list of such persons who attended the aforesaid meeting. The circumstances in which Shri Arjun Singh was expelled from the Party have already been explained earlier. It is also submitted that the reference to paragraphs 6 and 7 of the Symbols Order are disingenuous and totally inappropriate.

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22. PRAYER

It is, therefore, prayed that this Hon'ble Commission may be pleased to dismiss the petition of the group led by Shri Narain Dutt Tiwari purporting to be under paragraph 15 of the Election Symbols (Reservation & Allotment) Order, 1968.

5. Being conscious of the fact that a decision in the matter brooked no delay in view of the fast approaching general elections to the House of the People and some State Legislative Assemblies, the Commission heard the matter on 9th, 12th and 13th February on day to day basis, despite its other heavy engagements. The Commission is obliged to the learned Senior Counsel Shri D.D. Thakur representing the petitioner group and the learned Senior Counsel S/Shri D.N. Dwivedi and O.P. Sharma, representing the respondent group, for ably assisting the Commission with succinct oral presentation of their respective cases supplemented with their written arguments for which they were granted time, at their request, upto 16th February, 1996.

6. The case of the petitioner group as made out in its written pleadings and orally by its learned senior counsel Shri D.D. Thakur is that the Indian Natinal Congress (INC for short) fell into disarray primarily because those who were in command of the party chose to betray the trust and confidence of millions of primary members spread over the entire country and resorted to unconstitutional measures to keep themselves in positions of power in perpetuity. According to him, the last organisational elections were completed by 16th April, 1992 when the election of AICC was held in Tirupathi Session of the Congress. The President of the party was elected on 27th February, 1992. The constitution of the party (Article VI) provides that the term of office of all elected office bearers will be ordinarily two years and

no elected office bearer could continue after the period fixed in the constitution. Thus, the term of all elected office bearers including the Party President expired by April, 1994. The working committee of the Party was given power to take decisions in such situations which are enumerated in sub-clause (v) of clause (f) of Article XIX, but that clause did not include within its ambit the power to enlarge or extend the term of office of an elected office bearer. The working committee under clause (j) of Article XIX could deal with special situations. But neither sub-clause (v) of Clause (f) of Article XIX nor clause (j) thereof confer upon the working committee power to enlarge and extend the term of an elected office bearer. Even if it be assumed that Article XIX (j) could be invoked in special circumstances to extend the term of office of elected office bearers, no special circumstance existed justifying exercise of such power and, in any event, there was no ratification of any such decision of the working committee by the AICC, as enjoined by the said clause (j) of Article XIX. As a result of the failure on the part of the bosses of the party to honour the party constitution, the rank and file, raised their voice as expected. Millions of members and party workers across the country with ambitions to rise up the ladder in the party hierarchy, who were feeling dissatisfied at the course chosen by the coterie at the top, ultimately held the "Congress Convention" at Talkatora Gardens in New Delhi on the 19th May, 1995 wherein 3,00,000 primary members, past members, active members and other participated and unanimously denounced the coterie and elected Shri Tewari as the Party President. Shri Thakur stated that the main inspiration for such restoration of democracy in the internal funcitoning of the party came from this Commission's order dated 16.10.1994 in Dispute No. 1 of 1994 (in *re* Janata Dal) wherein the importance of restoration of democracy in the internal affairs of the political party was emphasised. By that order the Commission gave four months time to all political parties in the country to complete organisational elections according to their constitutions and put them on prior notice that in the event of failure on the part of any political party and a dispute arising in the party resulting in a split in might consider withdrawing recognition of that party. He added that because of the aforesaid order of the Commission the subdued protest within the party got ignited into a major crisis since what was considered to be absolute discretion of the party bosses was declared to be the party's constitutional obligation to hold elections within the period mentioned by the Commission. The petitioner group further says that the Symbols Order speaks of a split in a political party which can take place in a variety of ways. When a section of a particular organ of a party differs with another in the course of deliberations and decides to part company with the other it becomes a split but then it has to radiate vertically down to the grass roots. It is not necessary that the vertical division should divide the party into two equal or even comparable halves. Even a splinter group could constitute a faction. In such a case there can be no dispute as to whether any of them did or did not step out of the constitution - both being the creation of the constitution. In such a situation the principles laid down by the Hon'ble Supreme Court in Sadiq Ali's case (AIR 1972 SC 187) will have to be made applicable. But

where one faction repudiates or flouts the party constitution of which it is the creation and shows no adherence to it, such faction cannot ask for the principles in Sadiq Ali's case to be applied in relation to it.

7. The petitioner group further contends that so far as the members of the State Legislatures and Parliament are concerned that matter will have to be considered in the light of the Tenth Schedule to the Constitution of India inserted by the Constitution (52nd Amendment) Act, 1985. If in the circumstances indicated above, the party headed by Shri Tiwari is constitutionally recognisable as Indian National Congress, the members of Legislature belonging to INC have constitutionally to be recognised as members of such constitutionally recognisable party.

8. The case of the respondent group in its written pleadings and oral submissions of its learned senior counsel S/Shri D.N. Dwivedi and O.P. Sharma is that the group of individuals on whose behalf the petitioner has filed the present petition under para 15 of the Symbols Order have also filed an application under Section 29A of the Representation of the Pepole Act, 1951 for registering themselves as a new party under the name "All India Indira Congress". Their application under section 29A was filed on 15.12.1995 while this petition was filed on 19.1.1996. The petitioners, therefore, are debarred and estopped from filing this petition under para 15 of the Symbols Order, 1968. Section 29A of the R.P. Act and para 15 of the Symbols Order are not alternative courses but instead are mutually exclusive. The petitioner group's application under Section 29A has destroyed their locus under para 15 of the Symbols Order, as after moving an application for being registered as a new party, the petitioners have ceased to be a group of INC within the meaning of para 15 of the Symbols Order, 1968.

9. The respondent group further contends that their case is fully covered by the judgement of the Hon'ble Supreme Court in the Sadiq Ali's case (supra) in which the Apex Court has upheld the rule of majority and numerical strength applied by the Election Commission as the relevant test to determine which of the two rival sections of a party is that party in a dispute under para 15 of the Symbols Order. This test has been applied in each and every case decided so far by the Commission. The petition group cannot be said to be a rival section within the meaning of para 15 in as much as they enjoy the allegiance of a microscopic minority of the members of Indian National Congress both in legislative and organisational wings and they cannot lay claim to be the real Indian National Congress on the strength of their following in the organisational and legislative wings. This the reason why the petitioner group has not furnished any information and material as envisaged under para 15. The plea of the petitioner group that the Sadiq Ali case is not applicable in this case is in derogation of the law laid down by the Apex Court and any attempt to distinguish the Sadiq Ali's case is disingenuous and impermissible in law. The scheme underlying para 15 does not envisage any test other than the majority rule.

10. The respondent group further points out that the petitioner group seeks to rest its whole case on certain observations and directions of this

Commission, in its order dated 16.10.94 in Dispute Case No. 1 of 1994. Relying on those observations of the Commission, the petitioner group has built up its case that since the Indian National Congress has not complied with the directions contained in para 52 of the aforesaid order, it is open to the petitioner group to invoke para 15, if not for getting the petitioner's own group declared as the Indian National Congress but with the objective of getting the Indian National Congress de-recognised under para 15. If the proposition being canvassed by the petitioner group is accepted, it will mean that the observations of the Commission in paras 44 to 54 of the said order tantamount to rewriting para 15, changing it beyond recognition and making the law laid down by the Apex Court in the Sadiq Ali case as redundant and inoperative. The respondent group contends that directions contained in para 52 of that order, even though couched in general terms and intended "to put all political parties on prior notice and on the alert" that their failure to hold the elections as stipulated in their respective constitutions within a period of four months might result in their derecognition, were nonetheless passed in an adversary proceedings between the two factions of the Janata Dal in which all the political parties were not given an opportunity of being heard. Even though the aforesaid order was communicated to all recognised parties. "for information, guidance and necessary action", the same cannot be deemed to be in the nature of a regulation inasmuch as passing of a Regulation requires a certain procedure. Any action proposed to be taken in terms of para 52 of the order dated 16.10.1994 can be lawfully taken only after the political parties have been served with prior notice and have been given opportunity to be heard in a separate proceeding on the question of the penal action proposed to be taken as provided in para 16A and not para 15 of the Symbols Order.

11. The further case of the respondent group is that the Indian National Congress has a long tradition of running its affairs along democratic lines and in strict compliance with the provisions of its constitution. The petitioner's plea that the terms of various committees of the Indian National Congress as well as of the office bearers having expired after a completion of two years and no election having been held has created a situation in which the working of the organisation at different levels is lacking in legitimacy and legality is an absurd proposition and in derogation of the various provisions of the party constitution as well as to a long tradition of various usages, conventions and customs which govern the working of the Indian National Congress. Article VI, X, XII, XIII, XVI, XVIII, XIX and XXVI(G) of the party constitution are relevant for the present purposes. A bare reading of these provisions makes it abundantly clear that even though the term of every Congress Committee and its office bearers is ordinarily for two years, the Congress Working Committee, in exercise of its powers given to it by Article XIX(J), to meet any special situation, shall have the power to take such action in the interest of the Congress as it may deem fit. The Congress Working Committee extended the terms of the various committees and office bearers vide Resolution dated 4.4.94 and authorised the Congress President to reconstitute the various committees after consultations. It is true that the

same article provides for rectification of any action taken which is beyond the power of the Working Committee not later than 6 months but the Congress Working Committee was of the view that ratification of the decision taken by the Working Committee was not required under the provisions. The respondent group added that in case such a ratification was held to be necessary the same would be done on a short notice.

12. This take us straight to the question whether the petitioner group has the locus stands to maintain their present petition dated 19.1.96 under para 15 of the Symbols Order. The status of the petitioner group has been questioned on two grounds. Firstly, it is contended that the petitioner group is a separate party and not a rival group in the Indian National Congress. Secondly, even if it is a group of the Indian National Congress, it being in microscopic minority cannot be regarded as a rival group within the meaning of para 15 of the Symbols Order.

13. It is a matter of record that on 15.12.1995 the petitioner group filed an application for registration under the name "All India Indira Congress" under section 29A of the Representation of the People Act, 1951. Does that stop the petitioner group from claiming to be a rival group in the Indian National Congress and raising a dispute in terms of para 15 of the Symbols Order? The answer to that depends on the facts of the case as pleaded and disclosed in the application and other connected and relevant records. Here it would be pertinent to see what the petitioner group said in their application for registration dated 15.12.1995. It was stated in that application that "this application for registration of the party named "All India Indira Congress" is being filed as and by way of abundant caution to avoid any legal complications subsequently and is without prejudice to the applicant's claim that it represents the real Indian National Congress and is entitled to claim the 'Hand' symbol". This was again the stand taken by Shri Thakur in his oral submissions and he stated that the registration of the petitioner group would become necessary if its main claim as being the Indian National Congress was not accepted by the Commission. He added that the petitioner group had given to itself the name of All India Indira Congres to distinguish itself from the respondent group. In view of the above factual position, the door of the Election Commission cannot be shut to the petitioner group that it has destroyed its right even to make a claim that it is a rival or splinter group of the Indian National Congress within the meaning of para 15 of the Symbols Order. The Commission has in the past entertained similar petitions under para 15 of the Symbols Order on more than one occasion when the petitioners had separately applied for registration under Section 29A by way of abundant caution. Suffice here to refer to the cases of Janta Dal (Samajwadi) in 1991 and Samata Party in 1994, both of whom claimed to be rival groups of the Janta Dal despite their applications for registration as separate parties by way of abundant caution. The case of the present petitioners cannot, therefore, be treated differently in the face of the above precedents.

14. The second preliminary objection is that the petition group is so small and in such microscopic minority that it cannot be regarded as a rival group within the meaning of para 15 of the Symbols Order. The learned senior counsel for the respondent group was, however, not in a position to categorically state as to what percentage of members of a party could be regarded as forming a rival group. In the present case, it was an oft repeated claim on behalf of the petitioner group that a Congress Workers Convention was held on 19.5.95 at the Talkatora Gardens in New Delhi which was attended by 3,00,000 persons and where Shri Tewari was elected as the party president. The respondent group does not deny the factum of such a meeting having taken place. They, no doubt, dispute the legality of that meeting as not being the meeting of the Indian National Congress under the party constitution and where outsiders were present in large numbers. But those are the matters to be decided after making proper enquiry and certainly not a ground for shutting out the enquiry itself at the very threshold. There is, therefore, no merit in both the preliminary objections and the petition cannot be summarily dismissed, as prayed for by the respondent group.

15. Having held that the present petition is maintainable, we have to be proceed to examine the claims of the petitioner group. Their main case, to recapitulate, is that the party president, members of the Congress working..., Committee, All India Congress Committee and other committees were elected at the last organisational elections held in early 1992 and completed at the Tirupathi session in April, 1992, for a period of two years under the party constitution, and as they continued to occupy those posts unconstitutionally beyond their term of office, the rank and file of the party feeling frustrated ultimately denounced them and elected Shri Tewari as the party president at the convention held on 19.5.95 at New Delhi. The petitioner group thus claims to be the only legitimate claimant to the name and symbol of the Indian National Congress for having revived the party constitution to which all party members are wedded.

16. The respondent group denies the averment of the petitioner group and avers that the party president and all committees at various levels are functioning according to the party constitution, as the organisational elections every two years are not a mandatory requirement and the constitution provides flexibility in this regard and the two year term can be extended which has been done. Their further case is that if there is a split in a party, the Hon'ble Supreme Court has laid down in Sadiq Ali's case (supra) that the test of majority is the 'only' test for determining the claims of the rival or splinter groups.

17. Before proceeding further, it is, therefore, necessary to find out first whether the rest of majority is the 'only' test to be applied in the present case, as contended by the respondent group, or the claims of the rival groups can be tested on the touchstone of the party constitution, as contended by the petitioner group.

18. A careful reading and analysis of the Hon'ble Supreme Court's decision in Sadiq Ali's case does not support the contention of the respondent

group. The Hon'ble Supreme Court has nowhere stated that the test of majority is the 'only' test to be applied by the Election Commission whenever any dispute is brought before it for determination under para 15 of the Symbols Order. In that case, the Commission had first applied the case of the party constitution in relation to functioning of the rival groups and come to conclusion that neither of the groups could be said to be acting strictly in accordance with the party constitution for making expulsions and counter expulsions and holding rival meetings of various committees and that in those circumstances, the test of party constitution having failed, the test of majority was the most relevant test to be applied to the facts and circumstances of that test. The Hon'ble Supreme Court affirmed that decision in the following terms.:

> "As regards point No. 4, the Commission observed that the majority test was a valuable and relevant test in a democratic organisation. The test based upon the provisions of the Constitution of the Congress canvassed on behalf of the Congress 'O' was held to be hardly of any assistance in view of the removals from membership and expulsions from the Committees of the Congress of the members belonging to one group by those belonging to the opposite group. Reference was also made in this context to the rejection of the requisition sent by some members of Congress 'J' for convening a meeting of the All India Congress Committee. The Commission then considered another test, namely, that based upon the aims and objects as incorporated in the Constitution of the Congress. It was observed that none of the two groups had challenged in any manner or openly repudiated these aims and objects. The test based upon the aims and objects was consequently held to be ineffective and neutral. Applying the test of majority, the Commission observed that Congress 'J' had majority out of the total number of members returned on Congress tickets to the Houses of Parliament as well as the majority out of the sum total number of members of all legislatures returned on Congress tickets although in some States like Gujarat and Mysore, Congress 'O' had majority in the Legislatures. As regards the organisational wing of the Congress, the Commission came to the conclusion that Congress 'J' enjoyed majority in the All India Congress Committee as well as amongst the delegates of the undivided Congress. Decision was accordingly given that for the purpose of paragraph 15 of the Symbol Order, Congress 'J' was the Congress for which the symbol "two bullocks with Yoke on" had been reserved.
>
> .....
>
> Controversy between the parties has ranged on the question whether the Commission has taken into account all the available facts and circumstances of the case. The Commission in this context considered the various criteria for determining which of the two groups, Congress 'J' or Congress 'O' was the Congress and came to the conclusion that the criteria other than that of the numerical strength or majority could not provide a satisfactory solution.

.....

As Congress is a democratic organisation, the test of majority and numerical strength, in our opinion, was a very valuable and relevant test. Whatever might be the position in another system of government or organisation, numbers have a relevance and importance in a democratic system of government or political set up and it is neither possible nor permissible to lose sight of them. Indeed it is the view of the majority which in the final analysis proves decisive in a democratic set up.

.....

We can consequently discover no error in the approach of the Commission in applying the rule of majority and numerical strength for determining as to which of the two groups, Congress 'J' and Congress 'O' was the Congress party for the purpose of paragraph 15 of the Symbols Order (emphasis supplied)."

19. **From what is quoted above, can it be inferred that the Hon'ble Supreme Court has excluded all other tests from, and held the test of majority as the sole decisive test for, the determination of any issue arising under para 15 of the Symbols Order? The answer has to be in the negative. The Hon'ble court has held the test of majority in a democratic organisation as a 'relevant and valuable test', but not the only or sole decisive test. Therefore, the party constitution cannot by any stretch of imagination be said to be wholly irrelevant for considering the claims of the rival groups under para. 15 of the Symbols Order and those claims cannot be reduced to mere game of numbers.**

20. **Interestingly, an identical contention was raised before the Commission at the time of the second split in this very party in 1978 when the group led by the late Smt. Indira Gandhi approached under para 15 for a declaration that the group led by her represented the Indian National Congress. Such a contention was repelled by the Commission in its order dated 25.1.78 in the following terms:**

"I am not inclined to agree with the view of Shri Chawla that for the purposes of paragraph 15 of the Symbols Order, the constitution of a party is not germane. His contention does not stand to reason in view of the fact that the whole case as made out in the various letters and applications of Smt. Indira Gandhi and the telegram dated 4th January, 1978 of Shri Buta Singh is that Shrimati Indira Gandhi is the duly elected president of the Indian National Congress in accordance with the provisions of the Constitution of the party. I also do not find anything in the Supreme Court's judgement in Sadiq Ali's case (supra) on which reliance was placed by Shri Chawla that the Commission should not look into the Party constitution at all and as soon as a claim howsoever frivolous is preferred the Commission should proceed

to count the heads for and against that claim. In this view of mine, I am fortified by the decisions of the Supreme Court in Rama shankar Kaushik Vs Election Commission of India (1974 (2) SCR 275) and APHLC Vs Captain William Sangma (AIR 1977 SC 2155) on which considerable reliance was placed by Shankar Ghosh. The decisions in these cases rested on the question of legality of action taken by the parties according to their party constitution or accepted principles and not solely on the majority test. In the Sadiq Ali's case to which frequent reference was made by the learned counsel for Smt. Indira Gandhi, nowhere had it been stated as to what alone would constitute the test or tests in respect of a matter falling to be determined within the meaning of paragraph 15 of the Symbols Order. Once again the Commission cannot resist the temptation to draw attention to the observations made by the Supreme Court in the APHLC case (which are very much relevant to the present case). As regards the question of test being applied generally in respect of the determination of any specific matter, the Supreme Court in the APHLC case said "the tests are not exhaustive in all cases. It is also well settled that all the tests laid down may not be present in a given case. While some tests may be present, others may be lacking". From this, it could easily be inferred that it is not humanly possible to lay down any particular test as a litmus test which and which alone would govern a matter which has to be determined by a judicial or a quasi-judicial body or authority. To take a view that the Commission, while deciding cases falling under paragraph 15 of the Symbols Order should not be concerned with the party constitution would be to introduce utter chaos in the functioning of political parties in the country and the operation of the Symbols Order would be rendered a plaything between the various shades of opinion or groups in a political party. It cannot be gainsaid that a group claiming to be a particular party must abide by its own constitution which imposes a contractual obligation on its members, unless it is shown that a clear impasse had been reached where the functioning of the party could not be carried on in accordance with its own constitution. To ensure a healthy standard of political life, the Commission should not lay down any procedure which will make it easy for the established political parties to break up at the slightest pretext. The Commission considers that a group or section which wants to form a rival group within a party must declare itself a rival group and assert that there has been a split in the party. It must show that it has exhausted all the remedies available to it under the constitution of the party to assert its majority, but that the other group has frustrated its efforts whimsically or capriciously and is not itself functioning in accordance with the provisions of the constitution of the party or democratic norms. The rival group

must also show that it has no alternative but to come to the Commission to establish its majority in the party. In the present case no such situation has been shown to exist".

21. **On appeal, the Hon'ble Supreme Court refused to interfere with this order of the Commission by their order dated 31. 1. 1978 in Civil Appeal No. 4 of 1978 (Smt. Indira Gandhi Vs. Shri K. Brahmananda Reddy and others).**

22. **The parties are voluntary organisations and the members of such organisations bind themselves into mutual obligations and privileges by means of their party constitution which is given by them unto themselves. The party constitution is the basic document which governs and regulates its functioning. Any group which is shown to have repudiated its party constitution by its conduct or otherwise cannot lay claim to be regarded as that party. The averments and assertions of the petitioner group that the respondent group is acting in violation of the party constitution and its leaders are holding on to their posts and positions in disregard of the constitutional mandate cannot, therefore, be simply brushed aside and turned a blind eye to by the Commission. This is precisely what the respondent group wants the Commission to do and which, as abovestated, it cannot do.**

23. **In the present case, it is an undisputed fact that the last organisational elections of the party were held in early 1992. The petitioner group stated that the party president was elected at such organisational elections on 27.2.92, but the party office informed the Commission in its letter dated 31.5.95 that the party president was elected on 16.2.92, which should, therefore, be taken as the correct date of his election. It is also common ground that all elective seats in the Congress Working Committee. All India Congress Committee and other committees at various levels were completed at the Tirupathi Session in April, 1992. Article VI of the party constitution provides as under:**

"Article VI-Term of Congress Committee, the term of every Congress Committees and of its office bearers, executive committee and members shall ordinarily be two years.

24. **Thus the two year term of the party president, Congress Working Committee, All India Congress Committee, etc., and its members elected in 1992 ordinarily expired by April 1994. It is again not in dispute that no organisational elections have been held subsequent to 1992. The moot point, therefore, is whether such office bearers and committees can still validly claim to be legitimately holding their posts and positions under the party constitution. The respondent group contends that the term of office bearers and committees is 'ordinarily' two years and it provides for flexibility and the term can be extended by the Working Committee if the**

situation so warrants. In support of this contention, they have relied on the provisions of Article XIX (j) of the party constitution which provides as follows:

> **" (j) To meet any special situation, the Working Committee shall have the power to take such action in the interest of the Congress as it may deem fit; provided however that if any action is taken which is beyond the power of the Working Committee as defined in this constitution, it shall be submitted as early as possible to the AICC for ratification but not later than six months."**

They claim that the Working Committee, by its resolution dated 4.4.95, extended the terms of the various committees and office-bearers and authorised the party president to reconstitute the various committees after consultations and that the president has accordingly reconstituted those committees. According to them, organisational elections could not be held to reconstitute the various committees after the normal expiry of their two year term as such elections would have clashed with the Assembly elections and, therefore, the Working Committee passed the above resolution in exercise of its power under the above quoted Article XIX (j) of the party constitution.

25. **The petitioner group refutes the above contention of the respondent group on the following grounds:**

Firstly, Under clause (j) of Article XIX, the Working Committee cannot extend its own tenure.

Secondly, there was no extension of the tenure of the President whose two year term had expired in February, 1994.

Thirdly, clause (j) can be invoked if certain extraordinary or special circumstances exist. Nothing to this effect has been shown to or placed before the Commission.

Fourthly, if it was intended to give powers to the Working Committee to defer or postpone elections and to extend the life of various committees and office-bearers it would have found a mention in sub-clause (v) of clause(f) of Article XIX, which reads as under:

"(v) In special cases, to relax application of provision under Article V(A) (a) (i), V(B), VIII(b) & VIII(c)".

A plain reading of the said sub-clause makes it abundantly clear that wherever it was intended that power be conferred on the Working Committee to relax any provision of the constitution, a specific provision was made. If the intention was to give such power of extension of tenure of various bodies and office bearers to the Working Committee, Article VI would have found a place in sub-

clause (v) of clause (f) of Article XIX. Since it is not mentioned therein, it cannot be argued that such a power can be found in clause (j).

Fifthly, and most significantly, it has been conceded by the respondent group that there was no ratification of the Working Committee's resolution dated 4.4.94 by AICC at all which is a mandatory requirement under clause (j) of Article XIX to make the decision taken by the Working Committee legal. In the absence of ratification the action/decision of the Working Committee becomes void ab-initio for the reason that the action taken was "beyond the power of the Working Committee" and hence it was required to be ratified by the AICC took place on 10th and 11th June, 1994 but the resolution of the Working Committee dated 4.4.94 was not placed before it for ratification.

26. **Both in their written pleadings as also in the oral submissions of Shri Dwivedi, learned senior counsel for the respondent group, it is fairly well admitted and conceded that the resolution of the Working Committee dated 4.4.94 seeking to extend the terms of various committees and its office bearers was not ratified by the AICC within six months of its passing and nor has it been ratified till date by the All India Congress Committee. A feeble attempt has been made to justify such non-ratification on the ground that such action was within the powers of the working committee and did not require ratification under Article XIX (j). But no such justification can be accepted, as the respondent group has not shown or brought to the Commission's notice any provision in the party constitution defining the power of the Working Committee to extend the term of various committees or its office bearers. Thus, non-ratification of the Working Committee's resolution dated 4.4.94 is fatal to the validity of that resolution. The failure to place it before the AICC for ratification within six months as necessarily enjoined upon by Article XIX (j) rendered it void and, in any event, inoperative after the expiry of six months, i.e. from 4.10.94. The only logical and legal consequence of the above is that no one in the respondent group can validly claim to be legitimately holding the post of party president or member of the Working Committee or any other committee or its office bearer whose term was extended or which was reconstituted by or in pursuance of the Working Committee's unratified resolution dated 4.4.94.**

27. **The respondent group has stated that if any ratification was needed of the said resolution the same can be done now on a short notice. But one fails to understand how some person or body of persons who have ceased to hold their office on the expiration of their term of office can now take a decision to extend their own term. The term of all these members ordinarily expired in April, 1994 as the word 'ordinarily' in Article VI of the party constitution cannot**

mean indefinitely, nor can the expression 'ordinarily two years' in that article mean four years, i.e. till this date or beyond.

28. **In view of the position as emerging above, it is neither expedient nor necessary to deal with the other objections of the petitioner group with regard to the working committee's resolution dated 4.4.94 that it did not speak about the extension of the term of the party president or about the special or extraordinary situation under which organisational elections could not take place. Suffice to say that the clash of organisational elections with Assembly elections was advanced as a reason for deferring the organisations elections, but no assembly general elections were due to be held in or around April, 1994 and the next round of Assembly general elections was held only towards the end of 1994 in November-December.**

29. **Having regard to the above facts and circumstances, will it be wrong on the part of the Commission to conclude that the respondent group cannot claim to represent the Indian National Congress which is constituted of millions of its members spread over the entire length and breadth of the country? The leaders of the respondent group were given a limited mandate by such members to run the affairs of the party ordinarily for two years. But instead of going back to those members for renewal of that mandate, have they not sought to perpetuate their hold on the vantage positions in the party hierarchy and to run party affairs as per their will in defiance of the party constitution?**

30. **The respondent group contended that such a view could not taken by the Commission in a proceeding under para 15 of the Symbols Order and without prior notice. Both these contentions already stand dispelled and answered in the Commission's order dated 16.10.94 in Dispute Case No. 1 of 1994. In fact, the whole case of the petitioner group is founded on that order. It would be apt and in the fitness of things to reproduce the relevant passages from that order to fully appreciate the observations of the Commission, its concern and intention to put the parties on prior notice:**

> **"44. Before I part with this case, I would be failing in my duty if I do not highlight the sorry state of affairs privileges in almost all political parties in the country, whether recognised National or State parties or recognised-unrecognised parties. Adhocism seems to be the order of the day in the functioning of almost all political parties - may be, there are a few exceptions to this. In my stint as the Chief Election Commissioner during the last nearly four years, I have dealt with a number of cases of disputes arising in National and State parties. I have yet to come across any party whose affairs are being run in accordance with the provisions of its constitution or rules and regulations. As will be observed from the present case itself,**

the party was formed in 1988. By my order dated 16.4.91, I had held that the party was formed by the joining of some leaders and office bearers of the Janta Party and Lok Dal in their individual capacities and not by the formal merger of those two parties as was claimed by the Janta Dal. Some committees of the party so formed were constituted at the National and State levels on ad-hoc basis pending regular constitution thereof in accordance with the party constitution. The state of affairs as brought out by the learned counsel for the applicant group to which a detailed reference has been made in the earlier paragraphs make a shocking revelation that such ad-hoc arrangements still continue even after a lapse of nearly five years. The party has not yet regularly constituted even its national council which as per the provisions of the party constitution is the highest deliberative body to run the affairs of the party.

45. The state of affairs in other political parties also seems to be no better. There are political parties functioning at National level for several decades and recognised by the Commission as such where no organisational elections have held for very long years - even more than ten years in some cases. Though their constitutions provide for periodic elections at all levels at regular intervals of two to three years, such organisational elections have not been held as and when due and postponed indefinitely for one reason or the other. In many recognised parties which are required as per their constitutional provisions to maintain regular lists of their primary members, disputes often arise on the basic issue of such lists and this affords an easy excuse to postpone organisational elections to various party fora indefinitely. Party functionaries at the top level thus continue to occupy their offices and positions long after they would have otherwise ceased or demitted the same had the organisational elections at the lower levels which from the electorate or the electoral college for elections to those highest offices been held when due. These party functionaries at the highest levels who themselves are holding their offices on such borrowed life, perpetuate the lower bodies by granting them ad-hoc extensions because of the postponed organisational elections. Very often, these bodies are dissolved at the whims and fancies of those who have a sway at the highest levels if those bodies are not following their dictates. Either such dissolved bodies are not reconstituted at all or replaced with ad-hoc bodies packed with their own henchmen. Such ad-hoc arrangements are, in fact, the bane of the present political system and a major cause for its degeneration.

46. The political parties are now registered with the Election Commission under Section 29A of the Representation of the People Act, 1951. Prior their to, there were certain political parties which were in existence in the political field and even secured a recognition at the hands of the Commission under the Symbols Order, which had no written party constitution. The classic example of such a party was the All Party Hill Leaders' conference whose dispute came before the Commission in 1977 and which ultimately went to the Supreme Court. Now under the present dispensation of law, the Election Commission while registering a political party insists on a written constitution or set of rules and regulations. In such constitution or rules and regulation, the Commission further insists on detailed provisions which would govern the internal functioning of the political party seeking registration. The Commission ensures that there are specific provisions in those constitutions or rules and regulations to lay down as to who can become the members of those parties, when they would require to renew their membership, what would be their rights and duties, what would be the main decision making organs of the party at the National level, State level or lower levels, what would be the strength of such main organs, how they would be elected, what would be their term of office, what would be the powers and the functions of the various party functionaries at the aforesaid levels and all such kindred matters. All these provisions in the party's constitution are a sine qua non for the democratic functioning of any organization so that the primary members of the party at the grassroot level have an effective say in the running of the affairs of the party either directly or through their chosen representatives at periodic elections. It is needless to star that a political party is a voluntary organisation and its members give unto themselves a constitution by mutual consent which binds them in the form of a mutual contract. The party constitution thus expects, nay requires that the affairs of the party must be regulated by the provisions of the party constitution and carried out in accordance with the same. As that alone is the method of ensuring the participation of the primary members of the party, either direct or though their chosen representatives, in the formulation of the party's policies and programmes and execution thereof through various activities undertaken at different levels in which these primary members have to play a vital and effective role.

47. Non-holding of organisational elections at periodic intervals as provided for in the constitution and as and when they become due is nothing but negation of the right of

participation to the primary members in the decision making of the party and depriving them of their right of effective say in the running of the party's affairs. This gives rise to 'bossism' and 'personality cult' and small coteries hijack the parties. Those refusing to follow the dictates of party bosses or towing their line are thrown out of the party organisation unceremoniously and without following the provisions of the party constitution regulating the taking of disciplinary action against erring members. In fact the committees responsible for taking disciplinary action are themselves absent, either having not been formed at all or superseded in many of the political parties though provided for in their party constitution. These, in my view, are the geneses of almost all the disputes which have arisen in the political parties and which have come up before the Commission for determination under the Symbols Order. The matters governing the policies, programmes and activities of the parties are decided not by its various committees/bodies at their regularly convened meeting/sessions but at places elsewhere and by a handful of persons at the top or having a clout with them. Decisions of far reaching repercussions are taken not after due deliberation in regularly convened meetings/sessions with proper notice and proper agenda, but arbitrarily and whimsically by a few, often left to single individual, affecting not merely the rank and file of the members of the party but sometimes the whole nation. Dissent which is of the essence of democracy and of democratic functioning of any organisation run on those lines which the political parties essentially are, is not tolerated in such a set up and becomes the first casualty.

48. The Commission had observed in its order dated 25.01.1978 in the case of dispute in the Indian National Congress that a group or section which wants to form a rival group or section within a party must exhaust all the remedies available to it under the constitution of the party to assert its majority and should come to the Commission if the other group has frustrated its efforts whimsically or capriciously and not in accordance with the party constitution or democratic norms. In almost all the cases of disputes in political parties with which I had the occasion to deal, allegations have been made that the disputes had arisen or splits occasioned due to the arbitrary or capricious acts of certain office bearers who were not allowing the will of the majority to prevail. But in all such cases what the Commission was confronted with was some office bearers occupying or sticking to their offices by the manipulative tactics of postponing or not holding altogether the organisational elections in the party and with some adhoc

committees or bodies constituted of some handful of nominated members chosen at the whim and fancy of the leaders at the top. The test of majority in such ad-hoc nominated bodies also becomes redundant. Firstly, such adhoc nominated bodies having been formed by the party bosses themselves will naturally consist of the favoured persons who will rarely go against the wishes of those to whom they owe their very existence in those bodies. In the next place, such nominated persons cannot be truly termed the representatives of the primary members who had no say or hand in their appointments and consequently the decisions taken by such ad hoc nominated bodies, even if by majority, cannot be regarded as the decisions reflecting the wishes and aspirations of the majority of the primary members. Confronted with such situation, the Commission finds itself in a helpless situation to grant relief to those who approach it seeking protection against the tyranny of the privileged few who have been treating the political parties headed by them as their fiefdom.

49. The Commission cannot remain a mute spectator for all time to come to these unsavoury happenings in political parties registered with it and specially those which are recognised by it as National or State parties and which entitles them to several benefits under the election law at the cost of the public exchequer, like the grant of two free copies of electoral rolls at the time of draft publication and again after publication, facilities of political broadcast over AIR and telecasts over Doordarshan during general elections, privilege of exclusive allotment of their reserved symbols to their candidates, preference in the matter of seating arrangements for their polling agents and counting agents in the polling stations and counting halls and so on. While there is an obligation on the part of all registered political parties to abide by their party constitution, it is even more so on the part of the recognised parties to scrupulously observe the same, particularly in the matter of their democratic functioning. Apart from the said obligation under their party constitution, the concept of "noblesse oblige" casts a sacred duty upon such recognised parties, which are placed at a higher pedestal even by the law in certain respects, to ensure their functioning on healthy democratic norms to which they bind themselves through the convenient of a written constitution at the time of seeking registration under section 29A of the Representation of the People Act, 1951. By not constituting governing bodies in accordance with their party constitution and affording their primary members to choose their representatives to run the affairs of the party in accordance with the wishes and

aspirations of the primary members at regular prescribed intervals, the parties are making a travesty of the trust reposed by these primary members in the present office bearers and other governing bodies.

50. It is true that while deciding a dispute in a recognised political party under para 15 of the Symbols Order, the Commission on the facts and circumstances of the case may decide that none of the rival sections or groups claiming to be party is that party. During the course of the hearing of the present case, a specific question was put to the learned counsel for the opposite group (led by Shri Bommai) as to why the Commission may not take the view on the facts and circumstances of the present case where the party affairs have apparently been carried on by the Janta Dal on ad-hoc basis that neither of the two rival groups before it is the Janta Dal. In fairness to the learned counsel, the learned counsel did concede that the various office bearers and governing bodies of the party had not been elected or constituted in accordance with the party constitution, but urged the Commission not to take such a view as that would be unprecedented and without any warning beforehand from the Commission in such an important aspect affecting the very survival of the party.

51. I have desisted from taking such a view in the present case because of the two considerations. Firstly, I see force in the submission of the learned counsel that the Commission should not take such a position without prior notice to the political parties and putting them on the alert that such a consequence can also follow if they do not constitute their governing bodies and elect their office bearers at various levels at regular prescribed intervals as provided in the party constitution and in accordance with those provisions and run their affairs on ad hoc basis indefinitely, whereby the members of the party are denied the opportunity of having an effective say in its functioning on democratic norms reflecting the will of the majority in true sense. Secondly, the Commission refrains from depriving a recognised National Party of the use of its reserved symbol just on the eve of general elections to the ten State Legislative Assemblies where it may be putting up its candidates. It may also lead to confusion among the electors for whose ultimate benefit the symbol system has been evolved in the country.

52. The Commission, therefore, by and through this order puts all political parties, specially those recognised by it under the Symbols Order as National or State parties, on prior notice and on the alert that they should constitute their various governing bodies/committees and elect their office bearers at

different levels in accordance with their own party constitutions within a reasonable time, say, the next four months commencing from the date of this order. Any dispute brought before the Commission thereafter under para 15 of the Symbols Order may result in a declaration that none of the rival sections or groups is the recognised party which it claims to be should the Commission observe that the organisational elections have not been conducted in accordance with the party constitution and affairs of the party are being run on ad hoc basis and adhoc arrangements are the order rather than the exceptions in its organisational set up.

53. In appropriate cases, the Commission may also be obliged to take recourse to action against the defaulting parties under para 16A of the Symbols Order. The said para reads as under :

"16A. Power of Commission to suspend or withdraw recognition of a recognised political party for its failure to observe Model Code of Conduct or follow lawful directions and instructions of the Commission. - Notwithstanding anything in this Order, if the Commission is satisfied on information in its possession that a political party, recognised either as a National party or as a State party under the provisions of this Order, has failed or has refused or is refusing or has shown is showing defiance by its conduct or otherwise :-

a) to observe the provisions of the 'Model Code of Conduct for Guidance of Political Parties and Candidates' as issued by the Commission in January, 1991 or as amended by it from time to time, or

b) to follow or carry out the lawful directions and instructions of the Commission given from time to time with a view to furthering the conduct of free, fair and peaceful elections or safeguarding the interests of general public and the electorate in particular,

The Commission may, after taking into account all the available facts and circumstances of the case and after giving the party a reasonable opportunity of showing cause in relation to the action proposed to be taken against it, either suspend, subject to such terms as the Commission may deem appropriate, or withdraw the recognition of such party as the National party or as the case may be, the State party".

54. Let the present order be deemed to be the direction of the Commission to all recognised National and State parties as a direction in terms of the above quoted para 16A of the Symbols Order. Accordingly, a copy of the present order be served on all

recognised National and State parties individually for their information, guidance and action as due as directed above".

31. **A copy of that order was formally forwarded to all recognised National and State parties on 17.10.94 and the Indian National Congress duly acknowledged its receipt and even furnished certain information in its letter dated 31.5.95 with reference to that order. It never challenged that order and it cannot now take the plea of lack of prior notice. There could not be any better prior notice to the party to hold its organisational elections in accordance with its constitution and/or to suffer the consequences so unambiguously and unequivocally spelt out therein in the event of its failure to follow and implement is own constitution.**

In such a situation, the test of majority as applied and upheld in Sadiq Ali's case is of no avail to the respondent group. Sadiq Ali's case (supra) is also distinguishable on facts and circumstances of the present case. In the former case, the party split into two factions following differences of the choice of the party's candidate for the election of the President of India which became due on the sad untimely demise of Dr. Zakir Hussain. Here, the genesis of the present controversy brought before the Commission is stated to be the Commission's own order dated 16.10.94 whereby the Commission asked all recognised parties, including the Indian National Congress, to hold their organisational elections wherever due under their party constitution within four months of that order. The Commission's orders unless shown to be unlawful or arbitrary, are meant to be respected by the parties and particularly in those respects in which they seek certain privileges from the Commission. If a party chooses to show scant respect to the Commission's order, which is apparent from the fact that even after eighteen months of the passing of that order no organisational elections which are long overdue in the present party have been planned or contemplated as yet or in near future, and that gives rise to dispute in the party and the Commission's jurisdiction in respect of such dispute is invoked under para 15 of the Symbols Order, can it be said that the Commission is to apply only the test of majority as was applied in Sadiq Ali's case? Such an approach would be wholly destructive not only of the Commission's authority and responsibility under the Constitution of India, but also of the sanctity of the constitution of the party itself. As will be seen from the observations of the Hon'ble supreme Court, quoted earlier in this order, Sadiq Ali's case was decided both by the Commission and the Hon'ble Supreme Court with respect to all available facts and circumstances of that case. So is the present case to be decided by taking into account all available facts and circumstances of this case, which as noticed earlier are materially different from Sadiq Ali's case and not merely by applying the test of numbers alone.

32. **The inescapable conclusion is that none in the respondent group can be regarded as the duly elected President of the Indian National Congress, nor can any committee, like the Congress Working Committee or All India Congress Committee, claim as the duly constituted committee under the provisions of the party constitution. Claims of all such persons or committees dehors the party constitution of which they are the creations are not sustainable at all.**

33. **It now remains to be seen whether the petitioner group can validly claim to represent the Indian National Congress. The whole edifice of the petitioner group's case is based and built upon the Congress Workers Convention held on 19.5.95 at New Delhi. It is here that Shri Tewari claims to have been elected as the President of Indian National Congress. It is his further case that by electing him as the President at that convention the rank and file of the party restored the supremacy of the party constitution and revived inner party democracy. But do these claims stand established by the facts as have unfolded in the present enquiry and the documents brought on record? The answer is in the negative here too. Detailed procedure is provided for the election of the President in the Party constitution and the rules made thereunder to fill any vacancy in that office, regular or casual. Essential features of that procedure are akin to any standard procedure of election by giving advance notice to the electoral college, inviting nominations, scrutiny of nominations, conduct of poll in case election is contested. But no such thing has been shown to have been done here. What has been shown to have been done is the convening of a meeting of workers. Why it was called Congress Workers Convention and not Congress Members Convention is not explained. But it does indicate that it was not a full convention of all members, but a limited gathering of those who were considered as workers - and all members are not workers in any organisation. Further, the pleadings of the petitoner group themselves shown that the convention was attended not only by primary and active members of the party, but also by past members and others. This by itself shows that it was a gathering in which even outsiders participated. Furthermore, no notice or agenda of that convention is brought on record to show whether the election of the party president was an item on the agenda. Above all, a workers convention which may even elect the party president is nowhere provided for or even contemplated in the party constitution. Thus, the workers convention held at New Delhi on 19.5.95 was not a forum to elect the party president and any person claiming to have been elected as the party president at such convention cannot be regarded as the constitutionally elected head of the organisation.**

34. **In the next place, the petitioner group claims to have restored inner party democracy which, they allege, had been hijacked by a coterie. But does their conduct prove what they profess? They too at the said convention elected Shri Tewari as the president and then left the formation of all bodies including CWC to his choice and discretion. In what way is this different from the conduct of the respondent group and how has inner party democracy been restored thereby?**

35. **The claim of the petitioner group that they truly represent the Indian National Congress is also thus not established.**

36. **Para 15 of the Symbols Order provides that :**

"15. Power of the Commission in relation to splinter groups or rival sections of a recognised political party - When the Commission is satisfied on information in its possession that there are rival sections or groups of a recognised political party each of whom claims to be that party the Commission may, after taking into account all the available facts and circumstances of the case and hearing such representatives of the sections or groups and other persons as desire to be heard decide that one such rival section or group of none of such rival sections or groups is that recognised political party and the decision of the Commission shall be binding on all such rival section or groups.

37. **Having regard to all available facts and circumstances of the present case and after hearing the representatives of both the groups and after giving them every possible opportunity and giving careful consideration thereto, the only conclusion reached is that neither of these two groups led by Shri Tewari and Shri P. V. Narasimha Rao, both of whom claim to be the president of the Indian National Congress, can be declared to be the Indian National Congress, on the touchstone of the party's own constitution. In such a situation, their numerical strength in the legislature or organisational wings (in fact, the organisational wing being non-existent altogether by efflux of time and expiration of term) becomes irrelevant. Consequently, I am left with no other option or alternative but to freeze the symbol 'Hand' reserved for the Indian National Congress and it shall remain so frozen till the party elects its office bearers and constitutes its committees at various levels to run its affairs in accordance with its own constitution which is in the nature of mutual contract which binds all its members at all levels.**

38. **The matter also requires to be looked at from another highly significant angle. Political parties are recognised and symbols are reserved for them by the Commission under the Symbols Order for the purpose of allotment of those symbols to the candidates set up by those parties at elections. In order that a candidate set up by a**

recognised party gets the symbol reserved for it, that party has to intimate the Returning Officer the name of such candidate within the time prescribed for the purpose under para 13 of the Symbols Order. Not only that the intimation to the above effect has to be given under that, para by the President or general secretary or some other office bearer & the President or general secretary or such office bearer should be authorised by the party to give such intimation and his specimen signature should also be made available to the Returning Officer by the party. But where there is no person who can be regarded as validly holding the office of the Party President or general secretary or any other office bearer in any of the party's main decision making bodies, who will give the intimation to the Returning Officer about the Party's candidates as required under the said para 13? And on whose intimation the Returning Officer will act upon to proceed and allot the party's reserved symbol to its candidates? The only obvious answer is that in such circumstances and situation the party's symbol becomes incapable of allotment to any candidate and the Commission will not only be fully justified but left with no alternative but to freeze the symbol till such time as the party appoints its President or general secretary or any other office bearer who can legitimately lay claim to that office under the party constitution. Unfortunately, the Commission finds itself in same dilemma in the present case where none in either of the disputant groups before the Commission can be regarded by it, for the reasons mentioned above, as the legitimate claimant to the office of the President or general secretary or any other office in the organisational hierarchy of the Indian National Congress. The Party's reserved symbol has, therefore, to be kept and stored by the Commission in trust for the party so long as it does not hold its organisational elections as envisaged and provided for in or under its own constitution and brings into existence its various office bearers and committees to run its affairs in accordance with its constitution and who can be regarded by the Commission as the valid authorities for giving due intimation to the Returning Officers in terms of para 13 of the Symbols Order.

39. **Accordingly I hereby direct under paras 6, 7, 13, 15, 16A and 18 of the Election Symbols (Reservation and Allotment) Order, 1968 read with Article 324 of the Constitution and rules 5 and 10 of the Conduct of Elections Rules, 1961 and all other powers enabling the Commission in this behalf that the symbol 'Hand' reserved for the Indian National Congress be frozen and the notification issued under para 17 of the Symbols Order shall stand amended accordingly.**

(T. N. SESHAN)

CHIEF ELECTION COMMISSIONER OF INDIA

Dated 11th March, 1996.

ELECTION COMMISSION OF INDIA

BEFORE

Hon'ble	**Hon'ble**	**Hon'ble**
Shri G.V.G. Krishnamurty	**Shri T.N. Seshan**	**Dr. M.S. Gill**
Election Commissioner	**Chief Election Commissioner**	**Election Commissioner**

ISSUE-WISE SUM AND SUBSTANCE OF THE TWO SEPARATE MAIN ORDERS.

In Re : "INDIAN NATIONAL CONGRESS"

Dispute No. 1 of 1996 : Under Para 15 of the Election Symbols (Reservation and Allotment) Order, 1968.

And

In Re : Registration of "ALL INDIA INDIRA CONGRESS"

Dispute No. 6 of 1995 : Under Section 29A of the Representation of the People Act, 1951.

BETWEEN

Arjun Singh	—	***.. Petitioner***
VS		
The President Indian National Congress	—	***.. Respondent***

Advocates for Petitioner : **Mr. D.D. Thakur Senior Counsel and Messers, Lalit Bhasin, Aswini Kumar, Neeraj Sharma, N.M. Bhatt, M.K. Singh, Iqbal Siddique, Jaspal Singh and Ms. Vina Gupta and Ms. Kiran Bharadwaj.**

Advocates for Respondents : **Messers Devendra Dwivedi, O.P. Sharma, B.A. Desai Senior Counsel & Messers Ranji Thomas, W.A. Noomani, G. Seshagiri Rao, Ashok Bhan, and Nanda Kumar.**

UPON having heard the submissions made by the respective counsel for the parties on 12 and 13 February, 1996 and after having examined carefully all the documents available on record and also the facts and circumstances and propositions of law placed before and the written submissions filed by both the parties on 16th February, 1996, the Election Commission of India is pleased to pass the orders today. Sum and substance of the main orders, issue- wise, is made available which is as follows.

ISSUE NO.1 : **WHETHER THE PETITIONER'S GROUP HEADED BY SHRI N.D. TIWARI IS THE REAL 'INDIAN NATONAL CONGRESS', AS CLAIMED?**

Decision : **The Commission unanimously holds that the Group headed by Shri Narain Datt Tiwari is not the real Indian National Congress, as claimed.**

ISSUE NO. 2 : **IF NOT, WHETHER THE SAID GROUP IS ENTITLED AS PRAYED ALTERNATIVELY, TO BE DECLARED AND RECOGNISED AS 'ALL INDIA INDIRA CONGRESS', AND ALLOTTED A NEW SYMBOL EITHER "TWO BULLOCKS' OR "FOLDED HANDS (NAMASTE)'?**

Decision : **The Commission unamimously holds that the group headed by Shri Narain Datt Tiwari be registered and recognised as 'All Indian Indira Congress'. In regard to their request for alloting a new symbol either 'Two Bullocks' or 'Folded Hands (Namaste)', it also unanimously holds the request for "Two Bullocks" can not be acceded since it was earlier allotted to a National party and the same stands frozen; secondly the symbol 'Folded Hands' (Namaste); can not be allotted on the ground of its being the form of greetings throughout the country. Therefore the Commission, while turning down the petitioner's request for both the symbols, states, to be fair to the group that, having been registered and recognised as a National Party in the name of "All India Indira Congress", it is open for them to select any symbol from the list of free symbols or a new symbol chosen and designed by them for allotment under a separate application.**

ISSUE NO. 3 : **WHETHER ANOTHER ALTERNATIVE PRAYER OF THE PETITIONER, TO FREEZE THE SYMBOL 'HAND' OF THE RESPONDENT 'INDIAN NATIONAL CONGRESS' IS JUSTIFIED, IN THE FACTS AND CIRCUMSTANCES OF THE CASE?**

OPINION : **PER : G.V.G. KRISHNAMURTY AND M.S. GILL (MAJORITY).**

It is held that, consequent to the rejection by the Commission of the petition of Shri Narain Datt Tiwari Group as the real Indian National Congress, as held in Issue No. 1, the respondent Indian Naional Congress would automatically be entitled to continue to ave all its rights and privileges untouched and undisturbed. Therefore, the request to freezing the symbol 'Hand' for Indian National Congress is rejected.

OPINION : **PER : T.N. SESHAN (MINORITY)**

Since neither of the groups of the Indian National Congress could prove that they are the real Indian National Congress, it is held that the Commission would not only be fully justified but left with no alternative to freeze the symbol 'Hand' – Further, the party's

reserved symbol has therefore, to be kept and stored by the Commission as frozen.

Decision of the Commission

In regard to transaction of business of the Election Commission, the majority decision prevails and is therefore final. (Vide sections 9 and 10 of the Election Commissoners Act, 1993, which has been upheld by the Supreme Court by its unanimous judgement on 14th July, 1995).

Therefore, the Commission by majority of 2:1 rejects the prayer to freeze the reserved symbol "Hand" of the respondent and consequently holds that the symbol "Hand" of Indian National Congress, would continue to remain with them undisturbed.