REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL ORIGINAL JURISDICTION

CIVIL APPEAL NO. 881 OF 2021
(@ SLP (CIVIL) NO.3937 OF 2021)

STATE OF GOA & ANR. …APPELLANTS

VERSUS

FOUZIYA IMTIAZ SHAIKH & ANR. …RESPONDENTS

WITH
CIVIL APPEAL NO. 882 OF 2021
(@ SLP(C) NO. 4131/2021)

CIVIL APPEAL NO. 883 OF 2021
(@ SLP(C) NO. 4121/2021)

CIVIL APPEAL NO. 884 OF 2021
(@ SLP(C) NO. 4138/2021)

CIVIL APPEAL NO. 885 OF 2021
(@ SLP(C) NO. 4100/2021)

CIVIL APPEAL NO. 886 OF 2021
(@ SLP(C) NO. 4200/2021)

CIVIL APPEAL NO. 887 OF 2021
(@ SLP(C) NO. 4201/2021)

CIVIL APPEAL NO. 888 OF 2021
(@ SLP(C) NO. 4219/2021)

CIVIL APPEAL NO. 889 OF 2021
(@ SLP(C) NO. 4160/2021)

CIVIL APPEAL NO. 890 OF 2021
(@ SLP(C) NO. 4360/2021)

CIVIL APPEAL NO. 891 OF 2021
(@ SLP(C) NO. 4362/2021)

CIVIL APPEAL NO. 892 OF 2021
(@ SLP(C) NO. 4361/2021)

W.P.(C) NO. 309/2021

J U D G M E N T

R.F. Nariman, J

1. IA No. 35153/2021 in SLP(C) No. 3937/2021 being an application for intervention is allowed. Leave granted in all the Special Leave Petitions.

2. The present batch of civil appeals raise important questions on the provisions contained in Part IXA of the Constitution of India. The Goa State Election Commission ["**SEC**"] decided to postpone the elections to 11 Municipal Councils whose terms were to expire on 04.11.2020. The elections were scheduled to be held on 18.10.2020, which were postponed to 18.01.2021 in view of the COVID-19 pandemic situation

in the State of Goa. On 03.11.2020, the Governor of Goa appointed the Law Secretary of the Government of Goa, a member of the IAS, as State Election Commissioner which duties were to be in addition to his duties as Law Secretary. By an order dated 05.11.2020, Municipal Administrators were appointed by the Department of Urban Development (Municipal Administration) for all these municipal councils whose terms had expired. By a notification dated 14.01.2021, the Goa SEC further postponed the election for a period of three months i.e., till April, 2021 or the election date which may be determined by the Commission.

3. On 04.02.2021, the State of Goa published an amendment to Section 10(1) of the Goa Municipalities Act, 1968 ["**Goa Municipalities Act**"] in the official gazette, by which the time frame for issuance of a notification for reservation of wards was stated as being "at least seven days" before the notification for schedule of dates and events of the elections. On the same day, the Director of Municipal Administration issued an order for reservation of wards for 11 municipal councils within the State of Goa. We are informed by the SEC that on 05.02.2021, electoral rolls were prepared and returning officers appointed for an ensuing election.

4. Meanwhile, being aggrieved by the order dated 04.02.2021, 9 writ petitions were filed before the High Court of Bombay at Goa between 09.02.2021 and 12.02.2021 challenging the aforesaid order on various grounds. By a separate writ petition, being W.P. No.92/2021, the amendment to Section 10(1) also came to be challenged. This matter is pending hearing and final disposal before the High Court, and has been segregated from the other writ petitions which were disposed of by the High Court.

5. On 15.02.2021, the writ petitions came up for hearing and the High Court was pleased to list the matters for final disposal on 22.02.2021. It is stated by Shri Nadkarni, learned Senior Advocate appearing on behalf of first Respondent in civil appeal arising out of SLP(C) No. 3937/2021, that this was done with the understanding between the parties that the election schedule would not be notified till the disposal of the writ petitions.

6. On 22.02.2021, as the Division Bench at Goa commenced the hearing of the petitions, a notification of the same date, time being 9.00 a.m., was presented to the Goa Bench, by which elections to the 11 municipal councils commenced. The petitions were then taken up and

heard by the learned Division Bench. Two judgments were delivered, one by Bharati Dangre, J., and one by M.S.Sonak, J. After discussing in some detail the relevant constitutional and statutory provisions and the judgments of this Court and the Bombay High Court, the Division Bench allowed the writ petitions as follows:

> **"81.** In the wake of the above reasoning, we pass the following order:
>
> (a) Writ Petition No. 515 of 2021 (filing) is dismissed.
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> (b) Writ Petition No.85 of 2021, 86 of 2021, 87/2021, 88/2021, 90/2021, 91/2021, 524/2021 (Filing) and 525/2021 (Filing) are hereby allowed. The impugned order dated 04/02/2021 issued by the Director and ex-officio Additional Secretary, Municipal Administrator/ Urban Development, Goa in so far as it concerned the Municipal Council of Sanguem, Mormugao, Mapusa, Margao and Quepem is quashed and set aside.
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> (c) By a Writ of Mandamus, we direct the Director and ex-officio Additional Secretary, Municipal Administrator/ Urban Development, Goa to issue fresh Notification under sub-section 1 of Section 9 r/w. Subsection 1 of Section 10 of the Goa Municipalities Act, 1968 within a period of 10 days from today, thereby ensuring inter alia, reservation for women of not less than one-third of the total number of seats reserved for direct elections to the Municipal Councils.
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> (d) While exercising the power afresh and rectifying the gross illegalities pointed out in our judgment and order, the Director shall give due weightage to our observations made therein.

(e) The State Election Commission of Goa is directed to expeditiously notify the election programme, on the order for reservation of seats in the Municipal Councils being issued by the Director, Respondent No.2 and the State Election Commission shall align the schedule of election in a manner, to ensure its completion by fixing up its various stages as per the Goa Municipalities (Election) Rules, 1969 and the culmination of the process on or before 15th April,2021.

(f) No order as to costs."

Stay, though requested for, was declined.

7. An SLP was moved by the State of Goa being SLP (C) No.3937 of 2021, and this Court, by its order dated 04.03.2021, was pleased to observe:

"Issue notice.

Having heard Mr. Tushar Mehta, learned Solicitor General for the petitioner, Mr. Atmaram NS. Nadkarni, learned Senior Advocate for the Respondent No.1 and Mr. Abhay Anil Anturkar, learned counsel for the Respondent No.2, we stay the impugned direction of the High Court as well as the Election Commission notification which is in pursuance of the High Court judgment.

Pleadings to be completed before the next date of hearing.

List on Tuesday, the 9th March, 2021.

Liberty is granted to learned counsel to file written arguments in the meantime."

8. This is how the matter has been placed before us today i.e., on

9.3.2021. Shri Tushar Mehta, learned Solicitor General appearing on behalf of the State of Goa, read to us Articles 243T, 243ZA, 243ZG of the Constitution of India and Sections 9, 10 and 22 of the Goa Municipalities Act. The aforesaid Articles mirror Part XV of the Constitution and thus, the judgments of this Court on Part XV are extremely relevant.

9. According to the learned Solicitor General, first and foremost, the bar to interference by courts in electoral matters contained in Article 243ZG(a) gets attracted as the order dated 04.02.2021 relating to delimitation of constituencies and allotment of seats to such constituencies is a "law" for the purposes of 243ZG(a), attracting the constitutional bar which prohibits any court from entertaining a challenge to the aforesaid order's validity. For this purpose, he relied heavily on ***Meghraj Kothari v. Delimitation Commission,*** (1967) 1 SCR 400. Even otherwise, the concession made by the learned Advocate General in the High Court cannot bind a constitutional court which must give effect to a constitutional bar in electoral matters, and once the election schedule is notified, there is a complete judicial hands-off *qua* challenge to such election schedule which would have the effect, in any manner, of thwarting or postponing the aforesaid

election schedule. For this purpose, he relied upon the constitutional bar contained in Article 243ZG(b), and relied on a plethora of case law namely, ***N.P. Ponnuswami v. Returning Officer, Namakkal Constituency,*** 1952 SCR 218, ***Durga Shankar Mehta v. Thakur Raghuraj Singh,*** (1955) 1 SCR 267, ***Hari Vishnu Kamath v. Syed Ahmad Ishaque,*** (1955) 1 SCR 1104, ***Narayan Bhaskar Khare (Dr) v. Election Commission of India,*** 1957 SCR 1081, ***Mohinder Singh Gill v. Chief Election Commr.,*** (1978) 1 SCC 405, ***Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman,*** (1985) 4 SCC 689, ***Indrajit Barua v. Election Commission of India,*** (1985) 4 SCC 722, ***Anugrah Narain Singh v. State of U.P.,*** (1996) 6 SCC 303, ***Election Commission of India v. Ashok Kumar,*** (2000) 8 SCC 216, ***Kishansing Tomar v. Municipal Corpn., Ahmedabad,*** (2006) 8 SCC 352, ***W.B. State Election Commission v. Communist Party of India (Marxist)***, (2018) 18 SCC 141, ***Dravida Munnetra Kazhagam v. State of T.N.***, (2020) 6 SCC 548, ***Laxmibai v. Collector,*** (2020) 12 SCC 186. He also relied on judgments which in other contexts, such as cooperative societies for example, accepted what is laid down in ***Ponnuswamy's*** judgment even without any constitutional or statutory bar, stating that

the only method of challenging an election is after the election process is over, by means of an election petition. For this purpose, he relied upon Section 22 of the Goa Municipalities Act which, according to him, contained grounds wide enough to set aside the entire election.

10. Shri Mukul Rohatgi, learned Senior Advocate appearing on behalf of the appellant in civil appeal arising out of SLP(C) Diary No. 6385/2021, referred to the judgment in ***Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman*** (supra) and in particular the passage about how a court ought not to interfere with an election at a stage in which the election process is "imminent" i.e., about to start. He then relied upon ***Election Commission of India v. Ashok Kumar*** (supra) for the proposition that even if there were certain faults after an election process is underway, these faults must be ignored as they can always be the subject matter of an election petition after the elections are complete. For this purpose, he also relied heavily upon ***Election Commission of India v. Shivaji,*** (1988) 1 SCC 277 and read from Chandrachud, J.'s judgment in ***W.B. State Election Commission v. Communist Party of India (Marxist)*** (supra) speaking of a judicial hands-off until the election process is over.

11. Shri P.S. Narasimha, learned Senior Advocate appearing on behalf of

the SEC, relied upon the judgments in ***Kishansing Tomar v. Municipal Corpn., Ahmedabad*** (supra) and ***Anugrah Narain Singh v. State of U.P.*** (supra) and emphasized the fact that timely elections had to be held for which the SEC alone was in charge. He pointed out that a huge machinery had to be set up and was set up pursuant to the election notification that has been issued, all of which would be set at naught if the impugned judgment is not set aside. He further added that the observations made by the impugned judgment on the State Election Commission's indolence and non-action were not fair to the Commission and asked that they be deleted.

12. Shri Vinay Navare, learned Senior Advocate appearing on behalf of the appellant in civil appeal arising out of SLP(C) Diary No. 6385/2021, also emphasized the non obstante clause contained in Article 243ZG. He also went into and attacked the judgment's findings on women's reservation not being correctly made and that the rotation principle was not correctly observed. He strongly advocated that the *de minimis non curat lex* principle be applied to these situations particularly when the election process is already underway. So far as the judgment striking down the impugned order on the ground that OBC reservation was less than 27% as mandated by Section 9(2)(bb) of the Goa

Municipalities Act, he argued that the judgment itself made it clear that, though not raised in the writ petitions, the Judges took it up *suo motu* and set aside the order even on this ground.

13. Shri Atmaram Nadkarni, learned Senior Advocate appearing on behalf of first Respondent in civil appeal arising out of SLP(C) No. 3937/2021, was at pains to point out that both Shri Mehta and Shri Rohatgi did not challenge the impugned judgment on merits. He was also at pains to point out that in the facts of the present case, there was no delimitation commission which is headed by a retired judge but the entire exercise of delimitation and reservation is done by an executive officer of the Government. He argued that this Court ought not to exercise its jurisdiction under Article 136 of the Constitution at all in view of the fact that the SEC in the present case was not an independent body but was acting through the Law Secretary, Government of Goa, which is what led to the order dated 04.02.2021. He strongly relied upon two earlier Bombay High Court judgments in which solemn statements had been made before the High Court that the State Government would issue reservation notifications at least 3 weeks before the notification which lays down the schedule for elections. He further argued that the lightning speed with which everything was done on one day and which

was correctly commented upon by the High Court judgment showed complete non-application of mind insofar as reservation of women/SCs/STs/OBCs and the principle of rotation was concerned. He also added that there was malice in law so far as the SEC is concerned, as has been found by the High Court. Contrary to assurances made before earlier Division Benches, the State Government first amended Section 10 of the Goa Municipalities Act and thereafter published the impugned order reserving Municipal Wards for various categories, and then announced the elections without waiting for at least three weeks. The High Court was not told that on 05.02.2021 itself the SEC had made up its mind to hold the election on 20.03.2021. Had this fact been disclosed to the High Court, it could have heard the writ petitions much before 22.2.2021. He also stressed the fact that despite the fact that the State Government offices begin at 9:30 a.m., a notification was pulled out at 9:00 a.m. on 22.02.2021 so as to forestall the High Court from commencing the hearing of the writ petitions with a *fait accompli*, namely, that the election process has now started. He also argued that even after our order dated 04.03.2021, the Goa SEC issued a notification on

04.03.2021, not adhering to the original timelines fixed but extending the time period for filing of nominations from 04.03.2021 till 06.03.2021 and thus rescheduled the elections. According to the learned Senior Advocate, the bar contained in Article 243 ZG(a) and (b) do not apply on the peculiar facts of this case. Further, the High Court judgment was correct on merits so far as women's reservation was concerned as Article 243T mandates a reservation of at least one-third, using the word "shall" and using the words "not less than", making it clear that in the case of a fraction, the fraction has to be rounded up to the figure one. He also relied upon a plethora of judgments in order to buttress his submissions.

14. Shri Vivek Tankha, learned Senior Advocate appearing for the first Respondent in civil appeal arising out of SLP(C) No. 4121/2021, emphasized that the SEC that is constituted under Article 243K is on par with the Election Commission of India. For this, he emphasized, in particular, the proviso in Article 243K(2) which makes it clear that the State Election Commissioner shall not be removed from his office except in like manner and on the like ground as a Judge of a High Court, and the conditions of service of the State Election Commissioner shall not be varied to his disadvantage after his

appointment. This provision, according to the learned Senior Advocate, ensures that the SEC is an independent constitutional functionary which is to oversee elections conducted at Panchayat and Municipal levels. The whole problem in the present case has arisen only because this mandate of the Constitution has been flouted by the Government of Goa in that the Law Secretary has been given additional charge and made the State Election Commissioner, leading to the SEC not functioning as an independent body and, in fact, acting so as to pre-empt the jurisdiction of the High Court in challenging a notification issued by the Director under Section 10 of the Goa Municipalities Act. He reiterated the facts of this case as pointed out by Shri Nadkarni and relied, in addition, to ***Bendict Denis Kinny v. Tulip Brian Miranda & Ors***., (2020) SCC Online 802 for the proposition that the High Court's doors are never closed under Article 226 of the Constitution of India in deserving matters, in particular where the court's process is sought to be overreached by a non-functioning non-independent State Election Commission.

15. Shri Ninad Laud, learned counsel appearing on behalf of the intervenor in SLP(C) No. 3937/2021, cited the judgment in ***Anugrah Narain Singh v. State of U.P.*** (supra) and pointed out that under the

Goa Municipalities Act, just as under the UP Act that was considered in that case, orders of delimitation, reservation and allotment of seats do not statutorily have the force of law, and can thus be challenged in a writ petition filed under Article 226 of the Constitution of India. He argued that this decision distinguishes ***Meghraj**'s* case (supra) and would be applicable on the facts contained in the present case, as a result of which it was within the jurisdiction of the High Court to strike down the order of the Director reserving seats in wards dated 04.02.2021. He also made a reference to various provisions of the Goa Municipalities Act which specifically provide that when fractions are to be taken into account, they should be ignored. Such provision is conspicuous by its absence in Sections 9 and 10 of the Goa Municipalities Act, which is required to follow the constitutional mandate that is contained in Article 243T of the Constitution of India.

16. Having heard learned counsel for all parties, it is important to emphasize a few background facts before coming to the impugned judgment in the present case. In ***Dnyaneshwar Narso Naik v. State of Goa***, WP No. 179/2020, a Division Bench of the Bombay High Court at Goa, by its judgment dated 11.12.2020, (in the context of Zilla Panchayat elections in Goa) recorded as follows:

“98. In this case, there is yet another disturbing feature. Despite repeated letters and reminders from the SEC commencing from 11.06.2019 to the State Government requiring the State Government to complete the exercise of delimitation, reservation, and rotation of reserved seats, such exercise was completed and notified only on 20.02.2020, knowing fully well that the term of the earlier members was to expire on 24.03.2020 and the SEC would require a minimum 26 days to complete the election process. As noted earlier, the learned counsel for the Petitioners have pointed out that the purpose for this delay and the issuance of forthcoming Notification by the SEC was to preempt any challenges to the impugned Notification dated 20.02.2020 before the Constitutional Court. The learned counsel for the Petitioners pointed out that this is invariably done so that once the election process sets in, the Constitutional Courts are extremely reluctant to interfere with the election process in deference to the provisions in Article 243-O of the Constitution.

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101. Thereafter, on account of the COVID-19 Pandemic situation, the election could not be held on 22nd March 2020 as scheduled. On 14.10.2020, this Court ordered these matters to be placed for final hearing in the week commencing from 23.11.2020. The final hearing commenced on 24.11.2020. During the final hearing, Notifications were issued fixing the date of polling on 12.12.2020. Once again it was contended now that the election process is so far advanced, this Court ought not to grant any reliefs to the Petitioners. Thus, by delaying the issuance of impugned Notifications, the State Government has virtually succeeded in depriving the Petitioners of a reasonable opportunity of seeking judicial review before this Court. Again, there is no explanation whatsoever in the affidavit filed on behalf of the State Government as to why Notifications regarding reservation were not issued earlier

> even though the SEC was constantly reminding the State Government for issuance of the same.
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> 102. The learned Advocate General has now, however, made a statement that hereafter the exercise of notifying reservations will be made at least three weeks before any Notification is issued under Rule 10(1) of the said Rules to commence the election process. According to us, this period of hardly three weeks is too short and this exercise of notifying the reserved constituencies must be made at least two months before the date of issuance of Notification under Rule 10(1) of the said Rules. We, therefore, direct the State Government to issue Notification reserving and/or rotating reserved seats at least two months before the date of issuance of Notification under Rule 10(1) by which the election process to the Panchayats commences."

17. Likewise, a few days later, a Division Bench of the High Court, by an order dated 21.12.2020, in ***Sujay S. Lotlikar v. State of Goa,*** LD-VC-CW-359-2020, also specifically recorded:

> "5. Today, the learned Advocate General for the State of Goa makes a statement that the notifications for delimitation and reservation will be issued by the appropriate authorities whom he represents, at least three weeks prior to the date of the notification of the schedule for municipal election."

18. This order is important in the facts of the present case as it dealt directly with Municipal elections in some of the very wards that were before the High Court in the impugned judgment.

19. Contrary to the Advocate General's statement made before two Division Benches of the High Court, the State Government amended Section 10 of the Goa Municipalities Act by adding a proviso on

04.02.2021, which then provided that such orders shall be issued at least 7 days before the date of notification of the General Elections. Armed with this amendment, the Law Secretary as State Election Commissioner, by a communication dated 05.02.2021 to the Director, Urban Development, requested the aforesaid Director to issue an order under Section 10 of the Goa Municipalities Act “at an early date” insofar as the 11 Municipal Councils in this case are concerned, as elections are proposed to be held on by 20.03.2021. With retrospective effect and with lightning speed, the Director complied with this request on a day previous to this date, and provided for reservations vide order dated 04.02.2021 in all 11 Municipal Councils for women/SCs/STs/OBCs. To make matters worse, the SEC did not disclose to the Court that vide a note dated 05.02.2021, elections were to be held on 20.03.2021. The High Court was thus lulled into a false sense of security when writ petitions that were filed between 9th and 12th February, 2021, challenging the 04.02.2021 order, were taken up on 15.02.2021 and were then set down for final hearing on 22.02.2021. To make matters worse, when the Division Bench of the High Court commenced hearing these writ petitions at 9.00 a.m. on 22.02.2021, it

was provided with a notification announcing the schedule of elections at 9:00 a.m. on 22.02.2021. This is despite the fact that the State Government's offices open only at 9:30 a.m. It is in the background of these disturbing facts that the writ petitions were then taken up and decided by the Division Bench of the High Court on 01.03.2021.

20. Both Judges delivered judgments in this case. The judgment of Bharati Dangre, J. held as follows:

> "5. Nine Writ Petitions came to be instituted before this Court, pursuant to the order passed on 04/02/2021 by the respondent no.2 posing a challenge to the determination of the reservation of seats in different Wards of Municipal Councils for the purpose ensuing Municipal elections. The said order reserved the seats for different categories being Scheduled Castes, Scheduled Tribes, Other Backward Classes and women and purported it to be complaint with the provisions contained in the Goa Municipalities Act, 1968. The aforesaid Writ Petitions were filed before this Court between 09/02/2021 to 12/02/2021 and came to be listed before the Division Bench on 15/02/2021, when notice came to be issued for final disposal, making it returnable on 22/02/2021. The learned counsel for the Petitioners submitted that this was on the understanding that up to 22nd February 2021, the Respondents will not declare the election schedule. However, on 22nd February 2021 itself when the matters were to be taken up for final disposal, the State Election Commission (SEC) declared the election schedule. On the returnable date we heard the respective Counsel for the petitioners and the learned Advocate General. Mr. D. Pangam, learned Advocate General also submitted that the issuance of such election schedule will not be urged as a ground to deny any reliefs to the Petitioners if such reliefs are indeed found to be due. He,

however, clarified that he would be submitting that this Court ought not to grant any reliefs to the Petitioners since, even on the date of the institution of the petitions, the elections to the Municipal Councils were quite imminent.

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13. Mr. Joshi, learned counsel appearing for the SEC admitted that there has been constitutional infraction on the part of the Director, in failing to reserve not less than one-third of the total number of seats in Mormugao and Mapusa Municipal Councils, in favour of women. On questioned whether the Commission has pointed out the flaw, his answer is in the negative. He submits that the issue of reservation is within the purview of the Directors and therefore, notwithstanding the constitutional or statutory infraction, the SEC is helpless and has no choice but to proceed with the elections based on the impugned order dated 4th February 2021 and since it is bestowed with a duty to conduct timely elections.

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16. Pertinent to note that the noting itself provide solution, by enlisting the mechanism to be adopted which reflect, that since reservation for women is done by rotation and after delimitation done in 2015, rotation end up in three terms, commencing from 2015 and going to end in 2026. After charting the reservation which is already provided for women category in 2015 and 2021, the solution offered is the remaining Wards which are not reserved for women in the earlier two elections, may be reserved in 2026. Implicitly, the stand taken is that in order to complete the fraction, the seat would be rounded off in the three terms by rotation, in order to avoid excessive reservation to women and therefore the aforesaid solution.

We are afraid whether this would serve the intention of clause 3 of Article 243T as well as the mandate of the State

Legislation, which, effectively read would mean that on constitution of a Municipal Council for every term, not less than 1/3rd seats shall be reserved for women. The expression used in the Constitution as well as in the Municipalities Act, being "not less than" or "no less than", make it clear that even a fraction cannot be ignored because by ignoring the same, the reservation would be minimized than 1/3rd and if it is done so, it would amount to infraction of the constitutional mandate.

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18. Keeping in mind the aforesaid philosophy in introducing reservation for women by the Constitution and subsequently in the State Legislation, we are of the firm opinion that the course adopted by the respondent no.2 violate the mandate of law. The solution offered by the respondent no.2 in taking forward the reservation and to be adjusted within the three terms, is also, according to us defeat the very purpose as the mandate contained in the first proviso appended to sub-section 1 of Section 9 which is to be followed in every Council which means, the Municipal Council constituted or deemed to be constituted under the Act for a Municipal area and as a body corporate with a prescribed tenure. The fraction even if it is created in calculating 1/3rd reservation cannot be permitted to be rounded off towards the earlier denomination and the normal principle for rounding off, which is based on logic and common sense; "if part is one half or more, its value shall be increased to one and if less than one half the value shall be ignored", cannot be made applicable here.

In **Ashok Maniklal Harkut Vs Collector, Amravati and others** [1988 Mh.L.J.378], the Full Bench of this Court, in the context of provisions of Section 55(1) and 55(2) of the Maharashtra Municipalities Act held that a valid no-confidence motion must be passed by not less than two-thirds of the total number of councilors was mandatory. The Full Bench held that the total number of votes must not be

less than two-third though they may be more. The fraction cannot be ignored since if the fraction is ignored then the majority will be two-third of the councilors. Thus, where the total number of elected councilors at the time when the motion was moved 19, support of only 13 councilors, being less than two-third, was not sufficient to carry such a no-confidence motion.

The Hon'ble Apex Court has reiterated the view taken by Full Bench of this Court and in the case of **Ganesh Sukdev Gurule v/s. Tahsildar Sinnar & Ors** (2019) 3 SCC 211. The issue for deliberation before the Apex Court involved Section 35 of the Maharashtra Village Panchayats Act, 1959, which is a provision for no confidence motion and sub-section 3 of the said Section indicating the requirement of majority of not less than two third of total number of members who are for the time being entitled to sit and vote. Construing the phrase "not less than", Their Lordships of the Apex Court, dealing with the arguments that when the fraction arrived is 5.33, it should be rounded to 5 has held as under:

> '12. The next submission pressed by the respondent is that for applying the principle of rounding off 5.33 votes have to be rounded as to five. Thus, five votes are sufficient to accept majority for the purpose of passing no-confidence motion. Whether 5.33 votes can be rounded up into 5 votes or requirement is at least six votes is the real issue. When there are clear words in the statute i.e. “not less two-third of the total number of members” applying the principle of rounding off, 5.33 votes cannot be treated as 5. Vote of a person cannot be expressed in fraction. When computation of a majority comes with fraction of a vote that fraction has to be treated as one vote, because votes cannot be expressed in fraction. The principle that figure less than . 5 is to be ignored and figure more than .5 shall be treated as one, is not applicable in the statutory scheme

as delineated by Section 35. Provision of Section 35(1) which provides for requirement for moving motion of no-confidence by not less than one-third of the total number of the members who are for the time being entitled to sit and vote at any meeting of the Panchayat, is the same expression as used in sub-section(3). Obviously, requirement of not less than one-third number for moving motion has to be computed from total number of the members who are entitled to sit and vote. Thus, the same expression having been used in sub-section (3) of Section 35, both the expressions have to be given the same meaning. Thus, one-third of total number of members who are entitled to sit and vote have to be determined on the strength of members entitled to vote at a particular time. The same meaning has also to be applied while computing two-third majority.'

In light of the aforesaid authoritative pronouncements, we find that the approach adopted by the respondent no.2 would stare in face of the constitutional mandate, reserving 1/3rd seats for women and to this extent the impugned order dated 04.02.2021 is liable to be quashed. By the same reasoning, the impugned order which reserve 8 seats in Margao Municipal Council where the total number of seats to be filled in are 25, must also be quashed and set aside.

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The Director has acted in breach of the Constitution as well as the statutory provision and the impugned order dated 04.02.2021 is therefore required to be quashed and set aside as not adhering to the mandate of law.

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23. When our attention is invited to the action of the Director and on the conduct of the Election Commission as a mute spectator, which in fact was expected to act and live upto its role conferred by the constitution, ensuring free and fair

elections, we are not expected to be oblivious to the situations which have been drawn to us. We do not appreciate the helplessness expressed by the State Election Commission, which is supposed to be an authority independent of the Government. If the illegality has been noticed by the State Election Commission, we expect it to act with promptitude and issue appropriate directions to the Director to rectify the said action by ensuring that it follows the mandate of the constitution rather than to rush and issue the election schedule. Its power of superintendence over the "conduct of elections" is wide enough, which include the power to take all steps necessary for conduct of free and fair election. The silence on part of the constitutional functionary, according to us, is highly detrimental to the democratic concept of this country. We say nothing more.

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26. We would have appreciated the submission advanced by the learned Advocate General that mere absence of policy would not lead to arbitrariness, albeit, we have before us instances as reflected in the Noting from where we have discerned that absence of policy has resulted into non discernable and non justifiable rotation of seats in different wards of respective Municipal Councils. The prescribed reservation of women as per the mandate is one such instance. Similar is the case in respect of the OBC reservations, though none of the petitioners before us raised the said ground before us, however, since we have perused the Noting, we are enlisting it as one of the aspect demonstrating non application of mind and attitude towards flouting the mandate of the State legislation. The Goa Municipalities Act, prescribes reservation for other backward classes based on concentration of the population of the said class in a particular ward. By the (amendment) Act, 2016 clause (bb) of sub section 2 of Section 9 has prescribed 27% number of seats to be filled in the election of Municipal Council to the person belonging to other back ward classes

and such seats are to be allotted by reservations to different wards in the Council. The Noting produced before us reflect that there was utter failure to adhere to the said the proportion and other Municipal Councils where 27% of seats are reserved for other backward classes, the proportion of reservation in other Municipal Council stood to the percentage of 20% being in Valpoi, Pernem and Sanguem. In the remaining Municipal Councils, the percentage of reserved seats for OBC vary from 21% to 25%.

Another instance of arbitrariness or non-application of mind is the reservation in ward no. 1 in Sanguem Municipal Council; the ward is reserved for Scheduled Tribe category whereas the percentage of population in the Ward of ST is 0.23% and a specific averment is made in the petition, which is not denied is there is only one voter belonging to the said category. If the respondent no. 2 would have paid attention to the wording applied in Section 10 “having regard to the concentration of the population” and given the said term significance as population of SC, ST and OBC, the said error was avoidable. By ignoring the concentration of the population, the situation that has arisen wherein ward no. 10 which has ST population of 206 as against total population of 681, by following cycle of rotation, since in the year 2010, ward no. 4 which had maximum ST population and it was reserved in the next election, according to us, the next highest population ward should have been reserved in the year 2013. The challenge to the reservation of the said provided in the year 2021 as arbitrary, justify the said accusation.

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31. Now we turn to the relief which the petitioners are entitled to. Once we have recorded that our interference in the process of election has necessitated on account of the flaws which defeat the constitutional mandate of reservation and rotation, our endeavor is to ensure that our decision to intervene do not cause any interruption or obstruction or in

any way to protract the election procedure but on the contrary it subserve the progress of election and facilitates its completion. Amongst the 11 Municipal Councils whose process of reservation and rotation has been alleged to be flawed one, their term has already expired and it is being informed that its administration has been taken over by the body of Administrators. By the Notification published on 14/01/2021, the SEC has already postponed the elections for a period of three months i.e. till April 2021 or the election date which may be determined by the Commission. By passing the impugned order on 04/02/2021 the reservation has been determined by the respondent No.2 and on 22/02/2021 the election programme has been notified by the respondent No.3. On perusal of the said programme, it is apparent that it will consume a period of 22 days from the last date of filing of nomination till the declaration of result on 22/03/2021. Since the Municipal Councils are already under the management of the administrator and the time scheduled for completion of election has been extended by the election Commission till 14/04/2021, and since from the date of pronouncement of our judgment still there is a period of 45 days available, in our opinion on rectification of errors which amount to infringement the constitutional mandate not only qua the reservation to women but also other infractions which we have noticed, a fresh programme shall be notified. If the authorities move with lightning speed, which they are expected to, since in the exigency of the situation which prompted the SEC to be agile in issuing the Notification declaring the elections when the Writ Petitions were pending before the Court, challenging the impugned Notification, expecting the same promptitude by the election Commission and on behalf of the State Government to rectify its procedure, and ensure free and fair election which is a hallmark of democracy, we direct the respondent No.2 to redetermine the reservation of seats in the Wards of the Municipal Council in the light of the observations made by us in the judgment. This exercise shall be undertaken within a period of 10 days from today, which will leave sufficient

time for the SEC to notify the election programme and complete the election process before 15/04/2021, by adhering to all the necessary stages as prescribed under the Goa Municipalities Election Rules, 1969."

21. Likewise, M.S.Sonak, J. delivered a concurring judgment holding:

"48. Applying the principles laid down by the Full Bench and the Hon'ble Supreme Court to the position of reservation in Mormugao Municipal Council, it will have to be held that the reservation of only eight seats out of a total number of 25 seats in favour of women is a reservation which is less than one-third the total number of seats to be filled by direct election to the Mormugao Municipal Council. Similarly, the reservation of only six seats from out of a total number of 20 seats to be filled by direct election to the Mapusa Municipal Council amounts to a reservation less than one-third of the total number of seats to be filled by direct election. The Director has acted in breach of both constitutional as well as statutory provisions in failing to provide reservation of not less than one-third of the total number of seats, in favour of women, and to that extent the impugned order dated 4th February 2021 is required to be quashed and set aside.

49. Mr. Joshi, learned counsel appearing for the SEC admitted that there has been constitutional infraction on the part of the Director, in failing to reserve not less than one-third of the total number of seats in Mormugao and Mapusa Municipal Councils, in favour of women. He, however, on instructions stated that the SEC is not concerned with the issue of reservation and therefore, notwithstanding the constitutional or statutory infraction, the SEC is quite helpless and will have no choice but to proceed with the elections based on the impugned order dated 4th February 2021 howsoever defective such order may be.

50. At least we did not hear any arguments from the learned Advocate General that there was no constitutional or statutory infraction on the part of the Director in reserving

less than one-third of the total number of seats in favour of women.

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51. The “understanding” of the Director of the constitutional provisions in Article 243-T or statutory provisions in Section 9 of the said Act cannot be the basis for sustaining the impugned order. The understanding of the Director is far from reasonable contrary to what was contended by the learned Advocate General. Neither the Constitution nor the said Act gives the Director three election terms i.e. 15 years to comply with the constitutional and statutory mandate of reserving not less than one- third of the total number of seats to be filled by direct election in “every municipality”. Both constitutional provisions as also statutory provisions make it abundantly clear that for each term the Municipality or Municipal Council, must have at least one -third women councilors, for a Municipality or Council to be regarded as a validly constituted Municipality or Council.

52. This understanding or theory of complying with the constitutional or statutory mandate in three installments spread over 15 years is some unique device adopted by the Director in a futile attempt to justify the gross constitutional and statutory infraction. Such a justification finds no basis either in the Constitution or the said Act. Such a justification is neither legal nor reasonable. Based on such a justification, there is no question of sustaining the order dated 4th February 2021.

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54. From the aforesaid, it is apparent that the Director carries the impression that both the Constitution as well as the said Act provide that the reservation in favour of women must not exceed one-third the total number of seats, when in fact, both the Constitution as well as the said Act provide exactly opposite. The Director seems to hold the impression

that reserving seven seats out of a total of 20 seats in Mapusa Municipal Council will “exceed and violate the mandate of 1/3rd reservation which is 20 seats”. Such understanding or impression of the Director flies in the face of both Constitutional as well as statutory mandate that not less than one-third of seats must be reserved in favour of the women. This means that there can be no violation of both Constitutional as well as statutory mandate if reservation exceeds one-third but there will be a violation of both Constitutional as well as statutory mandate if the reservation is less than one-third.

55. Since the impugned order dated 4th February 2021 is based upon such a gross misunderstanding of the provisions of the Constitution and the said Act, the same, will have to be quashed and set aside. Accordingly, the first contention of the learned Advocate General that the understanding of the Director being reasonable in support of the impugned order dated 4th February 2021 will have to be rejected. No understanding which results in doing what the Constitution specifically prohibits can be held as reasonable understanding. Any order based upon such understanding is therefore ultimately vulnerable and will have to be quashed and set aside.

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59. In the aforesaid context, we do not appreciate the helplessness expressed by the SEC, which is supposed to be an authority independent of the Government of Goa. The fortuitous circumstance that the SEC is also the Law Secretary, Government of Goa is not sufficient circumstance to express helplessness in the wake of an unconstitutional and ultra vires order by the Director of Municipal Administration/Urban Development. According to us, it was the duty of the SEC to require the Director to immediately rectify the impugned order and to provide for reservation of less than one-third of the seats in favour of women, rather than to rush and issue election schedule.

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63. The contention that the writ Court ought not to interfere with when the elections are imminent cannot be sole ground to defend an indefensible order or a patent infraction of the constitutional or statutory mandate. In this case, the learned Advocate General, apart from contending that “understanding” of the Director was not unreasonable, did not urge even a single contention in defence of the Director's failure to comply with the constitutional mandate in Article 243-T(3) or Section 9(1) of the said Act. Normally, at least plausible defence is put forth and the contention is that the detailed adjudication may be postponed until the conclusion of the election process. In this case, however, the only contention was that this Court should adopt hands-off doctrine because the elections were imminent. The “hands-off doctrine” has been evolved not to legalize or immunize patently unconstitutional orders or to enable the parties to create a situation fait accompli.

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77. The aforesaid means that there is a total disconnect between the noting prepared and relied upon by the Director and his affidavit dated 23rd February 2021. The noting refers to the concentration of ST population whereas the affidavit in terms states that there is no mandate to reserve seats for SC or ST merely because the population of SC or ST in those particular wards is high. The Director has gone to the extent of stating that the Petitioners' contention draws no support either from the Constitution or the said Act. In the affidavit, there is no explanation why the rotation mandate has been openly flouted.

78. Based on the disconnect between the affidavit filed by the Director and his Noting, the impugned order in so far as it reserves the ward Nos.4 and 7 in favour of ST, ignoring the mandate of rotation of reserved seats, will have to be set aside. Besides, the impugned notification, in so far as it

concerns Margao Municipal Council will also have to be set aside on account of the constitutional and statutory infraction of reserving less than one-third seats in favour of women.

79. The Director after having admitted that there was no policy based on which the reservation has been made or rotation policy implemented, appears to have regarded the absence of such policy as a licence to make reservations based on his whims and caprices. Different yardsticks have been applied in respect of different Municipal Councils. There is no uniform policy even for the implementation of the rotation mandate in the same councils. The entire exercise of making reservations to no less than 11 councils was completed by the Director in a single day i.e. 4th February 2021 and even the impugned order was issued on the same date. At least prima facie, even the amended provisions of section 9(2)(bb) of the said Act in relation to 27% reservations for OBCs appear to have been completely overlooked. The Noting that is a precursor for the issuance of the impugned order dated 4th February 2021 and was prepared on 4th February 2021 itself in a tearing hurry and soon thereafter Law Secretary who is holding the post of SEC issued the election schedule on 22nd February 2021 even though, these petitions had already been instituted and were posted for final disposal on 22nd February 2021. Based upon these artificially created events, the entire defence was to press forth the hands-off doctrine and overlook the gross illegalities and the constitutional and statutory infraction by the Director.

80. For all the above reasons I concur and join my Sister, Hon'ble Smt. Justice Bharati Dangre in allowing all the writ petitions except Writ Petition No. 515 of 2021 and in issuing the operational directions."

22. This reasoning then led to the final conclusion which, as has been

extracted above, struck down the order dated 04.02.2021 and directed the Director, Urban Development to issue a fresh order within 10 days from the date of the judgment giving due weightage to the observations contained in the judgments. Further, the SEC was then directed to notify the election programme afresh so that the election process culminates on or before 15.04.2021.

23. Part IXA of the Constitution titled “The Municipalities” was inserted by the Constitution (Seventy-Fourth) Amendment Act, 1992 with effect from 1st June, 1993. Article 243P defines “Municipal Area” and “Municipality” as follows:

> **243P. Definitions.**
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> xxx xxx xxx
>
> (d) “Municipal area” means the territorial area of a Municipality as is notified by the Governor;
>
> (e) “Municipality” means an institution of self-government constituted under article 243Q;
>
> xxx xxx xxx

24. Municipalities are then divided into three categories under Article 243Q. The first is the Nagar Panchayat for a transitional area i.e., an area in transition from a rural to an urban area; the second is the Municipal Council for a “smaller urban area” and third, a Municipal

Corporation for a “larger urban area” as follows:

243Q. Constitution of Municipalities.

(1) There shall be constituted in every State, -

(a) a Nagar Panchayat (by whatever name called) for a transitional area, that is to say, an area in transition from a rural area to an urban area;

(b) a Municipal Council for a smaller urban area; and

(c) a Municipal Corporation for a larger urban area,

in accordance with the provisions of this Part:

Provided that a Municipality under this clause may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township.

(2) In this article, “a transitional area”, “a smaller urban area” or “a larger urban area” means such area as the Governor may, having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factors as he may deem fit, specify by public notification for the purposes of this Part.

25. Article 243T is important and provides for reservation of seats in Municipalities as follows:

243T. Reservation of seats.

(1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes in every Municipality and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Municipality as the population of the Scheduled Castes in the Municipal area or of the Scheduled Tribes in the Municipal area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Municipality.

(2) Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality.

(4) The offices of Chairpersons in the Municipalities shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide.

(5) The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in article 334.

(6) Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Municipality or offices of Chairpersons in the Municipalities in favour of backward class of citizens.

26. Under Article 243U(1), every Municipality, unless earlier dissolved

under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer. Importantly, Article 243U(3) provides:

> **243U. Duration of Municipalities, etc.**
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> xxx xxx xxx
>
> (3) An election to constitute a Municipality shall be completed, -
>
> (a) before the expiry of its duration specified in clause (1);
>
> (b) before the expiration of a period of six months from the date of its dissolution:
>
> Provided that where the remainder of the period for which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Municipality for such period.

27. Article 243ZA provides for elections to Municipalities as follows:

> **243ZA. Elections to the Municipalities.**
>
> (1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Municipalities shall be vested in the State Election Commission referred to in article 243K.
>
> (2) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with, elections to the Municipalities.

28. Article 243K of the Constitution provides as follows:

243K. Elections to the Panchayats.

(1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor.

(2) Subject to the provisions of any law made by the Legislature of a State, the conditions of service and tenure of office of the State Election Commissioner shall be such as the Governor may by rule determine:

Provided that the State Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of a High Court and the conditions of service of the State Election Commissioner shall not be varied to his disadvantage after his appointment.

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

(4) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with, elections to the Panchayats.

29. It will be noticed that Article 243ZA(1) corresponds to Article 324 contained in Part XV dealing with elections to Parliament and the legislative bodies of the States. Likewise, 243ZA(2) corresponds to Article 328 contained in the same chapter.

30. Article 243ZG is important and states:

243ZG. 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 243ZA shall not be called in question in any court;

(b) no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State.]

This Article corresponds to Article 329 of the Constitution contained in Part XV.

31. The relevant provisions of the Goa Municipalities Act are contained in Sections 8 to 10A thereof:

8. Establishment and incorporation of Councils.

For every municipal area there shall be a Municipal Council. Every such Council shall be a body corporate by the name of “The ... Municipal Council” and shall have perpetual succession and a common seal, and shall have power to acquire, hold and dispose of property, and to enter into contracts and may by the said name sue, or be sued, through its Chief Officer.

9. Composition of Councils.

(1) Save as otherwise provided by this Act, every Council shall consist of Councillors elected at ward elections;

Provided that—

(1) in every Council, no less than (1/3) seats shall be reserved for women;

(2) in every Council, seat shall also be reserved for Scheduled Caste, Scheduled Tribes and Other Backward Class and for woman belonging to Scheculed Caste, as the case may be, the the Scheduled Tribes and Other Backward Class as provided in subsection (2)

(2) The Director shall from time to time by an order published in the Official Gazette fix for each municipal area —

(a) the number of elected Councillors in accordance with the following table:

Class of Municipal area	Number of elected Councillors
i) 'A' Class	The minimum number of elected Councillors shall be 20, and for every 2500 of the voters in the municipal area or part thereof above 50,000 there shall be one additional elected Councillor, so, however, that the total number of elected Councillors shall not exceed 25;
(ii) 'B' Class	The minimum number of elected Councillor shall be 12, and for every 2500 of the voters in the municipal area or part thereof above 10,000 there shall be one additional elected Councillor, so, however, that the total number of elected Councillors shall not exceed 20;
(iii) 'C' Class	The number of elected Councillors shall be 10.

(b) the number of seats, if any, to be reserved for the Scheduled Castes, Scheduled Tribes so that such number shall bear, as nearly as may be, the same proportion to the number of elected Councillors as the population of the Scheduled Castes, Scheduled Tribes in the municipal area bears to the total population of that area and not less than one-third of such seats shall be reserved for women and such seats shall be allotted by rotation to different wards in the Council.

(bb) the number of seats, if any, to be reserved for persons belonging to the category of Other Backward Classes so that such number shall be twenty seven percent of the number of seats to be filled in through election in the Council and such seats shall be allotted by rotation to different wards in the Council.

(c) the number of seats for the office of Chairperson in the Council for Scheduled Castes, the Scheduled Tribes and women so that such number will bear as nearly as may be, the same proportion to the number of elected Councillors as the population of the scheduled Castes, Scheduled Tribes in the municipal area bears to the total population of that area and such seats shall be allotted by rotation to different constituencies in a Council.

(3) The reservation of seats for Scheduled Castes and Scheduled Tribes made by an order under sub-section (2) shall cease to have effect when the reservation of seats for those Castes and Tribes in the House of the People ceases to have effect under the Constitution of India:

Provided that nothing in this sub-section shall render any person elected to any such reserved seat ineligible to continue as a Councillor during the term of office for which he was duly elected by reason only of the fact that the reservation of seats has so ceased to have effect.

(4) Every order under sub-section (2) shall take effect for the purposes of the next general election of the Council immediately following after the date of the order.

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10. Division of municipal area into wards and reservation of wards for women, Scheduled Castes, Scheduled Tribes and Other Backward Class.

(1) The Director shall from time to time by order published in the Official Gazette, fix for each municipal area the number and the extent of the wards into which such area shall be divided. The Director shall specify in the order the ward in which a seat is reserved for women but in so doing he shall ensure that such a seat its reserved from time to time by rotation in different wards of the municipal area. He shall by a like order specify the wards in which seats are reserved for Scheduled Castes, Scheduled Tribes or the Other Backward Class, including the seats for offices of Chairperson having regard to the concentration of population of those Castes, or Tribes, or as the case may be, of those class, in any particular wards.

(2) Each of the wards shall elect only one Councillor.

(3) Every order issued under sub-section (1) shall take effect for the purpose of the next general election immediately following the date of such order.

(4) Nothing in this section shall be deemed to prevent women or persons belonging to the Scheduled Castes, Scheduled Tribes or Other Backward Class for whom seats are reserved in any Council, from standing for election and being elected to any of the seats which are not reserved.

10A. Election of Councils.

The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all

elections to the Council shall be vested in the State Election Commission constituted under section 237 of the Goa Panchayat Raj Act, 1994(Act 14 of 1994).

Bar contained in Articles 243ZG(b) / 329(b)

32. The *locus classicus* on the subject is by an early judgment of this court which has been followed on innumerable occasions. ***N.P. Ponnuswami v. Returning Officer, Namakkal Constituency*** (supra), dealt with a petition that was filed under Article 226 before the Madras High Court praying for a writ of certiorari in the following circumstances:

> "The appellant was one of the persons who had filed nomination papers for election to the Madras Legislative Assembly from the Namakkal Constituency in Salem district. On 28th November, 1951, the Returning Officer for that constituency took up for scrutiny the nomination papers filed by the various candidates and on the same day he rejected the appellant's nomination paper on certain grounds which need not be set out as they are not material to the point raised in this appeal. The appellant thereupon moved the High Court under Article 226 of the Constitution praying for a writ of certiorari to quash the order of the Returning Officer rejecting his nomination paper and to direct the Returning Officer to include his name in the list of valid nominations to be published. The High Court dismissed the appellant's application on the ground that it had no jurisdiction to interfere with the order of the Returning Officer by reason of the provisions of Article 329(b) of the Constitution. The appellant's contention in this appeal is that the view expressed by the High Court is not correct, that the

jurisdiction of the High Court is not affected by Article 329(b) of the Constitution and that he was entitled to a writ of certiorari in the circumstances of the case." (at page 221)

33. This Court then summarized Part XV of the Constitution dealing with elections as follows:

"In construing this Article, reference was made by both parties in the course of their arguments to the other Articles in the same Part, namely, Articles 324, 325, 326, 327 and 328. Article 324 provides for the constitution and appointment of an Election Commissioner to superintend, direct and control elections to the legislatures; Article 325 prohibits discrimination against electors on the ground of religion, race, caste or sex; Article 326 provides for adult suffrage; Article 327 empowers Parliament to pass laws making provision with respect to all matters relating to, or in connection with, elections to the legislatures, subject to the provisions of the Constitution; and Article 328 is a complementary article giving power to the State Legislature to make provision with respect to all matters relating to, or in connection with, elections to the State Legislature. A notable difference in the language used in Articles 327 and 328 on the one hand, and Article 329 on the other, is that while the first two articles begin with the words "subject to the provisions of this Constitution", the last article begins with the words "notwithstanding anything in this Constitution". It was conceded at the bar that the effect of this difference in language is that whereas any law made by Parliament under Article 327, or by the State Legislatures under Article 328, cannot exclude the jurisdiction of the High Court under Article 226 of the Constitution, that jurisdiction is excluded in regard to matters provided for in Article 329."

(at pages 224,225)

34. This court held that "election" has to be understood in the wider

sense as follows:

> "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."
>
> (at page 228)

35. Dealing with the specific contention of the bar contained in Article 329(b) shutting out proceedings under Article 226, the Court then held:

> "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 Article 226 of the Constitution (the ordinary jurisdiction of the courts having been expressly excluded), and another after they have been completed by means of an election petition. 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, 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 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.

I think that a brief examination of the scheme of Part XV of the Constitution and the Representation of the People Act, 1951, will show that the construction I have suggested is the correct one. 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 the third requisite. The other two articles in Part XV, viz, Articles 325 and 326 deal with two matters of principle to which the Constitution-framers have attached much importance. They 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."

(at pages 228-230)

36. The Court then summed up its conclusions thus:

> "It may be pointed out that Article 329(b) must be read as complementary to clause (a) of that article. Clause (a) bars the jurisdiction of the courts with regard to such law as may be made under Articles 327 and 328 relating to the delimitation of constituencies or the allotment of seats to such constituencies. It was conceded before us that Article 329(b) ousts the jurisdiction of the courts with regard to matters arising between the commencement of the polling and the final selection. The question which has to be asked is what conceivable reason the legislature could have had to leave only matters connected with nominations subject to the jurisdiction of the High Court under Article 226 of the Constitution. If Part XV of the Constitution is a code by itself i.e., it creates rights and provides for their enforcement by a Special Tribunal to the exclusion of all courts including the High Court, there can be no reason for assuming that the Constitution left one small part of the election process to be made the subject-matter of contest before the High Courts and thereby upset the time-schedule of the elections. The more reasonable view seems to be that Article 329 covers all "electoral matters".
>
> The conclusions which I have arrived at may be summed up briefly as follows:
>
> > (1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized 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.

> (2) In conformity with this principle, the scheme the election law in this country as well as in England is that no significance should be attached to anything which does not affect the 'election'; and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the 'election' and enable the person affected to call it in question, they should be brought up before a Special Tribunal by means of an election petition and not be made the subject of a dispute before any court while the election is in progress."
>
> (at pages 233, 234)

37. Leaving open what the powers of this court and the High Courts under Articles 226, 227 and 136 are <u>after</u> an Election Tribunal decides a dispute before it, this Court held:

> "It should be mentioned here that the question as to what the powers of the High Court under Articles 226 and 227 and of this court under Article 136 of the Constitution may be, is one that will have to be decided on a proper occasion."
>
> (at page 237)

38. What was left open in ***Ponnuswami's*** case as to the powers of this Court under Article 136 after an election tribunal had decided an election petition before it was decided by this Court in ***Durga Shankar Mehta v. Thakur Raghuraj Singh,*** (supra). This judgment described the reach of the non-obstante clause contained in Article 329(b) as follows:

> “As has been said already, the non obstante clause in Article 329 prohibits challenge to an election either to Parliament or any State Legislature, except in the manner laid down in clause (2) of the article. But there is no prohibition of the exercise of its powers by the Supreme Court in proper cases under Article 136 of the Constitution against the decision or determination of an Election Tribunal which like all other Judicial Tribunals comes within the purview of the article. It is certainly desirable that the decisions on matters of disputed election should, as soon as possible, become final and conclusive so that the constitution of the legislature may be distinctly and speedily known. But the powers under Article 136 are exercisable only under exceptional circumstances. The article does not create any general right of appeal from decisions of all tribunals. As regards the decision of this court in Ponnuswami v. Returning Officer, Namakkal Constituency [1952 SCR 218] to which reference has been made by the learned counsel, we would only desire to point out that all that this case decided was that the High Court had no jurisdiction, under Article 226 of the Constitution, to interfere by a writ of certiorari, with the order of a Returning Officer who was alleged to have wrongly rejected the nomination paper of a particular candidate. It was held that the word “election” in Article 329(b) of the Constitution had been used in the wide sense to connote the entire process, culminating in a candidate's being declared elected and that the scheme of Part XV of the Constitution was that all matters which had the effect of vitiating election should be brought up only after the election was over and by way of an election petition. The particular point, which arises for consideration here, was not decided in that case and was expressly left open.”
>
> (at pages 274,275)

39. Likewise, a discussion on the reach of Article 329(b) and Article 226 of the Constitution after an election petition has been decided by an

election tribunal was then discussed in ***Hari Vishnu Kamath v. Syed Ahmad Ishaque,*** (supra):

> "Now, the question is whether a writ is a proceeding in which an election can properly be said to be called in question within the meaning of Article 329(b). On a plain reading of the article, what is prohibited therein is the initiation of proceedings for setting aside an election otherwise than by an election petition presented to such authority and in such manner as provided therein. A suit for setting aside an election would be barred under this provision. In N.P. Ponnuswami v. Returning Officer, Namakkal Constituency [1952 SCR 218] it was held by this court 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, and that an application under Article 226 challenging the validity of any of the acts forming part of that process would be barred. These are instances of original proceedings calling in question an election, and would be within the prohibition enacted in Article 329(b). But when once proceedings have been instituted in accordance with Article 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 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. There being no dispute that they are subject to the supervisory jurisdiction of the High Courts under Article 226, a writ of certiorari under that article will be competent against decisions of the Election Tribunals also.
>
> The view that Article 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. If he applies under Article 226 for a writ to set aside the order of the Tribunal, he cannot in any sense be said to call in question the election; on the other hand, he seeks to maintain it. His application could not, therefore, be barred by Article 329(b). And if the contention of the first respondent is well-founded, the result will be that proceedings under Article 226 will be competent in one event and not in another and at the instance of one party and not the other. Learned counsel for the first respondent was unable to give any reason why this differentiation should be made. We cannot accept a construction which leads to results so anomalous."

(at pages 1111,1112)

40. In ***Narayan Bhaskar Khare (Dr) v. Election Commission of India*** (supra), a 7-Judge Bench dealt with elections to the President and the Vice President of India contained under Article 71. The Court held:

"As already indicated, Article 71(1) confers jurisdiction and power on this court to inquire into and decide "all doubts and disputes arising out of or in connection with the election of a President or Vice-President". The question is: Is there in this Article or in any other part of the Constitution or anywhere else any indication as to the time when such inquiry is to be held? In the first place, Article 71 postulates an "election of the President or Vice-President" and provides for inquiry into doubts and disputes arising out of or in connection with such an election. What is the meaning to be given to the word "election" as used in this Article? If we give to the word "election" occurring in Article 71(1) the same wide meaning as comprising the entire election process culminating in a candidate being declared elected, then clearly the inquiry is

to be made after such completed election i.e. after a candidate is declared to be elected as President or Vice-President as the case may be. We see no reason why this accepted meaning should not be given to the critical word. In the second place, under clause 3 of Article 71, subject to the provisions of this Constitution, Parliament may by law regulate any matter “relating to or connected with the election” of a President or Vice-President. The words here also are similar to those used in Article 327 and are equally wide enough to cover matters relating to or connected with any stage of the entire election process. In exercise of powers conferred on it by Article 71(3), Parliament has enacted the Presidential and Vice-Presidential Election Act, 1952 (31 of 1952) to regulate certain matters relating to or connected with elections to the office of President and Vice-President of India. A glance through the provisions of this Act will indicate that in the view of Parliament the time for the exercise of jurisdiction by this court to inquire into and decide doubts and disputes arising out of or in connection with the Presidential election is after the entire election process is completed.”

(at pages 1088,1089)

“The above stated interpretation appears to us to be in consonance with the other provisions of the Constitution and with good sense. If doubt or dispute arising out of or in connection with the election of a President or Vice-President can be brought before this court before the whole election process is concluded then conceivably the entire election may be held up till after the expiry of the five years' term which will involve a non-compliance with the mandatory provisions of Article 62. The well recognised principle of election law, Indian and English, is that elections should not be held up and that the person aggrieved should not be permitted to ventilate his individual interest in derogation of the general interest of the people, which requires that elections should be gone through according to the time

> schedule. It is, therefore, in consonance both with the provisions of Article 62 and with good sense to hold that the word “election” used in Article 71 means the entire process of election. “
>
> (at page 1090)

41. The judgment of Krishna Iyer,J. contained in ***Mohinder Singh Gill v. Chief Election Commr.*** (supra), is of great importance and delineates not only the parameters of Article 329(b) *qua* writ petitions filed under Articles 226 and 227 of the Constitution of India but also speaks of the powers of the Election Commission in supervising and conducting the entire election process. This Court made a distinction between challenges under Article 226 while the election process is on which interfere with the progress of the election as against approaching a writ court to accelerate the completion of the election and to act in furtherance of the election. The Court put it thus:

> “**28.** What emerges from this perspicacious reasoning, if we may say so with great respect, is that any decision sought and rendered will not amount to “calling in question” an election if it subserves the progress of the election and facilitates the completion of the election. We should not slur over the quite essential observation “Anything done towards the completion of the election proceeding can by no stretch of reasoning be described as questioning the election.” Likewise, it is fallacious to treat “a single step taken in furtherance of an election” as equivalent to election.

29. Thus, there are two types of decisions, two types of challenges. The first relates to proceedings which interfere with the progress of the election. The second accelerates the completion of the election and acts in furtherance of an election. So, the short question before us, in the light of the illumination derived from Ponnuswami is as to whether the order for re-poll of the Chief Election Commissioner is "anything done towards the completion of the election proceeding" and whether the proceedings before the High Court fecilitated the election process or halted its progress. The question immediately arises as to whether the relief sought in the writ petition by the present appellant amounted to calling in question the election. This, in turn, revolves round the point as to whether the cancellation of the poll and the reordering of fresh poll is "part of election" and challenging it is "calling it in question".

30. The plenary bar of Article 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 statutes and controlled by the Constitution. Durga Shankar Mehta has affirmed this position and supplemented it by holding that, once the Election Tribunal has decided, the prohibition is extinguished and the Supreme Court's overall power to interfere under Article 136 springs into action. In Hari Vishnu this court upheld the rule in Ponnuswami excluding any proceeding, including one under Article 226, during the on-going process of election, understood in the comprehensive sense of notification down to declaration. Beyond the declaration comes the election petition, but beyond the decision of the Tribunal the ban of Article 329(b) does not bind.

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> **34.**…But what is banned is not anything whatsoever done or directed by the Commissioner but everything he does or directs in furtherance of the election, not contrarywise. For example, after the President notifies the nation on the holding of elections under Section 15 and the Commissioner publishes the calendar for the poll under Section 30, if the latter orders Returning Officers to accept only one nomination or only those which come from one party as distinguished from other parties or independents, is that order immune from immediate attack. We think not. Because the Commissioner is preventing an election, not promoting it and the court's review of that order will facilitate the flow, not stop the stream. Election, wide or narrow be its connotation, means choice from a possible plurality, monolithic politics not being our genius or reality, and if that concept is crippled by the Commissioner's act, he holds no election at all."

42. Dealing with the power of the Election Commission under Article 324 of the Constitution and judicial review of such power, in an important passage Krishna Iyer,J. stated:

> "**38.** 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*:
>
> > "In the opinion of some of the Judges constituting the majority in Bharati's case [Kesavananda Bharati v. State

of Kerala, (1973) 4 SCC 225.] 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.

39. 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 despotism — 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 leading strings of legal guidelines, can call the bluff, quash the action and bring order into the process."

43. Finally, the court summarized its conclusions as follows:

> "**92.** Diffusion, even more elaborate discussion, tends to blur the precision of the conclusion in a judgment and so it is meet that we synopsize the formulations. Of course, the condensed statement we make is 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.
> >
> > (2)(a) The Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. This responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances.
> >
> > (b) Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission, shall act in conformity with, not in violation of, such provisions but where such law is silent Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from, pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act

bona fide and be amenable to the norms of natural justice insofar as conformance to such canons can reasonably and realistically be required of it as fairplay-in-action in a most important area of the constitutional order viz. elections. Fairness does import an obligation to see that no wrongdoer candidate benefits by his own wrong. To put the matter beyond doubt, natural justice enlivens and applies to the specific case of 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.

(3) The conspectus of provisions bearing on the subject of elections clearly expresses the rule that there is a remedy for every wrong done during the election in progress although it is postponed to the post-election stage and procedure as predicated in Article 329(b) and the 1951 Act. The Election Tribunal has, under the various provisions of the Act, large enough powers to give relief to an injured candidate if he makes out a case and such processual amplitude of power extends to directions to the Election Commission or other appropriate agency to hold a poll, to bring up the ballots or do other thing necessary for fulfilment of the jurisdiction to undo illegality and injustice and do complete justice within the parameters set by the existing law."

44. In ***Boddula Krishnaiah and Another v. State Election Commissioner, A.P. & Ors.,*** (1996) 3 SCC 416, a Gram Panchayat election notification had been issued, subsequent to which the High Court, by interim orders directed 94 persons to participate in the election. By subsequent interim orders, the claims of various

respondents were to be ascertained, and ultimately, the Revenue Divisional Officer found 20 persons to be eligible to be included in the voters list, as a result of which the High Court directed that these persons should be allowed to participate in the election. This Court held:

> "**11.** 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.
>
> 12. Under these circumstances, we hold that the order passed by the High Court is not correct in law in giving direction not to declare the result of the election or to conduct fresh poll for 20 persons, though the writ petition is maintainable. The High Court, pending writ petition, would not be justified in issuing direction to stall the election process. It is made clear that though we have held that the respondents are not entitled to the relief by interim order, this order does not preclude any candidate including defeated candidate from canvassing the correctness of the election. They are free, as held earlier, to seek remedy by way of an election petition as provided in the Act and the Rules."

45. In ***Election Commission of India v. Ashok Kumar*** (supra), a 3-Judge Bench of this Court reviewed the entire case law relating to

Article 329(b) and Article 226 holding:

> "**28.** Election disputes are not just private civil disputes between two parties. Though there is an individual or a few individuals arrayed as parties before the court but the stakes of the constituency as a whole are on trial. Whichever way the lis terminates it affects the fate of the constituency and the citizens generally. A conscientious approach with overriding consideration for welfare of the constituency and strengthening the democracy is called for. Neither turning a blind eye to the controversies which have arisen nor assuming a role of overenthusiastic activist would do. The two extremes have to be avoided in dealing with election disputes."

A useful summary of conclusions based on the case law was then set out by the court as follows:

> **"31.** The founding fathers of the Constitution have consciously employed use of the words "no election shall be called in question" in the body of Section 329(*b*) and these words provide the determinative test for attracting applicability of Article 329(*b*). If the petition presented to the court "calls in question an election" the bar of Article 329(*b*) is attracted. Else it is not.
>
> **32.** For convenience's sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:
>
> *(1)* If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial

remedy has to be postponed till after the completing of proceedings in elections.

(2) Any decision sought and rendered will not amount to “calling in question an election” if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

(3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

(4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the court.

(5) The court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(*b*) but brought to it during the pendency of election proceedings. The court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the court would act with reluctance and shall not act, except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material.”

46. In ***Kurapati Maria Das v. Dr. Ambedkar Seva Samajan*****,** (2009) 7 SCC 387, the validity of a caste certificate came up for determination in a writ petition that was filed which challenged municipal elections made to a reserved constituency. In this context, this court held:

> "**18**. Regarding the bar of jurisdiction under Article 243-ZG(b), learned counsel Shri Gagan Gupta submitted that the decision relied upon by the High Court as K. Venkatachalam v. A. Swamickan [(1999) 4 SCC 526] was applicable and, therefore, it could not be said that there was a bar to the entertainment of the writ petition under Article 226. Learned counsel supported the factual findings recorded by the High Court to the effect that the appellant was a Christian and, therefore, could not claim the status of a person belonging to the Scheduled Caste, more particularly, caste "Mala".
>
> **19.** In the first place, it would be better to consider as to whether the bar under Article 243-ZG(b) is an absolute bar. The article reads thus:
>
> > "243-ZG. (b) no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the legislature of a State."
>
> At least from the language of clause (b), it is clear that the bar is absolute. Normally, where such a bar is expressed in a negative language as is the case here, it has to be held that the tone of clause (b) is mandatory and the bar created therein is absolute.
>
> **20.** This Court in its recent decisions has held the bar to be absolute. First such decision is Jaspal Singh Arora v. State of M.P. [(1998) 9 SCC 594] In this case the election of the

petitioner as the President of the Municipal Council was challenged by a writ petition under Article 226, which was allowed setting aside the election of the petitioner. In para 3 of this judgment, the Court observed:

> "3. … it is clear that the election could not be called in question except by an election petition as provided under that Act. The bar to interference by courts in electoral matters contained in Article 243-ZG of the Constitution was apparently overlooked by the High Court in allowing the writ petition. Apart from the bar under Article 243-ZG, on settled principles interference under Article 226 of the Constitution for the purpose of setting aside election to a municipality was not called for because of the statutory provision for election petition…."

21. The second such decision is Gurdeep Singh Dhillon v. Satpal [(2006) 10 SCC 616]. In that decision, after quoting Article 243-ZG(b) the Court observed that the shortcut of filing the writ petition and invoking constitutional jurisdiction of the High Court under Articles 226/227 was not permissible and the only remedy available to challenge the election was by raising the election dispute under the local statute.

22. There is no dispute that Rule 1 of the Andhra Pradesh Municipalities (Decision on Election Disputes) Rules, 1967, specifically provides for challenging the election of Councillor or Chairman. It was tried to be feebly argued that this was a petition for quo warranto and not only for challenging the election of the appellant herein. This contention is clearly incorrect. When we see the writ petition filed before the High Court, it clearly suggests that what is challenged is the election. In fact the Prayer clauses (b) and (c) are very clear to suggest that it is the election of the appellant which is in challenge."

47. In ***W.B. State Election Commission v. Communist Party of India***

(Marxist) (supra), the West Bengal State Commission issued certain directions extending the last date for submitting nominations by one day, after which the said order was recalled on the next day. A learned single Judge of the High Court delivered a judgment in which the order cancelling the extension was quashed and the commission was directed to issue a fresh notification extending the date for filing nomination. In obedience to this order, the SEC issued a notification extending the date for filing of nominations on 21.04.2018. Writ petitions were then filed which were dismissed by a learned Single Judge, who declined to interfere with the election process. Ultimately, after fresh writ petitions were moved before a single Judge of the Calcutta High Court, the single Judge declined to give any further directions, more particularly, that the SEC be made to accept nominations already filed in electronic forms. The Division Bench, while disposing of the appeal, directed the SEC to accept nominations in electronic forms by those candidates who had submitted them on or before 3.00 p.m. on 23.04.2018. After setting out the relevant provisions of the Panchayat Elections Act, this Court held:

> "**28.** The Panchayat Elections Act is a complete code in regard to the conduct of the poll and for the resolution of

disputes concerning the validity of the election. Article 243-K entrusts the superintendence, direction and control over the conduct of all elections to the panchayats in the State Election Commission. Clause (b) of Article 243-O stipulates thus:

> "243-O. Bar to interference by courts in electoral matters.—Notwithstanding anything in this Constitution —
>
> ***
>
> (b) no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the legislature of a State."

29. There is merit in the submission that the discipline which is mandated by the provisions of the Constitution and enforced by the enabling State law on the subject must be maintained. Any dispute in regard to the validity of the election has to be espoused by adopting a remedy which is known to law, namely, through an election petition. It is at the trial of an election petition that factual disputes can be resolved on the basis of evidence. This principle has been consistently adhered to in decisions of this court. In Boddula Krishnaiah v. State Election Commr., A.P., (1996) 3 SCC 416, a three-Judge Bench adverted to the decisions of the Constitution Bench in N.P. Ponnuswami v. Returning Officer, Namakkal Constituency, 1952 SCR 218 in Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman, (1985) 4 SCC 689. After referring to Ponnuswami, it was observed:

> "8. In N.P. Ponnuswami v. Returning Officer, Namakkal Constituency a Constitution Bench of this court had held that 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. In conformity with the principle, the scheme of the election law is that no significance should be attached to anything which does not affect the "election"; and if any irregularities are committed while it is in progress and they belong to the category or class which under the law by which elections are governed, would have the effect of vitiating the "election"; and enable the person affected to call it in question, they should be brought up before a Special Tribunal by means of an election petition and not be made the subject of a dispute before any court while the election is in progress."

The binding principle must be followed.

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33. For these reasons, we are of the view that challenges in regard to the validity of the elections to the uncontested seats in the panchayats, Panchayat Samitis and Zila Parishads must also be pursued in election petitions under Section 79(1) of the Panchayat Elections Act. We leave it open to any person aggrieved to raise a dispute in the form of an election petition in accordance with the provisions contained in the Panchayat Elections Act. In exercise of the power conferred by Article 142, we direct that the period of 30 days for filing election petitions in respect of the uncontested seats shall commence from the date of the publication of the results in the Official Gazette."

48. A recent judgment of 3 learned Judges in ***Laxmibai v. Collector,*** (supra), comes nearer home when it deals with municipal elections, and holds as follows:

"**42.** This court again examined the question in respect of raising a dispute relating to an election of a local body before the High Court by way of a writ petition under Article 226 of the Constitution of India in a judgment reported as Harnek Singh v. Charanjit Singh [Harnek Singh v. Charanjit Singh, (2005) 8 SCC 383]. It was held as under:

> "15. Prayers (b) and (c) aforementioned, evidently, could not have been granted [Charanjit Singh v. State of Punjab, 2003 SCC OnLine P&H 1226] in favour of the petitioner by the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India. It is true that the High Court exercises a plenary jurisdiction under Article 226 of the Constitution of India. Such jurisdiction being discretionary in nature may not be exercised inter alia keeping in view the fact that an efficacious alternative remedy is available therefor. (See Sanjana M. Wig v. Hindustan Petroleum Corpn. Ltd. (2005) 8 SCC 242)
>
> 16. Article 243-O of the Constitution of India mandates that all election disputes must be determined only by way of an election petition. This by itself may not per se bar judicial review which is the basic structure of the Constitution, but ordinarily such jurisdiction would not be exercised. There may be some cases where a writ petition would be entertained but in this case we are not concerned with the said question.
>
> 17. In C. Subrahmanyam [C. Subrahmanyam v. K. Ramanjaneyullu, (1998) 8 SCC 703], a three-Judge Bench of this court observed that a writ petition should not be entertained when the main question which fell for decision before the High Court was non-compliance with the provisions of the Act which was one of the grounds for an election petition in terms of Rule 12 framed under the Act."

43. Section 10-A of the 1959 Act and Section 9-A of the 1961 Act read with Articles 243-K and 243-O, are *pari materia* with Article 324 of the Constitution of India. In view of the judgments referred, we find that the remedy of an aggrieved person accepting or rejecting nomination of a candidate is by way of an election petition in view of the bar created under Section 15-A of the 1959 Act. The said Act is a complete code providing machinery for redressal to the grievances pertaining to election as contained in Section 15 of the 1959 Act. The High Court though exercises extraordinary jurisdiction under Article 226 of the Constitution of India but such jurisdiction is discretionary in nature and may not be exercised in view of the fact that an efficacious alternative remedy is available and more so exercise restraint in terms of Article 243-O of the Constitution of India. Once alternate machinery is provided by the statute, the recourse to writ jurisdiction is not an appropriate remedy. It is a prudent discretion to be exercised by the High Court not to interfere in the election matters, especially after declaration of the results of the elections but relegate the parties to the remedy contemplated by the statute. In view of the above, the writ petition should not have been entertained by the High Court. However, the order of the High Court that the appellant has not furnished the election expenses incurred on the date of election does not warrant any interference."

Powers of the State Election Commission under Article 243K r/w 243ZA

49. In ***Election Commission of India v. Shivaji,*** (supra), this court after referring to ***Ponnuswami's*** case then referred to the powers of the Election Commission under Article 324 as follows:

> "**6.** …….. 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 Article 324 of the Constitution as decided in Mohinder Singh Gill v. Chief Election Commissioner [(1978) 1 SCC 405] and to see that the election process was completed in a fair manner."

50. Similarly, in ***Digvijay Mote v. Union of India,*** (1993) 4 SCC 175, this court referred to the powers of the Election Commission under Article 324 of the Constitution as follows:

> "**8.** The conduct of election is in the hands of the Election Commission which has the power of superintendence, direction and control of elections vested in it as per Article 324 of the Constitution. Consequently, if the Election Commission is of the opinion that having regard to the disturbed conditions of a State or a part thereof, free and fair elections could not be held it may postpone the same. Accordingly, on account of unsettled conditions, the elections in the States of Assam & Jammu and Kashmir could be postponed.
>
> **9.** However, it has to be stated this power is not unbridled. Judicial review will still be permissible, over the statutory body exercising its functions affecting public law rights.
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> xxx xxx xxx
>
> **14.** The resultant position is that it cannot be stated that the exercise of power under Article 324 is not altogether unreviewable. The review will depend upon the facts and circumstances of each case."

51. In ***Kishansing Tomar v. Municipal Corpn., Ahmedabad*** (supra), a Constitution Bench of this Court clearly set out the powers of the State

Election Commissions under the Constitution as follows:

> "**22.** In our opinion, the entire provision in the Constitution was inserted to see that there should not be any delay in the constitution of the new municipality every five years and in order to avoid the mischief of delaying the process of election and allowing the nominated bodies to continue, the provisions have been suitably added to the Constitution. In this direction, it is necessary for all the State Governments to recognise the significance of the State Election Commission, which is a constitutional body and it shall abide by the directions of the Commission in the same manner in which it follows the directions of the Election Commission of India during the elections for Parliament and the State Legislatures. In fact, in the domain of elections to the panchayats and the municipal bodies under Part IX and Part IX-A for the conduct of the elections to these bodies they enjoy the same status as the Election Commission of India.
>
> **23.** In terms of Article 243-K and Article 243-ZA(1) the same powers are vested in the State Election Commission as the Election Commission of India under Article 324. The words in the former provisions are in pari materia with the latter provision.
>
> **24.** The words, "superintendence, direction and control" as well as "conduct of elections" have been held in the "broadest of terms" by this court in several decisions including Special Reference No. 1 of 2002, In re [Special Reference No. 1 of 2002, In re, (2002) 8 SCC 237] and Mohinder Singh Gill case [Mohinder Singh Gill v. Chief Election Commr., (1978) 1 SCC 405] and the question is whether this is equally relevant in respect of the powers of the State Election Commission as well.
>
> **25.** From a reading of the said provisions it is clear that the powers of the State Election Commission in respect of conduct of elections is no less than that of the Election

Commission of India in their respective domains. These powers are, of course, subject to the law made by Parliament or by the State Legislatures, provided the same do not encroach upon the plenary powers of the said Election Commissions.

26. The State Election Commissions are to function independent of the State Governments concerned in the matter of their powers of superintendence, direction and control of all elections and preparation of electoral rolls for, and the conduct of, all elections to the panchayats and municipalities.

27. Article 243-K(3) also recognises the independent status of the State Election Commission. It states that upon a request made in that behalf the Governor shall make available to the State Election Commission "such staff as may be necessary for the discharge of the functions conferred on the State Election Commission by clause (1)". It is accordingly to be noted that in the matter of the conduct of elections, the Government concerned shall have to render full assistance and cooperation to the State Election Commission and respect the latter's assessment of the needs in order to ensure that free and fair elections are conducted.

28. Also, for the independent and effective functioning of the State Election Commission, where it feels that it is not receiving the cooperation of the State Government concerned in discharging its constitutional obligation of holding the elections to the panchayats or municipalities within the time mandated in the Constitution, it will be open to the State Election Commission to approach the High Courts, in the first instance, and thereafter the Supreme Court for a writ of mandamus or such other appropriate writ directing the State Government concerned to provide all necessary cooperation and assistance to the State Election Commission to enable the latter to fulfil the constitutional mandate."

52. Given the fact that the scheme contained in Part XV is bodily lifted into the provisions contained in Part IX-A, the powers exercised by the SEC under Article 243ZA(1) are the same as those vested in the Election Commission of India under Article 324 of the Constitution of India. As has been pointed out in ***Mohinder Singh Gill*** (supra) and the aforesaid decisions, the entire supervision and conduct of elections to municipalities is vested in a constitutional authority that is the SEC which is to supervise and conduct elections by giving orders and directions to the State Government as well as authorities that are set up under State statutes for the purpose of supervision and conduct of elections. The power thus conferred by the Constitution is a power given to the SEC not only to carry out the constitutional mandate but also to fill in gaps where there is no law or rule governing a particular situation during the conduct of an election. The SEC, being an independent constitutional functionary, is not only to be obeyed by the State Government and the other authorities under local State statutes, but can also approach the writ court under Articles 226 and 227 of the Constitution of India to either enforce directions or orders issued by it or to ask for appropriate orders from High Courts in that behalf.

Bar contained in Articles 243ZG(a) / 329(a).

53. So far as delimitation and allocation of seats is concerned, the bar contained in Article 243ZG(a) operates together with the non-obstante clause contained therein to bar all courts from interfering with State statutes dealing with delimitation and allocation of seats, just as is the bar contained in Article 329(a) of the Constitution. In ***Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman*** (supra), Chandrachud,CJ. speaking for the majority of a Constitution Bench of this court, held that the delimitation process and the making of electoral rolls is independent of the process of any particular election and thus held:

> "**27.** …In Rampakavi Rayappa Belagali [(1970) 3 SCC 147] , 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. In Mohinder Singh Gill [(1978) 1 SCC 405], Krishna Iyer, J., speaking for the Constitution Bench, has considered at great length the scope and meaning of Article 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."
>
> **28.** 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 rolls 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."

54. This judgment was followed by another Constitution Bench in ***Indrajit Barua v. Election Commission of India*** (supra), the Court holding:

> "**12.** …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 case [AIR 1957 SC 304] 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 Article 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 case [(1985) 4 SCC 689] . 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 Section 22(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."

55. In ***Meghraj Kothari v. Delimitation Commission*** (supra), this court dealt with Sections 8, 9 and 10 of the Delimitation Commission Act, 1962, and the bar contained in Article 329(a) as follows:

> "In this case we are not, faced with that difficulty because the Constitution itself provides under Article 329(a) that any law relating to the delimitation of constituencies etc. made or purporting to be made under Article 327 shall not be called in question in any court. Therefore an order under Section 8 or 9 and published under Section 10(1) would not be saved merely because of the use of the expression "shall not be called in question in any court". But if by the publication of the order in the Gazette of India it is to be treated as law made under Article 327, Article 329 would prevent any investigation by any court of law."
>
> (at page 408)
>
> xxx xxx xxx
>
> "In our view, therefore, the objection to the delimitation of constituencies could only be entertained by the Commission before the date specified. Once the orders made by the Commission under Sections 8 and 9 were published in the Gazette of India and in the Official Gazettes of the States concerned, these matters could no longer be reagitated in a court of law. There seems to be very good reason behind such a provision. If the orders made under Sections 8 and 9 were not to be treated as final, the effect would be that any

voter, if he so wished, could hold up an election indefinitely by questioning the delimitation of the constituencies from court to court. Section 10(2) of the Act clearly demonstrates the intention of the Legislature that the orders under Sections 8 and 9 published under Section 10(1) were to be treated as law which was not to be questioned in any court.

It is true that an order under Section 8 or 9 published under Section 10(1) is not part of an Act of Parliament, but its effect is to be the same."

(at pages 410,411)

xxx xxx xxx

"In the instant case the provision of Section 10(4) of the Act puts orders under Sections 8 and 9 as published under Section 10(1) in the same street as a law made by Parliament itself which, as we have already said, could only be done under Article 327, and consequently the objection that the notification was not to be treated as law cannot be given effect to."

(at page 415)

56. This judgment was followed in ***Assn. of Residents of Mhow (ROM) v. Delimitation Commission of India,*** (2009) 5 SCC 404, which dealt with Sections 9 and 10 of the Delimitation Act, 2002. The Court held:

"**35.** This court in Pradhan [1995 Supp (2) SCC 305] was not considering any similar issue as the one that has arisen for our consideration in the present case. This court did not take any view that the proposals in respect of each constituency shall have to be treated as an independent proposal and the Commission's power to determine delimitation of the constituencies is with reference to each constituency. The objections and/or suggestions, as the case may be, are required to be taken into consideration

treating the proposals as for the whole of the State and delimitation of the constituencies with reference to a State as a unit.

36. In Meghraj Kothari v. Delimitation Commission [(1967) 1 SCR 400] a Constitution Bench of this court while interpreting Sections 8, 9 and 10 of the Delimitation Commission Act, 1962 which are in *pari materia* with the provisions of the present Act, observed:

> "19. In our view, therefore, the objection to the delimitation of constituencies could only be entertained by the Commission before the date specified. Once the orders made by the Commission under Sections 8 and 9 were published in the Gazette of India and in the Official Gazettes of the States concerned, these matters could no longer be reagitated in a court of law. There seems to be very good reason behind such a provision. If the orders made under Sections 8 and 9 were not to be treated as final, the effect would be that any voter, if he so wished, could hold up an election indefinitely by questioning the delimitation of the constituencies from court to court. Section 10(2) of the Act clearly demonstrates the intention of the legislature that the orders under Sections 8 and 9 published under Section 10(1) were to be treated as law which was not to be questioned in any court.
>
> 20. It is true that an order under Section 8 or 9 published under Section 10(1) is not part of an Act of Parliament, but its effect is to be the same."

37. The Constitution Bench went to the extent of saying that: (Meghraj Kothari case [(1967) 1 SCR 400]

> "18. An examination of Sections 8 and 9 of the Act shows that the matters therein dealt with were not to be subject to the scrutiny of any court of law. …
>
> ***

32. … the provision of Section 10(4) of the Act puts orders under Sections 8 and 9 as published under Section 10(1) in the same street as a law made by Parliament itself which, … could only be done under Article 327, and consequently the objection that the notification was not to be treated as law cannot be given effect to."

Conclusion

38. In the present case, the Commission finally determined the delimitation of parliamentary constituencies in the State of Madhya Pradesh after considering all the objections and suggestions received by it before the specified date and got published its orders in the Gazette of India and in the Official Gazette of the State as is required under Section 10(1) of the Act. The orders so published puts them "in the same street as a law made by Parliament itself". Consequently that notification is to be treated as law and required to be given effect to."

57. In ***Rampakavi Rayappa Belagali v. B.D. Jatti, (***1970) 3 SCC 147, the Court dealt with the scheme of the Representation of People Act, 1950 and its inter-relation with Article 329(a) as follows:

"**7.** …The entire 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 it and not in any other manner or before any other forum unless some question of violation of the provisions of the Constitution is involved. …..

8. The other provisions relating to election are contained in Part XV of the Constitution. Article 324 deals with the superintendence, direction and control of elections which are vested in the Election Commission. Article 325 declares

that no person shall be ineligible for inclusion in an Electoral Roll on account only of religion, race, caste, sex or any of them. Article 326 says that the elections to the House of People and the Legislative Assemblies of State shall be on the basis of adult franchise. Article 327 gives power to the Parliament to make provisions with respect to elections to Legislatures. Article 329 bars the interference of courts in electoral matters. By virtue of that Article no election shall be called in question except by an election petition. It is abundantly clear that in the present case the question whether Respondent 1 was ordinarily resident in Jamkhandi Constituency during the material period and was entitled to be registered in the Electoral Roll could not be the subject-matter of enquiry except in accordance with the provisions of the Act of 1950. The grounds on which the election can be declared to be void under the Act are set out in Section 100 of the Act. Clause (d) is "that the result of the election, insofar as it concerns a returned candidate, has been materially affected—(2) ……. (i)…….. ……..... (ii) ..... (iii) ……. (iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act". Nothing could be clearer than the ambit of this provision. It does not entitle the court in an election petition to set aside any election on the ground of non-compliance with the provisions of the Act of 1950 or of any rules made thereunder with the exception of Section 16."

58. However, in ***State of U.P. v. Pradhan Sangh Kshettra Samiti,*** 1995 Supp (2) SCC 305, a division bench of this Court delineated the scope of interference so far as delimitation of Panchayat areas is concerned, as follows:

"**44.** It is for the Government to decide in what manner the panchayat areas and the constituencies in each panchayat

area will be delimited. It is not for the court to dictate the manner in which the same would be done. So long as the panchayat areas and the constituencies are delimited in conformity with the constitutional provisions or without committing a breach thereof, the courts cannot interfere with the same. xxx

45. What is more objectionable in the approach of the High court is that although clause (a) of Article 243-O of the Constitution enacts a bar on the interference by the courts in electoral matters including the questioning of the validity of any law relating to the delimitation of the constituencies or the allotment of seats to such constituencies made or purported to be made under Article 243-K and the election to any panchayat, the High Court has gone into the question of the validity of the delimitation of the constituencies and also the allotment of seats to them. We may, in this connection, refer to a decision of this court in Meghraj Kothari v. Delimitation Commission [(1967) 1 SCR 400]. In that case, a notification of the Delimitation Commission whereby a city which had been a general constituency was notified as reserved for the Scheduled Castes. This was challenged on the ground that the petitioner had a right to be a candidate for Parliament from the said constituency which had been taken away. This court held that the impugned notification was a law relating to the delimitation of the constituencies or the allotment of seats to such constituencies made under Article 327 of the Constitution, and that an examination of Sections 8 and 9 of the Delimitation Commission Act showed that the matters therein dealt with were not subject to the scrutiny of any court of law. There was a very good reason for such a provision because if the orders made under Sections 8 and 9 were not to be treated as final, the result would be that any voter, if he so wished, could hold up an election indefinitely by questioning the delimitation of the constituencies from court to court. Although an order under Section 8 or Section 9 of the Delimitation Commission Act

and published under Section 10(1) of that Act is not part of an Act of Parliament, its effect is the same. Section 10(4) of that Act puts such an order in the same position as a law made by Parliament itself which could only be made by it under Article 327. If we read Articles 243-C, 243-K and 243-O in place of Article 327 and Sections 2(kk), 11-F and 12-BB of the Act in place of Sections 8 and 9 of the Delimitation Act, 1950, it will be obvious that neither the delimitation of the panchayat area nor of the constituencies in the said areas and the allotments of seats to the constituencies could have been challenged nor the court could have entertained such challenge except on the ground that before the delimitation, no objections were invited and no hearing was given. Even this challenge could not have been entertained after the notification for holding the elections was issued. The High Court not only entertained the challenge but has also gone into the merits of the alleged grievances although the challenge was made after the notification for the election was issued on 31-8-1994."

59. The judgment in ***Anugrah Narain Singh v. State of U.P.,*** (1996) 6 SCC 303 is instructive in that it deals with a local law namely the U.P. Nagar Maha Palika Adhiniyam, 1959, in the context of challenges made to orders under that Act. ***Meghraj's*** case was distinguished by this court as follows:

"**24.** The validity of Sections 6-A, 31, 32 and 33 of the U.P. Act dealing with delimitation of wards cannot be questioned in a court of law because of the express bar imposed by Article 243-ZG of the Constitution. Section 7 contains rules for allotment of seats to the Scheduled Castes, the Scheduled Tribes and the Backward Class people. The validity of that section cannot also be challenged. That apart, in the instant case, when the delimitation of the wards

was made, such delimitation was not challenged on the ground of colourable exercise of power or on any other ground of arbitrariness. Any such challenge should have been made as soon as the final order was published in the Gazette after objections to the draft order were considered and not after the notification for holding of the elections was issued. As was pointed out in *Lakshmi Charan Sen case* [(1985) 4 SCC 689], that the fact that certain claims and objections had not been disposed of before the final order was passed, cannot arrest the process of election.

25. In this connection, it may be necessary to mention that there is one feature to be found in the Delimitation Commission Act, 1962 which is absent in the U.P. Act. Section 10 of the Act of 1962 provided that the Commission shall cause each of its order made under Sections 8 and 9 to be published in the Gazette of India and in the Official Gazettes of the States concerned. Upon publication in the Gazette of India every such order shall have the force of law and shall not be called in question in any court. Because of these specific provisions of the Delimitation Commission Act, 1962, in the case of *Meghraj Kothari* v. *Delimitation Commission* [AIR 1967 SC 669] , this court held that notification of orders passed under Sections 8 and 9 of that Act had the force of law and therefore, could not be assailed in any court of law because of the bar imposed by Article 329. The U.P. Act of 1959, however, merely provides that the draft order of delimitation of municipal areas shall be published in the Official Gazette for objections for a period of not less than seven days. The draft order may be altered or modified after hearing the objections filed, if any. Thereupon, it shall become final. It does not lay down that such an order upon reaching finality will have the force of law and shall not be questioned in any court of law. For this reason, it may not be possible to say that such an order made under Section 32 of the U.P. Act has the force of law and is beyond challenge by virtue of Article 243-ZG. But any

such challenge should be made soon after the final order is published…"

60. In ***Dravida Munnetra Kazhagam v. State of T.N.*** (supra), this Court dealt with certain interlocutory applications that were filed seeking directions for compliance with the constitutional mandate concerning elections to local bodies. This Court dealt with contentions raised by the parties before it as follows:

> "**10.** It, thus, emerges that before the election process could begin as per the State Election Commission's Press Release dated 2-12-2019, the State of Tamil Nadu increased the number of districts from 31 to 39 and also restructured various talukas. However, with regard to posts of Chairman and Vice-Chairman of District Panchayat Councils, elections are still sought to be held only for 31 posts. This resultant incongruity has prompted the appellants to file these applications with prayers to strike down the Notification dated 2-12-2019; hold elections for the entire State comprising all 39 revenue districts; and conduct such local body elections only after completion of all legal formalities i.e. after delimitation of the newly carved districts. A specific direction has also been prayed for, to compel the respondents to first carry out delimitation, reservation, rotation processes and fulfil all other legal requirements before notifying or conducting elections of any panchayat at the village, intermediate or district level.
>
> **11.** Having heard the learned counsel for the parties at a considerable length and after an in-depth analysis of various statutory provisions as well as the constitutional scheme under Part IX which envisages democratisation of grass-root level administration, we are of the view that, as per Article 243-B, panchayats have to mandatorily be constituted in a

State at the village, intermediate and district levels. Article 243-C requires the State, as far as is practicable, to maintain a similar ratio between the population residing within the territory of a particular panchayat and the number of seats allocated to it, across all panchayats in the State. Further, each panchayat must be divided into territorial constituencies and per Article 243-D, seats in proportion to their population must be reserved for Scheduled Castes and Scheduled Tribes in each panchayat.

12. It is, thus, clear that the constitutional object of Part IX cannot be effectively achieved unless the delimitation exercise for constitution of local bodies at all levels is properly undertaken. Such exercise in the State of Tamil Nadu must keep in view the criteria for delimitation of wards prescribed under the Tamil Nadu Local Bodies Delimitation Regulations, 2017 (formulated under the Tamil Nadu Delimitation Commission Act, 2017), which criteria must itself not be contrary to Article 243-C read with Article 243-B(1) of the Constitution.

13. Noticing how at the completion of the delimitation process there were only 31 revenue districts, but despite a subsequent increase in number of districts to 39, no fresh delimitation exercise has been undertaken, it is clear that the State Government cannot fulfil the aforestated constitutional mandate. There is no identified data elucidating population proportions and, hence, requisite reservation for Scheduled Castes and Scheduled Tribes cannot be provided for, both in re village panchayat wards or Chairman/Vice-Chairman of District bodies. We, hence, have no doubt that the election process as notified by the State Election Commission on 2-12-2019, in respect of the newly constituted nine districts cannot be held unless fresh delimitation exercise in respect thereto is first completed. The State Government cannot justify holding local body elections of these nine districts by relying upon this Court's order dated 18-11-2019 [C.R. Jayasukin v. T.N. State

Election Commission, 2019 SCC OnLine SC 1664] as the said order itself mandates notification of elections only after completing “all legal formalities”.

14. The contention of the respondents that the present proceedings amount to “calling in question an election” and hence not being maintainable in view of the express constitutional embargos of Articles 243-O and 243-ZG does not impress us for the present proceedings are only to further the expeditious completion of prerequisites of a fair election. Hence, the following ratio of a coordinate Bench in Election Commission of India v. Ashok Kumar, (2000) 8 SCC 216 squarely applies to the present case:

> “32. … (2) Any decision sought and rendered will not amount to “calling in question an election” if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.
>
> (3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body been shown to have acted in breach of law.
>
> (4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the court.”

61. Accordingly, directions were issued ordering the respondents, including the Delimitation Commission, to delimit 9 newly constituted districts in accordance with law and only thereafter hold elections for their Panchayats at the village, intermediate and district levels within a period of 4 months.

62. Shri Tushar Mehta, learned Solicitor General has exhorted us to hold that this judgment is *per incuriam* in that it flies in the face of the earlier decisions of this Court. We find nothing in this judgment as flying in the face of the earlier judgments of this court. On the contrary, the Court extracts the ratio in ***Ashok Kumar's*** case (supra) and thereafter issues directions to the authorities concerned.

63. A conspectus of the aforesaid judgments in the context of municipal elections would yield the following results.

I. Under Article 243 ZG(b), no election to any municipality can be called in question except by an election petition presented to a Tribunal as is provided by or under any law made by the Legislature of a State. This would mean that from the date of notification of the election till the date of the declaration of result a judicial hands-off is mandated by the non-obstante clause contained in Article 243ZG debarring the writ court under Articles 226 and 227 from interfering once the election process has begun

until it is over. The constitutional bar operates only during this period. It is therefore a matter of discretion exercisable by a writ court as to whether an interference is called for when the electoral process is “imminent” i.e, the notification for elections is yet to be announced.

II. If, however, the assistance of a writ court is required in subserving the progress of the election and facilitating its completion, the writ court may issue orders provided that the election process, once begun, cannot be postponed or protracted in any manner.

III. The non-obstante clause contained in Article 243ZG does not operate as a bar after the election tribunal decides an election dispute before it. Thus, the jurisdiction of the High Courts under Articles 226 and 227 and that of the Supreme Court under Article 136 of the Constitution of India is not affected as the non-obstante clause in Article 243ZG operates only during the process of election.

IV. Under Article 243ZA(1), the SEC is in overall charge of the superintendence, direction and control of the preparation of electoral rolls, and the conduct of all municipal elections. If there is a constitutional or statutory infraction by any authority including the State Government either before or during the election process, the

SEC by virtue of its power under Article 243ZA(1) can set right such infraction. For this purpose, it can direct the State Government or other authority to follow the Constitution or legislative enactment or direct such authority to correct an order which infracts the constitutional or statutory mandate. For this purpose, it can also approach a writ court to issue necessary directions in this behalf. It is entirely upto the SEC to set the election process in motion or, in cases where a constitutional or statutory provision is not followed or infracted, to postpone the election process until such illegal action is remedied. This the SEC will do taking into account the constitutional mandate of holding elections before the term of a municipality or municipal council is over. In extraordinary cases, the SEC may conduct elections after such term is over, only for good reason.

V. Judicial review of a State Election Commission's order is available on grounds of review of administrative orders. Here again, the writ court must adopt a hands-off policy while the election process is on and interfere either before the process commences or after such process is completed unless interfering with such order subserves and facilitates the progress of the election.

VI. Article 243ZA(2) makes it clear that the law made by the legislature of a State, making provision with respect to matters relating to or in connection with elections to municipalities, is subject to the provisions of the Constitution, and in particular Article 243T, which deals with reservation of seats.

VII. The bar contained in Article 243ZG(a) mandates that there be a judicial hands-off of the writ court or any court in questioning the validity of any law relating to delimitation of constituency or allotment of seats to such constituency made or purporting to be made under Article 243ZA. This is by virtue of the non-obstante clause contained in Article 243ZG. The statutory provisions dealing with delimitation and allotment of seats cannot therefore be questioned in any court. However, orders made under such statutory provisions can be questioned in courts provided the concerned statute does not give such orders the status of a statutory provision.

VIII. Any challenge to orders relating to delimitation or allotment of seats including preparation of electoral rolls, not being part of the election process as delineated above, can also be challenged in the manner provided by the statutory provisions dealing with

delimitation of constituencies and allotment of seats to such constituencies.

IX. The constitutional bar of Article 243ZG(a) applies only to courts and not the State Election Commission, which is to supervise, direct and control preparation of electoral rolls and conduct elections to municipalities.

X. The result of this position is that it is the duty of the SEC to countermand illegal orders made by any authority including the State Government which delimit constituencies or allot seats to such constituencies, as is provided in proposition (IV) above. This may be done by the SEC either before or during the electoral process, bearing in mind its constitutional duty as delineated in the said proposition.

64. Applying the law to the facts of the present case, the first important thing to be noted is that the constitutional bar contained in Article 243ZG(a) does not apply to the facts of this case. As has correctly been pointed out by Shri Laud, the judgment in ***Anugrah Narain Singh v. State of U.P.*** (supra) would apply as the Goa Municipalities Act does not contain any provision akin to Section 10(2) or 10(4) of the Delimitation Commission Act, 1962 that was highlighted in ***Meghraj****'s* case (supra), providing that orders of the Delimitation Commission

have the force of law. This being the case, the first and foremost roadblock that has been put forward by the learned Solicitor General has been cleared. No fault can be found with the Division Bench of the High Court in ignoring any constitutional bar in arriving at the conclusion that the 04.02.2021 order is illegal and *ultra vires* the provisions of Article 243T of the Constitution of India read with Sections 9 and 10 of the Goa Municipalities Act. On merits, it is important to note that Shri Tushar Mehta, learned Solicitor General, did not advance any argument that the reservation of seats for women and OBCs was in accord with the provisions of the Constitution and the Goa Municipalities Act. Indeed, even otherwise, we do not find fault with the Division Bench judgment in its conclusion that a fraction has to be worked upwards whatever that fraction be, given the mandatory language of Article 243T of the Constitution which provides for reservation for women which shall not be less than one-third. Also, the findings of the High Court on OBC reservation not complying with the mandate of Section 9(2)(bb) in that in several councils it was below 27% cannot be faulted. The same goes for observations made on the 1 ST seat in Sanguem and non-application of the principle of rotation.

65. However, there can be no doubt that Shri Tushar Mehta is right in

stating that assurances given by the Advocate General that the State Government would not raise the bar of Article 243ZG(b), but would instead argue that since the election programme was “imminent” and that therefore, the High Court ought not intervene, cannot alter the position in law. There can be no doubt that no concession by counsel can operate against a constitutional bar.

66. However, on the peculiar facts of these cases, this Court is constrained not to interfere with the impugned judgment under Article 136 of the Constitution of India. This is because of the following special features of the facts of these cases:

(i) First and foremost, it is important to note that the State Election Commissioner is none other than the Law Secretary to the Government of Goa. The whole process of these elections is, therefore, faulted at the start so to speak as the SEC is not, in the facts of these cases, an independent body as is mandated by Article 243K.

(ii) It is important to note that the SEC had itself postponed the municipal elections twice due to the COVID-19 pandemic raging throughout the State. On the second occasion, by the notification dated 14.01.2021, the SEC had itself postponed these elections till April 2021 or the election date which may be determined by

the State Election Commission. Obviously, the expression “or the election date which may be determined by the Commission” would indicate a date beyond April, 2021, given the situation in which the State of Goa finds itself due to the COVID-19 pandemic. It is important to note that the High Court in its direction contained in paragraph 81(e) directs the SEC to act in accordance with this notification so that elections are held by 15.04.2021.

(iii) In ***Dnyaneshwar Narso Naik’s*** case (supra) and ***Sujay S. Lotlikar’s*** case (supra), solemn assurances were made by the Advocate General that orders of reservation in wards of Municipal Councils will be made at least three weeks before the election programme is announced. The State Government instead of acting upon these statements, inserted an amendment by adding a proviso to Section 10 of the Goa Municipalities Act in which a lesser period was mentioned i.e., a period of at least one week.

(iv) The Law Secretary’s letter dated 05.02.2021, calling upon the Director, Urban Development, to issue a reservation order under Section 10 of the Goa Municipalities Act was to do so “at an early

date". The Director, by an order passed one day before this communication i.e., on 04.02.2021, with lightning speed provided for reservation in all 11 Municipal Councils of women/SCs/STs and OBCs prompting the High Court to observe that due application of mind could not have been bestowed before issuing such an order.

(v) All the writ petitions in the present cases were filed between 9th and 12th February, 2021 immediately challenging the Director's order dated 04.02.2021. None of these writ petitions contained a prayer that would hold up any election programme. The only prayer was to strike down the aforesaid order so that the Director in issuing a fresh order would have to truly and faithfully carry out the constitutional mandate of Article 243T of the Constitution of India and the statutory mandate contained in Section 9 of the Goa Municipalities Act.

(vi) When the High Court issued notice on 15.02.2021 for final hearing on 22.02.2021, the SEC did not inform the High Court that *vide* a note of 05.02.2021 (disclosed for the first time by an affidavit filed in this Court on 08.03.2021), elections were proposed to be held on 20.03.2021.

(vii) In a clear attempt to overreach the High Court, the State Election

Commissioner, who is none other than the Law Secretary of the State of Goa, issues an election notification at 9:00 a.m. on 22.02.2021, even before the Government offices open at 9:30 a.m. in order to forestall the hearing of the writ petitions filed before the High Court, which commences hearing the writ petitions at 9.00 a.m. [1]

(viii) After the judgment was pronounced by the Division Bench of the High Court on 01.03.2021 and no stay granted, this court, "issued notice" on 04.03.2021 and stayed the impugned judgment, the effect of which was to revive the election programme that was notified on 22.02.2021. Despite this, the State Election Commission, on this very day i.e., 04.03.2021,

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It is well settled that actions of the State with oblique or indirect object will be attributed to "malice in law". This Court in ***Kalabharati Advertising v. Hemant Vimalnath Narichania & Ors*** (2010) 9 SCC 437 has summarised this as follows:

> "25. The State is under obligation to act fairly without ill will or malice— in fact or in law. "Legal malice" or "malice in law" means something done without lawful excuse. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill will or spite on the part of the State. It is an act which is taken with an oblique or indirect object. It means exercise of statutory power for "purposes foreign to those for which it is in law intended". It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts. (Vide ADM, Jabalpur v. Shivakant Shukla [(1976) 2 SCC 521], S.R. Venkataraman v. Union of India [(1979) 2 SCC 491], State of A.P. v. Goverdhanlal Pitti [(2003) 4 SCC 739], BPL Ltd. v. S.P. Gururaja [(2003) 8 SCC 567] and W.B. SEB v. Dilip Kumar Ray [(2007) 14 SCC 568])"

amended the aforesaid notification by extending the time period for filing of nomination for 5 Municipal Councils from 04.03.2021 till 06.03.2021 between 10:00 hrs to 13:00 hrs. and therefore, rescheduled the election.

67. Given the aforesaid, the order of the High Court contained in paragraph 81 of the impugned judgment will be observed with two changes. In paragraph 81(c), it is clarified that the period of 10 days in which the Director, Urban Development is to issue a fresh order will be 10 days from the date of this judgment. Also, instead of "15th April" occurring in paragraph 81(e), the words "30th April" be substituted. All the other directions will remain undisturbed.

68. The most disturbing feature of these cases is the subversion of the constitutional mandate contained in Article 243K of the Constitution of India. The State Election Commissioner has to be a person who is independent of the State Government as he is an important constitutional functionary who is to oversee the entire election process in the state *qua* panchayats and municipalities. The importance given to the independence of a State Election Commissioner is explicit from the provision for removal from his office made in the proviso to clause (2) of Article 243K. Insofar as the manner and the ground for his

removal from the office is concerned, he has been equated with a Judge of a High Court. Giving an additional charge of such an important and independent constitutional office to an officer who is directly under the control of the State Government is, in our view, a mockery of the constitutional mandate. We therefore declare that the additional charge given to a Law Secretary to the government of the state flouts the constitutional mandate of Article 243K. The State Government is directed to remedy this position by appointing an independent person to be the State Election Commissioner at the earliest. Such person cannot be a person who holds any office or post in the Central or any State Government. It is also made clear that henceforth, all State Election Commissioners appointed under Article 243K in the length and breadth of India have to be independent persons who cannot be persons who are occupying a post or office under the Central or any State Government. If there are any such persons holding the post of State Election Commissioner in any other state, such persons must be asked forthwith to step down from such office and the State Government concerned be bound to fulfil the constitutional mandate of Article 243K by appointing only independent

persons to this high constitutional office. The directions contained in this paragraph are issued under Article 142 of the Constitution of India so as to ensure that the constitutional mandate of an independent State Election Commission which is to conduct elections under Part IX and IXA of the Constitution be strictly followed in the future.

69. The appeals are disposed of accordingly.

Writ Petition (Civil) No. 309/2021

1. This writ petition has been filed under Article 32 of the Constitution of India by a resident of Margao, Goa, challenging the reservation order dated 04.02.2021 issued by the Director of Municipal Administration, Goa, and the notification dated 04.03.2021 which was issued by the Goa SEC altering the original schedule of elections.

2. Given our judgment in the aforesaid appeals, in view of the fact that the reservation order dated 04.02.2021 has been set aside and that a fresh election schedule will have to be notified, the writ petition is allowed and the notification dated 04.03.2021 is also struck down.

……J.
[ROHINTON FALI NARIMAN]
……J.
[B.R. GAVAI]
……J.
[HRISHIKESH ROY]

New Delhi;
March 12th, 2021.