



***LANDMARK JUDGEMENTS
ON
ELECTION LAW***

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

VOLUME - I

***ELECTION COMMISSION OF INDIA
NEW DELHI***



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FOREWORD

India has recently celebrated the Golden Jubilee of its independence, and is on the threshold of a new millenium. During the last 50 years of independence, which we, the people of India, adopted as the way of governance of our country, has moved from strength to strength. India is now regarded, by the international community, as one of the most stable democracies in the world. The Election Commission of India, an independent constitutional authority, has played a fundamental and critical role in the evolution of Indian democracy.

In the discharge of its constitutional responsibility of conducting free, fair and peaceful elections in he country, the hands of the Election Commission have been strengthened by the Supreme Court of India, by its several landmark judgements, pronouncing upon the provisions of the constitution of India, and the laws relating to the elections. These judgements of the Supreme Court, the guiding stars, not only for the Courts, but also for the Election Commission, its electoral machinery, Governments at the Center and in the states, political parties and the candidates contesting elections. These judgements are reported in various law journals and reports, scattered over a period of 50 years. A growing need was being felt for a collection of these judgements, for facility of reference and guidance. Often, requests for copies of such judgements have also been received by the Commission from various international organisations and for a, interested in the study of elections and election laws of India. The Commission has made a discreet selection of some of these landmark judgements, and also a few judgements of High Courts, having a bearing on various aspects o election system and procedures in India, and put them together in this book. To this, we have added one of the more recent pronouncements of the Commission in connection with a dispute between splinters groups of a major national party. This decision of the Commission is of a historic nature, and has defined the procedures and principles in settling such disputes.

I hope this book will meet the requirements of, and will be found useful by, every one, who has a role to play in the election field, including the Courts and Advocates.

(Dr. M. S. Gill)

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New Delhi.

VOLUME I

Sl.No.	CONTENTS	Page No.
1.	N. P. Ponnuswami Vs. The Returning Officer, Namakkal Constituency (Supreme Court of India)	1
2.	Election Commission of India Vs. Saka Venkata Rao (Supreme Court of India)	20
3.	Brundaban Nayak Vs. Election Commission of India & Another (Supreme Court of India)	33
4.	Meghraj Kothari Vs. Delimitation Commission & Others (Supreme Court of India)	45
5.	Pashupati Nath Singh Vs. Harihar Prasad Singh (Supreme Court of India)	62
6.	Sadiq Ali & Another Vs. Election Commission of India & Others (Supreme Court of India)	70
7.	Smt. Indira Nehru Gandhi Vs. Shri Raj Narayan (Supreme Court of India)	96
8.	All Party Hill Leaders' Conference Vs. Captain W.A. Sangma (Supreme Court of India)	436
9.	Narendra Madivalapa Kheni Vs. Manikarao Patil & Others (Supreme Court of India)	465
10.	Mohinder Singh Gill & Another Vs. Chief Election Commissioner & Others (Supreme Court of India)	484

VOLUME II

Sl.No.	CONTENTS	Page No.
11.	Jyoti Basu & Others Vs. Debi Ghosal & Others (Supreme Court of India)	561
12.	Km. Shradha Devi Vs. Krishna Chandra Pant & Others (Supreme Court of India)	572
13.	Pashupati Nath Sukul Vs. Nem Chandra Jain & Others (Supreme Court of India)	592
14.	A.C. Jose Vs. Sivan Pillai & Others (Supreme Court of India)	609
15.	Election Commission of India Vs. State of Haryana (Supreme Court of India)	625
16.	Samarath Lal Vs. Chief Election Commissioner & Others (Supreme Court of India)	640
17.	(i) Lakshmi Charan Sen Vs. A.K.M. Hassan Uzzaman & Others (ii) Election Commission of India Vs. A.K.M. Hassan Uzzaman (Supreme Court of India)	642
18.	Krishna Ballabh Prasad Singh Vs. Sub-Divisional Officer, Hilsa-cum-Returning Officer & Others (Supreme Court of India)	682
19.	Indrajit Barua Vs. Election Commission of India & Others (Supreme Court of India)	687
20.	Kanhiya Lal Omar Vs. R.K. Trivedi & Others (Supreme Court of India)	700
21.	Azhar Hussain Vs. Rajiv Gandhi (Supreme Court of India)	715
22.	Dhartipakar Madan Lal Agarwal Vs. Rajiv Gandhi (Supreme Court of India)	746
23.	Election Commission of India Vs. Shivaji & Others (Supreme Court of India)	779

24.	B. Sundra Rami Reddy Vs. Election Commission of India (Supreme Court of India)	790
25.	Shri Kihota Hollohon Vs. Mr. Zachilhu & Others (Supreme Court of India)	793
26.	Rama Kant Pandey Vs. Union of India (Supreme Court of India)	894
27.	Lal Babu Hussain & Others Vs. Electoral Registration Officer (Supreme Court of India)	901
28.	T.N. Seshan Vs. Union of India & Others (Supreme Court of India)	920
29.	Janata Dal (Samajwadi) Vs. Election Commission of India (Supreme Court of India)	959
30.	Common Cause, A Registered Society Vs. Union of India & Others. (Supreme Court of India)	967
31.	Kanhaiya Prasad Sinha Vs. Union of India & Others ⁹⁸⁷ (Patna High Court)	
32.	N. Kristappa Vs. Chief Election Commissioner & Others (Andhra Pradesh High Court)	996
33.	P. Ravindra Reddy, P.Indrajit Reddy, P. Bayyapa Reddy Vs. Election Commission of India & Others (Andhra Pradesh High Court)	1010
34.	Om Prakash Srivastava alias Babloo Srivastava Vs Election Commission of India & Others (Allahabad High Court, Lucknow Bench)	1027
35.	Harbans Singh Jalal Vs. Union of India & Others (Punjab and Haryana High Court)	1043
36.	Kotha Dass Goud Vs. The Returning Officer, 41-Nalgonda P.C. and Election Commission of India (Andhra Pradesh High Court)	1059
37.	Arjun Singh Vs. The President, Indian National Congress (Election Commission of India)	1067

SUPREME COURT OF INDIA*

(Civil Appellate Jurisdiction)

Case No. 351 of 1951^s

(Decision Dated 21st January, 1952)

N.P. Ponnuswami

.. *Appellant*

Vs.

The Returning Officer, Namakkal Constituency,

Namakkal, Salem District and four Others

..

Respondents

The Union of India

The State of Madhya Bharat

.. *Interveners*

SUMMARY OF THE CASE

The appellant filed his nomination paper for election to the (then) Madras Legislative Assembly from the Namakkal Assembly Constituency in Salem District. The Returning Officer, at the time of scrutiny of nomination papers on 28.11.1951, rejected his nomination paper on certain grounds. Aggrieved by the order of the Returning Officer rejecting his nomination paper, the appellant moved the Madras High Court under Article 226 of the Constitution seeking a direction to the Returning Officer to include his name in the list of validly nominated candidates.

The High Court dismissed the writ petition on the ground that it had no jurisdiction to interfere with the order of the Returning Officer in view of the provisions of Article 329 (b) of the Constitution.

The appellant then moved the present appeal before the Supreme Court. The Supreme Court also dismissed the appeal confirming the view of the High Court. The Supreme Court held that the word 'election' in Article 329 (b) connotes the entire electoral process commencing with the issue of the notification calling the election and culminating in the declaration of result, and that the electoral process once started could not be interfered with at any intermediary stage by Courts.

Constitution of India (1950), Article 226 and 329 (b) – Jurisdiction of the High Court under Article 226 – If excluded by Article 329 (b) in regard to order of Returning Officer rejecting nomination paper for election to the State Assembly.

The High Court has no jurisdiction under Article 226 of the Constitution to entertain petitions regarding improper rejection by the Returning Officer of nomination papers of candidates for election either to the House of Parliament or to the State Assembly. The Jurisdiction of the High Court under Article 226 has been excluded in regard to matters provided for an Article 329 which covers all 'electoral matters'.

The scheme of Part XV of the Constitution and the Representation of the People Act, 1951 seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any Court. Under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. Article 329 (b) was apparently enacted to prescribe the manner in which and the stage at which this ground and other grounds which may be raised under the law to call the election in question, could be urged. It follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other Court.

Appeal under Article 132 of the Constitution of India from the Judgement and Order dated the 11th December, 1951 of the High Court of Judicature at Madras (Subba Rao and Venkatarama Ayyar, JJ.) in Writ Petition No. 746 of 1951.

JUDGMENT

Present:— M. Patanjali Sastri, Chief Justice, S. Fazl Ali, Mehrchand Mahajan, B.K. Mukherjea, S.R.Das and N. Chandrasekhara Aiyar, JJ.

N. Rajagopala Iyengar, Advocate for Appellant.

R. Ganapathi Iyer, Advocate for the First Respondent.

M. C. Setelvad, Attorney-General of India (*G.N. Joshi*, Advocate with him) for the Union of India.

K. A. Chitale, Advocate-General, Madhya Bharat (*G.N. Joshi*, Advocate with him) for the State of Madhya Bharat.

The Judgement of the Court was delivered by

FAZL ALI.— This is an appeal from an order of the Madras High Court dismissing the petition of the appellant praying for a writ of *certiorari*.

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 the 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 there upon

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.

Broadly speaking, the arguments on which the judgment of the High Court is assailed are two-fold :

(1) that the conclusion arrived at by the High Court does not follow from the language of Article 329 (b) of the Constitution, whether that Article is read by itself or along with the other Articles in Part XV of the Constitution ; and

(2) that the anomalies which will arise if the construction put by the High Court on Article 329 (b) is accepted, are so startling that the Courts should lean in favour of the construction put forward on behalf of the appellant.

The first argument which turns on the construction of Article 329 (b) requires serious consideration, but I think the second argument can be disposed of briefly at the outset. It should be stated that what the appellant chooses to call anomaly can be more appropriately described as hardship or prejudice and what their nature will be has been stated in forceful language by Wallace, J., in *Sarvothama Rao v. Chairman, Municipal Council, Saidapet*¹, in these words:

“I am quite clear that any post-election remedy is wholly inadequate to afford the relief which the petitioner seeks, namely, that this election, now published, be stayed, until it can be held with himself as a candidate. It is no consolation to tell him that he can stand for some other election. It is no remedy to tell him that he must let the election go on and then have it set aside by petition and have a fresh election ordered. The fresh election may be under altogether different conditions and may bring forward an array of fresh candidates. The petitioner can only have his proper relief if the proposed election without him is stayed until his rejected nomination is restored, and hence an injunction staying this election was absolutely necessary, unless the relief asked for was to be denied him altogether in limine. In most cases of this kind no doubt there will be difficulty for the aggrieved party to get in his suit in time before the threatened wrong is committed; but when he has succeeded in so doing; the Court cannot stultify itself by allowing the wrong which it is asked to prevent to be actually consummated while it is engaged in trying the suit.”

These observations however represent only one side of the picture and the same learned Judge presented the other side of the picture in a subsequent case (*Desi Chettiar v. Chinnasami Chettair*)² in the following passage :

“The petitioner is not without his remedy. His remedy lies in an election petition which we understand he has already put in. It is argued for him that remedy which merely allows him to have set aside an election once held is not as efficacious as the one which would enable him to stop the election altogether; and certain observations at page 600 of *Sarvathama Rao v. Chairman, Municipal Council, Saidapet*¹ are quoted. In the first place we do not see how the mere fact that the petitioner cannot get the election stopped and has his remedy only after it is over by an election petition, will in itself confer on him any right to obtain a writ. In the second place, these observations were directed to the consideration of the propriety of an injunction in a civil suit, a matter with which we are not here concerned. And finally it may be observed that these remarks were made some years ago when the practice of individuals coming forward to stop elections in order that their own individual interest may be safeguarded was not so common. It is clear that there is another side of the question to be considered, namely, the inconvenience to the public administration of having elections and the business of Local Boards held up while individuals prosecute their individual grievances. We understand the election for the elective seats in this Union has been held up since 31st May because of this petition the result being that the electors have been unable since then to have any representation on the Board and the Board is functioning, if indeed it is functioning, with a mere nominated fraction of its total strength; and this state of affairs the petitioner proposes to have continued until his own persona grievance is satisfied.”

These observations which were made in regard to elections to Local Boards will apply with greater force to elections to Legislatures, because it does not require much argument to show that in a country with a democratic Constitution in which the Legislatures have to play a very important role, it will lead to serious consequences if the elections are unduly protracted or obstructed. To this aspect of the matter I shall have to advert later, but it is sufficient for the present purpose to state firstly, that in England the hardship and inconvenience which may be suffered by an individual candidate has not been regarded as of sufficient weight to induce Parliament to make provision for immediate relief and the aggrieved candidate has to wait until after the election to challenge the validity of the rejection of his nomination paper, and secondly, that the question of hardship or inconvenience is after all only a secondary question, because if the construction put by the High Court on Article 329 (b) of the Constitution is found to be correct, the fact that such construction will lead to hardship and inconvenience becomes irrelevant.

Article 329 is the last Article in Part XV of the Constitution, the heading of which is “Election”, and it runs as follows : –

“Notwithstanding anything in this Constitution –

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any court;

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.”

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 complimentary 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 Article 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.

Now, the main controversy in this appeal centres round the meaning of the words “no election shall be called in question except by an election petition” in Article 329 (b), and the point to be decided is whether questioning the action of the Returning Officer in rejecting a nomination paper can be said to be comprehended within the words, “no election shall be called in question.” The appellant’s case is that questioning something which has happened before a candidate is declared elected is not the same thing as questioning an election, and the arguments advanced on his behalf in support of this construction were these : –

(1) That the word “election” as used in Article 329 (b) means what it normally and etymologically means, namely, the result of polling or the final selection of a candidate;

(2) That the fact that an election petition can be filed only after polling is over or after a candidate is declared elected and what is normally called in question by such petition is the final result, bears out the contention that the word “election” can have no other meaning in Article 329 (b) than the result of polling or the final selection of a candidate;

(3) That the words “arising out of or in connection with” which are used in Article 324 (1) and the words “with respect to all matters relating to, or in connection with” which are used in Articles 327 and 328, show that the framers of the Constitution knew that it was necessary to use different language when referring respectively to matters which happen prior to an after the result of polling, and if they had intended to include the rejection of a nomination paper within the ambit of the prohibition contained in Article 329 (b) they would have used similar language in that Article; and

(4) That the action of the Returning Officer in rejecting a nomination paper can be questioned before the High Court under Article 226 of the constitution for the following reason: Scrutiny of nomination papers and their rejection are provided for in section 36 of the Representation of the People Act, 1951. Parliament has made this provision in exercise of the powers conferred on it by Article 327 of the Constitution which is “subject to the provisions of the Constitution”. Therefore, the action of the Returning Officer is subject to the extraordinary jurisdiction of the High Court under Article 226.

These arguments appear at first sight to be quite impressive, but in my opinion there are weightier and basically more important arguments in support of the view taken by the High Court. As we have seen, the most important question for determination is the meaning to be given to the word “election” in Article 329 (b). That word has by long usage in connection with the process of selection of proper representatives in democratic institutions, acquired both a wide and a narrow meaning. In the narrow sense, it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling or a particular candidate being returned unopposed when there is no poll. In the wide sense, the word is used to connote the entire process culminating in a candidate being declared elected. In *Srinivasalu v. Kuppaswami*¹, the learned Judges of the Madras High Court after examining the question, expressed the opinion that the term “election” may be taken to embrace the whole procedure whereby an “elected member” is returned, whether or not it be found necessary to take a poll. With this view, my brother, Mahajan, J., expressed his agreement in *Sat Narain v. Hanuman Parshad*²; and I also find myself in agreement with it. It seems to me that the word “election” has been used in Part XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the Legislature. The use of the expression “conduct of elections” in Article 324 specifically points to the wide meaning, and that meaning can also be read consistently into the other provisions which occur in Part XV including Article 329 (b). That the word “election” bears this wide meaning whenever we talk of elections in a

democratic country, is borne out by the fact that is most of the books on the subject and in several cases dealing with the matter, one of the questions mooted is, when the election begins. The subject is dealt with quite concisely in Halsbury's Laws of England in the following passage¹ under the heading "Commencement of the Election":-

"Although the first formal step in every election is the issue of the writ, the election is considered for some purposes to begin at an earlier date. It is a question of fact in each case when an election begins in such a way as to make the parties concerned responsible for breaches of election law, the test being whether the contest is "reasonably imminent". Neither the issue of the writ nor the publication of the notice of election can be looked to as fixing the date when an election begins from this point of view. Nor, again, does the nomination day effort any criterion. The election will usually begin at least earlier than the issue of the writ. The question when the election begins must be carefully distinguished from that as to when "the conduct and management of" an election may be said to begin. Again, the question as to when a particular person commences to be a candidate is a question to be considered in each case." The discussion in this passage makes it clear that the word "election" can be and has been appropriately used with reference to the entire process which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process.

The next important question to be considered is what is meant by the words "no election shall be called in question." A reference to any treatise on elections in England will show that an election proceeding in that country is liable to be assailed on very limited grounds, one of them being the improper rejection of a nomination paper. The law with which we are concerned is not materially different, and we find that in section 100 of the Representation of the People Act, 1951, one of the grounds for declaring an election to be void is the improper rejection of a nomination paper.

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 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.

The Representation of the People Act, 1951, which was passed by Parliament under Article 327 of the Constitution, makes detailed provisions in regard to all matters and all stages connected with elections to the various Legislatures in this country. That Act is divided into 11 parts, and it is interesting to see the wide variety of subjects they deal with. Part II deals with “the qualifications and disqualifications for membership,” Part III deals with the notification of General Elections, Part IV provides for the administrative machinery for the conduct of elections, and Part V makes provisions for the actual conduct of elections and deals with such matter as presentation of nomination papers, requirements of a valid nomination, scrutiny of nominations, etc., and procedure for polling and counting of votes. Part VI deals with disputes regarding elections and provides for the manner of presentation of election petitions, the constitution of election tribunals and the trial of election petitions. Part VII outlines the various corrupt and illegal

practices which may affect the elections, and electoral offences. Obviously, the Act is a self-contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the rules made thereunder. The provisions of the Act which are material to the present discussion are sections 80, 100, 105 and 170, and the provisions of Chapter II of Part IV dealing with the form of election petitions, their contents and the reliefs which may be sought in them. Section 80, which is drafted in almost the same language as Article 329 (b), provides that

“no election shall be called in question except by an election petition presented in accordance with the provisions of this Part”.

Section 100, as we have already seen, provides for the grounds on which an election may be called in question, one of which is the improper rejection of a nomination paper. Section 105 says that “every order of the Tribunal made under this Act shall be final and conclusive.” Section 170, provides that

“no Civil Court shall have jurisdiction to question the legality of any action taken or of any decision given by the Returning Officer or by any other person appointed under this Act in connection with an election.”

These are the main provisions regarding election matters being judicially dealt with, and it should be noted that there is no provision anywhere to the effect that anything connected with elections can be questioned at an intermediate stage.

It is now well-recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J., in *Wolverhampton New Water Works Co. v. Hawkesford*¹ in the following passage :-

“There are three classes of cases in which a liability may be established founded upon statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, *viz.*, where a liability not existing at common law is created by a statute which at the same times gives a special and particular remedy for enforcing it The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.”

The rule laid down in this passage was approved by the House of Lords in *Neville v. London Express Newspaper Limited*¹ and has been re-affirmed by the Privy Council in *Attorney-General of Trinidad and Tobago v. Gordon Grant Co.*,² and *Secretary of State v. Mask and Co.*,³; and it has also been held to be equally applicable to enforcement of rights (see *Hardutrai v. Official Assignee of Calcutta*⁴.) That being so, I think it will be a fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage.

It was argued that since the Representation of the People Act was enacted subject to the provisions of the Constitution, it cannot bar the jurisdiction of the High Court to issue writs under Article 226 of the Constitution. This argument, however, is completely shut out by reading the Act along with Article 329 (b). It will be noticed that the language used in that Article and in section 80 of the Act is almost identical, with this difference only that the Article is preceded by the words “notwithstanding anything in this Constitution.” I think that those words are quite apt to exclude the jurisdiction of the High Court to deal with any matter which may arise while the elections are in progress.

It may be stated that section 107 (1) of the Representation of People Act, 1949, (12 & 13, Geo., 6 c.68) in England in drafted almost in the same language as Article 329 (b). That section runs thus : –

“No parliamentary election and no return to Parliament shall be questioned except by a petition complaining of an undue election or undue return (hereinafter referred to as a parliamentary election petition) presented in accordance with this Part of this Act.”

It appears that similar language was used in the earlier statutes, and it is note-worthy that it has never been held in England that the improper rejection of a nomination paper can be the subject of a writ of *certiorari* or *mandamus*. On the other had it was conceded at the bar that the question of improper rejection of a nomination paper has always been brought up in that country before the appropriate tribunal by means of an election petition after the conclusion of the election. It is true that there is no direct decision holding that the words used in the relevant provisions exclude the jurisdiction of the High Court to issue appropriate prerogative writs at an intermediate stage of the election, but the total absence of any such decision can be accounted for only on the view that the provisions in question have been generally understood to have that effect. Our attention was drawn to rule 13 of the rules appended to the Ballot Act of 1872 and a similar rule in the Parliamentary Elections Rules of 1949, providing that the decision of the Returning Officer disallowing an objection to a nomination paper shall be final, but allowing the same shall be subject to reversal on a petition questioning the election or return. These rules, however, do not affect the main argument. I think it can be legitimately stated that if words similar to

those used in Article 329 (b) have been consistently treated in England as words apt to exclude the jurisdiction of the Courts including the High Court, the same consequence, must follow from the words used in Article 329 (b) of the Constitution. The words “notwithstanding anything in this Constitution” give to that Article the same wide and binding affect as a statute passed by a sovereign Legislature like the English Parliament.

It may be pointed out that Article 329 (b) must be read as complementary to clause (a) of that Article. Clause (b) 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 of 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 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.

(2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to any thing 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.

It will be useful at this stage to refer to the decision of the Privy Council in *Theberge v. Laudry*¹. The petitioner in that case having been declared duly elected a member to represent an electoral district in the Legislative Assembly of the Province of Quebec, his election was afterwards, on petition, declared null and void by judgment of the Supreme Court under the Quebec

Controverted Elections Act 1875, and himself declared guilty of corrupt practices, both personally and by his agents. Thereupon, he applied for special leave to appeal to Her Majesty-in-Council, but it was refused on the ground that the fair construction of the Act of 1875 and the Act of 1872 which preceded it providing among other things that the judgement of the Superior Court” shall not be susceptible of appeal” was that it was the intention of the Legislature to create a tribunal for the purpose of trying election petitions in a manner which should make its decision final for all purposes, and should not annex to it the incident of its judgement being reviewed by the Crown under its prerogative. In delivering the judgement of the Privy Council, Lord Cairns observed as follows:—

“These two Acts of Parliament, the Acts of 1872 and 1875, are Acts peculiar in their character. They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular Court..... for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that Court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in such a way that should as soon as possible become conclusive; and enable the constitution of the Legislative Assembly to be distinctly and speedily known.”

After dealing with certain other matters, the Lord Chancellor proceeded to make the following further observations :—

“Now, the subject-matter, as has been said, of the legislation is extremely peculiar. It concerns the rights and privileges of the electors and of the Legislative Assembly to which they elect members. Those rights and privileges have always in every colony, following the example of the mother-country, been jealously maintained and guarded by the Legislative Assembly. Above all, they have been looked upon as rights and privileges which pertain to the Legislative Assembly, in complete independence of the Crown, so far as they properly exist. And it would be a result somewhat surprising and hardly in consonance with the general scheme of the legislation, if, with regard to rights and privileges of this kind, it were to be found that in the last resort the determination of them no longer belonged to the Legislative Assembly, no longer belonged to the Superior Court which the Legislative Assembly had put in its place, but belonged to the Crown in Council, with the advice of the advisers of the Crown at home, to be determined without reference either to the judgement of the Legislative Assembly, or of that Court which the Legislative Assembly had sustained in its place.”

The points which emerge from this decision may be stated as follows:—

(1) The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it.

(2) Strictly speaking, it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members, and if the Legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it.

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.

It is necessary to refer to at this stage to an argument advanced before us on behalf other appellant which was based on the language of Article 71 (1) of the Constitution. That provision runs thus :—

“All doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court whose decision shall be final.”

The argument was as follows :— There is a marked contrast between the language used in Article 71 (1) and that of Article 329 (b). The difference in the phraseology employed in the two provisions suggests that they could not have been intended to have the same meaning and scope as regards matters to be brought up before the tribunals they respectively deal with. If the framers of the Constitution, who apparently knew how to express themselves, intended to include within the ambit of Article 329 (b) all possible disputes connected with elections to Legislatures, including disputes as to nominations, they would have used similar words as are to be found in Article 71(1). It is true that it is not necessary to use identical language in every provision, but one can conceive of various alternative ways of expression which would convey more clearly and properly what Article 329 (b) is said to convey.

It seems to me that once it is admitted that the same idea can be expressed in different ways and the same phraseology need not be employed in every provision, the argument loses much of its force. But, however that may be, I think there is a good explanation as to why Article 329 (b) was drafted as it stands.

A reference to the election rules made under the Government of India Acts of 1919 and 1935 will show that the provisions in them on the subject were almost in the small language, as Article 329 (b). The corresponding rule made under the Government of India Act, 1919, was rule 31 of the elector rules, and it runs as follows :—

“No election shall be called in question, except by an election petition presented in accordance with the provisions of this Part.”

It should be noted that this rule occurs in Part VII, the heading of which is:

“The final decision of doubts and disputes as to the validity of an election.”

These words throw some light on the function which the election tribunal was to perform, and they are the very words which the learned counsel for the appellant argued, ought to have been used to make the meaning clear.

The same scheme was followed in the election rules framed under the Government of India Act, 1935, which are contained in “The Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order 1936 dated the 3rd July, 1936. In that Order, the rule corresponding to rule 31 under the earlier Act, runs thus :-

“No election shall be called in question except by an election petition presented in accordance with the provision of this part of the Order.”

This rule is to be found in Part III of the Order, the heading of which is

Decision of doubts and disputes as to validity of an election and disqualification for corrupt practices”

The rules to which I have referred were apparently framed on the pattern of the corresponding provisions of the British Acts of 1868 and 1872, and they must have been intended to cover the same ground as the provisions in England, have been understood to cover in that country for so many years. If the language, used in Article 329 (b) is considered against this historical background, it should not be difficult to see why the framers of the Constitution framed that provision in its present form and chose the language which had been consistently used in certain earlier legislative provisions and which had stood the test of time.

And now a word as to why negative language was used in Article 329 (b). It seems to me that there is an important difference between article 71 (1) and Article 329 (b). Article 71 (1) had to be in an affirmative form, because it confers special jurisdiction on the Supreme Court, which that Court could not have exercised but for this Article. Article 329 (b), on the other hand, was primarily, intended to exclude or oust the jurisdiction of all Courts in regard to electoral matters and to lay down the only mode in which an election could be challenged. The negative form was therefore more appropriate, and that being so, it is not surprising that it was decided to follow the pre-existing pattern in which also the negative language had been adopted.

Before concluding, I should refer to an argument which has strenuously pressed by the learned counsel for the appellant and which has been reproduced by one of the learned Judges of the High Court in these words :-

“It was next contended that if nomination is part of election a dispute as to the validity of nominating is a dispute relating to election and that

can be called in question only in accordance with the provisions of Article 329 (b) by the presentation of an election petition to the appropriate Tribunal and that the Returning Officer would have no jurisdiction to decide that matter, and it was further argued that section 36 of Act 43 of 1951 would be *ultra vires* inasmuch as it confers on the Returning Officer a jurisdiction which Article 329 (b) confers on a Tribunal to be appointed in accordance with the Article.”

This argument displays great dialectical ingenuity, but it has no bearing on the result of this appeal that I think it can be very shortly answered. Under section 36 of the Representation of the People Act, 1951, it is the duty of the Returning Officer to scrutinize the nomination papers to ensure that they comply with the requirements of the Act, and decide all objections which may be made to any nomination. It is clear that unless this duty is discharged properly, any number of candidates may stand for election without complying with the provisions of the Act and a great deal of confusion may ensue. In discharging the statutory duty imposed on him, the Returning Officer does not call in question any election. Scrutiny of nomination papers is only a stage, though an important stage, in the election process. It is one of the essential duties to be performed before the election can be completed, and anything done towards the completion of the election proceeding can by no stretch of reasoning be described as questioning the election. The fallacy of the argument lies in treating a single step taken in furtherance of an election as equivalent to election. The decision of this appeal however, turns not on the construction of the single word “election”, but on the construction of the compendious expression — “no election shall be called in question” in its context and setting, with due regard to the scheme of Part XV of the Constitution and the Representation of the People Act, 1951. Evidently, the argument has no bearing on this method of approach to the question posed in this appeal, which appears to me to be the only correct method.

We are informed that besides the Madras High Court, seven other State High Courts have held that they have no jurisdiction under Article 226 of the Constitution to entertain petitions regarding improper rejection of nomination papers. This view is in my opinion correct and must be affirmed. The appeal must therefore fail and is dismissed. In view of the nature and importance of the points raised in this appeal, there should be no order to costs.

M. Patanjali Sastri, C.J. – I agree.

Mehrchand Mahajan, J. – I agree.

B.K. Mukherjea, J. – I agree.

S.R. Das, J. – I agree.

N. Chandrasekhara Aiyar, J. – I agree

Agent for Appellant : *S. Subramaniam*

Agent for 1st Respondent : *P.A. Mehta*

Agent for Union of India : *P.A. Mehta*

Agent for State of Madhya Bharat : *P.A. Mehta*

Appeal dismissed.

SUPREME COURT OF INDIA *

(Civil Appellate Jurisdiction)
Civil Appeal No. 205 of 1952^s
(Decision dated 27th February, 1953)

The Election Commission, India

.. Appellant

Vs.

Saka Venkata Rao

.. Respondent

The Union of India

.. Intervener

SUMMARY OF THE CASE

Shri Saka Venkata Rao was convicted by the Session's Judge of East Godavari and sentenced to a term of 7 years rigorous imprisonment in 1942. He was released on the occasion of the celebration of the Independence Day on the 15th August, 1947. In June, 1952, he was elected to the Madras Legislative Assembly at a bye-election held from the Kakinad Assembly constituency. On the 3rd July, 1952, a question was raised in the Assembly as to whether Shri Rao was disqualified to be a member of the Assembly by reason of his aforesaid conviction. The Speaker referred the question to the Governor of Madras. He forwarded the case to the Election Commission for its opinion, as required by Article 192(2) of the Constitution. The Commission heard the case on the 21st August, 1952. On the same day, Shri Rao moved the Madras High Court under Article 226 of the Constitution, contending that Article 192 of the Constitution was applicable only where a member of a State Legislature became subject to disqualification after he was elected, but not where the disqualification arose long before election, in which case the only remedy was to challenge the validity of the Election before an election Tribunal by means of an election petition.

A single judge of the Madras High Court upheld the contentions of Shri Rao, and held that Article 192 applied only to cases of supervening disqualification and the Election Commission had, therefore, no jurisdiction to opine on the Petitioner's disqualification which arose long before the election took place.

Aggrieved by the order of the High Court, the Election Commission filed the present appeal before the Supreme Court. The Supreme Court dismissed the appeal, confirming and upholding the view taken by the High Court.

Constitution of India (1950), Article 133 (3) – Scope – Decision of single judge on question involving interpretation of the Constitution – Grant of certificate of fitness for appeal – Right of appeal – Article 226 – Jurisdiction and powers under – Scope – Articles 190 (3) and 192 (1) – Applicability only to disqualifications arising after election.

While it is true that constitutional questions could be raised in appeals filed without a certificate under Article 132 of the Constitution, the terms of that Article

make it clear that an appeal is allowed from "any judgment, decree or final order of a High Court" provided, of course, the requisite certificate is given, and no restriction is placed on the right of appeal having reference to the number of Judges by whom such judgment, decree or final order was passed. Had it been intended to exclude the right of appeal in the case of a judgment, etc., by one Judge, it would have been easy to include a reference to Article 132 also in the opening words of Article 133 (3) as in the immediately preceding clause. The whole scheme of the appellate jurisdiction of the Supreme Court clearly indicates that questions relating to the interpretation of the Constitution are placed in a special category irrespective of the nature of the proceedings in which they may arise, and a right of appeal of the widest amplitude is allowed in cases involving such questions. An appeal to the Supreme Court against the judgment of a single Judge of the High Court is not barred under Article 133 (3) of the Constitution.

The power of a High Court under Article 226 of the Constitution of India, 1950 is to be exercised "throughout the territories in relation to which it exercises jurisdiction" that is to say the writs issued by the Court cannot run beyond the territories subject to its jurisdiction. The person of authority to whom the High Court is empowered to issue such writs must be "within those territories," which clearly implies that they must be amenable to its jurisdiction either by residence or location within those territories.

A tribunal or authority permanently located and normally carrying on its activities elsewhere (as for instance the Election Commission at New Delhi) exercises jurisdiction within those territorial limits (as in Madras State) so as to affect the rights of parties therein (in any election dispute) cannot be regarded as "functioning" within the territorial limits of the High Court and being therefore amenable to its jurisdiction under Article 226. The rule that cause of action attracts jurisdiction in suits based on statutory enactment cannot apply to writs issuable under Article 226, which makes no reference to any cause of action or where it arises but insists on the presence of the person or authority "within the territories" in relation to which the High Court exercises jurisdiction.

Article 190 (3) and 192 (1) are applicable only to disqualifications to which a member becomes subject after he is elected as such and neither the Governor nor Election Commission has jurisdiction to enquire into the disqualification of a member which arose long before his election.

On Appeal from the Judgment and Order dated the 16th September, 1952, of the High Court of Judicature at Madras (Subba Rao, J.) in Writ Petition No. 599 of 1952 filed under the Special Original Jurisdiction of the High Court under Article 226 of the Constitution of India.

JUDGMENT

Present :- M. Patanjali Sastri, Chief Justice, B.K. Mukherjea, Vivian Bose, Ghulam Hasan and N.H. Bhagwati, JJ.

M.C. Setalvad, Attorney-General for India and G.N. Joshi, Advocate, with him, for Appellant and Intervener.

Mohan Kumaramangalam, Advocate, for Respondent.

The Judgment of the Court was delivered by

PATANJALI SASTRI, C.J.—This is an appeal from an order of a single Judge of the High Court of Judicature at Madras issuing a writ of prohibition restraining the Election Commission, a statutory authority constituted by the President and having its offices permanently located at New Delhi, from enquiring into the alleged disqualification of the respondent for membership of the Madras Legislative Assembly.

The respondent was convicted by the Sessions Judge of East Godavari and sentenced to a term of seven years' rigorous imprisonment in 1942, and he was released on the occasion of the celebration of the Independence Day on 15th August, 1947. In June, 1952, there was to be a by-election to a reserved seat in the Kakinada constituency of the Madras Legislative Assembly, and the respondent, desiring to offer himself as a candidate but finding himself disqualified under section 7 (b) of the Representation of the People Act, 1951, as five years had not elapsed from his release, applied to the Commission on 2nd April, 1952, for exemption so as to enable him to contest the election. No reply to the application having been received till 5th May, 1952, the last day for filing nominations, the respondent filed his nomination on that day, but no exception was taken to it either by the Returning Officer or any other candidate at the scrutiny of the nomination papers. The election was held on 14th June, 1952 and the respondent, who secured the largest number of votes, was declared elected on 16th June, 1952. The result of the election was published in the Fort St. George Gazette (Extra-ordinary) on 19th June, 1952, and the respondent took his seat as a member of the Assembly on 27th June, 1952. Meanwhile, the Commission rejected the respondent's application for exemption and communicated such rejection to the respondent's by its letter dated 13th May, 1952, which however, was not received by him. On 3rd July, 1952, the Speaker of the Assembly read out to the House a communication received from the Commission bringing to his notice, "for such action as he may think fit to take", the fact that the respondent's application for exemption had been rejected. A question as to the respondent's disqualification having thus been raised, the Speaker referred the question to the Governor of Madras who forwarded the case to the Commission for its "opinion" as required by Article 192 of the Constitution. The respondent having thereupon challenged the competency of the reference and the action taken thereon by the Governor, the Commission notified the respondent that his case would be heard on 21st August, 1952. Accordingly, the Chief Election Commissioner (who was the sole Member of the Commission for the time being) went down to Madras and heard the respondent's counsel and the Advocate-General of Madras on 21st August, 1952, when it was agreed that, in case the petitioner's counsel desired to put forward any further representations or arguments, the same should be sent in writing so as to reach the Commission in Delhi by 28th August, 1952, and the Commission should take them into consideration before giving its opinion to the Governor.

On the same day (21st August, 1952), the respondent applied to the High Court under Article 226 of the Constitution contending that Article 192 of the Constitution was applicable only where a member became subject to a disqualification after he was elected but not where, as here, the disqualification arose long before the election, in which case the only remedy was to challenge the validity of the election

before an Election Tribunal. He accordingly prayed for the issue of a writ of *mandamus* or of prohibition directing the Commission to forbear from proceeding with the reference made by the Governor of Madras who was not however, made a party to the proceeding. On receipt of the *rule nisi* issued by the High Court, the Commission demurred to the jurisdiction of the Court to issue the writs asked for, on the ground that the Commission was not "within the territory in relation to which the High Court exercised jurisdiction". A further objection to the maintainability of the application was also raised to the effect that the action of the Governor in seeking the opinion of the Commission could not be challenged in view of the immunity provided under Article 361 (1), and that the Commission itself, which had not to "decide" the question of disqualification, but had merely to give its "opinion", could not be proceeded against under Article 226. On the merits, the Commission contended that Article 192 was, on its true construction, applicable to cases of disqualification arising both before and after the election and that both the reference of the question as to the respondent's disqualification to the Governor of Madras and the latter's reference of the same to the Commission for its opinion were competent and valid.

The application was heard by Subba Rao, J., who overruled the preliminary objections and held that Article 192 on its true construction applied only to cases of supervening disqualifications and that the Commission had, therefore, no jurisdiction to deal with the respondent's disqualification which arose long before the election took place. He accordingly issued a writ prohibiting the Commission from proceeding with the enquiry in regard to the question referred to it by the Governor under Article 192. The learned Judge, however, granted a certificate under Article 132 that the case involved substantial questions of law as to the interpretation of the Constitution, and the Commission has accordingly preferred this appeal.

A preliminary objection was raised by Mr. Mohan Kumaramangalam, who argued the case for the respondent with marked ability, that the appeal brought from the judgment of a single Judge was barred under Article 133(3) of the Constitution despite the certificate granted by the learned Judge overruling the same objection which was also raised before him. It has been urged that, so far as civil matters are concerned, the more comprehensive provisions in Article 133 (1) (c) for the grant of a certificate of fitness for appeal to the Supreme Court completely overlap Article 132 (1) which relates only to one specific ground, namely, a substantial question of law being involved as to the interpretation of the Constitution, and that the Court's power, therefore, to grant a certificate of fitness on any ground, including the ground referred to above, must be deemed to arise under Article 133 (1) (c), with the result that the exercise of such power is excluded by the opening words of clause (3) of that article which bars an appeal from the judgment, decree or final order of one Judge of a High Court. The argument was sought to be reinforced by reference to clause (2) of that Article and the provision to Article 145 (3) both of which contemplate appeals involving substantial questions of law as to the interpretation of the Constitution being brought without a certificate having been obtained under Article 132. The argument has no force. While it is true that constitutional questions could be raised in appeals filed without a certificate under Article 132, the terms of that Article make it clear that an appeal is allowed from "any judgment, decree or final order of a High Court" provided, of course, the

requisite certificate is given, and no restriction is placed on the right of appeal having reference to the number of Judges by whom such judgment, decree or final order was passed. Had it been intended to exclude the right of appeal in the case of a judgment, etc., by one Judge, it would have been easy to include a reference to Article 132 also in the opening words of Article 133 (3), as in the immediately preceding clause. If the respondent's contention were accepted, not only would Article 132 become redundant so far as it relates to *civil* proceedings, but the object of the Explanation to the Article, which was designed to supersede the decision of the Federal Court *S. Kuppuswami Rao v. The King*¹ and thus to secure a speedy determination of constitutional issues going to the root of a case, would be defeated, as the explanation is not made applicable to the same expression "final order" used in Article 133 (1). The whole scheme of the appellate jurisdiction of the Supreme Court clearly indicates that questions relating to the interpretation of the Constitution are placed in a special category irrespective of the nature of the proceedings in which they may arise, and a right of appeal of the widest amplitude is allowed in cases involving such questions. We accordingly overrule the preliminary objection and hold that the appeal is maintainable.

Turning now to the question as to the powers of a High Court under Article 226, it will be noticed that Article 225 continues to the existing High Courts the same jurisdiction and powers as they possessed immediately before the commencement of the Constitution. Though there had been some conflict of judicial opinion on the point, it was authoritatively decided by the Privy Council in the *Parlakimedi case*² that the High Court of Madras – the High Courts of Bombay and Calcutta were in the same position – had no power to issue what were known as high prerogative writs beyond the local limits of its original civil jurisdiction, and the power to issue such writs within those limits was derived by the Court as successor of the Supreme Court which had been exercising jurisdiction over the Presidency Town of Madras and was replaced by the High Court established in pursuance of the Charter Act of 1861. The other High Courts in India had no power to issue such writs at all. In that situation, the makers of the Constitution, having decided to provide for certain basic safeguards for the people in the new set-up, which they called fundamental rights, evidently thought it necessary to provide also a quick and inexpensive remedy for the enforcement of such rights and, finding that the prerogative writs, which the Courts in England had developed and used whenever urgent necessity demanded immediate and decisive interposition, were peculiarly suited for the purpose, they conferred, in the States' sphere, new and wide powers on the High Courts of issuing directions, orders, or writs primarily for the enforcement of fundamental rights, the power to issue such directions, etc., "for any other purpose" being also included with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of King's Bench in England. But wide as were the powers thus conferred, a two-fold limitation was placed upon their exercise. In the first place, the power is to be exercised "throughout the territories in relation to which it exercise jurisdiction", that is to say, the writs issued by the Court cannot run beyond the territories subject to its jurisdiction. Secondly, the person or authority to whom the High Court is empowered to issue such writs must be "within those territories", which clearly implies that they must be amenable to its jurisdiction either by residence or location within those territories.

Such limitation is indeed a logical consequence of the origin and development of the power to issue prerogative writs as a special remedy in England such power formed no part of the original or the appellate jurisdiction of the Court of King's Bench. As pointed out by Prof. Holdsworth (*History of English Law*, Vol. I, p. 212, et seq.) these writs had their origin in the exercise of the King's prerogative power of superintendence over the due observance of the law by his officials and tribunals, and were issued by the Court of King's Bench – *habeas corpus*, that the King may know whether his subjects were lawfully imprisoned or not; *certiorari*, that he may know whether any proceedings commenced against them are conformable to the law; *mandamus*, to ensure that his officials did such acts as they were bound to do under the law, and prohibition, to oblige the inferior tribunals in his realm to function within the limits of their respective jurisdiction. See also the introductory remarks in the judgment in the *Parlakimedi case*¹. These writs were thus specifically directed to the persons or authorities against whom redress was sought and were made returnable in the Court issuing them and in case of disobedience, were enforceable by attachment for contempt. These characteristics of the special form of remedy rendered it necessary for its effective use that the persons or authorities to whom the Court was asked to issue these writs should be within the limits of its territorial jurisdiction. We are unable to agree with the learned Judge below that if a tribunal or authority permanently located and normally carrying on its activities elsewhere exercises jurisdiction within those territorial limits so as to affect the rights of parties therein, such tribunal or authority must be regarded as "functioning" within the territorial limits of the High Court and being therefore amenable to its jurisdiction under Article 226.

It was, however, urged by the respondent's counsel that the High Court had jurisdiction to issue a writ to the Commission at New Delhi because the question referred to it for decision related to the respondent's right to sit and vote in the Legislative Assembly at Madras and the parties to the dispute also resided in the State of Madras. The position, it was claimed, was analogous to the Court exercising jurisdiction over persons outside the limits of its jurisdiction, provided the cause of action arose within those limits. Reliance was placed upon the following observations of the Privy Council in the *Parlakimedi case*¹;

"The question of jurisdiction must be regarded as one of substance and that it would not have been within the competence of the Supreme Court to claim jurisdiction over such a matter as the present of issuing *certiorari* to the Board of Revenue on the strength of its location in the Town. Such a view would give jurisdiction to the Supreme Court in the matter of the settlement of rents of ryoti holdings in Ganjam between parties not otherwise subject to its jurisdiction, which it would not have had over the Revenue Officer who dealt with the matter at first instance."

We cannot accede to this argument. The rule that cause of action attracts jurisdiction in suits is based on statutory enactment and cannot apply to writs issuable under Article 226 which makes no reference to any cause of action or where it arises but insists on the presence of the person or authority "within the territories" in relation to which the High Court exercises jurisdiction. Nor is much assistance to be derived from the observations quoted above. That case arose out of proceedings before a special Revenue Officer for settlement of fair rent for certain holdings within the Zamindari Estate of Parlakimedi situated beyond the local

limits of the original civil jurisdiction of the Madras High Court. Dissatisfied with the settlement made by the Revenue Officer, the ryots appealed to the Board of Revenue which had its offices at Madras. The appeal was accepted by a single member of the Board who reduced the rent as desired by the ryots. The Zemindar appealed by way of revision to the Collective Board which sanctioned an enhancement. Thereupon the ryots applied to the High Court for the issue of a writ of certiorari to bring up and quash the proceedings of the collective Board which passed the order complained of in the Town of Madras. The Privy Council considered the question of jurisdiction from two separate standpoints:-

"(a) independently of the local civil jurisdiction which the High Court exercises after the Presidency town; or

(b) solely by reason thereof, as an incident of the location of the Board of Revenue within the town".

On question (a), they examined the powers of the Supreme Court at Madras to issue *certiorari* beyond the Presidency Town under clause 8 of the Charter of 1800, as it was suggested that the High Court succeeded to the jurisdiction and powers of the Supreme Court which had been granted the same powers of issuing prerogative writs as the Court of King's Bench in England throughout the Province, and they recorded their conclusion thus:

Their Lordships are not of opinion that the Supreme Court would have had any jurisdiction to correct or control a country court of the Company deciding a dispute between Indian inhabitants of Ganjam about the rent payable for land in that district.

Then, dealing with question (b) and referring to their decision in *Mrs. Annie Besant's case*¹ that the High Courts of Calcutta, Madras and Bombay had power to issue *certiorari* in the exercise of their local jurisdiction, they held that the principle could not be applied.

"to the settlement of rent for land in Ganjam merely on the basis of the location of the Board of Revenue as a body which is ordinarily resident or located within the town of Madras, or on the basis that the order complained of was made within the town. If so, it would seem to follow that the jurisdiction of the High Court would be avoided by the removal of the Board of Revenue beyond the outskirts of the town and that it would never attach but for the circumstance that an appeal is brought to, or proceedings in revision taken by the Board of Revenue".

Then followed the passage already quoted on which the respondent's counsel laid special stress. It will thus be seen that the decision is no authority for dispensing with the necessity of the presence or location, within the local limits of the Court's jurisdiction, of the person or authority to whom the writ is to be issued, as the basis of its power to issue it. Their Lordships considered, in the peculiar situation they were dealing with, that the mere location of the appellate authority alone in the Town of Madras was not a sufficient basis for the exercise of jurisdiction whereas both the subject-matter, *viz.*, the settlement of rent for lands in Ganjam, and the Revenue Officer authorised to make the settlement at first instance were outside the local limits of the jurisdiction of the High Court. If the Court in Madras were recognised as having jurisdiction to issue the writ of *certiorari* to the appellate

authority in Madras, it would practically be recognising the Court's jurisdiction over the Revenue Officer in Ganjam and the settlement of rents for lands there, which their Lordships held it never had. That was the "substance" of the matter they were looking at, and their observations lend no support to the view that if the subject-matter or the cause of action and the parties concerned were within the territorial limits of the jurisdiction, the High Court could issue prerogative writs to persons or authorities who are not within those limits. In any case, the decision did not turn on the construction of a statutory provision similar in scope, purpose or wording to Article 226 of the Constitution and is not of much assistance in the construction of that Article.

It was said that it could not have been contemplated that an inhabitant of the State of Madras, feeling aggrieved by a threatened interference with the exercise of his rights in that State by an authority located in Delhi and acting without jurisdiction, should seek his remedy under Article 226 in the Punjab High Court. It is a sufficient answer to this argument of inconvenience to say that the language of the Article being reasonably plain, it is idle to speculate as to what was or was not contemplated.

Our attention has been called to certain decisions of High Courts dealing with the situation where the authority claiming to exercise jurisdiction over a matter at first instance is located in one State and the appellate authority is located in another State. It is not necessary for the purposes of this appeal to decide which High Court would have jurisdiction in such circumstances to issue prerogative writs under Article 226.

In the view we have expressed above as to the applicability of Article 226 to the present case, it is unnecessary to enter upon a discussion of the question whether Article 192 (1) applies only to members who, having been already elected, have become subject to a disqualification by reason of events happening after their election; but having heard the point fully argued before us, we think it right to express our opinion thereon, especially as both sides have invited us to do so in view of its general importance.

The relevant provisions of the Constitution on which the determination of the question turns are as follows:-

190. (3) If a member of a House of the Legislature of a State —

(a) becomes subject to any of the disqualifications mentioned in clause (1) of Article 191; or

(b) resigns his seat by writing under his hand addressed to the Speaker or the Chairman as the case may be.

his seat shall thereupon become vacant.

191. (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State —

(a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India or has voluntarily acquired the citizenship of a foreign State or is under any acknowledgment of allegiance or adherence to a foreign State;

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

192. (1) If any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of Article 191 the question shall be referred for the decision of the Governor and his decision shall be final.

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

193. If a person sits or votes as a member of the Legislative Assembly or the Legislative Council of a State when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by Parliament or the Legislature of the State, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the State.

As has been stated already, the respondent's conviction and sentence in 1942 disqualified him both for being chosen as, and for being, a member of the Legislative Assembly under Article 191 (1) (e) read with section 7 of the Representation of the People Act, 1951, passed by Parliament, the period of five years since his release on August 15, 1947, not having elapsed before the date of the election. The respondent having thus been under a disqualification since before his nomination on March 15, 1952, could he be said to have "become" subject to that disqualification within the meaning of Article 192? The rival contentions of the parties centred round the true interpretation to be placed on that word in the context of the provisions quoted above.

The Attorney-General argued that the whole fasciculus of the provisions dealing with "disqualifications of Members", *vis.*, Articles 190 to 193, should also be read together, and as Articles 191 and 193 clearly cover both pre-existing and supervening disqualifications, Articles 190 and 192 should be similarly understood as relating to both kinds of disqualification. According to him all these provisions together constitute an integral scheme whereby disqualifications are laid down and machinery for determining questions arising in regard to them is also provided. The use of the word "become" in Articles 190 (3) and 192 (1) is not inapt, in the context, to include within its scope pre-existing disqualifications also, as becoming subject to a disqualification is predicated of "a member of a House of Legislature", and a person, who, being already disqualified, gets elected, can, not appropriately, be said to "become" subject to the disqualification *as a member* as soon as he is elected. The argument is more ingenious than sound. Article 191, which lays down the same set of disqualifications for election as well as for continuing as a member, and Article 193 which prescribes the penalty for sitting and voting when disqualified, are naturally phrased in terms wide enough to cover both re-existing and supervening disqualifications; but it does not necessarily follow that Articles 190 (3) and 192 (1) must also be taken to cover both. Their meaning must depend on the language used which, we think, is reasonably plain. In our opinion these two 'Articles go together and provide a remedy when a member incurs a disqualification after he is elected as

a member. Not only do the words "becomes subject" in Article 190 (3) and "has become subject" in Article 192 (1) indicate a *change in the position* of the member *after* he was elected, but the provision that his seat is to become *thereupon* vacant, that is to say, the seat which the member was filling theretofore becomes vacant on his becoming disqualified, further reinforces the view that the Article contemplates only a sitting member incurring the disability while so sitting. The suggestion that the language used in Article 190 (3) can equally be applied to a pre-existing disqualification as a member can be supposed to vacate his seat the moment he is elected is a strained and far-fetched construction and cannot be accepted. The Attorney-General admitted that if the word "is" were substituted for "becomes" or "has become", it would more appropriately convey the meaning contended for by him, but he was unable to say why it was not used.

It was said that on the view that Articles 190 (3) and 192 (1) deal with disqualifications incurred after election as a member, there would be no way of unseating a member who became subject to a disqualification *after* his nomination and *before* his election, for, such a disqualification is no ground for challenging the election by an election petition under Article 329 of the Constitution read with section 100 of the Representation of the People Act, 1951. If this is an anomaly, it arises out of a lacuna in the latter enactment which could easily have provided for such a contingency, and it cannot be pressed as an argument against the respondent's construction of the constitutional provisions. On the other hand, the Attorney-General's contention might, if accepted, lead to conflicting decisions by the Governor dealing with a reference under Article 192 and by the Election Tribunal inquiring into an election petition under section 100 of the Parliamentary statute referred to above.

For the reasons indicated we agree with the learned Judge below in holding that Articles 190 (3) and 192 (1) are applicable only to disqualifications to which a member becomes subject after he is elected as such, and that neither the Governor nor the Commission has jurisdiction to enquire into the respondent's disqualification which arose long before his election.

As however, we have held that the High Court was not competent under Article 226 to issue any prerogative writ to the appellant Commission the appeal is allowed and the writ of prohibition issued by the learned Judge is quashed. We make no order as to costs.

Agent for Appellant and Intervener: *G.H. Rajadhyaksha.*

Agent for Respondent: *S. Subramaniam.*

Appeal allowed

SUPREME COURT OF INDIA *

Civil Appeal No-50 of 1965^s
(Decision dated 12th February, 1965)

Brundaban Nayak

.. Appellant

Vs.

Election Commission of India and Another

.. Respondents

SUMMARY OF THE CASE

Shri Brundaban Nayak was elected to the Legislative Assembly of Orissa from the Hinjili constituency in Ganjam District in 1961. On 18th August, 1964, one Shri P. Biswal applied to the Governor of Orissa under Article 192(1) of the Constitution, alleging that Shri Nayak had incurred disqualification subsequent to his election under Article 191 (1) (e) of the Constitution read with Section 7 (d) of the Representation of the People Act, 1951. The Governor referred the matter to the Election Commission for its opinion under Article 192 (2) of the Constitution.

The Election Commission started an enquiry in the matter. Shri Nayak challenged the authority of the Commission to make an enquiry. His objection was, however, over ruled by the Commission. Thereupon, he moved the Punjab High Court by a Writ Petition under 226 of the Constitution, contending, inter alia, that the question of disqualification of a member of Legislative Assembly could be raised only on the floor of the House and not by any person outside the House. The High Court dismissed the writ petition in limine.

Shri Nayak then filed the present appeal before the Supreme Court. The Supreme Court also dismissed his appeal holding that the question of disqualification of a sitting member of a State Legislature could be raised before the Governor by any citizen under Article 192 (1) of the Constitution, and that the Election Commission had the jurisdiction to make the enquiry into the question of such disqualification referred to it under Article 192 (2) of the Constitution.

(a) Constitution of India Art. 192(1) – Scope – Who can raise question – Ordinary citizen or voter can raise question under Art. 192(1).

What the first clause of Art. 192(1) requires is that a question should arise; how it arises, by whom it is raised, in what circumstances it is raised, are not relevant for the purpose of the application of this clause. Such a question can be raised not only on the floor of the Legislative Assembly by members of the Assembly but also by an ordinary citizen or voter in the form of a complaint to the Governor. There is no assumption implied in the words “the question shall be referred for the decision of the Governor”, that some other authority has first to receive the complaint and after a prima facie and initial investigation about it, send it on or refer it to the Governor for his decision. The words only emphasise that any question of the type

contemplated by clause (1) shall be decided by the Governor and Governor alone and by no other authority. The decision of the said question as such cannot fall within the jurisdiction of the Courts. The object of the Article is clear. Person who has incurred any of the disqualifications specified by Art. 191(1) cannot continue to be a member of the Legislative Assembly of a State, and the obligation to vacate his seat as a result of his subsequent disqualification having been imposed by the Constitution itself by Art. 190(3)(a), any citizen can make a complaint to the Governor alleging that such member of the Legislative Assembly has incurred one of the disqualifications mentioned in Art. 191(1) and should, therefore, vacate his seat. (Paras 9, 12, 13, 14)

(b) Constitution of India Art. 192(2) – Scope – Opinion by Election Commission – It is Election Commission and not the Governor which is to hold enquiry to arrive at such opinion.

The scheme of Article 192(1) and (2) is absolutely plain. The decision on the question raised under Art. 192(1) has no doubt to be pronounced by the Governor, but that it must be in accordance with the opinion of the Election Commission. It is the opinion of the Election Commission which is in substance decisive. When the Governor receives the complaint, and he forwards the same to the Election Commission, it can be assumed that the Election Commission should proceed to try the complaint before giving its opinion. It would not therefore be correct to say that it is the Governor who should hold the enquiry and then forward to the Election Commission all the material collected in such an enquiry to enable it to form its opinion and communicate the same to the Governor. (Paras 15, 16).

(c) Constitution of India Art. 192(2)–Election Commission receiving complaint and order of reference by Governor – Election Commission acts with in jurisdiction in sending notice to other party – Jurisdiction of Election Commission to hold enquiry is not affected merely because copies of complaint and order of reference have not been sent along with such notice. (Para 17)¹

(d) Constitution of India Art. 192(1), (2) – Scope – Complaints made under Art. 192(1) must be disposed of as expeditiously as possible. This is clear from Art. 190 (3) (Para 20)

(e) Constitution of India Art. 191(1) – Scope – Disqualification must be incurred subsequent to election.

The disqualification referred to in Art. 191(1) must be incurred subsequent to the election of the member. This follows from Art. 190(3) (a). AIR 1953 SC 210 Rel. on.

(Para 7)

Cases Referred: Courtwise Chronological Paras (53) AIR 1953 SC 210 (V 40): 1953 SCR 1144, Election Commission India v. Saka Venkata Subba Rao.

JUDGMENT

Present:- P.B. Gajendragadkar C.J., M. Hidayatullah, Raghubar Dayal, S.M. Sikri and V. Ramaswami JJ.

Mr. M.C. Setalvad, Senior Advocate, (M/s. Ravinder Narain, J.B. Dadachanji and O.C. Mathur, Advocates of M/s. J.B. Dadachanji & Co. with him), for Appellant; Mr. C.K. Daphtary, Attorney General for India and Mr. S.V. Gupta, Solicitor General for India, (M/s. B.R.L. Iyengar and R.H. Dhebar, Advocates with them), (for No. 1) and M/s. Santosh Chatterjee, B.B. Ratho and M.L. Chhibber, Advocates (for No. 2), for Respondents.

The following Judgment of the Court was delivered by

GAJENDRAGADKAR C.J.: The principal question which this appeal by special leave raises for our decision relates to the construction of Article 192 of the Constitution. The said question arises in this way. The appellant Brundaban Nayak was elected to the Legislative Assembly of Orissa from the Hinjili constituency in Ganjam district in 1961, and was appointed one of the Ministers of the Council of Ministers in the said State. On August 18, 1964, respondent No. 2, P. Biswal, applied to the Governor of Orissa alleging that the appellant had incurred a disqualification subsequent to his election under Art. 191(1)(e) of the Constitution read with section 7 of the Representation of the People Act, 1951 (No. 43 of 1951) (hereinafter called the Act). In his application respondent No. 2 made several allegations in support of his contention that the appellant had become disqualified to be a member of the Orissa Legislative Assembly. On September 10, 1964, the Chief Secretary to the Government of Orissa forwarded the said complaint to respondent No. 1, the Election Commission of India, under the instructions of the Governor. In this communication, the Chief Secretary stated that a question had arisen under Article 191(1) of the Constitution whether the member in question had been subject to the disqualification alleged by respondent No. 2, and so, he requested respondent No. 1 in the name of the Governor to make such enquiries as it thinks fit and give its opinion for communication to the Governor to enable him to give a decision on the question raised.

(2) On November 17, 1964, respondent No. 1 served a notice on the appellant forwarding to him a copy of the letter received by it from respondent No. 2 dated the 4th November, 1964. The notice intimated to the appellant that respondent No. 1 proposed to enquire in the matter before giving its opinion on the Governor's reference, and, therefore, called upon him to submit on or before the 5th December, 1964, his reply with supporting affidavits and documents, if any. The appellant was also told that the parties would be heard in person or through authorised counsel at 10.30 a.m. On the 8th December, 1964, in the office of respondent No. 1 in New Delhi.

(3) On December 1, 1964, the appellant sent a telegram to respondent No. 1 requesting it to adjourn the hearing of the matter. On the same day, he also addressed a registered letter to respondent No. 1 making this same request. Respondent No. 2 objected to the request made by the appellant for adjourning the hearing of the complaint. On December 8, 1964, respondent No. 1 took up this matter for consideration. Respondent No. 2 appeared by his counsel Mr. Chatterjee, but the appellant was absent. Respondent No. 1 took the view that an enquiry of the nature contemplated by Art. 192(2) must be conducted as expeditiously as possible, and so, it was necessary that whatever his other commitments may be, the appellant should arrange to submit at least his statement in reply to the allegations made by respondent No. 2, even if he required some more time for filing affidavits and/or

documents in support of his statement. Even so, respondent No. 1 gave the appellant time until the 2nd January, 1965, 10.30 a.m. when it ordered that the matter would be heard.

(4) On January 2, 1965, the appellant appeared by his counsel Mr. Patnaik and respondent No. 2 by his counsel Mr. Chatterjee. On this occasion. Mr. Patnaik raised the question about the maintainability of the proceedings before respondent No. 1 and its competence to hold the enquiry. Mr. Chatterjee repelled Mr. Patnaik's contention. Respondent No. 1 overruled Mr. Patnaik's contention and recorded its conclusion that it was competent to hold the enquiry under Art. 192(2). Mr. Patnaik then asked for adjournment and made it clear that he was making the motion for adjournment without submitting to the jurisdiction of respondent No. 1. In view of the attitude adopted by Mr. Patnaik, respondent No. 1 took the view that it would be pointless to adjourn the proceedings, and so, it heard Mr. Chatterjee in support of the case of respondent No. 2. After hearing Mr. Chatterjee, respondent No. 1 reserved its orders on the enquiry and noted that its opinion would be communicated to the Governor as early as possible.

(5) When matters had reached this stage before respondent No. 1, the appellant moved the Punjab High Court under Art. 228 of the Constitution praying that the enquiry which respondent No. 1 was holding, should be quashed on the ground that it was incompetent and without jurisdiction. This writ petition was summarily dismissed by the said High Court on January 6, 1965. Thereafter, the appellant applied to this Court for special leave on January 8, 1965, and special leave was granted to him on January 14, 1965. The appellant then moved this Court for stay of further proceedings before respondent No. 1, and the said prayer was granted. When special leave was granted to the appellant, this Court had made an order that the preparation of the record and the filing of statements of the case should be dispensed with and the appeal should be heard on the paper-book filed along with the special leave petition and must be placed for hearing within three weeks. That is how the matter has come before us for final disposal.

(6) Since the Punjab High Court had dismissed the writ petition filed by the appellant in limine, neither of the two respondents had an opportunity to file their replies to the allegations made by the appellant in his writ petition. That is why both respondent No. 1 and respondent No. 2 have filed counter affidavits in the present appeal setting out all the relevant facts on which they wish to reply. The appellant has filed an affidavit-in-reply. All these documents have been taken on the record at the time of the hearing of this appeal. It appears from the affidavit filed by Mr. Prakash Narain, Secretary to respondent No. 1, that when notice issued by respondent No. 1, on the 17th November, 1964 was served on the appellant, through oversight the original complaint filed by respondent No. 2 before the Governor of Orissa and the reference made by the Governor to respondent No. 1 were not forwarded to the appellant. At the hearing before us, it is not disputed by the appellant that a complaint was in fact made by respondent No. 2 before the Governor of Orissa and that the Governor had then referred the matter to respondent No. 1 for its opinion.

(7) Let us then refer to Article 192 which falls to be construed in the present appeal. Before reading this article, it is relevant to refer to Art. 191(1) provides that a person shall be disqualified for being chosen as, and for being, a member of the

legislative Assembly or Legislative Council of a State if, inter alia, he is so disqualified by or under any law made by Parliament. There are four other disqualifications prescribed by clauses (a) to (d) with which we are not concerned in the present appeal. It is the disqualification prescribed by clause (e) on which respondent No. 2 relies in support of the complaint made by him to the Governor. As we have already indicated, respondent No. 2's case is that the appellant has incurred the disqualification under Art. 191(1) (e) read with S. 7(d) of the Act, and this disqualification has been incurred by him subsequent to his election. It is well settled that the disqualification to which Art. 191(1) refers, must be incurred subsequent to the election of the member. This conclusion follows from the provisions of Art. 190(3)(a). This article refers to the vacation of seats by members duly elected. Sub-article (3)(a) provides that if a member of a House of the Legislature of a State becomes subject to any of the disqualifications mentioned in clause (1) of Art. 191, his seat shall thereupon become vacant. Incidentally, we may add that corresponding provisions with regard to the disqualification of members of both Houses of Parliament are prescribed by Articles 101, 102 and 103 of the Constitution. It has been held by this Court in *Election Commission, India v. Saka Venkata Subba Rao*, 1953 SCR 1144: (AIR 1953 SC 210) that Articles 190(3) and 192(1) are applicable only to disqualifications to which a member becomes subject after being elected as such. There is no doubt that the allegations made by respondent No. 2 in his complaint before the Governor, prima facie, indicate that the disqualification on which respondent No. 2 relies has arisen subsequent to the election of the appellant in 1961.

(8) Reverting then to Art. 192, the question which we have to decide in the present appeal is whether respondent No. 1 is entitled to hold an enquiry before giving its opinion to the Governor as required by Art. 192(2). Let us read Art. 192:

“(1) If any question arises as to whether a member of a House of the Legislature of a State has become subject any of the disqualifications mentioned in clause (1) of article 191, the question shall be referred for the decision of the Governor and his decision shall be final.

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

(9) Mr. Setalvad for the appellant contends that in the present cases, no question can be said to have arisen as to whether the appellant has become subject to any of the disqualifications mentioned in clause (1) of Art. 191, because his case is that such a question can be raised only on the floor of the Legislative Assembly and can be raised by members of the Assembly and not by an ordinary citizen or voter in the form of a complaint to the Governor. Mr. Setalvad did not dispute the fact that this contention has not been taken by the appellant either in his writ petition before the High Court or even in his application for special leave before this Court. In fact, the case sought to be made out by the appellant in the present proceedings appears to be that though a question may have arisen about this disqualification, it is the Governor alone who can hold the enquiry and not respondent No. 1. Even so, we have allowed Mr. Setalvad to raise this point because it is purely a question of law depending upon the construction of Art. 192(1).

(10) In support of his argument, Mr. Setalvad refers to the fact that Art 192 occurs in Chapter III of Part VI which deals with the State Legislature, and he

invited our attention to the fact that under Art. 199(3) which deals with a question as to whether a Bill introduced in the Legislature of a State which as a Legislative Council is a Money Bill or not, the decision of the Speaker of the Legislative Assembly of such State thereon shall be final. He urges that just as the question contemplated by Art. 199(3) can be raised only on the floor of the House, so can the question about a subsequent disqualification of a member of a Legislative Assembly be raised on the floor of the House and nowhere else. He concedes that whereas the question contemplated by Art. 199(3) has to be decided by the Speaker and his decision is final, the authority to decide the question under Art. 192(1) is not vested in the Speaker, but is vested in the Governor. In other words, the context in which Art 192(1) occurs is pressed into service by Mr. Setalvad in support of his argument.

(11) Mr. Setalvad also relies on the fact that Art. 192(1) provides that if any question arises, it shall be referred for the decision of the Governor and this clause, says Mr. Setalvad, suggests that there should be some referring authority which makes a reference of the question to the Governor for his decision. According to him, this referring authority, by necessary implication, is the Speaker of the Legislative Assembly. There is another argument which he has advanced before us in support of this construction. Article 192(2) requires that whenever a question is referred to the Governor, he shall obtain the opinion of the Election Commission, and Mr. Setalvad suggests that it could not have been the intention of the Constitution to require the Governor to refer to the Election Commission every question which is raised about an alleged disqualification of a member of a Legislative Assembly even though such a question may be patently frivolous or unsustainable.

(12) We are not impressed by these arguments. It is significant that the first clause of Art, 192(1) does not permit of any limitations such as Mr. Setalvad suggests. What the said clause requires is that a question should arise; how it arises, by whom it is raised, in what circumstances it is raised, are not relevant for the purpose of the application of this clause. All that is relevant is that a question of the type mentioned by the clause should arise; and so, the limitation which Mr. Setalvad seeks to introduce in the construction of the first part of Art, 192(1) is plainly inconsistent with the words used in the said clause.

(13) Then as to the argument based on the words “the question shall be referred for the decision of the Governor”, these words do not import the assumption that any other authority has to receive the complaint and after a prima facie and initial investigation about the complaint, send it on or refer it to the Governor for his decision. These words merely emphasise that any question of the type contemplated by clause (1) of Art, 192 shall be decided by the Governor and Governor alone; no other authority can decide it, nor can the decision of the said question as such fall within the jurisdiction of the Courts. That is the significance of the words “shall be referred for the decision of the Governor”. If the intention was that the question must be raised first in the Legislative Assembly and after a prima facie examination by the Speaker it should be referred by him to the Governor, Art, 192(1) would have been worded in an entirely different manner. We do not think there is any justification for reading such serious limitations in Art, 192(1) merely by implication.

(14) It is true that Art 192(2) requires that whenever a question arises as to the subsequent disqualification of a member of the Legislative Assembly, it has to be

forwarded by the Governor to the Election Commission for its opinion. It is conceivable that in some cases, complaints made to the Governor may be frivolous or fantastic; but if they are of such a character, the Election Commission will find no difficulty in expressing its opinion that they should be rejected straightway. The object of Art, 192 is plain. No person who has incurred any of the disqualifications specified by Art, 191(1) is entitled to continue to be a member of the Legislative Assembly of a State and since the obligation to vacate his seat as a result of his subsequent disqualification has been imposed by the Constitution itself by Art, 190(3) (a), there should be no difficulty in holding that any citizen is entitled to make a complaint to the Governor alleging that any member of the Legislative Assembly has incurred one of the disqualifications mentioned in Art. 191(1) and should therefore, vacate his seat. The whole object of democratic elections is to constitute legislative chambers composed of members who are entitled to that status, and if any member forfeits that status by reason of a subsequent disqualification, it is in the interests of the constituency which such a member represents that the matter should be brought to the notice of the Governor and decided by him in accordance with the provisions of Art 192(2). Therefore, we must reject Mr. Setalvad's argument that a question has not arisen in the present proceedings as required by Art, 192(1).

(15) The next point which Mr. Setalvad has raised is that even if a question is held to have arisen under Art. 192(1), it is for the Governor to hold the enquiry and not for the Election Commission. He contends that Art 192(1) requires the question to be referred to the Governor for his decision and provides that his decision shall be final. It is a normal requirement of the rule of law that a person who decides should be empowered to hold the enquiry which would enable him to reach his decision, and since the Governor decides the question, he must hold the enquiry and not the Election Commission. That, in substance, is Mr. Setalvad's case. He concedes that Art. 192(2) requires that the Governor has to pronounce his decision in accordance with the opinion given by the Election Commission; that is a Constitutional obligation imposed on the Governor. He, however, argues that the Election Commission which has to give an opinion, is not competent to hold the enquiry, but is the Governor who should hold the enquiry and then forward to the Election Commission all the material collected in such an enquiry and then forward to the Election Commission all the material collected in such an enquiry to enable it to form its opinion and communicate the same to the Governor.

(16) We are satisfied that this contention also is not well-founded. The scheme of Article 192(1) and (2) is absolutely clear. The decision on the question raised under Art, 192(1) has no doubt to be pronounced by the Governor, but that decision has to be in accordance with the opinion of the Election Commission. The object of this provision clearly is to leave it to the Election Commission to decide the matter, though the decision as such would formally be pronounced in the name of the Governor. When the Governor pronounces his decision under Art, 192(1), he is not required to consult his Council of Ministers; he is not even required to consider and decide the matter himself, he has merely to forward the question to the Election Commission for its opinion, and as soon as the opinion is received, "he shall act according to such opinion. In regard to complaints made against the election of members to the Legislative Assembly, the jurisdiction to decide such complaints is left with the Election Tribunal under the relevant provisions of the Act. That means

that all allegations made challenging the validity of the election of any member, have to be tried by the Election Tribunals constituted by the Electional Commission. Similarly, all complaints in respect of disqualifications subsequently incurred by members who have been validly elected, have in substance to be tried by the Election Commission, though the decision in form has to be pronounced by the Governor. If this scheme of Art. 192(1) and (2) is borne in mind, there would be no difficulty in rejecting Mr. Setalvad's contention that the enquiry must be held by the Governor. It is the opinion of the Election Commission which is in substance decisive; and it is legitimate to assume that when the complaint is received by the Governor, and he forwards it to the Election Commission, and the Election Commission should proceed to try the complaint before it gives its opinion. Therefore, we are satisfied that respondent No. 1 acted within its jurisdiction when it served a notice on the appellant calling upon him to file his statement and produce his evidence in support thereof.

(17) Mr. Setalvad faintly attempted to argue that the failure of respondent No. 1 to furnish the appellant with a copy of the complaint made by respondent No. 2 before the Governor and of the order of reference passed by the Governor forwarding the said complaint to respondent No. 1, rendered the proceedings before respondent No. 1, illegal. This contention is plainly misconceived. As soon as respondent No. 1 received the complaint and the order of reference which was communicated to it by the Chief Secretary to the Government of Orissa, it was seized of the matter and it was plainly acting within its jurisdiction under Art. 192(2) when it served the notice on the appellant. As we have already indicated, it was through oversight that the two documents were not forwarded to the appellant along with the notice, but that cannot in any sense affect the jurisdiction of respondent No. 1 to hold the enquiry. In fact, as respondent No. 2 has pointed out in his affidavit the fact that a reference had been made by the Governor to respondent No. 1 was known all over the State, and it is futile for the appellant to suggest that when he received the notice from respondent No. 1, he did not know that a complaint had been made against him to the Governor alleging that subsequent to his election, he had incurred a disqualification as contemplated by Art. 191(1)(e) of the Constitution read with S 7(d) of the Act. It would have been better if the appellant had not raised such a plea in the present proceedings.

(18) In this connection, we ought to point out that so far the practice followed in respect of such complaint has consistently recognised that the enquiry is to be held by the Election Commission both under Art. 192(2) and Art. 108(2). In fact, the learned Attorney General for respondent No. 1 stated before us that though on several occasions, the Election Commission has held enquiries before communicating its opinion either to the President under Art. 103(2) or to the Governor under Art. 192(2), no one ever thought of raising the contention that the enquiry must be held by the President or the Governor respectively under Art. 103(1) and Art. 192(1). He suggested that the main object of the appellant in taking such a plea was to prolong the proceedings before respondent No. 1. In the first instance, the appellant asked for a long adjournment and when that request was refused by respondent No. 1, he adopted the present proceedings solely with the object of avoiding an early decision by the Governor on the complaint made against the appellant by respondent No. 2. We cannot say that there is no substance in this suggestion.

(19) There is one more point to which we may refer before we part with this appeal. Our attention was drawn by the learned Attorney General to the observations made by the Chief Election Commissioner when he rendered his opinion to the Governor on May 30, 1964, on a similar question under Art. 192(2) in respect of the alleged disqualification of Mr. Biren Mitra, a member of the Orissa Legislative Assembly “Where, as in the present cases”, observed the Chief Election Commissioner, “the relevant facts are in dispute and can only be ascertained after a proper enquiry, the Commission finds itself in the unsatisfactory position of having to give a decisive opinion on the basis of such affidavits and documents as may be produced before it by interested parties. It is desirable that the Election Commission should be vested with the power of a commission under the Commissions of Enquiry Act, 1952, such as the power to summon witnesses and examine them on oath, the power to compel the production of documents, and the power to issue commissions for the examination of witnesses”. We would like to invite the attention of Parliament to these observations, because we think that the difficulty experienced by the Election Commission in rendering its opinion under Art 103(2) or Art 192(2) appears to be genuine, and so, Parliament may well consider whether the suggestion made by the Chief Election Commissioner should not be accepted and appropriate legislation adopted in that behalf.

(20) The result is, the appeal fails and is dismissed with costs. In view of the fact that present proceedings have unnecessarily protracted the enquiry before respondent No. 4, we suggest that respondent no. 1 should proceed to consider the matter and forward its opinion to the Governor as early as possible. It is hardly necessary to point out that in case the allegations made against the appellant are found to be valid, and the opinion of respondent No. 1 is in favour of the case set out by respondent No. 2 complications may arise by reason of the constitutional provision prescribed by Art. 190(3). In view of the said provision, it is of utmost importance that complaints made under Art, 192(1) must be disposed of as expeditiously as possible.

Appeal dismissed

SUPREME COURT OF INDIA *

Case No. 843 of 1966^s
(Decision dated 20-9-1966)

Meghraj Kothari

Vs.

Delimitation Commission and Others

..Appellant

..Respondents

SUMMARY OF THE CASE

Shri Megh Raj Kothari, a resident of Ujjain, filed a writ petition before the Madhya Pradesh High Court, challenging the order dated 24.7.1964 of the Delimitation Commission, whereby that Commission had inter alia reserved the Ujjain Parliamentary Constituency for the Scheduled Castes. The High Court dismissed the petition on 25.2.1965, on the short ground that under Article 329 (a) of the Constitution, the order of the Delimitation Commission could not be questioned in any Court.

Aggrieved by that order, Shri Kothari filed the present appeal before the Supreme Court. The Supreme Court dismissed the appeal, confirming the view taken by the High Court. The Supreme Court held that the objection to the delimitation of constituencies could only be entertained by the Delimitation Commission and not by any Court in view of the prohibition contained in Article 329 (a) of the Constitution.

(A) Constitution of India, Arts 327, 82 (as it stood after amendment in 1956) – Power of delimitation of constituencies – such power is given not by Art. 82 but by Art. 327 – Reference to Art 82 in statement of objects and reasons of Delimitation Commission Act, 1962 does not mean that the Act was law made under Art. 82.

(Paras 8, 12)

(B) Constitution of India, Arts 329 (a), 327 – Word law – Delimitation Commission Act (1962), Ss. 10 (2) 10 (4) 8, 9 and 10(1) — Orders under Ss. 8 and 9 and their publication under S. 10 (1) — Legal effect — Orders, once published in Gazette, have same effect as if they were law made by Parliament itself under Art. 327 – Orders were to make complete set of rules governing delimitation of constituencies — Objection can be entertained only before date specified under S. 9(2) and after their publication in Gazette, they can no longer be reargued in Court of law.

Parliament by enacting S. 10 (2) wanted to make it clear that orders passed under Ss. 8 and 9 were to be treated as having the binding force of law and not mere administrative directions. This is further reinforced by S. 10(4) which brought complete effacement of all provisions of this nature which were in force before the passing of the orders under Ss. 8 and 9 and only such orders were to hold the field. Therefore once the Delimitation Commission has made orders under Ss. 8 and 9 and they have been published under S. 10(1), the orders are to have the same effect as if they were law made by Parliament itself. An order under S. 8 or 9 and published under s. 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 Art. 327, Art. 329 would prevent any investigation by any Court of law. AIR 1954 SC 465. Foll. (1941)

Canada Law Rep. 111 and AIR 1955 SC 425. Disting. Misc. Petn. No. 72 of 1965 dated 25-2-1965 (MP) , affirmed.

(Paras 11, 16, 23)

The order under Ss. 8 and 9 published under S. 10(1) of the Delimitation Commission Act were to make a complete set of rules which would govern the readjustment of number of seats and the delimitation of constituencies.

(Para 30)

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 Ss. 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 Ss. 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.

(Para 19)

Cases Referred: Chronological (1964) AIR 1964 SC 648 (V 51): 1964-5 SCR 294, Jayantilal Amrat Lal v. F.N. Rana

(1957) AIR 1957 SC 790 (V 44): 1957-8 STC 358. Kailash Nath v. State of U.P.

(1955) AIR 1955 SC 25 (V 42): 1955-1 SCR 735, Edward Mills Co., Ltd. v. State of Ajmer

(1955) AIR 1955 SC 233 (V 42): 1955-1 SCR 1104. Hari Vishnu v. Ahmed Ishaque.

(1955) AIR 1955 SC 425 (V 42): 1955-2 SCR 1, Sangram Singh v. Election Tribunal, Kotah.

(1954) AIR 1954 SC 465 (V 41): 1955-1 SCR 380: 1954 Cri LJ 1322 Hari Shankar Bagla v. State of Madhya Pradesh.

(1952) AIR 1952 SC 64 (V 39): 1952 SCr 218. N. P. Ponnuswami v. Returning Officer, Namakkal Constituency.

(1941) 1941 Canada Law Rep. 111, His Majesty the King v. William Singer.

JUDGMENT

Present:- K. Subba Rao, C.J., M. Hidayatullah, S. M. Sikri, J.M. Shelat and G.K. Mitter, JJ.

M/s. G.N. Dikshit, K.L. More and R.N. Dixit, Advocates, for Appellant; Mr. Niren De, Additional Solicitor-General of India, (M/s. R. Ganapathy Iyer, R.H. Dhebar and B.R. G.K. Achar, Advocates, with him) (for Nos. 1 to 4 and 14) and Mr. S.S. Shukla, Advocate (for No. 5), for Respondents.

The following Judgment of the Court was delivered by

MITTER, J.: This is an appeal by special leave from a judgment and order, dated February 25, 1965 of the Madhya Pradesh High Court at Jabalpur in Miscellaneous Petition No. 72 of 1965. The High Court summarily dismissed the petition under Art. 226 of the Constitution praying for a writ of certiorari for quashing a notification issued in pursuance of sub-s. (1) of S. 10 of the Delimitation Commission Act, 1962 in respect of the delimitation of certain Parliamentary and Assembly constituencies in the State of Madhya Pradesh. The petition was rejected on the short ground that under Art. 329 (a) of the Constitution the said notification could

not be questioned in any Court. Article 329—which is relevant for our purpose—reads:-

“Notwithstanding anything in this Constitution.

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Art 328, shall not be called in question in any Court;”

(2) Before us it was contended that the notification referred to is not law and secondly it was not made under Art 327 of the Constitution.

(3) The facts are shortly as follows: The petitioner is a resident of Ujjain and a citizen of India. He had been a voter in all the previous general elections and still claims to be a voter in Daulatganj, Ward No. 5 in the Electoral Roll of Ujjain. He claims to have a right to contest the election to any Assembly or Parliamentary constituency in the State of Madhya Pradesh. The impugned notification which was published in the Gazette of India Extraordinary on July 24, 1964 shows Ujjain as a constituency reserved for the scheduled castes. It was made in pursuance of sub-s (1) to S. 10 of the Delimitation Commission Act, 1962 and recites that proposals of the Delimitation Commission for the delimitation of Parliamentary and Assembly constituencies in the State of Madhya Pradesh had been published on October 15, 1963 in the Gazette of India and in the official gazette of the State of Madhya Pradesh and that after considering all objections and suggestions the Commission determined that the territorial constituencies into which the State of Madhya Pradesh shall be divided for the purpose of elections to the House of the People and the extent of each such constituency shall be as shown in Table A.

(4) Respondent No. 1 to the petition was the Delimitation Commission, respondent No. 2 was its Chairman and respondents Nos. 3 and 4 were its members. The petition alleges many acts of omission and commission on the part of the Commission and its Chairman, but we are not here concerned with all that. If we come to the conclusion that the High Court was not justified in rejecting the petition on the short ground noted above, we shall have to send the case back to the High Court for trial on merits. According to the petitioner, Ujjain city has been from the inception of the Constitution of India a general constituency and by the fact of the city being converted into a reserved constituency his right to be a candidate for Parliament from this constituency has been taken away.

(5) In order to appreciate the working of the Delimitation Commission and the purpose which it serves reference must be made to the following Articles of the Constitution. Article 82 provides that —

“Upon the completion of each census, the allocation of seats in the House of the People to the States and the division of each State into territorial constituencies shall be readjusted by such authority and in such manner as Parliament may by law determine:

Provided that such readjustment shall not affect representation in the House of the People until the dissolution of the then existing House.”

(6) This Article is a verbatim copy of Cl. (3) of Art. 81 of the Constitution before its amendment in 1956.

(7) Article 327 of the Constitution provides that—

“Subject to the provisions of this Constitution, Parliament may from time to time by law make provision with respect to all matters relating to or in connection

with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.’”

(8) It was argued before us that the Delimitation Commission Act was not passed by Parliament under Art. 327, but under Art, 82 and as such Courts of law are not precluded from entertaining the question as to the validity of a notification under the Delimitation Commission Act because of the opening words of Art 329. Article 82, however, merely envisages that upon the completion of each census the allocation of seats in the House of the People and the division of each State into territorial constituencies may have to be readjusted. It is Art 327, which enjoins upon Parliament to make provision by law from time to time with respect to all matters relating to or in connection with election to either House of Parliament... delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

(9) The preamble to the Delimitation Commission Act, 1962, shows that it is an Act to provide for the readjustment of the allocation of seats in the House of the People to the States, the total number of seats in the Legislative Assembly of each State, the division of each State into territorial constituencies for elections to the House of the People and Legislative Assemblies of the States and for matters connected therewith. Article 82 only foreshadows that readjustment may be necessary upon completion of each census, but Art, 327 gives power to Parliament to make elaborate provision for such readjustment including delimitation of constituencies and all other matters connected therewith as also elections to either House of Parliament Section 3 of the Delimitation Commission Act (hereinafter referred to as the Act) enjoins upon the Central Government to constitute a Commission to be called the Delimitation Commission as soon as may be after the commencement of the Act. Section 4 of the Act provides that it is the duty of the Commission to readjust on the basis of the latest census figures the allocation of seats in the House of the People to the several States..... and the division of each State into territorial constituencies for the purpose of elections to the House of the People. Section 8 of the act makes it obligatory on the Commission to determine by order, on the basis of the latest census figures, and having regard to the provisions of Arts, 81, 170, 330 and 332, the number of seats in the House of the People to be allocated to each State and the number of seats, if any, to be reserved for the Scheduled Castes and for the Scheduled Tribes of the State as also the total number of seats to be assigned to the Legislative Assembly of each State and the number of seats, if any, to be reserved for the Scheduled Castes and for the Scheduled Tribes of the State. The delimitation of the constituencies is provided for in S. 9, sub-s. (1) of the Act which reads:—

“The Commission shall, in the manner herein provided, then distribute the seats in the House of the People allocated to each State and the seats assigned to the Legislative Assembly of each State to single-member territorial constituencies and delimit them on the basis of the latest census figures, having regard to the provisions of the Constitution and to the following provisions, namely:-

(a) all constituencies shall, as far as practicable, be geographically compact areas, and in delimiting them regard shall be had to physical features, existing

boundaries of administrative units, facilities of communication and public convenience:

(b) every assembly constituency shall be so delimited as to fall wholly within one parliamentary constituency:

(c) constituencies in which seats are reserved for the Scheduled Castes shall be distributed in different parts of the State and located, as far as practicable, in those areas where the proportion of their population to the total is comparatively large; and

(d) constituencies in which seats are reserved for the Scheduled Tribes shall, as far as practicable, be located in areas where the proportion of their population to the total is the largest.”

Under sub-s. (2) of the section the Commission shall publish its proposals for the delimitation of the constituencies together with the dissenting proposals, if any, of an associate member, specify a date on or after which the proposals will be further considered and consider all objections and suggestions which may have been received by it before the day so specified. Thereafter its duty is by one or more orders to determine the delimitation of Parliamentary constituencies and the delimitation of assembly constituencies of each State. Publicity is to be given to the orders of the Commission under S. 10 (1) of the Act. Sub-section (1) prescribes that each of its orders made under S. 8 or S.9 is to be published in the Gazette of India and the official gazettes of the States concerned. Sub-section (3) provides that as soon as may be after such publication every such order shall be laid before the House of the People and the Legislative Assemblies of the States concerned.

(10) The legal effect of the orders is given in sub-ss. (2) and (4) of S.10 of the Act. Under sub-s. (2) “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”. Under sub-s. (4) (omitting the irrelevant portion)

“the readjustment of representation of the several territorial constituencies in the House of the People or in the Legislative Assembly of a State and the delimitation of those constituencies provided for in any such order shall apply in relation to every election to the House or to the Assembly, as the case may be, held after the publication in the Gazette of India of that order and shall so apply in supersession of the provisions relating to such representation and delimitation contained in the Representation of the People Act, 1950, and the Delimitation of Parliamentary and Assembly Constituencies Order, 1961.”

(11) It will be noted from the above that it was the intention of the legislature that every order under Ss. 8 and 9 after publication is to have the force of law and not to be made the subject matter of controversy in any court. In other words, Parliament by enacting S. 10(2) wanted to make it clear that orders passed under Ss. 8 and 9 were to be treated as having the binding force of law and not mere administrative directions. This is further reinforced by sub-s. (4) of S.10 according to which the readjustment of representation of the several territorial constituencies in the House of the People and the delimitation of those constituencies provided for in any such order (i.e., under S.8 or S.9) was to apply in relation to every election to the House held after the publication of the order in the Gazette of India and these provisions contained in the order were to supersede all provisions relating to such

representation and delimitation contained in the Representation of the People Act, 1950 and the Delimitation of Parliamentary and Assembly Constituencies Order 1961. In effect, this means the complete effacement of all provisions of this nature which were in force before the passing of the orders under Ss. 8 and 9 and only such orders were to hold the field. Therefore although the impugned notification was not a statute passed by Parliament, it was a law relating to the delimitation 'of constituencies or the allotment of seats to such constituencies made under Art. 327 of the Constitution.

(12) Our attention was drawn to Bill No. 98 of 1962 for providing for readjustment of allocation of seats in the House of the People to the State, the total number of seats in the Legislative Assembly of each State, the division of each State into territorial constituencies for elections to the House of the People and Legislative Assemblies of the States and for matters connected therewith and the statement of objects and reasons therefor as appearing in the Gazette of India Extraordinary, Part II, Section 2 of the year 1962 which mentions Arts. 82 and 170 (3) of the constitution. The said statement further shows that as the 1961 census had been completed a readjustment of the several matters earlier mentioned was necessary inasmuch as there had been a change in the population figures from the 1951 census. This, however, does not mean that the Delimitation Commission, Act was a law made under Art. 82. Article 82, as already noted, merely envisaged that readjustment might be necessary after each census and that the same should be effected by Parliament as it may deem fit, but it is Art. 327 which casts a duty on Parliament specifically to make provision with respect to all matters relating to or in connection with elections to either House of Parliament etc., the delimitation of constituencies and all other necessary matters for securing the due constitution of such House or Houses.

(13) With regard to S.10 (2) of the Act it was argued by counsel for the appellant that the order under S.9 was to have the force of law, but such order was not itself a law. To support this contention our attention was drawn to a judgment of the Supreme Court of Canada in His Majesty the King v. William Singer, (1941) Canada Law Rep. 111. There sub-s. (2) of S.8 of the War Measures Act of 1914 provided that all orders and regulations made under this section shall have the force of law and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe and may be varied, extended or revoked by any subsequent order or regulation. By S. 4 of the Act the Governor in Council was empowered to prescribe the penalties that may be imposed for violating the orders and regulations under this Act and also to prescribe whether such penalties shall be imposed upon summary conviction or upon indictment. Purporting to act under the provisions of the War Measures Act the Governor in Council made an order to the effect that no retail druggist shall sell or supply straight Codeine, whether in powder, tablet or liquid form, or preparations containing any quantity of any of the narcotic drugs mentioned in Parts I and II of the Schedule to the Opium and Narcotic Drug Act. mixed with medicinal or other ingredients, except upon the written order or prescription therefor signed and dated by a physician, veterinary surgeon or dentist. The order further provided that any person found in possession of Codeine or preparation containing narcotic drugs mentioned in Parts I and II of the Schedule to the Opium and Narcotic Drug Act mixed with other medicinal or other ingredients, save and except under the

authority of a license from the Minister of Pensions and National Health shall be liable to the penalties provided upon summary conviction under the provisions of S.4 of the Opium and Narcotic Drug Act.

(14) The Opium and Narcotic Drug Act which was a Dominion statute contained a schedule wherein narcotic drugs were enumerated, but which up to the date of the order in question did not contain Codeine. Under the provisions of that order a charge was laid against the respondent, a retail druggist, that he did without lawful excuse disobey an Act of the Parliament of Canada for which no penalty or other mode of punishment was expressly provided, to wit; Paragraph two of regulations dated 11th day of September, 1939, of the War Measures Act, by willfully selling Codeine, a narcotic drug mentioned in Part Two of the Schedule to the Opium and Narcotic Drug Act without first having had and obtained a written order or prescription therefor signed and dated by a physician, contrary to sec. 164, Criminal Code of Canada. Section 164 of the Criminal Code enacted specifically that the offence must consist in wilfully doing any act which was forbidden or omitting to do any act which was required to be done by an Act of the Parliament of Canada. In his judgment Rinfret, J. observed: (page 114):-

“It is an Act of the Parliament of Canada which the guilty person must have disobeyed without lawful excuse.”

His Lordship agreed with the Trial Judge and with the majority of the Court of Appeal that in the premises S. 164 of the Criminal Code had no application and said:—

“Of course, the War Measures Act enacts that the orders and regulations made under it “Shall have the force of law. It cannot be otherwise. They are made to be obeyed and, as a consequence, they must have the force of law. But that is quite a different thing from saying that they will be deemed to be an Act of Parliament.”

Taschereau, J. put the matter rather tersely (see at p. 124):—

“An order in Council is passed by the Executive Council, and an Act of Parliament is enacted by the House of Commons and by the Senate of Canada. Both are entirely different, and unless there is a provision in the law stating that the Orders in Council shall be considered as forming part of the law itself, or that any offence against the regulations shall be a violation of the Act, it cannot be said that the violation of an Order in Council is a violation of an Act of Parliament within the meaning of Section 164 of the Criminal Code.”

The observations from the judgment of Taschereau, J. point out the difference between something which has the force of law as distinguished from an Act of Parliament itself. The Order in Council in the Canadian case, although it had the force of law, was not a provision contained in an Act of Parliament and therefore although there was a violation of the Order in Council there was no violation of any section of an Act of the Parliament of the Dominion of Canada.

(15) Counsel for the appellant also drew our attention to the judgment of this Court in Sangram Singh v. Election Tribunal, Kotah, 1955-2 SCR 1 at pp. 6 and 7: (AIR 1955 SC 425 at pp. 428-429). There the Court had to consider the effect of S.103 of the Representation of the People Act, 1951 (Act XLIII of 1951) which provided that “every order of the Tribunal made under this Act shall be final and conclusive”. The contention there put forward was that this provision put an order

of the Tribunal beyond question either by the High Court under Art. 226 of the Constitution or by the Supreme Court in appeal therefrom. It was further submitted that the intention of the Legislature was that the decisions of the Tribunals were to be final on all matters whether of fact or of law, and they could not be said to commit an error of law when acting within the ambit of their jurisdiction. They decided what the law was. This submission was turned down by this Court and it was observed after referring to *Hari Vishnu v. Ahmed Ishaque*, 1955-1 SCR 1104: (AIR 1955 SC 233) that “the Court laid down in general terms that the jurisdiction under Art. 226 having been conferred by the Constitution, limitations cannot be placed on it, except by the Constitution itself.”

(16) In this case we are not faced with that difficulty because the Constitution itself provides under Art. 329 (a) that any law relating to the delimitation of constituencies etc. made or purporting to be made under Art. 327 shall not be called in question in any court. Therefore an order under S. 8 or 9 and published under S.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 Art. 327, Art. 329 would prevent any investigation by any court of law.

(17) In dismissing the petition under Art. 226 of the Constitution the High Court of Madhya Pradesh relied exclusively on the decision of this Court in *N.P. Ponnuswami v. Returning Officer, Namakkal Constituency*, 1952 SCR 218: (AIR 1952 SC 64) which proceeded on the basis of certain concessions made. There the appellant was a person who had filed a nomination paper for election to the Madras Legislative Assembly from the Namakkal constituency which was rejected. The appellant thereupon moved the High Court under Art. 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 said officer to include his name in the list of valid nominations to be published. The High Court dismissed the application on the ground that it had no jurisdiction to interfere with the order of the Returning Officer by reason of Art. 329 (b) of the Constitution. The Court pointed out (at p.225 (of SCR): (at p.67 of AIR):—

“A notable difference in the language used in Arts. 327 and 328 on the one hand, and Art. 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 Art. 327, or by the State Legislatures under Art. 328, cannot exclude the jurisdiction of the High Court under Art. 226 of the Constitution, that jurisdiction is excluded in regard to matters provided for in Art. 329.”

Reference was also made by counsel to certain other concessions which appear at pp. 233 and 237 of the report (of SCR): (at pp. 70 and 71 of AIR). It will be noted, however, that the decision in that case did not proceed on the concessions made. The Court examined at some length the scheme of Part XV of the Constitution and the Representation of the People Act, 1951 which was passed by the Parliament under Art.327 of the Constitution to make detailed provision in regard to all matters and all stages connected with elections to the various Legislatures in the country. It was there argued that since the Representation of the People Act was enacted subject to

the provisions of the Constitution, it could not bar the jurisdiction of the High court to issue writs under Art. 226 of the Constitution. This was turned down by the Court observing:—

“This argument, however, is completely shut out by reading the Act along with Art. 329 (b). It will be noticed that the language used in that Article and in S. 80 of the Act is almost identical, with this difference only that the Article is preceded by the words “notwithstanding anything in this constitution.” (p.232 (of SCR): (at p 69 of AIR).

The Court went on to observe at p.233 of SCR): (at p. 70 of AIR):—

“It may be pointed out that Art.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 Arts. 327 and 328 relating to the delimitation of constituencies of the allotment of seats to such constituencies. 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 Art. 329 covers all “electoral matters”.

(18) An examination of Ss. 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. Section 8, which deals with the readjustment of the number of seats, shows that the Commission must proceed on the basis of the latest census figures and by order determine having regard to the provisions of Arts. 81, 170, 330 and 332, the number of seats in the House of the People to be allocated to each State and the number of seats, if any, to be reserved for the Scheduled Castes and for the Scheduled Tribes of the State . Similarly, it was the duty of the Commission under S.9 to distribute the seats in the House of the People allocated to each State and the seats assigned to the Legislative Assembly of each State to single member territorial constituencies and delimit them on the basis of the latest census figures having regard to the provisions of the Constitution and to the factors enumerated in Cls. (a) to (d) of sub-s. (1). Sub-section (2) of S.9 shows that the work done under sub-s. (1) was not to be final, but that the Commission (a) had to publish its proposals under sub-s. (1) together with the dissenting proposals, if any, of an associate member, (b) to specify a date after which the proposals could be further considered by it, (c) to consider all objections and suggestions which may have been received before the date so specified, and for the purpose of such consideration, to hold public sittings at such place or places as it thought fit. It is only then that the Commission could by one or more order, determine the delimitation of Parliamentary constituencies as also of Assembly constituencies of each State.

(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 Ss. 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 reargued in a court of law. There seems to be very good reason behind such a provision. If the orders made under Ss. 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 Ss. 8 and 9 published under S. 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 S. 8 or 9 published under S. 10 (1) is not part of an Act of Parliament, but its effect is to be the same.

(21) The situation here bears some comparison with what obtained in *Harishankar Bagla v. State of Madhya Pradesh*, 1955-1 SCR 380: (AIR 1954 SC 465). There S.3 of the Essential Supplies (Temporary Powers) Act, 1946, provided that the Central Government, so far as it appeared to it to be necessary or expedient for maintaining or increasing supplies of any essential commodity, or for securing their equitable distribution and availability at fair prices, might by order provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein. Under S.4 it was open to the Central Government by notified order to direct that

“the power to make orders under S. 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by such officer or authority subordinate to the Central Government or such State Government or such officer or authority subordinate to a State Government as may be specified in the direction.”

Section 6 of the Act read as follows:—

“Any order made under S.3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or any instrument having effect by virtue of any enactment other than this Act.”

(22) Under powers conferred by S.3 the Central Government promulgated on September 10, 1948. Cotton Textiles (Control of Movement) Order, 1948. Section 3 of the said order provided that no person shall transport or cause to be transported by rail, road, air, sea or inland navigation any cloth, yarn or apparel except under and in accordance with a general permit notified in the Gazette of India by the Textile Commissioner or a special transport permit issued by the Textile Commissioner. The appellant Harishankar Bagla and his wife were arrested at Itarsi by the Railway police for contravention of S.7 of the Essential Supplies (Temporary Powers Act, 1946 read with Cl. (3) of the Cotton Textiles (Control of movement) Order, 1948 having been found in possession of new cotton cloth weighing over six maunds which was being taken by them from Bombay to Kanpur without any permit. The State of Madhya Pradesh contended before this Court that the judgment of the High Court that S.6 of the Act was unconstitutional was not justified. This contention was upheld by this Court and it was observed:—

“By enacting S.6 Parliament itself has declared that an order made under S.3 shall have effect notwithstanding any inconsistency in this order with any enactment other than this Act. This is not a declaration made by the delegate but the Legislature itself has declared its will that way in S.6. The power of the delegate is only to make an order under S.3. Once the delegate has made that order its power is exhausted. Section 6 then steps in wherein the Parliament has declared that as soon as such an order comes into being that will have effect notwithstanding any inconsistency therewith contained in any enactment other than this Act.”

(23) Similarly it may be said here that once the Delimitation Commission has made orders under Ss. 8 and 9 and they have been published under S.10(1), the orders are to have the same effect as if they were law made by Parliament itself.

(24) Reference was also made by counsel for the respondent to the judgment of this Court in *Kailash Nath v. State of U.P.*, AIR 1957 SC 790. There under S.4 of the U.P. Sales Tax Act the State Government was empowered either to exempt certain kinds of transactions from the payment of sales tax completely, or to allow a rebate of a portion of the tax payable. In pursuance of that, the Uttar Pradesh Government issued a notification that with effect from December 1, 1948 the provisions of S.3 of the Act (relating to the levy of sales tax) shall not apply to the sales of cotton cloth or yarn manufactured in Uttar Pradesh, made on or after December 1, 1949 with a view to export such cloth or yarn outside the territories of India on the condition that the cloth or yarn is actually exported and proof of such actual export is furnished. It was held by this Court that “this notification having been made in accordance with the power conferred by the statute has statutory force and validity and, therefore, the exemption is as if it is contained in the parent Act itself.”

(25) In *Jayantilal Amrat Lal v. F.N. Rana*, 1964-5 SCR 294: (AIR 1964 SC 648), the question for consideration by this Court was the effect of a notification of the President of India under Art. 258 (1) of the Constitution. The President of India by a notification, dated July 24, 1959, under Art. 258 (1) of the Constitution entrusted with the consent of the Government of Bombay to the Commissioners of Divisions in the State of Bombay the functions of the Central Government in relation to the acquisition of land for the purposes of the Union. Two new States were constituted by the Bombay Reorganisation Act (XI of 1960) and the Baroda Division was allotted to the State of Gujarat. In exercise of the powers entrusted by the notification issued by the President on July 24, 1959, the Commissioner of the Baroda Division notified under S.4 (1) of the Land acquisition Act (1 of 1894) the appellant's land as being needed for a public purpose and authorised the Special Land Acquisition Officer, Ahmedabad, to perform the functions of the Collector under the Act. The Special Land Acquisition Officer after considering the objections raised by the appellant submitted his report to the Commissioner who issued a declaration under Section 6(1) of the Act. The appellant then moved the High Court of Gujarat under Arts. 226 and 227 of the Constitution for a writ, but his petition was dismissed. His case inter alia was that the President's notification under Art. 258 (1) was ineffective after the partition since the consent of the government of the newly formed State of Gujarat to the entrustment of functions to its officers had not been obtained as required by Art. 258(1).

(26) Article 258 (1) of the Constitution reads,—

“Notwithstanding anything in this Constitution the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.”

One of the contentions put forward before this Court was that the power exercised by the President was executive in character and the functions which might be entrusted to a State Government under Art. 258 (1) were executive and as such entrustment of such executive authority was not law within the meaning of S.87 of

the Bombay Reorganisation Act which made provisions for maintaining the territorial extent of the laws even after the appointed day. On this basis, it was argued that the Commissioners in the new State of Gujarat after May 1, 1960 were incompetent by virtue of the Presidential notification to exercise the functions of the Union under the Land Acquisition Act.

(27) It was observed by the majority Judges of this Court at p.308 (of SCR): (at p.656 of AIR):—

“The question which must be considered is whether the notification issued by the President is law within the meaning of S.87 read with S.2 (d) of the Bombay Reorganisation Act, 11 of 1960.”

After analysing the three stages of the constitutional process leading to the ultimate exercise of function of the Union Government the Court observed (at p.309) (of SCR): (at p.657 of AIR):—

“By Art. 53 the executive power of the Union is vested in the President and is exercisable by him either directly or through officers subordinate to him in accordance with the Constitution and the executive power of the Union by Art. 73 extends subject to the provisions of the Constitution:

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreements.

Provided that the executive power referred to in sub-cl. (a) shall not, save as expressly provided in the Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has power to make laws. Prima facie, the executive power of the Union extends to all matters with respect to which parliament has power to make laws and in respect of matters to which the power of the Parliament extends”.

(28) The Court then went on to consider the nature of the power exercised by the President under Art. 258(1). It noted that by item 42, List III the subject of acquisition of property fell within the Concurrent List and the Union Parliament had power to legislate in respect of acquisition of property for the purposes of the Union and by Art. 73 (1) (a) the executive power of the Union extended to the acquisition of property for the Union. It was observed that “By Art. 298 of the Constitution the executive power of the Union extends to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The expression.

“acquisition, holding and disposal of property would, in our judgment, include compulsory acquisition of property. That is a provision in the Constitution which within the meaning of the proviso to Art. 73 (1) expressly provides that the Parliament may acquire property for the Union and consequently executive power of the Union in relation to compulsory acquisition of property is saved thereby, power of the State to acquire land notwithstanding.”

(29) Reference was also made by the majority Judges to the case of Edward Mills Co. Ltd. v. State of Ajmer, 1955-1 SCR 735: (AIR 1955 SC 25), where it was held that an order made under S.94 (3) of the Government of India Act, 1935, was,

notwithstanding the repeal of the Government of India Act, 1935, by Art. 395 of the Constitution, law in force. Finally, it was held by the majority of Judges (p.315) (of SCR): (at p.659 of AIR):—

“We see no distinction in principle between the notification which was issued by the Governor-General in Edward Mill's case, and the notification with which we are dealing in this case. This is not to say that every order issued by an executive authority has the force of law. If the order is purely administrative, or is not issued in exercise of any statutory authority it may not have the force of law. But where a general order is issued even by an executive authority which confers power exercisable under a statute, and which thereby in substance modifies or adds to the statute, such conferment of powers must be regarded as having the force of law.”

(30) In this case it must be held that the orders under Ss. 8 and 9 published under S.10 (1) of the Delimitation Commission Act were to make a complete set of rules which would govern the readjustment of number of seats and the delimitation of constituencies.

(31) In this case the powers given by the Delimitation Commission Act and the work of the Commission would be wholly nugatory unless the Commission as a result of its deliberations and public sittings were in a position to readjust the number of seats in the House of the People or the total number of seats to be assigned to the Legislative Assembly with reservation for the Scheduled castes and Scheduled Tribes and the delimitation of constituencies. It was the will of Parliament that the Commission could by order publish its proposals which were to be given effect to in the subsequent election and as such its order as published in the notification of the Gazette of India or the Gazette of the State was to be treated as law on the subject.

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

(33) In the result the appeal fails and is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA*

Civil Appeal No. 1692 of 1967*
(Decision dated 22.1.1968)

Pashupati Nath Singh

..Appellant

Vs.

Harihar Prasad Singh

..Respondent

Syed Mir Qasim

..Intervener

SUMMARY OF THE CASE

The nomination of Shri Pashupati Nath Singh, at the general election to the Bihar Legislative Assembly from Dumraon Assembly Constituency in 1967, was rejected by the Returning Officer, on the ground that he had not made and subscribed the requisite oath or affirmation, as required by Article 173 (a) of the Constitution. It was contended by him that on objection being taken in regard to his nomination on the above ground, he was entitled to make and subscribe the oath or affirmation immediately before the objection was considered by the Returning Officer. He challenged the election of the returned candidate by an election petition on the ground that his nomination was improperly rejected by the Returning Officer. His election petition was dismissed by the Patna High Court, whereupon he filed the present appeal before the Supreme Court.

The Supreme Court dismissed his election appeal holding that he should have been qualified under Article 173 (a) of the Constitution on the date fixed for scrutiny of nominations and, therefore, he should have taken the oath before the commencement of the date of scrutiny of nominations and not on the date of scrutiny of nominations. The Supreme Court also held that the oath or affirmation can not be made by a candidate before he has been nominated as a candidate.

(A) Representation of the People Act (1951), Section 36 (2) (a) – ‘On the date fixed for scrutiny – Meaning of – Making and subscription of oath or affirmation as required by Article 173 (a) of the Constitution – Time for – Absence of oath or affirmation on date of scrutiny disqualifies candidate – Rejection of nomination paper is valid – (Constitution of India. Art 173) – (Words and Phrases – ‘On the date fixed for scrutiny).

Under Section 36 (2) of the Act, one of the grounds on which a nomination can be rejected is that on the date fixed for the scrutiny of nominations the candidate is not qualified for being chosen to fill the seat under Article 173 of the Constitution. The expression “on the date fixed for scrutiny” in Section 36 (2) (a) means “on the whole of the day on which the scrutiny of nomination has to take place.” In other words, the qualification must exist from the earliest moment of the day of scrutiny. The law disregards, as far as possible fractions of the day. It is, therefore, necessary for a candidate to make and subscribe the requisite oath or affirmation as enjoined by Art. 173 (a) of the Constitution before the date fixed for scrutiny of nomination paper. The

candidate who has failed to make and subscribe the requisite oath along with the nomination paper is not entitled to do so when objection is taken before the Returning Officer on the date of scrutiny. If he has failed to do so till the date of scrutiny he becomes disqualified to be chosen to fill the seat within the meaning of Section 36 (2) (a) and his nomination paper is liable to be rejected. (1866-67) LR 2 CP 348 and 10 Ad and E 335. Ref. to (Paras 4, 9, 11, 13 and 16).

(B) Conduct of Election Rules (1961, Form 2B – Form of nomination paper – No provision in Form for statement by candidate that he had taken oath or affirmation – Reason is that such oath has to be taken after a candidate has been nominated – This does not mean that oath can be subscribed on date fixed for scrutiny.

(Para 17)

(C) Constitution of India, Art, 173 (a) and Sch. III – Form of oath or affirmation to be made by candidate for election to Legislation of State – Words having been nominated in form clearly show that oath or affirmation cannot be made by a candidate before he is nominated – Word ‘Nominated in form cannot be interpreted to mean ‘validly nominated’ as provided in S 36 (8), Representation of the People Act – Election Appeal No. 4 1965, D/- 22-9-1965 (Pat), Overruled.

(Paras 11 and 18)

Cases	Referred : Chronological	Paras
(1965)	Election Appeal No. 4 of 1965, D/- 22-9-1965 (Pat), Shiv Shankar Kanodia v. Kapildeo Narain Singh	18
	(1866-67) LR 2 C. P. 348 = 15 LT 660. Paynter v. James	14
	(1839) 10 Ad & E 335 Regina v. Humphery	14

JUDGMENT

Present:- M. Hidayatullah, S.M. Sikri and K.S. Hegde. JJ.

Mr. H.R. Gokhale. Senior Advocate (M/s. J.P. Goyal and Sobhag Mal Jain, Advocates, with him), for Appellant; Mr. S.V. Gupte, Senior Advocate (M/s. S.N. Prasad and B.P. Singh, Advocates, with him), for Respondent; M/s. R.K. Garg and S.C. Agarwal, Advocates of M/s. Ramamurthi and Co., for Intervener.

The following Judgment of the Court was delivered by

SIKRI, J. : – This is an appeal under Section 116A of the Representation of the People Act, 1951 – hereinafter referred to as Act – from the judgement of the High Court of Judicature at Patna dismissing Election Petition No. 8 of 1967 filed by the Appellant Pashupati Nath Singh hereinafter referred to as the petitioner. In order to appreciate the point arising before us it is necessary to state the relevant facts.

(2) The petitioner stood as a candidate for election to the Bihar Legislative Assembly. The election to that Assembly from the Dumrao Assembly Constituency was held during the last general election as per the following schedule :

- (a) Date of filing nominations papers – 13th January, 1967 to 20th January, 1967.
- (b) Date of scrutiny of nomination papers – 21st January, 1967.
- (c) Last date of withdrawal of candidatures – 23rd January, 1967.
- (d) Date of poll – 17th February, 1967.
- (e) Date of counting of votes – 23rd February, 1967.
- (f) Date of declaration of result of the election – 23rd February, 1967”.

The petitioner filed his nomination paper before the Returning Officer at Buxar on January 16, 1967. Eight other candidates, including the respondent Harihar Prasad Singh, filed their nomination papers before the Returning Officer on different dates between January 13, 1967, and January 20, 1967. On January 21, 1967, the nomination papers were taken up for scrutiny when the Returning officer rejected the nomination paper of the petitioner and accepted the nomination papers of the remaining eight candidates. On February 17, 1967, the poll was held and the respondent, Shri Harihar Prasad Singh, secured the largest number of votes, namely, 14,539, and was accordingly declared elected. Thereupon the petitioner presented election petition in the Patna High Court for a declaration that the election of the respondent is void on the ground that the nomination paper of the petitioner was improperly rejected by the Returning Officer.

(3) The High Court held that the nomination of the petitioner was rightly rejected by the Returning Officer on the ground that he was not qualified to be chosen to fill a seat in the State Legislature since he had not made and subscribed the requisite oath or affirmation as enjoined by Clause (a) of Article 173 of the Constitution, either before the Scrutiny of nominations or even subsequently on the date of scrutiny.

(4) The short question which arises in this appeal is whether it is necessary for a candidate to make and subscribe the requisite oath or affirmation as enjoined by Clause (a) of Art. 173 of the Constitution before the date fixed for scrutiny of nomination paper. In other words, is a candidate entitled to make and subscribe the requisite oath when objection is taken before the Returning Officer or must he have made and subscribed the requisite oath or affirmation before the scrutiny of nomination commenced? The answer to this question mainly depends on the interpretation of Section 36 (2) of the Act. It will, however, be necessary to refer to some other sections of the Act in order to fully appreciate the effect of the words used in that section. Section 32 of the Act provides for nomination of candidates for election thus.

“Any person may be nominated as a candidate for election to fill a seat if he is qualified to be chosen to fill that seat under the provisions of the Constitution and this Act or under the provisions of the Government of Union Territories Act, 1963, as the case may be.”

(5) It was suggested by the learned counsel for the respondent, Mr. Gupte, that this section means that a candidate must also be qualified to be chosen on the last date for filling nominations. We need not consider this question because we have come to the conclusion that the petitioner was not qualified for being chosen to fill the seat on the date fixed for scrutiny of nominations within the meaning of Section 36 (2) (a).

(6) Section 33 provides for presentation of nomination paper and certain requirements for a valid nomination. Sub-section (2) for instance, provides that in the case of a constituency where any seat is reserved, the nomination paper must contain a declaration by the candidate specifying the particular caste or tribe of which he is a member and the area in relation to which that caste or tribe is a Schedule Caste or, as the case may be, a Scheduled Tribe of the State, Sub-section (3) provides that where a candidate is a person who, having held any office referred to in Clause (f) of Section 7 has been dismissed and a period of five years has not lapsed since the dismissal, he must with the nomination paper give a certificate issued in the prescribed manner by the election Commission to the effect that he has not been dismissed for corruption or disloyalty to the State.

(7) Section 35 deals with the notice of nominations and the time and place for their scrutiny. The Returning Officer has to inform the person or persons delivering the nomination paper of the date, time and place fixed for the scrutiny of nominations. He is also required to sign a certificate stating the date on which and the hour at which the nomination paper has been delivered to him, and also to cause to be fixed in some conspicuous place in his office a notice of the nomination containing descriptions similar to those contained in the nomination paper, both of the candidate and of the proposer.

(8) Then comes Section 36, relevant portion of which reads as follows :

“36 Scrutiny of nominations : – (1) on the date fixed for the scrutiny of nominations under section 30 the candidates, their election agent one proposer of each candidate, and one other person duly authorised in writing by each candidate, but no other person, may attend at such time and place as the Returning Officer may appoint and the Returning Officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in section 33.

(2) The Returning Officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds :–

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

Articles 84, 102, 173 and 191.

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

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

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

(9) It will be noticed that under Section 36 (2) of the Act, one of the grounds on which a nomination can be rejected is that on the date fixed for the scrutiny of nominations the candidate is not qualified for being chosen to fill the seat under Article 173 of the Constitution. The relevant part of Article 173 provides :

“173 A person shall not be qualified to be chosen to fill a set in the Legislature of a State unless he —

(a) is a citizen of India, and makes and subscribes before some person authorized in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule.”

(10) The form referred to reads as under :—

“Form of oath or affirmation to be made by a candidate of election to the Legislature of a State—

“ I, A. B., having been nominated as a candidate to fill a seat in the Legislative Assembly (or Legislative Council), do swear in the name of God solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established and that I will uphold the sovereignty and integrity of India.”

(11) “The words having been nominated” in this form clearly show that the oath or affirmation cannot be taken or made by a candidate before he has been nominated as a candidate. Further, it is clear that none of the sections from Section 30 to Section 36 require that this oath should accompany the nomination paper. No reference has been made to the form of oath in Section 33 or Section 35, although in Section 33 it is provided that in certain cases the nomination paper should be accompanied by a declaration or by a certificate issued by the Election Commission. In this case it is common ground that on oath or affirmation was attached to the nomination paper or was filed before the date fixed for the scrutiny.

(12) Mr. Gokhale, who appears for the petitioner, contends that on objection being taken under S. 36 (2) that the petitioner had not made and subscribed an oath or affirmation according to the form set out above, he was entitled to make and subscribe the oath or affirmation immediately before

the objection was considered by the Returning Officer. He says that as soon as a candidate takes the oath or makes and subscribes the oath or affirmation he would become qualified within the terms of Art. 173 of the Constitution, and this qualification would exist “on the date fixed for the scrutiny” because the date of scrutiny of nomination paper – in this case January 21, 1967 – would not have passed away by the time the oath or affirmation is taken or subscribed.

(13) It seems to us that the expression, “on the date fixed for scrutiny” in S. 36 (2) (a) means “on the whole of the day on which the scrutiny of nomination has to take place.” In other words, the qualification must exist from the earliest moment of the day of scrutiny. It will be noticed that on this date the Returning Officer has to decide the objections and the objections have to be made by the other candidates after examining the nomination papers and in the light of S. 36 (2) of the Act and other provisions. On the date of the scrutiny the other candidates should be in a position to raise all possible objections before the scrutiny of a particular nomination paper starts. In a particular case, an objection may be taken to the form of the oath; the form of the oath may have been modified or the oath may not have been sworn before the person authorised in this behalf by the Election Commission. It is not necessary under Art. 173 that the person authorised by the Election Commission should be the Returning Officer.

(14) In *Paynter v. James*, (1866-67) LR 2 C. P. 348. Bovill, C.J. quoted, with approval, the passage, from the judgement of Tindal, C.J. in *Regina v. Humphery*, (1939) 10 Ad and E 335 in which the following occurs :

“..... We hold it therefore to be unnecessary to refer to instances of the legal meaning of the word upon which, in different cases, may undoubtedly either mean before the act done to which it relates, or simulatenously with the act done, or after the act done, according as reason and good sense require the interpretation, with reference to the context and the subject matter of the enactment.”

(15) Bovill, C.J., observed that “that is a very clear statement of the various meanings of the word “on” or “upon”.

(16) In this connection it must also be borne in mind that law disregards, as far as possible, fractions of the day. It would lead to grant confusion if it were held that a candidate would be entitled to qualify for being chosen to fill a seat till the very end of the date fixed for scrutiny of nominations. If the learned Counsel for the petitioner is right, the candidate could ask the Returning Officer to wait till 11.55 p.m. on the date fixed for the scrutiny to enable him to take the oath.

(17) Reference was also made to Form 2-B in the Conduct of Election Rules, 1961. It was pointed out that in this form there is no place where it can be stated by the candidate that he had taken the requisite oath or affirmation. But, this in our view does not mean that the oath or affirmation can be taken and subscribed on the date fixed for scrutiny. It seems to us that the nomination paper does not provide for the statement about the oath

because the oath or affirmation has to be taken after a candidate has been nominated.

(18) Our attention was invited to an unreported decision of the Patna High Court in Shiva Shankar Kanodia v. Kapildeo Narain Singh, Election Appeal No. 4 of 1965, D/- 22-9-1965 (Pat). That decision proceeded on the basis that “one can be said to be so nominated only when, after scrutiny of the nomination papers, the Returning Officer finds him to be validly nominated, as provided under Section 36 (8) of the Representation of the People Act, 1951.” With respect, the High Court proceeded on a wrong basis. The form of oath does not say “having been validly nominated” but only “having been nominated.”

(19) In the result the appeal fails and is dismissed with costs.

Appeal dismissed

SUPREME COURT OF INDIA*

**Civil Appeal No. 70 of 1971 and
Civil Appeal Nos 212 to 2124 of 1970^s
(Decision dated 11-11-1971)**

Sadiq Ali and Another

..Appellants

Vs.

**The Election Commission of India,
New Delhi and Others**

..Respondents

P. Kakkan

..Intervenor

SUMMARY OF THE CASE

The Indian National Congress is a recognised National Party under the provisions of the Election Symbols (Reservation and Allotment) Order, 1968. There was a split in that party in 1969, resulting in the formation of two groups led by Shri Jagjivan Ram and Shri Nijalingappa respectively. As each group contended that it was the party, the Election Commission adjudicated the dispute between the two rival groups of the party under para 15 of the said Order. After recording the evidence and hearing detailed submissions of both the groups, the Commission came to the conclusion that the group led by Shri Jagjivan Ram enjoyed the majority support, both in the organisational and Legislature wings of the party, and, consequently, recognised that group as the Indian National Congress, by its order dated 11.1.1971.

The rival group led by Shri Nijalingappa felt aggrieved by the Election Commission's aforesaid order and filed the present appeal before the Supreme Court by way of Petition for Special Leave to Appeal under Article 136 of the Constitution. The Supreme Court dismissed the appeal and upheld the order of the Election Commission. The Supreme Court held that the test of majority or numerical strength applied by the Commission for determining the dispute was a relevant and valuable test, and rightly applied by the Commission.

The Supreme Court also held that para 15 of the Symbols Order was not ultra vires the powers of the Election Commission under Article 324 of the Constitution. Further, the Court held that an election symbol is not property of the party concerned.

(A) Election Symbols (Reservation & Allotment) Order (1968) Paragraph 15 – Dispute as to which of the two groups is the recognised political party known as the Indian National Congress – Test of majority or numerical strength applied by the Commission, held, in the circumstances, to be the relevant and valuable test, 1904 A.C. 515 and AIR 1967 SC 898, Distinguished.

(Para 28)

The Commission found that the group presided over by Shri Jagjiwan Ram had the majority out of the total number of members returned on

congress tickets to the House of Parliament as well as the majority out of the sum total of the members of all Legislatures returned on congress tickets. As regards on organisational wing of the congress the Commission came to the conclusion that the same group enjoyed majority in the All India Congress Committee as well as amongst the delegates of the undivided congress. Decision was accordingly given that for the purpose of para 15 that group was the Indian National Congress for which the Symbol “Two Bullocks and Yoke on” had been reserved:

Held, that in the context of the facts and circumstances of the case the test of majority and numerical strength applied by the Commission was not only germane and relevant but a very valuable test. Decision of the Commission, Affirmed.

(Para 28)

Whatever might be the position in another system of government or organisation it is the view of the majority which in the final analysis proves decisive in a democratic set up.

(Paras 23 and 24)

It is no doubt true that the mass of congress members are its primary members. But there were obvious difficulties in ascertaining who were the primary members and in ascertaining their wishes. The Commission in deciding the dispute under para 15 has to act with certain measure of promptitude. It can be legitimately considered that the members of the All India Congress Committee and the delegates reflected by and large the views of the primary members.

(Para 25)

The fact that the other group presided over by Shri Nijalingappa enjoyed majority in the congress working Committee cannot carry so much weight as to outweigh the majority support obtained by the group presided over by Shri Jagjiwan Ram among delegates and members of the All India Congress Committee.

(Para 26)

Paragraph 13 has nothing to do with the question of resolving a dispute wherein two rival groups of a recognised political party claim to be that party. For the resolving of such dispute para 15 alone is relevant.

(Para 29)

It is not permissible to dissect the symbol and give one out of the two bullocks represented in the symbol to one group and the other bullock to the other group as symbol is not a property to be divided between co-owners.

(Para 32)

(B) Constitution of India, Art. 136 – Special leave appeal against the decision of Election Commission under para 15 of Election

Symbols (Reservation & Allotment) Order (1968) – Right of addressing the court.

Although the Commission may hear during the course of proceedings under paragraph 15 ‘such representatives of the section or groups or other persons as desire to be heard’, the parties to the dispute necessarily remain rival sections or groups of the recognised political party. Other persons as desire to be heard and who are heard by the Commission do not become parties to the dispute so as to have a right of addressing the court in appeal.

(Para 30)

(C) Election Symbols (Reservation & Allotment) Order (1968) Paragraph 15 – Decision of Commission under – Binding nature of.

The Commission only decides the question as to whether any of the rival sections or groups of a recognised political party, each of whom claims to be that party, is that party. The claim made in this respect is only for the purpose of symbols in connection with the elections to the Parliament and State Legislatures and the decision of the Commission pertains to this limited matter. The proper forum for adjudication of disputes about property are the civil courts. The decision of the Commission under paragraph 15 constitutes a direction to the Returning Officer for the purpose of Rule 10 of the Conduct of Election Rules, 1961. The direction shall be binding upon the Returning Officer in accordance with Rule 10 (4) and (5).

(Para 31)

(D) Constitution of India, Art. 136 – Special leave appeal against the decision of Election Commission under para 15 of Election Symbols (Reservation & Allotment) Order (1968) – Case not set up before the Commission cannot be allowed to be raised in appeal when such matter hinges upon facts.

(Para 33)

(E) Election Symbols (Reservation & Allotment) Order (1968) Paragraph 15 – Provision is not ultra vires the powers of the Commission. (X-Ref: Const. of Ind., Arts, 324 and 327)

(Para 39)

Para 15 is intended to effectuate and subserve the main purposes and objects of the order. The Commission is an authority created by the Constitution. The fact that the power of resolving a dispute between two rival groups for allotment of symbol of a political party has been vested in such a high authority would raise a presumption, though rebuttable, and provide a guarantee, though not absolute but to a considerable extent, that the power would not be misused but would be exercised in a fair and reasonable manner.

(Para 37)

The opening words of Article 327 "subject to the provisions of this Constitution" indicate that any law made by the Parliament in exercise of the powers conferred by Article 327 would be subject to the other provisions of the Constitution including Article 324. Article 324 provides that superintendence, direction and control of elections shall be vested in Election Commission. It, therefore, cannot be said that when the Commission issues direction, it does so not on its own behalf but as the delegate of some other authority.

(Para 38)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 898 (V 54) = (1967) 1 SCR, 643, Samyukta

Socialist Party v. Election Commission of India-35

(1904) 1904 A C 515 = 91 LT

394, General Assembly of Free

Church of Scotland v. Lord Overtoun-34

JUDGMENT

Present:- K. S. Hegde, A.N. Grover and H.R. Khanna, JJ.

In C. A. No. 70 of 1971.

Mr. Shanti Bhushan, Sr. Advocate, (M/s. K. C. Sharma, Y. K. Mathew and V. P. Chaudhry, Advocates, with him), for Appellants.

In C. A. No. 70 of 1971

Mr. R. N. Sachthey, Advocate (for No.1) and Mr. K. L. Mishra, Sr. Advocate (M/s. A. P. Misra, Naunit Lal, V. P. Nanda, Janak Raj, Miss Swaranjit Sodhi and Mr. R. K. Shukla, Advocates with him) (for No. 2); Mr. A.K. Sen, Sr. Advocate (Bawa Shiv charan, M/s K.S. Suri, O.P. Sharma and Miss Kailash Mehta Advocates, with him) (for No. 3); M/s. P. N. Lekhi, M. K. Garg and V. C. Prashar, Advocates, (for No. 4); Mr. Mukat Behari Lal Bhargava, Sr. Advocate, (M/s, S. L. Bhargava and V. C. Prashar, Advocates, with him) (for No. 5), for Respondent.

Respondent No. 6 in person, (In C. A. No. 70 of 1971).

Mr. M. Natesan, Sr. Advocate, (M/s. T. L. Garg and R. Gopalakrishan, Advocates with him), for Intervener, (In C. A. No. 70 of 1971) and the appellants (In C. As. Nos. 2122 to 2124 of 1970).

M/s. R. N. Sachthey and S. P. Nayar, Advocates, for Respondents Nos. 1 and 2 (in C. As. Nos. 2122 and 2123 of 1970) and Respondent No. 1 (In C. A. No. 2124 of 1970).

The Judgement of the Court was delivered by

KHANNA, J. :- (Civil Appeal No. 70 of 1971 has been filed by special leave by Shri Sadiq Ali and another against the order of the Election

commission of India (hereinafter referred to as the Commission) under paragraph 15 of the Election Symbols (Reservation and Allotment) Order, 1968 (hereinafter referred to as the 'Symbols Order'), whereby the Commission held that for the purpose of allotment of symbol in elections the political party presided over by Shri Jagjivan Ram was the Indian National Congress and was entitled to the symbol of "Two Bullocks with Yoke on", reserved for the said Congress.

2. Indian National Congress (hereinafter referred to as the 'Congress') is a recognised National Party under the Symbols Order. The symbol of the "Two Bullocks with Yoke on" was exclusively reserved for the Congress for the purpose of elections to the Houses of Parliament and the Legislative Assemblies of the States and Union Territories. The Congress is a voluntary association; it is neither a statutory body nor a registered society under the Societies Registration Act. It has framed its own constitution and rules. Shri S. Nijalingappa was elected President of the Congress with effect from 1st January, 1968 for a period of two years. Dr. Zakir Hussain, President of India, died in 1969. Split then took place in the Congress Party following differences over the choice of Congress nominee for the office of the President of India. Each group claimed to represent the Congress Party. One of the groups elected Shri C. Subramaniam as the President of the congress. Subsequently, Shri Jagjivan Ram was elected President by this group in place of Shri Subramaniam. For sake of convenience this group would hereafter be referred to as Congress 'J'. Shri Nijalingappa continued to be the President of the party represented by the other group which would hereafter be referred to as Congress 'O'.

3. On 21st December, 1969, Shri Subramaniam claiming to be the President of the Congress, addressed a letter to the Chief Election Commissioner stating that there had been a change in the office-bearers of the Congress. Enclosed with the letter was the list of office-bearers of the Congress 'J' Party and it was stated that they were the office-bearers of the Congress. There was then some exchange of correspondence between the Commission and Congress 'J' Party. On 3rd January, 1970, a communication was addressed to the Election Commission on behalf of the Congress 'J' that Shri Jagjivan Ram had been duly elected as President of the Congress and had taken charge on December 25, 1969, during the plenary Session held at Bombay.

4. On 8th January, 1970, a letter was sent on behalf of the Commission to the Secretary of Congress 'O'. Enclosed with that letter was a copy of the letter of Shri Subramaniam dated 21-12-1969. The Congress 'O' was asked to make its comments so as to enable the Commission to take decision in the matter after hearing both parties. On 14th January, 1970, a replay was sent on behalf of Congress 'O' by its General Secretary Shri Sadiq Ali. In that reply it was stated that Shri Subramaniam who had styled himself as the President of the Congress was, in fact, not its President and that the duly elected President of the Congress was Shri Nijalingappa. It was also stated that the office-bearers mentioned by Shri Subramaniam including Shri

Subramaniam himself, were persons expelled from the Congress and had otherwise ceased to be the members of the Congress. Further, according to the letter of Shri Sadiq Ali, the Commission should not have entertained any communication from a group of people who had formed a new party and were masquerading themselves in the name and style of the Congress. This association of persons, added Shri Sadiq Ali, was neither a splinter group nor a rival section of the Congress. The competence of the Commission to enquire into the matter was also questioned.

5. On 15th January, 1970, communication was addressed by Commission to the Secretary of Congress 'J' as well as that of Congress 'O' stating that, "a dispute appears to have arisen as to which of the two groups is the recognised political party known as the Indian National Congress for the purposes of the Election Symbols (Reservation and Allotment) Order, 1968, and the Commission is required to take a decision in the matter in terms of paragraph 15, read with paragraph 18, of the said Order. The Commission proposes to afford reasonable opportunities to each group to present its case before it so that the Commission may take into account all the available facts and circumstances for deciding the case".

6. On 22nd January 1970, a statement was filed on behalf of Congress 'J' before the Election Commission. According to that statement Shri Nijalingappa was elected President of the Congress with effect from 1st January, 1968 for a period of two years under Article 5 of the old Constitution which came into force on 25th June, 1967. The election of the members of the All India Congress Committee was held by the delegates. In accordance with the old Constitution, the members of the Pradesh Congress Committees were delegates to the All India Congress Committee. The term of the members of the All India Congress Committee, the Pradesh Congress Committees and the Committees subordinate there to and of the office-bearers thereof was to expire on 31st December, 1969, under Article 5 of the old Constitution. On 28th January, 1969, the Working Committee of the Congress passed a resolution at Faridabad for extending the term of all Committees of the Congress and of the office-bearers including that of the President, Shri Nijalingappa, for a further period of one year. The said resolution, according to Congress 'J' was not legal as there was no emergency of special situation warranting the extension of the normal term of two years. The resolution was also stated to be invalid as it was not submitted under the old Constitution to the All India Congress Committee for ratification as early as possible.

7. Under the new Constitution which came into force on 11th July, 1969, the above resolution was required, according to the statement on behalf of Congress 'J', to be submitted to the All India Congress Committee for ratification in any case within 6 months. The resolution was not ratified at the meeting of the All India Congress Committee held in Bangalore in July, 1968. The period of 6 months prescribed for the ratifications of the resolution expired on 28th October, 1969, and as the resolution was not ratified, the same according to the statement became void. Further, as the term of Shri Nijalingappa as President was going to expire on 31st December, 1969, it

became necessary for the All India Congress Committee to make arrangements for the election of the President before the said date. A requisition, it is stated, signed by more than 400 members of the All India Congress Committee, out of a total of 707, was sent for calling a meeting of the All India Congress Committee. Shri Nijalingappa then called a meeting of the Congress Working Committee on 1st November, 1969. Before that, on the night of 31st October, 1969, Shri Nijalingappa declared that Shri Subramaniam, a member of the Congress Working Committee had ceased to be a member of that Committee. Shri Nijalingappa also on that night removed Shri Fakhruddin Ali Ahmed from the membership of the Working Committee. The above act of Shri Nijalingappa according to the statement, was mala fide, illegal and against the principles of natural justice.

8. According further to the statement submitted on behalf of Congress 'J' the requisition sent by more than 400 members of All India Congress Committee was received by Shri Nijalingappa on the night of 31st December, 1969 and was turned down by the Working Committee, 17 members of the All India Congress Committee who were also signatories to the above mentioned requisition, issued a notice on 5th November, 1969 calling a meeting of the All India Congress Committee to consider the subjects mentioned in the requisition. copies of the said notice were sent to Shri Nijalingappa and a public statement was issued by Shri Subramaniam that Shri Nijalingappa would be presiding over the meeting if he attended the same. The requisitioned meeting of the All India Congress Committee was held at Delhi on 22nd and 23rd November, 1969 and was, according to the statement, attended by 435 members of the All India Congress Committee out of a total of 707. Shri Nijalingappa and his followers did not attend the requisitioned meeting. Six members having voting rights also communicated their support in writing for the requisitioned meeting. One of the resolutions passed at the requisitioned meeting related to the removal of Shri Nijalingappa from the office of President. By another resolution Shri Subramaniam was appointed President and he was asked to function as such until a new President was elected by the delegates. In accordance with the resolution passed in the above requisitioned meeting, a plenary session of the Congress was held in Bombay on 28th and 29th December, 1969. Shri Jagjivan Ram was elected President before the said plenary session. An over-whelming majority of delegates are stated to have attended the plenary session held at Bombay under the Presidentship of Shri Jagjivan Ram. The resolutions passed in the requisitioned meeting of 22nd and 23rd November, 1969 were ratified at the plenary session in Bombay, 423 out of 707 members of the All India Congress Committee attended the Bombay Session.

9. According further to the statement submitted on behalf of Congress 'J', 229 out of 284 Congress Members of Lok Sabha and 108 out of 147 Congress Members of Rajya Sabha declared their allegiance to the Congress Government led by Shrimati Indira Gandhi as Prime Minister and to the Congress led by Shri Jagjivan Ram as President. As against that, Congress 'O' claimed the allegiance of 65 Members of Lok Sabha and 40 Members of

Rajya Sabha. The Congress Legislature Parties of Maharashtra, Madhya Pradesh, Andhra Pradesh, Rajasthan, Assam, Haryana, Jammu & Kashmir, Himachal Pradesh and Tripura declared their support to the Congress Governments in those States and to Congress 'J'. The Speaker of Lok Sabha and the Chairman of Rajya Sabha recognised Congress 'J' in Parliament as the party which was in power and which ran the Central Government. The statement added that the Election Commission was the only authority to decide dispute about the allotment of symbol. Prayer was accordingly made that the symbol reserved for Congress for the purposes of general elections and bye-elections should be allotted to candidates who would be nominated and declared their allegiance to Congress 'J'.

10. A counter-statement was submitted on behalf of Congress 'O' by its General Secretary, Shri Sadiq Ali on 16th February, 1970. The various allegations made in the statement submitted on behalf of Congress 'J' were controverted and it was stated that the Election Commission had no jurisdiction to hold the enquiry. According to the counter-statement, the Congress Parliamentary Board in its meeting held in July 1969 decided by majority to put up Shri N. Sanjiva Reddy as candidate for the office of the President of India. The decision of the majority upset Smt. Indira Gandhi. Smt. Indira Gandhi, Shri Jagjivan Ram and Shri Fakhruddin Ali Ahmed, at the initial stages of the Presidential election, supported the candidature of Shri Sanjiva Reddy but subsequently they started a campaign for the defeat of the Congress candidate and for the success of Shri V. V. Giri. The explanations of Shrimati Indira Gandhi, Shri jagjivan Ram and Shri Fakhruddin Ali Ahmed were called by the Congress President on 18th August, 1969. On 31st October 1969, Shri Nijalingappa wrote a letter to Shri Subramaniam that he had ceased to be a member of the Working Committee. The reason for that was that Shri Subramaniam who was a member of the All India Congress Committee by virtue of being the President of the Tamil Nadu Congress Committee, had resigned the President of the Tamil Nadu Congress Committee, had resigned the Presidentship thereof and had thus ceased to be a member of the All India Congress Committee. Shri Fakhruddin Ali Ahmed was removed from the membership of the Working Committee because according to the Counter-statement, he had lost the confidence of the President. The requisition sent for calling a meeting of the All India Congress Committee was rejected in a meeting of the Congress Working Committee on 1st November, 1969. When the members of the Congress Working Committee learnt from newspaper reports that some members of the Working Committee had taken a decision to convene a meeting of the All India Congress Committee on 22nd and 23rd November, 1969, the Working Committee took the view that it was bound to result in indiscipline. Shri Najalingappa then addressed a letter to Shrimati Indira Gandhi charging her with indiscipline and asking her to explain her position.

11. **As regards the validity of the resolution postponing the elections, the case set up in the counter-statement is that the said resolution was valid in law and its validity had not been questioned by any one. Regarding the notice sent by 17**

members of the All India Congress Committee for convening the requisitioned meeting of the All India Congress Committee, the case of the Congress 'O' is that the said notice was invalid and the persons who attended the meeting on 22nd and 23rd November, 1969 did so in their personal capacity. The decisions taken in that meeting are stated to have no effect on the Working Committee. Smt. Indira Gandhi, who presided over the meeting, according to the counter-statement, had been expelled from the primary membership of Congress on 12th November, 1969. The resolutions passed in the meeting held on 22nd and 23rd November, 1969 being void ab initio could not be subsequently ratified by any authority. As regards the Members of Parliament and State Legislatures who declared their allegiance to Congress 'J', the stand taken in the counter-statement is that their position was that of defectors.

12. A rejoinder and some other applications were thereafter filed. The commission on 7th March, 1970 framed and settled the following four points for discussion:—

1. Has the Election Commission jurisdiction within the meaning of paragraph 15 of the Election Symbols (Reservation and Allotment) Order 1968, to decide whether any one or none of the rival sections or groups of the Indian National Congress, a national party, is the said Indian National Congress?

2. Has the Election Commission, for the purpose of undertaking the enquiry to come to a decision as aforesaid, been satisfied on information in its possession that there are two rival sections or groups of the said Indian National Congress each claiming to be that Congress?

3. What is the nature of an election symbol under the Election Symbols (Reservation and Allotment) Order, 1968, and whether an election symbol, whether reserved or free, is property?

4. Whether, on the facts and circumstances available to the Election Commission, any of the alleged rival sections of the said Indian National Congress is that Congress for the purposes of the Election Symbols (Reservation and Allotment) Order 1968; if so, which is that rival section, or, whether on the facts and circumstances referred to above, none of the rival sections of the said Indian National Congress is that Congress?"

13. In an order covering 437 pages which, considering the nature of controversy, appears to be abnormally prolix, the Commission held on the first point that it had jurisdiction to decide the matter. The contention that the Working Committee or the President of Congress 'O' were the only authorities to give a binding decision in the dispute was repelled in the following words:—

"if, therefore, there are facts in the present case which show a total and entire cleavage in the Indian National Congress from top to bottom, and that the rivalry between the two groups has almost assumed the form of enmity, then relying upon a few provisions of the Constitution and the rules of the party it cannot, in my view, be validly contended that the Election Commission has no jurisdiction because the Working Committee or the President of one group whose existence and authority are totally repudiated by the other group, are the only authorities to give final and binding decisions in the present dispute. The very existence of such a conflict is enough to create jurisdiction to find out and decide whether the conflict is genuine and whether the claims and allegations of the applicants are valid or the contentions

and objections of the opposite parties. But that question will have to be determined on the facts and circumstances established in the case".

On point 2, the Commission observed that it was satisfied on the information available in its possession that there were two rival sections of the Indian National Congress, each claiming to be that Congress. Regarding point 3, the finding of the Commission was that the Election Symbol was not property. As regards point No. 4, the Commission observed that the majority test was a valuable and relevant test in a democratic organisation. The test based upon the provisions of the Constitution of the Congress canvassed on behalf of the Congress 'O' was held to be hardly of any assistance in view of the removals from membership and expulsion from the Committees of the Congress of the members belonging to one group by those belonging to the opposite group. Reference was also made in this context to the rejection of the requisition sent by some members of Congress 'J' for convening a meeting of the All India Congress Committee. The commission then considered another test, namely, that based upon the aims and objects as incorporated in the constitution of the Congress. It was observed that none of the two groups had challenged in any manner or openly repudiated those aims and objects. The test based upon the aims and objects was consequently held to be ineffective and neutral. Applying the test of majority, the Commission observed that Congress 'J' had the majority out of the total number of members returned on Congress tickets to the Houses of Parliament as well as the majority out of the sum total of the members of all the Legislatures returned on Congress tickets although in some States, like Gujarat and Mysore, Congress 'O' had majority in the Legislatures. As regards the organisational wing of the Congress, the Commission came to the conclusion that Congress 'J' enjoyed majority in the All India Congress Committee as well as amongst the delegates of the undivided Congress. Decision was accordingly given that for the purpose of Paragraph 15 of the Symbol Order, Congress 'j' was the Congress for which the Symbol "Two bullocks with Yoke On" had been reserved.

14. Before dealing with the contentions advanced in appeal, it may be apposite to refer to the relevant provisions. Article 324 of the Constitution provides inter alia that the superintendence, direction and control of the preparation of electoral rolls for and the conduct of all elections to Parliament and Legislative Assemblies of the States and all elections to the offices of President and Vice-President held under the Constitution shall be vested in the Commission. According to Section 169 of the Representation of the People Act, 1951 (Act 43 of 1951), the Central Government may, after consulting the Election Commission by notification in the official gazette, make rules for carrying out the purposes of the Act. Without prejudice to the generality of the foregoing power, sub-section (2) enumerals some of the matters for which provision may be made in the rules Sub-section (3) requires that the rules framed should be laid before each House of Parliament. Conduct of Election Rules, 1961 were thereafter framed by the Central Government Rule 5 of those Rules requires the Commission to specify the symbols that may be chosen by candidates at elections in Parliamentary and Assembly elections and the restrictions to which that choice shall be subject Rule 10 makes provision for allotment of symbols to the contesting candidates by the Returning Officer subject to general or special directions issued by the Commission.

15. The Symbols Order has been issued by the Commission in exercise of the powers conferred by Article 324 of the Constitution read with Rule 5 and 10 of the Conduct of Election Rules. Paragraph 2 of the Symbols Order contains the various definitions. According to Clause (h) of that paragraph, political party means an association or body of individual citizens of India registered with the Commission as a political party under Paragraph 3 and includes a political party deemed to be registered with the Commission under the proviso to sub-paragraph (2) of that paragraph. Paragraph 3 deals with registration with the Commission of associations and bodies as political parties for the purpose of the Order. According to that paragraph, any association or body of individuals, citizens of India calling itself a political party and intending to avail itself of the provisions of the Order shall make an application to the Commission for its registration as a political party for the purpose of that Order. Sub-paragraph (2) provides the period within which an application has to be made. Exemption from making the application in certain contingency with which we are not concerned is also granted. Subparagraphs (3) and (4) specify the formalities and the particulars required for the application. The particulars include the names of the President, Secretary and other office-bearers of the political party, the numerical strength of its members as well as the political principles on which it was based and the policies, aims and objects it pursued or sought to pursue. Power is given to the Commission under sub-paragraph (5) to call for further particulars. The Commission thereafter decides whether to register the association or body as political party or not. The decision of the Commission in this respect has been made final by sub-paragraph (7). Provision is further made by subparagraph (8) that after the association or body has been registered as a political party any change in its name, head-office, office-bearers, address and political principles, policies, aims and objects and any change in any other material matter, shall be communicated to the Commission without delay. Paragraph 4 provides for allotment of symbols. Paragraph 5 deals with the classification of symbols. According to this paragraph, a reserved symbol is a symbol reserved for a political party for exclusive use by that party. A symbol other than the reserved symbol has been described by the said paragraph to be a free symbol. Political parties have been classified as recognised political parties or unrecognised political parties by paragraph 6. The recognised political parties have been divided into two categories. If a political party is treated as a recognised political party in four or more States in accordance with paragraph 6, it shall have the status of a national party throughout the whole of India. If on the contrary a political party is treated as a recognised political in less than four States, it shall enjoy the status of a State Party in the State or States in which it is a recognised political party. We need not dilate upon this aspect because it is common case of the parties that the Congress is a national party. Paragraph 8 deals with choice of symbols by candidates of national and State parties and allotment thereof Paragraphs 9, 10, 11 and 12 deal with certain restrictions on the allotment of symbols, concessions to certain candidates as well as the choice of symbols by some categories of candidates with which we are not concerned. Paragraph 13 specified as to when a candidate shall be deemed to be set up as a candidate by a political party and reads as under:—

"13. When a candidate shall be deemed to be set up by a political party —

For the purposes of this Order a candidate shall be deemed to be set up by a Political party if, and only if —

(a) the candidate has made a declaration to that effect in his nomination paper;

(b) a notice in writing to that effect has not later than 3 p.m. on the last day of withdrawal of candidatures, been delivered to the returning officer of the constituency; and

(c) the said notice is signed by the President, the Secretary or any other office-bearer of the party and the President, Secretary or such other office bearer is authorised by the party to send such notice and the name and specimen signature of the President, the Secretary or such other office-bearer are communicated in advance to the returning officer of the constituency and to the Chief Electoral Officer to the State:.

16. Paragraph 14 gives power to the Commission to issue certain instructions to un-recognised political parties. Paragraph 15 with which we are directly concerned in this case reads as under:—

"15. Power of Commission in relation to splinter groups of rival sections of a recognised political party —

When the Commission is satisfied on information in its possession that there are rival sections or groups of a recognised political party each of whom claims to be that party, the Commission may, after taking into account all the available facts and circumstances of the case and hearing such representatives of the sections or groups and other persons as desire to be heard, decide that one such rival section or group or none of such rival sections or groups is that recognised political party and the decision of the Commission shall be binding on all such rival sections or groups:.

The powers of the Commission in case of amalgamation of two or more political parties is contained in paragraph 16 and it reads:—

"16. Power of Commission in case of amalgamation of two or more political parties —

(1) When two or more political parties, one or some or all of whom is a recognised political party or are recognised political parties, join together to form a new political party, the Commission may, after taking into account all the facts and circumstances of the case, hearing such representatives of the newly formed party and other persons as desire to be heard and having regard to the provisions of this Order. decide —

(a) whether such newly formed party should be a National party; and

(b) the symbol to be allotted to it.

(2) The decision of the Commission under sub-paragraph (1) shall be binding on the newly formed political party and all the component units thereof".

A notification containing the list of political parties and symbols has to be issued by the Commission under Paragraph 17 while Paragraph 18 gives certain additional powers to the Commission for issuing instructions and directions. The requisite notification was accordingly issued by the Commission under Paragraph 17. According to that notification, Indian National Congress was a National party and its reserved symbol was "Two Bullocks with Yoke on".

17. Perusal of the different paragraphs of the Symbols Order makes in manifest that they provide, as is made clear by its preamble, for specification, reservation, choice and allotment of symbols at elections in Parliamentary and assembly constituencies as well as for the recognition of political parties in relation thereto

and for matters connected therewith. One such matter is the decision of a dispute when two rival sections or groups of a recognised political party claim to be that party for the purpose of the Symbols Order. Paragraph 15 provides for the machinery as well as the manner of resolving such a dispute.

18. Before discussing the scope and ambit of Paragraph 15, it may be pertinent to find out the reasons which led to the introduction of symbols. It is well known that overwhelming majority of the electorate are illiterate.

It was realised that in view of the handicap of illiteracy, it might not be possible for the illiterate voters to cast their votes in favour of the candidate of their choice unless there was some pictorial representation on the ballot paper itself whereby such voters might identify the candidate of their choice. Symbols were accordingly brought into use. Symbols or emblems are not a peculiar feature of the election law of India. In some countries, are not a peculiar feature of the election law of India. In some countries details in the form of letters of alphabet or numbers are added against the name of each candidate while in others, resort is made to symbols or emblems. The object is to ensure that the process of election is as genuine and fair as possible and that no elector should suffer from any handicap in casting his vote in favour of a candidate of his choice. Although the purpose which accounts for the origin of symbols was of a limited character, the symbol of each political party with the passage of time acquired a great value because the bulk of the electorate associated the political party at the time of elections with its symbol. It is therefore, no wonder that in case of a split in a political party, there is a keen contest by each rival group to get the symbol of that party.

19. Let us now go back to Paragraph 15. The occasion for making an order under this paragraph arises when the Commission is satisfied on information in its possession that there are rival sections or groups of a recognised political party each of whom claims to be that party. The Commission in such an event decides the matter after taking into account all available facts and circumstances of the case and hearing such representative of the sections or groups and other persons as desire to be heard. The Commission may decide that one such rival section or group is that recognised political party or that none of such rival sections or groups is that party. The aforesaid decision has been made binding on all the rival sections or groups who claim to be the political party in question.

20. In the present case, we find that a claim was made on behalf of Congress 'J' that its office-bearers were the office-bearers of the Congress. The said claim was repudiated by Congress 'O' and according to it, it was genuine Congress Party and its President was Shri Nijlingappa. According further to the stand taken on behalf of Congress 'O', the members of Congress 'J' were masquerading themselves in the name and style of the Congress. The Commission, in the circumstances, had to decide the matter under Paragraph 15 and we find nothing objectionable in the communication dated January 15, 1970 sent to the two rival parties on its behalf wherein it was stated that "a dispute appears to have arisen as to which of the two groups is the recognised political party known as the Indian National Congress for the purposes of the Symbols order".

21. Controversy between the parties has ranged on the question whether the Commission has taken into account all 'the available facts and circumstances of the case'. The Commission in this context considered the various criteria for determining which of the two groups, Congress 'J' or Congress 'O' was the

Congress and came to the conclusion that the criteria other than that of the numerical strength or majority could not provide a satisfactory solution. So far as the test of majority is concerned, the Commission found that the relative strength of the two groups in the two House of Parliament and the State Legislature was as under:—

1	Name of the House	Position as on 22-1-1970		Position in the later half of 1970		Remarks
		Congress 'J'	Congress 'O'	Congress 'J'	Congress 'O'	
		2	3	4	5	
I- PARLIAMENT						
	1. Lok Sabha	221	64	228	65	
	2. Rajya Sabha	103	42	85	40	
II-LEGISLATIVE ASSEMBLIES						
A. STATES						
	1. Andhra Pradesh	...	...	175	14	
	2. Assam	...	...	75	...	
	3. Bihar	81	31	86	28	
	4. Gujarat	5	96	8	108	
	5. Haryana	(no separate group in the strength of 48 Congress members)			53	6
	6. Jammu & Kashmir	...	...	...	61	...
	7. Kerala	4	5	33	4	
	8. Madhya Pradesh	177	...	192	...	
	9. Maharashtra	204	...	191	13	
	10. Mysore	23	126	37	127	
	11. Nagaland	...	...	No Party as Indian National Congress		
	12. Orissa	...	...	8	3	
	13. Punjab	28	...	28	...	
	14. Rajasthan	111	1	113	1	
	15. Tamil Nadu	...	...	8	41	
	16. Uttar Pradesh	120	102	150	84	
	17. West Bengal	38	13	...	...	Assembly dissolved on 30-7-1970
B. UNION TERRITORIES						
	1. Goa, Daman & Diu	...	...	...	1	...
	2. Himachal Pradesh	...	42	...	43	...
	3. Manipur	Dissolved with effect from 16.10.1969				
	4. Pondicherry	6	4	7	3	
	5. Tripura	27	...	27	...	
III- LEGISLATIVE COUNCILS						
	1. Andhra Pradesh...	...	...	...	52	6
	2. Bihar	...	...	33	22	
	3. Maharashtra	51	...	46	3	
	4. Mysore	6	46	7	43	
	5. Tamil Nadu	...	...	2	17	
	6. Uttar Pradesh	37	33	33	29	

22. As regards the delegates who were entitled to vote at the earlier Faridabad session of Congress the Commission found that out of the total number of 4,690 delegates, 2,870 pledged their support to Congress 'J'. Regarding the members of the All India Congress Committee (hereinafter referred to as the AICC), the Commission held that the total number of AICC members who attended the Bombay meeting of the Congress J. AICC was 423 out of 707 elected members and 56 out of 95 nominated and co-opted members. The Bombay, Session it was further held, assumed importance in view of the fact that all the resolutions passed at the requisitioned meeting of Congress 'J' at Delhi were ratified unanimously at the Bombay session. For determining as to who were members of AICC and delegates, the Commission accepted those persons as members of AICC and delegates who held that position in the earlier session of the Congress at Faridabad before the split. In view of the removals and expulsions which followed in the wake of split in the Congress, the Commission, in our opinion, adopted proper approach for determining as to who should be taken to be members of AICC or the delegates, more so, when in the opinion of the Commission the validity of those removals and expulsions was open to question.

23. The figures found by the Commission of the members of the two Houses of Parliament and of the State Legislatures as well as those of AICC members and delegates who supported Congress 'J' have not been shown to us to be incorrect. In view of those figures, it can hardly, be disputed that substantial majority of the members of the Congress in both its legislative wing as well as the organisational wing supported Congress 'J'. As Congress is democratic organisation the test of majority and numerical strength, in our opinion, was a very valuable and relevant test. Whatever might be the position in another system of Government or organisation, numbers have a relevance and importance in a democratic system of Government or political set up and it is neither possible nor permissible to loss sight of them. Indeed it is the view of the majority which in the final analysis proves decisive in a democratic set up.

24. It may be mentioned that according to Paragraph 6 of the Symbols Order, one of the factors which may be taken into account in treating a political party as a recognised political party is the number of seats secured by that party in the House of People or the State Legislative Assembly or the number of votes polled by the contesting candidates set up by such party. If the number of seats secured by a political party or the number of votes cast in favour of the candidates of a political party can be a relevant consideration for the recognition of a political party, one is at a loss to understand as to how the number of seats in the Parliament and State Legislatures held by the supporters of a group of the political party can be considered to be irrelevant. We can consequently discover no error in the approach of the Commission in applying the rule of majority and numerical strength for determining as to which of the two groups, Congress 'J' and Congress 'O' was the Congress party for the purpose of paragraph 15 of Symbols order.

25. It is no doubt true that the mass of Congress members are its primary members. There were obvious difficulties in ascertaining who were the primary members because there would in that event have been allegations of fictitious and bogus members and it would have been difficult for the commission to go into those allegations and find the truth within a short span of time. The Commission in deciding that matter under paragraph 15 has to act with a certain measure of promptitude and it has to see that the inquiry does not get bogged down in a

quagmire. This a part, there was practical difficulty in ascertaining the wishes of those members. The Commission for this purpose could obviously be not expected to take referendum in all the towns and villages in the country in which there were the primary members of the Congress. It can, in our opinion, be legitimately considered that the members of All India Congress Committee and the delegates reflected by and large the views of the primary members.

26. It is urged by Mr. Shanti Bhushan on behalf of the appellants that 11 members of the Congress Working Committee were with Congress 'O' while 10 members were with Congress 'J'. The matter, according to the learned counsel, should have been decided in accordance with the majority in the Working Committee. So far as this aspect is concerned, we find that as it is not always convenient to convene general session of the Congress or a meeting of the All India Congress Committee, the Congress has its Working Committee which represents the Congress for administrative purposes and for taking decision on political and other matters. Some of the members of the Working Committee are elected by the All India Congress Committee while others are nominated by the President. The Working Committee has not been shown to possess any power of vetoing the decision of the All India Congress Committee. On the contrary, majority decisions taken by the Working Committee at the time of All India Congress Committee meetings are placed before the All India Congress Committee for ratification. In view of the fact that the wishes of the majority of the members of All India Congress Committee as well as the delegates have been ascertained, we find it difficult to accede to the contention that the majority enjoyed by Congress 'O' against Congress 'J' in the Working Committee should carry so much weight as to outweigh the majority support obtained by Congress 'J' among delegates and the members of All India Congress Committee. In any case, we find that as against the slender majority enjoyed by Congress 'O' in the Working Committee, Congress 'J' had substantial majority among the members of All India Congress Committee and the delegates as well as the Congress members of two Houses of Parliament as also the sum total of members of the State Legislatures.

27. The observations of late Pandit Jawaharlal Nehru in the course of his speech on Kamraj Plan in the meeting of All India Congress Committee held in August 1963, to which a reference has been made on behalf of the appellants, is hardly of any assistance to the appellants for the purpose of this case. Pandit Nehru in that speech emphasized the importance of the organisational wing of the Congress and said that if the All Working Committee did not desire that he should remain in office, he was not going to have general elections to secure the support of the people against the said Committees. It is obvious that the stress in that speech was on the need of the Prime Minister securing the support of the organisational wing. The speech did not deal with a contingency as arises in the present case of resolving a dispute wherein one group has the support of the majority of the legislative wing as well as the organisational wing other than the Working Committee. The present is not a case wherein a conflict has arisen because of one group having majority in the organisational wing and the other having a majority in the legislative wing of the party.

28. Argument has been advanced on behalf of the appellants that the matter should have been decided in accordance with the provisions of the Congress constitution. The Commission in this context has found that there were removals

and expulsions of the supporters of Congress 'J' from the various Committees of the Congress by the members of Congress 'O' and the President Shri Nijalingappa. The Commission has come to the conclusion that the validity of the action of Shri Nijalingappa and other members of Congress 'O' in removing and expelling members of the other group was doubtful and open to question. The Commission has also questioned the propriety of the action of the Working Committee in rejecting the requisition sent by the members of All India Congress Committee for convening meeting of the All India Congress Committee. It is, in our opinion, not necessary for this Court to express any opinion for the purpose of this appeal about the validity of the above mentioned removals and expulsions nor is it necessary to express any view about the propriety of the rejection of the requisition. Likewise it is not essential to say anything as to whether one or both the groups were in the wrong and if so, to what extent in the controversy relating to the split in the Congress. All that this Court is concerned with is whether the test of majority or numerical strength which has been taken into account by the Commission is in the circumstances of the case a relevant and germane test. On that point, we have no hesitation in holding that in the context of the facts and circumstances of the case the test of majority and numerical strength was not only germane and relevant but a very valuable test.

29. Reference has been made on behalf of the appellants to paragraph 13 of the Symbols Order which has been reproduced earlier in this judgment. The said paragraph mentions as to when a candidate shall be deemed to be set up by a political party. The three requisites for that are: that the candidate has made a declaration to that effect in his nomination paper; that a notice is delivered to the Returning Officer before the specified time and the said notice is delivered to the Returning Officer before the specified time and the said notice is signed by such office-bearer of the party who has been authorised to send the notice. It also requires that the name and specimen signature of such office bearer should be communicated in advance to the returning Officer and the Chief Electoral Officer of the State. Reading of Paragraph 13 makes it plain that it deals with the case of individual candidates and provides a safeguard against the contingency of a claim being made by two rival candidates of being the nominee of the same party. Paragraph 13 has nothing to do with the question of resolving a dispute wherein two rival sections or groups of a recognised political party claim to be that party. For the resolving of such a dispute we have only to look to Paragraph 15.

30. Question during the course of hearing of the appeal has also arisen whether the persons who were heard during the course of proceedings under Paragraph 15 become parties to those proceedings so as to be entitled to be heard in appeal. In this connection, we are of the opinion that although the Commission may hear during the course of proceedings under Paragraph 15 'such representative of the sections or groups or other persons as desire to be heard;', the parties to the dispute necessarily remain rival sections or groups of the recognised political party. Other persons as desired to be heard and who are heard by the Commission do not become parties to the dispute so as to have a right of addressing this Court in appeal. We have consequently not allowed arguments to be addressed in appeal on their behalf.

31. Question then arises as to what is the binding nature of the decision given by the Commission under Paragraph 15. In this respect, it has to be borne in mind that the Commission only decides the question as to whether any of the rival sections or

groups of a recognised political party, each of whom claims to be that party is that party. The claim made in this respect is only for the purpose of symbols in connection with the elections to the Parliament and State Legislatures and the decision of the Commission pertains to this limited matter. The Commission while deciding the matter under Paragraph 15 does not decide dispute about property. The proper forum for adjudication of disputes about property are the Civil Courts. The decision of the Commission under Paragraph 15 constitute a direction to the Returning Officer for the purpose of Rule 10 of the Conduct of Elections Rules, 1961. The said direction shall be binding upon the Returning Officer in accordance with sub-rules (4) and (5) of the above-mentioned Rule. Whether the decision of the Commission can be called into question in appropriate proceedings in a Court of law is a matter which does not arise in this case and we need not express any opinion thereon.

32. Contention has also been advanced on behalf of the appellants that Congress 'O' although adhering to Congress aims and objects is deprived of the use of symbol of "Two Bullocks with Yoke on" which had been allotted to the Congress for the purpose of elections. The answer to this contention is that as a result of differences and dissensions, a political party may be split into two or more groups but the symbol cannot be split. It is only one of the rival sections or groups, as is held to be that political party under Paragraph 15, which would be entitled to the use of the symbol in the elections while the other section or group would have to do without that symbol. It is not permissible in a controversy like the present to dissect the symbol and give one out of two bullocks represented in the symbol of the Congress to one group and the other bullock to the other group. The symbol is not property to be divided between co-owners. The allotment of a symbol to the candidates set up by a political party is a legal right and in case of split, the Commission has been authorised to determine which of the rival groups or sections is the party which was entitled to the symbol. The Commission in resolving this dispute does not decide as to which group represents the party but which is that party. If it were a question of representation, even a small group according to the Constitution of the organisation may be entitled to represent the party. Where, however, the question arises as to which of the rival groups is the party, the question assumes a different complexion and the numerical strength of each group becomes an important and relevant factor. It cannot be gainsaid that in deciding which group is the party, the Commission has to decide as to which group substantially constitutes the party.

33. Attempt has also been made during the course of arguments to show that the supporters of Congress 'J' were defaulters in payment of subscription. No such case was admittedly set up before the Commission. We have consequently not allowed the appellants to raise this matter which hinges upon facts in appeal.

34. Reference has been made on behalf of the appellants to a House of Lords decision in the case of General Assembly of Free Church of Scotland v. Lord Overtoun, 1904 AC 515. The said case related to the denomination of Christians which called itself the Free Church of Scotland and had been founded in 1843. It consisted of ministers and laity who seceded from the Established Church of Scotland, but who professed to carry with them the doctrine and system of the Established Church, only freeing themselves by secession from what they regarded as interference by the State in matters spiritual. For many years, efforts had been made to bring about a union between the Free Church and the United Presbyterian

Church, also seceders from the Established Church. In 1900 Acts of Assembly were passed by the majority of the Free Church and unanimously by the United Presbyterian Church for union under the name of the United Free Church and the Free Church property was conveyed to the new trustees for behoof of the new Church. The United Presbyterian Church was opposed to the Establishment principle and did not maintain the Westminster Confession of Faith in its entirety. The respondents contended that the Free Church had full power to change its doctrines so long as the identity was preserved. The appellants, a very small minority of the Free Church, objected to the union maintaining that the Free Church had no power to change its original doctrines or to unite with a body which did not confess those doctrines. The appellants accordingly complained of breach of trust. It was held that the Establishment principle and the Westminster Confession were distinctive tenets of the Free Church and the Free Church had no power, where property was concerned, to alter the doctrine of the Church, that there was no true union as the United Free Church had not preserved its identity with the Free Church not having the same distinctive tenets and that the appellants were entitled to hold for behoof of the Free Church the property held by the Free Church before the union in 1900. The above case can hardly be of any assistance to the appellants. It is clearly distinguishable on two grounds. The first ground relates to change of tenets on the part of a religious group. As against that the present case relates to a political party wherein none of the rival groups professes to renounce the aims and objects of the party. The other ground is that the dispute in the cited case related to property while that in the present case relates to a legal right and not to property.

35. The case of *Samyukta Socialist Party v. Election Commission of India*, (1967) 1 SCR 643 = (AIR 1967 SC 898) has also no bearing on the present case. The cited case related to merger of two political parties into one as a result of which the election symbol of one of the merger parties was allotted to the new party. The parties separated again and the question which arose for determination was whether the symbol can be taken back from the new party and given to the party to which it originally belonged. It is plain that the nature of controversy in the said case was entirely different.

36. Civil Appeals Nos. 2122-2124 of 1970 have been filed by Shri P. Kakkah and another against the judgment of the Madras High Court on a certificate granted by that Court. It is not necessary to give the facts giving rise to these appeals because according to Shri Natesan, learned counsel for the appellants in these appeals, the only additional point to be agitated is about the vires of Paragraph 15 of the Symbols Order. The Madras High Court repelled the contention advanced on behalf of the appellants that Paragraph 15 was ultravires and invalid in so far as it conferred power on the Commission to decide the dispute between two groups of a political party.

37. It would follow from what has been discussed earlier in this judgment that the Symbols Order makes detailed provisions for the reservation, choice and allotment of symbols and the recognition of political parties in connection therewith. That the Commission should specify symbols for elections in parliamentary and assembly constituencies has also been made obligatory by Rule 5 of Conduct of Election Rules. Sub-rule (4) of Rule 10 gives a power to the Commission to issue general or special directions to the Returning Officers in respect of the allotment of

symbols. The allotment of symbols by the Returning officers has to be in accordance with those directions. Sub-rule (5) of Rule 10 gives a power to the Commission to revise the allotment of a symbol by the Returning Officers in so far as the said allotment is inconsistent with the directions issued by the Commission. It would, therefore, follow that Commission has been clothed with plenary powers by the above mentioned Rules in the matter of allotment of symbols. The validity of the said Rules has not been challenged before us. If the Commission is not to be disabled from exercising effectively the plenary powers vested in it in the matter of allotment of symbols and for issuing directions in connection therewith it is plainly essential that the Commission should have the power to settle a dispute in case claim for the allotment of the symbol of a political party is made by two rival claimants. In case, it is a dispute between two individuals, the method for the settlement of that dispute is provided by paragraph 13 of the Symbols Order. If on the other hand, a dispute arises between two rival groups for allotment of a symbol of a political party on the ground that each group professes to be that party, the machinery and the manner of resolving such a dispute is given in paragraph 15. Paragraph 15 is intended to effectuate and subserve the main purposes and objects of the Symbols Order. The paragraph is designed to ensure that because of a dispute having arisen in a political party between two or more groups, the entire scheme of the Symbols Order relating to the allotment of a symbol reserved for the political party is not set at naught. The fact that the power for the settlement of such a dispute has been vested in the Commission would not constitute a valid ground for assailing the vires of and striking down paragraph 15.

The Commission is an authority created by the Constitution and according to Article 324, the superintendence, direction and control of the electoral rolls for and the conduct of elections to Parliament and to the Legislature of every State and of elections to the office of President and Vice-President shall be vested in the Commission. The fact that the power of resolving a dispute between two rival groups for allotment of symbol of a political party has been vested in such a high authority would raise a presumption, though rebuttable, and provide a guarantee, though not absolute but to a considerable extent, that the power would not be misused but would be exercised in a fair and reasonable manner.

38. There is also no substance in the contention that as power to make provisions in respect to elections has been given to the Parliament by Article 327 of the Constitution, the power cannot be further delegated to the Commission. The opening words of Article 327 are "subject to the provisions of this Constitution". The above words indicate that any law made by the Parliament in exercise of the powers conferred by Article 327 would be subject to the other provisions of the Constitution including Article 324. Article 324 as mentioned above provides that superintendence, direction and control of elections shall be vested in Election Commission. It, therefore, cannot be said that when the Commission issues direction, it does so not on its own behalf but as the delegate of some other authority. It may also be mentioned in this context that when the Central Government issued Conduct of Election Rules, 1961 in exercise of its powers under Section 169 of the Representation of the People Act, 1951, it did so as required by that section after consultation with the Commission.

39. We, therefore, find no substance in the contention that paragraph 15 of the Symbols Order is ultra vires the powers of the Commission.

40. **The result is that all the four appeals fail and are dismissed but in the circumstances without costs.**

Appeals dismissed.

SUPREME COURT OF INDIA*

**Civil Appeals Nos. 887 and 909 of 1975^s
(Decision dated 7-11-1975)**

In C.A. No. 887 of 1975

Smt. Indira Nehru Gandhi

..Appellant

Vs.

Shri Raj Narain

..Respondent

In C.A. No. 909 of 1975

Shri Raj Narain

..Appellant

Vs.

Smt. Indira Nehru Gandhi

..Respondent

SUMMARY OF THE CASE

Smt.Indira Nehru Gandhi was elected to the House of the People from Rae Bareli Parliamentary Constituency in March, 1971. Her election was challenged by one of the rival candidates Shri Raj Narain, before the Allahabad High Court by an election petition. The High Court, by its judgment and order dated 12.6.1975, allowed the election petition and declared the election of Smt. Indira Nehru Gandhi as void. The High Court held that Smt. Gandhi had procured assistance of Shri Yashpal Kapoor, a Gazetted Officer of the Government of India, the District Magistrate and Superintendent of Police, Rae Bareli, the Executive Engineer, PWD, and the Engineer, Hydrel Department, for her election campaign and had thus committed corrupt practices under Section 123 (7) of the Representation of the People Act, 1951.

Aggrieved by the order of the Allahabad High Court, Smt. Indira Nehru Gandhi filed the present appeal before the Supreme Court. A cross-appeal was also filed by Shri Raj Narain. During the pendency of these appeals, Parliament passed the Election Laws (Amendment) Act, 1975. By this Amendment Act, several provisions of the Representation of the People Act, 1951 were amended retrospectively. Further, Parliament also passed the Constitution (Thirty-ninth Amendment) Act, 1975. By this Amendment Act, a new Article 329-A was inserted into the Constitution to provide, inter alia, that the election to Parliament of a person, who holds office of Prime Minister or Speaker of the Lok Sabha at the time of such election or is appointed as Prime Minister or Speaker after such election, shall be called in question only before a specially prescribed authority [and not before the High Court under Article 329 (b) of the Constitution]. Furthermore, by the said Amendment Act, Parliament also validated the election of Smt. Indira Nehru Gandhi.

The validity of the above mentioned two Amending Acts also became subject matter of the present appeals. One of the grounds of attack on the validity of these Acts was that many members of Parliament were subjected to preventive detention

after the Proclamation of Emergency in June, 1975 and, therefore, these Acts had not been validly passed by Parliament in their absence.

The Supreme Court, in the present appeals, upheld the validity of the Election Laws (Amendment) Act, 1975 and also the validity of the Constitution (Thirty-ninth Amendment) Act, 1975, except that part of the latter Act whereby Parliament had validated the election of Smt. Indira Nehru Gandhi. Applying the law, as amended retrospectively by the aforesaid Election Laws (Amendment) Act, 1975, the Supreme Court upheld the election of Smt. Indira Gandhi to the House of the People, allowing her appeal, and rejecting the cross-appeal of Shri Raj Narain.

(A) Election Laws (Amendment) Act 40 of 1975), Pre. – Constitution (Thirty-ninth Amendment) Act (1975), Pre. – constitutional validity of – cannot be challenged on ground that a number of Members of Parliament were in detention –(Constitution of India, Arts. 85 and 122).

Per Ray, C.J. : – The constitution of the House which passed the Constitution (Thirty-ninth Amendment) Act is not illegal on the ground that a number of members of Parliament of the two Houses were detained by executive order after 26 June, 1975. It has also to be stated that it is not open to challenge the orders of detention collaterally. The principle is that what is directly forbidden cannot be indirectly achieved.

(Paras 69, 74, 75, 76, 82, 86, 87)

Per Khanna, J : – The constitutional validity of the Constitution Amendment Act and the 1975 Act amending the Representation of the People Act cannot be assailed on the ground that some members of Parliament were prevented because of their detention from attending and participating in the proceedings of the respective Houses of Parliament.

(Para 184)

The contention that the sittings of the two Houses of Parliament in which the impugned Acts were passed were not valid essentially relates to the validity of the proceedings of the two Houses of Parliament. These are matters which are not justiciable and pertain to the internal domain of the two Houses. Of course, the courts can go into the question as to whether the measures passed by Parliament are constitutionally valid. The court cannot, however, go into the question as to whether the sittings of the Houses of Parliament were not constitutionally valid because some members of those Houses were prevented from attending and participating in the discussions in those Houses.

(Para 180)

The act of detaining a person is normally that of an outside agency and not that of the House of Parliament. It would certainly look anomalous if the act of an outside agency which might ultimately turn out to be not legal could affect the validity of the proceedings of the House of Parliament or could prevent that House from assembling and functioning.

(Para 182)

Per Mathew J. : – The detention of members of Parliament was by statutory authorities in the purported exercise of their statutory power. It would be strange if a statutory authority, by an order which turns out to be illegal, could prevent the Houses of Parliament from meeting as enjoined by Article 85. If a statutory authority passes an illegal Order of detention and thus prevents a member of Parliament from attending the House, how can the proceedings of Parliament become illegal for that reason? It is the privilege of Parliament to secure the attendance of persons illegally detained. But if the privilege is not exercised by Parliament the proceedings of Parliament would not become illegal for that reason.

(Para 378)

The President, in performing his constitutional function under Articles 352, 359 has not authorised the illegal detention of any person let alone any member of Parliament or unconstitutionally prevented the release from custody of any member. He has only discharged his constitutional functions. If this be so, it is difficult to hold that the session in which the amendments were passed was illegally convened. The challenge to the validity of the amendments on this score must be overruled.

(Para 379)

Per Beg, J. : – Constitutional validity of the impugned Acts cannot be challenged on the ground that as a number of members of Parliament belonging to the opposite parties were in detention, under the Preventive detention laws, which could not be questioned before Courts of law, because of the declaration of the emergency by the President, there was a procedural defect in making the impugned enactments. Such an objection is directly covered by the terms of Article 122 which debars every Court from examining the propriety of proceedings “in Parliament”. If any privileges of Members of Parliament were involved, it was open to them to have the question raised “in Parliament.”

(Para 509)

As regards the validity of the detentions of the Members of Parliament, that cannot be questioned automatically or on the bare statement by counsel that certain Members of Parliament are illegally detained with some ulterior object. The enforcement of fundamental rights is regulated by Articles 32 and 226 of the Constitution and the suspension of remedies under these articles is also governed by appropriate constitutional provisions.

(Para 511)

Per Chandrachud, J. : – There is no merit in the contention that the constitutional amendment is bad because it was passed when some members of the Parliament were in detention. The legality of the detention orders cannot be canvassed collaterally. And from a practical point of view, the presence of 21 members of the Lok Sabha and 10 members of the Rajya Sabha who were in detention could not have made a difference to the passing of the Amendment.

(Para 696)

(B) Constitution of India. Art. 329-A (4) and (5) as inserted by Constitution (Thirty-ninth Amendment) Act 1975 – Validation of election – Constitutional Validity – (Pre and Arts. 14, 105 (3), 329 (b) and 368) – (Interpretation of Statutes) – (Representation of The People Act (1951), S. 116-A).

Per Majority – (Khanna, Mathew and Chandrachud, JJ.) : – Clause (4) of Article 329-A as introduced by the Constitution 39th Amendment Act of 1975 is unconstitutional.

(Paras 213, 345 and 682)

Per Khanna, J. : – Clause (4) of Article 329-A is liable to be struck down on the ground that it violates the principle of free and fair elections which is an essential postulate of democracy and which in its turn is a part of the basic structure of the Constitution inasmuch as (1) it abolishes the forum without providing for another forum for going into the dispute relating to the validity of the election of the appellant and further prescribes that the said dispute shall not be governed by any election law and that the validity of the said election shall be absolute and not consequently be liable to be assailed, and (2) it extinguishes both the right and the remedy to challenge the validity of the aforesaid election.

(Para 213)

Per Mathew, J. : – Our Constitution, by Article 329 (b) visualizes the resolution of an election dispute on the basis of a petition presented to such authority and in such manner as the appropriate legislature may, by law, provide. The nature of the dispute raised in an election petition is such that it cannot be resolved except by judicial process, namely, by ascertaining the facts relating to the election and applying the preexisting law: when the amending body held that the election of the appellant was valid, it could not have done so except by ascertaining the facts by judicial process and by applying the law. The result of this process would not be the enactment of constitutional law but the passing of a judgement or sentence. The amending body, though possessed of judicial power, had no competence to exercise it, unless it passed a constitutional law enabling it to do so. If, however, the decision of the amending body to hold the election of the appellant valid was the result of the exercise of an ‘irresponsible despotic discretion’ governed solely by what it deemed political necessity or expediency, then, like a bill of attainder, it was a legislative judgement disposing of a particular election dispute and not the enactment of a law re-sulting in an amendment of the Constitution. And, even if the latter process (the exercise of despotic discretion) could be regarded as an amendment of the Constitution, the amendment would damage or destroy an essential feature of democracy as established by the Constitution, namely, the resolution of election dispute by an authority by the exercise of judicial power by ascertaining the adjudicative facts and applying the relevant law for determining the real representative of the people. The decision of the amending body cannot be regarded as an exercise in constituent legislative validation of an election. There can be no legislative validation of an election when there is dispute between the parties

as regards the adjudicative facts; the amending body cannot gather these facts; by employing legislative process; they can be gathered only by judicial process. The amending body must change the law retrospectively so as to make the election valid, if the election was rendered invalid by virtue of any provision of the law actually existing at the time of election: Article 368 does not confer on the amending body the competence to pass any ordinary law whether with or without retrospective effect. Clause (4) expressly excluded the operation of all laws relating to election petition to the election in question. Therefore, the election was held to be valid not by changing the law which rendered it invalid.

(Para 329)

Equality is a multi-coloured concept incapable of a single definition. It is a nation of many shades and connotations. The preamble of the Constitution guarantees equality of status and of opportunity. They are nebulous concepts and it is not sure whether they can provide a solid foundation to rear a basic structure. The types of equality which our democratic republic guarantees are all subsumed under specific articles of the constitution like Articles 14, 15, 16, 17, 25 etc. and there is no other principle of equality which is an essential feature of our democratic polity.

(Para 336)

There is a genuine concept of rule of law and that concept implies equality before the law or equal subjection of all classes to the ordinary law. But, if rule of law is to be a basic structure of the Constitution, one must find specific provisions in the Constitution embodying the constituent elements of the concept. To be a basic structure, it must be a terrestrial concept having its habitate within the four corners of the Constitution. The provisions of the Constitution were enacted with a view to ensure the rule of law even if it is assumed that rule of law is a basic structure, the meaning and the constituent elements of the concept must be gathered from the enacting provisions of the Constitution. The equality aspect of the rule of law and of democratic republicanism is provided in article 14. May be, the other articles referred to do the same duty.

(Para 343)

The concept of equality which is basic to rule of law and that which is regarded as the most fundamental postulate of republicanism are both embodied in Article 14. If according to the majority in *Bharati's case* (AIR 1973 SC 1461) Article 14 does not pertain to basic structure of the Constitution, which is the other principle of equality incorporated in the Constitution which can be a basic structure of the Constitution or an essential feature of democracy or rule of law?

(Para 344)

Per Chandrachud, J. : – Clauses (4) and (5) of Article 329-A are unconstitutional. These provisions are an outright negation of the right of equality conferred by Art. 14, a right which more than any other is a basic

postulate of our Constitution. The provisions are arbitrary and are calculated to damage or destroy the Rule of Law.

(Paras 678, 679, 680, 682)

It is beyond the pale of reasonable controversy that if there be any unamendable features of the Constitution on the score that they form a part of the basic structure of Constitution, they are that : (i) India is a Sovereign Democratic Republic; (ii) Equality of status and opportunity shall be secured to all its citizens; (iii) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion and that (iv) the Nation shall be governed by a Government of laws, not of man.

(Para 665)

It is impossible to subscribe to the view that the Preamble of the Constitution holds the key to its basic structure or that the preamble is too holy to suffer a human touch. Though our Preamble was voted upon and is a part of the Constitution, it is really “a preliminary statement of the reasons” which made passing of the constitution necessary and desirable. The Preamble of our Constitution cannot be regarded as a source of any prohibitions or limitations.

(Para 666)

Since the Constitution, as originally enacted, did not consider that judicial power must intervene in the interests of purity of elections, judicial review cannot be considered to be a part of the basis structure in so far as legislative elections are concerned. The theory of Basic Structure has to be considered in each individual case, not in the abstract, but in the context of the concrete problem. It is not possible, therefore, to accept the contention that Cls. (4) and (5) of Art. 329-A are unconstitutional on the ground that by those provisions, the election of the Prime Minister is placed beyond the purview of Courts.

(Paras 668 and 671)

Equally, there is no substance in the contention that the relevant clauses of the 39th Amendment are in total derogation of ‘Political Justice’ and are accordingly unconstitutional. The concept of political justice of which the Preamble speaks is too vague and nebulous to permit by its yardstick the invalidation of a Constitutional amendment.

(Para 672)

The contention that “Democracy” is an essential feature of the Constitution is unassailable. But the impugned provisions do not destroy the democratic structure of our government. The rule is still the rule of the majority despite the 39th Amendment and no law or amendment of the fundamental instrument has provided for the abrogation of the electoral process.

(Paras 673 and 676)

The 39th Amendment is, however, open to grave objection on other grounds, in so far as clauses (4) and (5) of Article 329-A are concerned. Generality and equality are two indelible characteristics of justice administered according to law.

(Para 678)

It is the common man's sense of Justice which sustains democracies and there is a fear that the 39th Amendment, by its impugned part, may outrage that sense of justice. Different rules may apply to different conditions and classes of men and even a single individual may, by his uniqueness, form a class by himself. But in the absence of a differentia reasonably related to the object of the law, justice must be administered with an even hand to all.

(Para 681)

The Parliament, by clause (4) of Article 329-A, has decided a matter of which the country's Courts were lawfully seized. Neither more nor less. It is true, that retrospective validation is a well-known legislative process which has received the recognition of this Court in tax cases, pre-emption cases, renancy cases and a variety of other matters. But in all of these cases, what the legislature did was to change the law retrospectively so as to remove the reason of disqualification, leaving it to the Courts to apply the amended law to the decision of the particular case. The exercise by the legislature of what is purely and indubitably a judicial function is impossible to sustain in the contexts even of our co-operative federalism which contains no rigid distribution of powers but which provides a system of salutary checks and balances.

(Para 690)

It is contrary to the basic tenets of our Constitution to hold that the Amending Body is an amalgam of all powers – legislative, executive and judicial. “Whatever pleases the emperor has the force of law” is not an article of democratic faith. The basis of our Constitution is a well-planned legal order, the presuppositions of which are accepted by the people as determining the methods by which the functions of the Government will be discharged and the power of the State shall be used.

(Para 691)

Per Ray, C.J. : – When the constituent power exercises powers the constituent power comprises legislative, executive and judicial powers. All powers flow from the constituent power through the Constitution to the various departments or heads. In the hands of the constituent authority there is no demarcation of powers. It is only when the constituent authority defines the authorities or demarcates the areas that separation of power is discussed. The constituent power is independent of the doctrine of separation of powers. The constituent power is sovereign. It is the power which creates the organs and distributes the powers.

(Para 48)

The Constitution permits by amendment exclusion of judicial review of a matter if it is necessary to give effect to the Directive Principles of State

Policy. A similar power may be available when such exclusion is needed in the larger interest of the security of the State. In either case of the exclusion of judicial review does not mean that principles of equality are violated. It only means that the appropriate body making the law satisfied itself and determines conclusively that principles of equality have not been violated. That body conclusively makes classification for the purpose of applying the principles of equality.

(Para 52)

Decisions in election disputes may be made by the legislature itself or may be made by courts or tribunals on behalf of the legislature or may be made by courts and tribunals on their own exercising judicial functions. In cases of disputes as to election, the concept of free and fair election means that disputes are fairly and justly decided. Electoral offences are statutory ones. It is not possible to hold that the concept of free and fair election is a basic structure.

(Para 55)

Clause (4) suffers from these infirmities. First, the forum might be changed but another forum has to be created. If the constituent power became itself the forum to decide the disputes constituent power by repealing the law in relation to election petitions and matters connected therewith did not have any petition to seize upon to deal with the same. Secondly, any decision is to be made in accordance with law. Parliament has power to create law and apply the same. In the present case, the constituent power did not have any law to apply to the case, because the previous law did not apply and no other law was applied by clause (4). The validation of the election in the present case is, therefore, not by applying any law and it, therefore, offends Rule of Law.

(Para 59)

It is true that no express mention is made in our Constitution of vesting the judiciary the Judicial power as is to be found in the American Constitution. But a division of the three main functions of Government is recognised in our Constitution. Judicial power in the sense of the judicial power of the State is vested in the Judiciary. Similarly, the Executive and the Legislature are vested with powers in their spheres. Judicial power has lain in the hands of the Judiciary prior to the Constitution and also since the Constitution. It is not the intention that the powers of the Judiciary should be passed to or be shared by the Executive or the Legislature or that the powers of the Legislature or the Executive should pass to or be shared by the Judiciary.

(Para 60)

The constituent power is sovereign, Law making power is subject to the Constitution. Parliament may create forum to hear election disputes. Parliament may itself hear election disputes. Whichever body will hear election disputes will have to apply norms. Norms are legal standards. There is no discrimination if classification on rational basis is made for

determination of disputes relating to persons holding the office of Prime Minister on the Speaker. The changes effected by the Amendment Acts, 1974 and 1975 apply to all and there is no discrimination. Retrospective legislation is not by itself discrimination. The changes introduced to the 1951 Act apply to all.

(Para 61)

Clause 4 of Article 329-A in the present case in validating the election has passed a declaratory judgement and not a law. The legislative judgement in clause 4 is an exercise of judicial power. The constituent power can exercise judicial power but it has to apply law. The validation of the election is not by applying legal norms. Nor can it be said that the validation of election in Cl4. is by norms set up by the constituent power.

(Paras 62, 63)

Clause 5 in Article 329-A states that so appeal against any order of any court referred to in clause 4 pending, before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975 before the Supreme Court, shall be disposed of in conformity with the provisions of clause 4. The appeal cannot be disposed of in conformity with the provisions of clause 4 inasmuch as the validation of the election cannot rest on clause 4.

(Para 64)

Per Beg. J : – As it is well established that it is the Constitution and not the constituent power which is Supreme in the sense that the Constitutionality of the Constitution cannot be called in question before the Court but the exercise of the constituent power can be, the court has to judge the validity of exercise of the constituent power by testing it on the anvil of constitutional provisions. According to the majority view in Keshvananda's case (AIR 1973 SC 1461), the Court can find the test primarily in the Preamble to the Constitution. The preamble furnishes the Yard-stick to be applied even to constitutional amendments. AIR 1973 sc 1461. Foll.

(Paras 622, 623)

According to Article 329 (b) an election dispute can only be resolved by an election petition before a forum provided by an ordinary enactment. In exercise of its powers under Article 329 (b) The Parliament had enacted the Representation of the People Act (1951). The procedure provided by the Act had the binding force of a constitutionally prescribed procedure. It could not be circumvented unless with reference to cases covered by Article 329-A (4), it had been first repealed. Only after such a repeal could any other forum or procedure be legally adopted. It could not be assumed by reason of Article 105 (3), that the prescribed forum had shifted to Parliament itself, and that Parliament, in exercise of its constituent function, had both legislated and adjudicated.

(Paras 586, 587)

The well-recognised rule of construction of statutes, which must apply to the interpretation of the Constitution as well, is : “*Expressio Unius Est Exclusio Alterius*”, From this is derived the subsidiary rule that an expressly laid down mode of doing something necessarily prohibits the doing of that thing in any other manner. Therefore, what is separately, expressly, and especially provided for by Article 329 (b) must necessarily fall outside the purview of Article 105 (3) on the principle stated above. Moreover, Article 105 (3) contained a temporary provision until other provision was made by Parliament in that behalf. Appropriate provisions were enacted by the Act of 1951 in compliance with Article 329 (b) because that was the proper Article for it. It would be idle to contend that these provisions suddenly lapsed or ceased to exist as soon as parliament took up consideration of the issues and the grounds of the decision on them by the High Court to which reference is made in Article 329-A (4). Again, a purported exercise of power, in enacting Article 329-A (4), would only be a law making power and not any other power which could conceivably fall under Article 105 (3).

(Paras 588, 590)

The Act of 1951, enacted under the provisions of Article 329 (b) of the Constitution, provided a procedure which could not be circumvented. This procedure was certainly applicable until 10-8-1975 when the 39th Amendment received Presidential assent. Rights of appeal under Section 116-A of the Act of 1951 having been invoked by the returned candidate, the Prime Minister as well as by the election petitioner, and the operation of the High Court’s order having been suspended, the position was, in the eyes of law, that the election dispute was continued by a proceeding, exclusively prescribed by Article 329 (b) for the resolution of the dispute, pending in the Supreme Court. Despite the impression created by the terms of the declaration at the end of clause (4) of Article 329-A, the Court cannot assume that Parliament took over the case into its own hands to decide it and to incorporate the result in the form of Article 329-A (4) so that this may take the place of a possible judgement of the Supreme Court. Parliament could not be deemed to be unaware of the bar created by Article 329 (b) and the 1951 Act. Parliament could not therefore be assumed to have withdrawn and then to have decided a particular case in a particular way by applying its own norms. It is presumed to know the law. Ostensibly, Article 329-A (4) is part of an amendment of the Constitution for the purposes found in the Statement of Objects and Reasons. Only the declaration given at the end of it suggests that, in the course of it, the effect upon the case before the Supreme Court was considered and dealt with.

(Paras 600, 604)

If the contention that the 39th Amendment bars the jurisdiction to hear the appeals under Section 116-A of the Act of 1951 on merits is accepted, the total effect would be that justice would appear to be defeated even if, in fact, it is not so as a result of the alleged bar to the Court’s jurisdiction if it were

held to be there. It could not be the intention of Parliament that justice should appear to be defeated.

(Para 629)

It is a well-established canon of interpretation that out of two possible interpretations of a provision, one which prevents it from becoming unconstitutional should be preferred if this is possible – ut res magis valeat quam pereat. It is true that the deeming provision seems to stand in the way of examining the merits of the case even though there is no direct provision taking away court's jurisdiction to consider the merits of the appeals before the Courts. A deeming provision introducing a legal fiction must be confined to the context of it and cannot be given a large effect. In other words the Court should examine the context and the purpose of the legal fiction and confine its effects to these. Therefore the context and the political considerations placed before the Court could be relevant in understanding the real meaning of clause (4) of Article 329-A. (Case law discussed).

(Paras 632 to 634)

If the purpose of the clause (4) of Article 329-A was purely to meet the political needs of the country and was only partly revealed by the policy underlying the Statement of Objects and Reasons it seems possible to contend that it was not intended at all to oust the jurisdiction of the Court. Hence, Article 329-A clause (5) will not so understood, bar the jurisdiction of the Court to hear and decide the appeals when it says that the appeal shall be disposed of in conformity with the provisions of clause (4). On interpretation of clauses (4) and (5) it was held that Article 329-A (4) did not stand in the way of the consideration of the appeals before the Court on merits under the Act of 1951 or the validity of the amendments of the Act.

(Para 637)

It was also observed by his Lordship that he fails to see what danger to the Country could arise or how national interests could be jeopardised by a consideration and a decision by the Supreme Court of such a good case as the Prime Minister of this Country had on facts and law.

(Para 632)

(C) Representation of the People Act (1951), Sections 123 (7), 79 (b) and 100 (1) (b) – Corrupt practice – Obtaining or procuring assistance from Government servant – Corrupt practice contemplated by S. 123 (7) cannot be committed BY any person before there is a 'candidate' for an election – 'Candidate', meaning of Election Petition No. 5 of 1971. D/-12-6-1975 (All), Reversed.

Per Khanna. J. : – There is nothing to indicate that the word “candidate” in clause (7) of Section 123 has been used merely to identify the person who has been or would be subsequently nominated as a candidate. A definition clause in a statute is a legislative device with a view to avoid making different provisions of the statute to be cumbersome. Where a word is defined in the statute and that word is used in a provision to which that definition is

applicable the effect is that wherever the word defined is used in that provision, the definition of the word gets substituted. Reading the word “candidate” in Section 123 (7) in the sense in which it has been defined as a result of the amendment made by Act 40 of 1975, the only reasonable inference is that the person referred to as a candidate in that clause should be a person who has been or claims to have been duly nominated as a candidate at an election and not one who is yet to be nominated.

(Para 218)

Per Mathew, J. : – There can be no doubt that Section 100 (1) (b), when it speaks of commission of corrupt practice by a returned candidate, it can only mean commission of corrupt practice by a candidate before he became a returned candidate. Any other reading of the subsection would be absurd. But there is no such compulsion to read the word ‘candidate’ in Section 123 (7) in the same manner. It is the context that gives colour to a word. A word is not crystal clear, Section 79 of the Act indicates that the definitions therein have to be read subject to the context. The legislature must fix some point of time before which a person cannot be a ‘candidate’ in an election and a wide latitude must be given to the legislature in fixing that point.

(Paras 384, 385)

In the instant case it was held that the returned candidate became candidate only on the date of filing of her nomination paper.

(Para 387)

Per Beg. J. : – The corrupt practice defined in Section 123 (7) could not be committed by any person before there was a ‘candidate’ for an election.

(Para 409)

A holding out as a ‘candidate’ within the meaning of Section 79 (b) must be by declaration of the candidate to an elector or to the electorate in a particular constituency and not to others. There is a gap between intent and action which has to be filled by proof of either statements or of conduct which amount to unequivocal declarations made to voters in the constituency in order to amount to a “holding out” to them. Absence of proof of a desire to change the constituency is not proof of a positive “holding out”. What is relevant is not what other people think or say about what a possible candidate would do, but what the candidate concerned himself has said or done, so as to amount to ‘a holding out’ as a candidate by the candidate from a particular constituency. (Case law discussed).

(Paras 449, 452, 457)

In any case, if there was any uncertainty at all in the law, it has been removed by amendment of Section 79 (b) by Section 7 of Election Laws (Amendment) Act No. 40 of 1975. According to the amended definition ‘candidate’ means a person who has been or claims to have been duly nominated as a candidate at any election.

(Para 458)

In the instant case the respondent to the election petition, the Prime Minister filed her nomination from the Rae Bareilly constituency on 1-2-1971. One K who was a Central Government servant and a Gazetted officer of the rank of an Under Secretary was deputed to serve in the Prime Minister's Secreariat as an officer on special duty. As he had political ambitions he, after expressing his desire to the Prime Minister to resign from his post submitted his resignation on 13-1-1971 to one H who was incharge of the Prime Minister's Secretariat. H relying upon R 3 of the Government of India Transaction of Business Rules orally accepted the resignation as the head of the Prime Minister's Secretariat. His resignation tendered on 13-1-1971 was accepted by the President of India on 25-1-1971 with effect from 14-1-1971 by means of a notification published on 6-2-71. The respondent appointed K her election agent on 1-2-71 K did not work in the Prime Minister Secretariat after 13-1-71 and he drew no salary as government servant after that date. It was alleged that K made certain speeches on different dates between 7-1-71 to 25-1-71 supporting the respondent's candidature in Rae Bareilly constituency. There was no evidence whatsoever from any source that K did so either after having been requested by the respondent to do so or with her knowledge of consent or approval. There was also no evidence that K was constituted a sort of general de factor agent of the Prime Minister even before he became her election agent on 1-2-71. The uncontroverted evidence was that K went to Rae Bareilly voluntarily. Despite the large number of speeches and statements the respondent might have made throughout the country in this period not a single statement made by her could even be cited in which she had said before 1-2-1971 that she was standing as a candidate from the Rae Bareilly constituency.

Held that no corrupt practice could be said to have been committed by the respondent vicariously due to anything done by K because he acted voluntarily he was not a Government servant after 14-1-1971 and the respondent was not a candidate before 1-2-1971 i.e. the date of filing of her nomination. She became a candidate only on 1-2-1971. Ele Petn. No. 5 of 1971. D/- 12-6-1975 (All) Reversed.

(Paras 444, 445)

Neither the Government nor the Government servant is in a worse position than an ordinary master or servant on a matter governed by contract. In fact, Article 310 makes it clear that in such a case, the tenure of office of a Central Government servant is "during the pleasure of the President". In the instant case the President's pleasure was contained in the notification dated 25-1-1971 showing that the President had accepted the resignation of K with effect from the forenoon of 14-1-1971. And, this is what K himself wanted. Hence, there is no difficulty at all in accepting the correctness of resignation effective from the date which both parties to the contact on patent facts had agreed to No rights of an innocent 3rd party were either involved or affected by such an acceptance of the resignation from the date immediately after the date on which k had tendered his resignation. That was also the date after which he had ceased to work or draw his salary.

(Para 435)

As the assistance which K may have rendered was entirely voluntary without any request or solicitation from the respondent it did not make any difference to the result even if K had continued to be a Government servant upto 25-1-1971.

(Para 428)

The answer of the Prime Minister at the Press Conference on 29-12-1970 or the contents of her speech in Comibatore in early January, 1971 or even a declaration or announcement of the All India congress Committee on 29-1-1971 assuming that there was such an announcement could not mean that the Prime Minister had herself finally decided to contest from the Rae Bareily constituency and had held herself out as a candidate for this constituency. This holding out had to take place by the Prime Minister herself and not by the Congress Committee.

(Para 451)

(D) Representation of the People Act (1951). Section 123 (3) – Corrupt practice – Use of religious symbol – Cow and Calf is not a religious symbol.

Per Ray C. J : – It is impossible to hold that because one party has not been given the symbol of cow, calf and milk-maid, therefore, the symbol of cow and calf becomes a religious symbol.

(Para 156)

Per Beg. J. : – A cow is not a religious symbol. The use of pictures of this excellent and useful animal is so frequently made today for commercial purposes or purposes other than religious that the representation of a cow and calf cannot, except in some special and purely religious contexts be held to have a religious significance. In addition the proviso inserted at the end of Section 123 (3) by Act 40 of 1975 has made the position on this point very clear.

(Paras 484, 486)

(E) Representation of the People Act (1951), Section 123 (7) proviso (as inserted by Act 40 of 1975) – Official duty – Meaning.

Per Ray. C.J. : – Official duty will be a duty in law. Official duty will be duty under administrative directions of the Executive. Official duty will be for security, law and order, and matters in aid of public purpose. These duties will be in connection with election. To illustrate, Section 197 of the Criminal Procedure Code speaks of official duty.

(Para 149)

Per Khanna J. : – There is nothing in the above proviso to confine the world “official duty” to duty imposed by statute. Official duty would include not merely duties imposed by statutes but also those which have to be carried out in pursuance of administrative instructions.

(Para 223)

(F) Representation of the People (Amendment Act 58 of 1974), Section 2 – Elections Laws (Amendment) Act 140 of 1975), Sections 7, 8 and 10 – Validity – Provisions of amending Acts held valid, (Constitution of India, Articles 31-B, 245 and 246)

Per Rav. C.J. : –

The constitutional validity of a statute depends entirely on the existence of the legislative power and the express provision in Article 13. Apart from the limitation the legislature is not subject to any other prohibition. The amendments made to the 1951 Act by the amendment Acts, 1974 and 1975 are to give effect to certain views expressed by the Supreme Court in preference to certain views departed from or otherwise to clarify the original intention. It is within the powers of Parliament to frame laws with regard to elections. Parliament has power to enumerate and define election expenses. Parliament has power to lay down limits on election expenses. Parliament has power to state whether certain expenses can be included or may be excluded from election expenses. Parliament has power to adopt conclusive proof with regard to matters of appointment, resignation or termination of service. Parliament has power to state what can be considered to be office of profit. Parliament has power to state as to what will and what will not constitute corrupt practice. Parliament has power to enact what will be the ground for disqualification. Parliament has power to define "candidate." Parliament has power to state what symbols will be allotted to candidates at election. These are all legislative policies.

(Para 137)

The conclusive evidence or conclusive proof clause is an accepted legislative measure. Similarly, given retrospective effect to legislative amendment is accepted to be valid exercise of legislative power.

(Para 138)

The rendering of a judgement ineffective by changing the basis by legislative enactment is not encroachment of judicial power because the legislation is within the competence of the legislature.

(Para 138)

The contention that the amendment of the definition of "candidate" has damaged or destroyed basic structure is untenable. There is no basic structure or basic feature or basic framework with regard to the time when under the Election Laws a person is a candidate at the election. The word "candidate" in relation to various electoral offences shows that he must be a candidate at the time of the offence. Time is necessary for fixing the offences.

(Para 141)

There is no vice of delegation in the statutes.

(Para 151)

The contention that the Amendment Acts of 1974 and 1975 are subject to basic features or basic structure or basic frame-work fails on two grounds.

First, legislative measures are not subject to the theory of basic features or basic structure or basic framework. Second, the majority view in Kesavananda Bharati's case, (AIR 1973 SC 1461) is that the 29th Amendment which put the two statutes in the Ninth Schedule and Article 31-B is not open to challenge on the ground of either damage to or destruction of basic features, basic structure or basic framework or on the ground of violation of fundamental rights.

(Para 153)

Per Khanna J. – The provisions of Sections 7, 8 and 10 of Act 40 of 1975 are valid and do not suffer from any constitutional infirmity.

(Para 239)

In the case of provisions of the amended law are abused. The proper course in such an event would be to strike down the action taken under the amended law and not the law itself.

(Para 233)

Per Mathew. J. – Representation of the People (Amendment) Act (1974) and Election Laws (Amendment) Act (1975) are valid.

(Para 363)

Articles 245 and 246 give the power and also provide the limitation upon the power of these organs to pass laws. It is only the specific provisions enacted in the Constitution which could operate as limitation upon that power. The preamble though a part of the Constitution, is neither a source of power nor a limitation upon that power.

(Para 347)

An ordinary law cannot be declared invalid for the reason that it goes against the vague concepts of democracy, justice political economic and social; liberty of thought, belief and expression, or equality of status and opportunity, or some invisible radiation from them.

(Paras 348 and 349)

The Constitution has entrusted the task of framing the law relating to election to Parliament, and, subject to the law made by Parliament to the State Legislatures. An important branch of the law which sounds in the area of free and fair election, namely, delimitation of constituencies and allotment of seats to such constituencies is put beyond the cognizance of court. When it is found that the task of writing the legislation on the subject has been committed to Parliament and State Legislatures by the Constitution, it is not competent for a court to test its validity on the basis of some vague norms of free and fair election.

(Para 351)

The doctrine of the 'spirit' of the Constitution is a slippery slope the courts are not at liberty to declare an act void, because, in their opinion, it is

opposed to the spirit of democracy or republicanism supposed to pervade the Constitution but not expressed in word.

(Para 352)

Even though an Act is put in the Ninth Schedule by a constitutional amendment its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to basic structure. But the Act cannot be attacked for a collateral reason, namely the provisions of the Act have destroyed or damaged some other basic structure says, for instance, democracy or separation of powers.

(Para 355)

So if it be assumed that these election laws amendment Acts even after they were put in the Ninth Schedule by constitutional amendment remained open to attack for contravention, if any, of the fundamental rights these Acts would not be open to attack on the ground that their provisions destroyed or damaged an essential feature of democracy, namely free and fair election. The Acts remain part of the ordinary law of the land. They did not attain the status of constitutional law merely because they were put in the Ninth Schedule.

(Para 360)

Retrospective operation of any law would cause hardship to some persons or other. This inevitable; but that is no reason to deny to the legislature the power to enact retrospective law. In the case of a law which has retrospective effect, the theory is that the law was actually in operation in the past and if the provision of the Acts and general in their operation, there can be no challenge to them on the ground of discrimination or unfairness merely because of their retrospective effect.

(Para 362)

Per Beg. J. – The amendments made by Section 7 and 8 read with Section 10 of the Act 40 of 1975 are valid. They cannot be challenged on ground of misuse of power by those who hold the reins of Government the presumption is that a bona fide use will be made of this power lodged in such responsible hands. If such powers are even exercised in a mala fide manner. It is the particular exercise of the power that can be questioned and struck down. The provision does not become invalid merely because it could be abused as practically any provision of law can be by those who may want to do so.

(Para 436)

The possibility of misuse of a power given by a statute cannot invalidate the provisions conferring the power. The occasion to complain can only arise when there is such alleged misuse even the possibility of such misuse of this power by so responsible an official as the Election Commissioner cannot be easily conceived of. (Case Law referred)

(Para 485)

The amendment made by the Representation of the People (Amendment) Act 58 of 1974 by adding Explanation (1) to Section 77 (1) could be justified as merely an attempt to restore the law as it had been understood to be previous to decision in AIR 1975 SC 308. (Per Beg. J.)

(Para 496)

Per Chandrachud. J. – The argument regarding the invalidity of the Representation of the People (Amendment) Act, 58 of 1974, and of the Election Laws (Amendment) Act, 1975 has no substance.

(Para 692)

It does not logically follow from the majority judgement in AIR 1973 SC 1461 that ordinary legislation must also answer the same test as a constitutional amendment. Ordinary laws have to answer two tests for their validity : (1) The law must be within the legislative competence of the legislature as defined and specified in Chapter I. Part XI of the Constitution and (2) it must not offend against the provisions of Article 13 (1) and (2) of the Constitution. ‘Basic Structure’, by the majority judgment, is not a part of the fundamental rights nor indeed a provision of the Constitution. The theory of basic structure is wholly out of place in matters relating to the validity of ordinary laws made under the Constitution.

(Para 692)

It is not paradoxical that the higher power should be subject to a limitation which will not operate upon a lower power. The two powers, though species of the same genus, operate in different fields and are therefore subject to different limitations.

(Para 693)

No objection can accordingly be taken to the constitutional validity of the two impugned Acts on the ground that they damage or destroy the basic structure. The power to pass these Acts could be exercised retrospectively as much as prospectively.

(Para 694)

(G) Representation of the People Act (1951) Ss. 77 83 (1) (b) and 123 (6) – Corrupt practice – Election expenses – Expenditure incurred or authorised – Test of – Allegations that the election expenses exceeded the limit of authorised expenditure – Evidence and proof.

Per Ray. C.J. : – Allegations that election expenses are incurred or authorised by a candidate or his agent will have to be proved. Authorisation means acceptance of the responsibility. Authorisation must precede the expenditure. Authorisation means reimbursement by the candidate or election agent of the person who has been authorised. by the candidate or by the election agent of the candidate to spend or incur. In order to constitute authorisation the effect must be that the authority must carry with it the right of reimbursement.

(Para 121)

Per Beg. J.:— The test of authorisation would naturally be the creation of a liability to reimburse whoever spends the money and not necessarily the provision of money before-hand by the candidate on whose behalf it is spent. Nevertheless, the authorisation has to be set up and proved.

(Para 497)

Voluntary expenditure by friends, relations, or sympathisers and expenditure incurred by a candidate's party without any request or authorisation by the candidate has never been deemed to be expenditure by the candidate himself. The law requires proof of circumstances from which at least implied authorisation can be inferred. It is not enough that some advantage accrued or expenditure was incurred within the knowledge of the candidate. (Case law discussed).

(Paras 498, 504)

In the instant case there was no case or evidence that the Congress Party was the agent, express or implied, of the respondent, the returned candidate, or acting as the channel through which any money whatsoever was spent by the respondent. The petition could not possibly succeed on the ground of exceeding election expenses.

(Para 504)

(H) Representation of the People Act (1951), S. 77 – Expenditure incurred or authorised by political party – Candidate is not required to disavow or denounce expenditure. AIR 1975 SC 308 held no longer good law in view of legislative changes.

Per Ray. C. J. : – Expenditure incurred by a political party in connection with the election of the candidates of the party is not a part of the election expenses of the candidate. Similarly participation in the programme of activity organised by a political party will not fall within the election expenses of the candidate of the party. A candidate is not required to disavow or denounce the expenditure incurred or authorised by the political party because the expenditure is neither incurred nor authorised by the candidate. One can disavow what would be ascribed to be incurred or authorised by one. In the case of expenses of a political party there is no question of disavowing expenditure incurred or authorised by the political party. AIR 1975 SC 308 held no longer good law in view of legislative changes.

(Paras 113, 119)

(I) Representation of the People Act (1951), S. 123 (7) – Corrupt practice – Obtaining or procuring assistance from Government servant – Evidence and Proof – Standard – Proof of means rea is necessary, Ele. Petn. No. 5 of 1971, D/- 12-6-1975). (All) reversed Observations to the contrary in AIR 1959 SC 244, Dissented from.

Per Beg. J. – Allegations of corrupt practice in the course of an election must be judged by the same standards as a criminal charge. No rule of evidence in judging guilt on a criminal charge, is more firmly rooted than that no charge, resting on circumstantial evidence, could be held to be proved

beyond reasonable doubt unless the chain of circumstances is so complete and so connected with the charge that it leaves no other reasonable hypothesis open for the Court to adopt except that the offender had committed the offence alleged. AIR 1975 SC 1417 Foll.

(Para 414)

The logical consequence of placing a charge of corrupt practice on the same footing as a criminal charge is obligation to interpret the words which define it strictly and narrowly. Indeed, any natural and ordinary interpretation on the words “obtaining or procuring or abetting or attempting must carry with it the imperative requirement that the candidate concerned or his agent must have intentionally done an act which has the effect contemplated by Section 123 (7). In other words a “means rea” or a guilty mind as well as an “actus reus” or a wrongful act must concur to produce the result contemplated by law. Ele. Petn. No. 5 of 1971. D/- 12-6-1975 (All), Reversed. (Case law discussed). Observations to the contrary in AIR 1959 SC 244. Dissented from

(On the facts of the case it was held that there could not be any means rea on the part of the returned candidate).

(Paras 429, 472)

(J) Representation of the People Act (1951), S. 123 (7) – Corrupt practice – Obtaining or procuring assistance from Government servant – “Obtaining or procuring or abetting or attempting to obtain or procure” – What amounts to Ele. Petn. No. 5 of 1971, D/- 12-6-1975 (All) Reversed.

Per Beg. J. : – “The obtaining or procuring or abetting or attempting to obtain or procure” had to take place either by a candidate or by his agent or by somebody “with the consent of the candidate or his election agent.” Until the candidate had appointed an election agent the action of any other person could not constitute him automatically an agent so that he may, by doing something voluntarily succeed in making the candidate vicariously liable for his own actions whether he has or was not a gazetted officer at the time when he committed the act complained of.

(Para 404)

It is the act of solicitation for the aid of the officials mentioned in Section 123 (7), whether successful or not, and not the mere fact that certain advantages flow quite naturally and conventionally from the occupation of an office, without any solicitation, or the mere fact that some assistance is voluntarily given by some one to an election campaign, which penalised by the provision.

(Para 408)

One the language of Section 123 (7) a liability is not created by merely not rejecting voluntarily given aid. The candidate may not often be aware of the voluntarily given assistance so as to be able to reject it. A case of consent

which can be legally set up is only one of the consenting to active obtaining or procurement by an agent or by some other person who becomes, for the purposes of the specific aid given and consented to ordinarily prior to obtaining it as good as an agent employed by the candidate.

(Para 406)

Help rendered voluntarily by a Government servant without any attempt by the candidate concurred to 'obtain' or 'procure' does not constitute a 'corrupt practice' of the candidate whatever be the impropriety of it for the Government servant himself. A Government servant has a 'private personality' too. Ele. Petn. No. 5 of 1971, D/- 12-6-1975 (All). Reversed.

(Para 443)

(K) Representation of the People Act (1951), S. 79 (b) (as amended by Act 40 of 1975) – 'Candidate' – Amendment of definition retrospectively – Validity – Amendment is within powers of Parliament to legislate – (Constitution of India, Art. 327) – (Election Laws (Amendment) Act (40 of 1975), Ss. 7 and 10).

Per Beg. J. : – The amendment of Section 79 (b) by Section 7 read with Section 10 of the Election laws (Amendment) Act 40 of 1975 is within the unquestionable powers of Parliament to legislate, either prospectively or retrospectively with regard to election matters. It can not be interpreted as an attack on free and fair elections. Courts cannot take upon themselves the task of laying down what electoral laws should be. The law makers, assembled in Parliament, are presumed to know and understand their business of making laws for the welfare and well being of the mass people of this country, for the protection of democracy and of free and fair election, in accordance with the needs of the democratic process, better than Courts know and understand these. It is only where a piece of legislation clearly infringes a constitutional provision or indubitably overrides a constitutional purpose or mandate or prohibition that Courts can interfere.

(Para 462)

(L) Representation of the People Act (1951), S. 123 (7) – Corrupt practice – Arrangements made by State Government for rostrums and loudspeakers in connection with election tour of the Prime Minister, the returned candidate, held was not a corrupt practice within S. 123 (7). Ele. Petn. No. 5 of 1971, D/- 12-6-1975 (All), Reversed.

Per Beg. J. : – The State Government had acted in compliance with the instructions issued by the comptroller and Auditor General of India in 1958 read with Rule 71 (6) of what is known as the Blue Book.

(Para 463)

It would be extending the scope of Section 123 (7) too wide to hold that the facilities automatically provided by the State to the Prime Minister, by virtue of his or her office, are also struck by a provision directed against solicitation of official aid and assistance by candidates.

(Para 468)

(M) Representation of the People Act (1951), S. 123 (7), Proviso (as inserted by Act 40 of 1975) – Validity – Amendment not changing the law but merely clarifying the State of law as it really was even before the amendment – Validity of S. 123 (7) as it existed before amendment not challenged – There could be no challenge to the validity of the amendment – (Per Beg. J.) – (Election Laws (Amendment) Act (40 of 1975), S. 7).

(Para 476)

(N) Election Laws (Amendment) Act (40 of 1975), Sec. 7 – Validity of Sec. 7 inserting a proviso at the end of S. 123 (7) of representation of the people Act – Amendment relating to certain facilities to prime Minister by virtue of her office by Government Officials – Act 40 of 1975 placed in protected 9th Schedule of the Constitution – Amendment cannot be challenged on ground of violation of Article 14 of the Constitution – (Constitution of India, Arts. 14 and 31-B).

Per Beg. J. : – Even if an attack on the ground of a violation of Article 14 were open today, the occupation of such a high and important office as that of the Prime Minister of this country, with all its great hazards and trails, would provide a rational basis for reasonable classification in respect of advantages possessed by a Prime Minister as a candidate at an election due to arrangements made necessary by considerations of safety and protection of the life and person of the Prime Minister. To treat unequally situated and circumstanced person as though they were equals in the eyes of law for all purposes is not really to satisfy the requirements of the equality contemplated by the Constitution.

(Paras 477, 479)

(O) Representation of the People Act (1951), Ss. 83 (1) (b) and 123 – Election petition – Allegations of corrupt practice – Insufficient particulars of corrupt practice – Pleadings and evidence – Rule as to – No amount of evidence can be looked into on a case not really set up. (per Beg. J.)

(Paras 440, 493 and 494)

(P) Evidence Act (1872), Section 114, Illus. (g) – Non - production of available evidence – Presumption as to adverse inference – such presumption is always optional and one of fact depending upon the whole set of facts – It is not obligatory. (Per Beg. J.)

(Para 505)

(Q) Interpretation of Statutes – Provision widely worded – Rule of Construction.

Per Khanna J. : – If a clause of a Constitution or statutory provision is widely worded the width of its ambit cannot be circumscribed by taking into account the facts of an individual case to which it applies.

(Para 204)

(R) Representation of the People Act (1951), Ss. 123 (5) and (6) – Corrupt practice – Use of vehicles.

Per Khanna J :. – It is no doubt true that by using a vehicle for the furtherance of the prospects of candidates in more than one constituency one should not be allowed to circumvent the salutary provisions of the R.P. Act in this respect. To prevent such circumvention, it is essential that evidence should be led to show as to what was the extent of the user of the vehicle in the constituency concerned.

(Para 243)

(S) Constitution of India, Art. 368 – ‘Constitution power’ of Parliament – Supremacy – It is the constitution and not the constituent power which is supreme.

Per Beg J. : – The theory advanced that the ‘Constituent power’ is a power of a kind which is above the constitution itself cannot be accepted. If this theory is accepted it would make it unnecessary to have a constitution beyond one consisting of a single sentence laying down that every kind of power is vested in the constituent bodies which may by means of a single consolidated order or declaration of law, exercise any or all of them themselves whenever they please whether such powers be executive, legislative, or judicial. Both the supremacy of the constitution and separation of powers are parts of the basic structure of the constitution. AIR 1973 SC 1461, Foll.

(Para 523)

If “constituent power”. by itself is so transcendental and exceptional as to be above the provisions of the Constitution itself it should not logically speaking be bound even by the procedure of amendment prescribed by Article 368 (2).

(Para 524)

The words ‘constituent power’ were advisedly used in Art 368 (1) (as introduced by the Constitution 24th Amendment Act) so as to clarify the position and not to put in or to include anything beyond constitution making power in Article 368.

(Para 576)

The “constituent power” is still bound by the exclusively prescribed procedure to “amend by way of addition, variation, or repeal” any provision of the Constitution. It is entirely a law making procedure elaborately set out in clause (2). The absence of any quasi-judicial procedure, from the comprehensively framed procedural provisions of Art. 368, seems extremely significant. It indicates that it was the clear intention of Constitution makers that no judicial or quasi-judicial function could be performed by parliament whilst operating in the special constituent field of law making. An omission

to provide any quasi-judicial procedure in Article 368 which apparently, furnishes a self-contained code, means that no such power was meant to be included here at all Proper exercise of judicial power is in separable from appropriate procedure.

(Para 577)

The Constitution undoubtedly specifically vests “judicial power” only in the Supreme Court and in the High Courts and not in any other bodies or authorities whether executive or legislative, functioning under the Constitution.

(Para 553)

The claim therefore that an amalgam or some undifferentiated residue of inherent power incapable of precise definition and including judicial power vests, in Parliament in its role as a constituent authority, cannot be substantiated by a reference to any Article of the Constitution whatsoever, whether substantive or procedural. It cannot be said that because the constituent power necessarily carries with it the power to constitute judicial authorities, it must also, by implication mean that the Parliament, acting in its constituent capacity, can exercise the judicial power itself directly without evesting it in itself first by an amendment of the Constitution.

(Para 554)

The term “sovereign” is only used in the preamble of our Constitution. The Constitution is a document recording an act of entrustment and conveyance by the people of India the political sovereign of legal authority to act on its behalf to a “Sovereign Democratic Republic”. The expression “this Constitution” in the preamble has a basic structure comprising the three organs of the Republic: the Executive, the Legislature and the Judiciary. It is through each of these organ that the Sovereign will of the people has to operate and manifest itself and not through only one of them. Neither of these three separate organs of the Republic can take over the function assigned to the other. This is the basic structure or scheme of the system of Government of the Republic laid down in this constitution whose identity cannot according the majority view in Kesvandanda’s (AIR 1973 SC 1461) be changed even resorting to Article 368.

(Paras 555)

The republic is controlled and directed by the constitution to proceed to wards certain destinations and for certain purposes only. The Power to change even the direction and purposes is itself divided in the sense that a proposed change if challenged must be shown to have the sanction of all the three organs of the Republic each applying its own methods and principles and procedure for testing the correctness or validity of the measure. If the judicial power operates like a break or a veto, it is not one which can be controlled by any advice or direction to the judiciary as is the case in totalitarian regime. In our system which is democratic its exercise is left to the judicial conscience of each individual judge. This is also a basic and distinguishing feature of Democracy. AIR 1973 SC 1461, Foll.

(Para 557 and 558)

Implied limitations of “a basic structure”, operating from even outside the language of Art 368 as it stood before the 24th amendment, restrict its scope. These limitations must however, be related to provisions of the Constitution. AIR 1973 SC 1461. Followed.

(Para 575)

(T) Constitution of India, Art 368 – Fundamental Rights – whether part of basic structure of Constitution.

Per Khanna, J. : – It was pointed out that no distinction was made by his Lordship in AIR 1973 SC 1461 so far as the ambit and scope of the power of amendment is concerned between a provision relating to fundamental rights and provisions dealing with matters other than fundamental rights. The limitation inherent in the word “amendment” according to which it is not permissible by amendment of the Constitution to change the basic structure of the Constitution was to operate equally on articles pertaining to fundamental rights as on other articles not pertaining to those rights. (Observations of Khanna. J. in AIR 1973 SC 1461, Explained).

(Paras 251, 252)

Cases	Referred :	Chronological	Paras
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AIR 1975	SC 1417		414
AIR 1974	SC 396	(1974) 2 SCR 530	607
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			186,229,
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	117		
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(1968)	36 Ele LR 327 (All)		483
(1968)	37 Ele LR 67 (All)		483
(1968)	37 Ele LR 137 (All)		483
(1968)	37 Ele LR 176 (Madh. Pra)		483
(1968)	39 Ele LR 363 (All)		483
(1968)	39 Ele LR 463 (Raj.)		483
(1968) (SC)	40 Ele LR 125	1969 DEC	441
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AIR 1967	SC 1427	(1967) 2 SCR 703	340
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AIR 1962	Punj 129	23 Ele LR 92	443
(1962)	7 L Ed 2 d 663	369 US 186	29, 630
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AIR 1954	SC 520	(1955) 1 SCR 267	273
AIR 1954	SC 587	10 Ele LR 103	412
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(1953)	4 Ele Lr 283	(Ele Tri Vellore)	448
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(1869)	1 O'M & H 295	21 LT 306	144
(1863)	14 CBNS 180	143 ER 414	566
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(1842)	4 Moo PC 63	13 ER 225	594
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JUDGMENT

Present:- A.N. Ray, C.J., H.R. Khanna, K.K. Mathew, M.H. Beg, and Y.V. Chandrachud, JJ.

M/s. A. K. Sen, J. N. Kaushal, D.P. Singh Sr. Advocates (M/s. J.B. Dadachanji. R.H. Debar, Madun Gujadhur. S.C. Agarwal, Yogeshwar Prasad, H.K.L. Bhagat, Sudhir Bera and K.P. Bhandri and Mrs. Anjali K. Verma Advocates with them). for Appellant.

Mr. Shanti Bhushan, Sr. Advocate (M/s. J.P. Goyal, R.C. Dvivedi, R.C. Srivastava, Pranab Chatterjee, S.S. Khanduja, E.C. Agarwala, C.K. Ratnaparkhi, M.C. Gupta, T. N. Porwar, U.N. R. Rao, S.K. Garg, B. Soloman, K.C. Dua Raghunath Singh and Sripal Singh Advocates with him). for Respondent No. 1.

Mr. Niren De. Attorney General for India. Mr. Lal Narain Sinha, Solicitor General for India and Dr. V.A. Sayid Mohammad, Senior Advocates (M/s. R. N. Sachthey, P.P. Rao, Miss Sumitra Chkravarty and Mr. S.P. Nayar Advocate with them) for the Attorney General for India).

Judgments of the Court were delivered by **RAY, C.J. :-**

In Civil Appeal No. 887 of 1975 the appellant is Indira Nehru Gandhi and the respondent is Raj Narain. Civil Appeal No. 909 of 1975 is the cross objection of the respondent. On 14 July, 1975 it was directed that both the appeals would be heard together. The appeal arise out of the judgment of the High Court of Allahabad dated 12 June, 1975. The High Court held that the appellant held herself out as a candidate from 29 December, 1970 and was guilty of having committed corrupt practice by having obtained the assistance of Gazetted Officers in furtherance of her election prospects. The High Court

further found the appellant guilty of corrupt practice committed under Section 123 (7) of the Representation of the People Act, 1951 hereinafter referred to as the 1951 Act by having obtained the assistance of Yashpal Kapur a Gazetted Officer for the furtherance of her election prospects. The High Court held the appellant to be disqualified for a period of six years from the date of the order as provided in Section 8 (a) of the 1951 Act. The High Court awarded costs of the election petition to the respondent.

2. It should be stated here that this judgment disposes of both the appeals. Under directions of this Court the original record of the High Court was called for. The appeal filed by the respondent with regard to Issues Nos. 2, 4, 6, 7 and 9 forms the subject-matter of cross objections in Civil Appeal No. 909 of 1975. The cross-objections are the same which form grounds of appeal filed by the respondent in the High Court at Allahabad, against an order of dismissal of Civil Misc. Writ No. 3761 of 1975 filed in the High Court at Allahabad.

3. The Constitution (Thirty-ninth Amendment) Act 1975 contains three principal features. First, Article 71 has been substituted by a new Article 71. The new Article 71 states that subject to the provisions of the Constitution, Parliament may by law regulate any matter relating to or connected with the election of a President or Vice-President including the grounds on which such election may be questioned.

4. The second feature is insertion of Article 329-A in the Constitution. Clause 4 of Article 329-A is challenged in the present appeals. There are six clauses in Art. 329-A.

5. The first clause states that subject to the provisions of Chapter II of Part V (except sub-clause (e) of clause (1) of Art. 102) no election to either House of Parliament of a person who holds the office of Prime Minister at the time of such election or is appointed as Prime Minister after such election; and to the House of the People of a person who holds the office of Speaker of that House at the time of such election or who is chosen as the Speaker for that House after such election shall be called in question, except before such authority (not being any such authority as is referred to in clause (b) of Article 329) or body and in such manner as may be provided for by or under any law made by Parliament and any such law may provide for all other matters relating to doubts and dispute in relation to such election including the grounds on which such election may be questioned.

6. Under the second clause the validity of any such law as is referred to in clause (1) and the decision of any authority or body under such law shall not be called in question in any court.

7. The third clause states that where any person is appointed as Prime Minister or as the case may be chosen to the office of the Speaker of the House of the People while an election petition referred to in Art 329 (b) in respect of his election to either House of Parliament or as the case may be to the House of the People is pending such election petition shall abate upon such person being appointed as Prime Minister or as the case may be being chosen to the office of the Speaker of the House of the People, but such

election may be called in question under any such law as is referred to in clause (1).

8. The fourth clause which directly concerns the present appeals states that no law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975 in so far as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election of any such person as is referred to in clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void under any such law and notwithstanding any order made by any court before such commencement declaring such election to be void such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.

9. The fifth clause states that any appeal or cross appeal against any such order of any court as is referred to in clause (4) pending immediately before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, before the Supreme Court shall be disposed of in conformity with the provisions of clause (4).

10. The sixth clause states that the provisions of this Article shall have effect notwithstanding any thing contained in the Constitution.

11. The third feature in the Constitution (Thirty-ninth Amendment) Act is that in the Ninth Schedule to the Constitution after Entry 86 and before the Explanation several Entries Nos. 87 to 124 inclusive are inserted. The Representation of the People Act, 1951, the Representation of the People (Amendment) Act, 1974 and the Election Laws (Amendment) Act, 1975 are mentioned in Entry 87.

12. The respondent contends that the Representation of the People (Amendment) Act, 1974 and the Election Laws (Amendment) Act 1975 referred to as the Amendment Acts 1974 and 1975 do not enjoy constitutional immunity because these Acts destroy or damage basic structure or basic features.

13. In view of the challenge by the respondent to the constitutional validity of the Amendment Acts, 1974 and 1975 notice was given to the Attorney General.

14. The appeals were to be heard on 11 August, 1975. In view of the Constitution (Thirty-ninth Amendment) Act, 1975 which came into existence on 10 August, 1975 the hearing was adjourned till 25 August, 1975.

15. The constitutional validity of clause (4) of Article 329-A falls for consideration. Clause (4) of Article 329-A is challenged on two grounds. First, it destroys or damages the basic features or basic structure of the Constitution. Reliance is placed in support of the contention on the majority view of 7 learned Judges in *Kesavananda Bharati Sripadanagalvaru v. State of Kerala*, 1973 Sup SCR 1 - (AIR 1973 Sc 1461).

16. It should be stated here that the hearing has proceeded on the assumption that it is not necessary to challenge the majority view in Kesavananda Bharati's case (AIR 1973 SC 1461). The contentions of the respondent are these : First, under Article 368 only general principles governing the organs of the State and the basic principles can be laid down. An amendment of the Constitution does not contemplate any decision in respect of individual cases. Clause (4) of Article 329-A is said to be in exercise of a purely judicial power which is not included in the constituent power conferred by Article 368.

17. Second, the control over the result of the elections and on the question whether the election of any person is valid or invalid is vested in the judiciary under the provisions of Article 329 and Article 136. The jurisdiction of judicial determination is taken away, and, therefore, the democratic character of the Constitution is destroyed.

18. Third, the Amendment destroys and abrogates the principles of equality. It is said that there is no rational basis for differentiation between persons holding high offices and other persons elected to Parliament.

19. Fourth, the rule of law is the basis for democracy and judicial review. The fourth clause makes the provisions of Part VI of the Representation of the People Act inapplicable to the election of the Prime Minister and the Speaker.

20. Fifth, clause (4) destroys not only judicial review but also separation of power. The order of the High Court declaring the election to be void is declared valid. The cancellation of the judgment is denial of political justice which is the basic structure of the Constitution.

21. The second ground is that the constitution of the House which passed the Constitution (Thirty-ninth Amendment) Act is illegal. It is said that a number of members of Parliament of the two Houses were detained by executive order after 26 June, 1975. These persons were not supplied any grounds of detention or given any opportunity of making a representation against their detention. Unless the President convenes a session of the full Parliament by giving to all members thereof an opportunity to attend the Session and exercise their right of speech and vote, the convening of the session will suffer from illegality and unconstitutionality and cannot be regarded as a session of the two Houses of Parliament. The mere fact that a person may be deprived of his right to move any court to secure his release from such illegal detention by means of a presidential order under Article 359 does not render the detention itself either legal or constitutional. The Important leaders of the House have been prevented from participation. Holding of the session and transacting business are unconstitutional.

22. Under the first ground these are the contentions. The Constitution Amendment affects the basic structure of institutional pattern adopted by the Constitution. The basic features of separation of powers with the role of independence of judiciary is changed by denying jurisdiction of this Court to test the validity of the election. The essential feature of democracy will be destroyed if power is conceded to Parliament to declare the elections void

according to law under which it has been held to be valid. This is illustrated by saying that Parliament can by law declare the election of persons against the predominant ruling party to be void. If the majority party controls the legislature and the executive, the legislature could not have any say as to whether the executive was properly elected. Free and fair elections are a part of democratic structure and an election which has been held to be invalid for violation of the principles of free and fair elections and by commission of corrupt practice is validated. The basic structure of equality is violated by providing that those who have office of Prime Minister and Speaker are above law although election laws were there. The persons who will hold the office of Prime Minister and Speaker have been free from those laws and they are not under rule of law and there is no judicial review with regard to their elections.

23. The nature of the constituent power is legislative. The constituent power cannot exercise judicial power. Exercise of judicial power or of a purely executive power is not power of amendment of the Constitution. The Constitution may be amended to change constitutional provisions but the constituent power cannot enact that a person is declared to be elected. The consequence of change of law may be that the decision given by a court under the law as it stood will not stand.

24. The respondent contends that judicial review is an essential feature of basic structure because of the doctrine of separation of powers for these reasons : Judicial review is basic structure in the matter of election to ensure free, fair and pure election. In the American and the Australian Constitutions the judicial power of the State is located in the judiciary. There is no such provision in our Constitution. The Executive, the Legislature and the Judiciary are all treated under our Constitution with respective spheres. The jurisdiction of this Court and of High Courts under our Constitution is dealt with by Articles under the Heads of the Union Judiciary and the State Judiciary. Under Article 136 any Tribunal or Court is amenable to the jurisdiction of this Court. The corollary drawn from this is that if under clause (4) of the Thirty-ninth Amendment the power of judicial review is taken away it amounts to destruction of basic structure.

25. In England formerly Parliament used to hear election disputes. In 1870 Parliament found that because of political factions it would be better to leave the task of deciding controverted elections to Judges. Parliament delegated its power of deciding controverted elections to Courts. Under the English Law the Courts hear and make a report to Parliament. In America each House shall be the judge of the election, returns and qualifications of its own Members. That is Article 1 Section 5 of the American Constitution. In Australia any question of a disputed election to either House shall be determined by the house in which the question arises. Under the German Federal Republic Constitution the legislature decides whether a person has lost his seat. Against the decision of the Bundestag an appeal shall lie to Federal Constitutional Court.

26. The view of Story on the American Constitution is that the power to judge election, returns and qualifications of the members of each House composing the legislature is to be lodged in the legislature. Story says that no other body can be so perpetually watchful to guard its own rights and privileges from infringement (See Story page 585).

27. In *Corpus Juris* Vol. 16 (1956) it is said that the judiciary cannot exercise powers which are to be found in the other two departments of Government which are normally legislative or powers which are generally executive, in their nature. All matters relating to or affecting elections are political questions and as such are not questions for the judiciary. All matters relating to or affecting elections are in the absence of controlling constitutional or statutory provisions to the contrary, political questions and as such are not questions for the judiciary. So, subject to express constitutional restrictions, all matters relating to the holding of elections and determining their results, including contests are political questions (pp. 691, 692, 710).

28. In *Corpus Juris* Vol. 29 (1965) it is stated that under constitutional provision as to conferring on the legislature the power to determine by law, before what authority, and in what manner the trial or contested elections shall be conducted the legislature is given broad power. A constitutional provision authorising the legislature to provide for the mode of contesting elections in all cases not otherwise specifically provided for in the Constitution itself confers on the legislature adequate authority to provide for all election contests and to determine where and by what means election contests shall be conducted. The right to contest an election is not a common law right. Elections belong to the political branch of the Government, and in the absence of the special constitutional or statutory provisions are beyond the control of the judicial power. (Section 245, 246). A contested election case is a proceeding in which the public is interested since it is for the public good. An election contest is not merely a proceeding for the adjudication and settlement of the private rights of rival claimants to an office. It is the public interest not the parties claims which is the paramount legislative concern (Section 247).

29. In America disputed elections are decided by the Legislature. In *Taylor v. Beckham*. (1899) 44 L Ed 1187 = (178 US 548) the American Supreme Court held that a determination of an election contest for the office of the Governor is a political question and is not justiciable. In *Truman H. Newberry v. United States of America*. (1920) 65 L Ed 913 the American Supreme Court held that the manner of elections can be controlled. In *David S. Barry v. United State of America Ex. Re. Thomas W. Cunningham*. (1928) 73 L Ed 979 = (279 US 827) the decision of the American Supreme Court in *Charles W. Baker v. Joe C. Carr*, (1962) 7 L Ed 2d 663 was referred to in order to find out as to what aspects of elections would be justiciable and not a political question. In *Baker v. Carr* (Supra) the delimitation of constituencies was held to be a justiciable issue. In *Julian Bond v. James 'Sloppy' Floyd*. (1966) 17 L Ed 2d 235 the exclusion of an elected representative because of

his statement attacking the Vietnam policy was held to be justiciable on the ground that it was not within the jurisdiction of the Legislature to find out whether a member was sincere in regard to his oath of the legislature. In *Adam Clayton Powell v. John W. McCormack*. (1969) 23 L Ed 2d 491 the disqualification by the House of a Congressman on the basis of qualification on the ground which was not in the Constitution was held to be justiciable. The Federal District Court has jurisdiction over the subject-matter of controversies arising under the Constitution. The conferment of power on each House in America to be a judge of elections is an exclusive ground of power and constitutes the House to be the sole and ultimate Tribunal.

30. **The American decisions show that if the House claims additional power to disqualify a member on the ground other than those stated in the Constitution judicial review against disqualification would be available. In *Bond's case* (1966) 17 L Ed 2d 235 (supra) disqualification was on an unconstitutional ground that his statement on Vietnam policy was a matter of free speech and expression. The court did not decide an election dispute but as a custodian of judicial power judged whether the House was acting within its power.**

31. **Parliament itself can also hear election disputes. That was the English practice until the Grenville Act. 1868 when Parliament conferred power on courts. Before 1770, controverted elections were tried by the whole House of Commons as party questions. The House found that the exercise of its privilege could be submitted to a Tribunal constituted by law to secure impartiality in the administration of justice according to the laws of the land. In 1868 the jurisdiction of the House in the trial of controverted elections was transferred by statute to the courts of law. The present procedure is contained in the English Representation of the People Act, 1949. The trial is confided to judges selected from the judiciary. Provision is made in each case for constituting a rota from whom these judges are selected. The House has no cognizance of these proceedings until their determination when the judges certify their determination, in writing, to the Speaker, which is final to all intents and purposes. Trial is not a proceeding of the House. The judges are to make a report in any case where charge has been made in the petition of corrupt and illegal practice. Provision is also made for the trial of a special case. All certificates and reports of the election court are entered in the Journals of the House. Under Section 124 (5) of the English Representation of the People Act. 1949, it is the duty of the House to make orders for carrying the determination of the judges into execution.**

32. **Judicial review in many matters under statute may be excluded. In many cases special jurisdiction is created to deal with matters assigned to such authorities A special forum is even created to hear election disputes. A right of appeal may be conferred against such decision. If Parliament acts as the forum for determination of election disputes it may be a question of parliamentary privilege and the courts may not entertain any review from such decisions. That is because the exercise of power by the Legislature in determining disputed elections may be called legislative power. A distinction arises between what can be called the traditional judicial determination by courts and tribunals on the one hand and the peculiar jurisdiction by the legislature in determining controverted elections on the other.**

33. **The legal order is a system of general and individual norms connected with each other according to the principle that law regulates its own creation. Each norm**

of this order is created according to the provisions of another norm and ultimately according to the provisions of the basic norm constituting the unity of this system, the legal order. A norm belongs to a certain legal order, because it is created by an organ of the legal community constituted by this order. Creation of law is application of law. The creation of a legal norm is normally an application of the higher norm, regulating its creation. The application of higher norm is the creation of a lower norm, determined by the higher norm. A judicial decision is an act by which a general norm, a statute is applied but at the same time an individual norm is created binding one or both parties to the conflict. Legislation is creation of law. Taking it into account is application of law. The higher norm may determine the organ and the procedure by which a lower norm and the contents of the lower norm are created. For a norm the creation of which is not determined at all by another norm cannot belong to another legal order. The individual creating a norm cannot be considered the organ of the legal community, his norm-creating function cannot be imputed to the community, unless in performing the function he applies a norm of the legal order constituting the community. Every law-creating act must be a law applying act. It must apply a norm preceding the act in order to be an act of the legal order or the community constituted by it. When settling a dispute between two parties a court applies a general norm on statutory or customary law. Simultaneously the court creates an individual norm providing that a definite sanction shall be executed against a definite individual. The individual norm is related to the general norm as the statute is related to the constitution. The judicial function is thus like legislation, both creation and application of law. The judicial function is ordinarily determined by the general norms both as to procedure and as to the contents of the norm to be created, whereas legislation is usually determined by the constitution only in the former respect.

34. The general norm which attach abstractly determined consequences, has to be applied to concrete cases in order that the sanction determined in abstract may be orderdered and executed in concrete. The two essential elements of judicial functions are to apply a pre-existing general norm in which a certain consequence is attached to certain condition. The existence of the concrete conditions in connection with the concrete consequence are what may be called individualization of the general and abstract norm to the individual norm of the judicial decision.

35. The contention is that the constituent power is an exercise in legislature process. The constituent power, it is said, can exercise legislative as well as judicial and executive powrs. It is said that if a leislation can validate a matter declared invalid by a judgment the constituent power may equally do so. Special emphasis is laid on Art. 105 of the Constitution which is amended by the Constitution (Thirty-ninth Amendment) Act. Article 105 (e) speaks of disqualificaiton by certain laws. The constitutional amendment seeks to amend Article 105 and remove the disqualification in the case of the Prime Minister and the Speaker. Reliance was placed on the decisions in *Abeyesekera v. Jayatilake*, 1932 AC 260 and *Piarc Dusadh v The King Empeor*, 1944 FCR 61 = (AIR 1944 FC 1) that an amendment is supportable to invalidate a judgment.

36. *Abeyesekera's case* 1932 AC 260 (supra) is an authority for the proposition that the legal infirmity can be removed and active indemnity can be passed to relieve from penalties incurred.

37. In *Piare Dusadh's case* (AIR 1944 FC 1) (supra) the Special Criminal Courts (Repeal) Ordinance, 1943 which conferred validity and full effectiveness on sentences passed by special courts which functioned under the Special Criminal Courts Ordinance, 1942 was challenged. It was argued in *Piare Dusadh's case* (supra) that the 1943 Ordinance attempted to exercise judicial power. The Federal Court did not accept the contention on the ground that in India the legislature has enacted laws providing that suits which had been dismissed on a particular view of the law must be restored and retried. Our Federal Court said that Parliament simply takes up certain determinations which exist in fact, though made without authority, and prescribes not that they shall be acts done by a board of Review, but that they shall be treated as they would be treated if they were such acts. The sections do not constitute an exercise of the judicial power. The legislature had not attempted to decide the question of the guilt or innocence of any of the accused. That question had as a matter of fact been decided by tribunals which were directed to follow a certain judicial procedure. Our Federal Court held that once the decisions of the special courts were held void for want of jurisdiction the legislature created those special courts and authorised them to try cases and pass sentences. The legislature gave jurisdiction to the courts to pass the sentences. The Ordinance did not exercise any judicial power because the sentences in due course were subject to an appeal and review by the regular courts of the land.

38. The power of the legislature to validate matters which have been found by judgments or orders of competent courts and Tribunals to be invalid or illegal is a well-known pattern. The legislature validates acts and things done by which the basis of judgments or orders of competent courts and Tribunal is changed and the judgments and orders are made ineffective. All the Sales Tax Validation cases, the election validation cases are illustrations of that proposition. The present appeals are not of the type of providing indemnity against penalties or determining existing facts to be treated in accordance with change of law.

39. The effect of validation is to change the law so as to alter the basis of any judgment, which might have been given on the basis of old law and thus make the judgment ineffective. A formal declaration that the judgment rendered under the old Act is void, is not necessary. If the matter is pending in appeal, the appellate court has to give effect to the altered law and reverse the judgment. The rendering of a judgment ineffective by changing its basis by legislative enactment is not an encroachment on judicial power but a legislation within the competence of the Legislature rendering the basis of the judgment non est. If a competent court has found that a particular tax or levy has been imposed by a law, which is void because the legislature passing the law was not competent to pass the law, then the competent legislature has validated the tax or levy by a validation Act involving a re-enactment of the invalid law. Where the competent legislature has passed a law which is contrary to any of the Fundamental Rights in Part III of the Constitution and the law has been declared void by a competent court, the appropriate legislature has passed a retrospective law validating the actions taken under the old invalid law by curing the defects in the old law so as to make the new law consistent with Part III of the Constitution.

40. Where invalid elections declared by reason of corrupt practices have been validated by changing the definition of corrupt practices in the Representation of the People Act, 1951 retrospectively the original judgment is rendered ineffective.

(See *Kanta Kathuria v. Manak Chand Surana*, (1970) 2 SCR 835 = (AIR 1970 SC 694).

41. Our Federal Court in *Basanta Chandra Ghose v. The King Emperor*, 1944 FCR 295 = (AIR 1944 FC 86) dealt with the validity and effect of Ordinance No. 3 of 1944. One of the objects of that Ordinance was to enact a presumption in the Ordinance itself in favour of detention orders to preclude their being questioned in courts of law and to take away or limit the power of the High Court to make orders under S. 491 of the Cri. P.C. The third object of the Ordinance was challenged on the ground that Section 10 (2) of the Ordinance which provided that if at the commencement there is pending in any Court any proceeding by which the validity of an order having effect by virtue of Section 6 as if it had been made under this Ordinance is called in question that proceeding is hereby discharged. Section 10 (2) of the Ordinance was challenged on the ground that this was in abrogation of judicial power by legislative authority. It was said that the legislative authority only passed the law and the disposal of the particular case could remain the function of the court. Section 10 (2) of the Ordinance was said not to leave it to the court to apply the rule of law to the decision of cases but to discharge all pending proceedings. Our Federal Court noticed the distinction between a legislative act and the judicial act, and said "a direction such a proceeding is discharged is clearly a judicial act and not an enactment of law". In *Piare Dusadh's case* (AIR 1944 FC 1) (supra) the latter Ordinance provided that the decisions of the earlier Tribunals which were negated by a decision of the Federal Court should be treated as decisions of duly constituted Tribunals. That was held not to constitute a judicial power by the Ordinance making authority. In *Basanta Chandra Ghose's case* (supra) the Federal Court held Section 10 (2) of the Ordinance to be a direct disposal of cases by the legislature itself. *Basanta Chandra Ghose's case* (supra) was decided on the ground that the section in the Ordinance discharged the proceedings. There was nothing left to the Court.

42. Counsel on behalf of the respondent contended that the constituent power could deal with amendments of the Constitution, but could not exercise constituent power in relation to validating an election.

43. Judicial Review is one of the distinctive features of the American Constitutional Law. In America equal protection of the laws is based on the concept of due process of law. These features are not in our Constitution.

44. In *Bond's case* (1966) 17 L Ed 2d 235 (supra) the House claimed additional power to disqualify a member on grounds other than those stated in the Constitution. It was conceded there as it will appear at page 244 of the Report that judicial review against the disqualification decreed by the House would be available if a member was excluded on racial ground or other unconstitutional grounds. The House claimed that the ground on which Bond was disqualified was not an unconstitutional ground. The court held that there was no distinction between a disqualification decreed by the House on racial grounds and one alleged to violate the right of free speech. The court concluded that Bond was deprived of his constitutional rights guaranteed by the First Amendment by the disqualification decreed by the House. This was not a case of deciding an election dispute by the House and the Court sitting on appeal on the decision of the House. This is a case where a disqualification was imposed on unconstitutional grounds, thereby affecting

the fundamental rights of Bond. This is not an authority for the proposition that the decision of the House on an election dispute would be open to judicial review.

45. The case of *Powell v. McCormack*. (1969) 23 L Ed 2d 491 (supra) is also one of disqualification by the House of a Congressman on the basis of qualification which the House added to those specified in the Constitution. In other words, the House purported to unseat a member by disqualifying him on a ground not given in the Constitution. This was not a case of deciding an election dispute. Under the statute in question the Federal District Court had jurisdiction over all civil actions where controversy arises under the Constitution. This was a case entertained on the ground that exclusion of a member of the House was unconstitutional. This case is an authority for the proposition that if a power is committed to a particular organ the court cannot adjudicate upon it. Where a power is exercised by one organ, which is not committed to that particular organ of the State and such exercise of power is violative of a constitutional provision the matter becomes cognizable by courts. The Court held that a question of unconstitutional exclusion of a member is not barred from judicial review as a political question.

46. Judicial review is not to be founded on any Article similar to the American Constitution. In the Australian Constitution also the judicial power is located in the court. The doctrine of separation of powers is carried into effect in countries like America, Australia. In our Constitution there is separation of powers in a broad sense. But the large question is whether there is any doctrine of separation of powers when it comes to exercise of constituent power. The doctrine of separation of powers as recognised in America is not applicable to our country. (See *Delhi Laws Act*, 1951 SCR 747 at pp., 965-66 = (AIR 1951 SC 332 at p. 395); *Javantilal Sodhan v. F.N. Rana* (1964) 5 SCR 294 = (AIR 1964 SC 648) *Chandra Mohan v. State of Uttar Pradesh*. (1967) 1 SCR 77 at p. 87 = (AIR 1966 SC 1987 at p. 1993) and *Udai Ram Sharma v. Union of India*. (1968) 3 SCR 41 at p. 67 = (AIR 1968 SC 1138 at p. 1152).

47. The rigid separation of power as under the American Constitution or under the Australian Constitution does not apply to our country. Many powers which are strictly judicial have been excluded from the purview of the courts. The whole subject of election has been left to courts traditionally under the Common Law and election disputes matters are governed by the Legislature. The question of the determination of election disputes has particularly been related as a special privilege of Parliament in England. It is a political question in the United States, Under our Constitution Parliament has inherited all the privileges, powers and immunities of the British House of Commons. In the case of election disputes Parliament has defined the procedure by law. It can at any time change that procedure and take over itself the whole question. There is therefore, no question of any separation of powers being involved in matters concerning elections and election petitions.

48. When the constituent power exercises powers the constituent power comprises legislative, executive and judicial powers. All powers flow from the constituent power through the Constitution to the various departments or heads. In the hands of the constituent authority there is no demarcation of powers. It is only when the constituent authority defines the authorities or demarcates the areas that separation of power is discussed. The constituent power is independent of the

doctrine of separation of powers. The constituent power is sovereign. It is the power which creates the organs and distributes the powers.

49. The constituent power is sui generis. It is different from legislative power. The position of unlimited law making power is the criterion of legal sovereignty. The constituent power is sovereign because the Constitution flows from the constituent power.

50. In Article 329-A an exercise of judicial power is the question for determination. In legislative processes there may be judicial process. If the legislature has to fix the amount or lay down the principle for fixation of amount the question will arise as to whether this is exercise of judicial power. The determination of the amount will involve judicial procedure. When the legislature determines the amount the fixation of amount is purely by legislative process. But in doing so the legislature takes into account factors relevant to individual properties.

51. Every organ of the State has to ascertain facts which make the foundation of its own decision. The executive usually collects its materials through its departments. The judiciary acts in a field where there are two or more parties before it and upon evidence placed before it pronounces its verdict according to principles of natural justice. The legislature is entitled to obtain information from any source. The legislature may call witnesses. The rule of Audi Alterm Partem is not applicable in a legislative process. Legislation is usually general. It may sometimes be for special reasons an individual case. There is no doubt that the constituent power is not the same as legislative power. The distinction between constituent power and legislative power is always to be born in mind because the constituent power is higher in norm.

52. Judicial review in election disputes is not a compulsion. Judicial review of decisions in election disputes may be entrusted by law to a judicial Tribunal. If it is to a Tribunal or to the High Court the judicial review will be attracted either under the relevant law providing for appeal to this Court or Article 136 may be attracted. Under Article 329 (b) the contemplated law may vest the power to entertain election petitions in the House itself which may determine the dispute by a resolution after receiving a report from a special Committee. In such judicial review may be eliminated without involving amendment of the Constitution. The Constitution permits by amendment exclusion of judicial review of a matter it is necessary to give effect to the Directive Principles of State Policy. A similar power may be available when such exclusion is needed in the larger interest of the security of the State. In either case the exclusion of judicial review does not mean that principles of equality are violated. It only means that the appropriate body making the law satisfied itself and determines conclusively that principles of equality have not been violated. That body conclusively makes classification for the purpose of applying the principles of equality. It is said that in this class of cases of answer to the question of the validity of the classification rests on factors to which the court has no access and the materials may be of highly confidential nature and the decision has to be on a matter of political necessity. If judicial review is excluded the court is not in a position to conclude that principles of equality have been violated.

53. Equality of status as well as equality of opportunity is a fundamental right in Articles 14 and 16 of the Constitution. It also means equality before law and equal protection of the laws. equality is spoken in the Preamble. There is liberty to

legislature to classify to establish equality. When Articles 31-A and 31-B eliminated judicial review the meaning was not that the legislature would go on discriminating. The task of classification can be left to the legislature. It is the very nature of legislation that classification must be in public interest. The amending body has excluded judicial review in Article 31-A, 31-B and 31-C.

54. Exclusion of the operation of the equality principle from some fields is constitutionally possible. Article 33 excludes judicial review in matters relating to the Armed Forces. Article 262 (2) excludes jurisdiction of courts in water disputes.

55. Decisions in election disputes may be made by the legislature itself or may be made by courts or tribunals on behalf of the legislature or may be made by courts and tribunals on their own exercising judicial functions. The concept of free and fair election is worked out by the Representation of the People Act. The Act provides a definition of "corrupt practice" for the guidance of the court. In making the law the legislature acts on the concept of free and fair election. In any legislation relating to the validity of elections the concept of free and fair elections is an important consideration. In the process of election the concept of free and fair election is worked out by formulating the principles of franchise, and the free exercise of franchise. In cases of disputes as to election, the concept of free and fair election means that disputes are fairly and justly decided. Electoral offences are statutory ones. It is not possible to hold that the concept of free and fair election is a basic structure, as contended for by the respondent. Some people may advocate universal franchise. Some people may advocate proportional representation. Some people may advocate educational qualifications for voters. Some people may advocate property qualifications for voters. Instances can be multiplied on divergence of views in regard to qualifications for voters, qualifications of members, forms of corrupt practices. That is why there is law relating to and regulating elections.

56. Clause (4) in Article 329-A has done four things. First, it has wiped out not merely the judgment but also the election petition and the law relating thereto. Secondly, it has deprived the right to raise a dispute about the validity of the election by not having provided an other forum. Third there is no judgment to deal with and no right or dispute to adjudicate upon. Fourth, the constituent power of its own legislative judgment has validated the election.

57. At the outset it has to be noticed that constituent power is not the same as ordinary law making power. On behalf of the appellant it was rightly contended that if any amendment of Article 105 of the Constitution had to be made, it had to be made by amendment of the Constitution. The matter does not rest there.

58. If no law prior to the Constitution (Thirty-ninth Amendment) Act will apply to election petitions or matters connected therewith the result is that there is not only no forum for adjudication of election disputes but that there is also no election petition in the eye of law. The insurmountable difficulty is in regard to the process and result of validating the election by clause (4). Two answers were given on behalf of the appellant. One was that the validation of the election is itself the law. The other has that the constituent power applied its own norms to the election petition. Both the answers are unacceptable. If the election petition itself did not have any existence in law there was no petition which could be looked into by the constituent power. If there was no petition to look into it is difficult to comprehend as to what norms were applied to the election dispute. The dispute has to be seen. The dispute has to be adjudicated upon.

59. Clause (4) suffers from these infirmities. First the forum might be changed but another forum has to be created. If the constituent power became itself the forum to decide the disputes the constituent power by repealing the law in relation to election petitions and matters connected therewith did not have any petition to seize upon to deal with the same. Secondly, any decision is to be made in accordance with law. Parliament has power to create law and apply the same. In the present case, the constituent power did not have any law to apply to the case because the previous law did not apply and no other law was applied by clause (4). The validation of the election in the present case is, therefore, not by applying any law and it, therefore, offends Rule of Law.

60. It is true that no express mention is made in our Constitution of vesting in the judiciary the judicial power as is to be found in the American Constitution. But a division of the three main functions of Government is recognised in our Constitution. Judicial power in the sense of the judicial power of the State is vested in the Judiciary. Similarly, the executive and the Legislature are vested with powers in their spheres. Judicial power has lain in the hands of the Judiciary prior to the Constitution and also since the Constitution. It is not the intention that the powers of the Judiciary should be passed to or be shared by the Executive or the Legislature or that the powers of the Legislature or the Executive should pass to or be shared by the Judiciary.

61. The constituent power is sovereign. Law making power is subject to the Constitution. Parliament may create forum to hear election disputes. Parliament may itself hear election disputes. Whichever body will hear election disputes will have to apply norms. Norms are legal standards. There is no discrimination if classification on rational basis is made for determination of disputes relating to persons holding the office of Prime Minister or the Speaker. The changes effected by the Amendment Acts 1974 and 1975 apply to all and there is no discrimination. Retrospective legislation is not by itself discrimination. The changes introduced to 1951 Act apply to all.

62. Clause 4 of Article 329-A in the present case the election has passed a declaratory judgment and not a law. The legislative judgment in Clause 4 is an exercise of judicial power. The constituent power can exercise judicial power but it has to apply law.

63. The validation of the election is not by applying legal norms. Nor can it be said that the validation of election in Clause 4 is by norms set up by the constituent power.

64. Clause 5 in Article 329-A states that an appeal against any order of any court referred to in Clause 4 pending, before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, before the Supreme Court, shall be disposed of in conformity with the provisions of Clause 4. The appeal cannot be disposed of in conformity with the provisions of Clause 4 inasmuch as the validation of the election cannot rest on Clause 4.

65. In view of the conclusion that the appeal cannot be disposed of in conformity with clause 4 it is necessary to hear the appeals on other grounds in accordance with the provisions of the 1951 Act and the Amendment Acts 1974 and 1975.

66. The second contention of the respondent is that the session of the Lok Sabha and the Rajya Sabha is invalid for these reasons. If the Executive illegally and

unconstitutionally detains any person the detention affects the validity of the proceedings. A number of member of Parliament of the two Houses namely, the Lok Sabha and the Rajya Sabha were detained by executive orders after 26th June, 1975 and before the summoning of a session of the two Houses of Parliament. Parliament commenced the sessions on 21st July, 1975. None of the memebtrs of Parliament were either supplied any grounds of detention or given any appportunity to make any respresentation against their detention. The President who was the authority to summon a session of Parliament issued the Presidential Order under Article 359 of the Constituion on 27th June, 1975. The right of the detained members of Parliament to move any court for the enforcement of their fundamental right under Article 22 of the Constitution was taken away by the executive order of the President who became a party to the unconstitutional and illegal detention of the members of Parliament by preventing them from securing their release.

67. The constitutional position of the two Houses of Parliament is governed by the provisions of Articles 79 and 81 of the Constitution. The respondent contends that unless the President convenes a session of the Full Parliament by giving to all members thereof an opportunity to attend the session and exercise their right of speech and vote. The convening of the session will suffer from illegality and unconstitutionality and cannot be regarded as a session of the two Houses of Parliament. Any business transacted in a session of such truncated House cannot, therefore, be regarded in law as a session of a House.

68. The mere fact that a person who is under unconstitutional and illegal detention may be deprived of his right to move a court to secure his release from such illegal detention by means of a Presidntial Order under Article 359 is said by the respondent not to render the detention of a person either legal or constitutional and therefore, such a detenu must be provided an opportunity to participate in the proceedings of the House. It is emphasised by the respondent that when important leaders of different parties are unconstitutionally prevented from participating in the session of the House a session cannot be held for deliberations in which different members influence the views of others by their own participation. If in the holding of a session and in transacting business therein the provisions of the Constitution are not complied with. This is said to amount to illegality or unconstitutionality and not a mere procedural irregularity within the meaning of Article 122 (1) of the Constitution.

69. The essence of the respondent's contention is that the right of participation of some members of the House of Parliament in the proceedings of Parliament under Article 105 (3) of the Constitution has been interfered with. When a member is excluded from participating in the proceedings of the House, that is a matter concerning Parliament and the grievance of exclusion is in regard to proceedings within the walls of Parliament. In regard to rights to be exercise within the walls of the House the House itself is the judge. (See May's Parliamentary Practice 18th Ed. pp. 82-83. (1884) 12 QBD 271 at p 285-286).

70. In *Bradlaugh v. Gossett*. (1884) 12 QBD 271 Bradlaugh claimed to make affirmation instead of taking the oath. He was permitted to make the affirmation "subject to any liability by statute" and took his seat. Upon an action for penalties it was decided finally by the House of Lords, that Bradlaugh had not qualified himself to sit by making the affirmation. On re-election he attempted to take the oath but

was prevented by order of the House which eventually directed the Serjeant to exclude him from the House until he undertook to create no further disturbance. Bradlaugh then brought an action against the Serjeant in order to obtain a "declaration that the order of the House was beyond the power and jurisdiction of the House and void, and an order restraining the Serjeant at Arms from preventing Bradlaugh by force from entering the House". It was held that the Court had no power to restrain the executive officer of the House from carrying out the order of the House. The reason is that the House is not subject to the control of the Courts in the administration of the internal proceedings of the House.

71. If an outside agency illegally prevents a member's participation the House has the power to secure his presence. In 1543 Ferrers a member was arrested in London. The House, on hearing of his arrest, ordered the Serjeant to go to the Compter and demand his delivery. The Serjeant was resisted by the city officers, who were protected by the sheriffs. The Commons laid their case before the Lords. They ordered the Serjeant to repair to the Sheriffs, and to require the delivery of Ferrers without any writ or warrant. The Lord Chancellor had offered them a writ of privilege but they refused it. The Sheriffs in the mean time had surrendered the prisoner. This practice of releasing Members by a writ of Privilege continued but no writ was to be obtained.

72. The present mode of releasing arrested members goes back to Shirley's case (1 Hatsell 157) In 1603 Shirley was imprisoned in the Fleet, in execution, before the meeting of Parliament. The Commons first tried to bring him into the House by habeas corpus and then sent the Serjeant to demand his release. The warden refuse to give up his prisoner. At length the warden delivered up the prisoner.

73. As Act 1 James 1. c. 13 was passed which while it recognised the privilege of freedom from arrest, the right of either House of Parliament to set a privileged person at liberty and the right to punish those who make or procure arrests enacted that after such time as the privilege of that session in which privilege is granted shall cease, parties may sue and execute a new writ. In 1700 an Act was passed which while it maintained the privilege of freedom from arrest with more distinctness than the Act 1 James 1 c. 13 made the goods of privileged persons liable to distress infinite and sequestration, between a dissolution or prorogation and the next meeting of Parliament and during adjournments for more than fourteen days.

74. The composition of Parliament is not dependent on inability of a member to attend for whatsoever reason. The purpose of Article 85 is to give effect to the collective right of the House which represents the nation to be called as often as the situation demands and in any case the interval between two sessions must not exceed six months. Assuming a conflict were to arise between the privileges of member under Article 105 (3) and the functions of the House to assemble under Article 85 the privilege of the member will not prevail. The detention of members of Parliament is by a statutory authority in the exercise of his statutory powers.

75. The suspension under Article 359 of the remedy for the enforcement of fundamental rights is dependent on a Proclamation of Emergency under Article 352. Parliament has the power not to approve of the Proclamation and thereafter the emergency shall cease to operate The contention of the respondent means that Parliament cannot meet even so as to withhold approval of the emergency and thus terminate the suspension of the members' right of moving the court. The

Constitution provides for proclamation of emergency the suspension of the remedy under Article 359 for enforcement of fundamental rights enabling even detention of members of Parliament when necessary. Article 85 is not suspended. The six months rule is obligatory. It follows that the members' right under Art. 105 are not available under a detention in these circumstances. For the purposes of Article 105 (3) a conviction under Penal laws or detention under Emergency laws must be deemed to be valid till it is set aside.

76. When under Article 359 the President during the operation of a Proclamation of Emergency by order declared that the right to move any court for the enforcement of rights conferred by Part III shall remain suspended and persons who are members of House of Parliament are in detention under orders made under the Maintenance of Internal Security Act the detention cannot be challenged by collateral attack on the ground of deprivation of their participation in the Parliamentary proceedings. The challenge will be questioning the detention on the ground that the detention is in violation of Articles 19 21 and 22.

77. Article 85 provides that not more than six months shall intervene between the two Sessions of Parliament Article 85 is not a provision regarding the constitution of Parliament but of holding of Sessions. The powers, privileges and immunities of Parliament and its members as provided in Article 105 are that they shall be such as may be defined by Parliament by law and until so defined shall be those of the House of Commons of the Parliament of the United Kingdom.

78. In Special Reference No. 1 1964 (1965) 1 SCR 413 = (AIR 1965 S 745) it was held that the court could entertain a petition under Article 226 on the ground that the imposition of penalty by the legislature on a person who is not a member of the legislature or issuing process against such person for its contempt committed outside the four walls of the House.

79. The scope of the parliamentary privilege of freedom from arrest has been defined positively and negatively. The positive aspect of the privilege is expressed in the claim of the Commons to freedom from arrest in all civil actions or suits during the time of Parliament and during the period when a member was journeying or returning from Parliament. The privilege has been defined negatively in the claim of the Commons which specifically excepted treason, felony and breach of surety of the peace.

80. The privilege of freedom from arrest is limited to civil causes, and has not been allowed to interfere with the administration of criminal justice of emergency legislation (See May's Parliamentary Practice 18th Ed. at p. 100) In early times the distinction between "civil" and "criminal" was not clearly expressed. The development of the privilege has shown a tendency to confine it more narrowly to cases of a civil character and to exclude not only every kind of criminal case but also cases which while not strictly criminal partake more of a criminal than of a civil character. This development is in conformity with the principle laid down by the Commons in a conference with the Lords in 1641; "Privilege of Parliament is granted in regard of service of the Commonwealth and is not to be used to the danger of the Commonwealth".

81. In Wilkes' case 19 State Tr.,981 it was resolved by both Houses on 29th November, 1763 that the privilege of Parliament does not extend to the case of writing and publishing seditious libels nor ought to be allowed to obstruct the

ordinary course of the laws in the speedy and effectual prosecution of so heinous and dangerous an offence. "Since that time" the Committee of Privileges said in 1831 "it has been considered as established generally, that privilege is not claimable for any indictable offence".

82. These being the general declarations of the law of Parliament, the House will not allow even the sanctuary of its walls to protect a Member from the process of criminal law although a service of a criminal process on a Member within the precincts of Parliament whilst the House is sitting without obtaining the leave of the House would be a breach of privilege.

83. The committal of a Member in England for high treason or any criminal offence is brought before the House by a letter addressed to the Speaker by the committing judge or magistrate. Where a Member is convicted but released on bail pending an appeal the duty of the Magistrate to communicate with the Speaker does not arise. No duty of informing the Speaker arises in the case of a person who while in prison under sentence of a court is elected as a Member of Parliament in the case of detention of Members under Regulation 14-B of the Defence of Realm Regulations in England, the communication was made to the Speaker by a letter from the Chief Secretary to the Lord Lieutenant of Ireland which was read to the House by the Speaker. The detention of a Member under Regulation 18-B of the Defence (General) Regulations, 1939, made under the Emergency Powers (Defence) Acts, 1939 and 1940, led to the committee of Privileges being directed to consider whether such detention constituted a breach of the privileges of the House : the Committee reported that there was no breach of privilege involved. In the case of a member deported from Northern Rhodesia for non-compliance with an order declaring him to be a prohibited immigrant the Speaker held there was no prima facie case of breach of privilege (See May's Parliamentary Practice 18th Ed. p. 103).

84. In *K. Anandan Nambia v. Chief Secretary Government of Madras*, (1966) 2 SCR 406 = (AIR 1966 SC 657) the petitioners who were members of the Parliament and detained by orders passed by the State Government under R. 30 (1) (b) of the Defence of India Rules, 1962 challenged the validity of the orders of detention on the ground that Rule 30 (1) (b) was not valid because "a legislator cannot be detained so as to prevent him from exercising his constitutional rights as such legislator while the legislative chamber to which he belongs is in session." The State raised a preliminary objection that the petitions were incompetent in view of the order issued by the President under Article 359 (1) suspending the rights of any person to move any Court for the enforcement of rights conferred by Articles 14, 21 and 22. This court held that the validity of the Act, Rule or order made under the Presidential Order could not be questioned on the ground that they contravene Articles 14, 21 and 22.

85. The petitioners also contended in Nambiar's case (AIR 1966 SC 657) (Supra) that Rule 30(1) (b) under which the orders of detention had been passed was invalid on grounds other than those based on Article 14, 19, 21 and 22. This Court held that if that plea was well founded the last clause of the presidential Order was not satisfied and therefore, the bar created by it suspending the citizens' fundamental rights under Articles 14, 21 and 22 could not be pressed into service by the respondent.

86. Articles 79, 85, 86, 100(1) and 105(3) were considered in Nambiar's case (AIR 1966 SC 657) (supra) in relation to rights of Members of Parliament and it was held

that the totality of rights cannot claim the status of fundamental rights and freedom of speech on which reliance was placed is a part of the privileges falling under Article 105. The reason is that freedom from arrest under a detention order is not recognised as a privilege which can be claimed by Members of House of Commons in England. This Court then posed the question that if a claim for freedom from arrest by a detention order could not be sustained under the privileges of the Members of Parliament whether it could be sustained on the ground that it is a constitutional right which could not be contravened. The statement in May's Parliamentary Practice 7th Ed. at p. 78 which is to be found in the 18th Edition at p.100 that the privilege of freedom from arrest is limited to civil causes, and has not been allowed to interfere with the administration of criminal justice or emergency legislation was accepted as the basis of two propositions laid down in Nambiar's case (supra). First Articles 79, 85, 86, 100 and 105 cannot be construed to confer any right as such on individual Members or impose any obligation on them. It is not as if a Member of Parliament is bound to attend the session or is under an obligation to be present in the House when the President addresses it. The context in which these Articles appear shows that the subject matter of these Articles is not the individual rights of the Members of Parliament, but they refer to the right of the President to issue a summons for the ensuing session of Parliament or to address the House or Houses. Second, the freedom of speech to which Article 105 refers would be available to a Member of Parliament when he attends the session of the Parliament. If the order of detention validity prevents him from attending a session of Parliament no occasion arises for the exercise of the right of freedom of speech and no complaint can be made that the said right has been invalidly invaded.

87. The second ground of challenge that there was no valid session of the House cannot be accepted for the reasons given above. It has also to be stated that it is not open to the respondent to challenge the orders of detention collaterally. The principle is that what is directly forbidden cannot be indirectly achieved.

88. The High Court found first that the appellant has to be regarded as a candidate from 29th December, 1970 as she held herself out on that date as a candidate. The second finding is that the appellant obtained and procured the assistance of Yashpal Kapur for the furtherance of her election prospects when Yashpal Kapur was serving as a Gazetted Officer within the Government of India. The High Court found that Yashpal Kapur's resignation from his service though submitted on 13th January, 1971 did not become effective until 25th January, 1971 when it was notified. The further finding by the High Court is that Yashpal Kapur under the instructions of the appellant delivered election speech on 7th January, 1971 at Munshi Ganj and another speech at Kalan on 19th January 1971. The third finding by the High Court is that the appellant and her election agent Yashpal Kapur procured and obtained the assistance of the officers of the State Government, particularly, the District Magistrate, the Superintendent of Police, the Executive Engineer, P.W.D. and the Engineer to Hydels Department for the construction of rostrums and arrangement for supply of power for loudspeakers at meetings addressed by the appellant on 1st February, 1971 and 25th February, 1971 and further that the said assistance was for furtherance of the prospects of election of the appellant. The High Court found the appellant guilty of corrupt practice under Section 123 (7) of the 1951 Act. The High Court declared the election of the

appellant to be void. The High Court also held the appellant to be disqualified for a period of six years from the date of the order.

89. The definition of “candidate in Section 79(b) of the 1951 Act until the amendment thereof by the Election Laws (Amendment) Act, 1975 was as follows:—

“ ‘Candidate’ means a person who has been or claims to have been duly nominated as a candidate at any election and any such person shall be deemed to have been a candidate as from the time whom with the election in prospect, he began to hold himself out as a prospective candidate.”

90. This definition has now been substituted by Section 7 of the Amendment Act, 1975, as follows:—

“ ‘Candidate’ means a person who has been or claims to have been duly nominated as a candidate at any election.’ ”

91. Section 10 of the Amendment Act, 1975 further enacted that the amendments shall have retrospective operation so as to apply to and in relation to election held before the commencement of the Amendment Act, 1975 on 6th August, 1975 to either House of Parliament or to either House or the House of the Legislature of a State, inter alia. (iv) in respect of which appeal from any order of any High Court made in any election petition under Section 98 or Section 99 of the 1951 Act is pending before the Supreme Court immediately before such commencement.

92. Section 9 of the Amendment Act, 1975 has substituted clause (a) in Section 171-A of the Indian Penal Code and a “candidate” means for the purpose of Section 171-A of the Indian Penal Code a person who has been nominated as a candidate at any election. Previously the definition of “candidate” in S. 171-A of the Indian Penal Code was the same as in Section 79(b) of the 1951 Act prior to the amendment thereof by the Amendment Act, 1975. In Section 171-A of the Indian Penal Code there was a proviso to the effect that candidate would mean a person who holds himself out as a prospective candidate provided he is subsequently nominated as a candidate.

93. Relying on the provisions introduced by the Amendment Act, 1975, it is contended on behalf of the appellant that she will be regarded as a candidate only from 1st February, 1971, namely, the date when she has been duly nominated as a candidate at her election and therefore, the finding of the High Court cannot be sustained. It is also contended by the appellant that the finding of the High Court that yashpal Kapur delivered election speeches on 7th January, 1971 and 19th January, 1971 under instructions of the appellant cannot be supported because the appellant was not a candidate either on 7th January, 1971 or on 19th January, 1971.

94. The second finding by the High Court with regard to the resignation of Yashpal Kapur not to be effective until 25th January 1971 is contended to be displaced by legislative change by the Amendment Act, 1975. Section 8 (b) of the Amendment Act, 1975 has introduced Explanation (3) at the end of Section 123 (7) of the 1951 Act. This amendment has retrospective operation.

95. The Explanation is as follows:-

“(3) For the purposes of clause (7), notwithstanding anything contained in any other law, the publication in the Official Gazette of the appointment, resignation, termination of service, dismissal or removal from service of a person in the service of the Central Government (including a person serving in connection with the

administration of a Union territory) or of a State Government shall be conclusive proof—

(i) of such appointment, resignation, information of service, dismissal or removal from service, as the case may be and

(ii) where the date of taking effect of such appointment resignation, termination of service, dismissal or removal from service as the case may be is stated in such publication also of the fact that such person was appointed with effect from the said date, or in the case of resignation, termination of service, dismissal or removal from service, such person ceased to be in such service with effect from the said date.”

96. The effect of Explanation (3) at the end of Section 123 (7) of the 1951 Act incorporated by the notification dated 25th January, 1971 in the Gazette dated 6th February, 1971 makes the fact of the resignation of Yashpal Kapur from his service fully effective from 14th January, 1971. It is, therefore, contended that from 14th January, 1971 Yashpal Kapur was not a Government servant.

97. To constitute a corrupt practice within the meaning of Section 123 (7) of the 1951 Act the act complained of must be an act of obtaining or procuring of assistance of the categories of Government servants mentioned therein by the candidate or his election agent or by any other person with the consent of the candidate or his election agent. Section 100(1) (b) of the 1951 Act enacts that if the High Court is of opinion that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent, the High Court shall declare the election of the returned candidate to be void. A returned candidate is defined in Section 79(f) of the 1951 Act to mean a candidate whose name has been published under section 67 of the 1951 Act. as duly elected. A returned candidate in order to be guilty of a corrupt practice within the meaning of Section 123(7) of the 1951 Act must be guilty of any of the acts mentioned in the different sub-sections of Section 123 as a candidate. The appellant contends that the appellant was not a candidate on 7th January 1971 or 19th January, 1971 and there could not be any procuring or obtaining of any assistance by the appellant as a candidate or by anybody else with the consent of the appellant. All the sub-sections of Section 123 of the 1951 Act refer to the acts of a candidate or his election agent or any other person with the consent of the candidate or his election agent. The present definition of “candidate” which has retrospective effect is contended to exclude completely acts by candidate prior to the date he is nominated as a candidate.

98. The third finding by the High Court that the appellant and her election agent Yashpal Kapur procured and obtained the assistance of the officers of the State Government, particularly, the District Magistrate, the Superintendent of Police, the Executive Engineer. P.W.D. and the Engineer to Hydel Department for construction of rostrums and arrangement for supply of power for loudspeakers and for their assistance for furtherance of the prospects of the election of the appellant has to be tested in the light of the provisions contained in Section 123 (7) of the 1951 Act. Under the said provision obtaining or procuring by candidate or his agent any assistance for the furtherance of the prospect of that candidate from Gazetted Officers is corrupt practice. The Amendment Act, 1975 by Section 8 thereof has added a proviso to Section 123(7) of the 1951 Act. The proviso is as follows:—

“Provided that where any person in the service of the Government and belonging to any of the classes aforesaid in the discharge or ourported discharge of his official duty makes any arrangements or provides any facilities or does any other act or thing for to or in relation to any candidate or his agent or any other person acting with the consent of the candidate or his election agent, (whether by reason of the office held by the candidate or for any other reason), such arrangements facilities or act or thing shall not be deemed to be assistance for the furtherance of the prospects of that candidate's election.”

99. The proviso aforesaid shows that where persons in the service of the Government in the discharge of official duty make any arrangement or provide any facility or do any act or thing in relation to a candidate, such arrangements and facilities shall not be deemed to be assistance for furtherance of the prospect of the candidate's elecion. Therefore, the service rendered by Government servants for construction of rostrums and arrangement for supply of power for loudspeakers according to the contention of the appellatant could not be considered as assistance for the furtherance of the prospects of the election of the appellatant.

100. The contentions of the appellatant can succeed if the Amendment Acts of 1974 and 1975 are valid. The respondent has challenged the constitutional validity of these Acts. Therefore, that question has to be examined before the appellatant's contentions can be answered.

101. The respondent in cross-appeal challenged the findings of the High Court on issue No. 9 and contended that the High Court should have held that the election expenses of the appellatant exceeded the limit. The respondent also challenged the finding of the High Court with regard to issue No. 6 and contended that the High Court should have held that the symbol of cow and calf was are ligious symbol and the appellatant committed corrupt practice as defined in Section 123 (3) of the 1951 Act. The respondent did not press Issues Nos. 4 and 5 which related to distribution of quilts, blankets dhoties and liquor. The respondent also abandoned Issue No. 7 which related to voter being conveyed to the polling stations free of charge on vehicles hired and procured by Yashpal Kapur.

102. The issue pressed by the respondent was that the appellatant and his election agent Yashpal Kapur incurred of authorised expenditure in excess of the amount prescribed by Section 77 of the 1951 Act read with Rule 90. The respondent alleged that the election expenses of the appellatant, inter alia, were Rs.1,28,700 on account of hiring charges of vehicle Rs.43,230/- on account of cost of petrol and diesel; Rs. 9,900/- on account of payment made to the drivers of the vehicles. The respondent further alleged that the appellatant spent Rs. 1,32,000/- on account of construction of rostrums for public meetings on 1st February, 1971 and 25th February, 1971. The respondent contended that the findings of the High Court should be reversed.

103. The High Court found that the election expenses furnished by the appellatant were Rs.12.892.97. The High Court added another sum of Rs. 18,18,503. The three items which were added by the High Court were cost of erection of rostrums amounting to Rs. 16,000/- cost of curred in installation of loudspeaker amounting to Rs. 1,951/- and cost for providing car transport to respondent. No! amounting to Rs. 232.50. The total election expenses found by the High Court came to Rs. 31.976.47 which was below the prescribed limit of Rs.35,000/-

104. With regard to hiring charge of vehicles the High Court found that the respondent did not examine any with to indicate as to whether the vehicles were used only for party propaganda they were used in connection with election of the appellant. The High Court further found that the documents which were relied on by the respondent did establish that the vehicles had been engaged or used in connection with the election work of the appellant.

105. The respondent repeated into following contentions which had been advanced before the High Court. Dal Bahadur Singh, President District Congress Committee wrote a letter to the District Election Officer intimating that 23 vehicles had been engaged by the District Congress Committee for election work in Rae Bareilly, Amethi and Ram Sanahi Ghat constituencies, and therefore, the vehicles should be derequisitioned. Dal Bahadur Singh thereafter wrote a note to Yashpal Kapur and requested that the letter be sent to the District Election Officer to that effect. Yashpal Kapur wrote a letter to the District Election Officer and repeated the prayer contained in Dal Bahadur Singh's letter. It was, therefore, contended that because Yashpal Kapur was the election agent of the appellant and he moved for the derequisition of the vehicles it should be inferred that the vehicles were engaged for the election of the appellant. Yashpal Kapur said that the vehicles were used in the three Parliamentary constituencies. The High Court rightly held that the evidence did not establish that the vehicles had been used for the election work of the appellant. The High Court also correctly found that there was no evidence to show that Yashpal Kapur made any propaganda from the vehicles in any manner for the purpose of the election.

106. With regard to the expenses for the erection of rostrums the respondent contended that the appellant's election expenses should include Rs. 1,32,000/- as the costs for erection of rostrums for the meetings on 1st February, 1971 and the meeting on 25th February 1971. The High Court held that Rs.16,000/- could only be added to the election expenses of the appellant consisting of Rs.6,400/- for four rostrums and Rs.9,600/- for six rostrums.

107. The amount of Rs. 16,000/- which was added by the High Court on account of cost of erection of rostrums cannot be included in the election expenses of the appellant by reason of amendment to Section 77 of the 1951 Act by the Amendment Act, 1975, Explanation 3 has been added as follows:-

“For the removal of doubt it is hereby declared that any expenditure incurred in respect of any arrangements made, facilities provided or any other act or thing done by any person in the service of the Government and belonging to any of the classes mentioned in Cl. (7) of Section 123 in the discharge or purported discharge of his official duty as mentioned in the proviso to that clause shall not be deemed to be expenditure in connection with the election incurred or authorised by a candidate or by his election agent for the purposes of this sub-section.”

108. By the Amendment Act, 1975 a proviso has been added to Section 123 (7) of the 1951 Act to the effect that arrangements made or facilities provided or my act done by a Government servant belonging to the class mentioned there in the discharge of official duty shall not be deemed to be assistance for furtherance of the prospects of that candidates election. All these amendments have retrospective operation. Therefore, the cost of rostrums cannot be added to the election expenses of the appellant. Services rendered by Government servants for the erection of

rostrums and for supply of power for loudspeakers cannot be deemed to be assistance for the furtherance of the prospects of that candidate's election.

109. The respondent contended that Exhibit 118 which was the Bank account of the District Congress Committee showed on the one hand that there was deposit of Rs.69,930/- on 4th March, 1971 and on the other there was a withdrawal of Rs.40,000/- on 4th March, 1971 and of Rs. 25,000/- on 6th March, 1971 and therefore, the sum of Rs.65,000/- should be added to the election expenses of the appellant. When it was put to Yashpal Kapur that the sums of Rs.40,000/- and Rs.25,000/- were withdrawn by Dal Bahadur Singh, Yashpal Kapur said that he was not aware of it. There is no pleading in the election petition that the appellant authorised incurring expenditure by a political party. There is no pleading that any amount has been paid by the political party. There is no complaint in the petition about the sum of Rs.65,000/- or the sum of Rs.69,930/- Yashpal Kapur denied knowledge of Rs. 70,000/-. The appellant was not asked a single question. There is no evidence to identify any of these payments with the election of the appellant.

110. It is appropriate at this stage to refer to the amendment which was introduced by the Amendment Act, 1974. The appellant relies on the provision to show that expenses incurred or authorised by a political Party cannot be included in election expenses. Explanation I which was inserted at the end of Section 77 of the 1951 Act by Amendment Act, 1974 is that any expenditure incurred or authorised in connection with the election of a candidate by a political party or by any other association or body of persons or by an individual other than the candidate or his election agent shall not be deemed to be and shall not ever be deemed to have been expenditure in connection with the election incurred or authorised by the candidate or by his election agent.

111. A proviso was also added to the aforesaid Explanation I by the Amendment Act, 1974. The proviso stated that nothing contained in the Explanation shall affect (a) any judgement, order or decision of the Supreme Court whereby the election of a candidate to the House of the People or to the Legislative Assembly of a State has been declared void or set aside before the commencement of the Representation of the People (Amendment) Ordinance, 1974; (b) any judgement, order or decision of a High Court where-by the election of any such candidate has been declared void or set aside before the commencement of the said Ordinance if no appeal has been preferred to the Supreme Court against such judgment, order or decision of the High Court before such commencement and the period of limitation for filing such appeal has expired before such commencement.

112. Explanation 2 which was added to Section 77 of the 1951 Act by the Amendment Act, 1974 is as follows:—

“For the purposes of Explanation I “political party” shall have the same meaning as in the Election Symbols (Reservation and Allotment) Order, 1968, as for the time being in force.”

113. Counsel for the respondent relied on the recent decision of this Court in *Kanwar Lal Gupta v. Amarnath Chawla*, AIR 1975 SC 308 in support of the proposition that there has been no change in law and if expenses incurred by a political party can be identified with the election of a candidate then that expenditure is to be added to the election expenses of a candidate as being authorised by him. There are no findings by the High Court in the present appeals

that any expenses by a political party were authorised by the appellant. There is also no finding in the present appeals that any expenses incurred by a political party can be identified with the election of the appellant. The changes in law effected by the Amendment Acts, 1974 and 1975 totally repel the submissions on behalf of the respondent. Expenses incurred or authorised in connection with the election of a candidate by a political party shall not be deemed to be and shall not ever be deemed to have been expenditure in connection with the election incurred or authorised by the candidate. Furthermore the ruling in Kanwar Lal Gupta's case (supra) is no longer good law because of the legislative changes.

114. Counsel for the respondent contended that the judgment of the High Court should be reversed with regard to election expenses of the appellant on three counts. First, Exhibit 118 shows that the sum of Rs. 65,000/- which was drawn by the Congress Committee should have been held by the High Court on a reasonable inference to have been spent by the District Congress Committee as having been authorised by the election agent of the appellant. Second, the High Court has not taken into account expenses of the election agent at 12 meetings other than the meetings addressed by the appellant and has also not taken into account the telephone expenses of the election agent. The telephone expenses amounted to Rs. 836.85 between 11th January, 1971 and 10th February, 1971 and a further sum of Rs.2,514/- for the period 11th February, 1971 to 15th March, 1971. Third, it is said that there were 5000 polling booths and if 20 workers were required per booth then 10,000 workers would be required and the only inference is that an amount in excess was spent for workers with the authority of the election agent.

115. In Issue No. 9 there was no amount alleged with regard to telephone bills or election meetings under the heading of alleged election expenses. There was no allegation to that effect in the petition. With regard to expenses for the alleged 12 meetings addressed by the election agent the evidence of Yashpal Kapur is that he addressed about a dozen meetings and he did not include in the election return the expenses incurred for installation of loudspeakers because the expenditure was not incurred by him. He also said that he did not include in the election return the expenses incurred over the construction of platforms because the meetings were arranged by the District Congress Committee. No allegation were made in the petition with regard to any alleged sum of money on account of election meetings where the election agent spoke. The High Court rightly said that the telephone expenses and expenses for meetings could not be taken into consideration because no suggestion of the case was made until the stage of arguments.

116. The respondent's submission is that the appellant was the Prime Minister at the time of the election, and therefore there was a big campaign and the expenses were enormous. That will mean little. Expenses incurred or authorised by a political party are under the Amendment Act, 1974 not to be deemed to be expenditure in connection with the election incurred or authorised by the candidate or by his election agent for the purposes of Section 77 of the 1951 Act. The part played by a political party in connection with candidates of the party at the election particularly in relation to expenditure incurred by the political party with regard to candidates of the party has been the subject of some decisions of the Court. This Court has observed that expenditure must be by the candidate himself and any expenditure in his interest by others (not his agent within the meaning of the term of the Election Law is not to be taken note of. Where vehicles were engaged by the Congress

Committee and used by the candidate, the amount spent by the Congress Committee could not be taken to be included in the expenditure of the candidate's election expenses (See *Hans Raj v. Pt. Hari Ram*, (1968) 40 ELR 125 (SC)).

117. Expenses incurred by a political party in support of its candidates have been held by this Court not to fall within the mischief of Section 123 (6) of the 1951 Act (See *Shah Jayantilal Ambalal v. Kasturilal Nagindas Doshi*, (1969) 42 ELR 307 (SC). In *Rananjaye Singh v. Baijanath Singh*, (1955) 1 SCR 671 = (AIR 1954 SC 749) this Court pointed out that expenses must be incurred or authorised by the candidate or his agent. In that case the Manager, the Assistant Manager, 20 Ziladars and their peons were alleged to have worked for the election of the appellant. This Court held that the employment of extra persons and the incurring or authorising of extra expenditure was not by the candidate or his election agent. The extra men employed and paid were in the employment of the father of the appellant. This Court said that the position in law could not be at all different if the father had given those employees a holiday on full pay and they voluntarily worked in connection with the election of the appellant. Persons who volunteer to work cannot be said to be employed or paid by the candidate or by his election agent.

118. In *Ram Dayal v. Brijraj Singh*, (1970) 1 SCR 530 = (AIR 1970 SC 530) the appellant challenged the election of the respondent on the ground that the Maharaja and the Rajmata of Gwalior had helped the respondent's election in a number of waves and acted as his agents and the respondent incurred considerable expenditure which exceeded the limit. This Court found that assuming the expenditure was incurred by the Maharaja and the Rajmata of Gwalior for the purpose of canvassing votes, in the absence of any evidence to show that the Maharaja and the Rajmata acted as election agents or that the expenditure was authorised by the respondent. It was not liable to be included in the election expenses.

119. On behalf of the respondent it was said relying on the decision of this Court in *Kanwar Lal Gupta's case*, AIR 1975 SC 308 (supra) that if the candidate takes advantage of expenditure incurred by the political party in connection with the election of the candidate or participates in the programme of activity or fails to disavow the expenditure the candidate cannot escape the rigour of the ceiling by saying that he has not incurred the expenditure but his political party has done so. Expenditure incurred by a political party in connection with the election of the candidates of the party is not a part of the election expenses of the candidate. Similarly, participation in the programme of activity organised by a political party will not fall within the election expenses of the candidate of the party. A candidate is not required to disavow or denounce the expenditure incurred or authorised by the political party because the expenditure is neither incurred nor authorised by the candidate. One can disavow what would be ascribed to be incurred or authorised by one. In the case of expenses of a political party there is no question of disavowing expenditure incurred or authorised by the political party.

120. The decision in *Kanwar Lal Gupta's case* AIR 1975 SC 308 (supra) was based on an observation extracted from the decision of this Court in *Megh Raj Patodia v. R.K. Birla* (1971) 2 SCR 118 = (AIR 1971 SC 1295). In *Megh Raj Patodia's case* (supra) the allegations were that the respondent had been put up by one of the wealthiest business houses in the country which owned or controlled a large number of companies and during the election campaign vast material and

human resources of these companies were drawn upon by the respondent. This Court dismissed the appeal on the ground that the appellant had failed to establish that expenditure in excess of the prescribed limit was incurred by the respondent. In *Megh Raj Patodia's case (supra)* there is an observation that expenses incurred by a political party to advance the prospects of the candidates put up by it without more do not fall within Section 77 of the 1951 Act. The words "something more" were construed by counsel for the respondent to mean that if a candidate takes advantage of expenditure incurred or authorised by a political party such expenses could be attributed to a candidate. The Amendment Act, 1974 has added Explanation 1 to Section 77 of the 1951 Act which shows that expenditure incurred or authorised in connection with the election of a candidate by the political party shall not be deemed to be expenditure incurred or authorised by the candidate or his election agent.

121. Allegations that election expenses are incurred or authorised by a candidate or his agent will have to be proved. Authorisation means acceptance of the responsibility. Authorisation must precede the expenditure. Authorisation means reimbursement by the candidate or election agent of the person who has been authorised by the candidate or by the election agent of the candidate to spend or incur. In order to constitute authorisation the effect must be that the authority must carry with it the right of reimbursement.

122. For the foregoing reasons the contentions of the respondent that the appellant exceeded the limit of election expenses fail.

123. The respondent contended that the amendments by the Amendment Acts of 1974 and 1975 are constitutionally invalid. It may be stated here that the Constitution (Thirty-ninth Amendment) Act, 1975 in Section 5 thereof enacts that in the Ninth Schedule to the Constitution after entry 86, inter alia, the following Entries shall be inserted, namely:-

"87. The Representation of the People Act, 1951 (Central Act 43 of 1951); the Representation of the People (Amendment) Act, 1974 (Central Act 58 of 1974); and the Election Laws (Amendment) Act, 1975 (Central Act 40 of 1975)."

124. The contention of the respondent is that when the power of amending the Constitution cannot be exercised to damage or destroy the basic features of the Constitution or the essential elements of the basic structure or framework thereof the limitations on the exercise of legislative power will arise not only from the express limitations contained in the Constitution, but also from necessary implication either under Articles or even in the Preamble of the Constitution. This contention on behalf of the respondent is expanded to mean that if the democratic way of life through Parliamentary institutions based on free and fair elections is a basic feature which cannot be destroyed or damaged by amendment of the Constitution, it cannot similarly be destroyed or damaged by any legislative measure.

125. These reasons were submitted by the respondent, First, the power to resolve doubts and disputes about the validity of elections of Parliament and State Legislatures has been vested by the Constitution in the judicial organ competent to decide election petitions and therefore it is not open to the

Legislature to take away and interfere with these exclusive functions of the judiciary by any legislation amending the law governing the election adjudicated by the judiciary. Second, the insertion of these Acts in the Ninth Schedule will not confer any immunity on the legislative measure if basic features of the Constitution are damaged or destroyed on the ground that the provisions contravene Part III of the Constitution. Third, any provision in the legislative measures which has the effect of bringing about unfairness between different rival candidates in the matter of election is discriminatory and it not only contravenes Article 14 but also violates the implied limitation on legislative power relating to free and fair elections. Fourth any amendment of the law with retrospective operation governing an election which has already been held necessary introduces an element of unfairness and brings about a denial of equality amount rival candidate. Fifth, the deeming clause introduced in the 1951 Act by Sections 6(b) and 8 (a) and (b) of the Amendment Act, 1975 and the device of conclusive proof adopted by Section 8 (c) in the Amendment Act, 1975 are unconstitutional encroachments on judicial power. Sixth power conferred by an enactment including a constitutional enactment has to so exercised as to give effect to the guiding principles of the basic norms of that legislation and not so as to militate against those guiding principles or basic norms.

126. The definition of "candidate is amended by the Amendment Act 1975. The contentions of the respondent on the amendment of the definition of candidate are these. The expression returned candidate" is descriptive of the person and the corrupt practices mentioned in Section 123 of the 1951 Act in relation to candidate will not be confined to corrupt practices committed with reference to the definition of "candidate". Corrupt practices alleged in relation to candidates will be relatable to any period and will not be confined to corrupt practices alleged between the date of nomination and the date of election. If corrupt practices are committed by candidates who eventually become returned candidates such corrupt practices will be offences within meaning of Section 123 of the 1951 Act without any reference to the time of commission.

127. Counsel on behalf of the respondent also contended as follows. The basis of fair and free elections is that the election of a candidate will be avoided any corrupt practice has been committed by the candidate by or with the knowledge and consent of that candidate. The acts of a candidate may be either enter to the date of nomination or it may be subsequent to the date of nomination. Therefore, the Amendment Act, 1975 destroys and damages free and fair election by allowing candidates to commit corrupt practices prior to the date of nomination.

128. The Amendment Act, 1975 is also challenged as falling within the vice of delegated legislation by the amendments inserted as Explanation 3 to Section 77 of the 1951 Act and the insertion of the proviso to Section 123 (7) of 1951 Act. These provisions have already been noticed. Broadly stated expenditure incurred by persons in Government service will not be deemed to be for furtherance of the candidate's election. The contentions are these. No

guidelines have been laid down as to what expenditure can be incurred or what facilities can be made, what acts or things can be done. Delegation cannot include the change of policy. Policy must be clearly laid down in the Act for carrying into effect the objectives of the legislation. The legislature must declare the policy. Any duty can be assigned any facility in connection with the election can be asked for by the party in power to be done for the candidate. The official duty opens a wide power of instructions to Government servants who may be asked to assist candidates by canvassing, influencing which will damage fair elections.

129. The device of conclusive proof which is introduced to add Explanation 3 to Section 123 (7) of the 1951 Act with regard to the date with effect from which the person ceased to be in service is said to be an encroachment on judicial power.

130. Section 8 (a) of the Amendment Act, 1975 which adds a proviso to Section 123 of the 1951 Act to the effect that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purposes of this clause is attacked as legalising religious symbols and thus offending secularism.

131. Section 10 of the Amendment Act, 1975 which enacts that the amendments shall have retrospective effect is challenged as retrospectively legalising a void election. These submissions are made. If this power is upheld there can be a legislative measure to avoid valid elections. The distinction between law abiding persons and lawless persons is eliminated. One person has not been given the opportunity of spending money at the time of election but the other is retrospectively given the advantage of spending in excess and thereafter of avoiding the effect of excess expenses by validation.

132. The contentions on behalf of the respondent that ordinary legislative measures are subject like Constitution amendments to the restrictions of not damaging or destroying basic structure or basic features are utterly unsound. It has to be appreciated at the threshold that the contention that legislative measures are subject to restrictions of the theory of basic structures or basic features is to equate legislative measures with Constitution amendment. The hierarchical structure of the legal order of a State is that the Constitution is the highest level within national law. The Constitution in the formal sense is a solemn document containing a set of legal norms which may be changed only when special prescriptions are observed. The purpose of special prescriptions is to render the change of these norms more difficult by regulating the manner and form of these amendments. The Constitution consists of those rules which regulate the creation of the general legal norms in particular, the creation of statutes. It is because of the material Constitutional that there is a special form for constitutional law. If there is a constitutional form then constitution laws must be distinguished from ordinary laws. The material constitution may determine not only the organs and procedure of legislation, but also, to some degree the contents of future laws. The constitution can negatively determine that the laws must not have a certain content e.g. that the Parliament may not pass any statute which

restricts religious freedom. In this negative way not only contents of statutes but of the other norms of legal order judicial and administrative decisions likewise, may be determined by the Constitution. The Constitution can also positively prescribe certain contents of future statutes. This may be illustrated with reference to the provisions in Article 22 that no person who is arrested shall be detained in custody without being informed, as soon as may be of the grounds for such arrest nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice.

133. Articles 245 and 246 give plenary powers to legislatures to legislate. The only question is whether any provision of the Constitution is violated. The power of plenary body is not to be construed like the power of a delegate. The largest kind of power will be attributed to legislature. The only prohibition is with reference to the provisions of the Constitution. The Constitution is the conclusive instrument by which powers are affirmatively created or negatively restricted. The only relevant test for the validity of a statute made under Article 245 is whether the legislation is within the scope of the affirmative grant of power or is forbidden by some provision of the Constitution.

134. To accept the basic features or basic structures theory with regard to ordinary legislation would mean that there would be two kinds of limitations for legislative measures. One will pertain to legislative power under Articles 245 and 246 and the legislative entries and the provision in Article 13. The other would be that no legislation can be made as to damage or destroy basic features or basic structures. This will mean rewriting the Constitution and robbing the legislature of acting within the framework of the Constitution. No legislation can be free from challenge on this ground even though the legislative measure is within the plenary powers of the legislature.

135. The theory of implied limitations on the power of amendment of the Constitution has been rejected by seven Judges in *Kesavananda Bharati's* case (AIR 1973 SC 1461) (supra). Our Constitution has not adopted the due process clause of the American Constitution. Reasonableness of legislative measures is unknown to our Constitution. The crucial point is that unlike the American Constitution where rights are couched in wide general terms leaving it to the Courts to evolve necessary limitations our Constitution has denied due process as a test of invalidity of law. In *A.K. Gopalan v. State of Madras*, 1950 SCR 88 = (AIR 1950 SC 27) due process was rejected by clearly limiting the rights acquired and by eliminating the indefinite due process. Our Constitution contemplates that considerations of justice or general welfare might require restriction on enjoyment of fundamental rights.

136. The theory of basic structures or basic features is an exercise in impoderables. Basic structures or basic features are indefinable. The legislative entries are the fields of legislation. The pith and substance doctrine has been applied in order to find out legislative competency, and eliminate encroachment on legislative entries. If the theory of basic structures or basic features will be applied to legislative measures it will

denude Parliament and State Legislatures of the power of legislation and deprive them of leaving down legislative policies. This will be encroachment on the separation of powers.

137. The Constitutional validity of a statute depends entirely on the existence of the legislative power and the express provision in Article 13. Apart from the limitation the legislature is not subject to any other prohibition. The amendments made to the 1951 Act by the Amendment Acts, 1974 and 1975 are to give effect to certain views expressed by this Court in preference to certain views departed from or otherwise to clarify the original intention. It is within the powers of Parliament to frame laws with regard to elections. Parliament has power to enumerate and define election expenses. Parliament has power to lay down limits on election expenses. Parliament has power to state whether certain expenses can be included or may be excluded from election expenses. Parliament has power to adopt conclusive proof with regard to matters of appointment resignation or termination of service. Parliament has power to state what can be considered to be office of profit. Parliament has power to state as to what will and what will not constitute corrupt practice. Parliament has power to enact what will be the ground for disqualification. Parliament has power to define "candidate". Parliament has power to state what symbols will be allotted to candidates at election. These are all legislative policies.

138. The conclusive evidence or conclusive proof clause is an accepted legislative measure. Similarly, giving retrospective effect to legislative amendment is accepted to be valid exercise of legislative power. The well known pattern of all Validation Acts by which the basis of judgments or orders of competent Courts and Tribunals is changed and the judgements and orders are made in effective is to be found in *M.P. V. Sudararamier & Co. v. The State of Andhra Pradesh*, 1958 SCR 1422 = (AIR 1958 SC 468). The power of the legislature to pass a law includes a power to pass it retrospectively. An important illustration with reference to retrospective legislation in regard to election is the decision of this Court in *Kanta Kathuria's case* (AIR 1970 Sc 694) (supra). Kanta Kathuria was disqualified by reason of holding an office of profit. First the Ordinance and later the Act was passed to nullify the decision of the High Court. The Ordinance as well as the Act stated that notwithstanding any judgment or order of any court of Tribunal, the officer shall not be disqualified or shall be deemed never to have disqualified the holder thereof as a member of the Legislative Assembly. The rendering of a judgment ineffective by changing the basis by legislative enactment is not encroachment on judicial power because the legislation is within the competence of the legislature.

139. A contention was advanced that the legislative measure could not remove the disqualification retrospectively. Because the Constitution contemplates disqualification existing at certain time in accordance with law existing at that time. One of the views expressed in that case is that Article 191 recognises the power of the legislature of the State to declare by law that the holder of the office shall not be disqualified for being chosen as Member.

Power is reserved to the Legislature of the State to make the declaration. There is nothing in the Article to indicate that this declaration cannot be made with retrospective effect. The Act was held not to be ineffective in its retrospective operation on the ground that it is well recognised that Parliament and State Legislatures can make their laws operate retrospectively. Any law that can be made prospectively can be made with retrospective operation. It is said that certain kinds of laws cannot operate retrospectively. That is ex-post facto legislation. The present case does not fall within that category. Reference may be made to *Mays Parliamentary Practice* 17th Ed. p. 515. Where instances are given of validation election by the British Parliament.

140 This Court in *Jumuna Prasad Mukhariya v Lachhi Ram*, (1955) 1 SCR 608 = (AIR 1955 SC 686) rejected the contention advanced there that Sections 123 (5) and 124 (5) of the 1951 Act interfered with a citizen's fundamental right to freedom of speech. This Court said that these laws do not stop a man from speaking. They merely prescribe conditions which must be observed if one wants to enter Parliament. The right to stand as a candidate and to contest an election is not a common law right. It is a special right created by statute which can only be exercised on the conditions laid down by the statute. The Fundamental Rights Chapter has no bearing on a right like this created by a statute relating to election.

141. The contention on behalf of the respondent that the amendment of the definition of "candidate" has damaged or destroyed basic structure is untenable. There is no basic structure or basic feature or basic framework with regard to the time when under the Election Laws a person is a candidate at the election. The contention of the respondent that the expression "returned candidate" is descriptive of the expression "candidate" will rob Section 100 of its content. The word "candidate" in relation to various electoral offences shows that he must be a candidate at the time of the offence. Time is necessary for fixing the offences. A significant distinction arises between the electoral offences under the 1951 Act and the offences under Sections 171-A to 171-I of the Indian Penal Code namely, that the 1951 Act uses the word "candidate" or his election agent with reference to various offences, whereas the Indian Penal Code does not use the word "candidate" in relation to commission of any offence. Any person may fall within the offences of bribery undue influence. Personation at elections within the provisions of the Indian Penal Code or for false statement or illegal payments in connection with any election or failure to keep election accounts.

142 The English representation of the People Act, 1949 called the English Act was relied on by the respondent to show that the word "candidate" in the 1951 Act should have the same meaning as in the English Act and there should be no limitation as to time in relation to a candidate. "Candidate" is defined in Section 103 of the English Act in relation to Parliamentary election to mean a person who is elected to serve in Parliament or a person who is nominated as a candidate at the election or is declared by himself or by others to be a candidate on or after the day of the issue of the writ for the

election or after the dissolution or vacancy in consequence of which the writ was issued. The electoral offences under the English Act speak of a person to be guilty of corrupt practices of bribery as mentioned in section 99, of treating as mentioned in Section 100 and of undue influence as mentioned in Section 101 of the English Act. These sections in the English Act speak of a person and do not use the expression "candidate".

143. Where a candidate is elected the English definition gives no commencing date as from which his candidature has commenced; whereas if he be not elected, he is not a candidate until he has been nominated, or is declared to be a candidate on or after the dissolution or vacancy. A candidate who is elected is accordingly a "candidate" as soon as he has entered upon his election campaign, and has made it known that he intends to present himself as a candidate at the ensuing election, he may thus become a candidate before the dissolution of Parliament and may be unseated for bribery or treating committed months or even years before the vacancy or election, for such acts are offences at common law. With respect to illegal practices which are purely statutory offences, it would seem that a narrower construction will prevail, and that a candidate will not be held responsible for payments etc., made before he is a candidate in point of fact, and which payments only become illegal practices by reason of his subsequently becoming a candidate (See Parker's Conduct of Parliamentary Elections 1970 Ed. pages 52-53).

144 It has been held in England that a candidate may be unseated for bribery or treating committed months or even years before the vacancy or election (Youghal 1 OM & H 295; Bodmin 5 O'M & H 230). The present position under the English Act is stated in Parker's Conduct of Parliamentary Elections 1970 Ed at p. 330 to be that since the corrupt practice under consideration is purely a statutory offence which only becomes a corrupt practice by reason of the person in whose support the prohibited expenses were incurred subsequently becoming a candidate the candidate may not be held responsible. In Norwich (1886) 54 LT 625 (627) the question was considered in relation to the responsibility of a candidate for payments which only became illegal practices by reason of his subsequently becoming a "candidate" as defined by statute and it was held that he was not liable. The liability of a candidate under the English Act, particularly with regard to election expenses as laid down in Section 63 of the English Act is regarded as open to doubt until the point is settled by the decision of an election court.

145 Sections 171-A to 171-I of the Indian Penal Code and the provisions contained in Sections 125 to 136 of the 1951 Act follow the pattern of English Acts namely, Statutes 17 and 18 Victoria. Chapter CII (1853-54); Statutes 21 and 22 Victoria Chapter LXXXVII (1858) and Statutes 46 and 47 Victoria Chapter LI (1882). These English Statutes make certain acts punishable as corrupt practice when they relate to persons other than candidates or voters Section II of 17 and 18 Victoria chapter CII enacts that the persons mentioned therein shall be deemed guilty of bribery and punishable in accordance with the provisions of the Act. The words used there are "every person" who shall do the acts mentioned therein shall be punishable. In these

sections dealing with the acts of persons other than candidates and voters no time is mentioned. On the other hand, section IV of Statutes 17 and 18 Victoria chapter CII makes certain acts of voters and candidates corrupt practice. Section IV of the aforesaid English Statute enacts that every candidate at an election who shall corruptly by himself, or by or with any person or by any other ways or means on his behalf at any time either before during or after any election directly or indirectly give or provide or cause to be given or provided any expenses incurred for any meat drink, entertainment etc. shall be deemed guilty of an offence of treating. In these sections when the acts of voters and candidates are made punishable the words used are "before or during any election directly or indirectly or at any time either before, during or after any election" in Section IV of the Act. These words make acts of voters or candidates committed before or during an election also corrupt practice. Without these words acts of the candidate made punishable under the English Statutes would only be the acts committed by the candidate after he becomes a candidate.

146. The 1951 Act uses the expression "candidate" in relation to several offences for the purpose of affixing liability with reference to a person being a candidate. If no time be fixed with regard to a person being a candidate it can be said that from the moment a person is elected he can be said to hold himself out as a candidate for the next election. The definition in the English Act cannot be of any aid to the construction of the 1951 Act.

147. The contention of the respondent is that if a candidate is free to spend as much as a candidate likes before the date of nomination a great premium would be placed on free use of money before the date of nomination. The 1951 Act specifies what election expenses are of a candidate. The statute specifies time in regard to a candidate. That time can not be enlarged or reduced. The holding out by a person of candidature was a flexible and elastic idea. The date of nomination is definite and doubtless. Different views may be taken as to the time of holding out. The legislature has now set the matter at rest.

148. The word "incur" according to the dictionary meaning means to become liable to. The word "incur" means undertake the liability even if the actual payment may not be made immediately. The undertaking of the responsibility for the expenditure concerned may be either by the candidate or his election agent. Again, a candidate is also to be deemed responsible for the expenditure if he has authorised a particular expenditure to be made by someone else on his behalf.

149. The contention on behalf of the respondent is that the Amendment Acts of 1974 and 1975 fall within the vice of delegated legislation because there are no guiding principles with regard to official duty or nature of expenditure in explanation 3 to Section 77 of the 1951 Act and in the proviso to Section 123 (7) of the 1951 Act. Official duty will be a duty in law. Official duty will be duty under administrative directions of the Executive. Official duty will be for security law and order, and matters in aid of public purpose.

These duties will be in connection with election. To illustrate section 197 of the Criminal Procedure code speaks of official duty.

150 This Court in *Matajog v. H.C. Bhari* (1955) 2 SCR 925 = AIR 1956 SC 44) interpreted the words "official duty" to have reasonable connection between the act and the discharge of duty. The act must bear such relation to the duty that the person could lay a reasonable claim, but not a pretended fanciful claim that he did it in the course of the performance of his duty. Where a power is conferred or a duty imposed by statute or otherwise and there is nothing said expressly inhibiting the exercise of the power or the performance of the duty by any limitations or restrictions, it is reasonable to hold that it carries with it the power of doing all such acts or employing such means as are reasonably necessary for such execution, because it is a rule that when the law commands a thing to be done, it authorises the performance of whatever may be necessary for execute its command.

151. There is no vice of delegation in the Statute "Delegation is not the complete handing over or transference of a power from one person or body of persons to another. Delegation may be defined as the entrusting by a person or body of persons of the exercise of a power residing in that person or body of persons to another person or body of persons with complete power of revocation or amendment remaining in the grantor or delegator. It is important to grasp the implications of this for much confusion of thought has unfortunately resulted from assuming that delegation involves or may involve the complete abdication or abrogation of a power. This is precluded by the definition. Delegation often involves the granting of discretionary authority to another but such authority is purely derivative. The ultimate power always remains in the delegator and is never renounced". (See *Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. v. The Asst. Commr. of Sales Tax* (1974) 4 SCC 98 at p. 116 = (AIR 1974 SC 1660 at p. 1673).

152. The Constitution 29th Amendment Act was considered by this Court in *Kesavananda Bharati's* case (AIR 1973 SC 1461) (supra). The 29th Amendment Act inserted in the Ninth Schedule to the Constitution Entries 65 and 66 being the Kerala Land Reforms Act, 1969 and the Kerala Land Reforms act, 1971. This Court unanimously upheld the validity of the 29th Amendment Act. The unanimous view of this Court in *Kesavananda Bharati's* case (supra) is that Article 31-B is not open to challenge. Six Judges held that the 29th Amendment Act would be ineffective to protect the impugned Act if they took away the fundamental rights. Six judges took the view that the 29th Amendment Act is valid and further that Article 31-B has been held by this Court to be independent of Article 31-A and that Article 31-B protects Scheduled Acts and Regulations and none of the Scheduled Acts and Regulations is deemed to be void or ever to have become void on the ground of contravention of any fundamental rights. Article 31-B gives a mandate and complete protection from the challenge of fundamental rights to the Scheduled Acts and Regulations. The view of seven Judges in *Kesavananda Bharati's* case is that Article 31-B is a constitutional device to place the specified statute in the Schedule beyond any attack that these

infringe Part III of the Constitution. The 29th Amendment is affirmed in Kesavananda Bharati's case (supra) by majority of seven against six Judges.

153. The contentions of the respondent that the Amendment Acts of 1974 and 1975 are subject to basic features or basic structure or basic framework fails in two grounds. First, legislative measures are not subject to the theory of basic features or basic structure or basic framework. Second, the majority view in Kesavananda Bharati's case (AIR 1973 SC 1961) (supra) is that the 29th Amendment which put the two statutes in the Ninth Schedule and Article 31-B is not open to challenge on the ground of either damage to or destruction of basic features, basic structure or basic framework or on the ground of violation of fundamental rights.

154. The symbol allotted to the party of the appellant was characterised by the respondent as a religious symbol. Under Article 324 the superintendence, direction and control of elections to Parliament is vested in the Election Commission. Rule 5 of the Conduct of Elections Rules, 1961 states that the Election Commission shall by notification in the Gazette of India and in the Official Gazette of each State, specify the symbols that may be chosen by candidates at elections in Parliamentary or Assembly constituencies and the restrictions to which their choice shall be subject. Rule 10(4) of the 1961 Rules aforesaid states that at an election in a Parliamentary or Assembly constituency, where a poll becomes necessary, the returning officer shall consider the choice of symbols, expressed by the contesting candidates in their nomination papers and shall, subject to any general or special direction issued in this behalf by the Election Commission allot a different symbol to each contesting candidate in conformity, as far as practicable with his choice. It is, therefore, apparent that the power to specify permissible symbols is vested by Rule 5 in the Election Commission. The choice of candidates is limited to the symbol specified by the Election Commission. The Election Symbols (Reservation and Allotment) Order, 1968 was made in exercise of the power conferred by Article 328 of the Constitution read with Rule 5 and Rule 10 of the Conduct of Election Rules and all other powers enabling in this behalf.

155. Clause 17 of the Election Symbols (Reservation and Allotment) Order, 1968 provides that the Commission shall by notification in the Gazette of India publish lists specifying national parties and the symbols respectively reserved for them etc. There can, therefore be no doubt that the power of evolving permissible symbols is exclusively vested in the Election Commission. It is under their direction that the Returning Officer has to make allotments and allotments are made in terms of Clauses 5, 6 and 8. Therefore, in the matter of evolving of the permissible symbols, the jurisdiction is vested in the Election Commission. If a candidate displays in addition to the allotted symbol an additional symbol which may have a special appeal on grounds of religion to a particular community then the Court will be entitled to go into this question.

156. With regard to the symbol of cow and calf being a religious symbol it was said on behalf of the respondent that the Akhil Bhartiya Ram Rajya Parishad asked for cow, calf and milkmaid symbol and were refused. They were given the symbol of a "Rising Sun". It is impossible to hold that because one party has not been given the symbol of cow, calf and milkmaid, therefore, the symbol of cow and calf becomes a religious symbol. The High Court on the evidence adduced by the respondent rightly came to the conclusion that there was no evidence to prove that the cow and calf is a religious symbol. The High Court rightly held that cow and calf is not a religious symbol.

157. The finding of the High Court that the appellant held herself out to be a candidate from 29th December, 1970 is set aside because the law is that the appellant became a candidate only with effect from the date of nomination which was 1st February, 1971. The finding of the High Court that the resignation of Yashpal Kapur did not become effective until it was notified in the Gazette is also set aside because under the law the resignation became effective from 14th January, 1971. The finding of the High Court that the appellant committed corrupt practice in breach of Section 123 (7) of the 1951 Act is also repelled by the legislative changes and is, therefore, set aside. The order of disqualification of the appellant is also set aside.

158. For the foregoing reasons the contentions of the appellant succeed and the contentions of the appellant succeed and the contentions of the respondent fail. The appeal is accepted. The judgment of the High Court appealed against is set aside. The cross-objection of the respondent is dismissed. There will be no order as to costs.

KHANN A J.:-

159. Civil appeal No. 887 of 1975 has been filed by Smt. Indira Nehru Gandhi (hereinafter referred to as the appellant) against the judgment of the Allahabad High Court whereby election petition filed by Shri Raj Narain respondent No. 1 (hereinafter referred to as the respondent) to question the election of the appellant to the Lok Sabha from Rae Bareli Parliamentary constituency was allowed and the election of the appellant was declared void. The appellant was found guilty of having committed corrupt practices under Sec. 123 (7) of the Representation of the People Act, 1951 (hereinafter referred to as the RP Act) and as such as stated to be disqualified for a period of six years in accordance with S 8-A of the RP Act. Cross Appeal No. 909 of 1975 has been filed by Shri Raj Narain against the judgment of the High Court in so far as it decided certain issues against the respondent.

160 The President of India called upon different constituencies in the country to elect members to the Lok Sabha by notification dated January 27, 1971 under Section 14 (2) of the RP Act. Last date for filing nomination papers was fixed as February 3, 1971 for Rae Bareli constituency by the Election Commission. The appellant filed her nomination paper on February 1, 1971. The appellant was for a number of years before the election Prime Minister of India and is since then continuing to hold that office. Yashpal Kapur, who was previously a gazetted officer in the Government of India

holding the post of Officer on Special Duty in the Prime Minister's Secretariat and who subsequently submitted his resignation was appointed the election agent of the appellant. The signed form about the appointment of Yashpal Kapur as election agent was submitted to the Returning Officer on February 4, 1971, the date of scrutiny. The date on which Yashpal Kapur submitted his resignation and the same became effective is, however, a matter of controversy between the parties. The appellant who was a candidate of the Indian National Congress (R), was allotted the party symbol of cow and calf. Polling took place in the first week of March on March 1, March 3 and March 5, 1971. The appellant and the respondent were the principal contestants. There were two other candidates but we are not concerned with them. The result of the election was declared on March 10, 1971. The appellant got 1.83.309 votes, while the respondent secured 71.499 votes and the former was declared elected. The respondent thereafter filed election petition on April 24, 1971 to challenge the election of the appellant. Apart from some grounds which were not pressed, the election of the appellant was assailed on the following grounds.

(1) The appellant held herself out as a prospective candidate from the Rae Bareli constituency immediately after the dissolution of the Lok Sabha on December 27, 1970 and for furtherance of her election prospects she obtained and procured the assistance of Yashpal Kapur who was at that time holding the post of Officer on Special Duty. The appellant thus committed corrupt practice under S. 123 (7) of the RP Act.

(2) The appellant and her election agent procured the assistance of members of armed forces of the union for furtherance of her election prospects inasmuch as the members of the armed forces arranged planes and helicopters of the Air Force at her instance for her flights to enable her to address meetings in her constituency. The appellant there by committed corrupt practice under Section 123 (7) of the RP Act.

(3) The appellant and her election agent obtained the assistance of a number of gazetted officers and members of the police forces for the furtherance of her election prospects in as much as the services of the District Magistrate. Superintendent of Police Rae Bareli and the Home Secretary. Uttar Pradesh Government were utilised for the purposes of the construction of rostrums and installation loudspeakers at various places within the constituency where the appellant addressed her election meetings as also for the purpose of making arrangements of barricading and posting of police personnel on the routes by which the appellant was to travel in her constituency and at the places where she was to address meetings. In order to give publicity to her visits and thus attract large crowds. The appellant was thereby stated to have committed corrupt practice under Section 123 (7) of the RP Act.

(4) Yashpal Kapur, election agent of the appellant and her other agents with the consent of Yashpal Kapur, freely distributed quilts, blankets, dhotis and liquor among the voters to induce them to vote for her and thereby the

appellant committed corrupt practice of bribery under Section 123 (1) of the RP Act.

(5) The appellant and her election agent made extensive appeals to the religious symbol of cow and calf and thereby committed corrupt practice under Section 123 (3) of the RP Act.

(6) Yashpal Kapur and some other persons with his consent hired and procured a number of vehicles for the free conveyance of electors to the polling stations and thereby committed corrupt practice under Section 123 (5) of the RP Act.

(7) The appellant and her election agent incurred or authorised expenditure in contravention of Section 77 of the RP Act and thereby committed corrupt practice under Section 123 (6) of the RP Act.

161. The appellant in her written statement denied the various allegations levelled against her and pleaded that Yashpal Kapur resigned from his post on January 13, 1971 and his resignation was accepted with effect from January 14, 1971. Notification dated January 25, 1971 was issued by the Prime Minister's Secretariat in that connection. It was added that P.N. Haksar, then Secretary to the Prime Minister, told Yashpal Kapur on the same on which the resignation was tendered that it was accepted and that format orders would follow. Yashpal Kapur became the election agent of the appellant on February 4, 1971. During the period he was a gazetted officer in the Government of India, he did not do any work in furtherance of the appellant's election prospects. Regarding the use of planes and helicopters of the Air Force, the appellant admitted that on February 1, 1971 she went by an Indian Air Force plane from Delhi to Lucknow from where she went by car to Rae Bareli addressing meetings enroute. It was further admitted that on February 24, 1971 the appellant went by helicopter of the Indian Air Force to Gonda on regular party work and that from there she went by car to Lucknow, Unnao and Rae Bareli addressing public meetings in several constituencies besides her own. The appellant referred to the Pillai Committee Report and the Office Memoranda issued by the Government of India and asserted that the aforesaid flights were made by her in accordance with them. It was added that under the rules, bills for those flights were to be paid by the All India Congress Committee and most of them had already been paid. According to the appellant, neither she nor did her election agent solicit, require or order the use of Air Force planes and the Government of India provided the planes as part of their normal duty. The appellant denied having obtained the assistance of the District Magistrate and the Superintendent of Police Rae Bareli as also that of the Home Secretary, U.P. Government for any of the purposes mentioned in the petition. The appellant in this context referred to the instructions issued by the Comptroller and Auditor General of India. She pleaded that arrangements for posting of police on the routes which she followed and the arrangements of rostrums were made by the State government itself in compliance with those instructions. In regard to the loudspeakers, she pleaded that those were arranged by the

District Congress Committee and not by the officers of the State Government. It was denied that any directions or instructions in that regard were issued by the appellant or her election agent. The allegations regarding the distribution of blankets dhotis and liquor were stated to be absolutely false. As regards the Symbol of cow and calf, the appellant stated that it was not a religious symbol and that it was wrong that extensive appeals were made by her or her election agent to that symbol. The appellant added that she and her election agent merely informed the voters that the symbol of the Indian National Congress (R) was cow and calf and that the voting mark should be put against that symbol. The decision of the Election Commission allotting the symbol of cow and calf to her party was final and the same could not, according to the appellant, be made a ground of attack nor could the Court go into that question. The allegation regarding hiring and procuring of vehicles and the use thereof for conveyance of the voters to the polling stations was described by the appellant as false. Likewise, she denied the allegation that she or her election agent incurred expenditure in excess of the prescribed limit.

162. Following issues were framed in the case:-

“(1) Whether respondent No. 1 obtained and procured the assistance of Yashpal Kapur in furtherance of the prospects of her election while he was still a Gazetted Officer in the service of Government of India? If so, from what date?

(2) Whether at the instance of respondent No. 1 members of the Armed Forces of the Union arranged Air Forces planes and helicopters for her flown by members of the Armed Forces to enable her to address election meetings on 1-2-1971 and 25-2-1971, and if so, whether this constituted a corrupt practice under Sec. 123 (7) of the Representation of the People Act?

(3) Whether at the instance of respondent No. 1 and her election agent Yashpal Kapur, the District Magistrate of Rae Bareli, the Superintendent of Police of Rae Bareli and the Home Secretary of U.P. Government arranged for rostrums, loudspeakers and barricades to be set up and for members of the Police Force to be posted in connection with her election tour on 1-2-1971 and 25-2-1971; and if so, whether this amounts to a corrupt practice under Section 123 (7) of the Representation of the People Act?

(4) Whether quilts, blankets, dhotis and liquor were distributed by agents and workers of respondent No. 1, with the consent of her election agent Yashpal Kapur at the places and on the dates mentioned in Schedule A of the Petition in order to induce electors to vote for her?

(5) Whether the particulars given in paragraph 10 and Sch. A of the Petition are too vague and general to afford a basis for allegations of bribery under Section 123 (1) of the Representation of the People Act?

(6) Whether by using the symbol cow and calf which had been allotted to her party by the Election Commission in her election campaign the respondent No. 1 was guilty of making an appeal to religious symbol and

committed a corrupt practice as defined in Section 123 (3) of the Representation of the People Act?

(7) Whether on the dates fixed for the poll voters were conveyed to the polling stations free of charge on vehicles hired and procured for the purpose by respondent No 1's election agent Yashpal Kapur, or other persons with his consent as detailed in Schedule B to the Petition?

(8) Whether the particulars given in paragraph 12 and Schedule B of the Petition are too vague and general to form a basis for allegations regarding a corrupt practice under Section 123 (5) of the Representation of the People Act?

(9) Whether respondent No. 1 and her election agent Yashpal Kapur incurred or authorised expenditure in excess of the amount prescribed by Section 77 of the Representation of the People Act, read with Rule 90, as detailed in para 13 of the Petition?

(10) Whether the petitioner had made a security deposit in accordance with the rules of the High Court as required by Section 117 of the Representation of the People Act?

(11) To what relief, if any, is the petitioner entitled?"

Subsequent to the framing of the above issues, the following three additional issues were framed in pursuance of the judgment of this Court in an appeal against an interlocutory order of the High Court:

“(1) Whether respondent No. 1 obtained and procured the assistance of Yashpal Kapur in furtherance of the prospects of her election while he was still a Gazetted Officer in the service of the Government of India? If so, from what date?

(2) Whether respondent No. 1 held herself out as a candidate from any date prior to 1-2-1971 and, if so, from what date?

(3) Whether Yashpal Kapur continued to be in the service of Government of India from and after 14-1-1971 or till which date?

163 During the pendency of the election petition in the High Court, Section 77 of the RP Act was amended by an Ordinance which was subsequently replaced by Act 58 of 1974 (hereinafter referred to as the 1974 amending Act or Act 58 of 1974). The said amending Act inserted two explanations at the end of sub-section (1) of S. 77 of the RP Act. The material part of the explanations reads as under:

“Explanation 1 – Notwithstanding any judgment, order or decision of any court to the contrary, any expenditure incurred or authorized in connection with the election of a candidate by a political party or by any other association or body of persons or by any individual (other than the candidate or his election agent) shall not be deemed to be, and shall not ever be deemed to have been, expenditure in connection with the election incurred or

authorized by the candidate or by his election agent for the purposes of this sub-section.

Provided

Explanation 2. – For the purposes of Explanation 1, ‘political party’ shall have the same meaning as in the Election Symbols (Reservation and Allotment) Order, 1968, as for the time being in force.”

The above amendment in Section 77 had a bearing on the allegation which was the subject-matter of issue No. 9. The respondent filed writ petition challenging the validity of the amending Act.

164. The High Court decided issues 2, 4, 6 and 7 in favour of the appellant and against the respondent. Issues 5, 8 and 10 were found in favour of the respondent and against the appellant. On issues No. 9 the finding of the High Court was that the total amount of expenditure incurred or authorized by the appellant or her election agent, together with the expenditure proved to have been incurred by the party or by the State Government in connection with the appellant’s election amounted Rs. 31,976.47 which was sufficiently below the prescribed limit of Rs. 35,000. The appellant prescribed limit of Rs. 35,000. The appellant as such was held not guilty of any corrupt practice under Section 123 (6) of the Act. As the respondent was found to have failed to prove that the expenses of the appellant or her election agent, together with the expenses found to have been incurred by the political party and the State Government in connection with the appellant’s election proceeded the prescribed limit, the High Court held that no ground had been made out for inquiring into the validity of the 1974 amending Act. The writ petition filed by the respondent was accordingly dismissed.

165. On additional issue No.2, the finding of the High Court was that the appellant held herself out as a candidate from the Rae Bareilly Parliamentary constituency on December 29, 1970. Issue No.3 was decided by the High Court against the appellant. It was held that the appellant obtained the assistance of the officers of the U.P. Government, particularly the District Magistrate, Superintendent of Police, the Executive Engineer PWD and the Engineer Hydel Department for construction of rostrums and arrangement of supply of power for loudspeakers in the meetings addressed by her on February 1, 1971 and February 25, 1971 in furtherance of her election prospects. The appellant, as such, was found guilty of corrupt practice under Section 123 (7) of the RP Act. On additional issue No.3, the High Court found that Yashpal Kapur continued to be in the service of the Government of India till January 25, 1971, which was the date of the notification regarding the acceptance of Yashpal Kapur's resignation. The High Court referred to the fact that according to the notification resignation of Yashpal Kapur had been accepted with effect from January 14, 1971 and observed that the order accepting the resignation was passed on January 25, 1971 and till that order was passed, the status of Yashpal Kapur continued to remain that of a Government servant despite the fact that when that order was passed it was

given retrospective effect so as to be valid from January 14, 1971. As regards issue No. 1 and additional issue No. 1. the High Court held that the appellant obtained and procured the assistance of Yashpal Kapur during the period from January 7 to 24, 1971 when Yashpal Kapur was still a gazetted officer in the service of the Government of India in the furtherance of her election prospects.

166. As a result of its findings on issues No. 3, issue No. 1 read with additional issue No. 1, additional issue No. 2 and additional issue No. 3, the High Court allowed the petition and declared the election of the appellant to the Lok Sabha to be void. The appellant was found guilty of having committed corrupt practice under Section 123 (7) of the R P Act by having obtained the assistance of gazetted officers of the U.P. Government, viz., the District Magistrate and the Superintendent of Police Rae Bareli, the Executive Engineer PWD Rae Bareli and Engineer Hydrel Department Rae Bareli in furtherance of her election prospects. The appellant was further found guilty of having committed another corrupt practice under Section 123 (7) of the R P Act by having obtained the assistance of Yashpal Kapur, a gazetted officer in the Government of India holding the post of Officer on Special Duty in Prime Minister's Secretariat, for the furtherance of her election prospects. The appellant, it was accordingly observed, stands disqualified for a period of six years from the date of the order in accordance with Section 8-A of the R P Act. The writ petition, as mentioned earlier, was dismissed.

167. An appeal against the judgment of the learned single Judge of the High Court dismissing the writ petition is pending before the High Court.

168. During the pendency of these appeals, Parliament passed the Election Laws (Amendment) Act, 1975 (Act 40 of 1975) (hereinafter referred to as 1975) amending Act. or Act 40 of 1975 and the same was published in the Gazette of India Extraordinary dated August 6, 1975. Section 2 of the 1975 amending Act substituted a new section for Section 8-A in the Act. According to the new section, the case of every person found guilty of a corrupt practice by an order under Section 99 shall be submitted as soon as may be, after such order takes effect to the President for determination of the question as to whether such person shall be disqualified and if so, for what period, not exceeding six years. It is also provided that the person who stands disqualified may before the expiry of the period of disqualification submit a petition to the President for the removal of such disqualification for the unexpired portion of the said period. The President shall then give his decision on such petition after obtaining the opinion of the Election Commission and in accordance with such opinion. Sections 3, 4 and 5 of the 1975 amending Act deal with other consequential matters relating to disqualification, and it is not necessary for the purpose of the present case to go into them. Sections 6 and 7 amended Ss. 77 and 79 of the RP Act and we shall refer to them presently. Same is the position of Section 8 of the amending Act which introduced changes in Section 123 of the RP Act. Section 9 amended Section 171-A of the Indian Penal Code. Section 10 gives

retrospective effect to Sections 6, 7 and 8. Sections 6, 7, 8, 9 and 10 of Act 40 of 1975 read as under:

"6. In Section 77 of the principal Act, in sub-section (1),-

- (a) for the words 'the date of publication of the notification calling the election', the words 'the date on which he has been nominated' shall be substituted;
- (b) after Explanation 2, the following Ex-planation shall be inserted, namely:—

'Explanation 3.— For the removal of doubt, it is hereby declared that any expenditure in respect of any arrangements made, facilities provided or any other act or thing done by any person in the service of the Government and belonging to any of the classes mentioned in clause (7) of Section 123 in the discharge or purported discharge of his official duty as mentioned in the proviso to that clause shall not be deemed to be expenditure in connection with the election incurred or authorized by a candidate or by his election agent for the purposes of this sub-section.'

7. In Section 79 of the principal Act, for clause (b). the following clause shall be sub-stituted, namely:—

'(b) 'candidate' means a person who has been or claims to have been duly nominated as a candidate at any election.'

8. In Section 123 of the principal Act,—

- (a) in clause (3), the following proviso shall be inserted at the end, namely:—

'Provided that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purposes of this clause.'

- (b) in clause (7), the following proviso shall be inserted at the end, namely:—

'Provided that where any person, in the service of the Government and belonging to any of the classes aforesaid, in the discharge or purported discharge of his official duty, makes any arrangements or provides any facilities or does any other act or thing, for, to, or in relation to, any candidate or his agent or any other person acting with the consent of the candidate or his election agent, (whether by reason of the office held by the candidate or for any other reason), such arrangements, facilities or act or thing shall not be deemed to be assistance for the furtherance of the prospects of that candidate's election.'

- (c) in the Explanation at the end, the following shall be added, namely:—

'(3) For the purposes of clause (7), notwithstanding anything contained in any other law, the publication in the Official Gazette of the appointment, resignation, termination of service, dismissal or removal from service of a

person in the service of the Central Government (including a person serving in connection with the administration of a Union territory) or of a State Government shall be conclusive proof—

- (i) of such appointment, resignation, termination of service, dismissal or removal from service, dismissal or removal from service, as the case may be, and
- (ii) where the date of taking effect of such appointment, resignation, termination of service, as the case may be, is stated in such publication, also of the fact that such person was appointed with effect from the said date, or in the case of resignation, termination of service, dismissal or removal from service, such person ceased to be in such service with effect from the said date.'

9. In the Indian Penal Code, in Section 171-A, for clause (a), the following clause shall be substituted, namely:—

- '(a) 'candidate' means a person who has been nominated as a candidate at any election,'

10. The amendments made by Sections 6, 7 and 8 of this Act in the principal Act shall also have retrospective operation so as to apply to and in relation to any election held before the commencement of this Act to either House of Parliament or to either House or the House of the Legislature of a State—

- (i) in respect of which any election petition may be presented after the commencement of this Act; or
- (ii) in respect of which any election petition is pending in any High Court immediately before such commencement; or
- (iii) in respect of which any election petition has been decided by any High Court before such commencement but no appeal has been preferred to the Supreme Court against the decision of the High Court before such commencement and the period of limitation for filing such appeal has not expired before such commencement; or
- (iv) in respect of which appeal from any order of any High Court made in any election petition under Section 98 or Section 99 of the principal Act is pending before the Supreme Court immediately before such commencement."

169. It is submitted by Mr. Shanti Bhushan on behalf of the respondent that the amendments made in the RP Act have an impact upon five out of the seven grounds which were set up by the respondent to as sail the election of the appellants.

170. On August 10, 1975 the Constitution (Thirty-ninth Amendment) Act, 1975 was published. A number of constitutional changes were made by the Constitution Amendment Act. We are, however, concerned with section 4 of the Constitutional Amendment Act., which inserted Article 329-A in the Constitution after Article 329. Article 329-A read as under:

"329-A. Special provision as to election to Parliament in the case of Prime Minister and Speaker.— (1) Subject to the provisions of Chapter II of Part V (Except sub-clause @ of clause (1) of Art. 102), no election—

- (a) to either House of Parliament of a person who holds the office of Prime Minister at the time of such election or is appointed as Prime Minister after such election;
- (b) to the House of the People of a person who holds the office of Speaker of that House at the time of such election or who is chosen as the Speaker for that House after such election;

shall be called in question, except before such authority (not being any such authority as is referred to in clause (b) of Article 329 or body and in such manner as may be provided for by or under any law made by parliament and any such law may provide for all other matters relating to doubts and disputes in relation to such election including the grounds on which such election may be questioned.

(2) The validity of any such law as is referred to in clause (1) and the decision of any authority or body under such law shall not be called in question in any court.

(3) Where any person is appointed as Prime Minister or, as the case may be, chosen to the office of the Speaker of the House of the People, while an election petition referred to in clause (b) of Article 329 in respect of his election to either House of Parliament or, as the case may be, to the House of the People is pending, such election petition shall abate upon such person being appointed as Prime Minister or, as the case may be, being chosen to the office of the Speaker of the House of the People, but such election may be called in question under any such law as is referred to in clause (1).

(4) No law made by Parliament before the commencement of the Constitution (Thirtyninth Amendment) Act, 1975. in so far as it relates to election petitions and matters connected therewith shall apply or shall be deemed ever to have applied to or in relation to the election of any such person as is referred to in clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void or has, before such commencement been declared to be void under any such law and notwithstanding any order made by any court before such commencement declaring such election to be void such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.

(5) Any appeal or cross appeal against any such order of any court as is referred to in clause (4) pending immediately before the commencement of the Constitution (Thirtyninth Amendment) Act, 1975. before the Supreme Court shall be disposed of in conformity with the provisions of clause (4).

(6) The provisions of this article shall have effect notwithstanding anything contained in this Constitution.”

171. Section 5 of the above Constitution Amendment Act inserted in the Ninth Schedule to the Constitution a number of enactments including the RP Act as also Acts 58 of 1974 and 40 of 1975.

172. At the hearing of the appeal Mr. Sen on behalf of the appellant has relied upon clause (4) of the new Article 329-A and has contended that that clause clearly applies to the present case. It is urged that in view of that clause no law made by Parliament before the coming into force of the Constitution (Thirty-ninth Amendment) Act, 1975, i.e., before August 10, 1975, in so far as it relates to the election petitions and matters connected therewith shall apply or shall be deemed ever to have applied to or in relation to the election to the Lok Sabha of the appellant who being Prime Minister is one of the persons referred to in clause (1) of the article. It is further submitted that in view of that clause, the election of the appellant shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void or has before such commencement been declared to be void under any such law. Mr. Sen also adds that notwithstanding the order made by the High Court before such commencement declaring the election of the appellant to be void, her election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect. Submission is consequently made that in view of the mandate contained in clause (5) of the article, the appeal filed by the appellant and the cross appeal filed by the respondent should be disposed of in conformity with the provisions of clause (4).

173. In reply Mr. Shanti Bhushan on behalf of the respondent has not controverted, and in our opinion rightly, the stand taken by Mr. Sen that clause (4) of the article applies to the facts of the present case. He, however, contends that Section 4 of the Constitution Amendment Act which has inserted Art. 329-A in the Constitution is invalid. The validity of the above constitutional amendment has been challenged by Mr. Shanti Bhushan on the following two grounds:

- (1) The above constitutional amendment affects the basic structure or framework of the Constitution and is, therefore, beyond the amending power under Article 368.
- (2) The Constitution Amendment Act was passed in a session of Parliament after some members of Parliament had been unconstitutionally detained and thus illegally prevented from influencing the views of other members present at the time the above Act was passed. This ground, it is urged, also affects the validity of the amending Act 40 of 1975.

174. Article 329-A deals with election to either House of Parliament of a person who holds the office of Prime Minister at the time of such election or is appointed as Prime Minister after such election and to the House of the People of a person who holds the office of Speaker of that House at the time of such election or who is chosen as the Speaker for that House after such election. According to clause (1) of Article 329-A, no election of persons

mentioned above shall be called in question, except before such authority or body and in such manner as may be provided for by or under any law made by Parliament. It is made clear that the authority before which such election shall be called in question would not be the one as is referred to in clause (b) of Article 329. The law to be made by Parliament under clause (1) may provide for all other matters relating to doubts and disputes in relation to such election including the grounds on which such election may be questioned. The above law shall be subject to the provisions of clause (1) of Article 102 except sub-clause (e). The law made under clause (1) cannot, therefore, remove the dis-qualification for being chosen a member of either House of Parliament because of that person holding an office of profit or because of his unsoundness of mind or because of his being an undischarged insolvent or because of his being not a citizen of India, or because of his having voluntarily acquired the citizenship of a foreign State, or because of his being under any acknowledgment of allegiance or adherence to a foreign State, as contemplated by sub-clauses (a) to (d) of clause (1) of Article 102 of the Constitution. The law made under clause (1) of Article 329-A would not, however, be subject to clause (e) of clause (1) of Article 102, according to which a person shall be disqualified for being chosen as and for being, a member of either House of Parliament if he is so disqualified by or under any law made by Parliament. According to clause (2) of Article 329-A, the validity of a law referred to in clause (1) and the decision of any authority or body under such law shall not be called in question in any court. Clause (3) provides for the abatement of an election petition which is pending in respect of the election of any person who is appointed as Prime Minister or chosen as Speaker of the House of the People during the pendency of the petition. It is further provided that the election of such person can be called in question under any such law as is referred to in clause (1) of Article 329-A. Clause (4) is the crucial clause for the present case. According to this clause, no law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act in so far as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election of any of the persons mentioned above to either House of Parliament. The remaining part of the clause deals with some further matters. It is provided in clause (4) that the election of the aforesaid person shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void or has before such commencement, been declared to be void under any such law. It is further provided that notwithstanding any order made by any court before the commencement of the Constitution (Thirty-ninth Amendment) Act declaring such election to be void such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect. According to clause (5), any appeal or cross appeal against any such order as is referred to in clause (4) pending immediately before the commencement of the Constitution (Thirty-ninth Amendment) Act, before the Supreme Court shall be disposed of in conformity with the provisions of clause (4). Clause (6) states that the

provisions of Article 329-A shall take effect notwithstanding anything contained in the Constitution.

175. The proposition that the power of amendment under Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution was laid down by this Court by a majority of 7 to 6 in the case of His Holiness Kesavananda Bharathi v. State of Kerala, (1973) Supp SCR 1=(AIR 1973 SC 1461). Apart from other reasons which were given in some of the judgements of the learned Judges who constituted the majority, the majority dealt with the connotation of the word "amendment." It was held that the words "amendment of the Constitution" in Art. 368 could not have the effect of destroying or abrogating the basic structure of the Constitution. Some of us who were parties to that case took a different view and came to the conclusion that the words "amendment of the Constitution" in Article 368 did not admit of any limitation. Those of us who were in the minority in Kesavananda's case (supra) may still hold the same view as was given expression to in that case. For the purpose of the present case, we shall have to proceed in accordance with the law as laid down by the majority in that case.

176. Before dealing with the question as to whether the impugned amendment affects the basic structure of the Constitution I may make it clear that this Court is not concerned with the wisdom behind or the propriety of the impugned constitutional amendment. These are matters essentially for those who are vested with the authority to make the constitutional amendment. All that the Court is concerned with is the constitutional validity of the impugned amendment.

177. I may first deal with the second contention advanced by Mr. Shanti Bhushan According to him, the impugned constitutions amendement and the amending Act of 1975 were passed in sessions of Parliament where some members, including the respondent, could not be present because they had been illegally detained. The fact that those measures were passed by the requisite majority has not been questioned by the learned counsel but he submits that if the above meantioned members had not been detained and had not been prevented from attending the sittings of Parliament, they could have influenced the other members and as such is possible that the impugned Constitution Amendment Act and the 1975 R P amending Act might not have been passed. Mr. Shanti Bhushan accordingly asserts that the sitting of the Houses of Parliament in which for above mentioned two meansures were passed were not legal sittings. Any measure passed in such sittings, according to the learned counsel, cannot be considered to be a valid piece of constitutional amendment or statutory amendment.

178. There is, in my opinion, no face in the above submission. The proposition that member of Parliament cannot claim immune from being detained under a law relating to preventive detention does not now admit of much doubt. The privileges, powers and the immunities of the members of the two Houses of Indian Parliament as well as of the Indian legislatures as

the same as those of the members of the House of Commons as they existed at the time of the commencement of the Constitution. The position about the privileges of the members of the House of Commons as it obtained in the United Kingdom at the relevant time has been stated in Erskine May's Parliamentary Practice, 18th Ed. (p. 100) as under:

“The privilege of freedom from arrest is limited to civil causes, and has not been allowed to interfere with the administration of criminal justice or emergency legislation.”

The above observations were relied upon by this Court in the case of *K. Anandan Nambiar v. Chief Secretary Government of Madras*, (1966) 2 SCR 406 = (AIR 1966 SC 657). The petitioners in that case were members of Parliament. They were detained by orders passed by the State Government under R. 30 (1) (b) of the Defence of India Rules, 1962. They challenged the validity of the orders of detention, inter alia, on the ground that Rule 30 (1) (b) was invalid because a legislator cannot be detained so as to prevent him from exercising his constitutional rights as legislator while the legislative chamber to which he belongs is in session. This Court rejected that contention and held that the true constitutional position is that so far as a valid order of detention is concerned, a member of Parliament can claim no special status higher than that of an ordinary citizen and that he is as much liable to be arrested and detained under it as any other citizen. It was also held that if an order of detention validly prevents a member from attending a session of Parliament, no occasion would arise for the exercise by him of the right of freedom of speech.

179. Question as to whether a member of Parliament has been validly detained under a law relating to preventive detention can, in my opinion, be appropriately gone into in proceedings for a writ of habeas corpus. Such question cannot be collaterally raised in proceedings like the present wherein the court is concerned with the validity of a Constitution Amendment Act and an Act to amend the Representation of the People Act. In deciding a case before it the court should decide matters which arise directly in the case. A court should resist the attempt of a party to induce it to decide a matter which though canvassed during arguments is only incidental and collateral and can appropriately be dealt with in separate proceedings.

180. The contention advanced by Mr. Shanti Bhushan that the sittings of the two Houses of Parliament in which the impugned Acts were passed were not valid essentially relates to the validity of the proceedings of the two Houses of Parliament. These are matters which are not justiciable and pertain to the internal domain of the two Houses. Of course, the courts can go into the question as to whether the measures passed by Parliament are constitutionally valid. The court cannot, however, go into the question as to whether the sittings of the Houses of Parliament were not constitutionally valid because some members of those Houses were prevented from attending and participating in the discussions in those Houses. It has not been disputed before us, as already mentioned, that the impugned Constitution Amendment

Act and the statutory amendment Act were passed by the requisite majority. It is not the case of the respondent that the number of the detained members of Parliament was so large, that if they had voted against the impugned measures, the measures would not have been passed. Indeed, according to the affidavit filed during the course of arguments, the number of members of the Lok Sabha who were detained was 21 and of the Rajya Sabha the number was 10. An amendment of the Constitution under Article 368, it is noteworthy, has apart from the requirement in certain cases of ratification by the State legislatures, to be passed in each House of Parliament by majority of the total membership of that House and by a majority of two-thirds of the members of that House present and voting. According to clause (1) of Article 100 of the Constitution, save as otherwise provided in this Constitution, all questions at any sitting of either House or joint sitting of the Houses shall be determined by a majority of votes of the members present and voting, other than the Speaker or person acting as Chairman or Speaker. The Chairman or Speaker, or person acting as such, shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes. Clause (2) of that article provides that either House of Parliament shall have power to act notwithstanding any vacancy in the membership thereof, and any proceedings in Parliament shall be valid notwithstanding that it is discovered sub-sequently that some person who was not entitled so to do sat or voted or otherwise took part in the proceedings. Further, it is provided in clause (1) of Article 122 that the validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure. All this would show that the framers of the Constitution were anxious to ensure that the procedural irregularities and other grounds like those mentioned in clause (2) of Article 100 should not vitiate the validity of proceedings of Parliament and that it would not be permissible to call in question those proceedings on such grounds. The observations on page 456 in the case of Special Reference No. 1 of 1964, (1965) 1 SCR 413 = (AIR 1965 SC 745) that if the impugned proceedings of a legislature are illegal and unconstitutional and not merely irregular, the same can be scrutinised in a court of law do not, in my opinion warrant the inference that a court can hold the proceedings of a legislature to be not valid and constitutional by going into the question as to whether the detention of any member who was prevented from being present in the sitting of the legislature on account of his detention was or was not in accordance with law. The acceptance of the above submission of Mr. Shanti Bhushan would necessarily result in a situation that whenever a law is made by Parliament, it would be open to a person affected by that law to question the validity of that law by asking the court to examine the validity of detention of each of the members of Parliament who were under detention at the time the said law was passed even though those members do not themselves assail the validity of their detention. It is plain that it would not be possible for the court in such collateral proceedings to record a finding about the validity of the detention of the members because the full material having a bearing on the validity of the detention would normally be, apart from the authority passing the order for detention, only

with the person ordered to be detained or his friends and relatives. It would plainly be hazardous to record a finding without such material and a court of law, in my opinion, should decline to record such a finding in collateral proceedings. Till such time as a finding is recorded in appropriate proceedings about the validity of the detention of the members of Parliament, the court would have to proceed upon the assumption that the detention has not been shown to be invalid.

181. According to clause (3) of Article 105 of the Constitution, to which a short reference has been made earlier, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution. No law contemplated by clause (3) has been made by the Parliament in India and as such we have to find out the powers, privileges and immunities of the House of Commons in the United Kingdom at the relevant time. In the case of *Bradlaugh v. Gossett*, (1884) 12 QBD 271 the plaintiff, having been returned as member for the borough of Northampton, required the Speaker of the House of Commons to call him to the table for the purpose of taking oath. In consequence of something which had transpired on a former occasion the Speaker declined to do so. The House of Commons then upon motion resolved “that the Sergeant-at-Arms do exclude Mr. Bradlaugh (the plaintiff) from the House until he shall engage not further to disturb the proceedings of the House. In an action against the Sergeant-at Arms praying for an injunction to restrain him from carrying out the resolution, the court held that this being a matter relating to the internal management of the procedure of the House of Commons, the court had not power to interfere. Dealing with the rights to be exercised within the wall of the House Stephen J. observed that those rights must be dependent upon the resolutions of the House. He also added that there was no appeal from the decision of the House of Commons. Stephen J. in the course of the judgment also observed.

“.....for the purpose of determining on a right to be exercised within the House itself. and in particular the right of sitting and voting, the House and the House alone could interpret the statute but...as regarded right to be exercised out of and independently of the House, such as the right of suing for a penalty for having and voted the statute must be interpreted by this Court independently of the House.”

The above passage has been cited page 83 in *Erskine May's Parliamentary Practice*, 18th Ed. with a view to show that it is a right of House of Parliament to be the sole judge of the lawfulness of its own proceedings. It would follow from the above that the courts cannot go into the lawfulness of the proceedings of the Houses of Parliament.

182. The act of detaining a person is normally that of an outside agency and not that of the House of Parliament. It would certainly look anomalous if

the act of an outside agency which might ultimately turn out to be not legal could affect the validity of the proceedings of the House of Parliament or could prevent that House from assembling and functioning.

183. The matter can also be looked at from another angle Gazette copies of the Election Laws Amendment Act, 1975 (Act 40 of 1975) and the Constitution (Thirty-ninth Amendment) Act, 1975 have been produced before us. In the face of the publication in the Gazette of the above mentioned two Acts this Court must assume that those two Acts were duly passed. It may be pertinent in this context to refer to the position in the United States where it was laid down in the case of *Marshall Field & Co. v. John M. Clark*, (1892) 143 US 649 as under:

“The signing by the Speaker of the House of Representatives, and by the President of the Senate in open session, of an enrolled bill, is an official attestation by the two houses that such bill has passed Congress; and when the bill, thus attested receives the approval of the President, and is deposited in the public archives, its authentication as a bill that has passed Congress is complete and unimpeachable. An enrolled Act thus authenticated is sufficient evidence of itself that it passed Congress is complete and unimpeachable. An enrolled Act thus authenticated is sufficient evidence of itself that it passed Congress.”

In the case of a constitutional amendment which requires ratification by the States, the position was stated by Brandeis J. in the case of *Oscar Leser v. J. Mercer Garnett*, (1921) 66 L ed 505 as follows:

“The proclamation by the Secretary certified that, from official documents on file in the Department of State, it appeared that the proposed Amendment was ratified by the legislatures of thirty-six states, and that it 'has become valid to all intents and purposes as a part of the Constitution of the United States.' As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him, and being certified to by his proclamation, is conclusive upon the courts.”

184. I am, therefore, of the view that the constitutional validity of the Constitution Amendment Act and the 1975 Act amending the Representation of the People Act cannot be assailed on the ground that some members of Parliament were prevented because of their detention from attending and participating in the proceedings of the respective Houses of Parliament.

185. We may now deal with clause (4) of Article 329A which has been added by the Constitution (Thirty-ninth Amendment) Act, 1975. It is necessary to clarify at the outset that we are concerned in the present case only with the constitutional validity of clause (4) and not with that of the other clauses of that article. I, therefore, express no opinion about the validity of the other clauses of Article 329A. Clause (4) consists of four parts:

(i) No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975 in so far as it relates to the

election petitions and matters connected therewith shall apply or shall be deemed ever to have applied to or in relation to the election of any such person as is referred to in clause (1) to either House of Parliament;

(ii) and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void or has before such commencement been declared to be void under any such law;

(iii) and notwithstanding any order made by any court before such commencement declaring such election to be void, such election shall continue to be valid in all respects;

(iv) and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.

186. In so far as part (i) is concerned, I find that it relates to a matter which can be the subject of an ordinary legislation or a constitutional amendment. According to this part, no law made by Parliament before the commencement of the Constitution (39th Amendment) Act, 1975 in so far as it relates to the election petitions and matters connected therewith shall apply and shall be deemed ever to have applied to or in relation to the election of any such person as is referred to in clause (1) to either House of Parliament. A law in the above terms can validly be made by a legislature as well as by a constituent authority. The fact that the above law would have retrospective effect would not detract from the competence of the legislature or constituent authority to make such a law. It is well-settled that it is permissible for a legislature to make a law with retrospective effect. The power of legislature to make a law with retrospective effect is not curtailed or circumscribed by the fact that the subject matter of such retrospective law is a matter relating to an election dispute (see *State of Orissa v. Bhupendra Kumar Bose*, (1962) Supp 2 SCR 380 = (AIR 1962 SC 945) and *Kanta Kathuria v. Manak Chand Surana*, (1970) 2 SCR 835 = (AIR 1970 SC 694). Detailed reference to these cases would be made at the appropriate stage subsequently. If a legislature can pass legislation in respect of matters relating to an election dispute with a retrospective effect, the constituent authority, which is a kind of superlegislature, would a fortiori be entitled to do so.

187. Part (ii) of clause (4) spells out the consequence which flows from part (i) of the clause. If the previous law in so far as it relates to the election petitions and matters connected therewith was not to apply to the election of the Prime Minister and the Speaker, it would necessarily follow that the election of the appellant who was the Prime Minister would not be deemed to be void or ever to have become void on the ground on which such election could be declared to be void or has before such commencement been declared to be void under any such law.

188. The same, to some extent, appears to be true of part (iv) of cl. (4). If the previous law in so far as it relates to the election petitions and matters connected therewith was not to apply to the election of the appellant, the

High Court shall be deemed to have had no jurisdiction to decide the election petition challenging the election of the appellant. The effect of part (i) of clause (4) is that the High Court was divested of the jurisdiction to decide the dispute relating to the election of the appellant with a retrospective effect. The law under which the election of the appellant was declared to be void as a result of the amendment was also made inapplicable with retrospective effect to the dispute relating to the election of the appellant. The resultant effect of the amendment thus was that the order by which the election of the appellant was declared to be void and the finding on which such order was based were rendered to be void and of no effect.

189. Another aspect of part (iv) of clause (4) relates to the question as to whether it is open to the constituent authority to declare an order and a finding of the High Court to be void and of no effect or whether such a declaration can be made only either in separate judicial proceedings or in proceedings before a higher court.

190. A declaration that an order made by a court of law is void is normally part of the judicial function and is not a legislative function. Although there is in the Constitution of India no rigid separation of powers by and large the spheres of judicial function and legislative function have been demarcated and it is not permissible for the legislature to encroach upon the judicial sphere. It has accordingly been held that a legislature while it is entitled to change with retrospective effect the law which formed the basis of the judicial decision it is not permissible to the legislature to declare the judgement of the court to be void or not binding (see *Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality*, (1970) 1 SCR 388 (at page 392) = (AIR 1970 SC 192) *Janapada Sabha, Chhindwara v. The Central Provinces Syndicate Ltd.*, (1970) 3 SCR 745 (at page 751) = (AIR 1971 SC 57) *Municipal Corporation of the City of Ahmedabad etc. v. New Shorock Spg. & Wvg. Co. Ltd. etc.*, (1971) 1 SCR 288 = (AIR 1970 SC 1292) and *State of Tamil Nadu v. M. Rayappa Gounder*, AIR 1971 SC 231).

191. The position as it prevails in the United States, where guarantee of due process of law is in operation, is given on pages 318-19 of Vol. 46 of the *American Jurisprudence 2d* as under.

“The general rule is that the legislature may not destroy, annul, set aside, vacate, reverse, modify, or impair the final judgement of a court of competent jurisdiction, so as to take away private rights which have become vested by the judgement. A statute attempting to do so has been held unconstitutional as an attempt on the part of the legislature to exercise judicial power, and as a violation of the constitutional guarantee of due process of law. The legislature is not only prohibited from reopening cases previously decided by the courts, but is also forbidden to affect the inherent attributes of a judgement. That the statute is under the guise of an act affecting remedies does not alter the rule. It is worthy of notice, however, that there are cases in which judgments requiring acts to be done in the future may validly be affected by subsequent legislation making illegal that which the judgment

found to be legal, or making legal that which the judgement found to be illegal.

10—Judgment as to public right.

With respect to legislative interference with a judgement, a distinction has been made between public and private rights under which distinction a statute may be valid even though it renders ineffective a judgment concerning a public right. Even after a public right has been established by the judgment of the court, it may be annulled by subsequent legislation.”

192. Question arises whether the above limitation imposed upon the legislature about its competence to declare a judgment of the court to be void would also operate upon the constituent authority?

193. View has been canvassed before us that the answer to the above question should be in the negative. Although normally a declaration that the judgment of a court is void can be made either in separate proceedings or in proceedings before the higher court, there is, according to this view, no bar to the constituent authority making a declaration in the constitutional law that such an order would be void especially when it relates to a matter of public importance like the dispute relating to the election of a person holding the office of Prime Minister. The declaration of the voidness of the High Court judgment is something which can ultimately be traced to part (i). Whether such a declaration should be made by the court or by the constituent authority is more, it is urged, a matter of the mechanics of making the declaration and would not ultimately affect the substance of the matter that the judgment is declared void. According to Article 31B, without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall subject to the power of any competent Legislature to repeal or amend it, continue in force. The effect of the above article, it is pointed out, is that even if a statute has been declared to be void on the ground of contravention of fundamental rights by a court of law, the moment that statute is specified by the constituent authority in the Ninth Schedule to the Constitution, it shall be deemed to have got rid of that voidness and the order of the court declaring that statute to be void is rendered to be of no effect. It is not necessary in such an event to make even the slightest change in the statute to rid it of its voidness. The stigma of voidness attaching to the statute because of contravention of fundamental rights found by the court is deemed to be washed away as soon as the statute is specified by the constituent authority in the Ninth Schedule and the judgment of the court in this respect is rendered to be inoperative and of no effect. In the case of *Don John Douglas Liyange v. The Queen*, 1967 AC 259 the Judicial Committee struck down as ultra vires and void the provisions of the Criminal Law (Special Provisions) Act. 1962 on the ground that they

involved the usurpation and infringement by the legislature of the judicial powers inconsistent with the written constitution of Ceylon. Their Lordships, however, expressly referred on page 287 to the fact that the impugned legislation had not been passed by two-thirds majority in the manner required for an amendment of the Constitution contained in Section 29 (4) of the constitution. It was observed:

“There was speculation during the argument as to what the position would be if Parliament sought to procure such a result by first amending the Constitution by a two-thirds majority. But such a situation does not arise here. In so far as any Act passed without recourse to Section 29(4) of the Constitution purports to usurp or infringe the judicial power it is ultra vires.”

The above observations, it is urged, show that the restriction upon the legislature in encroaching upon judicial sphere may not necessarily hold good in the case of constituent authority.

194. The above contention has been controverted by Mr. Shanti Bhushan and he submits that the limitation on the power of the legislature that it cannot declare void a judgment of the court equally operates upon the constituent authority. It is urged that the constituent authority can only enact a law in general terms, even though it be a constitutional law. The constituent authority may also, if it so deems proper change the law which is the basis of a decision and make such change with retrospective effect, but it cannot, according to the learned counsel, declare void the judgment of the court. Declaration of voidness of a judgment, it is stated, is a judicial act and can not be taken over by the constituent authority. Although legislatures or the constituent authority can make laws including those for creation of courts, they cannot, according to the submission, exercise judicial functions by assuming the powers of a super court in the same way as the courts cannot act as a super legislature. It is in my opinion, not necessary to dilate upon this aspect and express a final opinion upon the rival contentions, because of the view I am taking of part (iii) of clause (4).

195. We may now come to part (iii) of clause (4) By part (iii) it is declared that the election of the appellant shall continue to be valid in all respects. Such a declaration would not follow from part (i) of the clause. It would not also follow from part (ii) and part (iv) of the clause which, as mentioned earlier, in effect represented the consequences flowing from part (i). The election to the Lok Sabha of the appellant, who was the Prime Minister, was challenged on the ground that she or her election agents had been guilty of some malpractices. The declaration that her election was to be valid in all respects necessarily involved the process of going into the grounds on which her election had been assailed and holding those grounds to be either factually incorrect or to be of such a nature as in law did not warrant the declaration of her election to be void. The case of the appellant is that some of the grounds mentioned against her were factually incorrect and in respect of those grounds the findings of the High Court is against the respondent and in her favour. In-respect of some other grounds, except in one or two matters there is not much divergence between the appellant and the respondent on

the question of facts. The point of controversy between the parties mainly is that, according to the respondent those facts constituted corrupt practice as defined in Section 123 of the R.P. Act. while according to the appellant those facts did not constitute corrupt practice. In any case, according to the appellant, in view of the amendment made in the RP Act by amending Acts 58 of 1974 and 40 of 1975 these facts did not constitute corrupt practice. The declaration made in part (iii) of clause (4) that the election of the appellant was to be valid in all respects was tantamount in the very nature of things to the repelling of the grounds advanced by the respondent to challenge the election of the appellant. Question therefore arises as to what, if any, was the law which was applied in repelling the grounds advanced by the respondent to challenge the election of the appellant. So far as the existing law relating to election disputes was concerned, part (i) of clause (4) expressly stated that such a law would not apply to the petition filed by the respondent to challenge the election of the appellant. This means that the provisions of the Representation of the People Act were not to apply to the petition filed by the respondent against the appellant. This also means that the amending Acts 58 of 1974 and 40 of 1975 were not to apply to the dispute relating to election of the appellant.

196. The dispute relating to the election of the appellant is also not to be governed by law which is to be enacted under clause (1) of Article 329A. Such a law would apply only to future elections. The result is that so far as the dispute relating to the election of the appellant is concerned, a legal vacuum came into existence. It was open to the constituent authority to fill that vacuum by prescribing a law which was to govern the dispute arising out of the petition filed by the respondent to challenge the election of the appellant. The constituent authority, however, did not do so and straightway proceeded to declare the election of the appellant to be valid. There is nothing in clause (4) to indicate that the constituent authority applied any law in declaring the election of the appellant to be valid and if so, what was that law.

197. I am unable to accede to the argument that the constituent authority kept in view the provisions of the RP Act as amended by Acts 58 of 1974 and 40 of 1975 and their impact on the challenge to the election of the appellant in declaring the election of the appellant to be valid. The difficulty in accepting this argument is that in part (i) of clause (4) the constituent authority expressly stated that the previous law, namely, the RP Act as amended in so far as it related to election petitions and matters connected therewith was not to apply so far as the challenge to the election of the appellant was concerned. It is also difficult to agree that the constituent authority took into account some other unspecified law or norm in declaring the election of the appellant to be valid. As mentioned earlier, there is nothing in clause (4) to indicate that the constituent authority took into account some other law or norm and if so, what that law or norm was. The position which thus emerges is that according to clause (4) no law was to apply for adjudicating upon the challenge to the election of the appellant and the same was in terms of part (iii) to be valid in all respects. The question

with which we are concerned is whether the provisions of clause (4) of the Article 329A by which the constituent authority in effect prescribed that no election law was to govern the challenge to the election of the appellant and that the same in any case was to be valid in all respects is a permissible piece of constitutional amendment or whether it is void on the ground that it affects the basic structure of the Constitution.

198. This Court in the case of *Kesavananda Bharati*, (AIR 1973 SC 1461) (supra) held by majority that the power of amendment of the Constitution contained in Article 368 does not permit altering the basic structure of the Constitution. All the seven Judges who constituted the majority were also agreed that democratic set up was part of the basic structure of the Constitution. Democracy postulates that there should be periodical elections, so that people may be in a position either to re-elect the old representatives or, if they so choose, to change the representatives and elect in their place other representatives. Democracy further contemplates that the elections should be free and fair, so that the voters may be in a position to vote for candidates of their choice. Democracy can indeed function only upon the faith that elections are free and fair and not rigged and manipulated, that they are effective instruments of ascertaining popular will both in reality and form and are not mere rituals calculated to generate illusion of deference to mass opinion. Free and fair elections require that the candidates and their agents should not resort to unfair means or malpractices as may impinge upon the process of free and fair elections. Even in the absence of unfair means and malpractices, sometimes the result of an election is materially affected because of the improper rejection of ballot papers. Likewise, the result of an election may be materially affected on account of the improper rejection of a nomination paper. Disputes, therefore, arise with regard to the validity of elections. For the resolving of those disputes, the different democratic countries of the world have made provisions prescribing the law and the forum for the resolving of those disputes. To give a few examples, we may refer to the United Kingdom where a parliamentary election petition is tried by two judges on the rota for the trial of parliamentary election petitions in accordance with the Representation of the People Act, 1949. Section 5 of Article 1 of the U S Constitution provides that each House (Senate and the House of Representatives) shall be the judge of the elections, returns and qualifications of its own members. Section 47 of the Australian Constitution provides that until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises. Article 55 of the Japanese Constitution states that each House shall judge disputes related to qualifications of its members. However, in order to deny a seat to any member, it is necessary to pass a resolution by a majority of two-thirds or more of the members present. Article 46 of the Iceland Constitution provides that the Althing itself decides whether its members are legally elected and also whether a member is disqualified. Article 64 of the Norwegian

Constitution states that the representatives elected shall be furnished with certificates, the validity of which shall be submitted to the judgment of the Storting. Article 59 of the French Constitution provides that the Constitutional council shall rule, in the case of disagreement, on the regularity of the election of deputies and senators Article 41 of the German Federal Republic Constitution states that the scrutiny of elections shall be the responsibility of the Bundestag. It shall also decide whether a deputy has lost his seat in the Bundestag. Againsts the decision of the Bundestag an appeal shall lie to the Federal Constitutional Court. Details shall be regulated by a federal law. According to Article 66 of the Italian Constitution, each Chamber decides as to the validity of the admission of its own Members and as to cases subsequently arising concerning ineligibility and in compatibility. In Turkey Article 75 provides inter alia that it shall be the function of Supreme Election Board to review and pass final judgment on all irregularities, complaints and objections regarding election matters during and after elections. The function and powers of the Supreme election Board shall be regulated by law. Article 53 of the Malaysian Constitution provides that if any question arises whether a member of a House of Parliament has become disqualified for membership, the decision of that House shall be taken and shall be final.

199. Not much argument is needed to show that unless there be a machinery for resolving an election dispute and for going into the allegations that elections were not free and fair being vitiated by malpractices the provision that a candidate should not resort to malpractices would be in the nature of a mere pious wish without any legal sanction. It is further plain that if the validity of the election of a candidate is challenged on some grounds, the said election can be declared to be valid only if we provide a forum for going into those grounds and prescribe a law for adjudicating upon those grounds. If the said forum finds that the grounds advanced to challenge the election are not well-founded or are not sufficient to invalidate the election in accordance with the prescribed law or dismisses the petition to challenge the election on some other ground, in such an event it can be said that the election of the returned candidate is valid.

200. Besides other things, election laws lay down a code of conduct in election matters and prescribe, what may be called, rules of electoral morality. Election laws also contain a provision for resolving disputes and determination of controversies which must inevitably arise in election matters as they arise in other spheres of human activity. The object of such a provision is to enforce rules of electoral morality and to punish deviance from the prescribed code of conduct in election matters. It is manifest that but for such a provision, there would be no sanction for the above code of conduct and rules of electoral morality. It is also plain that nothing would bring the code of conduct into greater contempt and make a greater mockery of it than the absence of a provision to punish its violation. The position would become all the more glaring that even though a provision exists on the statute book for punishing violation of the code of conduct in election matters, a particular

election is made immune and granted exemption from the operation of such a provision.

201. The vice of clause (4) of Article 329A is not merely that it makes the previous law contained in the RP Act as amended by Acts 58 of 1974 and 40 of 1975 inapplicable to the challenge to the election of the appellant, it also makes no other election law applicable for resolving that dispute. The further vice from which the said clause suffers is that it not merely divests the previous authority, namely, the High Court of its jurisdiction to decide the dispute relating to the election of the appellant, it confers no jurisdiction on some other authority to decide that dispute. Without even prescribing a law and providing a forum for adjudicating upon the grounds advanced by the respondent to challenge the election of the appellant, the constituent authority has declared the election of the appellant to be valid.

202. To confer an absolute validity upon the election of one particular candidate and to prescribe that the validity of that election shall not be questioned before any forum or under any law would necessarily have the effect of saying that howsoever gross may be the improprieties which might have vitiated that election, howsoever flagrant may be the malpractices which might have been committed on behalf of the returned candidate during the course of the election and howsoever foul and violative of the principles of free and fair elections may be the means which might have been employed for securing success in that election, the said election would be none-the-less valid and it would not be permissible to complain of those improprieties malpractices and unfair means before any forum or under any law with a view to assail the validity of that election. Not much argument is needed to show that any provision which brings about that result is subversive of the principle of free and fair election in a democracy. The fact that the candidate concerned is the Prime Minister of the country or the Speaker of the lower House of Parliament would, if anything, add force to the above conclusion because both these offices represent the acme of the democratic process in a country. That in fact the elections of the incumbents of the two offices were not vitiated by any impropriety, malpractice or unfair means is not relevant or germane to the question with which we are concerned, namely, as to what is the effect of clause (4) of Article 329A.

203. The vice of declaration contained in part (iii) of clause (4) regarding the validity of the election of the appellant is aggravated by the fact that such a declaration is made after the High Court which was then seized of jurisdiction had found substance in some of the grounds advanced by the respondent and had consequently declared the election of the appellant to be void. To put a stamp of validity on the election of a candidate by saying that the challenge to such an election would not be governed by any election law and that the said election in any case would be valid and immune from any challenge runs counter to accepted norms of free and fair elections in all democratic countries. In the case of *Marbury v. Madison*, (1803) 1 Cranch 137 at p. 163 Marshall C.J. said that “the government of the United States has been emphatically termed a government of laws and not of men.” In *United*

States v. Lee. (1883). 106 US 196 at p. 220 Samuel Miller J. observed that “no man is so high that he is above the law.... All.... officers are creatures of the law and are bound to obey it.” Although the above observations were made in the context of the US Constitution, they, in my opinion, hold equally good in the context of our Constitution.

204. It has been argued on behalf of the appellant that the grounds on account of which the election of the appellant had been held to be void by the High Court were of a technical nature. I need not express any opinion about this aspect of the matter at this stage but, assuming it to be so, I find that clause (4) of Article 329A is so worded that (however serious may be the malpractices vitiating the election of the Speaker or the Prime Minister, the effect of clause (4) is that the said election would have to be treated as valid. I cannot accede to the submission that in construing clause (4) we should take into account the facts of the appellant's case. This is contrary to all accepted norms of construction. If a clause of a Constitution or statutory provision is widely worded, the width of its ambit cannot be circumscribed by taking into account the facts of an individual case to which it applies. As already mentioned, cl. (4) deals with the past election not merely of the Prime Minister but also of the Speaker. So far as the election of the Speaker is concerned, we do not know as to whether the same was ever challenged and, if so, on what grounds, and whether such a dispute is still pending.

205. Another argument advanced in support of the validity of the amendment is that we should take it that the constituent authority constituted itself to be the forum for deciding the dispute relating to the validity of the election of the appellant and after considering the facts of the case, declared the election of the appellant to be valid. There is however, nothing before us as to indicate that the constituent authority went into the material which had been adduced before the High Court relating to the validity of the election of the appellant and after considering that material held the election of the appellant to be valid. Indeed, the statement of Objects and Reasons appended to the Constitution (Thirty-ninth Amendment) Bill makes no mention of this thing. In any case, the vice of clause (4) would still lie in the fact that the election of the appellant was declared to be valid on the basis that it was not to be governed by any law for settlement of election disputes. Although the provisions of a constitutional amendment should be construed in fair and liberal spirit, such liberal spirit should not be carried by the court to the extent of discovering the application of a dormant and latent law in the declaration of the validity of an election even though there is not even a remote indication of such a law in the impugned provision. Rule of law postulates that the decisions should be made by the application of known principles and rules and in general such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule, it is not predictable and such decision in the antithesis of a decision taken in accordance with the rule of law.

206. The matter can also be looked at from another angle. The effect of impugned clause (4) is to take away both the right and the remedy to

challenge the election of the appellant. Such extinguishment of the right and remedy to challenge the validity of the election, in my opinion is incompatible with the process of free and fair elections. Free and fair elections necessarily postulate that if the success of a candidate is secured in elections by means which violate the principle of free and fair elections, the election should on that account be liable to be set aside and be declared to be void. To extinguish the right and the remedy to challenge the validity of an election would necessarily be tantamount to laying down that even if the election of a candidate is vitiated by the fact that it was secured by flagrant violation of the principles of free and fair election, the same would still enjoy immunity from challenge and would be nonetheless valid. Clause (4) of Article 329A can therefore, be held to strike at the basis of free and fair elections.

207. I agree that it is not necessary in a democratic set up that disputes relating to the validity of the elections must be settled by courts of law. There are many countries like France, Japan and the United States of America where consistently with the democratic set up the determination of such controversies is by legislatures or by authorities other than the courts. The question with which we are concerned, however, is whether it is permissible in a democratic set up that a dispute with regard to the validity of a particular election shall not be raised before any forum and shall not be governed by law and whether such an election can be declared, despite the existence of a dispute relating to its validity, to be valid by making the existing law relating to election disputes not applicable to it and also by not applying any other election law to such a dispute. The answer to such a question, for the reasons given earlier by me, should be in the negative.

208. Reference to the election of the US President made by Mr. Sen is also not helpful to him. It is clear from observations on pages 47-50 of the American Commonwealth by Bryce 1912 Ed. and Sections 5, 6 and 15 of the United States Code (1970 Ed.) that there is ample provision for the determination of such disputes after the poll. The fact that such determination of the dispute is before the declaration of the result would not detract from the proposition that it is essential for free and fair elections that there should be a forum and law for the settlement of such disputes relating to the validity of the election.

209. Argument has also been advanced that the offices of the Prime Minister and Speaker are of great importance and as such they constitute a class by themselves. This argument, in my opinion, would have relevance if instead of the law governing disputes relating to the election of other persons, another law had been prescribed to govern the dispute relating to the election of a person who holds the office of the Prime Minister or Speaker. As it is, what we find is that so far as the dispute relating to the election of the appellant is concerned, neither the previous law governing the election of persons holding the office of the Prime Minister is to apply to it nor the future law to be framed under clause (1) of Article 329A governing the election of persons holding the office of Prime Minister is to apply to this dispute. Likewise, the previous forum for adjudicating upon the election dispute

which went into the matter has been divested of its jurisdiction with retrospective effect and at the same time no jurisdiction has been vested in any other forum to go into the matter. The present is not a case of change of forum. It is on the contrary, one of the abolition of forum. As such, the question as to whether the office of Prime Minister constitutes a class by itself loses much of its significance in the context of the controversy with which we are concerned.

210. It has been argued in support of the constitutional validity of clause (4) that as a result of this amendment, the validity of one election has been preserved. Since the basic structure of the Constitution, according to the submission, continues to be the same, clause (4) cannot be said to be an impermissible piece of constitutional amendment. The argument has a seeming plausibility about it but a deeper reflection would show that it is vitiated by a basic fallacy. Law normally connotes a rule or norm which is of general application. It may apply to all the persons or class of persons or even individuals of a particular description. Law prescribes the abstract principles by the application of which individual cases are decided. Law, however, is not what Blackstone called "a sentence". According to Roscoe Pound, law, as distinguished from laws, is the system of authoritative materials for grounding or guiding judicial and administrative action recognized or established in a politically organized society (see page 106. *Jurisprudence*. Vol. III). Law is not the same as judgement, Law lays down the norm in abstract terms with a coercive power and sanction against those guilty of violating the norm, while judgment represents the decision arrived at by the application of law to the concrete facts of a case. Constitutional law relates to the various organs of a State; it deals with the structure of the government, the extent of distribution of its powers and the modes and principles of its operation. The Constitution of India is so detailed that some of the matters which in a brief constitution like that of the United States of America are dealt with by statutes form the subject-matter of various Articles of our Constitution. There is, however, in a constitutional law, as there is in the very idea of law, some element of generality or general application. It also carries with it a concept of its applicability in future to situations which may arise in that context. If there is amendment of some provision of the Constitution and the amendment deals with matters which constitute constitutional law in the normally accepted sense, the court while deciding the question of the validity of the amendment would have to find out in view of the majority opinion in *Keshavananda Bharti's case* (AIR 1973 SC 1461) (*supra*), as to whether the amendment affects the basic structure of the Constitution. The constitutional amendment contained in clause (4) with which we are concerned in the present case is, however, of an altogether different nature. Its avowed object is to confer validity on the election of the appellant to the Lok Sabha in 1971 after that election had been declared to be void by the High Court and an appeal against the judgment of the High Court was pending in this Court. In spite of our query, we were not referred to any precedent of a similar amendment of any Constitution of the world. The uniqueness of the impugned constitutional amendment would not, however,

affect its validity. If the constituent authority in its wisdom has chosen the validity of a disputed election as the subject-matter of a constitutional amendment, this Court cannot go behind that wisdom. All that this Court is concerned with is the validity of the amendment. I need not go into the question as to whether such a matter, in view of the normal concept of constitutional law, can strictly be the subject of a constitutional amendment. I shall for the purpose of this case assume that such a matter can validly be the subject-matter of a constitutional amendment. The question to be decided is that if the impugned amendment of the Constitution violates a principle which is part of the basic structure of the Constitution can it enjoy immunity from an attack on its validity because of the fact that for the future, the basic structure of the Constitution remains unaffected. The answer to the above question, in my opinion should be in the negative. What has to be seen in such a matter is whether the amendment contravenes or runs counter to an imperative rule or postulate which is an integral part of the basic structure of the Constitution. If so, it would be an impermissible amendment and it would make no difference whether it relates to one case or a large number of cases. If an amendment striking at the basic structure of the Constitution is not permissible, it would not acquire validity by being related only to one case. To accede to the argument advanced in support of the validity of the amendment would be tantamount to holding that even though it is not permissible to change the basic structure of the Constitution, whenever the authority concerned deems it proper to make such an amendment, it can do so and circumvent the bar to the making of such an amendment by confining it to one case. What is prohibited cannot become permissible because of its being confined to one matter.

211. Lastly, question arised whether we should strike down clause (4) in its entirety or in part. So far as this aspect is concerned, I am of the view that the different parts of clause (4) are so integrally connected and linked with each other that it is not possible to sever them and uphold the validity of part of it after striking down the rest of it. It would indeed be unfair to the appellant if we were to uphold the first part of clause (4) and strike down other parts or even part (iii). As would be apparent from what follows hereafter, the election of the appellant is being upheld by applying the provisions of the RP Act as amended by Act 40 of 1975. Such a course would not be permissible if we were to uphold the validity of the first part of clause (4) and strike down the other parts. We would also in that event be creating a vacuum which is the very vice for which we are striking down clause (4). I am therefore, of the view that clause 4 should be struck down in its entirety.

212. In view of my finding that clause (4) strikes at the basic structure of the Constitution it is not necessary to go into the question as to whether, assuming that the constituent authority took it upon itself to decide the dispute relating to the validity of the election of the appellant, it was necessary for the constituent authority to hear the parties concerned before it declared the election of the appellant to be valid and thus in effect repelled the challenge of the respondent to the validity of the appellant's election.

213. As a result of the above. I strike down clause (4) of Article 329A on the ground that it violates the principle of free and fair elections which is an essential postulate of democracy and which in its turn is a part of the basic structure of the Constitution inasmuch as (1) it abolishes the forum without providing for another forum for going into the dispute relating to the validity of the election of the appellant and further prescribes that the said dispute shall not be governed by any election law and that the validity of the said election shall be absolute and not consequently be liable to be assailed, and (2) it extinguishes both the right and the remedy to challenge the validity of the aforesaid election.

214. We may now deal with Appeal No. 887 of 1975 filed by the appellant. So far as this appeal is concerned, it has been argued by Mr. Sen on behalf of the appellant that the grounds on which the election of the appellant has been declared by the High Court to be void no longer hold good in view of the amendment in the RP Act by Act 40 of 1975. As against that, Mr. Shanti Bhushan on behalf of the respondent has assailed the validity of Act 40 of 1975. In the alternative, Mr. Shanti Bhushan contends that even if the validity of Act 40 of 1975 were to be upheld, the grounds on which the election of the appellant has been declared to be void would still hold good.

215. The question as to whether Act 40 of 1975 is not vitiated by any constitutional infirmity would be dealt with by me subsequently. For the time being I would proceed upon the basis that the statutory amendment in the RP Act by Act 40 of 1975 is constitutionally valid.

216. Section 10 of Act 40 of 1975, which has been reproduced earlier, makes it clear, inter alia that the provisions of Sections 6, 7 and 8 of that Act shall have retrospective operation so as to apply to or in relation to any election held before the commencement of this Act to either House of Parliament in respect of which appeal from any order of any High court made in any election petition under the RP Act is pending before the Supreme Court immediately before such commencement. It is therefore, obvious that the provisions of Sections 6, 7 and 8 of Act 40 of 1975 would be attracted to this case. One of the questions which actually arose for determination before the High Court was as to what was the date on which the appellant held herself out as a candidate. According to the written statement filed on behalf of the appellant, she held herself out as a candidate from the Rae Bareli constituency on February 1, 1971 when she filed her nomination paper. As against that the case of the respondent was that the appellant held herself out as a candidate from that constituency on December 27, 1970 when the Lok Sabha was dissolved. The finding of the High Court is that the appellant held herself out as a candidate from the Rae Bareli constituency on December 29, 1970 when she addressed a Press conference. The question as to when the appellant held herself out as a candidate from the Rae Bareli constituency has now become purely academic in view of the change in the definition of the word "candidate" as given in clause (b) of Section 79 of the RP Act by Act 40 of 1975. According to the original definition. "unless the context otherwise requires, 'candidate' means a person who has been or claims to have been

duly nominated as a candidate at any election” and any such person shall be deemed to have been a candidate as from the time, when with the election in prospect, he began to hold himself out as a prospective candidate. The new definition states that “unless the context otherwise requires, 'candidate' means a person who has been or claims to have been duly nominated as a candidate at any election”. The question as to when a person holds himself out as candidate, therefore, loses its importance in the context of the new definition.

217. One of the grounds which weighed with the High Court in declaring the election of the appellant to be void was that the appellant committed corrupt practice under Section 123(7) of the RP Act inasmuch as she obtained and procured the assistance, for the furtherance of her election prospects, of Yashpal Kapur during the period from January 7 to 24, 1971 when Yashpal Kapur was still a gazetted officer in the service of the Government of India.

218. According to clause (7) of Section 123 of the RP Act, the following act shall constitute corrupt practice under that clause;

“The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or, by any other person with the consent of a candidate or his election agent, any assistance (other than the giving of vote) for the furtherance of the prospects of that candidate's election, from any person in the service of the Government and belonging to any of the following classes, namely:—

(a) gazetted officers;

(b) stipendiary Judges and Magistrates;

(c) members of the armed forces of the Union;

(d) members of the police forces;

(e) excise officers;

(f) revenue officers other than village revenue officers known as lambardars, malguzars, deshmukhs or by any other name, whose duty is to collect land revenue and who are remunerated by a share of or commission on, the amount of land revenue collected by them but who do not discharge any police function; and

(g) such other class of persons in the service of the Government as may be prescribed.

Explanation — (1) In this section the expression 'agent' includes an election agent, or polling agent and any person who is held to have acted as an agent in connection with the consent of the candidate.

(2) For the purposes of clause (7), a person shall be deemed to assist in the furtherance of the prospects of a candidate's election if he acts as an election agent.”

Perusal of the above clause shows that what constitutes corrupt practice under the above clause is the obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or by any person

with the consent of a candidate or his election agent any assistance (other than the giving of vote) for the furtherance of the prospects of the candidate's election from any person in the service of the Government and belonging to any of the classes specified therein. It is in my opinion, essential that at the time the impugned act, namely: the obtaining or procuring or abetting or attempting to obtain or procure the assistance of a Government servant is done, the person doing the act must be a candidate or his agent or any other person with the consent of a candidate or his election agent. Candidate in this clause would mean a person who has been or who claims to have been duly nominated as a candidate at the election I am unable to accede to the submission of Mr. Shanti Bhushan that the word "candidate" has been used merely to identify the person who is duly nominated as a candidate at an election and that the word "candidate", as mentioned in clause (7), would also include a person who, after the commission of the corrupt practice specified in that clause, is subsequently nominated as a candidate. The amended definition reproduced above shows that unless context otherwise requires, candidate means a person who has been or claims to have been duly nominated as a candidate at an election. To accede to the submission of Mr. Shanti Bhushan would be tantamount to reading in the definition of the word "Candidate" in addition to the words "who has been or claims to have been duly nominated" also the words "who is subsequently nominated as a candidate". There is nothing to indicate that the word "candidate" in clause (7) of Section 123 has been used merely to identify the person who has been or would be subsequently nominated as a candidate. A definition clause in a statute is a legislative device with a view to avoid making different provisions of the statute to be cumbersome. Where a word is defined in the statute and that word is used in a provision to which that definition is applicable, the effect is that wherever the word defined is used in that provision, the definition of the word gets substituted. Reading the word "candidate" in Section 123(7) of the RP Act in the sense in which it has been defined as a result of the amendment made by Act 40 of 1975. I find that the only reasonable inference is that the person referred to as a candidate in that clause should be a person who has been or claims to have been duly nominated as a candidate at an election and not one who is yet to be nominated.

219. Mr. Shanti Bhushan has invited our attention to clause (b) of Section 100 (1) of the RP Act where-in it is stated that subject to the provisions of sub-section (2) of the section if the High Court is of the opinion that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent, the High Court shall declare the election of the returned candidate to be void. "Returned candidate" has been defined in clause (f) of Section 79 to mean, unless the context otherwise requires, a candidate whose name has been published under Section 67 as duly elected. It is urged that as the corrupt practice referred to in clause (b) of Section 100 (1) of the RP Act would in the very nature of things have to be committed by the returned candidate before his name was published under Section 67 as duly elected,

the words “returned candidate” in clause (b) of Section 100(1) must be taken to have been used with a view to identify the person who subsequently became a returned candidate. It is urged that if while dealing with corrupt practice committed by a candidate before he became a returned candidate in the context of Section 100(1) (b), it is permissible to hold that the words “returned candidate” are intended to identify the person who subsequently became a returned candidate, the same criterion should apply when construing the word “candidate” in Section 123 of the RP Act. This contention, in my opinion, is devoid of force. The definition of the words “returned candidate” and “candidate” given in Section 79 of the RP Act are preceded by the words “unless the context otherwise requires”. The connotation of the above words is that normally it is the definition given in the section which should be applied and given effect to. This normal rule may, however, be departed from if there be something in the context to show that the definition should not be applied. So far as clause (b) of Section 100 (1) is concerned, the context plainly requires that the corrupt practice referred to in that clause should have been committed by the candidate before he became a returned candidate, or by his agent or by any other person with his consent or that of his election agent. The compulsion arising from the context which is there in clause (b) of Section 100(1) of the RP Act is singularly absent in Section 123(7) of the RP Act. There is nothing in the context of the latter provision which requires that we should not give full effect to the new definition of the word “candidate”.

220. Reference has also been made by Mr. Shanti Bhusan to observations on pages 222-3 of vol. 14 of Halsbury’s Laws of England Third Edition, according to which a candidate at a general election may be guilty of treating even though the treating took place before the dissolution of the Parliament and consequently before he came within the statutory definition of a candidate. These observations have been made in the context of the statutory provisions in the United Kingdom. Those provisions were couched in a language substantially different from that in which the provisions of the RP Act in India are couched and as such in my opinion, not much assistance can be derived from those observations.

221. As the appellant filed her nomination paper on February 1, 1971, in view of the amended definition of the word “candidate”, it would have to be taken that the appellant became a candidate only on February 1, 1971. The result is that even if the finding of the High Court that the appellant obtained and procured the assistance of Yashpal Kapur during the period from January 7 to 24, 1971 were assumed to be correct the appellant shall not be deemed to have committed corrupt practice under Section 123(7) of the RP Act. As regards the assistance of Yashpal Kapur which the appellant is alleged to have obtained and procured after January 14, 1971, the controversy stands resolved also by another amendment. According to the case of the appellant. Yashpal Kapur tendered his resignation by letter dated January 13, 1971 with effect from January 14, 1971. The High Court found that Yashpal Kapur continued to be in the service of the Government of India

till January 25, 1971 which was the date of the notification regarding the acceptance of Yashpal Kapur's resignation. According to the said notification the President was pleased "to accept the resignation of Shri Y.P.R. Kapoor. Officer on Special Duty in the Prime Minister's Secretariat with effect from the forenoon of the 14th January 1971". The explanation which has been added to Section 123 of the RP Act makes it clear inter alia, that for the purpose of clause (7), notwithstanding anything contained in any other law, the publication in the official gazette of the resignation and termination of service of a person in the service of the Central Government shall be conclusive Proof. of his resignation and termination of service and where the date of taking effect of his resignation or termination of service is stated in such publication, also of the fact that such person ceased to be in such service with effect from the said date Yashpal Kapur in view of the newly added explanation, shall be taken to have ceased to be in Government service with effect from January 14, 1971. Any assistance of Yashpal Kapur which the appellant was alleged to have obtained or procured on or after January 14, 1971 would not, therefore, make her guilty of corrupt practice under Section 123(7) of the RP Act.

222. Another ground on which the High Court declared the election of the appellant to be void was that she committed corrupt practice under Section 123(7) of the RP Act inasmuch as she obtained the assistance of the officers of the UP Government, particularly the District Magistrate, Superintendent of Police, the Executive Engineer, PWD and the Engineer Hydel Department for construction of rostrums and arrangement of supply of power for loudspeakers in the meeting addressed by her on February 1, 1971 and February 25, 1971 in furtherance of her election prospects. It is not disputed that what was done by the above mentioned officers was in pursuance of official directions and in the discharge or purported discharge of the official duties. This is indeed clear from letter dated November 19, 1969 from the Govt. of India, Ministry of Home Affairs to all State Governments wherein there is reference to Rule 6 of the Rules and Instructions for the Protection of the Prime Minister and it is stated:

"As the security of the Prime Minister is the concern of the State all arrangements for putting up the rostrum, the barricades etc. at the meeting place, including that of an election meeting will have to be made by the State Government concerned In the case of election meetings, all expenditure on police, setting up of barricades and taking lighting arrangements will be borne by the State Government while expenditure on the public address system and any decorative arrangements will be the responsibility of the political party concerned. (The expenditure on all these items, may in the first instance be borne by the State Government and then recovered from the political parties concerned). In regard to the rostrum only 25 per cent of the cost of the rostrum or Rs. 2500.00 whichever is less, shall be contributed by the party as the rostrum has to be of certain specifications because of security considerations."

Assuming that the finding of fact recorded by the High Court in this respect, is correct the appellant can still be not guilty of the commission of corrupt practice under Section 123 (7) of the RP Act in view of the new proviso which has been inserted at the end of clause (7) of Section 123 and which reads as under. "Provided that where any person, in the service of the Government and belonging to any of the classes aforesaid in the discharge or purported discharge of his official duty, makes any arrangements or provides any facilities or does any other act or thing, for, to or in relation to any candidate or his agent or any other person acting with the consent of the candidate or his election agent, (whether by reason of the office held by the candidate or for any other reason), such arrangements, facilities or act or thing shall not be deemed to be assistance for the furtherance of the prospects of that candidate's election." The above proviso has also a direct bearing on the allegation of the respondent that the appellant committed corrupt practice under Section 123 (7) of the RP Act in as much as she or her election agent procured the assistance of members of armed forces of the Union for furtherance of her election prospects because of fact that the members of the armed forces arranged planes and helicopters of the Air Force for her flights to enable her to address meetings in her constituency.

223. It has been argued by Mr. Shanti Bhushan that the words "in the discharge or purported discharge of his official duty" in the above mentioned proviso have reference only to statutory duty and not to other duty performance of which takes place in pursuance of administrative instructions. I find it difficult to accede to the above submission as there is nothing in the above proviso to confine the words "official duty" to duty imposed by statute. Official duty would include not merely duties imposed by statutes but also those which have to be carried out in pursuance of administrative instructions.

224. Mr. Shanti Bhushan during the course of arguments made it plain that apart from his submission with regard to the validity of Act 40 of 1975, his objection relating to the applicability of Act 40 of 1975 was confined to two matters, namely, the connotation of the word "candidate" and the meaning to be attached to official duty. Both these objections have been found by me to be not tenable. I would, therefore, hold that subject to the question as to whether the provisions of Act 40 of 1975 are valid, the grounds on which the High Court has declared the election of the appellant to be void no longer hold good for declaring the said election to be void.

225. We may also before dealing with the validity of Act 40 of 1975 refer to one other change brought about by that Act which has a bearing upon the present case. It was the case of the respondent that the appellant and her election agent made extensive appeals to the religious symbol of cow and calf and thereby committed corrupt practice under Section 123 (3) of the RP Act. Corrupt practice has been defined in that provision as under:-

"(3) The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or

language or the use of, or appeal to religious symbols or the use of or appeal to national symbols such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.”

It is the common case of the parties that the symbol of cow and calf was allotted to the Congress party by the Election Commission. The learned counsel for the respondent stated during the course of arguments in the High Court that he confined his case only to the use of the symbol of cow and calf. The learned counsel gave up that part of the case of the respondent wherein it had been alleged that appeals were made to the religious symbol of cow and calf by the appellant. The following proviso has now been inserted in clause (3) of Section 123 by Section 8 of Act 40 of 1975:

“Provided that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purposes of this clause.”

It is, therefore apparent in view of the above proviso that the symbol of cow and calf which was allotted to the appellant shall not be deemed to be a religious symbol or a national symbol for the purpose of Section 123(3) of the RP Act. The appellant as such cannot be deemed to have committed a corrupt practice under Section 123(2) of the RP Act by use of the symbol of cow and calf.

226. In assailing the validity of Act 40 of 1975 Mr. Shanti Bhushan has referred to Section 10 of that Act, according to which the amendments made by Sections 6, 7 and 8 of the Act in the RP Act shall have retrospective operation, so as to apply to any election held before the commencement of the Act in respect of which an election petition is pending or in respect of which appeal from any order of the High Court is pending immediately before the commencement of Act 40 of 1975. It is urged that a change in the election law with retrospective effect strikes at the principle of free and fair elections. Retrospective operation of the amending Act, according to the learned counsel, has the effect of condoning what was at the time it was committed a corrupt practice.

227. I have given the matter my earnest consideration, and am of the opinion that there is no substance in the above contention. A legislature has except in a matter for which there is prohibition like the one contained in Article 20 (1) of the Constitution the power to make laws which are prospective in operation as well as laws which have retrospective operation. There is no limitation on the power of the legislature in this respect. Essentially it is a matter relating to the capacity and competence of the legislature. Although most of the laws made by the legislature have a prospective operation, occasions arise quite often when necessity is felt of giving retrospective effect to a law. This holds good both in respect of a principal Act as well as in respect of an amending Act. If the provisions of an Act passed by the legislature are not violative of the provisions of the Constitution, those provisions shall have to be given effect to and the fact

that the operation of the Act is prospective or restrospective would make no difference. It is also permissible to amend a law which is basis of the decision of a court with retrospective effect and rely upon the provisions of the amended law in appeal against the above decision of the court. The court of appeal in such an event gives full effect to the amended law even though such amendment has been made after the decision of the original court. The one field in which it is not permissible to make a law with retrospective effect is contained in clause (1) of Article 20 according to which no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. Apart from the field in which there is a constitutional prohibition for giving retrospective effect to a law power of making amendment in law with restrospective effect has now become a part of normal legislative process. Question then arises as to whether in spite of the general competence of the legislature to make a law with retrospective effect is the legislature rendered incompetent to make a law with retrospective effect in election matters? The answer to this question in my opinion should plainly be in the negative. Election laws are a part of the normal legislative process and what is permitted in the matter of ordinary legislation would also be permissible in the matter of legislation relating to elections unless there be some provision in the Constitution which forbids such a course. We have not been referred to any provision in the Constitution which has the effect of creating a bar in the way of the legislature making a law relating to elections with retrospective operation. If a party seeks to carve out an exception to the normal rule, it can do so only on the basis of some cogent ground. No such ground has been brought to our notice. The matter indeed is not *res integra* because there have been two cases wherein this Court has upheld the validity of the law making amendments in election laws with restrospective effect.

228. The first such case was *State of Orissa v. Bhupendra Kumar Bose*. AIR 1962 SC 945 (*supra*). It arose out of elections to the Cuttack Municipality held in December 1957 to March 1958 as a result of which 27 appellants were declared elected as Councillors. The respondent, who was defeated at the elections filed a writ petition before the High Court challenging the elections. The High Court held that the electoral rolls had not been prepared in accordance with the provisions of the Orissa Municipalities Act, 1950, as the age qualification had been published too late thereby curtailing the period of claims and objections to the preliminary roll to 2 days from 21 days as prescribed. The High Court consequently set aside the elections. The State took the view that the judgement affected not merely the Cuttack Municipality but other municipalities also. Accordingly, the Governor promulgated an Ordinance validating the election to the Cuttack Municipality and validating the electoral rolls prepared in respect of various municipalities. The respondent thereupon filed a writ petition before the High Court contending that the Ordinance was unconstitutional. The High

Court struck down the Ordinance. One of the grounds which weighed with the High Court in striking down the Ordinance was that it contravened Article 14 of the Constitution. The State and the Councillors came up in appeal to this Court. It was held by this Court that the Ordinance was valid and that it successfully cured the invalidity of the electoral rolls and of elections to the Cuttack Municipality. The Ordinance was further held not to offend Art. 14 of the Constitution as its object was not only to save the elections to the Cuttack Municipality but also to other municipalities whose validity might be challenged on similar grounds. The Ordinance, in the opinion of the Court did not single out the respondent for discriminatory treatment. Gajendragadkar, J. (as he then was) speaking for the Constitution Bench of this Court observed :

“The Cuttack Municipal Elections had been set aside by the High Court and if the Governor thought that in the public interest, having regard to the factors enumerated in the preamble to the Ordinance, it was necessary to validate the said elections, it would not necessarily follow that the Ordinance suffers from the vice of contravening Art. 14.” It was further observed :

“Therefore, if the infirmity in the electoral rolls on which the decision of the High Court in the earlier writ petition was based had not been applicable to the electoral rolls in regard to other Municipalities in the State of Orissa, then it may have been open to the Governor to issue an Ordinance only in respect of the Cuttack Municipal Elections and if, on account of special circumstances or reasons applicable to the Cuttack Municipal Elections a law was passed in respect of the said elections alone, it could not have been challenged as unconstitutional under Art. 14. Similarly, if Mr. Bose was the only litigant affected by the decision and as such formed a class by himself, it would have been open to the Legislature to make a law only in respect of his case. But as we have already pointed out, the Ordinance does not purport to limit its operation only to the Cuttack Municipality, it purports to validate the Cuttack Municipal Elections and the electoral rolls in respect of other Municipalities as well. Therefore, we are satisfied that the High Court was in error in coming to the conclusion that Section 4 contravenes Article 14 of the Constitution.”

229. In *Kanta Kathuria v. Manak Chand Surana*, (AIR 1970 SC 694) (supra) the dispute related to the election of the appellant to the Rajasthan Legislative Assembly. The appellant in that case had been appointed as a Special Government Pleader to represent the State of Rajasthan in an arbitration case. The appellant then stood for election to the State Legislative Assembly and was declared elected. The election of the appellant was challenged inter alia on the ground that the appellant held an office of profit within the meaning of Article 191 (1) of the Constitution. The High Court set aside the election of the appellant. The appellant then came up in appeal to this Court. During the pendency of the appeal, Rajasthan Act 5 of 1969 was passed declaring among others that the holder of the office of Special Government Pleader was not disqualified from being chosen or for being a member of the State Legislative Assembly. The Act was made retrospective

and removed the appellant's disqualification retrospectively. On the question as to whether the appellant was holding an office of profit and hence was disqualified, Sikri, Ray and Reddy, JJ. held that the appellant was not holding an office of profit. Hidayatullah C.J. and Mitter, J., however, held that the High Court was right in holding that the appellant held an office of profit. All the five Judges constituting the Constitution Bench were however unanimous on the point that the Act of 1969 had removed the disqualification of the appellant retrospectively. Hidayatullah, C.J. speaking for himself and Mitter. J. observed :

“It is also well recognised that Parliament and Legislatures of the States can make their laws operate retrospectively. Any law that can be made prospectively may be made with retrospective operation except that certain kinds of laws cannot operate retroactively. This is not one of them.

This position being firmly grounded we have to look for limitations if any in the Constitution Article 191 (which has been quoted earlier) itself recognises the power of the Legislature of the State to declare by law that the holder of an office shall not be disqualified for being chosen as a member. The Article says that a person shall be disqualified if he holds an office of profit under the Government of India or the Government of any State unless that office is declared by the Legislature not to disqualify the holder. Power is thus reserved to the Legislature of the State to make the declaration. There is nothing in the words of the article to indicate that this declaration cannot be made with retrospective effect.”

It was further observed:

“Regard being had to the legislative practice in this country and in the absence of a clear prohibition either express or implied we are satisfied that the Act cannot be declared ineffective in its retrospective operation.”

Sikri J. (as he then was) speaking for himself, Ray J. (as he then was) and Reddy. J. dealt with the matter in the following words:

“Mr. Chagla, learned counsel for the respondent contends that the Rajasthan State Legislature was not competent “to declare retrospectively” under Article 191 (1) (a) the Constitution. It seems to us that there is no force in this contention. It has been held in numerous cases by this Court that the State Legislatures and Parliament can legislate retrospectively subject to the provisions of the Constitution. Apart from the question of fundamental rights, no express restriction has been placed on the power of the legislature of the State, and we are unable to imply, in the context, any restriction. Practice of the British Parliament does not oblige us to place any implied restriction. We notice that the British Parliament in one case validated the election : (Erskine May's Treatise on the Law Privileges Proceedings and Usage of Parliament – Seventeenth (1964) Edition) –

‘After the general election of 1945 it was found that the persons elected for the Coatbridge Division of Lanark and the Spring-bourn Division of Glasgow

were disqualified at the time of their election because they were members of tribunals appointed by the Minister under the Rent of Furnished Houses Control (Scotland) Act, 1943, which entitled them to a small fee in respect of attendance at a Tribunal. A Select Committee reported that the disqualification was incurred inadvertently and in accordance with their recommendation the Coatbridge and Springbourn elections (validation). Bills was introduced to validate the irregular election (H.C. Deb. 1945-46) 414 c. 564-6). (See also H. C. 3 (1945-46); *ibid*, 71 (1945-46) and *ibid* 92 (1945-46).

We have also noticed two earlier instances of retrospective legislation, e.g., the House of Commons (Disqualification) Act. 1813 (Halsbury Statutes of England P. 467) and Section 2 of the Re-election of Ministers Act, 1919 (*ibid* P. 515).

Great stress was laid on the word 'declare' in Art. 191 (1) (a), but we are unable to imply any limitation on the powers of the Legislature from this word. Declaration can be made effective as from an earlier date."

230. The above two authorities of this Court clearly lend support for the view that it is permissible to amend a law relating to elections with retrospective operation. Mr. Shanti Bhushan has criticised the observation of Sikri. J. reproduced above on the score that in the United Kingdom amendments in election law have not been made to affect pending proceedings in courts. This is essentially a matter for the legislature to decide this does not affect the competence of the legislature to make a change in election law with retrospective effect. In any case, the proposition of law laid down in the case of Kanta Kathuria. (AIR 1970 SC 694) is binding upon us and I do not find any reason to detract either from the soundness of the view expressed therein or its binding effect.

231. The Privy Council also upheld in the case of *Arevesekera v. Jayalilaka*. 1932 AC 260 an order in Council giving retrospective effect to an election law in Ceylon. This question arose in the following circumstances. An Order in Council of 1923 made provision as to the Legislative Council in Ceylon, but reserve to His Majesty power to revoke, alter or amend the Order. The appellant, as common informer, brought an action to recover penalties under the Order from the respondent, who he alleged had sat and voted after his seat had become vacant under its provisions by reason of his having a pecuniary interest in a contract with the Government. In 1928, after the action had been brought, but before its trial, an amending Order in Council was made providing that the action should be dismissed, it also amended the Order of 1923 so as to except the office held by the respondent from its operation. It was held that the Order of 1928 was valid, having regard to the power reserved by the Order of 1923, and was an effective defence to the action, although it was retrospective in its operation Lord Darling in the above context observed:

"It was argued that the Order in Council of November 1, 1928, was ultra vires as affecting to take away rights already in existence, thus having a retrospective action. The effect, however, of the Order of 1928, as expressed

on the face of its was no more than an act of indemnity and relief in respect of penalties incurred. It may be true that 'not Jove himself upon the past hath power', but legislators have certain the right to prevent alter or reverse the consequences of their own decrees. There is no necessity to give instances to prove that they have frequently done so, even going so far as to restore the heritable quality to blood which had been deprived of its virtue by Acts of attainder.

232. I am not impressed by the argument that retrospective operation of the relevant provisions of Act 40 of 1975 affects free and fair elections. The said provisions of Act 40 of 1975 are general in terms and would apply to all election disputes which may be pending either in the High Court or in appeal before the Supreme Court or which may arise in future. It is no doubt true that the retrospective operation of an amending Act has the effect of placing one of the parties to the dispute in a more advantageous position compared to others but that is inevitable in most of the amendments with retrospective operation. This Court in the case of Harbhajan Singh v. Mohan Singh, (1974) 2 SCC 363 (364) = (AIR 1974 SC 2068) dealt with the provisions of Section 3 of the Punjab Pre-emption (Repeal) Act, 1973, according to which on and from the date of commencement of that Act, no court shall pass a decree in any suit for pre-emption. This Court held that the above provision was also applicable to appeals which were pending at the commencement of that Act as an appeal was in the nature of a re-hearing, and as such even if the suit had been decreed by the trial court, the suit was liable to be dismissed because of the coming into force of the Punjab Pre-emption (Repeal) Act during the pendency of the appeal. It is plain that only those vendees obtained the benefit of the above Act who had filed appeals against the decree awarded against them in pre-emption suit. Vendees in other cases who did not file appeal against the decree awarded against them in view of the then existing law had to lose the purchased property and thus be at a disadvantage. That fact, however, did not prevent this Court from giving effect to the amendment. Whenever a legislature makes a law or amends a law, it has to indicate the time from which it would come into effect. This is essentially a matter for the legislature and the court cannot substitute its own opinion for that of the legislature. The fact that the change in law is made applicable to pending cases and the classification treats the decided cases as belonging to one category and pending cases as belonging to another category is not offensive to Art. 14 (see *Anant Mills v. State of Gujarat*, (1975) 2 SCC 175 = (AIR 1975 SC 1234)). Nor can the court interfere on the score of the propriety of giving retrospective effect to an amendment made in an election law. Indeed, the question of propriety is a matter which is entirely for the legislature to think of and decide. It cannot affect the validity of the law. This Court in the case of *Kanta Kathuria* (supra) expressly rejected the contention that amendment in election law was void because it gave advantage to a party. Hidayatullah, C.J. observed in this context :

“It is true that it gave an advantage to those who stand when the disqualification was not so removed as against those who may have kept

themselves back because the disability was not removed. That might raise questions of the propriety of such retrospective legislation but not of the capacity to make such laws.”

Likewise, Sikri, J. expressly rejected the contention that retrospective amendment in election law was bad because it was not a healthy practice and because such a course was liable to be abused in the following words:

“The apprehension that it may not be a healthy practice and this power might be abused in a particular case are again no grounds for limiting the powers of the State Legislature.”

233. The above observations also provide an answer to the contention of Mr. Shanti Bhushan that the provisions of the amendment made by Act 40 of 1975 can be abused. I may state that in case the provisions of the amended law are abused, and some of these instances of abuse were visualized by Mr. Shanti Bhushan during the course of arguments, this Court would not be helpless in the matter. The proper course in such an event would be to strike down the action taken under the amended law and not the law itself.

234. Reference was also made by Mr. Shanti Bhushan to the effect of retrospective amendment in cases which may arise under Section 123 (1) of the RP Act. We are in the present case not concerned with Section 123 (1) of the RP Act and consequently it is not necessary to express any opinion with regard to the impact of the amendment upon Section 123 (1) of the RP Act. Nor is it necessary to express opinion on the point as to whether it is permissible to make a law which has the effect of creating a corrupt practice or disqualification retrospectively and thus unseating a returned candidate as such a question does not arise in this case.

235. The change in the definition of the word “candidate” to which our attention has been invited by Mr. Shanti Bhushan does not impinge upon the process of free and fair elections. The fact that as a result of the above change, we have to take into account only the prejudicial activity of the candidate or his election agent from the date of the nomination of the candidate and not from the date he holds himself out as a candidate does not affect the process of free and fair elections. It is necessary while dealing with corrupt practice relating to elections to specify the period within which the impugned act, alleged to constitute corrupt practice should have been done. As a result of the amendment, the legislature has fixed the said period to be as from the date of nomination instead of the period as from the date on which the candidate with the election in prospect began to hold himself out as a prospective candidate. It is common experience that the date from which a candidate holds himself out as a prospective candidate is often a matter of controversy between the parties. The result is that an element of indefiniteness and uncertainty creeps in finding the date from which a person can be said to be candidate. As a result of the change in the definition of candidate, the legislature has fixed a definite date, viz., that of nomination, instead of the earlier time which had an element of indefiniteness and uncertainty about it for finding as to when a person became a candidate.

Certainty is an essential desideratum in law and any amendment of law to achieve that object is manifestly a permissible piece of legislation. The choice of date was a matter for the legislature to decide and the court cannot substitute its own opinion for that of the legislature in this respect, more so, when whatever be the choice of date, has aspects of both pros and cons. The date of nomination is normally, as in the present case, about a month before the date of polling and it is plain that most of the acts of corrupt practice are committed during this period. In any case, as mentioned above, the court cannot substitute its own opinion for that of the legislature in the choice of date. The choice of date, as observed in the case of *Union of India v. M/s. Parameshwaran Match Works*, (AIR 1974 SC 2349) as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances. When it is seen that a line or a point there must be and there is no mathematical or logical way of finding it precisely the decision of the legislature or its delegate must be accepted unless we can say that it is very wide of any reasonable mark.

236. One of the objects of the change effected by Act 40 of 1975 is to remove the uncertainty and set at rest the controversy as to what would be the precise date of a person in the service of the Central Government ceasing to be in such service in case he tenders his resignation. The amended law makes it clear that where the date of taking effect of the resignation is stated in the publication in the Official Gazette, it shall be that date. Similarly, in the case of appointment of a person, the date of taking effect of such appointment shall be the date mentioned in the publication in the Official Gazette in case such a date is stated in such publication. The fact that the new provision creates a conclusive presumption with regard to the date of taking effect of appointment or resignation does not mean, as is sought to be argued on behalf of the respondent, that there has been an encroachment by the legislature upon the judicial sphere. Laying down a rule of conclusive presumption in a statute with a view to remove uncertainty with regard to the date of the taking effect of appointment or resignation of a Government employee cannot be characterised as an assumption of judicial power by the legislature. Another object of the change effected by Act 40 of 1975 is that a candidate who is bound, in view of para 8 of the Election Symbols (Reservation and Allotment) Order, 1968 to use the party symbol allotted by the Election Commission and who cannot use any other symbol, shall not suffer and be guilty of corrupt practice under Section 123 (3) of the RP Act because of the use of that symbol. It is to be assumed that Election Commission which is an independent body, would act fairly and properly and would not allot a symbol, which is a religious symbol, to a party or a candidate. The fact that the allotted symbol was one of those suggested by the party concerned would not relieve the Election Commission of its duty to see that it does not allot a religious symbol to that party. Assuming that the Election Commission makes an error of judgment in this respect and allots a symbol which, in fact, is a religious symbol, the object of the new provision is

that a candidate should not be penalised because of such an error on the part of the Election Commission. The third object of the change effected by Act 40 of 1975 is that a candidate should not suffer or be held guilty of corrupt practice because of any act done by any person in the service of the Government and belonging to any of the classes mentioned in Section 123 (7) of the RP Act in the discharge or purported discharge of his official duty. None of the three objects mentioned above has any taint of unconstitutionality and I find it difficult to hold that the impugned provisions impinge upon the principle of free and fair elections.

237. So far as the newly added proviso to Section 123 (7) is concerned, it may be stated that the act in the discharge or purported discharge of official duty of the Government employees referred to above would in the very nature of things have to be of a kind which is germane to their official duties. It may include steps taken by the Government employees for maintenance of law and order or in connection with the security of a candidate or other persons. It would not, however, include canvassing or doing such acts which may properly be considered to be part of the election propaganda for furtherance of the prospects of a candidate's election. In taking action under the above provision, it must be borne in mind as stated on page 152 of Free Elections by W. J. M. Mackenzie that in the last resort "the system of free elections depends on a certain separation of powers between administrators (or policemen) and politicians : there must be some public sense that police and administration serve the public, not the party leaders". What would be permissible under the above provision would be that which is conceived to be done in public interest and not something conceived to be done in the personal interest of a candidate. In spite of some difficulty which may arise in borderline cases, this distinction must be borne in mind. If, however, because of doing some thing conceived in public interest, e.g., as in the present case the security arrangement for the person holding the office of the Prime Minister, some advantage may also possible accrue to a candidate, it will have to be regarded as incidental and would not detract from action taken under the above provision being in public interest. As against that, any action taken with a view to further the personal interest of a candidate should not be allowed to be camouflaged as an action taken in public interest. Care must be taken to ensure that public interest is not allowed to degenerate into a cloak for furtherance of the personal interests of a candidate in an election. The discharge or purported discharge of official duty must necessarily have public interest and not the personal interest of a candidate as its basis. The courts while dealing with the newly added proviso to Section 123 (7) should construe it, if reasonably possible, in such a manner as would sustain the validity of that proviso. In case there is abuse of the above provision, the proper course, as already mentioned, would be to strike down the action taken under the proviso and not the proviso itself.

238. One other change brought about by Act 40 of 1975 is the addition of an explanation in Section 77 of the RP Act. According to the new explanation, any expenditure incurred in respect of any arrangements made, facilities

provided or any other act or thing done by any person in the service of the Government and belonging to any of the classes mentioned in clause (7) of Sec. 123 in the discharge or purported discharge of his official duty as mentioned in the proviso to that clause shall not be deemed to be expenditure in connection with the election incurred or authorized by a candidate or by his election agent for the purpose of Section 77 (1). The validity of the above explanation in a great measure is linked with the validity of the new proviso to Section 123 (7) of the RP Act, and for the reasons stated for upholding the proviso to Section 123 (7), the new explanation to Section 77, it seems, may have also to be upheld. It is not necessary to dilate upon this aspect because even without invoking the aid of the new explanation to Section 77, the High Court has found, and I see no reason to disturb that finding, that the total expenses incurred by the appellants were less than the prescribed limit.

239. Argument has also been advanced that validity of Act 40 of 1975 cannot be assailed on the ground that it strikes at the basic structure of the Constitution. Such a limitation, it is submitted, operates upon an amendment of the Constitution under Article 368 but it does not hold good when Parliament enacts a statute in exercise of powers under Article 245 of the constitution. In view of my finding that the provisions of Act 40 of 1975 with which we are concerned have not been shown to impinge upon the process of free and fair elections and thereby to strike at the basic structure of the Constitution, it is not necessary to deal with the above argument. I would, therefore, hold that the provisions of Act 40 of 1975 with which we are concerned are valid and do not suffer from any constitutional infirmity.

240. We may now deal with cross appeal No. 909 of 1975. Mr. Shanti Bhushan has not pressed the challenge to the findings of the High Court on issues 4 and 7. He has, however, assailed the finding of the High Court on issue No. 9 whereby the High Court held that the appellant incurred an expenditure of Rs. 31, 976.47. on her election as against the prescribed limit of Rs. 35,000. In Ex 5, Return of her election expenses, the appellant showed her total election expenses to be Rs. 12,892.97. The respondent in para 13 of the election petition alleged that the appellant and her election agent had incurred expenditure much beyond the prescribed limit of Rs. 35,000 and thereby committed corrupt practice under Section 123 (6) of the RP Act. The respondent gave some items of the expenditure which were alleged to have been incurred by the appellant and her election agent but were not shown in the return of the election expenses. The material items with which we are now concerned were as under:

- | | | |
|--|---------------|----------|
| (i) The hiring charges of the vehicles specified in para 13 (1) | over Rs. | 1,28,700 |
| (ii) Cost of petrol and diesel for the vehicles specified in para 13 (1) | over Rs. | 43,230 |
| (iii) Payments made to the drivers of vehicles specified in para | | |

	13 (1)	.... over Rs.	9,900
(iv)	Repairing and servicing charges of vehicles specified in para 13 (1)	.... over Rs.	5,000
(v)	Payments made to the workers engaged for the purpose of election propaganda	.... over Rs.	6,600
(vi)	Expenses on the erection of rostrums for the public meetings addressed by the appellant in the constituency on February 1 and 25, 1971	.... over Rs.	1,32,000
(vii)	Expenses on arrangement of loudspeakers for the various election meetings of the appellant addressed on February 1 and 25, 1971	.... over Rs.	7,000
(viii)	expenses on motor transport for the conveyance of the appellant and her party to the place of her election meetings on February 1 and 25, 1971	.... over Rs.	2,000

The High Court held that the respondent had failed to prove the first five items. As regards the expenses for the erection of rostrums for the public meetings addressed by the appellant on February 1 and 25, 1971, the High Court found that four meetings were addressed by the appellant in the constituency on February 1 and six meetings on February 25, 1971. The cost of a rostrum in each meeting came to Rs. 1,600. The total expenses of the ten rostrums thus came to Rs. 16,000 and the same, it was held, was liable to be added to the amount shown in the return of election expenses of the appellant. The amount of Rs. 16,000 included the money paid by the District Congress Committee as its share of the cost of rostrums. Regarding the expenses of loudspeakers, the High Court found that the total expenses of Rs. 800 had been incurred on the installation of loudspeakers in the meetings addressed by the appellant on February 1 and 25, 1971. In addition to that, the High Court added Rs. 1,151 as cost of energy supplied for the functioning of the loudspeakers. The total amount which was added to the election expenses of the appellant on account of the loudspeakers thus came to Rs. 1,951. An amount of Rs. 232.50 was found by the High Court to have been incurred by the appellant for her transport on February 1 and 25, 1971. Adding the aggregate of Rs. 16,000, Rs. 1,951 and Rs. 232.50, in all Rs. 18,183.50, to the figure of Rupees 12,892.97 which had been shown by the

appellant in her return, the total expense incurred by the appellant on her election was found by the High Court to be Rs. 31,976.47.

241. In appeal before us Mr. Shanti Bhushan has assailed the finding of the High Court in so far as the High Court has not accepted the case of the respondent that the appellant incurred expenses on the cost of hiring, petrol and the salary of the drivers for 23 vehicles. It may be mentioned that the respondent in para 13 of the election petition referred to 32 vehicles which were alleged to have been hired by the appellant, but both before the High Court and in appeal before us learned counsel for the respondent has confined his argument to 23 vehicles.

242. To appreciate the point of controversy between the parties, it may be necessary to set out some material facts. Section 160 of the RP Act provides inter alia that if it appears to the State Government that in connection with an election held within the State, any vehicle is needed or is likely to be needed for the purpose of transport of ballot boxes to or from any polling station, or transport of members of the police force for maintaining order during the conduct of such election, or transport of any officer or other person for performance of any duties in connection with such election, the Government may by order in writing requisition such vehicle, provided that no vehicle which is being lawfully used by a candidate or his agent for any purpose connected with the election of such candidate shall be requisitioned until the completion of the poll at such election. It appears that 23 vehicles, described at some places as cars and at other places as jeeps, were requisitioned by the district authorities Rae Bareilly for election purposes under that above provision. On February 23, 1971 Dal Bahadur Singh, who was the President of the District Congress Committee Rae Bareilly, addressed a letter to the District Officer Rae Bareilly praying that the above mentioned 23 vehicles, of which the numbers were given, had been taken by the District Congress Committee Rae Bareilly for the Parliamentary constituencies of Rae Bareilly, Amethi and Ram Sanahi Ghat. There are, it may be stated seven Assembly constituencies in Rae Bareilly district. Out of them, five Assembly constituencies constitute Rae Bareilly Parliamentary constituency. One of the Assembly constituencies in Rae Bareilly district is part of Ram Sanahi Ghat Parliamentary constituency, while the seventh Assembly constituency is part of Amethi Parliamentary constituency. On February 24, 1971 a reply was sent on behalf of the District Election Officer to Dal Bahadur Singh regarding the latter's request for release of 23 vehicles. It was pointed out in the reply that it was not possible to release the vehicles in favour of any party for election purposes. At the same time, it was mentioned that the question of releasing of the vehicles could be considered at the request of a candidate or his election agent. On receipt of the above reply, Dal Bahadur Singh sent the same to Yashpal Kapur on February 24, 1971 along with note A43, the material part of which reads as under:

"You are requested to kindly write a letter with your recommendation to the Election Officer so that the cars taken by the District Congress Committee may be released. I have tried to find out Shri Vidyadhar Vajpayee

who is contesting the election from Amethi Parliamentary Constituency and Shri Baiznath Kureel who is contesting the election from Ram Sanehi Parliamentary Constituency, but they are not available. You are, therefore, requested to write the above letter to the District Election Officer positively so that the election work of all the three Parliamentary Constituencies which is going on, on behalf of District Congress Committee, may not suffer".

On February 25, 1971 Yashpal Kapur addressed a letter to the District Officer Rae Bareli stating that the 23 vehicles in question had been taken by the District Congress Committee Rae Bareli for the three Parliamentary constituencies of Rae Bareli, Amethi and Ram Sanehi Ghat. The District Officer was requested to release the 23 vehicles without delay. Yashpal Kapur also enclosed with that letter the note of Dal Bahadur Singh. The 23 vehicles, it would appear, were thereafter released by the District Election Officer. The appellant, in para 17(b) of her written statement, admitted that those 23 vehicles were used by the District Congress Committee Rae Bareli for election work in the three Parliamentary constituencies of Rae Bareli, Amethi and Ram Sanehi Ghat. The High Court, in not accepting the case of the respondent in respect of the 23 vehicles, observed that there was nothing to show that the above mentioned vehicles had been obtained on hire or were obtained gratis. There was also, according to the High Court, no cogent material to show that the said vehicles had been engaged and used in connection with election work of the appellant.

243. Mr. Shanti Bhushan, while assailing the finding of the High Court, has submitted that, as five out of the seven Assembly constituencies in Rae Bareli district were in Rae Bareli Parliamentary constituency, five-seventh of the expenses incurred on the said 23 vehicles should be added to the election expenses of the appellant. I find it difficult to accede to the above submission because of the paucity of the material on record. There is no cogent evidence to show that the 23 vehicles in question were used for the election of the appellant. It is no doubt true that the said 23 vehicles were used by the District Congress Committee Rae Bareli for election work in the three Parliamentary constituencies, viz, Rae Bareli, Amethi and Ram Sanehi Ghat. The record is, however, silent on the point as to what extent they were used in Rae Bareli Parliamentary constituency. One can in the above context visualise three possibilities:

- (i) As the appellant, who was the Prime Minister of the country, was contesting from Rae Bareli constituency, the District Congress Committee concentrated its attention on that constituency and used the 23 vehicles mostly for the election work in that constituency.
- (ii) As the appellant had a mass appeal the District Congress Committee office-bearers thought that the Rae Bareli constituency was very safe and, therefore, concentrated attention on the other two Parliamentary constituencies and used the 23 vehicles mostly for those two constituencies.

(iii) Equal attention was paid to all the three constituencies and there was proportionate use of the vehicles for the three constituencies.

Mr. Shanti Bhushan would have us to accept the first or the third possibility and would rule out the second. If so, it was, in my opinion, essential for the respondent to lead some evidence regarding the use of the 23 vehicles. He did nothing of the kind. Neither the owners nor the drivers of the those vehicles were examined as witnesses. There was also, as mentioned earlier, no other cogent evidence to show that those vehicles or any of them were used for the appellant's election in the Rae Bareilly constituency, and if so, to what extent. The respondent himself did not come into the witness box to substantiate the charge against the appellant regarding the use of the 23 vehicles. The fact that Dal Bahadur Singh was not examined as a witness on behalf of the appellant would not warrant the filling in of the gaps and lacunae in the evidence adduced by the respondent by a process akin to guess work. It is no doubt true that by using a vehicle for the furtherance of the prospects of candidates in more than one constituency one should not be allowed to circumvent the salutary provisions of the RP Act in this respect. To prevent such circumvention, it is essential that evidence should be led to show as to what was the extent of the user of the vehicle in the constituency concerned. In *Hans Raj v. Pt. Hari Ram*, (1968) 40 Ele LR 125 (SC) a jeep hired by the Congress Committee during elections was used in more than one constituency, including that of the returned candidate who was a Congress nominee. Question arose as to whether the expense incurred in connection with that jeep could be included in the election expenses of the returned candidate. While answering the question in the negative, Hidayatullah, C.J. Observed:

“The bill stands in the name of the Congress Committee and was presumably paid by the Congress Committee also. The evidence, however, is that this jeep was used on behalf of the returned candidate and to that extent we subscribe to the finding given by the learned judge. Even if it be held that the candidate was at bottom the hirer of the jeep and the expenditure on it must be included in his account, the difficulty is that this jeep was used also for the general Congress propaganda in other constituencies. As we stated, the jeep remained in Chalet and at Mubarakpur. No doubt Chalet is the home town of the returned candidate and his office was situated at Mubarakpur but that does not indicate that the jeep was used exclusively on his account. The petrol chart shows that petrol was bought at several pumps, both inside the constituency and outside. This shows, as does the evidence, that the jeep was used not only in this constituency but also in the other constituencies. If this be true, then, it is almost impossible on the evidence as it exists in this case to decide how much of the use went for the benefit of the returned candidate and how much for the use of candidates in the other constituencies also put up by the Congress Committee. In this situation it is difficult to say that the whole of the benefit of the jeep went to the returned candidate and once we hold that the entire benefit did not go to him, we are not in a position to allocate the expenses between him and the other candidates in the other constituencies.”

244. Reference has also been made during the course of arguments by MR. Shanti Bhushan to some entries in a register of the Congress Committee. The High Court declined to place any reliance on those entries as those entries had not been proved. I see no cogent ground to take a different view. Our attention has been invited by Mr. Shanti Bhushan to a report in issue dated January 22, 1971 of Swantantra Bharat wherein there was a reference to the Personal Secretary of the Prime Minister having reached Rae Bareli with a caravan of 70 motor vehicles. No reliance can be placed upon that report as the correspondent who sent that report was not examined as a witness.

245. The other difficulty which I find in accepting the submission of Mr. Shanti Bhushan in respect of 23 vehicles is that there is no evidence to show that any payment was made for the use of the above mentioned vehicles. There is also nothing to show that those vehicles were engaged on hire. As mentioned earlier, the owners and drivers of those vehicles were not examined as witnesses. I therefore, find no sufficient ground to interfere with the finding of the High Court in respect of the above mentioned 23 vehicles.

246. Mr Shanti Bhushan has next assailed the finding of the High Court in so far as it has held that the respondent has failed to prove that the appellant incurred an expense of Rs. 6,600 on workers engaged for the purposes of election propaganda. I, however, find no infirmity in the finding of the High Court in this respect as there is no cogent evidence whatsoever that any expense was incurred for engaging workers for the election work of the appellant. The case of the appellant is that her workers did the work voluntarily and without receipt of any remuneration.

247. Apart from challenging the findings of the High Court in respect of 23 vehicles and the alleged payment to workers, Mr. Shanti Bhushan has also referred to some other circumstances with a view to show that the election expenses of the appellant exceeded the prescribed amount of Rs. 35,000. It has been pointed out that a cheque for Rs. 70,000 was sent by the Provincial Congress Committee to Dal Bahadur Singh, President of the District Congress Committee Rae Bareli, and the same was credited in Dal Bahadur Singh's account after deducting of the bank charges on March 4, 1971. Dal Bahadur Singh withdrew out of that amount Rs. 40,000 and Rs. 25,000 on March 4 and 6, 1971 respectively nearabout the days of polling. It is urged that the said amount must have been spent for the purpose of the elections. There was no reference to the said amount of Rs. 70,000 in the petition. There is also no reference to the amount of Rs. 70,000 in the judgment of the High Court or in the grounds of appeal. As such, I am of the view that the respondent should not be allowed to set up a case against the appellant on the basis of the bank entries in the account of Dal Bahadur Singh. Reference has further been made by Mr. Shanti Bhushan to the expenses which were alleged to have been incurred on the telephone charges and the meetings addressed by Yashpal Kapur. The High Court rejected the submission in this respect on behalf of the respondent in the following words: "Learned counsel for the petitioner urged that from the evidence on record, it transpires that expenditure was also incurred on the telephone connection

and telephone charges, on the meetings addressed by Sri Yashpal Kapur within the Constituency during the period of election, on the election material viz. Pamphlets, posters, etc. and on the lighting arrangements made for some meetings addressed by the respondent No. 1. According to learned counsel, these expenses are also liable to be added to the election expenses of the respondent No. 1. None of these expenses were, however, pleaded in the petition. In fact, till the commencement of the arguments in the case, the respondent No. 1 could not even anticipate that the petitioner shall rely on these expenses for the purpose of his case. It will, therefore, be prejudicial to the interest of respondent No. 1 if the aforesaid expenses are taken into consideration. The submission made by learned counsel for the petitioner is accordingly negatived." I am in full agreement with the above observations of the High Court and find no cogent ground to take a different view.

248. It may be stated that in view of the new explanation added to Section 77 of the RP Act by Act 40 of 1975, the amount of Rs. 12,000 which represented 75 per cent of the expenditure incurred on the construction of 10 rostrums borne by the Government, cannot be included in the total election expenses of the appellant. The High Court was also inclined to hold that the said amount of Rs. 12,000 could not be included in the appellant's expenses. The High Court however, included the total amount of Rs. 16,000 in the election expenses of the appellant upon the assumption that the appellant had not disavowed that expenditure. Be that as it may, the fact remains that the High Court has found on issue No. 9 that the total expenses incurred by the appellant on her election have not been shown to exceed the prescribed limit. I find no cogent reason to interfere with that finding.

249. I also agree with the High Court that as the election expenses of the appellant have not been shown to exceed the prescribed limit of Rs. 35,000, the question of invoking and going into the validity of Act 58 of 1974 does not arise. Nor is it necessary to express an opinion about the view taken in *Kanwarlal v. Amarnath Chawla*. AIR 1975 SC 308 in view of the fact that even after applying the rule laid down in that case, the total election expense of the appellant has not been shown to exceed the prescribed limit.

250. So far as the finding of the High Court on issue No. 6 regarding the use of the symbol of cow and calf is concerned, the matter, as already discussed earlier, is now covered by the amendment made in Section 123 (3) of the RP Act by Section 8 of Act 40 of 1975.

251. There was a controversy during the course of arguments on the point as to whether I have laid down in my judgment in *Kesavananda Bharati's* case (AIR 1973 SC 1461) (supra) that fundamental rights are not a part of the basic structure of the Constitution. As this controversy cropped up a number of times, it seems apposite that before I conclude I should deal with the contention advanced by learned Solicitor General that according by learned Solicitor General that according to my judgment in that case no fundamental right is part of the basic structure of the Constitution. I find it difficult to read anything in that judgment to justify such a conclusion. What has been laid down in that judgment is that no article of the Constitution is immune from the amendatory process because of the fact that it relates to a

fundamental right and is contained in Part III of the Constitution. It was also held that a constitutional amendment under Article 368 does not constitute "Law" as mentioned in Art. 13. I also did not agree with the view taken in the case of Golaknath, (1967) 2 SCR 762=(AIR 1967 SC 1643) that there was a limitation on the power of Parliament to amend the provisions of Part III of the Constitution so as to abridge or take away the fundamental rights. I thereafter dealt with the scope of the power of amendment under Article 368 and the connotation of the word "amendment" and said in this context:

"I am further of the opinion that amendment of the constitution necessarily contemplates that the constitution has not to be abrogated but only changes have to be made in it. The word 'amendment' postulates that the old constitution survives without loss of identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done away with it is retained though in the amended form. What then is meant by the retention of the old Constitution? It means the retention of the basic structure or framework of the old constitution. A mere retention of some provisions of the old constitution even though the basic structure or framework of the constitution has been destroyed would not amount to the retention of the old constitution. Although it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern. The words amendment of the constitution with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the constitution. It would not be competent under the garb of amendment, for instance, to change the democratic government into dictatorship or hereditary monarchy nor would it be permissible to abolish the Lok Sabha and the Rajya Sabha. The secular character of the state according to which the state shall not discriminate against any citizen on the ground of religion only cannot likewise be done away with. Provision regarding the amendment of the constitution does not furnish a pretence for subverting the structure of the constitution nor can Article 368 be so construed as to embody the death wish of the Constitution or provides sanction for what may perhaps be called its lawful harakiri. Such subversion or destruction cannot be described to be amendment of the Constitution as contemplated by Article 368."

It was further observed by me:

"The word 'amendment' in Article 368 must carry the same meaning whether the amendment relates to taking away or abridging fundamental rights in Part III of the Constitution or whether it pertains to some other provision outside Part III of the Constitution. No serious objection is taken to repeal, addition or alteration of provisions of the Constitution other than those in Part III under the power of amendment conferred by Article 368. The same approach, in my opinion, should hold good when we deal with amendment relating to fundamental rights contained in Part III of the Constitution. It would be impermissible to differentiate between scope and width of power of amendment when it deals with fundamental rights and the

scope and width of that power when it deals with provisions not concerned with fundamental rights."

It would appear from the above that no distinction was made by me so far as the ambit and scope of the power of amendment is concerned between a provision relating to fundamental rights and provisions dealing with matters other than fundamental rights. The limitation inherent in the word "amendment" according to which it is not permissible by amendment of the Constitution to change the basic structure of the Constitution was to operate equally on articles pertaining to fundamental rights as on other articles not pertaining to those rights. This was further made clear by the following observations on page 688:

"Subject to the retention of the basic structure or framework of the Constitution. I have no doubt that the power of amendment is plenary and would include within itself the power to add, alter or repeal the various articles including those relating to fundamental rights."

Proposition (vii) of the summary of my conclusions on page 758 of the judgment also bears it out and the same reads as under:

"(vii) The power of amendment under Article 368 does not include power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features. No part of a fundamental right can claim immunity from amendatory process by being described as the essence or core of that right. The power of amendment would also include within itself the power to add, alter or repeal the various articles".

252. It has been stated by me on page 685 of the judgment (already reproduced above) that the secular character of the State, according to which the State shall not discriminate against any citizen on the ground of religion only cannot likewise be done away with. The above observations show that the secular character of the Constitution and the right guaranteed by Article 15 pertain to the basic structure of the Constitution. The above observations clearly militate against the contention that according to my judgement fundamental rights are not a part of the basic structure of the Constitution. I also dealt with the matter at length to show that the right to property was not a part of the basic structure of the Constitution. This would have been wholly unnecessary if none of the fundamental rights was a part of the basic structure of the Constitution.

253. Before parting with this case I must acknowledge the assistance we received from the learned counsel for the parties as also from learned Attorney General and Solicitor General in resolving the points of controversy. In spite of the political overtones, the case was argued forcefully yet without generating any heat and in an atmosphere of befitting calmness. It has been said by Holmes, J. that great cases like hard cases make bad law. For great

cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest, which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure (*Northern Securities Co. v. U.S.*), (1903) 193 US 197 at pp. 400-1. It, therefore, became essential to rid the case of all the embellishments resulting from the political overtones and to bring it to a level which is strictly judicial, so that the various constitutional and legal aspects of the matter may be examined in a dispassionate atmosphere. Learned counsel for the parties made a significant contribution towards the attainment of this objective. It may not be inappropriate in the above context to reproduce what was said by one of us (Khanna. J.) in *Kesavananda Bharati's case* (1973) Supp SCR 1 = (AIR 1973 SC 1461 (supra) at p. 755 (of SCR) = (at p. 1902 of AIR):

“That all constitutional interpretations have political consequences should not obliterate the fact that the decision has to be arrived at in the calm and dispassionate atmosphere of the court room, that judges in order to give legitimacy to their decision have to keep aloof from the din and controversy of politics and that the fluctuating fortunes of rival political parties can have for them only academic interest. Their primary duty is to uphold the constitution and the laws without fear or favour and in doing so, they cannot allow any political ideology or economic theory, which may have caught their fancy, to colour the decision.”

254. As a result of the above, I accept appeal No. 887 of 1975 filed by Shrimati Indira Nehru Gandhi, set aside the judgment of the High Court in so far as it has found the appellant guilty of corrupt practice under Section 123 (7) of the RP Act and has declared her election to the Lok Sabha to be void. The order that the appellant shall accordingly stand disqualified for a period of six years as provided in Section 8-A would also consequently be set aside. The election petition filed by the respondent shall stand dismissed. Appeal No. 909 of 1975 filed by Shri Raj Narain is dismissed. Looking to all the circumstances, more particularly the fact that the election petition filed by the respondent is being dismissed because of changes made in law during the pendency of the appeal, the parties are directed to bear their own costs throughout.

MATHEW, J.:— **255.** In the election petition filed by the respondent in Civil Appeal No. 887 of 1975 (hereinafter referred to as 'respondent') seven charges of corrupt practice were made against the appellant therein (hereinafter called the 'appellant') and it was prayed that the election of the appellant be set aside. The learned Judge who tried the petition found that two of the charges had been made out but that the rest of the charges were not substantiated. He set aside the election of the appellant with the result that the appellant incurred the disqualification for a period of six years as visualized in Section 8-A of the Representation of the People Act, 1951. It is against this judgment that Civil Appeal No. 887 of 1975 has been filed.

256. The respondent has filed a cross appeal (Civil Appeal No. 909 of 1975) challenging the findings of the High Court in respect of the other charges of corrupt practice.

257. During the pendency of these appeals, the Parliament passed the Election Laws (Amendment) Act, 1975 on 6-8, 1975 by which certain amendments were made in the provisions of the Representation of the People Act, 1951, and the Indian Penal Code.

258. On 10-8-1975, the Parliament in the exercise of its constituent power passed the Constitution (Thirty-ninth Amendment) Act, 1975 (hereinafter referred to as the 'Amendment'). By the Amendment, Article 71 of the Constitution was substituted by a new Article and that Article provided by clause (1) that subject to the provisions of the Constitution. Parliament may, by law, regulate any matter relating to or connected with the election of a President or Vice-President, including the grounds on which such election may be questioned. By clause (2) of the Article it was provided that all doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by such authority or body in such manner as may be provided for by or under any law referred to in clause (1). Clause (3) stated that the validity of any such law referred to in clause (1) and the decision of any authority or body under such law shall not be called in question in any court.

259. By clause 4 of the Amendment. Article 329-A was inserted reading as follows:

“329-A. Special provision as to elections to Parliament in the case of Prime Minister and Speaker:

(1) subject to the provisions of Chapter II of Part V (except sub-clause (e) of clause (1) of Article 102), no election—

(a) to either House of Parliament of a person who holds the office of the Prime Minister at the time of such election or is appointed as Prime Minister after such election;

(b) to the House of the People of a person who holds the office of a Speaker of that House at the time of such election or who is chosen as the Speaker for that House after such election: Shall be called in question except before such authority (not being any such authority as is referred to in clause (b) of Article 329) or body and in such manner as may be provided for by or under any law made by Parliament and any such law may provide for all other matters relating to doubts and disputes in relation to such election including the grounds on which such election may be questioned.

(2) The validity of any such law as is referred to in clause (1) and the decision of any authority or body under such law shall not be called in question in any court.

(3) Where any person is appointed as Prime Minister or, as the case may be, chosen to the office of the Speaker of the House of the People, while an election petition referred to in clause (b) of Article 329 in respect of his election to either House of Parliament or as the case may be to the House of

the People is pending such election petition shall abate upon such person being appointed as Prime Minister or, as the case may be being chosen to the office of the Speaker of the House of the People, but such election may be called in question under any such law as is referred to in clause (1).

(4) No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act. 1975, in so far as it relates to election petitions and matters connected therewith shall apply or shall be deemed ever to have applied to or in relation to the election of any such person as is referred to in clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void or has, before such commencement, been declared to be void under any such law and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.

(5) Any appeal or cross appeal against any such order of any court as is referred to in clause (4) pending immediately before the commencement of the Constitution (Thirty-ninth Amendment) Act. 1975 before the Supreme Court shall be disposed of in conformity with the provisions of clause (4).

(6) The provisions of this Article shall have effect notwithstanding anything contained in this Constitution.”

260. The respondent contended that clause (4) of Art 329-A (hereinafter referred to as 'clause (4)') is invalid for the reason that some of the basic structures of the Constitution have been damaged by its enactment.

261. The argument was that although the amending body could declare that the election of the appellant shall not be deemed to be void and the judgment of the High Court to be void on the basis that no law relating to election petition and matters connected therewith would apply to the election, yet the amending body could not have held the election to be valid as it did not ascertain the facts relating to the election and apply the relevant law to them. Counsel submitted that by its very nature, an election dispute in a democratic system of Government raises questions which can be decided only by the exercise of judicial power: that by retrospectively rendering the forum for investigation into the complaints regarding the validity of the election of the appellant coram non iudice and by the amending body judging its validity without ascertaining the facts and applying the relevant law, the Amendment has fundamentally damaged an essential feature of the democratic structure of the Constitution namely, free and fair election.

262. Counsel also submitted that equality and rule of law are essential features of democracy; that clause (4) by dispensing with the application of the law relating to election petition and matters connected therewith to the appellant made an unreasonable classification among persons similarly situated with reference to the purpose of the law.

263. The further submission was, that separation of powers is a basic structure of the Constitution and that if it be supposed that the amending

body ascertained the facts regarding the election of the appellant and applied the relevant law, the exercise of that power by the amending body would offend the doctrine of separation of powers and that, at any rate this process would not result in an amendment of the Constitution by enacting a law, but only in the passing of a judgment or sentence which can never be characterized as a law let alone a law relating to the Constitution of India.

264. In His Holiness Kesavananda Bharati Sirpadagalavaru v. State of Kerala, (1973) Supp SCR 1 = (AIR 1973 SC 1461) (hereinafter referred to as 'Bharati's case'), a majority of seven Judges held that the power conferred under Article 368 of the Constitution was not absolute. They took the view that by an amendment, the basic structure of the Constitution cannot be damaged or destroyed. And, as to what are the basic structures of the Constitution, illustrations have been given by each of these Judges. They include supremacy of the Constitution democratic republican form of Government, secular character of the Constitution, separation of powers among the legislature, executive and judiciary, the federal character of the Constitution, Rule of Law, equality of status and of opportunity; justice, social, economic and political; unity and integrity of the nation and the dignity of the individual secured by the various provisions of the Constitution. There was consensus among these Judges that democracy is a basic structure of the Constitution. I proceed on the assumption that the law as laid down by the majority in that case should govern the decision here, although I did not share the view of the majority.

265. Therefore, if by clause (4), any essential feature of the democratic republican structure of our polity as visualized by the Constitution has been damaged or destroyed, the clause would be ultra vires the Constitution.

266. One way of looking at the first part of clause (4) is that the amending body has, with retrospective effect, repealed the law relating to election petition in respect of the persons specified in clause (1) and hence the judgment rendered on the basis of the previous law relating to election petition became automatically void, and the amending body was merely stating the consequence of the retrospective repeal of the law and therefore the declaration that the judgment was void was not an exercise of judicial function. On the other hand, it might be possible to view the first part of clause (4) as an exercise of judicial power for the reason that, even assuming that by virtue of the retrospective repeal of the law relating to election petition there was no jurisdiction in the High Court to entertain or try the election petition and pass the judgment a repeal simpliciter did not render the judgment ipso facto void and therefore, in making the declaration that the judgment was void, the amending body was performing a function which has traditionally been in the province of court.

267. Be that as it may, I feel no doubt that the amending body, when it declared the election of the appellant to be valid, had to ascertain the adjudicative facts* and apply the relevant norm for adjudging its validity. If however the amending body did not ascertain the facts relating to the election and apply the relevant norm, the declaration of the validity of the election was a fiat of a *Shi generis* character of the amending body.

268. The concept of democracy as visualized by the Constitution presupposes the representation of the people in Parliament and State Legislatures by the method of election. And, before an election machinery can be brought into operation, there are three requisites which require to be attended to namely, (1) there should be a set of laws and rules making provisions with respect to all matters relating to or in connection with elections, and it should be decided as to how these laws and rules are to be made; (2) there should be an executive charged with the duty of securing the due conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections. Articles 327 and 328 deal with the first of these requisites, Article 324 with the second and Article 329 with the third requisite (see *N.P. Ponnuswami v. Returning Officer, Namakkal Constituency*. (1952) 3 SCR 218 at p. 229 = (AIR 1952 SC 64 at p. 68).

269. Article 329 (b) envisages the challenge to an election by a petition to be presented to such authority as the Parliament may, by law, prescribe. A law relating to election should contain the requisite qualifications for candidates, the method of voting, definition of corrupt practices by the candidates and their election agents, the forum for adjudication of election disputes and other cognate matter. It is on the basis of this law that the question whether there has been a valid election has to be determined by the authority to which the petition is presented. And, when a dispute is raised as regards the validity of the election of a particular candidate the authority entrusted with the task of resolving the dispute must necessarily exercise a judicial function, for, the process consists of ascertaining the facts relating to the election and applying the law to the facts so ascertained. In other words it is obvious that a power must be lodged somewhere to judge the validity of the election for otherwise, there would be no certainty as to who were legitimately chosen as members and any intruder or usurper might claim a seat and thus trample upon the privileges and liberties of the people. Indeed elections would become under such circumstances, a mockery. In whichever authority the power is lodged the nature of the function is such that it requires a judicial approach. It cannot be resolved on considerations of political expediency.

270. It was contended for the appellant that in England, it was the House of Commons which originally decided election disputes concerning its members, that it was only in 1770 that the function was delegated to committees and, therefore, Parliament is the proper forum for deciding election disputes of its members as it is one of its privileges I think, at the time our Constitution was framed the decision of an election dispute had ceased to be a privilege of the House of Commons in England and therefore, under Article 105 (3), it could not be a privilege of Parliament in this country.

271. Before the year 1770 controverted elections were tried and determined by the whole House of Commons as mere party questions upon which the strength of contending factions might be tested "In order to prevent

so notorious a perversion of justice, the House consented to submit the exercise of its privilege to a tribunal constituted by law, which, though composed of its own members should be appointed so as to secure impartiality and the administration of justice according to the laws of the land under the sanction of oaths". The principle of the Grenville Act, and of others which were passed at different times since 1770, was the selection by lot of committees for the trial of election petitions. And at present, by Part III of the Representation of the People Act, 1949, the trial of controverted elections is confided to Judges selected from the judiciary in the appropriate part of the United Kingdom. Provision is made in each case for constituting a rota from whom these Judges are selected. The House has no cognizance of these proceedings until their determination, when the Judges certify their determination. The Judges are to make a report in any case where a charge has been made in the petition of corrupt and illegal practice having been committed at an election; and they may also make a special report on any matter arising which they think should be submitted to the House.*

272. Article 1, Section 5 (1) of the Constitution of the United States of America provides that each House shall be the Judge of the elections, returns and qualifications of its own members.

273. In whichever body or authority, the jurisdiction is vested, the exercise of the jurisdiction must be judicial in character. This Court has held that in adjudicating an election dispute an authority is performing a judicial function and a petition for leave to appeal under Article 136 of the Constitution would lie to this Court against the decision notwithstanding the provisions of Article 329 (b) (see *Durga Shankar Mehta v. Thakur Rathuraj Singh* (1955) 1 SCR 267 = (AIR 1954 SC 520)).

274. In *Barry v. United States Ex. Rel. Cunningham*, (1928) 73 Law Ed 867, it was held that in exercising the power to judge of the election returns and qualifications of members, the senate acts as a judicial tribunal.

275. It might be that if the adjudication of election disputes in respect of its members had been vested in each of the Houses of Parliament by the Constitution, the decision of the House would have been final. That would have been on the basis of the doctrine of the political question, namely, that the function has been exclusively committed textually to another agency. I am aware that the doctrine of political question has no hospitable quarter in this Court since the decision in *Madhav Rao Scindia v. Union of India* AIR 1971 SC 530. But I venture to think that the doctrine alone can explain why the courts abstain from interfering with a verdict on an impeachment of the President for violation of the Constitution, a function essentially judicial.*

276. An election dispute has a public aspect in that it is concerned more with the right of a constituency to be represented by a particular candidate. But it does not follow from the public character of the controversy that there is no lis between the parties to the election contest and that the lis can be resolved otherwise than by ascertaining the facts relating to the election, and applying the relevant law.'

“A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. This is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.”†

277. The Privy Council had occasion to consider this question in *United Engineering Workers' Union v. Devanavagam*, 1968 AC 356. The judgment of the majority was delivered by Lord Dilhorne. Lord Guest and Lord Devlin dissented. The question in the case was whether the President of a labour tribunal in Ceylon was the holder of a judicial office. If so as the man in question had not been appointed in the way the Constitution of Ceylon required for appointments of judicial officers, whether the tribunal was without jurisdiction. It is clear from the judgment of their Lordships of the minority that judicial power is the exercise of a power on the basis of pre-existing law. At pp. 384-385, their Lordships said.'

“Another characteristic of the judicial power is that it is concerned with existing rights that is, those which the parties actually have at the inception of the suit and not those which it may be thought they ought to have; it is concerned with the past and the present and not with the future.”

278. According to the historic analysis, the essence of the distinction between legislative power and judicial power is that the legislature makes new law which becomes binding on all persons over whom the legislature exercises legislative power: the judicature applies already existing law in the resolution of disputes between particular parties and Judges may not deviate from this duty. This view of the distinction between the obligation to apply and enforce rules and a discretion to modify rules or make new rules was at one time applied uncompromisingly in describing functions as legislative or judicial. Thus De Lolme said that courts of equity as then existing in England had a legislative function. They are he said, a kind of inferior experimental legislature continually employed in finding out and providing law remedies for those new species of cases for which neither the courts of common law nor the legislature have as yet found it convenient or practicable to establish any.† Though this would show that neither for logic nor in language has the boundary between legislation and adjudication ever been rigidly and clearly drawn, the distinction between the two is well established.

279. If, therefore, the decision of the amending body that the election of the appellant was valid was the result of the exercise of judicial power or of despotic discretion governed solely by considerations of political expediency, the question is whether that decision, though couched in the form of an enactment, can be characterized as an amendment of the Constitution.

280. The constituent power is the power to frame a constitution. The people of India, in the exercise of that power, framed the Constitution and it enacts the basic norms. By that instrument, the people conferred on the amending body the power to amend by way of addition variation or repeal any of its provisions (Article 368). It is not necessary to go in detail into the

question whether the power to amend is co-extensive with the constituent power of the people to frame a constitution. In *Bharati's case* 1973 (Supp SCR 1 at p. 794 = (AIR 1973 SC 1461 at p. 1926) I said:

“..... under the Indian Constitution the original sovereign—the people created, by the amending clause of the Constitution, a lesser sovereign, almost co-extensive in power with itself. This sovereign the one established by the revolutionary act of the full or complete sovereign has been called by Max Radin the “pro-sovereign”, the holder of the amending power under the Constitution.”

281. I fully appreciate that 'sovereign',- if conceived of as an omnipotent being, has no existence in the real world. Several thoughtful writers have deprecated the use of the expression in legal discussion as it has theological and religious overtones. Nevertheless, as the practice has become inveterate it will only create confusion if any departure is made in this case from the practice. If it is made clear that sovereign is not a mortal God' and can express himself or itself only in the manner and form prescribed by law and can be sovereign only when he or it acts in a certain way also prescribed by law, then perhaps the use of the expression will have no harmful consequence.

282. “Legal sovereignty' is a capacity 'to determine the actions of persons in certain intended ways by means of a law... where the actions of those who exercise the authority, in those respects in which they do exercise it, are not subject to any exercise by other persons of the kind of authority which they are exercising.”*

283. The point to be kept in mind is that the amending body which exercises the constituent power of the legal sovereign though limited by virtue of the decision in *Bharati's case*, (AIR 1973 SC 1461) can express itself only by making laws.

284. The distinction between constitutional law and ordinary law in a rigid constitution like ours is that the validity of the constitutional law cannot be challenged whereas that of ordinary law can be challenged on the touchstone of constitution. But constitutional law is as much law as ordinary law. A Constitution cannot consist of a string of isolated dooms. A judgment or sentence which is the result of the exercise of judicial power or of despotic discretion is not a law as it has not got the generality which is an essential characteristic of law. A despotic decision without ascertaining the facts of a case and applying the law to them, though dressed in the garb of law, is like a bill of attainder. It is a legislative judgment.

285. According to Blackstone, a law and a particular command are distinguished in the following manner: a law obliges generally the members of a given community or a law obliges generally persons of a given class. A particular command obliges a single person or persons, whom it determines individually. Most of the laws established by political superiors are therefore, general in a twofold manner: as enjoining or forbidding generally acts of kinds or sorts; and as binding the whole community or at least whole classes of its members. He then said: See Blackstone: Commentaries Vol. 1, p. 44.

“Therefore, a particular act of the legislature to confiscate the goods of Titus, or to attain him of high treason does not enter into the idea of a municipal law: for the operation of this act is spent upon Titus only and has no relation to the community in general: it is rather a sentence than a law.’ This passage was cited with approval by the Privy Council in *Liyanage v. The Queen*, (1967) 1 AC 259 at p. 291 to show that the end product of the exercise of judicial power is a judgment or sentence and not a law.

286. St. Thomas Aquinas (after considering the views of Aristotle, St. Augustine and the opinions of jurists in pandects) has said that since the end of law is common good the law should, be framed not for private benefit but for the common good of all citizens, see “The Treatise on Law” Gateway Ed. (1970) p. 87.

287. Rousseau wrote: *Contract Social* Bk II, Chap. VI.

“When I say that the object of laws is always general, I mean that the law considers subjects collectively and actions as abstract; never a man as an individual, nor an action as particular.... neither is what the sovereign himself orders about a particular object a law but a decree; not an act of sovereignty, but of magistracy.”

288. Austin draws an explicit distinction between 'laws' and 'particular commands'. Where a command, he says, obliges generally to acts or forbearance of a class a command is a law of rule but where it obliges to a specific act or forbearance, a command is occasional or particular. See Austin's *Jurisprudence*, 2nd Ed., Vol. 1, p. 18.

289. Kelsen, after noting the distinction made by Austin has observed:

“We can of course recognize as law only general norms. But there is no doubt that law does not consist of general norms only. Law includes individual norms, i.e., norms which determine the behaviour of one individual in one non-recurring situation and which therefore are valid only for one particular case and may be obeyed or applied only once.”

According to him, such norms are valid law because they are parts of the legal order as a whole in exactly the same sense as those general norms on the basis of which they have been created. He said that particular norms are the decisions of courts as far as their binding force is limited to the particular case at hand and that a Judge who orders a debtor A to return \$ 1000 to his creditor B was passing a law: Kelsen: *General Theory of Law and State* 1961, p. 38.

290. It may be noted that Kelsen made no distinction between law-creation and law-application. According to him, every act of applying the law involved the creation of norms. In his view, there was no distinction between creation and application of law, a view I find difficult to accept in the light of clear distinction made by the decisions of this Court between legislative and judicial functions.

291. a statute is a general rule. A resolution by the legislature that a town shall pay one hundred dollars to Timothy Coggan is not a statute, John Chipman Gray: *Nature and Source of Law*, p. 161.

292. The mere fact that an Act to indemnify A or an Act sanctioning a pension to the Speaker is passed by the House of Commons in England should not lead us to conclude that it is law. "The English Legislature was originally constituted not for legislative but for financial purposes its primary function was, not to make laws, but to grant supplies".*

293. J.C. Carter has said that statute books contain vast masses of matter which, though in the form of laws, are not laws in the proper sense, that these consist in the making of provisions for the maintenance of public works of the State, for the building of asylums hospitals, school buses, and a great variety of similar matter, and that this is but the record of actions of the State in relation to the business in which it is engaged. According to him, the State is a great public corporation which conducts a vast mass of business, and the written provisions for this, though in the form of laws are not essentially different from the minute or ordinary corporate bodies recording their actions.†

294. Walter Bagehot has said:

"An immense mass indeed of the legislation is not in the proper language of jurisprudence legislation at all. A law is a general command applicable to many cases. The 'special acts' which crowd the statute book and weary parliamentary committees are applicable to one case only. They do not lay down rules according to which railways shall be made, but enact that such and such a railway shall be made from this place to that place and they have no bearing on any other transaction."**

295. "When the authors of books on jurisprudence write about law, when professional lawyers talk about law, the kind of law about which they are mainly thinking is that which is found in Justinian's Institutes, or in the Napoleone Codes or in the New Civil Code of the German Empire, that is to say, the legal rules which relate to contracts and torts to property, to family relations and inheritance or else to law of crimes as is to be found in a Penal Code."‡

296. John Locke was of the view that 'legislative authority is to act in a particular way... (and) those who yield this authority should make only general rules. They are to govern by promulgated established laws not to be varied in particular cases.‡‡

297. Perhaps the most exhaustive treatment of the question of the necessity for generality in law is to be found in "Jurisprudence, Men and Ideas of the Law" by Patterson (see Chapter V). According to him, the generality of a law depends upon its being applicable to an indefinite number of human beings and that is the most significant aspect of law. He said that an ordinary judgment of a court is not law as a judgment applies only to a limited number of individuals the parties to the case. He disagreed with Dr. Kelsen's statement that the judicial decision is an individual legal norm as the expression individual legal norm is a self-contradiction.

298. To Friedmann the most essential element in the concept of law is a degree of generality:

"The first desideratum of a system for subjecting human conduct to the governance of rules is an obvious one: there must be rules. This may be

stated as a requirement of generality. Here as in s many other fields, John Austin's distinction was basically right, but too rigidly drawn.”

Friedmann was of the view that a community which had no general prescription at all but only an infinite multitude of individual commands, would not be regarded as having a legal order. It would dissolve into millions of individual relationships*

299. For the purpose of this case I accept as correct the statement of Blackstone already quoted and approved by the Privy Council in *Liyanage v. The Queen*, (1967) 1 AC 259. I cannot regard the resolution of an election dispute by the amending body as law: It is either a judicial sentence or a legislative judgment like a Bill of Attainder.

300. It is no doubt true that the House of Commons in England used to pass bills of attainder. But the practice has fallen into desuetude, since the year 1696. A bill of attainder is a special act of the legislature, as inflicts capital punishments upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. The legislature assumes judicial magistracy pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears or unfounded suspicions.†

301. In *U.S. v. Brown*, 381 US 437 the Supreme Court of United States of America stated that the main reason why the power to pass bill of attainder was taken away from the Congress was:

“Everyone must concede that a legislative body, from its numbers and organisation, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamour is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited – the very class of cases most likely to be prosecuted by this mode.”‡

Much the same reason will apply to the resolution of an election dispute by an amending body as it consists in all democratic countries of an assembly of persons like parliament.

302. In *Liyanage v. The Queen*, (1967) 1 AC 259 the appellants had been charged with offences arising out of an abortive coup d'etat on January 27, 1962. The story of the coup d'etat was set out in a White Paper issued by the Ceylon Government. On March 16, 1962 the Criminal Law (Special Provisions) Act was passed and it was given retrospective effect from January 1. 1962. The Act was limited in operation to those who were accused of offences against the State in or about January 27, 1962. The Act legalised the imprisonment of the appellants while they were awaiting trial and modified a

section of the Penal Code so as to enact ex post facto a new offence to meet the circumstances of the abortive coup. The Act empowered the Minister of Justice to nominate the three Judges to try the appellants without a jury. The validity of the Act was challenged as well as the nomination which had been made by the Minister of Justice of the three Judges. The Ceylon Supreme Court upheld the objection about the vires of some of the provisions of the Act as well as the nomination of the Judges. Subsequently, the Act was amended and the power of nomination of the Judges was conferred on the Chief Justice. The appellants having been convicted at the trial before a court of three Judges nominated under the amended Act, went up in appeal before the Judicial Committee. It was contended that the Acts of 1962 offended against the Constitution in that they amounted to a direction to convict the appellants or to a legislative plan to secure the conviction and severe punishment of the appellants and thus constituted an unjustifiable assumption of judicial power by the legislature, or an interference with judicial power which was outside the legislature's competence.

303. The Privy Council said in the course of their judgment that the pith and substance of the law enactments was a legislative plan ex post facto to secure the conviction, that although legislation ad hominem which is directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary, but in the present case they had no doubt that there was such interference; that it was not only the likely but the intended effect of the impugned enactments and that it was fatal to their validity. They further said that the true nature and purpose of these enactments were revealed by their conjoint impact on the specific proceedings in respect of which they were designed and they took their colour, in particular from the alterations they purported to make as to their ultimate objective—the punishment of those convicted—and that these alterations constituted a grave and deliberate incursion into the judicial sphere and then, they quoted with approval the observations of Blackstone already referred to; See Blackstone; Commentaries, Vol. I, p. 44. These observations have great relevance to the case in hand. True it is that their Lordships did not decide the question whether by a constitutional amendment the result could have been achieved or not.

304. At the time when the Amendment was passed, the appeal filed by the appellant and the cross appeal of the respondent were pending before the Supreme Court. Clause (4) was legislation ad hominem directed against the course of the hearing of the appeals on merits as the appeal and the cross appeal were to be disposed of in accordance with that clause and not by applying the law to the facts as ascertained by the court. This was a direct interference with the decision of these appeals by the Supreme Court on their merits by a legislative judgment.

305. If the amending body really exercised judicial power that power was exercised in violation of the principles of natural justice of audi alteram partem. Even if a power is given to a body, without specifying that the rules

of natural justice should be observed in exercising it, the nature of the power would call for its observance.

306. The Solicitor General contended that the amending body, in declaring that the election was valid was exercising its constituent legislative power; that legislative power does not adjudicate but only creates validity, even retrospectively by enacting a law with that effect; that validation is law-making; that it alters the legal position by making new law and that validation may take place before or after a judgment. He said that by the repeal of the provisions of the Representation of the People Act, 1951, the amending body had wiped out not only the election petition but also the judgment of the High Court and has deprived the respondent of the right to raise any dispute as regards the validity of the election of the appellant and, therefore, there was no dispute to be adjudicated upon by the amending body. He also said – I think, in the alternative – that although the law relating to election petitions and other matters connected therewith was dispensed with in respect of the appellant, the amending body had the ideal norms of fair and free election in its view for adjudging the validity of the election. He submitted that it was open to the amending body to gather facts from any source and as the facts collected by the High Court were there factually the amending body looked into them and applied the ideal norms of election for adjudging its validity.

307. It is difficult to understand when the amending body expressly excluded the operation of all laws relating to election petition and matters connected therewith by the first part of clause (4), what ideal norms of free and fair election it had in view in adjudging the validity of the election of the appellant. I cannot conceive of any pre-existing ideal norms of election apart from the law enacted by the appropriate legislatures. If the amending body evolved new norms for adjudging the validity of the particular election, it was the exercise of a despotic power and that would damage the democratic structure of the Constitution.

308. Quite apart from it, there is nothing on the face of the amendment to show that the amending body ascertained the facts of the case or applied any norms for determining the validity of the election. I do not think that under Art. 368 the amending body was competent to pass an ordinary law with retrospective effect to validate the election. It can only amend the constitution by passing a law of the rank of which the Constitution is made of.

309. There is also nothing to show that the amending body validated the election with reference to any change of the law which formed the foundation of the judgment. The cases cited by the Solicitor General to show that a competent legislature has power to validate an invalid election do not indicate that there can be a validation without changing the law which invalidated the election. Nor do I think that a contested election can be validated without an authority applying the new law to the facts as ascertained by judicial process. If the Court which ascertained the facts and applied the law was rendered coram non Judge, the facts ascertained by it

have ceased to be facts. There are no absolute or immediately evident facts. Only by being first ascertained through legal procedure are facts brought into the sphere of law or we may say though it may sound paradoxical that the competent organ legally creates facts. The Courts perform a constitutive function in ascertaining facts. There is no fact in itself that A has killed B. There is only somebody's belief or knowledge. They are all private opinions without relevance. Only establishment by a competent organ has legal relevance. See Kelsen: General Theory of Law and State, p. 136. And when that organ was rendered coram non iudice, and its judgment declared void, the facts created by it perished. They ceased to be facts. Adjudicative facts of an election dispute cannot be gathered by legislative process behind the back of the parties; they can be gathered only by judicial process. The amending body did not ascertain the facts by resorting to judicial process.

310. If Clause (4) was an exercise in legislative validation without changing the law which made the election invalid when there ought to have been an exercise of judicial power of ascertaining the adjudicative facts and applying the law the clause would damage the democratic structure of the Constitution as the Constitution visualizes the resolution of an election dispute by a petition presented to an authority exercising judicial power. The contention that there was no election dispute as clause (4) by repealing the law relating to election petition had rendered the petition filed by the respondent nonest, if allowed, will toll the death knell of the democratic structure of the Constitution. If Article 329 (b) envisages the resolution of an election dispute by judicial process by a petition presented to an authority as the appropriate legislature may by law provide a constitutional amendment cannot dispense with that requirement without damaging an essential feature of democracy viz., the mechanism for determining the real representative of the people in an election as contemplated by the Constitution.

311. All the cases cited by the Solicitor General pertain either to legislative validation of a void election by applying a new law to undisputed facts or to the removal of an admitted disqualification by a law with retrospective effect.

312. In *Abeyesekera v. Javatilake*, 1932 AC 260, the facts were: An order in council of 1923 made provision as to the Legislative Council in Ceylon, but reserved to His Majesty power to revoke, alter or amend the order. The appellant, as common informer brought an action to recover penalties under the order from the respondent, who he alleged had sat and voted after his seat had become vacant under its provisions by reason of his having a pecuniary interest in a contract with the Government. In 1928, after the action had been brought but before its trial, an amending order in Council was made which provided: "if any such action or legal proceeding has been or shall be instituted, it shall be dismissed and made void, subject to such order as to costs as the Court may think fit to make." It also amended the Order of 1923 so as to except the office held by the respondent from its operation. The Privy Council held that the Order of 1928 was valid, having regard to the

power reserved by the Order of 1923 and was an effective defence to the action, although it was retrospective in its operation and that this was no exercise of judicial power. The direction to dismiss must be understood in the light of an earlier provision in the same Order in Council which amended the law on which the proceeding was founded the dismissal was thus the result of the change in the law and all that the later clause showed was that the change was to have retrospective effect and govern the rights of parties even in pending proceedings. The decision would be helpful here only if and in so far as the provision in Clause (4) had followed from a change in any rule of law.

313. The decision in *Piare Dusadh v. King Emperor*, (1944) 6 FCR 61 = (AIR 1944 FC 1) concerned the validation of a sentence imposed by a special Criminal Court which was held to have no jurisdiction to try the case by an order of a Court. By a validation Act the jurisdiction was conferred with retrospective effect on the special Criminal Court and the sentence imposed by it was made lawful. It was held that there was no exercise of any judicial power by the legislating authority.

314. In *Kanta Kathuria v. Manak Chand Surana*. (1970) 2 SCR 835 = (AIR 1970 SC 694), the appellant, a Government advocate stood for election to the State Legislative Assembly of Rajasthan and was declared elected. The election was challenged and the ground of challenge was that the appellant held an office of profit within the meaning of Art. 191 of the Constitution. The High Court set aside the election for that reason. While the appeal was pending in this Court. Rajasthan Act 5 of 1969 was passed declaring among others that the holder of the office of a Special Government Pleader was not disqualified from being chosen or for being a member of the State Legislative Assembly; and, by S. 2(2), the Act was made retrospective removing the appellant's disqualification retrospectively. It was held that Act 5 of 1969 had removed the disqualification retrospectively, that Parliament and the State legislatures can legislate retrospectively subject to the provisions of the Constitution, that no limitation on the powers of the legislature to make a declaration validating an election could be put, and that by enacting the impugned Act the disqualification if any which existed in the 1951 Act had been removed.

315. In *State of Orissa v. Bhupendra Kumar Bose* 1962 Supp (2) SCR 380 = (AIR 1962 SC 945), the facts were as follows: Elections were held for the Cuttack Municipality and 27 persons were declared elected as councillors. One B who was defeated at the elections, filed a writ petition before the High Court challenging the elections. The High Court held that the electoral rolls had not been prepared in accordance with the provisions of the Orissa Municipalities Act, 1950, as the age qualification had been published too late thereby curtailing the period of claims and objections to the preliminary roll to 2 days from 21 days as prescribed; consequently, the High Court set aside the elections. The State took the view that the judgment affected not merely the Cuttack Municipality but other municipalities also. Accordingly, the Governor promulgated an ordinance validating the elections to the Cuttack

municipality and validating the electoral rolls prepared in respect of other municipalities. Thereupon, B filed a writ petition before the High Court contending that the Ordinance was unconstitutional. The High Court found that the Ordinance contravened Article 14 of the Constitution, that it did not successfully cure the invalidity and that it offended Article 254(1) of the Constitution, as it was inconsistent with many Central Acts falling in the concurrent list and was unconstitutional. The State and the Councillors appealed and challenged the findings of the High Court.

316. This Court held that S. 3(1) of the Ordinance effectively removed the defects in the electoral rolls found by the High Court by its judgment and that it successfully cured the invalidity of the electoral roll and of the elections to the Cuttack Municipality.

317. The Solicitor General also cited other decisions to show that a legislature can validate proceedings rendered invalid by judgment of Court. As I said, they all involved substitution of new law with retrospective effect for the old one and the basic facts were all taken to have been admitted or not controverted. If the facts are not admitted the legislature cannot determine them except by employing judicial process. Besides, those cases being cases of legislative validation, need not pass the test of the theory of basic structure which, I think, will apply only to constitutional amendment.

318. Counsel for the appellant also brought to the notice of the Court certain election validation Acts passed by the House of Commons in England. These Acts removed with retrospective effect disqualifications of members of parliament. In none of these cases was an election which was being contested validated by parliament. Nor can these instances of legislative removal of disqualification furnish any assistance to this Court for the reason that in England there is no theory of basic structure operating as a fetter on the power of parliament.

319. It was argued for the respondent that if the amending body exercised judicial power and held the election of the appellant valid, its act was unconstitutional also on the ground it damaged another basic structure of the Constitution namely, the doctrine of separation of powers.

320. The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes licence; and, the difficulty has been to discover the practical means of achieving this grand objective and to find the opportunity for applying these means in the ever-shifting tangle of human affairs. A large part of the effort of man over centuries has been expended in seeking a solution of this great problem. A reign of law, in contrast to the tyranny of power, can be achieved only through separating appropriately the several powers of Government. If the law-makers should also be the constant administrators and dispensers of law and justice, then the people would be left without a remedy in case of injustice since no appeal can lie under the fiat against such a supremacy,. And, in this age-old search of political philosophers for the secret of sound Government, combined with individual

liberty, it was Montesquieu who first saw the light. He was the first among the political philosophers who saw the necessity of separating judicial power from the executive and legislative branches of Government. Montesquieu was the first to conceive of the three functions of Government as exercised by three organs, each juxtaposed against others. He realised that the efficient operation of Government involved a certain degree of overlapping and that the theory of checks and balances required each organ to impede too great an aggrandizement of authority by the other two powers. As Holdsworth says, Montesquieu convinced the world that he had discovered a new constitutional principle which was universally valid. The doctrine of separation of Governmental powers is not a mere theoretical, philosophical concept. It is a practical, work-a-day principle. The division of Government into three branches does not imply, as its critics would have us think, three water-tight compartments. Thus, legislative impeachment of executive officers or judges executive veto over legislation judicial review of administrative or legislative actions are treated as partial exceptions which need explanation.*

321. There can be no liberty where the legislative and executive powers are united in the same person or body of magistrates, or, if the power of judging be not separated from the legislative and executive powers. Jefferson said. All powers of Government – legislative executive and judicial – result in the legislative body. The concentration of these powers in the same hands is precisely the definition of despotic Government. It will be no alleviation that these powers will be exercised by a plurality of hands and not by a single person. One hundred and seventy three despots would surely be as oppressive as one. See Jefferson Works: 3: 223. And, Montesquieu's own words would show that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted. In Federalist No. 47, James Madison suggests that Montesquieu's doctrine did not mean that separate departments might have “no partial agency in or no control over the acts of each other.” His meaning was, according to Madison, no more than that one department should not possess the whole power of another.

322. The Judiciary, said the Federalist, is beyond comparison the weakest of the three departments of power. It has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society and can take no active resolution what-ever. It may truly be said to have neither force nor will, but merely judgment. Of the three powers Montesquieu said, the judiciary is in some measure next to nothing. If he realised the relative weakness of the judiciary at the time he wrote, it is evidence of his vision that he appreciated the supreme importance of its independence. There is no liberty he said, if the judicial power be not separated from the legislative and executive.

323. But this doctrine which is directed against the concentration of these powers in the same hand has no application as such when the question is whether an amending body can exercise judicial power. In other words, the doctrine is directed against the concentration of these sovereign powers in

one or other organ of Government. It was not designed to limit the power of a constituent body.

324. Whereas in the United States of America and in Australia, the judicial power is vested exclusively in Courts, there is no such exclusive vesting of judicial power in the Supreme Court of India and the Courts subordinate to it. And if the amending body exercised judicial power in adjudging the validity of the election, it cannot be said that by that act, it has damaged a basic structure of the Constitution embodied in the doctrine of separation of powers. Even so, the question will remain whether it could exercise judicial power without passing a law enabling it to do so. As I said, the exercise of judicial power can result only in a judgment or sentence. The constituent power no doubt, is all embracing, comprising within its ambit the judicial, executive and legislative powers. But if the constituent power is a power to frame or amend a constitution, it can be exercised only by making laws of a particular kind.

325. The possession of power is distinct from its exercise.* The possession of legislative power by the amending body would not entitle it to pass an ordinary law, unless the Constitution is first amended by passing a constitutional law authorizing it to do so. In the same way, the possession of judicial power by the amending body would not warrant the exercise of the power, unless a constitutional law is passed by the amending body enabling it to do so. Until that is done, its potential judicial power would not become actual. Nobody can deny that by passing a law within its competence, parliament can vest judicial power in any authority for deciding a dispute or vest a part of that power in itself for resolving a controversy, as there is no exclusive vesting of judicial power in Courts by the Constitution. The doctrine of separation of powers which is directed against the concentration of the whole or substantial part of the judicial power in the legislature or the executive would not be a bar to the vesting of such a power in itself. But, until a law is passed enabling it to do so, its potential judicial power would not become actual.

326. Lord Coke objected to the exercise of judicial power by James I for pragmatic reasons. Much of what Lord Coke said* can be applied to parliament when it seeks to exercise that power in its constituent capacity.

327. A sovereign in any system of civilized jurisprudence is not like an oriental despot who can do anything he likes in any manner he likes and at any time he likes. That the Nizam of Hyderabad had legislative, judicial and executive powers and could exercise any one of them by a firman has no relevance when we are considering how a pro-sovereign – the holder of the amending power – in a country governed by a constitution should function. Such a sovereign can express 'himself' only by passing a particular kind of law; and not through sporadic acts. 'He' cannot pick and choose cases according to his whim and dispose them of by administering 'cadi-justice': nor can the amending body as already noticed, pass an ordinary law, as Article 368 speaks of the constituent power of amending by way of addition, variation or repeal, any provision of the Constitution in accordance with the

procedure laid down in that Article. An ordinary law can be passed by it only after amending the provisions of the Constitution authorizing it to do so.

328. If the basic postulate that a sovereign can act only by enacting laws is correct, then that is a limitation upon his power to do anything he likes. If I may re-phrase the classical statement of Sir Owen Dixon: the law that a sovereign can act only by law is supreme but as to what may be done by a law so made, the sovereign is supreme over that law.* Of course, this is subject to the theory of basic structure. In other words, even though a sovereign can act only by making law, the law he so makes may vest the authority to exercise judicial power in himself: without such law he cannot exercise judicial power.

329. The result of the discussion can be summed up as follows: Our Constitution, by Article 329(b) visualizes the resolution of an election dispute on the basis of a petition presented to such authority and in such manner as the appropriate legislature may, by law, provide. The nature of the dispute raised in an election petition is such that it cannot be resolved except by judicial process, namely, by ascertaining the facts relating to the election and applying the pre-existing law; when the amending body held that the election of the appellant was valid, it could not have done so except by ascertaining the facts by judicial process and by applying the law. The result of this process would not be the enactment of constitutional law but the passing of a judgment or sentence. The amending body, though possessed of judicial power, had no competence to exercise it, unless it passed a constitutional law enabling it to do so. If however, the decision of the amending body to hold the election of the appellant valid was the result of the exercise of an 'irresponsible despotic discretion' governed solely by what it deemed political necessity or expediency, then like a bill of attainder, it was a legislative judgement disposing of a particular election dispute and not the enactment of a law resulting in an amendment of the Constitution. And, even if the latter process (the exercise of despotic discretion) could be regarded as an amendment of the Constitution, the amendment would damage or destroy an essential feature of democracy as established by the Constitution, namely, the resolution of election dispute by an authority by the exercise of judicial power by as-certaining the adjudicative facts and applying the relevant law for determining the real representative of the people. The decision of the amending body cannot be regarded as an exercise in constituent legislative validation of an election for these reasons: firstly there can be no legislative validation of an election when there is dispute between the parties as regards the adjudicative facts; the amending body cannot gather these facts by employing legislative process: they can be gathered only by judicial process. Secondly, the amending body must change the law retrospectively so as to make the election valid, if the election was rendered invalid by virtue of any provision of the law actually existing at the time of election: Art 368 does not confer on the amending body the competence to pass any ordinary law whether with or without retrospective effect. Clause (4) expressly excluded the operation of all laws relating to election petition to the election in question. Therefore, the election was held to be valid not by changing the law

which rendered it invalid. Thirdly, the cases cited for the appellant are cases relating to legislative validation of invalid elections or removal of disqualification with retrospective effect. Being cases of legislative validation, or removal of disqualifications by legislature they are not liable to be tested on the basis of the theory of basic structure which, I think, is applicable only to constitutional amendments. Fourthly, there was no controversy in those cases with regard to adjudicative facts: if there was controversy with regard to these facts it is very doubtful whether there could be legislative validation of an election by changing the law alone without ascertaining the adjudicative facts by judicial process.

330. Then I come to the argument of counsel that equality is a basic structure of the Constitution and that that has been damaged or destroyed by Clause (4).

331. The Solicitor General submitted that the majority in *Bharati's* case (AIR 1973 SC 1461) did not hold that Article 14 pertains to the basic structure that apart from Article 14, there is no principle of equality which is a basic structure of the Constitution and that it is not a chameleon like concept which changes its colour with the nature of the subject-matter to which it is applied.

332. The majority in *Bharati's* case did not hold that Article 14 pertains to the basic structure of the Constitution. The majority upheld the validity of the first part of Article 31-C; this would show that a constitutional amendment which takes away or abridges the right to challenge the validity of an ordinary law for violating the fundamental right under that Article would not destroy or damage the basic structure. The only logical basis for supporting the validity of Arts. 31-A, 31-B and the first part of 31-C is that Article 14 is not a basic structure.

333. Counsel for the respondent, however, submitted that even if Art. 14 does not pertain to basic structure equality is an essential feature of democracy and rule of law and that Clause (4) by dispensing with the application of the law relating to election petition and matters connected therewith to the appellant and another has made an unreasonable distinction between persons similarly situated and has thereby damaged or destroyed that essential feature and therefore, the clause is bad. He said that in so far as laws are general instructions to act or refrain from acting in certain ways in specified circumstances enjoined upon persons of a specified kind, they enjoin uniform behaviour in identical cases; that to fall under a law is pro tanto to be assimilated to a single pattern; and that a plea for rule of law in this sense is in essence a plea for life in accordance with laws as opposed to other standards namely, the adhoc dispensation from its operation. He argued that if some persons for no stated reason and in accordance with no rule, obtain exemption from the operation of law, while persons who are sufficiently similar in relevant characteristics are governed by it, that is manifestly unfair, for to allow some persons to do that which is forbidden to all others is irrational.

334. Democracy proceeds on two basic assumptions: (1) popular sovereignty in the sense that the country should be governed by the representatives of the people; that all power came from them; at their pleasure and under their watchful supervision it must be held; and (2) that there should be equality among the citizens in arriving at the decisions affecting them.*

335. Today it is impossible to conceive of a democratic republican form of Government without equality of citizens. It is true that in the republics of Athens and Rome there were slaves who were regarded as chattels. And even in the United States of America there was a republic even before the Negroes were enfranchised. Our Constitution envisages the establishment of a democratic republican form of Government based on adult suffrage.

336. Equality is a multi-coloured concept incapable of a single definition. It is a notion of many shades and connotations. The preamble of the Constitution guarantees equality of status and of opportunity. They are nebulous concepts. And I am not sure whether they can provide a solid foundation to rear a basic structure. I think the types of equality which our democratic republic guarantees are all subsumed under specific articles of the Constitution like Articles 14,15,16,17,25, etc.. and there is no other principle of equality which is an essential feature of our democratic polity.

337. In the opinion of some of the judges constituting the majority in *Bharati's case*, (AIR 1973 SC 1461) Rule of Law is a basic structure of the Constitution apart from democracy.

338. 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. 'Rule of law' is an expression to give reality to something which is not readily expressible. That is why Sir Ivor Jennings said that it is an unruly horse. Rule of law is based upon the liberty of the individual and has as its object, the harmonizing of the opposing notions of individual liberty and public order. The notion of justice maintains the balance between the two; and justice has a variable content. Dicey's formulation of the rule of law, namely, "the absolute supremacy or predominance of regular law, as opposed to the influence of arbitrary power excluding the existence of arbitrariness, of prerogative, even of wide discretionary authority on the part of the Government has been discarded in the later editions of his book. That is because it was realized that it is not necessary that where law ends, tyranny should begin. As Culp Davis said, where the law ends, discretion begins and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness. There has been no Government of legal system in world history which did not involve both rules and discretion. It is impossible to find an Government of laws alone and not of men in the sense of eliminating all discretionary powers. All Governments are Governments of laws and of men. Jerome Frank has said:

"This much we can surely say: For Aristotle, from whom Harrington derived the notion of a Government of laws and not of men that notion was not expressive of hostility to what today we call administrative discretion. Nor did it have such a meaning for Harrington." *

339. Another definition of rule of law has been given by Friedrich A. Hayek in his books: "Road to Serfdom" and "Constitution of Liberty". It is much the same as that propounded by the Franks Committee in England, Report (1957) P. 6:

"The rule of law stands for the view that decisions should be made by the application of known principles or laws. In general such decisions will be predictable, and the citizen will know where he is. On the other hand there is what is arbitrary. A decision may be made without principle, without any rules. It is therefore unpredictable, "the antithesis of a decision taken in accordance with the rule of law."

340. This Court said in *Jaisinghani V. Union of India*, (1967) 2 SCR 703, at p. 718 = (AIR 1967 SC 1427 at p. 1434) that the rule of law from one point of view means that decisions should be made by the application of known principles and rules, and in general such decisions should be predictable and the citizen should know where he is.

341. This exposition of the rule of law is only the aspiration for an ideal and it is not based on any down-to-earth analysis of practical problems with which a modern government is confronted. In the world of action this ideal cannot be worked out and that is the reason why this exposition has been rejected by all practical men.

342. If it is contrary to the rule of law that discretionary authority should be given to government departments or public officers, then there is no rule of law in any modern state. A judge who passes a sentence has no other guidance except a statute which says that the person may be sentenced to imprisonment for a term which may extend to, say, a period of ten years. He must exercise considerable discretion. The High Courts and the Supreme Court overrule their precedents. What previously announced rules guide them in laying down the new precedents? A court of law decides a case of first impression; no statute governs, no precedent is applicable. It is precisely because a judge cannot find a previously announced rule that he becomes a legislator to a limited extent. All these would show that it is impossible to enunciate the rule of law which has as its basis that no decision can be made unless there is a certain rule to govern the decision. See "Discretionary Justice" by K. C. Davis.

343. Leaving aside these extravagant versions of rule of law there is a genuine concept of rule of law and that concept implies equality before the law or equal subjection of all classes to the ordinary law. But, if rule of law is to be a basic structure of the Constitution, one must find specific provisions in the Constitution embodying the constituent elements of the concept. I cannot conceive of rule of law as a twinkling star up above the Constitution. To be a

basic structure, it must be a terrestrial concept having its habitat within the four corners of Constitution. The provisions of the Constitution were enacted with a view to ensure the rule of law. Even if I assume that rule of law is a basic structure, it seems to me that the meaning and the constituent elements of the concept must be gathered from the enacting provisions of the Constitution. The equality aspect of the rule of law and of democratic republicanism is provided in Article 14. May be, the other articles referred to do the same duty.

344. Das, C. J. said that Article 14 combines the English doctrine of the rule of law and the equal protection clause of the 14th amendment to the American Federal Constitution. *Bheshar Nath V. The Commr., of I T.*, 1959 Supp (1) SCR 528, at p. 550-551 = (AIR 1959 SC 149). In *State of Bengal V. Anwar Ali Sarkar*, (1952) 3 SCR 284, at p. 293 = (AIR 1952 SC 75, at p. 79), Patanjali Sastri, C. J. observed that the first part of the Article which has been adopted from the Irish Constitution, is a declaration of equality of the civil rights of all persons within the territories of India and thus enshrines what American judges regard as the "basic principle of republicanism" *CF. Ward V. Flood*, (1874) 17 Am Rep 405 and that the second part which is a corollary of the first is based on the last clause of the first section of the Fourteenth Amendment of the American Constitution. So, the concept of equality which is basic to rule of law and that which is regarded as the most fundamental postulate of republicanism are both embodied in Article 14. If, according to the majority in *Bharati's case*, (AIR 1973 SC 1461) Article 14 does not pertain to basic structure of the Constitution, which is the other principle of equality incorporated in the Constitution which can be a basic structure of the Constitution or an essential feature of democracy or rule of law? However, it is unnecessary to pursue this aspect of the question as I have already given reasons to show clause (4) to be bad.

345. I think clause (4) is bad for the reasons which I have already summarized. Clauses (1) to (3) of Article 329-A are severable but I express no opinion on their validity as it is not necessary for deciding this case.

346. Then the question is, whether the Representation of the People (Amendment) Act. 1974, and the Election Laws (Amendment) Act. 1975, are liable to be challenged for the reason that they damage or destroy a basic structure of the Constitution. Counsel for the respondent submitted that, if, by a constitutional amendment, the basic structure of the Constitution cannot be destroyed or damaged, it would be illogical to assume that an ordinary law passed under a power conferred by that instrument can do so and since these Acts damage the concept of free and fair election, the Acts were bad.

347. I think the inhibition to destroy or damage the basic structure by an amendment of the Constitution flows from the limitation on the power of amendment under Article 368 read into it by the majority in *Bharati's case* (AIR 1973 SC 1461) because of their assumption that there are certain fundamental features in the Constitution which its makers intended to

remain there in perpetuity. But I do not find any such inhibition so far as the power of parliament or state legislatures to pass laws is concerned. Articles 245 and 246 give the power and also provide the limitation upon the power of these organs to pass laws. It is only the specific provisions enacted in the Constitution which could operate as limitation upon that power. The preamble, though a part of the Constitution, is neither a source of power nor a limitation upon that power. The preamble sets out the ideological aspirations of the people. The essential features of the great concepts set out in the preamble are delineated in the various provisions of the Constitution. It is these specific provisions in the body of the Constitution which determine the type of democracy which the founders of that instrument established, the quality and nature of justice, political, social and economic which was their desideratum, the content of liberty of thought and expression which they entrenched in that document, the scope of equality of status and of opportunity which they enshrined in it. These specific provisions enacted in the Constitution alone can determine the basic structure of the Constitution as established. These specific provisions, either separately or in combination determine the content of the great concepts set out in the preamble. It is impossible to spin out any concrete concept of basic structure out of the gossamer concepts set out in the preamble. The specific provisions of the Constitution are the stuff from which the basic structure has to be woven. The argument of counsel for the respondent proceeded on the assumption that there are certain norms for free and fair election in an ideal democracy and the law laid down by parliament or state legislatures must be tested on those norms and, if found wanting, must be struck down. The norms of election set out by parliament or state legislatures tested in the light of the provisions of the Constitution or necessary implications therefrom constitute the law of the land. That law cannot be subject to any other test, like the test of free and fair election in an ideal democracy.

348. I do not think that an ordinary law can be declared invalid for the reason that it goes against the vague concepts of democracy; justice, political, economic and social: liberty of thought, belief and expression: or equality of status and opportunity, or some invisible radiation from them.

".....(N) o political terms have been so subjected to contradictory definitions as 'democracy' and 'democratic' since it has become fashionable and profitable for every and any state to style itself in this way. The Soviet Union and communist states of Eastern Europe, the Chinese People's Republic, North Korea and north Vietnam all call themselves democracies. So does Nasser's Egypt: so does General Stoessner's Paraguay; so did Sukarno's Indonesia. Yet, if anything is clear, it is that these states do not all meet the same definition of democracy". *

Definitions are important, for, they are responsible in the last analysis for our image of democracy. The question is not only what does the word 'democracy' mean but also what is the thing. And, when we try to answer this latter query, we discover that the thing does not correspond to the word. So, although 'democracy' has a precise literal meaning, that does not really help

us to understand what an actual democracy is. In the real world, R. A. Dahl has pointed out that, democracies are 'polyarchies'. The term democracy has not only a descriptive or denotative function but also a normative and persuasive function. Therefore, the problem of defining democracy is two-fold, requiring both a descriptive and prescriptive function. To avoid pitfalls, it is necessary to keep in mind two things – first, that a firm distinction should be made between the is and the ought of democracy, and, second, that the prescriptive and the descriptive definitions of democracy must not be confused, because the democratic ideal does not define the democratic reality and vice versa: the real democracy is not and cannot be the same as the ideal one. * One cannot test the validity of an ordinary law with reference to the essential elements of an ideal democracy. It can be tested only with reference to the principles of democracy actually incorporated in the Constitution.

349. Nor can it be tested on the touchstone of justice. The modern Pilate asks. What is justice? and stays not for an answer. To Hans Kelsen, justice is an irrational ideal, and regarded from the point of rational cognition, he thinks there are only interests and hence conflict of interests. Their solution, according to him, can be brought about by an order that satisfies one interest at the expense of the other or seeks to achieve a compromise between opposing interests. "General Theory of Law and State" 1946, p. 13. Mr. Allen has said that the concept of social justice is vague and indefinite. "Aspects of Justice" p. 31. Liberty of thought, expression, belief, faith and worship are not absolute concepts. They are emotive words. They mean different things to different people. Equality of status and of opportunity are concepts laden with emotional overtones. In their absoluteness they are incapable of actual realisation. The enacting provisions in the body of the Constitution alone give concrete shape to these ideas and it is on the basis of these provisions that the validity of ordinary law should be tested.

350. The democracy which our Constitution-makers established is based on the representation of the people in the law-making organs. The method by which this representation has to be effectuated has been provided in the Constitution. Part XV of the Constitution deals with the topic of elections. Article 326 provides that elections to the House of the people and to the legislative assemblies of State should be on the basis of adult suffrage. Articles 327 and 328 provide for making of laws with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses. The validity of any law relating to the delimitation of constituencies or the allotment of seats to the constituencies, made or purporting to be made under Article 327 or Article 328 shall not be called in question in any court (see Article 329 (a)).

351. This would indicate that the Constitution has entrusted the task of framing the law relating to election to parliament, and, subject to the law made by parliament to the State legislatures. An important branch of the law

which sounds in the area of free and fair election, namely, delimitation of constituencies and allotment of seats to such constituencies is put beyond the cognizance of court. When it is found that the task of writing the legislation on the subject has been committed to parliament and state legislatures by the Constitution, is it competent for a court to test its validity on the basis of some vague norms of free and fair election? I think not. As I said, like other laws made by parliament or state legislatures, the laws made under Articles 327 and 328 are liable to be tested by Part III of the Constitution or any other provision of the Constitution: but it is difficult to see how these laws could be challenged on the ground that they do not conform to some ideal notions of free and fair election to be evolved by the court from out of airy nothing.

352. The doctrine of the 'spirit' of the Constitution is a slippery slope. The courts are not at liberty to declare an act void, because, in their opinion, it is opposed to the spirit of democracy or republicanism supposed to pervade the Constitution but not expressed in words. When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation under the notion of having discovered some ideal norm: of free and fair election.

353. Cooley has observed that courts are not at liberty to declare statutes void because they appear to the minds of the judges to violate fundamental principles of republican government, unless it shall be found that those principles are placed beyond legislative encroachment by the Constitution. The principles of democratic republican government are not a set of inflexible rules: and unless they are specifically incorporated in the Constitution, no law can be declared bad merely because the Court thinks that it is opposed to some implication drawn from the concept. *

354. Counsel for the respondent, relied upon the observations of Sikri, C. J. at p. 216. Shelat and Grover JJ. at p. 292, Hegde and Mukherjea. JJ. at p. 355 and Reddy. J. at p. 556 in their judgments in Bharati's case (AIR 1973 SC 1461) in support of his contention that when these Acts were put in the Ninth Schedule by the constitutional amendment, their provisions became vulnerable to attack if they or any one of them damaged or destroyed the basic features of democracy or republicanism.

355. Sikri, C. J. has said that the Constitution 29th Amendment Act, 1971, is ineffective to protect the immunized Acts there if they abrogate or take away fundamental rights. This would not show that the learned Chief Justice countenanced any challenge to an Act on the ground that the basic structure of the constitution has been damaged or destroyed by its provisions not constituted by the fundamental rights abrogated or taken away. In other words, if by taking away or abridging the fundamental rights, the basic structure of the Constitution is damaged or destroyed, then according to the learned Chief Justice, the legislation would be vulnerable on that score, even though it is put in the Ninth Schedule by a constitutional amendment. But it would not follow that an Act so put can be challenged for a reason not resulting from the taking away or abrogation of the fundamental right. To

put it differently, even thought and act is put in the ninth schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to basic structure. But the Act cannot be attacked, if I may say so, for a collateral reason, namely, that the provisions of the Act have destroyed or damaged some other basic structure, say, for instance, democracy or separation of powers.

356. Shelat and Grover, JJ. have said in their judgment that the 29th Amendment is valid, but the question whether the Acts included in the Ninth Schedule by that Amendment or any provision of those Acts abrogates any of the basic elements of the constitutional structure or denudes them of their identity will have to be examined when the validity of those Acts comes up for consideration. Similar observations have been made by Hegde and Mukherjea, JJ. and by Reddy, J. Khanna. J. only said that the 29th Amendment was valid.

357. It is rather strange that an Act which is put in the Ninth Schedule with a view to obtain immunity from attack on the ground that the provisions thereof violate the fundamental rights should suddenly become vulnerable on the score that they damage or destroy a basic structure of the Constitution resulting not from the taking away or abridgment of the fundamental rights but for some other reason.

358. There is no support from the majority in Bharati's case (AIR 1973 SC 1461) for the proposition advanced by counsel that an ordinary law, if it damages or destroys basic structure should be held bad or for the proposition that a constitutional amendment putting an Act in the Ninth Schedule would make the provisions of the Act vulnerable for the reason that they damage or destroy a basic structure constituted not by the fundamental rights taken away or abridged but some other basic structure. And, in principle, I see no reason for accepting the correctness of the proposition.

359. The Constitution-makers eschewed to incorporate the 'due process' clause in that instrument apprehending that the vague contours of that concept will make the court third chamber. The concept of a basic structure as brooding omnipresence in the sky apart from the specific provisions of the Constitution constituting it is too vague and indefinite to provide a yardstick to determine the validity of an ordinary law.

360. So if it be assumed that these election laws amendment Acts, even after they were put in the Ninth Schedule by constitutional amendment remained open to attack for contravention, if any, of the fundamental rights these Acts would not be open to attack on the ground that their provisions destroyed or damaged an essential feature of democracy, namely, free and fair election. The Acts remain part of the ordinary law of the land. They did not attain the status of constitutional law merely because they were put in the Ninth Schedule. The utmost that can be said is, as I indicated, that even after putting them in the Ninth Schedule, their provisions would be open to challenge on the ground that they took away or abrogated all or any of the fundamental rights and therefore damaged or destroyed a basic structure if

the fundamental rights or right taken away or abrogated constitute or constitutes a basic structure.

361. Counsel for the respondent then contended that retrospective operation has been given to the provisions of these Acts and that that would destroy or damage an essential feature of democracy viz., free and fair elections. The argument was that if one set of laws existed when an election was held and the result announced, you cannot thereafter substitute another set of laws and say that those laws must be deemed to have been in operation at the time when the election was held and the result announced, as that would lead to inequality, injustice and unfairness.

362. Retrospective operation of law in the field of election has been upheld by this Court (see *Kanta Kathuria v. Manak Chand*. (AIR 1970 SC 694). Retrospective operation of any law would cause hardship to some persons or other. This is inevitable; but that is no reason to deny to the legislature the power to enact retrospective law. In the case of a law which has retrospective effect, the theory is that the law was actually in operation in the past and if the provisions of the Acts are general in their operation, there can be no challenge to them on the ground of discrimination or unfairness merely because of their retrospective effect. In other words, if an Act cannot be challenged on the ground that its provisions are discriminatory or unreasonable if it is prospective in operation, those provisions cannot be attacked on these grounds merely because the provisions were given retrospective effect, unless there are special circumstances. I see no such special circumstances here.

363. I therefore hold that these Acts are not liable to be challenged on any of the grounds argued by counsel.

364. Counsel for the respondent submitted that the session of parliament in which the Election Laws amendment Act. 1975 and the 39th Amendment to the Constitution were passed was not properly convened and therefore the amendments were invalid.

365. The argument was that a number of members of the two houses of Parliament were illegally detained by executive orders before the summoning of the two Houses and that was made possible by the President — the authority to summon the two Houses — making an order under Article 359 of the Constitution on 27-6-1975, which precluded these members from moving the court and obtaining release from illegal detention and attending the session. In effect, the contention of counsel was that the authority to summon parliament effectually prevented by its order made under Article 359, those members who were illegally detained from attending the session and as the composition of the session was unconstitutional, any measure passed in the session would be bad. Reliance was placed by counsel upon the decision in *A. Nambiar v. Chief Secretary*, (1966) 2 SCR 406 = (AIR 1966 SC 657) in support of this proposition.

366. The question which fell for consideration in that case was whether, when a member of parliament was convicted for a criminal offence and was undergoing a sentence in pursuance thereof, he has an unconditional right to attend a session of parliament. This Court held that he had no privilege which obliged the court to release him from custody in order to enable him to attend the session. The decision has no relevance to the point in controversy here.

367. In England, a member of parliament who is convicted of a criminal offence and is undergoing sentence in pursuance to his conviction has no right or privilege to be released from custody for attending parliament. The very same principle will apply in the case of a detention under an emergency regulation. *

368. In England, it was taken as settled that parliamentary roll is conclusive of the question that a bill has been passed by both houses of parliament and has received royal assent and no court can look behind the roll as such an inquiry would be an interference with the privilege of parliament. Lord Campbell said in *Edinburgh & Dalkeith Ry. v. Wauchope*, (1842) 8 Cl & F 710 at p. 724:

"I think it right to say a word or two upon the point that has been raised with regard to an Act of Parliament being held inoperative by a court of justice because the forms prescribed by the two Houses to be observed in the passing of a Bill have not been exactly followed.....I cannot but express my surprise that such a notion should have prevailed. There is no foundation for it. All that a court of justice can do is to look to the Parliamentary Roll: If from that it should appear that a Bill has passed both Houses and received the Royal Assent, no court of justice can inquire into the mode in which it was introduced in Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses."

369. It has since been said that Parliamentary Roll is not conclusive, that when the jurisdiction of a court is invoked, it has power to determine whether everything necessary has been done for the production of a valid statute, that rule of law requires that the court should determine legal questions raised before it and if its jurisdiction is properly invoked, it has to answer the question whether the document is a statute duly passed by a parliament. The view as propounded has been summarized as follows:

"(1) Sovereignty is a legal concept: the rules which identify the sovereign and prescribe its composition and functions are logically prior to it.

(2) There is a distinction between rules which govern, on the one hand, (a) the composition, and (b) the procedure, and on the other hand (c) area of power, of a sovereign legislature.

(3) The court have jurisdiction to question the validity of an alleged Act of Parliament on grounds 2(a) and 2(b), but not on ground 2(c).† The reasons for the view are these: When the purported sovereign is any one but a single

actual person, the designation of him must include statement or rules for the ascertainment of his will, and these rules since their observance is a condition of the validity of his legislation, are rules of law logically prior to him. See Latham: "The Law and the Commonwealth" (O. U. P. 1949) p. 523. The extraction of a precise expression of will from a multiplicity of human beings is, despite all the realists say an artificial process and one which cannot be accomplished without arbitrary rules. It is therefore an incomplete statement to say that in a state such and such an assembly of human beings is sovereign. It can only be sovereign when acting in a certain way prescribed by law. At least some rudimentary manner and form is demanded of it: the simultaneous incoherent cry of a rabble, small or large, cannot be law, for it is unintelligible. See Latham: "What is an Act of Parliament"? 1939 Kings Counsel. p. 152.

370. Sir Frederick Pollock has said that supreme legal power is one sense limited by the rules which prescribe how it shall be exercised. Even if no constitutional rule places a limit or boundary to what can be done by sovereign legal authority, the organs which are to exercise it must be delimited and defined by rules. See Geoffrey Marshall: Constitutional Theory. p. 40-41.

371. So, the questions to be asked are: how is parliament composed? How does parliament express its will?

372. The rules which identify the sovereign are as important as the institution so identified. If this is so, it is open to the court to see whether a parliament has been properly summoned in order to decide the question whether a measure passed by it answers the description of a statute or an Act and that parliamentary roll, if such a thing exists, is not conclusive.

373. As to Parliamentary Roll, Heuston has said:

"The 'Parliamentary Roll', whatever exactly it may have been, disappeared in England a century ago, though even good authors sometimes write as if it still exists. Since 1849 there has been no 'Roll', simply two prints of the Bill on durable vellum by Her Majesty's stationery Office, which are signed by the Clerk of the Parliament and regarded as the final official copies. One is preserved in the Public Record Office and one in the library of the House of Lords".*

374. Article 122 (1) provides that the validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure. So, even if there is any irregularity in the procedure in the passing of the statute, it is not open to a court to question its validity. But this is distinct from the question whether the two Houses have been properly summoned and the composition of the Session was proper.

375. The Solicitor General said that if a member is excluded from participating in the proceedings of a House, that is a matter concerning the privilege of that House as the grievance is one of exclusion from the proceedings within the walls of the House. And, in regard to the right to be

exercised within the walls of the House, the House itself is the judge. He referred to May's Parliamentary Practice (18th ed. pp. 82-83) and also to *Bradlaugh v. Gossett*, (1884) 12 QBD 271. 285-286 in this connection. He further said that if an outside agency illegally prevents a member from participating in the proceedings of the House, the House has power to secure his presence in the House and cited May's Parliamentary Practice (18th ed. pp. 92-95) to support the proposition.

376. These passages throw no light on the question in issue here. Ever since the decision of Hold C. J. in *Ashby v. White*. (1703) 14 St. Tr. 695 it has been settled that privilege is part of the common law and cannot affect rights to be exercised outside or independently of the House. Regularity of internal proceedings is one thing; the constitutional rights of the subject are another; and it is the latter which are in issue in a case where the question is whether the document is a statute. See *Heuston: Essays in constitutional Law*, 2nd ed., p. 22.

377. Article 85 (1) provides that the President shall from time to time summon each House of Parliament to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.

378. The detention of these members of parliament was by statutory authorities in the purported exercise of their statutory power. It would be strange if a statutory authority by an order which turns out to be illegal could prevent the houses of Parliament from meeting as enjoined by article 85. If a statutory authority passes an illegal order of detention and thus prevents a member of parliament from attending the House, how can the proceedings of parliament become illegal for that reason? It is the privilege of parliament to secure the attendance of persons illegally detained. But what would happen if the privilege is not exercised by parliament? I do not think that the proceedings of parliament would become illegal for that reason.

379. The suspension of the remedy for the enforcement of fundamental rights by the order of the President under Article 359 is dependent upon a valid proclamation of emergency under Article 352. If a situation arose which authorized the President to issue a proclamation under Article 352, he could also suspend, under Article 359 the remedy to move the court to enforce the fundamental rights. These are the constitutional functions of the President and unless it is established that the proclamation made by the President under Article 352 or the suspension under Article 359 of the remedy for enforcement of fundamental rights is unconstitutional it is impossible to hold that the President has in any way illegally prevented the release of these members from the supposed illegal detention so as to make a session of parliament unconstitutional in consequence of the inability of those members to attend the session. In other words, the President in performing his constitutional function under these articles has not authorized the illegal detention of any person let alone any member of parliament or unconstitutionally prevented the release from custody of any member. He has

only discharged his constitutional functions. If this be so, it is difficult to hold that the session in which the amendments were passed was illegally convened . The challenge to the validity of the amendments on this score must be overruled.

380. Counsel for the respondent submitted that it is immaterial when a candidate committed a corrupt practice – whether it was before or after he became a candidate – and that an election would be set aside even if a person committed the corrupt practice before he became a candidate. Section 79(b) of the Representation of the People Act 1951 defined the word 'candidate' as follows:

" 'candidate' means a person who has been or claims to have been duly nominated as a candidate at any election and any such person shall be deemed to have been a candidate as from the time when with the election in prospect he began to hold himself out as a prospective candidate."

Clause 7 of the Election Laws (Amendment) Act 1975 substituted the present definition in Section 79 (b) which reads : " 'candidate means a person who has been or claims to have been duly nominated as a candidate at an election."

381. In support of the proposition that an election can be set aside even if a person has committed corrupt practice of bribery before he became a candidate counsel cited Halsbury's Laws of England 3rd ed., Volume 14, pages 222 (para 386) and 218 (para 380).

382. These paragraphs state that in order to constitute the offence of bribery it does not matter how long before an election a bribe is given provided that the bribe is operative at the time of the election and that time is material only when considering the question of evidence.

383. Counsel further said that under Section 100 of the Representation of the People Act. 1951 an election is liable to be set aside if it is found under cl. (b) of sub-section (1) of that section that a returned candidate has committed corrupt practice; that ex-hypothesi, a returned candidate cannot commit a corrupt practice and therefore, it is not the description of a person as a returned candidate that is material. He argued that if in Section 100 (1) (b) the word 'returned candidate' is used not with the idea of indicating that a person should have committed corrupt practice after he became a returned candidate, there is no reason to think that the word candidate in S. 123 (7) has been used to show that the corrupt practice therein mentioned should have been committed after a person has become a 'candidate in order that the election of the candidate might be set aside.

384. There can be no doubt that Section 100 (1) (b) when it speaks of commission or corrupt practice by a returned candidate, it can only mean commission of corrupt practice by a candidate before he became a returned candidate. Any other reading of the sub-section would be absurd. But there is no such compulsion to read the word 'candidate' in S. 123 (7) in the same manner. It is the context that gives colour to a word. A word is not crystal

clear. Section 79 of the Act indicates that the definitions therein have to be read subject to the context.

385. The legislature must fix some point of time before which a person can not be a 'candidate' in an election and a wide latitude must be given to the legislature in fixing that point. In *Union of India v. Parameswaran Match Works* Civil Appeals Nos. 262-273, 587-591 and 1351-1402 of 1971 and 1883-1921 of 1972. D/- 4-11-1974 = (reported in AIR 1974 SC 2349) this Court observed:

"The choice of a date as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances. When it is seen that a line of point there must be and there is no mathematical or logical way of fixing it precisely, the decision of the legislature or its delegate must be accepted unless we can say that it is very wide of the reasonable mark. See *Louisville Gas Co. v. Alabama Power Co.*, 240 US 30 at p. 32 per Justice Holmes."

386. The learned Chief Justice has in his judgment referred to the relevant English statutes and the decisions of the English Courts bearing on this point and has pointed out the difference between the English Law and the Indian Law. I do not consider it necessary to cover the same ground. I agree with his conclusion on the point.

387. I would therefore hold that even if it be assumed that the finding of the High Court that the appellant obtained or procured the assistance of Shri Yashpal Kapur during the period from January 7 to 24, 1971 is correct the appellant shall not be deemed to have committed corrupt practice under Section 123 (7) of the Representation of the People Act, 1951 as she became a candidate only on February 1, 1971. The learned Chief Justice has also dealt with the contention urged by counsel for respondent that Clause 8 (b) of the Election Laws Amendment Act, 1975 suffers from the vice of excessive delegation and is arbitrary I agree with his reasoning for repelling the same.

388. There can be no dispute that if the Election Laws Amendment Act 1975 is valid the appeal has to be allowed. I would therefore, set aside the finding of the High Court against the appellant and allow the appeal without any order as to costs. In the cross appeal, the only question raised was about the correctness of the finding of the High Court that the appellant has not exceeded the prescribed limit of election expense. For the reasons given by Khanna. J. in his judgment I hold that the finding of the High Court on this issue was correct. In this view, I have no occasion to reach the other questions argued. I would dismiss the cross appeal without any order as to costs.

BEG. J. :- 389. There are two Election Appeals Nos. 887 and 909 of 1975 before us under Section 116-A of the Representation of the People Act of 1951 (hereinafter referred to as 'the Act'). They are directed against decisions on different issues contained in the same judgment of a learned Judge of the Allahabad High Court allowing an election petition filed by Shri Raj Narain (hereinafter referred to as the 'Election Petitioner'), a defeated candidate at

the election held in February 1971 for the membership of the Lok Sabha or the House of the People against Shrimati Indira Nehru Gandhi the Prime Minister of India hereinafter referred to as 'the Original Respondent'). The election petitioner is the respondent in Appeal No. 887 of 1975 filed by the original respondent. He is the appellant in Appeal No. 909 of 1975 where the original respondent is the contesting respondent.

390. Before the election case instituted on 24-4-1971 could be decided by the trial Court an explanation was added to Section 77 (1) of the Act. It had some bearing on questions relating to the expenses incurred on the original respondent's election sought to be raised by the election petitioner but on findings of fact recorded by the trial Court It became immaterial for the merits of the case and would continue to be that so long as the election petitioner is unable to dislodge the trial Court's findings on election expenses. Other amendments were made by the Election Laws (Amendment) Act No. 40 of 1975 (hereinafter referred to as the 'Act of 1975') notified on 6-8-1975 after the decision of the case by the learned Judge of the Allahabad High Court on 12-6-1975 and after the filing of the appeals before us. These amendments deal directly with several questions decided by the Allahabad High Court which were pending consideration before this Court Finally came the Constitution (Thirty-ninth) Amendment Act of 1975 (hereinafter referred to as the '39th Amendment') gazetted on 10-8-1975 just before the commencement of the hearing of the appeals by this Court.

391. It was submitted by the learned counsel for the original respondent in his opening address that Section 4 of the 39th Amendment adding clause (4) to Article 329-A of the Constitution meant that Parliament itself acting in its constituent capacity had taken the case in hand and had after applying its own standards decided it in favour of the original respondent so that the jurisdiction of this Court to go into the merits of the case was ousted by clause (4) read with clause (5) and (6) sought to be added to Article 329-A of the Constitution. It was submitted by him that each one of the amendments of the Act was aimed at removing genuine uncertainties or doubts about what the law was so that it may be brought into the line with what it had been previously understood to be as declared by this Court or in any case with what Parliament correctly exercising its unquestionable law making powers thought that it should be.

392. The constantly recurring and vehemently pressed theme of the arguments of the learned counsel for the election petitioner was that the context; and the contents of the Acts of 1974 and 1975 and after that of Section 4 of the 39th Amendment clearly indicated that the whole object of the Acts of 1974 and 1975 and of the Constitutional amendment was an oblique one: to deprive the election petitioner of the remedies he had under the law against an election vitiated by corrupt practices and of the benefits of a decision of the High Court in his favour by taking away its grounds and then the jurisdiction of Courts which existed at the time of the 39th Amendment to deal with the case so that this case may not in any event terminate in favour of the election petitioner. It was repeatedly suggested by

the learned counsel for the election petitioner throughout his arguments that the law making powers had been really abused by a majority in Parliament for the purposes of serving majority party and personal ends which were constitutionally unauthorised it was even alleged that the President of India had also become a party to the misuse of Constitutional powers by passing an ordinance depriving Courts of jurisdiction to encertain Habeas Corpus petitions so that members of Parliament belonging to opposition parties detained under preventive detention laws may not secure release and oppose proposals which became embodied in the 1975 Act and the 39th Amendment. It is when the country is faced with issues of this nature that the constitutionally vital role of the judicature as a co-ordinate and independent organ of a democratic system of Government, comes into prominence and has to be performed without fear or favour affection or illwill as the custodian of constitutionality.

393. In the circumstances indicated above, it seemed to me to be absolutely essential for us to call upon the parties defending or assailing the 39th Amendment and the Acts of 1974 and 1975 to take us inter alia into the merits of the cases of the two sides and the findings given by the trying Judge so as to enable us to see how far these findings were justifiable under the law as it stood even before the amendments by the Acts of 1974 and 1975 how they were affected by these amendments and how they were related to the validity of Section 4 of the 39th Amendment Speaking for myself. I clearly indicated to learned counsel for the parties that I regard the nature and merits of the case decided to to be of crucial importance not only in considering the validity of the 39th Amendment and of the Acts of 1974 and 1975 but also in the wider interests of justice which are bound to be served by the vindication of the case of the party which should on merits win. Elementary considerations of justice required that the party with a better case should not be deprived of an opportunity of justifying its position, on facts and law touching the merits of the case in the highest Court of the land particularly when the original respondent who happens to be the Prime Minister of this country was accused of corrupt practices to secure her election and then of abuse of constitutional power and position to shield them. The high office of the original respondent far from disabling this Court from investigating such allegations ought to provide a good ground for this court to go into the merits of the case if we are not really deprived of our jurisdiction to do that by Section 4 of the 39th Amendment. This follows from the rule of law as I understand it embodied in our Constitution National interests can not or at least should not I believe suffer if justice and right as determined by the highest Court in the country prevail.

394. Citizens of our country take considerable pride in being able to challenge before superior Courts even an exercise of constituent power resting on the combined strength and authority of Parliament and the State legislatures. This Court when properly called upon by the humblest citizen in a proceeding before it to test the Constitutional validity of either an ordinary statute or of a Constitutional amendment has to do so by applying the

criteria of basic constitutional purpose and constitutionally prescribed procedure. The assumption underlying the theory of judicial review of all law making including fundamental law making is that Courts acting as interpreters of what has been described by some political philosophers (See: Bosanquet's "Philosophical Theory of the State" Chap. V, p 96-115) as the "Real Will" of the people embodied in their Constitution and assumed to be more lasting and just and rational and less liable to err than their "General Will" reflected by the opinions of the majorities in Parliament and the State Legislatures for the time being can discover for the people the not always easily perceived purposes of their Constitution. The Courts thus act as agents and mouthpieces of the "Real Will" of the people themselves. Although, Judges, in discharging their onerous constitutional duties cannot afford to ignore the limitations of the judicial technique and their own possibly greater liability to err than legislators could on socio-economic issues and matters of either social philosophy or practical policy, or political opinion only yet they cannot without violating their oaths of office, fail to elucidate and uphold a basic constitutional principle or norm unless compelled by the law of the Constitution to abstain from doing so. One of these basic principles seems to me to be that, just as Courts are not constitutionally competent to legislate under the guise of interpretation so also neither our Parliament nor any State Legislature in the purported exercise of any kind of law making power perform an essentially judicial function by virtually withdrawing a particular case pending in any Court and taking upon itself the duty to decide it by an application of law or its own standards to the facts of that case. This power must at least be first constitutionally taken away from the Court concerned and vested in another authority before it can be lawfully exercised by that other authority. It is not a necessary or even a natural incident of a "Constituent power" As Hans Kelsen points out in his "General Theory of Law and the State." (See p 143), "while creation and annulment of all general norms whether basic or not so basic is essentially a legislative function their interpretation and application to findings reached after a correct ascertainment of facts involved in an individual case by employing the judicial technique is really a judicial function. Neither of the three constitutionally separate organs of State can according to the basic scheme of our Constitution today leap out side the boundaries of its own constitutionally assigned sphere or orbit of authority into that of the other. This is the logical and natural meaning of the principle of Supremacy of the Constitution.

395. Issues raised before us relating to the validity of the 39th Amendment and the Acts of 1974 and 1975 were: What are the Constitutional purposes and ambit of the "Constituent power" found in Article 368 of our Constitution? Were they in any way exceeded by the constituent authorities in making the 39th amendment in an unauthorised manner or for objects which however laudable were outside the scope of Article 368? Was there any procedural irregularity in the composition of Parliament which could enable this Court to hold that there was a basic

defect in the enactment of either the 1975 Act or of the 39th Amendment? Whether provisions of the Acts of 1974 and 1975 are immune from attack even on the ground that they resulted in a departure from the "basic structure" of our Constitution as explained by this Court in *Kesavananda Bharti v. State of Kerala* 1973 (1) Supple SCR 1 = (AIR 1973 SC 1461) by having been included in the 9th Schedule of our Constitution which does protect them from a challenge on the ground of any contravention of part III guaranteeing fundamental rights to citizens and other persons or in other words were the limits of the basic structure only operative against Constitutional amendments or apply to ordinary statutes as well? Are any of the provisions of the Acts of 1974 and 1975 void for departures from or damage to any part of the "basic structure" of our Constitution or for any other excess of misuse of law making powers?

396. We do not when such a case comes up before us concern ourselves with the validity of provisions other than those which affect the case before us. Nor do we consider the objects of any provision in vacuo divorced from the facts of the case to be decided. Therefore, parties had to and did address us on the broad features of the findings given by the learned trial Judge and the nature of the evidence given to support them so that we may be able to decide inter alia whether any "validation" of the original respondent's election which was the evident purpose of clause (4) of Article 329-A sought to be added by Section 4 of the 39th Amendment was at all necessary. If that election was not really void and had been wrongly held by the trial Court to be vitiated it did not need to be validated at all. In that event a purported validation would be an exercise in futility before this Court had decided these appeals. Could it not be said that the intended validation was premature inasmuch as it proceeded on a basically erroneous premise that the original respondent's election was invalid when the question of its validity was sub judice in this Court? How could such a premise be assumed to be correct before this Court had gone into merits and decided the appeals pending before it? Such an inquiry is not irrelevant if the very nature and purpose of the exercise of a power are put in issue by both sides.

397. If the existence of the judgment of the Allahabad High Court created the impression that it must be assumed to be correct even before this Court had pronounced upon the correctness of the judgment the stay order given by this Court should have removed it. The legal effect of that stay order was that the trial Court's order to use the language of Section 116-A (4) (sic) (116-B (3) (?)) of the Act, "shall be deemed never to have taken effect." It did not matter if the stay order out of deference for existing precedents had been framed in the form of a "conditioned" stay that is to say a stay in law and effect with certain conditions annexed. It was not a "conditional" stay. Indeed having regard to the nature of the order the operation of which was to be stayed there could be no "conditional" stay here. As to the legal effect of such a stay order there is no doubt in my mind that considering the clear words of S. 116-A (4) (sic) (116-B (3) (?)) of the Act it deprived the order of the High Court of any operative force whatsoever during the pendency of these appeals. There

could be really no binding precedent in discretionary matters depending on the facts and circumstances of each case. The operation of the judgment of the trial Court and the consequential orders are staved only on "sufficient cause" shown on the facts of that case. In the case before us the sufficient cause seems to me to be apparent from a bare perusal of the judgment of the trial Court As I have pointed out below, the judgment under appeal contains glaringly erroneous conclusions reached by ignoring what has been repeatedly laid down in election cases by this Court even if one were to assume for the sake of argument that all the findings of fact recorded by the trial Court including some very questionable ones on which its conclusions rest were correct.

398. In a case where the bona fides of legislation and even of a Constitutional amendment, is questioned on the ground of a suggested frightfulness in the facts of the case which Parliament and the ratifying State Legislatures are to be supposed. If we are to accept the suggestion to have been acting in concert to prevent this Court from examining on merits it was. I think the duty of counsel making any such suggestion to invite our attention to any fact not fully disclosed or discussed in the judgment under appeal at least when he was asked as I repeatedly asked him in the course of this arguments extending over a period of about fifteen days out of a total period of hearing of the case for thirty two days how the trial Court's conclusions on the two matters, forming the subject-matter of appeal No. 887 of 1975 of the original respondent could possibly be justified. However, I have also satisfied myself by going through the whole evidence on record on these two matters which I shall presently deal with that learned counsel for the election petitioner could not possibly usefully add anything to the replies he actually gave on the questions put to him on these matters and to the discussion of the whole evidence on these question by the trial Court. I have taken pains to clarify this position as the learned counsel for the election petitioner at the end of arguments of both sides extending over thirty two days of actual hearing stated that he had argued on the assumption that we will be concerned only with the validity of the 39th Amendment and the validity and correct interpretation of the Acts of 1974 and 1975. I think that it was made clear to him that we will have to enter into the merits if that was necessary as I think it is for judging whether amendments in law where either necessary or justified learned counsel for the election petitioner was not prevented from dealing with any question whether of fact or law which he may have wanted to raise, Learned counsel for both sides had fully argued at least the election petitioner's appeal No. 909 of 1975 on facts and law. They had taken us sufficiently into facts and findings involved in the original respondent's appeal No. 887 of 1975 to justify our dealing with all questions necessary to decide this appeal on merits also. Indeed it is not necessary for us to go beyond findings of fact recorded by the learned Judge, as distinct from conclusion based upon them which are questions of law to demonstrate the very palpable errors committed by the learned Judge on the two questions which are the subject-matter of appeal No. 887 of 1975.

399. Shrimati Indira Nehru Gandhi was elected to the House of the People from the Rae Bareli constituency in Uttar Pradesh by an overwhelming majority of 1,11,800 votes against Shri Raj Narain. As is not unusual the defeated candidate filed an election petition under the Act making all kinds of allegations including some quite extravagant ones which formed the Subject-matter of the first set of eleven issues framed on 19-8-1971. Thereafter three additional issues were framed on 27-4-1973 when the question whether an amendment of the petition, sought after the period of limitation for filing a petition to challenge the election had expired should be permitted had been finally decided by this Court in favour of Shri Raj Narain.

400. The issues framed give an idea of the cases set up on behalf of the two sides. They were:

ISSUES

"1. Whether respondent No. 1 obtained and procured the assistance of Yashpal Kapur in furtherance of the prospects of her election while he was still a Gazetted Officer in the service of Government of India. If so, from what date?

2. Whether at the instance of respondent No. 1 members of the Armed force of the union arranged Air Force Planes and helicopters for her, flown by members of the Armed Forces to enable her to address election meetings on 1-2-1971 and 25-2-1971 and if so, whether this constituted a corrupt practice under Section 123 (7) of the Representation of the People Act?

3. Whether at the instance of respondent No. 1 and her election agent Yashpal Kapur, the District Magistrate of Rae Bareli the Superintendent of Police of Rae Bareli and the Home Secretary of U.P. Government arranged for rostrums, loudspeakers and barricades to be set up and for members of the Police Force to be posted in connection with her election tour on 1-2-1971 and 25-2-1971; and, if so whether this amounts to a corrupt practice under Section 123 (7) of the Representation of the People Act?

4. whether quilts, blankets, dhoties and liquor were distributed by agents and workers of respondent No. 1 with the consent of her election agent Yashpal Kapur, at the places and on the dates mentioned in Schedule A of the petition in order to induce electors to vote for her?

5. Whether the particulars given in paragraph 10 and Schedule A of the petition are too vague and general to afford a basis for allegations of bribery under Section 123 (1) of the Representation of the People Act?

6. Whether by using the symbol cow and calf. which had been allotted to her party by the Election Commission in her election campaign the respondent No. 1 was guilty of making an appeal to a religious symbol and committed a corrupt practice as defined in Section 123 (3) of the Representation of the People Act?

7. whether on the dates fixed for the poll voters were conveyed to the polling stations free of charge on vehicles hired and procured for the purpose

by respondent No. 1's election agent Yashpal Kapur, or other persons with his consent, as detailed in Schedule B to the petition?

8. Whether the particulars given in paragraph 12 and Schedule B of the petition are too vague and general to form a basis for allegations regarding a corrupt practice under Section 123 (5) of the Representation of the People Act?

9. Whether respondent No. 1 and her election agent Yashpal Kapur incurred or authorised expenditure in excess of the amount prescribed by Section 77 of the Representation of the People Act. read with Rule 90, as detailed in para. 13 of the petition?

10. Whether the petitioner had made a security deposit in accordance with the rules of the High Court as required by Section 117 of the Representation of the People Act?

11. To what relief, if any, is the petitioner entitled?

ADDITIONAL ISSUES

1. Whether respondent No. 1, obtained and procured the assistance of Yashpal Kapur in furtherance of the prospects of her election while he was still a Gazetted Officer in the service of the Government of India. If so, from what date?

2. Whether respondent No. 1 held herself out as a candidate from any date prior to 1-2-1971 and if so, from what date?

3. Whether Yashpal Kapur continued to be in the service of Government of India from and after 14-1-1971 or till which date?"

401. The High Court trying the case had, in the course of a lengthy judgement, rejected the election petitioner's case on issues Nos. 2, 4, 6, 7 and 9 of the first set of issues, after minutely and meticulously scrutinizing every material allegation of the election petitioner and the evidence given in support of it on each of these issues. Out of these the election petitioner in his cross appeal No. 909 of 1975, has questioned the findings of the High Court only on issues Nos. 2, 4, 6, 7 and 9 set out above. Issues Nos. 5 and 8 and 10, decided in favour of the election petitioner, were technical and are immaterial now. It will be noticed that the additional issue No. 1, due to some error or oversight, is an exact and unnecessary repetition of the initial issue No. 1. Additional issues numbered 2 and 3 are connected with and subsidiaries of the initially framed issues numbered 1 and 3.

402. The learned trial Judge had accepted the election petitioner's case on the material issues numbered 1 and 3 of the initially framed issues, and on the overlapping and subsidiary additional issues 1, 2 and 3. He was of opinion that Shri Yashpal Kapur, a Central Government servant and a Gazetted Officer of the rank of an Under-Secretary, deputed to serve in the Prime Minister's Secretariat as an Officer on Special Duty, had held his post until 25-1-1971 when his resignation, tendered on 13-1-1971, was accepted by

the President of India with effect from 14-1-1971, by means of a notification published on 6-2-1971. Consequently, the learned Judge set aside the election of the original respondent after holding that she was guilty of a "corrupt practice", as defined by Section 123 (7) of the Act, on each of two grounds : firstly, that she must be deemed to have obtained the help of Shri Yashpal Kapur in the furtherance of her election, before he had ceased to be a Gazetted Officer in Government service, and after the original respondent had first held herself out, on 29-12-1970, as a candidate at the forthcoming election from the Rae Bareilly constituency by answering in the negative a question put to her at a Press Conference in New Delhi inquiring whether she had decided to change her constituency from Rae Bareilly in U.P. to Gurgaon in Haryana; and, secondly, that she must be deemed to have obtained the help of officials of the State of U.P. who got rostrums constructed for her election speeches and electricity provided and arrangements made for loudspeakers. The learned Judge declared her to be disqualified under Section 8-A of the Act from holding her office for a period of six years from the date of his order dated 12-6-1975. I deliberately employ the word "deemed" to describe the nature of the findings of the trial Judge on both these questions because the learned Judge had himself indicated that they were inferences based entirely on circumstantial and not on any direct evidence whatsoever of any instructions issued either by the original respondent or by her election agent during the period following 29-12-1970. Election Appeal No. 887 of 1975 was filed against decisions on these two questions and consequential orders of the learned trial Judge.

403. The law as found in the Act of 1951 did not unlike the English Act of 1949 make a distinction between corrupt practices and illegal practices. Section 123 (7) as it has stood unamended enumerates, as the last of the 7 classes of corrupt practice as follows:

"S. 123 (7) The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or by any other person with the consent of a candidate or his election agent any assistance other than the giving of vote for the furtherance of the prospects of that candidate's election from any person in the service of the government and belonging to any of the following classes namely: –

- (a) gazetted officers;
- (b) Stipendiary judges and magistrate;
- (c) members of the armed forces of the Union;
- (d) members of the police forces;
- (e) excise officers;
- (f) & (g) xx xx xx

Explanation – (1) In this section the expression 'agent' includes an election agent a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate.

(2) For the purpose of clause (7) a person shall be deemed to assist in the furtherance of the prospects of a candidate's election if he acts as an election agent of that candidate."

404. It is clear that "the obtaining or procuring or abetting or attempting to obtain or procure" had to take place either by a candidate or by his agent or by somebody "with the consent of the candidate or his election agent:. Until the candidate had appointed an election agent the action of any other person could not constitute him automatically an agent so that he may by doing something voluntarily succeed in making the candidate vicariously liable for his own actions whether he was or was not a gazetted officer at the time when he committed the act complained of. The question of obtaining assistance through "an agent" or "other person with the consent of a candidate or his election agent" could only arise where such a case of obtaining assistance indirectly through others is set up but not otherwise.

405. On issue No. 1 the case set up in paragraph 5 of the petition is:

"Smt. Indira Nehru Gandhi obtained and procured the assistance of the said Shri Yashpal Kapur for the furtherance of prospects of her election from the constituency aforesaid inasmuch as the said Shri Yashpal kapur was a Gazetted Officer in the service of Government of India when his assistance was obtained and procured The said Shri Yashpal Kapur on the direction of Smt. Indira Nehru Gandhi organized the electioneering work for her in the constituency during the period commencing from 27-12-1970"

It is a case of liability resulting from an alleged "direction" given by Smt. Indira Nehru Gandhi herself to Shri Kapur. No case of procurement of assistance of Shri Kapur through a third person is set up although the word "procured" is mechanically lifted from Section 123 (7) and used. On issue No 3 the case set up in para 9 of the petition is that both Smt. Indira Gandhi and her election agent. Sh. Kapur "obtained and procured" the assistance of Govt. Officers, but no direction or orders given by anyone are mentioned there Issue No. 1 shows that the case which was put in issue and went on trial was whether the original respondent had herself issued some direction to Shri Kapur. Issue No. 3 shows that what was in issue here was whether the Government officers mentioned there rendered the assistance indicated there "at the instance" of the original respondent or her election agent. The discussion of evidence and findings of the learned Judge, particularly on issue No. 1. show that the learned Judge had almost made out a new case for the election petitioner and accepted it. This was on issue No. 1 whether Shri Kapur had done some acts in circumstances which justify the inference that he was constituted a de facto agent of the Prime Minister even before he was appointed her election agent on 1-2-1971 and on issue No. 3, whether sending round of certain tour programmes with the approval of the Prime Minister in the background of certain long standing instructions of the Comptroller and Audit General read with letters sent by the Government of India. As long ago as 12-1-1959 and 19-11-1969 amounted to "implied" directions by the Prime Minister or her election agent to the State Government to provide the facilities the Govt. officials gave. Now, whenever a case of a liability by

"implication", where there is such a species of liability in law comparable to a criminal liability is to be fastened upon an individual the prosecutor is to be expected, as a part of an elementary duty to give fair notice and a fair opportunity to meet what the individual has really to be made liable for either because of some act or omission of the individual concerned or even more so for that of an agent or another person for which there may be some sort of vicarious liability from facts showing consent or agency to give full particulars of circumstances from which such implications or vicarious liabilities may arise I do not find that this was done here.

406. The law must lay down a duty to prevent by taking some steps which are not taken before a person is held liable for an omission. And there is a difference between omission to prevent the doing of something and actual consent to the doing of it. I do not find in the petition any case of a liability from omissions to do something set up obviously because the law does not impose upon the candidate the duty to prevent the giving of voluntary assistance by others whether officials or not Nor is there anywhere in the petition a case of procurement by consenting to aid obtained through others. It has to be remembered that on the language of Section 123 (7) a liability is not created by merely not rejecting voluntarily given aid. The candidate may not often be aware of the voluntarily given assistance so as to be able to reject it. A case of consent which can be legally set up is only one of consenting to active obtaining or procurement by an agent or by some other person who becomes for the purposes of the specific aid given and consented to ordinarily prior to obtaining it as good as an agent employed by the candidate.

407. On the terms of Section 123 (7) the following three types of cases of actual obtaining of assistance as distinguished from abetment or attempting to obtain it can be legally set up either exclusively or alternatively against a candidate; firstly a direct obtaining of it by the act of the candidate himself; secondly, an indirect or vicarious procurement of it by the acts of a duly constituted agent; and thirdly, an indirect or vicarious procurement of it by the acts of a person who though not a duly constituted agent, becomes constructively an agent for the purpose of some particular aid obtained because it was assented to by the candidate at a time which must ordinarily be before the aid is given, so that the person through whom assistance is obtained is a constructive agent for this particular aid at the time when it is given. The term procurement should strictly speaking apply only in the last two types of cases. A reference to Section 100 (1) (b) further emphasises the position that a corrupt practice for which the High Court is to declare an election void must have been committed either "by a returned candidate or his election agent or by any other person with the consent of the returned candidate or his election agent". A case falling under Section 100 (1) (d) (ii) of "a corrupt practice committed in the interest of a candidate by an agent other than his election agent" is very different and postulates : firstly a corrupt practice which can be committed only by an agent; and secondly, the existence of such an agent. A case falling under Section 100 (1) (d) requires also proof of the further fact that the result of the election was materially affected by the corrupt practice.

408. As I read the petition I find only the first of the three types of cases mentioned above set up exclusively on issue No. 1 because there are no particulars there which could apply to the other two types of cases. Obviously, the case set up was not of a corrupt practice by some act of a person to which the candidate became a party by merely giving consent in which case the circumstances from which the consent was to be inferred had to be indicated. It was a case of a direction given by the Prime Minister herself to Shri Kapur who it had to be presumed for the purposes of such a case would not have been the aid if the direction or order was not there. This deliberately given "direction" had to be proved on the case set up. On issue No. 3 the petition mentions only what was obtained that is to say the aid of particular officers and the form it took; but what caused that aid to be given or the means adopted to get it were not set up there. I think these distinctions should have been borne in mind. I shall indicate below how the learned Judge in dealing with a case of the first type only falling under Section 100 (1) (b) of the Act found in issue No. 1 mixed up facts which could strictly speaking be relevant only in considering a case of one of the other two types. And in deciding issue No. 3 what really and quite naturally flowed from and was the well understood appurtenant of the office of a Prime Minister and indeed absolutely necessary for the due protection of the life and freedom of movement of the holder of that high office was mistaken by the learned Judge to be the result of some kind of assumed solicitation for aid. What the learned Judge entirely missed was that it is the act of solicitations for the aid of the officials mentioned in Section 123 (7) whether successful or not and not the mere fact that certain advantages flow quite naturally and conventionally from the occupation of an office without any solicitations or the mere fact that some assistance is voluntarily given by someone to an election campaign which is penalised by the provision.

409. The definition given above in Section 123 (7) meant on an ordinary and natural interpretation of words used that the corrupt practice defined there could not be committed by any person before there was a "candidate" for an election. Hence, it became necessary to examine the definition of a "candidate" found in Section 79 (b) which laid down:

"79 In this part and in parts VII and VIII unless the context otherwise requires –

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(b) 'candidate' means a person who has been or claims to have been duly nominated as a candidate at any election and any such person shall be deemed to have been a candidate as from the time when with the election in prospect he began to hold himself out as a prospective candidate."

410. Section 123 defining corrupt practices is found in Part VII of the Act Therefore, the definition of candidate in Section 79 as it originally stood was sought to be applied by the Trial Court to determine whether the original respondent could have committed a corrupt practice at the time of the alleged commission of it. Before however, I deal with that question it is necessary to examine what "obtaining or procuring or abetting or attempting: meant in

the light of the law laid down repeatedly by this Court in case of alleged corrupt practices.

411. The logical consequence of placing a charge of corrupt practice on the same footing as a criminal charge is obligation to interpret the words which define it strictly and narrowly. Indeed any natural and ordinary interpretation on the words "obtaining or procuring or abetting or attempting" must carry with it the imperative requirement that the candidate concerned or his agent must have intentionally done an act which has the effect contemplated by Section 123 (7). In other words a "mens rea" or a guilty mind as well as an "actus reus" or a wrongful act must concur to produce the result contemplated by law. So far as election expenses are concerned it is possible to conceive that even an unintentional result (i.e. expenses "incurred" exceeding the prescribed limit) may be enough so that a duty to prevent this result may be there in law. But Section 123 (7) requires actual intended acts of "obtaining" or "procuring" or attempting or abetting. For Section 123 (7) results are immaterial.

412. In the case before us the petition contains, as I have indicated above the necessary averment of a deliberate direction by the original respondent herself so far as issue No. 1 is concerned and of "obtaining" and "procuring" as regards issue No.3. These are enough to denote the ingredients of a mens rea. But one will search the evidence in vain for any indication of a mens rea or guilty intent on the part of the original respondent or of her election agent when she had appointed one. As regards both issue 1 and 3 the learned Judge seemed to think that Sec 123 (7) creates what is called on "absolute statutory liability". Which does not required a mens rea. Although in dealing with issue No.2 he had himself after citing the necessary authorities taken the view that a mens rea was also essential. He had himself in dealing with issue No. 2 distinguished *Dr. Y.S. Parmar v. Hira Singh* AIR 1959 SC 244 a decision with whose ratio decided I have never, with due respect, felt happy in so far as it meant that a charge of corrupt practice under S. 123 (7) does not require proof of mens rea. It was decided on the strength of a statutory presumption. There were other decisions of the Supreme Court under earlier law showing that mere appointment of a Government servant as a polling agent could not be corrupt practice (See: *Satya Dev v. Padam Dev* 10 Ele LR 103 = (AIR 1954 SC 587). *Mahendra Kumar v. Vidvavati* 10 Ele LR 214 = (AIR 1956 SC 315) *Dr. Parmar's* case (supra) had necessitated an amendment in clause (2) of Explanation 1 of Section 123 (7) of the Act so that a Government servant, by merely acting as a polling agent could not be "deemed" to have so acted as to further the prospects of a candidate's election. The learned Judge had relied in his findings on issue No. 2 on *Babu Bhai Vallabh Das Gandhi v. Pilloo Homi Mody*, (1971) 36 Ele LR 108 at pp. 123-124 (Guj) and *Haji Abdul Wahid v. B.V. Keskar*, (1960) 21 Ele LR 409 at p. 432 (All.). But when he came to issue No. 3 and, right at the end of his judgment, to issue No. 1, he appears to have overlooked the basic requirements of a mens rea and an actus reus, or in any case, if he had these requirements in view, he erred in assuming that they existed here. I think he grevelly erred in holding that some "actus reus"

of the original respondent lay buried beneath circumstances which seem to me to really point in the opposite direction. Some times, even if direct evidence is lacking circumstantial evidence, which inescapably points to a particular conclusion may be even better. But where is that evidence here? I fail to see it and none was pointed out to us.

413. Let me here quote the exact language used by the Trial Judge himself in giving his findings on the first part (relating to 27-12-1970 to 31-1-1971) of issue No. 1 of the "first set" of issues combined with the issue No. 1 of the additional issues, both issues, for some inexplicable reason, being identically worded. The learned Judge said:

"Learned counsel for the respondent then urged that even accepting that Shri Yashpal Kapur delivered a speech at Munshiganj on 7th January, 1971 and that he canvassed support for the respondent in that speech he was not an election agent on that date and there is no evidence of the fact that he had been instructed to do so by the respondent No.1 Learned counsel stressed that consequently it should not be held on that basis that the respondent No. 1 obtained or procured the assistance of Shri Yashpal Kapur for the furtherance of her election prospects.

I have given my careful consideration to this argument as well but I regret my inability to accept the same. As also stated earlier. Shri Yashpal Kapur was occupying a position of trust and confidence with the respondent No. 1 since quite a long time. During the period in question he was Officer on Special Duty in the respondent No 1's Secretariat. In 1967 he had resigned from his post for the sake of respondent No. 1 to be able to do her election work in the constituency. After that was done, he was taken back in the respondent's Secretariat as Officer on Special Duty. Respondent No. 1 held herself out as a candidate on 29th December 1970. On 5th of January, 1971 Raja Dinesh Singh was sent to the constituency. On 7th of January 1971 Shri Yash pal Kapur visited Rae Bareli and on the own admission of respondent No. 1 he did so with previous notice to the respondent No. 1. The subsequent events also appear to be material for according to Shri Yashpal Kapur immediately on return from Rae Bareli he held a talk with the respondent No. 1 on 9th or 10th of January 1971. On 13th January he again resigned from the post and the same day set out once again for the constituency of the respondent No. 1. It was again he who was ultimately appointed election agent for the respondent No. 1. It may be added that it was not possible to adduce any direct evidence on the point whether the respondent No. 1 instructed Shri Yashpal Kapur to go to Rae Bareli on 7th January 1971 for any election work. That can be inferred only on the basis of the surrounding circumstances. I have already mentioned those circumstances above and to my mind the only inference that can be drawn on the basis of those circumstances is that the respondent No. 1 went to Rai Bareili on the aforesaid date under instruction of the respondent No. 1 for doing preliminary work pertaining to her election.

To sum therefore it is satisfactorily proved that the respondent No. 1 during the period ending on 13th January 1971 obtained/procured the

assistance of Sri Yashpal Kapur, a Gazetted Officer in the Government of India for the furtherance of her election prospects inasmuch as Shri Yashpal Kapur was made to go to Rae Bareli on 7-1-1971 and deliver a speech at Shaheed Mela in Munshiganj canvassing support for her candidature".

414. Now, it is a well settled rule repeatedly laid down by this Court that allegations of corrupt practice in the course of an election must be judged by the same standards as a criminal charge. And no rule of evidence in judging guilt on a criminal charge is more firmly rooted than no charge resting on circumstantial evidence could be held to be proved beyond reasonable doubt unless the chain of circumstances is so complete and so connected with the charge that it leaves no other reasonable hypothesis open for the Court to adopt except that the offender had committed the offence alleged (See e.g. Smt. Om Praha Jain v. Charan Das AIR 1975 SC 1417 at p. 1426).

415. The learned Judge dealt with evidence on issue No. 1 relating to the activities of Shri Yashpal Kapur by dividing it into three periods (1) from 27-12-1970 to 13-1-1971 when Shri Kapur had not resigned from Govt. service (2) from 14-1-1971 to 25-1-1971 the period after Shri Kapur's resignation upto its acceptance by the President of India evidenced by a notification dated 25-1-1971; (3) from 26-1-1971 to 6-2-1971 the period after the acceptance of Shri Kapur's resignation and upto the date of the publication of it in the Official Gazette. The learned Judge considered only the first two periods material as he held the activities in the third period to be above board because Shri Kapur was free to do what he liked in this period. Hence the fact that the original respondent appointed Shri Kapur her election agent on 1-2-1971 made no difference to the result in the third period. But we will find that a very glaring feature of the findings relating to the first two periods is that the original respondent is held vicariously responsible without anything beyond the activities of Shri Yashpal Kapur and his position as an Officer on Special Duty in the Prime Minister's Secretariat to justify the inference that he had an express or implied authorisation or direction from the Prime Minister to do anything in general or in particular on her behalf for her election.

416. Let us take the first period. What was required to be approved, beyond all reasonable doubt from the evidence on record on this part of the case, was that Shri Yashpal Kapur had been instructed or directed by the original respondent to render the help if any, that he did give by the speech he was alleged to have made at a fair at Shaheed Mela (Martyrs fair) at Munshiganj in Rae Bareli on 7-1-1971, canvassing support for the original respondent's election – an allegation which Shri Yashpal Kapur had denied in so far as any mention of the original respondent's candidature is concerned. Shri Kapur admitted that he had gone there with Shri Gulzarilal Nanda, a former Minister of the Central Government but said that he had only, when called upon to do so paid his tribute to the memory of the martyrs.

417. The learned Judge held that the recollection of Shri Yashpal Kapur about what he said at the Shaheed Mela on 7-1-1971 was less reliable than the statement of Shri Vidya Shankar Yadav (P.W. 43), an Advocate belonging

to an opposition party, supported by his political co-worker Nanku Yadav (P.W. 28) – a witness who, in his transparent anxiety to appear truthful went so far as to make the absurd assertion that he had not told anyone, before he appeared in the witness box that he had attended the Shaheed Mela on 7-1-1971 and who could not remember either the date of his marriage or the dates of births of his children but asserted that he had noted 7-1-1971 without even having ever talked on any previous occasion to anyone about this date if he is to be believed—and, by Shri R.K. Dixit (P.W. 31), a joint editor of a newspaper who claimed to be present on the occasion, and who, while reporting other facts and reasons in his newspaper for believing that the original respondent will stand from the Rae Bareilly constituency, had not mentioned what he claimed, in the witness box, to have heard Shri Yashpal Kapur himself say at the Mela, Obviously, both these witnesses, if they were not committing perjury did not have good memories on their own admissions. But, the learned Judge had believed them quite unhesitatingly although the meeting at Shaheed Mela, addressed by Shri Yashpal Kapur, had not even been given any prominence in the pleadings by being at least specifically mentioned in the petition.

418. The learned Judge disbelieved the evidence of the original respondent's witness Shri Sarju Prasad (R.W. 12), the Headmaster of a School, who had denied that he ever accompanied Shri Nankau (P.W. 28) to the Shaheed Mela as claimed by Nankau. The ground for holding that Shri Sarju Prasad must be deposing falsely appears to me to be very unfair both to Shri Sarju Prasad and Shri Gaya Prasad Shukla, a Congressman, who was suspected, without the slightest foundation in evidence of having induced Shri Sarju Prasad to give perjured evidence simply because Shri Gaya Prasad, who did not even appear as a witness, was a member of the Congress (R) party and was once connected with the School in which Shri Sarju Prasad served. The learned Judge said:

“It is quite likely that once Nankau had conceded in cross-examination that Sarju Prasad had accompanied him to the Shaheed Mela, pressure was brought to bear on Sarju Prasad (R.W. 12) by Gaya Prasad Shukla in order to make him appear as a witness in the case and give evidence to contradict the testimony of Nankau. It is true that in his re-examination Sarju Prasad (R.W. 12) admitted that on the date on which he was examined as a witness in the case the school was being run by the Government under the control of the District Basic Education Officer. However, the association that Gaya Prasad Shukla had with the Pathshala in his capacity as Adhyaksha, and consequently with Sarju Prasad, who was a teacher in that Pathshala could not have been wiped off overnight merely because the school was taken over by the Government to be run under its own officers”.

419. The reasons given by the learned Judge for holding that it was “abundantly clear” that Shri Ram Pal (R.W. 13) another witness of Smt. Gandhi was “also not a truthful witness”, were;

“Now, since Ramesh Chand Shukla Advocate is a resident of the same village where Ram Pal resided and since he was an important worker for the respondent No. 1 during the election and was also her Pairokar at some stage, the possibility of Ram Pal having been pressurised by Shri Ramesh Chand Shukla cannot be excluded. Together with it there is also the fact that Shri Gaya Prasad Shukla, another important worker of the respondent No. 1, happened to be the Adhyaksha of the Zila Parishad during the period the witness was examined in the case. It is a matter of common knowledge that the Adhyaksha of the Zila Parishad always wields influence in the rural areas. It will not be out of place to add that when it was put to Ram Pal in cross-examination as to which party did Sri Ramesh Chand Shukla belong he pleaded ignorance about it. It cannot be accepted for any moment that even though Shri Shukla resided in the village in which this witness resided and even though Shri Shukla was such a prominent worker of the Congress party Ram Pal would not have known about it.”

420. I do not know how, when workers of the Congress party were divided into two camps and had been changing sides from time to time, ignorance of a worker's precise party loyalties meant that Ram Pal was untruthful. If mere possibilities of being “pressurised” or biased were enough to tar a witness as untruthful, it is difficult to see how or why the witnesses of the election petitioner on whom lay the primary burden of proof, could escape similar treatment. V.S. Yadav, was, no doubt, an Advocate. But, he was not even paying Income-tax. He felt free, on a working day in Courts to go to the Mela. He was enthusiastic enough as a member of an opposition party to object according to himself, to Shri Yashpal Kapur bringing in the candidature of the original respondent even at a meeting which according to him, consisted mostly of Congress (R) sympathisers. Shri Yashpal Kapur was not so ignorant or inexperienced in election matters and could not be assumed without any evidence to support the assumption to be so imprudent as to make a speech when he would know that, as he was still a Government servant, this would be misinterpreted.

421. Let us, for the sake of argument, assume that Shri Yashpal Kapur had been over-powered by such a desire to exhibit an excessive zeal, which got the better of his prudence that he believing that a publicly made gesture of his loyalty was needed on this particular occasion cast all caution to the winds and while paying the tribute he was called upon to pay to the memory of the martyrs, suddenly decided to jump into the electoral fray by making an appeal at the martyrs' mela to support Smt. Indira Gandhi, as though the speeches of all those local leaders who in addition to Shri Gulzarilal Nanda, a former Minister are said to have spoken there to the same effect, were not enough. What follows? It is here that we find the weakest link in the misty and fanciful chain of the learned Judge's logic Where was the evidence that whatever else Shri Yashpal Kapur may or may not have been supposed to do on his visit to Rae Bareli, this particular piece of “frolic”, a term used by law relating to scope of authority, carried the “direction” of Smt. Indira Gandhi herself behind it? Indeed, there is not only not a jot of evidence to suggest

that Shri Yashpal Kapur was actually asked by Smt. Gandhi to go to Rae Bareli to do anything for her election on this visit, but there is ample absolutely unshaken evidence of Shri Yashpal Kapur to the contrary, supported by the evidence of the Prime Minister herself which the learned trial Judge had, for some reason, entirely ignored. In any case it is utterly unthinkable that the Prime Minister herself could have conceivably authorised Shri Kapur to go to Munshiganj and make a public speech while he was till a Government servant, to support her candidature. And, if he had no authority from her either to act generally or to do any particular act on her behalf how could each and every action of Shri Kapur possibly make the Prime Minister legally liable vicariously for it?

422. The learned Judge, as is evident, from his summary of evidence and conclusions relied on circumstantial evidence only. But, in order that the circumstances should have a conclusive effect, so as to exclude any reasonable hypothesis except that of guilt, they had to point in one direction only and in no other. What is the position that emerges from a consideration of the circumstances found and detailed by the learned Judge himself? It was held that Shri Yashpal Kapur was occupying a position of trust and confidence with the original respondent for quite a long time. Indeed his evidence shows that he was so attached to the family of the original respondent and the political and national causes its members had represented that he was just the type of person who could, even without the slightest suggestion on the part of the original respondent, voluntarily taken upon himself the duty to do whatever he could do in his private capacity to help her return at the election. Indeed his private capacity as a person attached to the family of the original respondent and to the causes espoused by its members, could very well be considered more important by him than his Government service. And, this is exactly what the findings given by the learned Judge relating to services rendered by Shri Yashpal Kapur at the previous elections of the original respondent, showing how he had resigned his post on a previous occasion to help in her election, indicated.

423. In the passage from the judgment quoted above, the learned Judge draws an inference of a previous instruction, from the Prime Minister to Shri Kapur, to say what he is alleged to have said in a speech, because, inter alia. Shri Kapur met the Prime Minister on his return from Rae Bareli; Again, the necessary inference of a previous intimation by Shri Kapur to the Prime Minister of his intention to visit Rae Bareli, could not be that there was any authority or direction given by the Prime Minister to Shri Kapur to do or to say anything on her behalf All this would lie in the realm of pure conjecture and suspicion. It left other possible and more reasonable inferences wide open.

424. The learned Judge had himself held, so far as use of rostrums is concerned that the Prime Minister sheds her personality, as the holder of her office, and assumes the role of a mere candidate as soon as she ascends a platform to make an election speech. But, when the learned Judge deals with the action of Shri Kapur, in making a speech from a platform at a martyrs

mela because Shri Kapur is called upon to pay his tribute to the martyrs, he holds that not only must the capacity of a Govt. servant unshakably stick to him, but that Shri Kapur must have been authorised by the Prime Minister herself knowing, as she did, that he was a Govt. servant to go and make a public speech at the Mela and canvass for votes for her. I do not think that we can indulge in a flight of fancy which could be described as “flamboyant.”

425. The uncontroverted evidence of Shri Kapur which had been ignored by the trial Judge was that it was the special business of this witness as an officer on Special duty in the Prime Minister's Secretariat, in his own words, “to deal with the representations received from public and other works of semi-political nature.” It is difficult to understand how the occupant of such a difficult and responsible office as that of the Prime Minister of the numerically largest democracy in the world can possibly discharge his or her duties towards the public satisfactorily without the aid of such officers. Naturally, as the Prime Minister was contemplating standing for election from the Rae Bareilly constituency, it would not be outside the scope of the duties of such an officer to attend especially to the complaints and representations from Rae Bareilly. He stated that Shri Gulzarilal Nanda, who was then the Railway Minister, had received some representations from the Rae Bareilly. He also said that he had from time to time, forwarded some representations to Shri Gulzarilal Nanda who had asked him to accompany him to Rae Bareilly. Therefore, apparently without being asked by the Prime Minister, but, after informing her of his intention to go with Shri Gulzarilal Nanda, the witness had, in the course of the performance of duties especially assigned to him since his appointment, visited Rae Bareilly in the company of Shri Gulzarilal Nanda. This could not be outside the scope of his duties.

426. Again, without any contradiction from any evidence whatsoever, his statement, unquestioned also in cross-examination, was that the Prime Minister did not, at any time, ask him in his own words “either directly or indirectly to do anything pertaining to her election”. The Prime Minister's replies to interrogatories served upon her show that she had no personal knowledge of what Shri Kapur did at Rae Bareilly before he was appointed her election agent. It is also apparent from the evidence of this witness and of the Prime Minister herself that, when he expressed his desire on 9th or 10th January, 1971, to the Prime Minister to resign from his post as Officer on Special Duty, she asked him to think over the matter as this would mean that he could not return to his post. He had earlier said that this decision was taken with a view to do work for the public in general and the Congress party in particular as he wanted to enter public life. It is clear that the Prime Minister had left the decision entirely to the free will and option of Shri Kapur who had been asked to ponder over it carefully. When Shri Kapur had informed the Prime Minister again on 13-1-1971 that he had reached his final decision, after due consideration, to resign from his post so as to be able to do public work, as he had political ambitions she had agreed to it and had asked him to see Shri P.N. Haksar, who was incharge of the Prime Minister's Secretariat. He informed Shri P.N. Haksar about this decision on the

telephone and then met him an hour later on 13-1-1971 to submit his letter of resignation. Shri Haksar, relying upon Rule 3 of the Govt. of India Transaction of Business Rules had orally accepted this resignation, as the head of the Prime Minister's Secretariat. He told Shri Kapur that he was a free man. Naturally, the necessary notification, showing that Shri Kapur was relieved of his office with effect from 14-1-1971, was to follow.

427. The statement of Shri Kapur, supported by those of the Prime Minister and Shri P.N. Haksar, had been accepted by the trial Court as correct so far as tender of this resignation and its acceptance, in all the stages followed by the notification in the Gazette went. The learned Judge held that the President gave his assent on 21-1-1971. Shri Kapur's letter of resignation must have been duly forwarded and was acted upon. This was the learned Judge's finding. Shri Kapur did not work in the Prime Minister's Secretariat after 13-1-1971 and he drew no salary as a Govt., servant after that date. The notification in the Gazette could not according to rules, take place until Shri Kapur had handed over charge. He signed and completed the necessary papers relating to relinquishment of the charge of his office on 13-1-1971, but he put the date 14-1-1971 under his signature on the document evidencing a formal handing over of charge as it was to take effect from that date. The trial Court held that the resignation of Shri Kapur would be effective from 25-1-1971 notwithstanding the fact that his request to be relieved from office, with effect from 14-1-1971, had been accepted and acted upon immediately by Shri P.N. Haksar as the official head of the Prime Minister's Secretariat. The papers were sent to the Secretariat of the President of India for completion of formalities. The formal Presidential sanction having been obtained the notification dated 25-1-1971, declaring the resignation of Shri Kapur to be effective from 14-1-1971, was published on 6-2-1971.

428. On the facts stated above there could be no doubt whatsoever that Shri Kapur was not asked to do anything at all in connection with her election by the Prime Minister herself, but he had decided to take interest in it voluntarily as he had some political ambitions; and, therefore he had asked the Prime Minister to be relieved of his office in her Secretariat with effect from 14-1-1971. It is unfortunate that the learned Judge thought that there was something almost minister in Shri Kapur taking such interest in the election or in hoping to enter political life through absolutely legitimate means. There is not the slightest reason for anyone who fairly examines the evidence of Shri Kapur, supported by that of the Prime Minister and Shri P.N. Haksar, to doubt the motives or the veracity of Shri Kapur on this point. He frankly stated that his ambition was to enter political life. In any case, the motives of Shri Kapur were not on trial. If such assistance as he may have rendered was entirely voluntary, without any request or solicitations from the Prime Minister. I do not see how, on the view of the correct legal position stated above it made any difference to the result even if Shri Kapur had continued to be a Government servant upto 25-11-1971.

429. Shri P.N. Haksar was aware of and cited the applicable rule for a resignation by a temporary Government servant, as Shri Kapur was, and

stated also the practice followed, in his experience, in such cases, He, presumably thought that the resignation was effective from 14-1-1971. Shri Kapur also acted upon that assumption and in that belief. The Prime Minister, who could not be expected to examine suo moto the question whether Shri P.N. Haksar and Shri Kapur were right in their beliefs about the effectiveness of the resignation, assumed that everything was alright. In any case, there could not possibly, on these facts, be any means read on her part.

430. The learned Judge having accepted, on the unimpeachable evidence of the date of notification of 25-1-1971 published in the official gazette on 6-2-1971 that Shri Kapur must have handed in his resignation in a letter of 13-1-1971. It is very difficult to see how one could possibly doubt the correctness of the statement of Shri P.N. Haksar that, as the Head of the Prime Minister's Secretariat he had accepted the resignation orally and forwarded it for necessary action. The resignation had taken place with the consent of the Prime Minister. It is inconceivable, in the circumstances, that Shri P.N. Haksar would not have, as the Head of the Department in which Shri Kapur was working agreed to relieve him of his duties by telling him that he was a free man, and, thereby, accepted his resignation. He very honestly, stated that he does not remember whether he wrote anything on the margin of that letter. He must have made so many endorsements on so many letters and documents that it was expecting the impossible to hold that he must remember what he wrote on every one of them. The only other ground given by the learned Judge for doubting the correctness of this version, which completely accords with the natural and ordinary course of official business was that the additional written statement filed a year after the original written statement, mentions this, fact for the first time. It seems to me that the learned Judge was carrying his suspicions to excessive lengths. The real question involved was the legal effect of the facts accepted by the learned Judge to be correct. These were: firstly, that such a letter of resignations was handed in on 13-1-1971 by Shri Kapur to Shri Haksar asking to be allowed to resign with effect from 14-1-1971; and, secondly, this very request was accepted by the President of India and incorporated in a notification dated 25-1-1971.

431. The learned Judge had found Shri P.N. Haksar's statement that such an oral acceptance followed by the necessary notification afterwards, was "rather interesting", and, that the resignation could not be effective until 25-1-1971, the date of drafting the notification. But, what the learned Judge completely over-looked was that the notification itself made the resignation effective from 14-1-1971, the date from which Shri Kapur had neither worked in the Prime Minister's Secretariat nor drawn any salary There was no plea anywhere, and there is no express finding on it that the President's notification itself, which made the resignation effective from 14-1-1971, was invalid to the extent that it purported to give any retrospective effect to the resignation, in the sense that it made it effective from a date prior to its actual acceptance. The fact that it is made effective from 14-1-1971 shows

that the letter must have reached the President's Secretariat with the request that this should be done, And, in the ordinary course of business, the head of the office concerned makes his endorsement on such letters.

432. The learned Judge had relied on Rule 5 of the Central Civil Services (Temporary Service) Rules, 1949, which runs as follows:

“5 (a) The service of a temporary Government servant who is not in quasipermanent service shall be liable to termination at any time by notice in writing given either by the Government servant to the appointing authority or by the appointing authority to the Government servant:

(b) The period of such notice shall be one month, unless otherwise agreed to by the Government and by the Government servant:

Provided that the service of any such Government servant may be terminated forthwith by payment to him of a sum equivalent to the amount of his pay plus allowances for the period of the notice or as the case may be for the period by which such notice falls short of one month or any agreed longer period.”

433. The learned Judge had referred to Halsbury's Laws of England. Vol. V (Simond's Edn.), p. 61. where it was laid down that in a “corporation created by Statute for the discharge of public functions a **member** may not have an absolute right to resign at will, because the law may cast a duty upon the person elected to a public office to act in that office in public interest.” He also referred to an American case. *Edwards M. Edwards v. United States.* (1880) 26 Law Ed 314 to the effect that only the appointing authority could have accepted the resignation of an occupant of a public office and that under the special provisions of the law, the holder of such an office could be subjected to a penalty for a wrongful refusal to perform the duties of his office. The desire or wish of the holder of the office had to give place to public interest in such special cases. It is clear that the cases cited could have no relevance what-soever for an interpretation of Rule 5 setout above.

434. The learned Judge had then relied upon *Raj Kumar v. Union of India*, AIR 1969 SC 180 = (1968) 3 SCR 857 where this Court held that “normally, and, in the absence of any law or rule governing the conditions of his service to the contrary, it will not be open to the public servant to withdraw his resignation after it is accepted by the appropriate authority.” In that case there was a dispute between the Government servant and the Union of India on the question whether the Government servant concerned would withdraw his resignation after it was accepted. It was held that he could not. It was not a case of and agreement between the parties at all as to the date from which the resignation could effectively terminate service. It is true that in *Raj Narain v. Smt. Indira Nehru Gandhi*. AIR 1972 SC 1302 = (1972) 3 SCR 841 when this very matter came up to this Court to decide whether an issue should be struck on it, this Court had sent back the matter to the High Court after holding that an issue should be framed to decide when Shri Kapur's resignation became effective and that this question “will

have to be examined with reference to his conditions of service.” Now it is clear from the rule itself, that a condition of Shri Kapur's service was that the Government and the Government servant could dispense with the period of notice if it was mutually agreed upon to do that. Rule 5(b) makes that abundantly clear. The learned Judge for some reason completely overlooked this aspect.

435. Neither the Government nor the Government servant is in a worse position than an ordinary master or servant on a matter governed by contract. In fact, Article 310 makes it clear that in such a case, the tenure of office of a Central Government servant is “during the pleasure of the President”. In the instant case the President's pleasure was contained in the notification dated 25-1-1971 showing that the President had accepted the resignation of Shri Kapur with effect from the forenoon of 14-1-1971. And, this is what Shri Kapur himself wanted. Hence, there is no difficulty at all in accepting the correctness of a resignation effective from the date which both parties to the contract, on patent facts had agreed to. No rights of an innocent 3rd party were either involved or affected by such an acceptance of the resignation from the date immediately after the date on which Shri Kapur had tendered his resignation. That as already pointed out was also the date after which he had ceased to work or draw his salary. It is inconceivable that the law should thrust the status of a Government servant upon one who does not want it, particularly when the Government also does not, in public interest, refuse to relieve him by making him stick to any terms to the contrary in his contract. Our law, on this point, is not so monstrous. The position accepted by the learned Judge appears to me to be quite indefensible. However, there was an amendment also in the law by Section 7 of Act 40 of 1975 adding the following at the end of the Explanation to Section 123 (7) of the Act:

“(3) For the purposes of Clause (7), notwithstanding anything contained in any other law, the publication in the Official Gazette of the appointment, resignation, termination of service dismissal or removal from service of a person in the service of the Central Government (including a person serving in connection with the administration of a Union territory) or of a State Government shall be conclusive proof—

(i) of such appointment, resignation termination of service, dismissal or removal from service, as the case may be, and

(ii) where the date of taking effect of such appointment, resignation, termination of service, dismissal or removal from service, as the case may be is stated in such publication, also of the fact that such person was appointed with effect from the said date, or in the case of resignation, termination of service, dismissal or removal from service, such person ceased to be in such service with effect from the said date.”

436. I find that this amendment, which was made retrospective, by S. 10 of Act 40 of 1975 makes the legal position still clearer. The learned Counsel for the election-petitioner had assailed the validity of this amendment on the

ground that powers conferred by it upon the Government are bound to be abused by those who hold the reins of Government. I am afraid I am unable to see any force in this contention. The presumption is that a bona fide use will be made of this power lodged in such responsible hands. If such powers are ever exercised in a mala fide manner, it is the particular exercise of the power that can be questioned and struck down. The provision does not become invalid merely because it could be abused as practically any provision of law can be by those who may want to do so.

437. I will next take up the period from 14-1-1971 upto 25-1-1971, when Shri Kapur is said to have gone and voluntarily worked at Rae Bareilly and to have done whatever he could to organise the conduct of the Prime Minister's election after his talks with the Prime Minister. The position with regard to allegations in this period is summarised as follows:

1. He is said to have either led or to have joined a procession of cars taken out on 14-1-1971 in the town of Rae Bareilly as a part of the election campaign for the original respondent although Shri U.S. Yadav (P.W. 41), an Advocate, who was a staunch S.S.P. worker, produced on behalf of the election-petitioner, clearly stated that he had not seen Shri Kapur in that procession which he watched but he had seen him only on 15-1-1971. The learned Judge, however, not only relied on the evidence of Shri R.K. Singh (P.W. 42) but also on that of Shri U.S. Yadav to hold that Shri Kapur must have been "associated with" the procession of people seen in cars and jeeps taken out on 14-1-1971 shouting Congress (R) party slogans to start off the election campaign.

2. On 17-1-1971, Shri Kapur is said to have participated in an election meeting held at the Clock Tower. On this allegation, the learned Judge accepted the evidence of Shri R.K. Dixit (P.W. 31), and Shri R.K. Singh, (P.W.42), although both these witnesses only stated that some confusion took place at the meeting and Shri R.K. Dixit did not even remember whether any speech was made at all by Shri Kapur. Shri R.K. Singh also did not state that Shri Kapur actually made a speech but had said that "a disturbance took place when Shri Kapur wanted to deliver a speech..... as a result of which he could not do so." The learned Judge rejected the evidence of Shri V.C. Dwivedi (R.W. 18) supported by Shri Kapur (R.W.32) himself, that Shri Kapur was not present at all at this meeting. However, on the evidence of the election petitioner's witnesses themselves, Shri Kapur could do nothing whatsoever in furtherance of the election of the original respondent at this meeting.

3. On 19-1-1971, Shri Kapur is said to have addressed a meeting at village Nihasta where he is said to have gone in the company of Prof. Sher Singh a Minister of State in the Government of India. Although, the tour programme of the Minister concerned showed that the Minister went to that village to inaugurate a Telephone Exchange on 18-1-1971, supported by the evidence of Jagannath Prasad (R.W.16), a resident of village Nahasta, and K.D. Pandey (R.W. 17) Post Master, Sub-Post Office, yet, the learned Judge preferred the

evidence of Shri R.K. Singh (P.W.42) for the election-petitioner despite the infirmity in this evidence that it was neither consistent with the tour programme of the Central Government Minister sent in advance for this function nor with the unshaken evidence of those who organised the function.

4. It was alleged that Shri Kapur on 19-1-1971, again in the company of Prof. Sher Singh, the Central Government Minister, mentioned above, attended a meeting held in Lalganj. So far as this particular allegation is concerned, the learned Judge thought that it could not be accepted because it was supported only by one highly partisan witness. Shri G.N. Pandey, against 4 faultless witnesses: Abdul Jabbar (R.W.25). Fatesh Bahadur Singh (R.W.26). Ishwar Chand (R.W.27), and Ranjit Singh (R.W.28).

5. On 19-1-1971, Shri Kapur was said to be present at the inaugural function of the Telephone Exchange at Behta Kalan and is said to have delivered a speech there. The learned trial Judge accepted the evidence of Pt. Shashank Misra, (P.W. 32), admittedly a highly partisan witness, who was believed because of a question put to him in cross-examination suggesting that there was uproar when Shri Kapur started speaking so that nobody could hear what he said. The learned Judge held that this amounted to an admission of Shri Kapur's presence and participation in this meeting.

6. Shri Kapur was alleged to have delivered a speech on 18-1-1971 at the foundation laying ceremony of a new Post Office building at Rae bareli in the company of Prof. Sher Singh, the Central Government Minister, mentioned above. This allegation was not accepted on the ground that it was not supported by any evidence whatsoever.

438. All that the witnesses could remember of Shri Kapur's speech, on each occasion, was that he supported the original respondent's candidature. Out of allegations of acts said to have been committed on 6 occasions by Shri Kapur in this period, the learned Judge found only 4 instances proved. Out of these, it was clear that Shri Kapur could not have done anything in furtherance of the original respondent's election on 17-1-1971, when according to the election-petitioner's witnesses, he was not even allowed to speak. Even if all the election petitioner's witnesses accepted by the learned Judge are to be implicitly believed for this period the position is:

(a) On three occasions in this period, from 14-1-1971 to 25-1-1971, Shri Kapur is shown to have made a speech supporting the original respondent's candidature.

(b) There is no evidence whatsoever from any source that Shri Kapur did so on any of these three occasions either after having been requested by the original respondent to do so or with her knowledge or consent or approval.

(c) The only evidence in the case on the decisive question, coming from the side of the original respondent, is that Shri Kapur did, whatever he did, entirely on his own initiative and in his private and individual capacity, without the slightest solicitation, request, or suggestion from the original respondent who did not even know what he was doing at Rai Bareli. And this evidence, being un-controverted, could not be rejected. In fact, it was not

rejected by the trial Court. It was ignored by it presumably under an erroneous belief that it was not material.

439. There is no evidence what-soever that Shri Kapur was constituted a sort of general de facto agent of the Prime Minister even before he became her election agent on 1-2-1971. Indeed, such a case that Shri Kapur was constituted a defacto agent of the Prime Minister, and if so, what was the scope of his authority, was not set up in the petition and was not put in issue. Therefore there is no finding on it by the learned Judge. Could the Court then, without any proof of any specific request or solicitation or even knowledge of or consent to the doing of any particular acts Shri Kapur may have done in this period make the Prime Minister liable for them in any way? I think not. The election petitioner had to be confined to the case he had set up. This, as already pointed out could only be on a fair reading of the petition on issue No.1, one of specific authorisation of particular individual acts of Shri Kapur. Of this there is not only no evidence whatsoever on record but the evidence is to the contrary.

440. Issue No. 1 as framed, and the form of findings given on it indicate that the learned Judge realized that the election petitioner's case must be confined to proof of specific acts or statements of the original respondent herself which induced Shri Kapur, as a Government servant to give some assistance in furtherance of her election but the discussion of evidence and the inferences which the learned Judge reached upon the circumstances found indicated that the learned Judge thought that Shri Kapur was constituted a sort of de facto agent even before Shri Kapur was clothed with legal authority on 1-2-1971. This appears to me to be the underlying current of thought and reasoning of the learned Judge. Thus the result was that what was really decided was the case of a defacto agency which was neither set up nor was the subject-matter of an issue. I therefore think that the principle that no amount of evidence could be looked into on a case not really set up was applicable here, it was quite unfair to expect the original respondent to meet a case not set up at all. Furthermore, the case of defacto agency was in the circumstances of the particular case only possible to set up if the Prime Minister had made some request to Shri Kapur to go and conduct the election campaign even before he was appointed her election agent on 1-2-1971. If this was not established by evidence on record, it could be said that the bottom was knocked out of even such a hypothetical case. Had a case of de facto agency been even argued it is not conceivable that certain cases of Division Benches of the Allahabad High Court itself would not have been cited to show on what kind of evidence it could succeed.

441. In *Rustom Satin v. Dr. Sampooranand.* (1959) 20 Ele LR 221 at p. 243 (All) it had been held by a Division Bench of the Allahabad High Court (V. Bhargava and J.N. Takru. JJ.), inter alia (at p. 243):

“So far as the election law in this country is concerned it is a creation of statute and as such has to be interpreted in accordance with the provisions of that statute. Section 100 of the Act clearly refers to corrupt practices

committed by four classes of persons only, viz., the candidate, his election agent, persons acting with the consent of the candidate or his election agent, and those acting without such consent. The corrupt practices committed by the first three classes of persons are covered by Section 100(1) (b) while those committed by persons falling in the fourth class are provided against in Section 100(1) (d) (ii).”

The same Bench of the Allahabad High Court in *J.P. Rawat v. K.D. Paliwal*, (1959) 20 Ele LR 443 (All) had held (at p. 456):

“.....Even in the case of admitted workers in whose case also general consent to work for the candidate may be implied the consent of the returned candidate to corrupt practice or practices complained against have to be separately proved, and reliance upon general consent, express or implied, to work legitimately for the candidate is not deemed sufficient.”

442. After 14-1-1971, the Prime Minister, like everyone else concerned, obviously believed that Shri Kapur was no longer a Government servant. As I have already pointed out, this was the legally correct assumption. Even if one were to assume, for the sake of argument, that this was not so and that the learned Judge had correctly held that Shri Kapur's resignation became effective from 25-1-1971, there could be no liability for a corrupt practice by merely permitting Shri Kapur to resign. The uncontroverted evidence is that after resigning, Shri Kapur went to Rae Bareilly voluntarily, without any request or suggestion made to him by the original respondent or by anybody else to go to Rae Bareilly and work for her election. Even his appointment as the original respondent's election agent on 1-2-1971, according to Shri Kapur's evidence was the result of a suggestion of Shri Dal Bahadur Singh at Rae Bareilly, apparently during the Prime Minister's visit to her constituency.

443. Cases in which help rendered voluntarily by a Government servant without any attempt by the candidate concerned to “obtain” or “procure” it were held not to constitute a “Corrupt practice” of the candidate, whatever be the impropriety of it for the Government servant himself were completely overlooked by the learned Judge. In *Hafiz Mohd. Ibrahim v. Election Tribunal*, (1957) 13 Ele LR 262 (All) a Division Bench of Allahabad (Mootham C.J. and Mukerji, J.) had pointed out that a Government servant has a “private personality” too. Similar observations of Dua J. are found in a Division Bench decision of the Punjab High Court (See: *Ram Phal v. Brahm Parkash*, 23 Ele LR 92 = (AIR 1962 Punj 129)).

444. On the conclusions reached by the learned Judge himself the acts of Shri Kapur between the period 25-1-1971 and 6-2-1971, the date of the publication of the notification, could not be taken into account as no corrupt practice could possibly exist in that period due to the participation of Shri Kapur in any election work. And with regard to the two earlier periods beginning with 7-1-1971. I am unable to see, for the reasons given above how any corrupt practice could be committed by the original respondent vicariously due to anything done by Shri Kapur, even if one were to apply the law as it existed before the amendments of the Act.

445. Another question, which I may now briefly consider is the date from which the original respondent could be said to have held herself out as a candidate. If she was not a “candidate”, upto 25-1-1971, as defined by law, that would in itself be a sufficient ground for wiping out the effect of findings of the learned Judge on the two periods dealt with above.

446. The learned Judge had inferred that the Prime Minister was a “candidate” from 29-12-1970 as she had held herself out as a candidate when she answered a question put to her on 29-12-1970 at a Press Conference at New Delhi. The question and answer were as follows:

Q. A short while ago there was a meeting of the opposition leaders and there they said that the Prime Minister is changing her constituency from Rae Bareli to Gurgaon?

In the witness box the Prime Minister disclosed that what she meant by the answer was that she would not contest from the Gurgaon constituency. On further cross-examination, she stated:

“It is wrong to assume that while giving the reply marked 'B' in the transcript (Ext. 132) I conveyed that I was not changing my constituency from Rae Bareli at all and emphatically held out that I would contest election again from Rae Bareli. In my opinion there is no basis for this assumption.”

447. The learned Judge had in preference to the statement of the Prime Minister herself as to what she meant, together with the evidence given by her Secretariat that there were entreaties or offers to her from other constituencies that she should be their representative, relied on Press reports and what members of other parties thought and did as a result of the above-mentioned statement of the Prime Minister on 29-12-1970. The learned Judge also referred to paragraph 1(A) of the additional written statement which runs as follows:

“That in fact there were offers, from other Parliamentary constituencies in India, requesting this respondent to stand as a candidate for the Lok Sabha from those Constituencies and a final decision in regard to the Constituency was announced by the All India Congress Committee only on January 29, 1971, and she only held herself out as a candidate on filing her nomination at Rae Bareli on 1st of February, 1971 (underlining is by me.)” He had also referred to the visits made by Congress (R) leaders to Rae Bareily, particularly. Shri Dinesh Singh, and Shri Gulzarilal Nanda and by Prof. Sher Singh. He had not accepted the explanation that they had gone there of their own accord.

448. The learned Judge had also considered several English authorities but had noted that the law here was not the same as in England. It had been laid in *Munniswami Gounder v. Khader Sheriff*, (1953) 4 Ele LR 283 at p. 292 (Ele. Tri., Vellore) where it was said:

“In this respect the law in this country makes a significant departure and that departure, in our opinion, again emphasises the application of vital democratic principle, in the light of differing conditions. We may here note,

briefly. A feature of the political practice in the United Kingdom, which repeatedly, colours and influences the English Cases, viz. the fact that there a person is often adopted as a candidate by a political association, without any move on his behalf, until a particular stage when the adoption is formalised by his consent.”

449. I am unable to see what barring the activities of opposition leaders and statements issued by them or Press Reports with regard to the candidature of the original respondent No.1 from the Rae Bareilly constituency, had upon either an interpretation of her own statement of 29-12-1970, or the date on which she made a final decision to stand as a candidate from the Rae Bareilly constituency or the communication of that decision by her to her constituency. The material relied upon by the learned Judge consisted of speculation and hearsay coming from persons who were certainly interested in finding out which constituency the Prime Minister, who had a choice of Gurgaon a constituency much nearer to New Delhi and possibly of other constituencies as well if she only wanted to change it. Absence of proof of a desire to change the constituency is not proof of a positive “holding out”. It has been repeatedly laid down in decided cases on the point that what is relevant is not what other people think or say about what a possible candidate would do, but what the candidate concerned himself has said or done so as to amount to “a holding out” as a candidate by the candidate from a particular constituency. Mere speculation or rumour circulated by other persons interested in finding out the Prime Minister's constituency could only prove what their own expectations or beliefs were. This type of “evidence”, strictly speaking, could not even be admissible unless it could be related to something actually said or done by the candidate. All that such “evidence” could prove was that people interested were speculating or indulging in guesswork. It seems to me that the learned Judge did not take into consideration the tactics in the political game which to some extent, every party participating in such a game adopts. Some of those tactics are quite legitimate and honourable, but others are not.

450. The learned Judge referred to the contents of a speech made by the Prime Minister at Coimbatore in South India, in the early part of January, 1971, castigating one of the tactics of the opposition parties in choosing Shri Raj Narain to oppose her, for purposes of maximum “mud slinging”. The learned Judge pointed out that the Prime Minister admitted, in her evidence, that she could have said this in her speech at Coimbatore, She was not asked whether this amounted to holding herself out as a candidate from Rae Bareilly constituency. If such a question had been asked, there is little doubt that she could have explained the statement by the context in which it was made, just as she had given the precise meaning of her statement of 29-12-1970 in the context in which it was made. Apparently, the context of the statement made in early January in Coimbatore was that the opposition parties had chosen a candidate, who, in the opinion of Prime Minister, possessed certain capacity for “mud slinging” which others did not have. The apparent object of what she mentioned in the speech was to expose tactics of

opposition parties in choosing such a candidate from a constituency from which they thought the Prime Minister must be standing. It was obviously meant to disparage such tactics and not to disclose her own intentions or future course of action. A healthy democratic practice or convention certainly is that the election of some candidates, of certain stature and standing or position in public life is not contested. To point out that the opposition parties far from intending to adopt such an attitude towards her, were busy devising methods of maligning her, could not reasonably be construed as a holding out of herself as a candidate from a particular constituency unless one was predisposed to put such a construction on every ambiguous statement of the Prime Minister, made anywhere after the dissolution of Parliament in December, 1970 until the election in the first week of March, 1971. Similarly, the context of the question of 29-12-1970, put to the Prime Minister at a conference at New Delhi, was that members of the opposition parties thought that she may be contesting from Gurgaon. In the light of the opposition tactics, which the Prime Minister herself had referred to in her speech at Coimbatore, it was not unlikely that the Prime Minister would have preferred to keep her own intentions about the constituency, from which she would ultimately stand either a closely guarded secret, or, at least, in a fluid State. In any case, it was not likely that she would announce her own intention very clearly to stand from any particular constituency until it was considered by her or by her political advisers to be politically expedient to do so. Again, it may be that the prospect of such a leader standing from a particular constituency was likely to have a politically exhilarating effect upon the workers or on party activities in that constituency. From such a point of view also, the Congress Party (R) of the Prime Minister may also have preferred that the Prime Minister should not announce her decision until the last moment. A disputed question of fact on such a matter could not possibly be determined by a Court on evidence of guess-work or speculations of others which are strictly speaking, not relevant. I have indicated here that if some guess-work were permissible, as it is to give its benefit to the person against whom circumstantial evidence is to be used, other possible explanations and interpretations were not excluded. The question had to be decided on proof of the actual statements and actions of the candidate herself which should amount to clear and unequivocal expressions of intention, showing a decision to stand from a particular constituency, meant primarily for the benefit of the voters of the particular constituency so chosen by a candidate. Where was that evidence here?

451. It seems to me that the learned Judge had given an exaggerated importance to what were either not strictly relevant or insignificant matters in preference to what could be and was decisive and unequivocal. I do not think that the answer of the Prime Minister at the Press Conference on 29-12-1970 or the contents of her speech in Coimbatore, in early January, 1971, or even a declaration or announcement of the All India Congress Committee on 29-1-1971, assuming that there was such an announcement, could mean that the Prime Minister had herself finally decided to contest from the Rae

Bareilly constituency and had held herself out as a candidate for this constituency. This holding out had to take place by the Prime Minister herself and not by the Congress Committee. Even if the fact of a declaration made by the Congress Committee, on 29-1-1971, which is all that the written statement admits, proves that the Prime Minister was chosen by her party for this particular constituency on this date, her own decision on the matter could only come and was proved by her to have actually come later than that. This admission was in my opinion, misconstrued by the learned Judge as a contradiction. In the absence of any evidence whatsoever which could conflict with the Prime Minister's statement about the actual date of her final decision to stand from this Constituency, it seems to me that the learned Judge had no option reasonably open to him except to accept the correctness of the only and the best evidence on this question available in the case. The learned Judge in observing, quite unnecessarily, that his finding on this question was not going to be affected by the importance of the office held by the Prime Minister, seems, subconsciously, to have been so affected by it that he did not act on the normal rule that the best evidence of a person's state of mind is his or her own statements and actions and not of others. He seems to have felt that judicial independence consists in inverting this rule and judging the matter primarily from the evidence of the states of minds and opinions and actions of other individuals in the case of a Prime Minister of this country. I do not consider this to be a judicially correct approach.

452. The fact that the tour programmes were circulated in advance for the Rae Bareilly District, in which the Prime Minister made electioneering speeches, could also not determine what the final declaration of intention by the Prime Minister was going to be in regard to the Rae Bareilly constituency. It is not enough that the candidate should have by then formed an intention to stand from a particular constituency. There is a gap between intent and action which has to be filled by proof of either statements or of conduct which amount to unequivocal declarations made to voters in the constituency in order to amount to a "holding out" to them. This seems to me to be the clear position in the law as laid down by Courts in this country on the meaning of Section 79(b) of the Act.

453. It is significant that despite the large number of speeches and statements the Prime Minister must have made throughout the country, in this period, not a single statement made by her could even be cited in which she had said before 1-2-1971, that she was standing as a candidate from the Rae Bareilly constituency. It is possible, as I have indicated above, that this may be a part of the political game or permissible party tactics so as to keep opposition parties guessing. It seems to me that the learned Judge was overlooking the context, the probabilities, the natural course of events in such a case, the legal and logical relevance and effect of what he thought was decisive, and finally, the importance of the statement of the Prime Minister herself on this question supported by complete absence of any evidence to show that she had herself made any clear and decisive statement in any speech or conversation which could shake her stand that her final decision

and un-equivocal act was the filing of a nomination paper as a candidate on 1-2-1971 at Rae Bareilly. I may mention here that, according to the findings of the learned Judge himself, the question of the Prime Minister holding herself out as a candidate for the Rae Bareilly constituency became quite immaterial after 25-1-1971, and on the findings I have reached above, the whole question becomes unimportant. However, I will indicate some authorities which the learned Judge himself had noticed.

454. In *S. Khader Sheriff v. Munnuswami Gounder*, (1955) 2 SCR 469 at p.473 = (AIR 1955 SC 775 at p. 777). this Court said (at p. 473 of SCR) = (at p. 777 of AIR):

“When therefore, a question arises under Section 79 (b) whether a person had become a candidate at a given point of time, what has to be seen is whether at that time he had clearly and unambiguously declared his intention to stand as a candidate, so that it could be said of him that he held himself out as a prospective candidate. That he has merely formed an intention to stand for election is not sufficient to make him a prospective candidate because it is of the essence of the matter that he should hold himself out as a prospective candidate.”

455. In *J.P. Rawat v. Krishna Dutt Paliwal*, (1959) 20 Ele LR 443 at p. 463 (All) a Division Bench of the Allahabad High Court (V. Bhargava and J.N. Takru. JJ.). following the decision of this Court in *S. Khader Sheriff's* case (1955) 2 SCR 469 = (AIR 1955 SC 775) (Supra) said (at p. 463):-

“The determining factor, therefore is the decision of the candidate himself, not the act of other persons or bodies adopting him as their candidate.”

456. In *Haji Abdul Wahid v. B. V. Keskar*, (1960) 21 Ele LR 409 (All) it was held by a Division Bench of the Allahabad High court (R.N. Gurtu and S.N. Dwivedi, JJ.):

“(i) that the purchase of the nomination forms and voters lists, could not amount to holding out as a candidate; (ii) the arranging of public meetings by the officials and the respondent's moving about in the constituency on the 15th and 16th could not by themselves amount to a holding out by the respondent as a prospective candidate on those days in the absence of evidence to show that the respondent had utilised those meetings and tours for the purpose of making utterances of an electioneering character.”

457. In *K.K. Mishra v. Banamali Babu*, 38 Ele LR 451 at p. 475 = (AIR 1968 Orissa 200 at p. 205) the Orissa High Court. relying upon the following observations of this Court in *S. Khader Sheriff's* case (AIR 1955 SC 775) (Supra), held that a holding out within the meaning of Section 79(b) must be by declaration of the candidate to an elector or to the electorate in a particular constituency and not to others:

“It may be that the holding out which is contemplated by that section is to the Constituency: but if it is the Central Committee that has to decide who shall be adopted for election from the concerned constituency any declaration

made to this Committee is in effect, addressed to the constituency through its accredited representative.”

458. The view of the learned Judge appears to me to run counter to the weight of authorities cited above. In any case, if there was any uncertainty at all in the law it has been removed by an amendment by Section 7 of Act No. 40 of 1975 so that Section 79 (b) reads as follows:

“ 'Candidate' means a person who has been or claims to have been duly nominated as a candidate at any election.”

459. Learned Counsel for the election petitioner contended that this amendment, read with Section 10 of the Act 40 of 1975, would retrospectively alter the “rules of the game” and would be destructive of the concept of free and fair elections if it means that a person is only a candidate after he has been duly nominated and that he can indulge in any amount of corrupt practices until the day previous to his nomination.

460. Even if the present definition is a new one, it cannot be said to be arbitrary. The concept contained in it is found in the English definition which lays down: (See: Halsbury's Laws of England — 3rd Edn. Vol. 14 p. 162):

“.....a candidate in relation to a parliamentary election means a person who is elected to serve in Parliament at the election or a person who is nominated as a candidate at the election, or is declared by himself or by others to be a candidate on or after the day of the issue of the writ for the election.....” The English definition is wider but contains, as its first part the very concept found in our new definition of a “candidate.”

461. Corrupt practices of a candidate cannot go unpunished whether they are committed before or after he becomes a candidate when they amount to acts which come within the purview of electoral offences dealt with by Chapter 3 Sections 125, 126, 127, 127 (A) or Chapter 9-A of the Indian Penal Code. Offences, such as bribery, for purposes of either inducing persons to vote or not to vote or to stand or not to stand as candidates, undue influence and personation are all dealt with here. These should be sufficient deterrents against perversion of the electoral process by a prospective candidate, who wants to adopt corrupt and objectionable means for gaining success at the polls.

462. The amendment appears to me to be within the unquestionable powers of Parliament to legislate either prospectively or retrospectively with regard to election matters. I am unable to see how it is capable of being interpreted as an attack on free and fair elections which, according to the learned Counsel for the election-petitioner, is part of the basic structure of the Constitution. I think it is important to bear in mind that Courts cannot take upon themselves the task of laying down what electoral laws should be. The law makers, assembled in Parliament are presumed to know and understand their business of making laws for the welfare and well-being of the mass of people of this country for the protection of democracy and of free and fair elections, in accordance with the needs of the democratic process

better than Courts know and understand these. It is only where a piece of legislation clearly infringes a constitutional provision or indubitably overrides a constitutional purpose or mandate or prohibition that Courts can interfere. After having listened to the lengthy and vehement arguments of the election petitioner. I fail to see any invalidity in this provision.

463. I will now take up issue No. 3 of the 1st set of issues on which, after rejecting the contention that the erection of barricades and the provision of the police force for security purposes by the Government of U.P. during the election tours of the Prime Minister on 1-2-1971 and 25-2-1971 in the Rae Bareli constituency, contravened Section 123(7) the learned Judge held that nevertheless, the arrangements made by the District Magistrate of Rae Bareli, the Superintendent of Police, Rae Bareli, the Executive Engineer. P.W.D. and the Engineer. Hydel Department, for constructing rostrums and the supply of power for loud speakers, on the instructions given by the State Government, was a corrupt practice struck by the provisions of Section 123(7) of the Act. As I have already indicated, the only evidence relied upon by the learned Judge for this extraordinary finding after having rejected a similar allegation of a corrupt practice under issue No.2 on account of provision of the Air Force planes and helicopters flown by members of the Air Force on necessary official instructions, to enable the Prime Minister to go to places where she could address election meetings on 1-2-1971 and 25-2-1971 was that the visits of the Prime Minister to her constituency on these occasions were preceded by the issue from the Prime Minister's Office of the tour programmes to the officials of the District through the State Government with the knowledge and consent of the Prime Minister. The State Government had acted in compliance with the instructions issued by the Comptroller and Auditor General of India in 1958 read with R.71 (6) of what is known as the Blue Book. The relevant part of this rule reads as follows:

“It has been noticed that the rostrum arrangements are not always properly made because the hosts are sometimes unable to bear the cost. As the security of the Prime Minister is the concern of the State, all arrangements for putting up the rostrum, the barricades etc. at the meeting place, including that of an election meeting, will have to be made by the State Government concerned.”

464. The Government of India had also issued a letter (Ex. A-21) dated 19-11-1969 inviting the attention of the State Governments to Rule 71(6) mentioned above and directing them to ensure that, whenever rostrums are constructed on such occasions. They should conform to certain specifications laid down with due regard to security considerations. The letter also directed the State Governments to bill the political party concerned with expenses upto 25% of the cost of the rostrums or Rs. 25,000/- whichever is less. The letter also directed that extravagance in expenditure should be avoided.

465. It was proved by the evidence of Shri R.K. Kaul (P. W. 58) the Home Secretary in the Government of U.P. that rostrums and arrangements for barricading are made by the local officials employing contractors for the purpose under instructions issued by the State Government. The reasoning

adopted by the learned Judge, however, was that as the Prime Minister's Office had issued her tour programmes with the approval of the Prime Minister the result must be in the language of the learned Judge himself.

"..... the tour programmes carried on an implied direction that the State Government should also get constructed rostrums and arrange for public address system for the election meetings to be addressed by her on 1st of February 1971 and 25th of February 1971. It should be presumed that the respondent No. 1 as Prime Minister of this country and with five years experience of that office behind her in 1971, also knew that the said work was to be done by the officers of the State Government."

466. This meant that the learned Judge was holding the Prime Minister herself responsible for instructing the State Government knowing that it will make the necessary arrangements through its servants. The case thus accepted that the Prime Minister was employing the State Government as her agency in procuring the aid of the officers concerned was neither set up nor put in issue. Apart from this objection the learned Judge overlooked that the provisions of Section 23(7) were intended to prevent solicitations for aid and not sending of information to the State Government in the course of ordinary official business even if the candidate concerned knows that the State Government is bound under the rules to make the necessary arrangements dictated by the needs of security of the Prime Minister and convenience of the public.

467. The view of the learned Judge involves holding that the "persona" (a term derived from the concept of the mask worn by Greek actors on the stage in a drama) of a candidate during an election must not only be different from that of the Prime Minister, but also that when the two capacities are held by the same person, what is due to the occupant of the office of the Prime Minister must be withdrawn when the same person acts as a candidate. On a similar argument, with regard to use of helicopters and aeroplanes, the learned Judge himself had refused to acknowledge what amounts to a separable legal personality of a candidate in the eyes of law. The ground given for this difference between the use of aeroplanes and helicopters by the Prime Minister and the use of rostrums by her was that the former was more connected with the office or capacity of the Prime Minister and that the latter was exclusively meant for her use in the capacity of a candidate. Even if we were to recognise this distinction between the "persona" of the Prime Minister and that of a candidate, it is impossible to separate the special arrangements made for the security of the person of the Prime Minister from those to which she may be entitled as a candidate only. It is impossible to deny at any time the facilities and precautions meant for the person who holds the office of the Prime Minister to the person just because she also figures as a candidate at an election. So long as the person is the same what is meant for the person must be attributed to the persona or capacity of the Prime Minister and not to that of a candidate only. The learned Judge, however, thought that a candidate who happens to hold the office of the Prime Minister of the country, is not entitled to the facilities or precautionary

measures taken to protect the person of the holder of the office when electioneering as though the Prime Minister and the candidate were two different persons. He was unable to see that so long as the person was the same the distinction between the two capacities or personae for the purposes for which facilities were given and protection provided, was both factually as well as legally impossible and quite immaterial.

468. I also think that the learned Judge erred in holding that such a case could be one of solicitation of official aid and assistance at all. It is a case in which certain precautions are taken and arrangements made almost "automatically", if one may use this word here by officers of the State as a matter of duty towards the office held by a candidate who undoubtedly enjoys certain advantages which an ordinary candidate cannot have. It is as futile to complain of such a distinction made as it is to complain that a candidate possesses certain advantages at an election because of the personal services rendered to the country or distinctions achieved by the candidate. Again, there are advantages which attach themselves to a candidate because of that candidate's personal qualities, qualifications, capacities or background. The appurtenances of office or distinctions achieved are in my opinion, comparable to such personal advantages in so far as they are not enjoyed because they are "obtained" or "procured". If such a result in law is unfair, it is not for Courts to find a remedy by accepting the argument advanced before us also : that those who enjoy the benefits of office must be made to realize and suffer some of its handicaps. This clearly means the benefit which law gives, without solicitation by the candidate must be converted, by a judicial fiat, into a disadvantage and a handicap. It is for Parliament to step in and change the law if an alteration of it is considered necessary by it. The only change that need be made in the law if that could be the legislative intent is to provide that the holder of any office for the time being would not be qualified to stand at an election. In that event holders of all Ministerial Offices will have to resign before they offer themselves as candidates. But such is not our law found in the 1951 Act or anywhere else. I think that it would be extending the scope of S. 123(7) too wide to hold that the facilities automatically provided by the State to the Prime Minister by virtue of his or her office are also struck by a provision directed against solicitation of official aid and assistance by candidates.

469. The learned Judge had mentioned a Division Bench decision of the Allahabad High Court in *Motilal v. Mangla Prasad* AIR 1958 All 794 at P. 797 where it was laid down :

"We think that the word 'obtain' in Section 123(7) has been used in the essence of the meaning which connotes purpose behind the action of the candidate. The word has not been used in the sub-section in the sense of a mere passive receipt of assistance without the candidate even being conscious of the fact that the assistance has been rendered. In order to bring the case under sub-section (7), it must be shown that the candidate did make some effort or perform some purposeful act in order to get the assistance."

470. He had also cited another Division Bench decision of the Assam High Court in *Biresw Mishra v. Ram Nath Sharma*. 17 Ele LR 243 at P. 253 = (AIR 1959 Assam 139 at P. 143) that :

"The words 'obtain' or 'procure' or 'abetting or attempting to obtain or procure' any assistance necessarily imply some effort on the part of candidate or his agent. Mere passive receipt of assistance is not contemplated by the Section."

471. I think that the import of such observations was clearly what has been laid down repeatedly by this Court and emphasized by me already - that a mens rea as well as an actus reus must be shown on the evidence on record, before a candidate can be held guilty of a corrupt practice. In *Sheopal Singh v. Ram Pratap*, (1965) 1 SCR 175 = (AIR 1965 SC 677) this Court held, in dealing with the allegation of corrupt practice under Section 123(4) of the Act, that mens rea was a necessary ingredient of the corrupt practice and that the doctrine of constructive knowledge was not applicable here.

472. In the case before us the election petitioner alleged a wrongfully "obtained and procured" assistance due to acts of the original respondent as well as her election agent Shri Yashpal Kapur. Hence, proof of actual mens rea as well as actus reus on the part of either the candidate herself or her election agent had to be given. This was not done. The election petition was, therefore, liable to be rejected on this ground alone.

473. If, however, there was any doubt or uncertainty on the matter, the view taken by the learned Judge had, at any rate directed the attention of Parliament to the need for a clarification of the law which became necessary. It is not possible to object to the motives behind the legislation on this ground. Parliament could certainly set right a defect in law which may have come to its notice as a result of the learned Judge's interpretation of Section 123 (7). The defect may be due to a possible ambiguity. In order to clarify the law. Section 7 of the Act 40 of 1975 inserted a proviso at the end of Section 123(7), which runs as follows :

"Provided that where any person, in the service of the Government and belonging to any of the classes aforesaid, in the discharge or purported discharge of his official duty, makes any arrangements or provides any facilities or does any other act or thing, for to or in relation to any candidate or his agent or any other person acting with the consent of the candidate or his election agent, (whether by reason of the office held by the candidate or for any other reason), such arrangements, facilities or act or thing shall not be deemed to be assistance for the furtherance of the prospects of that candidate's election."

474. The learned Counsel for the election petitioner has, very fairly conceded that, if this amendment, which is retrospective by reason of the operation of Section 10 of Act 40 of 1975, is valid, the decision of the learned Judge on the above mentioned issue No. 3 would not be sustainable. Such a concession, incidentally, means that whatever facilities were given to the

Prime Minister by the construction of rostrums or provision of power for the loud-speakers, for which the party was also billed, at least to the extent of 1/4th of the expenses of the rostrums and wholly as regards the expenses of loud-speakers were given by the officers concerned in the performance of their official duties. This is not the same thing as “obtaining” or “procuring” by solicitation.

475. Learned Counsel for the election petitioner has, however, put forward the same objection to this retrospective amendment as the one against a change in the definition of “candidate”. It appears to me that this amendment is merely clarificatory of the state of law as it really was even before the amendment. On the view I take, there is no question here of altering the “rules of the game” to the disadvantage of the election petitioner. The disadvantage, if any, was there already because of the consequences which, I think, legally and naturally flow from the occupation of the high office of the Prime Minister of this country.

476. There is no attack on the validity of Section 123 (7) of the Act as it existed before the amendment. Hence, there could be no challenge to the validity of the amendment if it does not, as I think it does not, change the law but merely clarifies it.

477. Learned Counsel for the election petitioner contended that, as a candidate at an election, the Prime Minister and an ordinary candidate should enjoy equal protection of the laws and should be afforded equal facilities irrespective of the office occupied by one of two or more candidates. Such an attack upon the validity of this amendment seems to me to be possible only under the provisions of Article 14 of the Constitution. But, as Act 40 of 1975, has been placed by Section 5 of the 39th Amendment in the protected 9th Schedule of the Constitution, it becomes immune from such an attack. After the practically unanimous opinion of this Court in *Kesavananda Bharti’s case* (AIR 1973 SC 1461) (Supra), that such an immunisation of an enactment from an attack based upon an alleged violation of the chapter on fundamental rights is constitutionally valid, I do not think that a similar attack can be brought in through the back door of a “basic structure” of the Constitution. Moreover, I am unable to see how this particular amendment has anything to do with damage to any part of the “basic structure” of the Constitution. Even if an attack on the ground of a violation of Article 14 were open today. I think that the occupation of such a high and important office as that of the Prime Minister of this country, with all its great hazards and trials, would provide a rational basis for reasonable classification in respect of advantages possessed by a Prime Minister as a candidate at an election due to arrangements made necessary by considerations of safety and protection of the life and person of the Prime Minister. Hence, I am unable to see any sustainable ground of attack at all on the validity of this provision.

478. Before I proceed further, I may mention that I have dealt with the findings of the learned Judge, assailed by the original respondent’s appeal No. 837 of 1975, perhaps in greater length and depth, after going through the

evidence in the case, than I had set out to do. I have done so far several reasons. Firstly, I think that the nature of the attack upon the bonafides of the amendments made, although ordinarily not even entertainable, having been permitted due to the constitutional importance and gravity of the allegations made, this question could not, in my opinion, be satisfactorily dealt with without considering the nature of the findings and the evidence at some length so as to satisfy myself that no such question could possibly arise here. Secondly, if the amendments were made necessary for reasons brought out fully only by dealing with facts and findings in this case, they could not give rise to any grounds to suggest that there was anything wrong in making amendments to remove such reasons. Therefore, I think, it was necessary to go into these for determining whether the amendments are good. Thirdly, even if the amendments are valid, we had to be satisfied that the tests of corrupt practices alleged are not fulfilled despite the concession of the election petitioner's learned Counsel that this would be the position. Fourthly, I find that the learned Judge has made certain manifest errors in appraising the evidence and interpreting the law which call for rectification by this Court as no other authority can properly do this.

479. It appears to me, as already indicated by me, that the learned Judge was perhaps unduly conscious of the fact that he was dealing with the case of the Prime Minister of this country. He, therefore, as he indicated in his judgment, seemed anxious not to allow this fact to affect his judgment. Nevertheless, when it came to appraising evidence, it seems to me that, as I have already pointed out, he applied unequal standards in assessing its worth so as to largely relieve the election petitioner of the very heavy onus of proof that lies on a party which challenges the verdict of a electors by allegations of corrupt practices. He also appeared to be attempting to achieve by means of judicial interpretation an equalisation of conditions under which in his opinion candidates should contest elections. I think that it is not the function of Courts to embark on attempts to achieve what is only in the power of Parliament to accomplish that is to say to bring about equality of conditions where the law permits justifiable discrimination. As this Court has repeatedly pointed out to treat unequally situated and circumstanced persons as though they were equals in the eye of law for all purposes is not really to satisfy the requirements of the equality contemplated by the Constitution.

480. As regards appraisal of evidence in such a case. I may point out that in *Rahim Khan v. Khurshid Ahmed*. (1974) 2 SCC 660 at pp. 666. 672 = (AIR 1975 SC 290 at pp. 294-295) Krishna Iyer, J. speaking for this Court said :

"An election once held is not to be treated in a light-hearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantial grounds and irresponsible evidence thereby introducing a serious elements of uncertainty in the verdict already rendered by the electorate. An election is a politically sacred public act not of one person or of one official but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election

which has already been held unless clear and cogent testimony compelling the Court to uphold the corrupt practice alleged against the returned candidate is adduced. Indeed election petitions where corrupt practices are imputed must be regarded as proceedings of a quasi-criminal nature wherein strict proof is necessary. The burden is therefore heavy on him who assails an election which has been concluded."

This Court also said there (at p. 672) (of SCC) = (at p. 299 of AIR):

"We regard it as extremely unsafe, in the present climate of kilkenny-cat election competitions and partisan witnesses wearing robes or veracity to upturn a hard won electoral victory merely because lip service to a corrupt practice has been rendered by some sanctimonious witnesses. The Court must look for serious assurance, unlying circumstances or unimpeachable documents to uphold grave charges of corrupt practices which might not merely cancel the election result but extinguish many a man's public life."

1975 S.C./152 XII G-10-H

481. I will now take up the election petitioner's Cross Appeal No. 909/75. Learned Counsel for the election Petitioner very properly and frankly conceded that he could not successfully assail the findings of the learned Judge issues Nos. 4 and 7 relating to alleged distribution of quilts, blankets, dhotis, liquor by workers of the original respondent or the alleged provision of free conveyance by vehicles said to have been hired by Shri Kapur. The evidence on these questions given by the election petitioner was too flimsy and extravagant and was met by overwhelming evidence to the contrary given by respectable residents of localities in which the alleged corrupt practices are said to have taken place. No driver of any conveyance was produced. Nor was any person produced who had actually received any alleged gift or had consumed anything provided on behalf of the successful candidate.

482. As regards Issue No. 2. relating to the use of aeroplanes and helicopters by the original respondent, which was not separately pressed evidently because it was covered by the amendment which was assailed by the election petitioner, the reasons I have given on issue No. 3 for upholding the validity of the amendment relating to the services rendered by Govt. Officials and members of defence forces in due discharge of their duties and enough to cover the points raised.

483. As regards Issue No. 6 relating to the adoption of the drawing of cow and a calf as the symbol of the Congress (R) Party of the original respondent the finding of the Trial Court, based on a large number of authorities was that this is not a religious symbol. This Question was directly decided in *Bharatendra Singh v. Ram Sahai Pandey*. AIR 1972 Madh Pra 167 at p. 179 *Shital Prasad Misra v. Nitiraj Singh Chaudhary** decided by M.P. High Court on 21-7-1971: and *Sir Prasanna Das Damodar Das Palwar v. Indu Lal Kanhaiya Lal Yajnik*** decided on 27-8-1971 by the High Court of Gujarat. The learned Judge also cited the following cases where it was decided that a cow is not a religious symbol:

Shah Jayanthi Lal Amba Lal v. Kasturi Lal Nagin Das Dosi (1968) 36 ELR 188 (Guj); Baijnath Singh Vaidya v. R.P. Singh (1968) 36 ELR 327 (All) : Bishmbhar Dayal v : Raj Rajeshwar, (1968) 39 ELR 363 at p. 376 (All); Dinesh Dang v. Daulat Ram. (1968) 39 ELR 463 at p. 476 (Raj) Shyamlal v. Mansa Din. (1968) 37 ELR 67 at p. 89 (All); B. P. Maurya v. Prakashvir Shastri. (1968) 37 ELR 137 at p. 147 (All); Sohadar Rai v. Ram Singh Aharwar, (1968) 37 ELR 176 at p. 188 (Madh Pra) : Vishwanath Pd. v. Salamat Ullah, (1965) 27 ELR 145 at p. 186 (All) and Lachchi Ram v. J. P. Mukhariya, (1953) 9 ELR 149 at p. 157 (Ele. Tri-Gwalior).

484. In addition Section 8 of the Act 40 of 1975 has made the position on this point also very clear by providing that, in Section 123 of the Act in clause (3) the following proviso shall be inserted at the end :

"Provided that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purposes of this clause".

485. As in the case of other amendments, this amendment was also challenged on behalf of the election petitioner on the ground that it could be misused. I am afraid that attacks made on such sweeping suggestions of likelihood of misuse, in future, cannot possibly succeed. It has been repeatedly laid down by this Court that the possibility of misuse of a power given by a statute cannot invalidate the provision conferring the power (See : Dr. N. B. Khare v. State of Delhi (1950) SCR 519 at p. 526 = (AIR 1950 SC 211 at p. 215) : State of W.B. v. A.A. Sarkar (1952) SCR 284 at p. 301 = (AIR 1952 SC 75 at p. 81) : R. K. Dalmia v. Justic Tendolkar (1959) SCR 279 at p. 306 = (AIR 1958 SC 538 at p. 551): T. K. Mudaliar v. Venkatachalam (1955) 2 SCR 1196 at p. 1239 = (AIR 1956 SC 246 at p. 266) : Chitrlekha v. State of Mysore, (1964) 6 SCR 368 at p. 382-383 = (AIR 1964 SC 1823 at p. 1831-1832) : M. R. Deka v. N.E.F. Rly. (1964) 5 SCR 683 = (AIR 1964 SC 600). The occasion to complain can only arise when there is such alleged misuse. Even the possibility of such misuse of this power by so responsible an official as the Election Commissioner cannot be easily conceived of.

486. It was submitted that the Election Commissioner's decision on this question was unreasonable. The best class of evidence as to what is and what is not to be reasonably regarded as a religious symbol, according to the customs, mores, traditions, and outlook of the people of a country at a certain time consists of contemporaneous decisions of Courts. It is useless to quote passages from ancient texts about the sacredness of the cow in support of the use of the cow as a religious symbol today. The use of pictures of this excellent and useful animal is so frequently made today for commercial purposes or purposes other than religious that the representation of a cow and a calf cannot, except in some special and purely religious contexts, be held, to have a religious significance. I, therefore, see no force at all in this submission of the election petitioner.

487. The only question argued with some seriousness in the election petitioner's appeal was that the election expenses which from the subject-

matter of Issue No. 9, had exceeded the limit of authorised expenditure imposed by Section 77 of the Act read with Rule 90. On this issue, the learned Judge had considered every allegedly omitted item of expense very thoroughly and had reached the conclusion that the following 3 items, totalling upto Rs. 18,183.50 had to be added to the return of election expenses of the original respondent which mentioned items totalling upto Rs. 12,892.97. These were : (1) Cost of rostrums Rs. 16,000/- (2) Cost of installation of loud-speakers Rs. 1,951/- (3) Cost of providing transport for one journey by car Rs. 232.50.

488. On this issue, the learned Judge's appreciation of evidence was not only very through and correct, but the application of the governing law on the subject also appears to me to be faultless. Ordinarily we do not sitting even in first appeals on questions of law as well as of fact in election cases, go into findings of fact arrived at without misapplication of law or errors of approach to evidence. In the case before us, two main questions and one subsidiary question, each of which is a mixed question of fact and law which deserve consideration by this Court on this issue, have been raised before us. I will deal with these questions briefly seriatim.

489. The first question is : If the party, which a candidate represents, spends or others also spend some money on his or her election, is this expenditure one which can be or should be properly included in the statement of election expenses submitted by the candidate. Arguments before us have proceeded on the assumption made by both sides that some expenditure was incurred by the Congress (R) Party and some expenditure must also have been incurred by those who either voluntarily helped or even thrust their supposed assistance whether it is was helpful or not, upon those managing the original respondent's election, which was not shown as part of her election expenses. Is the successful candidate bound under the law, to show this also as part of election expenses?

490. This question assumed special importance after the decision of this Court in *Kanwarlal Gupta v. Amarnagh Chawla*. AIR 1975 SC 308 at pp. 315-316, where a Division Bench of this Court observed:

"Now, if a candidate were to be subject to the limitation of the ceiling, but the political party sponsoring him or his friends and supporters were to be free to spend as much as they like in connections with his election the object of imposing the ceiling would be completely frustrated and the beneficent provision enacted in the interest of purity and genuineness of the democratic process would be wholly emasculated. The mischief sought to be remedied and the evil sought to be suppressed would enter the political arena with redoubled force and vitiate the political life of the country. The great democratic ideal of social, economic and political justice and equality of status and opportunity enshrined in Preamble of our Constitution would remain merely a distant dream eluding our grasp. The legislators could never have intended that what the individual candidate cannot do the political party sponsoring him or his friends and supporters should be free to do. That is

why the legislators wisely interdicted not only the incurring but also the authorising of excessive expenditure by a candidate. When the political party sponsoring a candidate incurs expenditure in connection with his election, as distinguished from expenditure on general party propaganda and the candidate knowingly takes advantage of it or participates in the programme or activity or fails to disavow the expenditure or consents to it or acquiesces in it, it would be reasonable to infer, save in special circumstances, that he impolitely authorised the political party to incur such expenditure and he cannot escape the rigour of the ceiling by saying that he has not incurred the expenditure, but his political party has done so. A party candidate does not stand apart from his political party and if the political party does not want the candidate to incur the disqualification, it must exercise control over the expenditure which may be incurred by it directly to promote the poll prospects of the candidate. The same proposition must also hold good in case of expenditure incurred by friends and supporters directly in connection with the election of the candidate."

491. After making the above-mentioned observations, the apparently broad sweep of the observations was limited as follows :

"It may be contended that this would considerably inhibit the electoral campaign of political parties but we do not think so. In the first place a political party is free to incur any expenditure it likes on its general party propaganda though, of course, in this area also some limitative ceiling is eminently desirable coupled with filing of return of expenses and an independent machinery to investigate and take action. It is only where expenditure is incurred which can be identified with the election of a given candidate that it would be liable to be added to the expenditure of that candidate as being impliedly authorised by him. Secondly if there is continuous community involvement in political administration punctuated by activated phases of well-discussed choice of candidates by popular participation in the process of nomination, much of unnecessary expenditure which is incurred today could be avoided."

492. It is not necessary to quote further from the judgement which suggests taking of steps for reform of electoral machinery so as to ensure "choice of candidates by popular participation in the process of nomination", because that would take us into a territory beyond mere interpretation of the law as it exists. It is clear from the passages cited and later parts of the judgment that the earlier decisions of this Court, requiring proof of authorisation by the candidate of the election expenditure for which he could be held responsible, and, in particular *Rananjaya Singh v. Bajinath Singh*, (1955) 1 SCR 671 = (AIR 1954 SC 749) which I shall refer to again a little later, are considered. It is enough to observe that the passages quoted above rest on the assumption that where there are special circumstances in a case which constitute a political party an implied agent of the candidate himself, the candidate will be responsible. It was also suggested there that a political party itself must exercise some control over the expenses of the candidate it sets up. The objection was to a candidate merely using the political party as a

channel or cover for expenses incurred by the candidate himself. This explains the exclusion of expenses for "general party propaganda" from those for which the candidate is accountable and liable. Such expenses could be, it was held, properly incurred by the party itself, irrespective of the source from which the party obtained funds for carrying it on. What is declared to be expense incurred by the candidate is that expense which his party may incur either as an express or implied agent of the candidate and that only.

493. The difficulty which faces the election petitioner at the outset in taking up a case of implied authorisation, on the strength of anything observed or decided by this Court in Kanwarlal Gupta's case (AIR 1975 SC 308) (supra) is that no such case was set up here. The petition does not say that the local Congress (R) Party was really an express or implied agent of the original respondent or that it had acted in a manner from which it could be inferred that the funds were really being supplied by the original respondent and were merely being spent by the party or its workers for the election under consideration. No facts or circumstances were at all indicated either in the petition or in evidence from which such inferences were possible. On the other hand what is sought to be pointed out now in the case before us is that a sum of Rs. 70,000/- was shown to have been received from some undisclosed sources by Shri Dal Bahadur Singh, the President of the District Congress Committee at Rae Bareilly, and that a large part of it was shown, from entries in the bank account of the President of this Committee, to have been disbursed during or soon after the election. The responsibility of the District Congress Committee was, however, to carry on propaganda and supply information in 3 Parliamentary Constituencies. Neither party summoned Shri Dal Bahadur Singh to give evidence so that it could not be proved what proportion of any of this sum of Rs. 70,000/- was spent and in what work and for which of the 3 Parliamentary constituencies. All that was alleged, in paragraph 13 of the petition, is that the "expenditure incurred by the respondent No. 1, Smt. Indira Nehru Gandhi and/or her election agent Shri Yashpal Kapur was much more than Rs. 35,000/- which was the permissible amount". After that particulars of 11 items were given, out of which the first was hiring of 32 vehicles whose numbers are mentioned. There is no mention whatsoever in this list of any sum paid either by the original respondent or by anyone else on her behalf to Shri Dal Bahadur Singh or of any expense incurred on behalf of the original respondent by this gentleman. The principle that no amount of evidence can be looked into on a case not set up is sufficient to dispose of this evidence of a cheque of Rs. 70,000/- received by Shri Dal Bahadur Singh.

494. It is true that the case set up is that the prescribed limit of expenditure was exceeded and the case is so stated that items beyond the list could conceivably be added. Nevertheless, unless and until there is a plea that whatever was spent by the Congress (R) Party either as an express or implied agent of the original respondent, this loop-hole left in the petition would not suffice. Section 83 (1) (b) of the Act contains the mandatory provisions that the petition "shall set forth full particulars of any corrupt

practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice."

495. The judgment of this Court, in Kanwarlal Gupta's case (AIR 1975 SC 308) (supra) discusses a number of cases decided by this Court which shows that it is not enough to prove expenditure of money by a candidate's party or friends or relations. It must be also proved that this was expenditure authorised by the candidate and incurred as the candidate's express or implied agent. These cases were :

Rananjaya Singh v. Baijnagh Singh, (1955) 1 SCR 671 = (AIR 1954 SC 749); Ram Dayal v. Brijraj Singh, (1970) 1 SCR 530 = (AIR 1970 SC 110); Magraj Patodia v. R. K. Birla, (1971) 2 SCR 118 = (AIR 1971 SC 1295) and B. Rajagopala Rao v. N.G. Ranga, (AIR 1971 SC 267).

496. After examining this catena of cases, I think, with great respect that the decision of this Court in Kanwarlal Gupta's case (AIR 1975 SC 308) (Supra) could be understood to point in a direction contrary to that in which the previous cases were decided. Hence, it appears to me that the amendment made by Act 58 of 1974 by adding the explanation (1) to Section 77(1) of the Act, could be justified as merely an attempt to restore the law as it had been understood to be previous to decision of this Court in Kanwarlal Gupta's case (supra):

"Explanation 1.— Notwithstanding any judgment, order or decision of any court to the contrary any expenditure incurred or authorised in connection with the election of a candidate by a political party or by any other association or body of persons or by any individual (other than the candidate or his election agent) shall not be deemed to be and shall not ever be deemed to have been, expenditure in connection with the election incurred or authorized by the candidate or by his election agent for the purposes of this sub-section:

Provided that nothing contained in this Explanation shall affect –

(a) any judgment, order or decision of the Supreme Court whereby the election of a candidate to the House of the People or to the Legislative Assembly of a State has been declared void or set aside before the commencement of the Representation of the People (Amendment) Ordinance, 1974.

(b) any judgment order or decision of a High Court where by the election of any such candidate has been declared void or set aside before the commencement of the said Ordinance if no appeal has been preferred to the Supreme Court against such judgment order or decision of the High Court before such commencement and the period of limitation for filing such appeal has expired before such commencement."

497. It appears to me that both parties to the case now before us were under the impression that the expenses incurred by a political party over its candidate's election was outside the prescribed limit which operated only

against expenditure by a candidate himself. Hence, the petitioner had not pleaded expenses incurred by the party of the original respondent as expenses authorised by the original respondent. The test of authorisation would naturally be the creation of a liability to reimburse whoever spends the money and not necessarily the provision of money before-hand by the candidate on whose behalf it is spent. Nevertheless the authorisation has to be set up and proved. In the written statement filed on behalf of the original respondent, it was very frankly admitted that some expenditure, incurred by the local Congress Party itself, had not been shown as election expenses of the candidate herself. This was the position because, on the side of the original respondent also, the law was understood to be as it is found now clarified by the addition of an explanation to Section 77(1) of the Act.

498. The second question which arises for consideration is; if some expenses are shown or admitted to have been incurred by the candidate's party or third persons over the election of the successful candidate, is it possible to separate it from a total expenditure on more than one constituency by some process of estimation and apportionment? Of course, this question can only arise if it is first proved that whatever expenditure was incurred by candidate's party or by some other person, who may be a friend, a relation, or a sympathiser was incurred in circumstances from which it can be inferred that the successful candidate would reimburse the party or person who incurred it. As I have already held, it is only then that expenditure could be held to be authorised by the candidate. It is not enough that some advantage accrued or expenditure was incurred within the knowledge of the candidate. This was very clearly brought out in *Rananjaya Singh v. Baijnath Singh* (1955) 1 SCR 671=(AIR 1954 SC 749). In this case, the Manager, Assistant Manager, 20 Ziladars and peons of the proprietor of an estate in Uttar Pradesh had carried on election work, after having been given a holiday on full pay by the proprietor of the estate who was the father of the successful candidate. It was contended that inasmuch as these persons were virtually employees of the candidate himself, their salary for the day must be added to the list of election expenses. This Court repelled this contention on the ground that this extra expenditure had not been authorised by the candidate or his agent. Hence it need not be shown as an item of election expense. Voluntary expenditure by friends relations, or sympathisers and expenditure incurred by a candidate's party, without any request or authorisation by the candidate, has never been deemed to be expenditure by the candidate himself. (See *Ram Dayal v. Brijraj Singh*, (1970) 1 SCR 530 = (AIR 1970 SC 110 *Magraj Patodia v. R. K. Birla*, (1971)2 SCR 118 = (AIR 1971 SC 1295).

499. An attempt was then made to pass the responsibility on to the original respondent for the expenses of at least 23 vehicles whose numbers are mentioned in a letter dated 25th February, 1971. Written by Shri Kapur, who then (was) the original respondent's election agent, and sent to the District officer, Rae Bareilly stating as follow:

"Sir, I beg to say that the District Congress Committee, Rae Bareilly has taken the following cars for election purposes in the three Parliamentary Constituencies, Rae Bareilly, Amethi and Ram Sanahi Ghat. You may, therefore, kindly release them."

After giving numbers of the vehicles the letter proceeds :

"It is therefore requested that the abovesaid cars may kindly be released without delay. The letter of the President of District Congress Committee about the abovesaid cars is enclosed here-with."

The letter of the President of the Committee, mentioned by Shri Kapur was a rather urgent request made to him by Shri Dal Bahadur Singh on 24-2-1971 (Ex. A-43), after informing him that he is in difficulties as he had tried to find out unsuccessfully the whereabouts of Shri V. Vajpayee, who was contesting election from Amethi Parliamentary Constituency and of Shri Baiznath Kureel, who was contesting the election from Ram Sanahi Parliamentary Constituency. He, therefore, asked Shri Kapur the election agent of the original respondent, to send a letter to the District Officer, who had refused to release the vehicles without the endorsement of the candidate concerned or his or her election agent.

500. It is clear from the abovementioned correspondence that Shri Kapur was not speaking on behalf of the other two candidates of adjoining Parliamentary Constituencies. He was not even undertaking to pay anything for the use of the vehicles on behalf of the original respondent. Shri Kapur also did not state that these vehicles were needed for work in the original respondent's constituency. He merely forwarded the latter with a request for compliance with what Shri D.B. Singh wanted Shri Dal Bahadur Singh was concerned and entrusted with conducting electioneering work in three adjoining Parliamentary Constituencies successfully. He had, therefore, made a frantic appeal to Shri Kapur to come to his help. Shri Kapur, without concealing any fact, had sent this very letter with a request for the release of the vehicles to the District Officer concerned. On this evidence the learned Judge came to the conclusion that it was not possible to say which vehicles, said to be jeeps had been utilized for election work and in which constituency. The learned Judge after considering the evidence recorded the finding that it was not possible to hold that the 23 vehicles in question had been used exclusively for the purposes of the election of the original respondent and not for "general party propaganda purposes" for which the original respondent was not liable to pay.

501. In *Hans Raj v. Hari Ram*. (1972) 40 Ele LR 125 at pp. 128-129 (SC) this Court in a similar situation said :

"Whichever way one looks at the matter it is quite clear in view of the decision of this Court reported in *Rananjaya Singh v. Baijnath Singh*. (1955) 1 SCR 671 = (AIR 1954 SC 749) that the expenditure must be by the candidate himself and any expenditure in this interest by others (not his agents within the meaning of the term in the election law) is not to be taken

note of. Here the hiring was by the Congress Committee which was not such an agent and therefore the amount spent by the Congress Committee cannot be taken as an amount which must compulsorily be included in the expenditure over the election by a candidate. If this be the position, we have to decide whether this amount spent on the jeeps must be taken to be an expenditure made by the candidate himself. Of that there is no evidence. The bill stands in the name of the Congress Committee and was presumably paid by the Congress Committee also. The evidence, however, is that this jeep was used on behalf of the returned candidate and to that extent we subscribe to the finding given by the learned Judge. Even if it be held that the candidate was at bottom the hirer of the jeep and the expenditure on it must be included in his account, the difficulty is that this jeep was used also for the general Congress propaganda in other Constituencies."

502. In *Shah Jayantilal Ambalal v. Kasturilal Nagindas Doshi* (1972) 42 Ele LR 307 at p. 311 this Court held :

"It is now well settled that expenses incurred by a political party in support of its candidates do not come within the mischief of Section 123 (6) read with Section 77 of the Act."

503. In *Samant N. Balakrishna v. George Fernandez*. (1969) 3 SCR 603 at p. 637 = (AIR 1969 SC 1201 at p. 1221) this Court pointed out:

"In India all corrupt practices stand on the same footing. The only difference made is that when consent is proved on the part of the candidate or his election agent to the commission of corrupt practice that itself is sufficient. When a corrupt practice is committed by an agent and there is no such consent then the petitioner must go further and prove that the result of the election in so far as the returned candidate is concerned was materially affected."

504. However, as I have already held, there is no case or evidence before us that the Congress Party was the agent, express or implied of the original respondent or acting as the channel through which any money whatsoever was spent by the original respondent. The petition could not possibly succeed on the ground of exceeding election expenses. On the other hand, on the findings given by me above, the expenses on the construction of rostrums were also erroneously added by the learned Judge. In fact it seems that other two items mentioned there were also wrongly added. Expenses of the installation and use of loudspeakers and the power supplied were certainly shown to have been borne by the Congress Party itself. It is true that when elections of persons in the position of the Prime Minister or even of Ministers, whether in the Central Government or a State Government, take place, a number of people come forward to either give or thrust their supposed aid in the election. It may be impossible for the candidate to refuse it without offending them. But it is also impossible for the Courts to make the candidate himself or herself responsible so as to impose an obligation upon the candidate to find out what expenses incurred by them were and then to add these on to the candidate's accounts of expenses. That would be, obviously, a

most unfair result. And, this is not what the law requires in this Country. The law requires proof of circumstances from which at least implied authorisation can be inferred.

505. The third and the last and a subsidiary submission on behalf of the election petitioner, on election expenses, was that, Shri Dal Bahadur Singh not having been produced by the original respondent, some sort of presumption arises against the original respondent. I do not think that it is possible to shift a burden of the petitioner on to the original respondent whose case never was that Shri Dal Bahadur Singh spent any money on her behalf. The case of *M. Channa Reddy v. Ramachandra Rao*, (1972) 40 Ele LR 390 at p. 415 (SC) was relied upon to submit that a presumption may arise against a successful candidate from the non-production of available evidence to support his version. Such a presumption under Section 114 Evidence Act, it has to be remembered, is always optional and one of fact, depending upon the whole set of facts. It is not obligatory.

506. In *Chenna Redy's case* (1972) 40 Ele LR 390 (SC) (*supra*) the evidence seemed to have resulted in a *prima facie* case whose effect the respondent had to get rid of. In the case before us the election petitioner had summoned Shri M.L. Tripathi (P.W. 59), the Secretary of the District Congress Committee, who appeared with account books of the Party at Rae Bareilly. The election petitioner could get nothing useful out of his evidence. Even if the election petitioner did not, for some reason, desire to summon Shri Dal Bahadur Singh similarly, his counsel could have requested the Court to exercise its discretionary powers under Order XVI. Rule 14 C.P.C, but this was never done. A presumption could not arise on the facts and circumstances of a case in which it could not be said that Shri Dal Bahadur Singh's evidence was necessary to discharge some burden of the original respondent. The original respondent had discharged whatever onus lay upon her by producing her own election agent Shri Kapur, who had kept her accounts. And, she had herself appeared in the witness-box and faced a cross-examination which could not be held up as an example of complete fairness and propriety. I do not quite understand what presumption could possibly arise, due to non-production of Shri Dal Bahadur Singh, against what part of her case, and to what effect. It could certainly not be suggested that there was any duty on her part to repeal some case never set up against her. It was nobody's case that the local Congress party was her agent.

507. I may now very shortly deal with the objection that, as a number of Members of Parliament belonging to the opposition parties were in detention under the preventive detention laws, which could not be questioned before the Courts of law because of the declaration of the emergency by the President there was a procedural defect in making the amendments of the Act of 1951 and the 39th Constitutional amendment.

508. Article 122 of the Constitution prevents this Court from going into any question relating to irregularity of proceedings "in Parliament". It reads as follows :

"122 (1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.

(2) No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business or for maintaining order in Parliament shall be subject to the jurisdiction of any Court in respect of the exercise by him of those powers."

509. What is alleged by the election petitioner is that the opposition Member of Parliament who had been detained under the preventive detention laws were entitled to get notice of the proposed enactment and the 39th Amendment, so as to be present "in Parliament", to oppose these changes in the law. I am afraid, such an objection is directly covered by the terms of Article 122 which debars every Court from examining the propriety of proceedings "in Parliament". If any privileges of Members of Parliament were involved, it was open to them to have the question raised "in Parliament". There is no provision of the Constitution which has been pointed out to us providing for any notice to each Member of Parliament. That, I think, is also a matter completely covered by Article 122 of the Constitution. All that this Court can look into in appropriate cases is whether the procedure which amounts to legislation or, in the case of a constitutional amendment, which is prescribed by Article 368 of the Constitution, was gone through at all. As a proof of that, however, it will accept, as conclusive evidence, a certificate of the Speaker that a Bill has been duly passed. (See *State of Bihar v. Kameshwar*, AIR 1952 SC 252 at p. 266).

510. Again, this Court has held, in *Sharma v. Sri Krishna* AIR 1960 SC 1186 at p. 1189 that a notice issued by the Speaker of a Legislature for the breach of its privilege cannot be questioned on the ground that the rules of procedure relating to proceedings for breach of privilege have not been observed. All these are internal matters of procedure which the Houses of Parliament themselves regulate.

511. As regards the validity of the detentions of the Members of Parliament, that cannot be questioned automatically or on the bare statement by counsel that certain Members of Parliament are illegally detained with some ulterior object. The enforcement of fundamental rights is regulated by Articles 32 and 226 of the Constitution and the suspension of remedies under these Articles is also governed by appropriate constitutional provisions. Their legality and regularity cannot be collaterally assailed by mere assertions made by Counsel before us. I, therefore, overrule these objections to the validity of the amendments and the 39th Amendment as we cannot even entertain them in this manner in these proceedings.

512. I will now turn to the validity of clause (4) of Article 329-A sought to be added by Section 4 of the 39 Amendment. I will quote the whole of Section 4 as some argument was advanced on the context in which clause (4) of Article 329-A occurs. Section 4 reads as follows :

"4 In Part XV of the Consitution, after Article 329, the following article shall be inserted, namely :-

“329-A. (1) Subject to the provisions of Chapter II of Part V (except sub-clause (e) of clause (1) of Article 102), no election—

(a) to either House of Parliament of a person who holds the office of Prime Minister at the time of such election or is appointed as Prime Minister after such election;

(b) to the House of the People of a person who holds the office of Speaker of that House at the time of such election or who is chosen as the Speaker for that House after such election; shall be called in question, except before such authority (not being any such authority as is referred to in clause(b) of Article 329) or body and in such manner as may be provided for by or under any law made by Parliament and any such law may provide for all other matters relating to doubts and disputes in relation to such election including the grounds on which such election may be questioned.

(2) The validity of any such law as is referred to in clause (1) and the decision of any authority or body under such law shall not be called in question in any court.

(3) Where any person is appointed as Prime Minister or, as the case may be, chosen to the office of the Speaker of the House of the People, while an election petition referred to in clause (b) of Article 329 in respect of his election to either House of Parliament or, as the case may be to the House of the People is pending, such election petition shall abate upon such person being appointed as Prime Minister or, as the case may be, being chosen to the office of the Speaker of the House of the People, but such election may be called in question under any such law as is referred to in clause (1).

(4) No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, in so far as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election of any such person as is referred to in clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void or has, before such commencement, been declared to be void under any such law and notwithstanding any order made by any Court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.

(5) Any appeal or cross appeal against any such order of any court as is referred to in clause (4) pending immediately before the commencement of the Constitution (Thirty ninth Amendment) Act, 1975, before the Supreme Court shall be disposed of in conformity with the provisions of clause (4).

(6) The provisions of this article shall have effect notwithstanding anything contained in this Constitution.”

513. Counsel for both sides are agreed that, for the purposes of the case before us, we need not consider the constitutional validity of Clauses (1) to (3) of the newly introduced Article 329-A of the Constitution. I will, therefore, concern myself only with the constitutional validity of clause (4) of Article 329-A of the Constitution.

514. Learned Counsel of the election-petitioner contended that the constituent or amending power contained in Article 368 of our Constitution had been misused to achieve some purpose which was either outside the Article or which struck at the roots of the “basic structure” or “the essential features” of our Constitution. It was submitted that the amendment is invalid on an application of the tests laid down by a majority of the 13 Judges who indicated certain basic and inviolable principles of our Constitution in *Kesavananda Bharati’s* case AIR 1973 SC 1461 (*supra*). It was contended that the newly added Article 329-A (4) of the Constitution, far from constituting a Constitutional law, which alone could be made under Article 368, did not even satisfy the tests of law, in as much as it did not lay down any general rule applicable to all cases of a particular class but was really designed to decide one particular election case, which is now before us for hearing, in a particular way. According to learned Counsel, the amending bodies had, under the guise of an exercise of constituent power, really decided a particular election dispute arbitrarily without following the elementary principles of judicial procedure or applying any intelligible norms or principles of justice either as a Court of law would have done or as any body of persons entrusted with the duty to decide a matter justly or quasi-judicially could possibly have done. The assumption underlying this argument was that setting aside the results of a judicially recorded judgment and order by declaring it void and the validation of an election held by a Court of law to be invalid necessarily involves the adoption of a judicial or a quasi-judicial procedure if the results are to appear just and not violative of the basic principles of natural justice which must be held to be parts of the Rule of law envisaged by our Constitution. What had been done by Clause (4) according to the learned Counsel for the election petitioner, was nothing short of lifting and placing the elections of the first four dignitaries of State outside the range of questionability before any authority whatsoever either in the past, present or future. As the only election out of these dignitaries still in dispute at the time of the passing of the 39th Amendment was the election of the Prime Minister to the House of the People, now under consideration in the appeals before us, it was suggested that all this was done, wholly and solely, though indirectly, with the object of validating the Prime Minister’s election as a Member of the House of Representatives in 1971. It sought to place the Prime Minister and the Speaker in a separate class by themselves as candidates at a general election for the membership of the House of Representatives. It was urged that there could be no reasonable or logical nexus between the alleged objects of such a classification and the results of the amendment made. It was urged that, in as much as a Prime Minister holds the pivotal position in the governance of the country, there could not be

a less and not more need to ensure that the election of the holder of such a high office to a Parliamentary seat had been free from any corrupt practice. It was urged that the test and the procedure for determining whether the holder of such an exalted, responsible, and important office was duly elected as a Member of Parliament could not, logically or reasonably, be different from that which ordinary Members of the Parliament had to go through. It was pointed out that in a case covered by this clause, there could be no consideration at all, if the amendment is upheld, of the validity of a past election by any authority in the future as all elections in this very special and exceptional class had been validated without any qualification and quite unconditionally. The effect was, it was urged, that the present Prime Minister was placed in a very privileged and exalted position which was not enjoyed by a past Prime Minister and which was not meant to be occupied by any future Prime Minister. Such a procedure and such a result, it was contended, made a mockery of the concept of free and fair elections under a democratic system. Furthermore, it was urged that it was destructive of the concepts of rule of law, of equality before law, and of just determination of judicially triable disputes. Taking away of even the supervisory jurisdiction of superior Courts in elections of a certain class of dignitaries was characterised as a gross violation of a basic principle of our Constitution. It was also submitted that, if what was intended to be conveyed by the amendment was that Parliament had withdrawn the case before us from the sphere of judicial scrutiny and determination and had decided in itself, as was stated in his opening address by the learned counsel for the original respondent, not merely was the basic constitutional principle of separation of powers set at naught but the primordial rule of natural justice, that no one should be a judge in his own cause, had been infringed inasmuch as the dispute was really between a majority party and the numerically minority groups or parties in the Houses of Parliament. No hearing could be given to leaders of the numerically minority groups of parties in Parliament because they were, it was submitted, illegally detained under Preventive Detention laws after a declaration of emergency by the President of India, with the result that members of Parliament who did not support the ruling party were denied access to Courts so as to secure their release from detention and could not take part in proceedings which produced the Acts amending the Act of 1951, and, the 39th Amendment. I have already dealt with and rejected the objection to the proceedings of the Houses of Parliament, on the collateral ground of allegedly illegal detentions of opposition leaders.

515. All the contentions of learned Counsel for the election petitioners, apart from the alleged procedural defect in amending the Act of 1951 and the Constitution when a number of opposition Members of Parliament are detained under the Preventive Detention laws, already dealt with by me, seemed directed towards producing two results either simultaneously or alternatively; firstly, to persuade us to hold that the constituent power had been exceeded or sought to be utilised for extraneous purposes falling outside the purview of Article 368 of the Constitution altogether; and, secondly, to

convince us that the effects of the 4th clause of Article 329-A must be such that if this purported addition to our Constitution was upheld, the “basic structure” or the “basic features” or “the underlying principles” of our Constitution will be irreparably damaged so that it could not any longer be looked upon as the same Constitution. It was submitted that the majority view in *Kesavananda Bharti’s* case (AIR 1973 SC 1461) (*supra*), which was binding upon us, will compel us to invalidate clause (4) of Article 329-A. There was, in the course of arguments, considerable overlapping between tests and considerations appertaining to the purposes and those involving the effects, consequences, or implications of clause (4) if it was upheld. It was proposed that purposes should be ascertained and their validity determined, *inter alia*, in the light of the consequences and implications of upholding the validity of the impugned clause. Both sets of contentions involved a definition of the scope of Article 368 and a determination of the exact nature of the function actually performed by the constituent authorities in passing the impugned clause (4) of Article 329-A.

516. We have heard the learned Attorney-General and the learned Solicitor-General of India, in defence of the 4th clause of Article 329-A sought to be added by the 39th Amendment, as well as Mr. A.K. Sen and Mr. Jagnath Kaushal, learned Counsel for the original respondent, who also supported the validity of the impugned clause. The 1st contention of the learned Counsel seemed directed towards inducing us not to look beyond the language to discover the purposes or the nature of the function performed in passing clause (4) of Article 329-A or its effect. This contention had necessarily to rest upon the assumption that provisions of clauses (4) and (5) and (6) of Article 329-A, sought to be introduced by the 39th Amendment were valid and had the effect of depriving this Court of jurisdiction to determine the validity of clause (4) by exploring the purposes and objects which may lie behind the plain meaning of clause (4). Our difficulty, however, is that even an attempt to give its natural and literal meaning to every word used in Clause (4) after hearing the statements made by learned counsel supporting the 39th Amendment, to the effect that Parliament had itself examined the validity of whatever order and findings on question of fact or law are referred to there, and had reached the conclusion that the order and each of the findings of fact on which it was based must be adjudged to be void and of no effect baffles us very much. This could only mean that Parliament, in its constituent capacity, had functioned as though it was a direct Court of Appeal from a judgment of the High court while an appeal in the last Court is pending – a procedure which has not been shown to have been followed so far in any case brought to our notice either decided in this country or anywhere else in the world, all the cases cited to support such a view being distinguishable on facts and law applicable.

517. In the circumstances of this case, set out above, the findings on contested questions of fact and law and the order indicated by clause (4) could only be those contained in the judgment under appeal by both sides before us. The language of clause (4) was, according to the submissions of learned

Counsel supporting the amendment, itself meant to convey that, after going into the disputed questions of fact, the constituent bodies had reached the conclusion that the order and the findings must have no legal effect. Indeed, the Solicitor-General went so far as to submit that Parliament must be deemed to be aware of the contents of the whole record of the proceedings in the High Court, including the pleadings, the evidence, and the findings in the judgment of the High Court, as these were all available to it. In other words, we must imagine and suppose that, whatever may be the actual position. Parliament had sat in judgment over the whole case as a Court of appeal would have done. But, the impugned clause (4), if valid, would compel us to make a contrary assumption in as much as it declares that all laws prior to the 39th Amendment, relating to election petitions and “matters connected therewith”, which must include the grounds given in Section 100 of the Representation of the People Act, 1951, were neither to be applied nor ever deemed to have applied to such a case as the one before us. This surely meant that they must be “deemed” not to have been applied by Parliament itself, according to the well-known rule of construction that legal fiction, introduced by a deeming provision, must be carried to its logical conclusion and we must not allow our imagination to boggle at the consequences of carrying the fiction to its logical conclusions (See: *East End Dwellings Co. Ltd v. Finsbury Borough Council*, (1952) AC 109).

518. At the same time, it was contended, and, this was especially emphasised by Mr. Jagnnath Kaushal, that Parliament and the ratifying legislatures of the State-participating in the constitution making process – had not applied any pre-existing norms but had merely declared and registered, almost automatically without any need to consider anything further or to apply any law whatsoever to any facts, what followed from the abrogation of all pre-existing law, with its procedure and norms so far as the election-petition against the original respondent was concerned. This meant that the constituent bodies, proceeding on the assumption that the High Court had rightly held the original respondent’s election to be invalid by applying the provisions of the 1951 Act, had considered it necessary to validate what really was invalid according to the 1951 Act. In view of what I have already held on merits, such an assumption, if it was there at all, could only be based on a misconception.

519. The conflicting points of view, advanced in support of the amendment, enabled the election-petitioner’s counsel to find support for his contention that the impugned clause (4) obviously meant that a considered judgment on, inter alia disputed questions of fact, however, erroneous, had been swept aside, quite uncemoniously, mechanically, and, without a semblance of quasi-judicial procedure by a purported exercise of constituent power by the constituent bodies, consisting of the two Houses of Parliament and the ratifying legislatures of the various States. He urged that the alternative contentions of Mr. Kaushal constituted an admission that no procedure whatsoever, which could be considered either reasonable or appropriate for a judicial or quasi judicial determination of any question of

fact or law was followed. He contended that whichever of the two alternative contentions of counsel supporting the 39th Amendment was accepted by us, his submission, that the amendment was ultra virus, arbitrary, and improperly motivated was made out.

520. The essence of judicial or quasi-judicial function is the application of a law which is already given by the law making authority to the judicial or quasi-judicial authority to apply. This law has to be applied to certain findings after determining the disputed questions of fact in a manner which must conform to the canons of natural justice. Learned Counsel for the election petitioner contended that it was not necessary to go beyond clause (4) to reach the conclusion that what was being done was to decide a dispute which could, under the law as it existed till then, only be judicially determined in the mode prescribed by Article 329 (b) read with the Act of 1951 which could not be circumvented even before Article 329-A engrafted exceptions on it and the Act of 1951 had been repealed retrospectively in its application to the Prime Minister. The result of a sort of consolidated legislative-cum-adjudicatory function was sought to be embodied in Article 329-A (4) by purported Constitutional amendment. He contended that we were bound to consider and decide whether the “constituent power” contained in Article 368 of the Constitution was meant to be used in this manner. Such use would, he submitted, fall outside Article 368. Hence, he submitted, there was no need to resort to principles emerging from a consideration of what may be spoken of as the basic structure or essential features of the Constitution. It was enough if we held that “constituent power” did not cover such a use made of it. Learned Counsel for the election petitioner had thus advanced an alternative contention based upon the meaning of the term “constituent power” introduced by the 24th Amendment; and in my opinion, we are duty bound to interpret Article 368 and determine the precise meaning of “constituent power” when properly called upon by a party before us to do so. Indeed, the very contention that we should so construe “constituent power” as to deny ourselves the jurisdiction to decide the validity of what was done under a purported exercise of such a power involves a determination of its meaning. I fail to see how our jurisdiction to do this could be barred by the provisions of the very amendment whose constitutional validity is challenged before us was repealed.

521. Learned Counsel supporting the 39th Amendment had, in defence of the Amendment advanced arguments which go beyond the position which was adopted to support the amendments considered by us in *Kesvananda Bharti’s case* (AIR 1973 SC 1461) (*supra*). The new argument now advanced, to use the language of the Solicitor-General in his last written submissions, is that “the power of amendment under Article 368 is “the very original power of the people which is unbroken into the legislative and the executive and the judicial.” He submitted that the implied limitations, to which the majority decision in *Kesavananda Bharti’s case* (*supra*) has committed this Court for the time being, are no longer available when considering this “unbroken”

power Mr. A.K. Sen, Learned Counsel for the original respondent, puts this very argument in the following words in his written submissions.

“In the hands of the constituent authority there is no demarcation of powers. But the demarcation emerges only when it leaves the hands of the constituent authority through well-defined channels into demarcated pools. The constituent power is independent of the fetters or limitations imposed by separation of powers in the hands of the organs of the Government, amongst whom the supreme authority of the State is allocated.

The constituent power is independent of the doctrine of separation of powers. Separation of powers is when the constitution is framed laying down the distribution of the powers in the different organs such as the legislative, executive and the judicial power. The constituent power springs as the fountain head and partakes of sovereignty and is the power which creates the organ and distributes the powers. Therefore, in a sense the constituent power is all embracing and is at once judicial, executive and legislative, or in a sense super power. The constituent power can also change the system of checks and balances upon which the separation of powers is based.”

522. The theory advanced before us may have been designed to escape the logical consequences of the majority view in *Kesavananda Bharti's* case (AIR 1973 SC 1461) (supra) which we cannot, sitting as a Bench of five Judges in this Court, overrule. The theory is, however, quite novel and has to be, I think, dealt with by us. It postulates an undifferentiated or amorphous amalgam of bare power constituting the “constituent power”. According to this theory, the power which constitutes does not need to be either constituted or prevented from exercising a power assigned by it already to a constituted authority. Hence, it is a power of a kind which is above the Constitution itself. If I am not mistaken, the learned Solicitor-General did say that the constituent power lies “outside” the Constitution. In other words, it is independent and above the Constitution itself because it operates on the Constitution and can displace it with, so to say, one stroke of its exercise. I do not think that such an extreme theory could be supported by the citation of either the majority or minority views of Judges, baring stray remarks made in other contexts, either in the *L.C. Golaknath v. State of Punjab's* case (1967) 2 SCR 672 = (AIR 1967 SC 1643) or in the *Kesavananda Bharti's* case (supra). In fact, in neither of these two cases was the question raised or considered at all by this Court whether the amending power or the “Constituent power” itself constituted such an amalgamated concentration of power, said to be distributed by the Constitution between the three different organs of a State at a “subsequent stage” whatever this may mean. The distribution of power of different kinds between the three organs was compared to delegation of authority to agents which could be withdrawn at any time by the constituent bodies.

523. If we were to accept the theory indicated above, it would make it unnecessary to have a constitution beyond one consisting of a single sentence laying down that every kind of power is vested in the constituent bodies

which may by means of a single consolidated order or declaration of law, exercise any or all of them themselves whenever they please whether such powers be executive, legislative, or judicial. Could this be the ambit of “constituent power” in our a Constitution? Would such a view not defeat the whole purpose of Constitution? Does the whole constitution so crumble and melt in the crucible of constituent power that its parts cannot be made out? Before we could accept a view which carries such drastic implications with it we will have overrule the majority view in Kesavananda Bharti’s case (AIR 1973 SC 1461) (supra). The majority view in that case, which is binding upon us, seemed to be that both the supremacy of the Constitution and separation of powers are parts of the basic structure of the Constitution.

524. If “constituent power”, by it itself, is so transcendental and exceptional as to be above the provisions of the Constitution itself, it should not, logically speaking, be bound even by the procedure of amendment prescribed by Article 368 (2) I have not found any opinion expressed so far by any learned Judge of this Court to show that the constituent power is not bound by the need to follow the procedure laid down in Article 368 (2) of the Constitution. Indeed, rather inconsistently with the theory of an absolute and unquestionable power in some undifferentiated or raw and unfettered form, operating from above and outside the Constitution, learned Counsel supporting the impugned 4th Clause in the 39th Amendment, concede that the constituent power is bound by the appropriate procedure laid down in Article 368 for the amendment of the Constitution. What they urge is that subject to this procedure, which has been followed here, the constituent power cannot be questioned because it is a “sovereign power”. The logical consequence of such an argument also is that the majority view in Kesavananda Bharti’s case (AIR 1973 SC 1461) (supra) was erroneous. It also overlooks that judicial review of laws made by Parliament is always a review of an exercise of “sovereign power”. It may be that the object of the learned Counsel in advancing this extraordinary theory was to induce us to refer this case to a much larger bench so that the majority view in Kesavananda Bharti’s case (supra) may, if necessary, be overruled. I, however, doubt whether putting forward such extreme and untenable propositions is the best method of securing such a result.

525. I think that the possible theoretical question indicated above, whatever may be the object of raising it, does deserve to be seriously considered and answered by us because it discloses a basic misconception. Therefore, I propose to consider it at a length which seems to me to be justified by our need to clarify our thinking on a basic or “key” concept without a final commitment to a particular view on it. Clearer thinking by examining a basic theoretical question from every conceivable angle, leads, I believe, to that openmindedness which is needed by lawyers no less than by any other class today so that we may, contrary to our reputation, be responsive to the inevitable challenges of change. Justice Holmes once said: “Theory is the most important part of the dogma of law as the architect is the most

important man who takes part in the building of a house” (Holmes, Collected Papers (1921) 200).

526. It seems to me that the words “sovereignty” and “sovereign power”, used repeatedly by learned Counsel defending the 39th Amendment to describe the constituent power, should for several good reasons, be avoided, so far as possible, by lawyers who seek that clarity of thought for which precision in language is the first requirement. One of these reasons was given by Lord Bryce (Studies in “History and Jurisprudence” (1901) (503-504)). “The frontier districts, if one may call them so, of Ethics of Law and of political science have been thus if tested by a number of vague or ambiguous terms which have produced many barren discussions and caused much needless trouble to students... No offender of this kind has given more trouble than the so-called ‘Doctrine of Sovereignty’. Prof. Mellwain, however, opined: “But this very fact is proof of its vital importance in our modern world, and the wide variety of the views held concerning its essence, as well as the conflicting conclusions to which these views still lead, may furnish sufficient excuse for another attempt to clarify some of our ideas touching this central formula under which we try to rationalize the complicated facts of our modern political life.” Another reason for eschewing such expressions, so far as possible, is that they are “emotive” or of a kind about which Mr. Leonard Schapiro, (writing on “Key concepts in Political Science” Series, at p. 7) rightly observed, “Emotive words such as ‘equality. ‘dictatorship’, ‘elite’ or even ‘power’ can often, by the very passions which they raise, obscure a proper understanding of the sense in which they are, or should be, or should not be, or have been used. Confucius regarded the ‘rectification of names’ as the first task of government. ‘If names are not correct, language will not be in accordance with the truth of things’, and this in time would lead to the end of justice, to anarchy and to war”. At any rate, in America, the concept of State Sovereignty, ranged against that of national sovereignty, did produce a civil war which is said to have been precipitated by the decision of the American Supreme Court in *Dred Scott v. Sandford*, (1856) 19 How. 393.

527. I must preface my observations here about the concepts of “sovereignty” and exercise of “sovereign power”, between which I make a distinction with two kinds of explanation. The first kind involves an exposition of a functional or sociological point of view. I believe that every social, political, economic, or legal concept or doctrine must answer the needs of the people of country at a particular time. I see the development of concepts, doctrines, and institutions as responses to the changing needs of society in every country. They have a function to fulfil in relation to national needs. The second type of explanation may be called historical or meant merely to indicate and illustrate notions or concepts put forward by thinkers at various times in various countries so as to appropriately relate them to what we may find today under our Constitution. We have to appreciate the chronology or stages of their development if we are to avoid trying to fit into our Constitution something which has no real relevance to it or bearing upon its contents or which conflicts with these. It must not, if I may so put it, be

constitutionally “indigestible” by a constitution such as ours. Of course, it is not a secret that we have taken some of the basic concepts of our Constitution from British and American Constitutions in their most developed stages. That too must put us on our guard against attempts to foist upon our constitution something simply because it happens to be either a British or American concept of some particular period which could not possibly be found in it today. Therefore, both types of explanation appear to be necessary to an exposition of what may or may not be found in our Constitution.

528. I certainly do not think that Judges of this Court have or should think that they have the power to consciously alter, under the guise of judicial interpretation, what the Constitution declares or necessarily implies even though our pronouncements, interpreting the Constitution, may have the effect of contributing something to the growth or even change of Constitutional law by clearing doubts, removing uncertainties, or filling up of gaps to a limited extent. If the law embodied in our Constitution, as declared by this Court, is not satisfactory. I do not think that we can or should even attempt to stand in the way of a change of any kind sought through appropriate constitutional means by the constitutionally appointed organs and agencies of the State. If, however, this Court is asked to declare as valid what seems to it to fall clearly outside the ambit of the Constitution, and, indeed, what is even claimed to be operating from outside the Constitution and described as a supra-Constitutional power, there may be no alternative left to it except to declare such a claim to be really outside the Constitution. If we were to do that we would only be accepting the professed basis of the claim without conceding its constitutional validity. After all we are really concerned with the questions of constitutional validity which can only be resolved by references to what the Constitution contains, either expressly or by a necessary implication, and not with what is beyond its range except in so far as this also may be necessary to explain what is or what is deemed to be a part of our Constitution.

529. The term “sovereign” is derived from the Latin word “Superanus” which was akin to “Suzerian” suggesting a hierarchy of classes which characterised ancient and medieval societies. In its origin, it is an attribute assigned to the highest living human superiors in the political hierarchy and not some abstract quality of a principle or of a law contained in a document – a meaning as will be shown here, which emerges clearly later. In times of anarchic disorder or oppression, by local straps or chieftains or barons or even bullies and criminals, ordinary mortals have sought the protection of those who could give it because of their superior physical might. No book or document could provide them with the kind of help they needed. They looked upto their “Sovereign liege and Lord” as the medieval monarch was addressed by his subjects, for protection against every kind of tyranny and oppression.

530. The Greeks and Romans were not troubled by theories of “Sovereignty” in a State. The principle that Might was Right was recognised as the unquestioned legally operative principle at least in the field of their

Constitutional laws. Greek philosophers had, however, formulated a theory of a Law of Nature which was morally, above the laws actually enforced. In later stages of Roman Law, Roman jurists also, saturated with Greek notions of an ethically superior law of Nature, said that the institution of slavery, which gave the owner of a slave theoretically absolute powers of life and death over the slave, just like the powers of a pater-familias over his children, was contrary to jus naturale although it was recognised by just gentium, the laws of then civilised world. Aristotle, in his analysis of forms of Government, had emphasized the importance of the Constitution of a State as a test or determinant of sovereign power in the State. And, Roman jurists, had indirectly cleared the path for the rise of modern legalism and constitutionalism by rescuing law itself from the clutches of a superstitious reverence for customs, surrounded with ceremonial and ritualistic observances and cumbersome justice defeating formalism, through fiction and equity, and forged a secular and scientific weapon of socio-economic transformation. All this was very useful in preparing for an age in which secular law could displace religion as the “control of controls” (see Julius Stone’s “Province and Function of Law,” 1961 Edn. pp. 754, 767).

531. Romans not only clarified basic notions but developed a whole armoury of new forms in which law could be declared or made, Lex, Plebiscitum, Magistratum Edicta, Senatusconsulta, Responsa Prudentium, Principum Placita. The last mentioned consisted of orders of Roman Emperors which were of various kinds, some of general application to cases of particular kinds and others for particular individual cases: Edicta, Decreta, Mandata, Rescripta. They had the “force of law” or “Lex” which could be roughly equated with our statutory law. “Decreta” were issued as decisions on individual disputes, in exercise of the Emperor’s power “under” the authority of “Lex de Imperio”, although “in the classical period it was firmly established that what the Emperor ordained had the force of law” (See R.W. league on Roman Law, Edn. 1961 p. 32). The point to note is that even in the embryonic stages of Government through legislation lawmaking and decision of individual cases are found distinctly separate.

532. After the break-up of the Roman Empire, there were attempts in medieval Europe, both by the Church and the Kings, to develop spiritual and temporal means for checking wrong and oppression. Quests for the superior or a sovereign power and its theoretical justifications by both ecclesiastical and lay thinkers were parts of an attempt to meet this need. The claims of those who, as vicars of God on earth, sought to meddle with mundane and temporal affairs and acquire even political power and influence were, after a struggle for power, which took different forms in different countries, finally defeated by European Kings with the aid of their subjects. Indeed, these Kings tries to snatch, and, not without success, to wear spiritual crowns which the role of “defenders of the faith” carried with them so as to surround themselves with auras of divinity.

533. The theory of a legally sovereign unquestionable authority of the King, based on physical might and victory in battle, appears to have been

developed in ancient India as well, by Kautaliya, although the concepts of a Dharma, based on the authority of the assemblies of those who were learned in the dharmashastras, also competed for control over exercise of royal secular power. High philosophy and religion, however, often seem to have influenced and affected the actual exercise of sovereign power and such slight law-making as the King may have attempted. The ideal King, in ancient India, was conceived of primarily as a Judge deciding cases or giving orders to meet specific situations in accordance with the Dharma Shastras. It also appears that the actual exercise of the power to administer justice was often delegated by the King to his judges in ancient India. Indeed, according to some, the theory of separation of powers appears to have been carried so far (See: K.P. Jayaswal in "Manu and Yajnavalkya" – A basic History of Hindu Law – 1930 Edn. p. 82) that the King could only execute the legal sentence passed by the Judge.

534. We know that Semetic prophets, as messengers of God, also became rulers wielding both spiritual and political temporal power and authority although to Jesus Christ, who never sought temporal power, is ascribed the saying: "render unto Caesar the things that are Caesar's and to God things that are God's. According to the theory embodied in this saying, spiritual and temporal powers and authorities had to operate in different orbits of power altogether. Another theory however, was that the messenger of God had been given the sovereign will of God Almighty which governed all matters and thus could not be departed from by any human authority of ruler In the practical administration of justice, we are informed, Muslim caliphs acknowledged and upheld the jurisdiction of their Kazis to give judgment against them personally. There is an account of how the Caliph Omar, being a defendant in a claim brought by a Jew for some money borrowed by him for purposes of State, appeared in person in the Court of his own Kazi to answer the claim. The Kazi rose from his seat out of respect for the Caliph who was so displeased with this unbecoming conduct that he dismissed him from office. (See: Sir A. Rahim's "Muhammadan Jurisprudence," (1958) p. 21)

535. The theory, therefore, that there should be a separation of functions between the making of laws, the execution of laws, and the application of laws, after ascertaining facts satisfactorily, is not new. It is embedded in our own best traditions. It is dictated, if by nothing else, by common sense and the principle of division of labour, without an application of which efficient performance of any duties cannot be expected.

536. We may now look back at the theory and practice of sovereignty in Europe. There, wise Kings, in the Middle ages, sought the support of their subjects in gatherings or "colloquia", which in the words of Mr. De Juvenile (See: "Sovereignty an Inquiry into the Political Good" p. 177), "had the triple character of a session of justice, a council of State and the timid beginnings of a legislative assembly were the means by which the affairs of the realm came more and more into the hands of the King". He goes on to observe: "The council of the King and the Courts of justice progressively developed an

independent life, the assembly remaining under the name of Parliament in England and States-General in France.”

537. Bodin, writing in the reign of Henry the III of France (1551 to 1589), viewed sovereignty as an absolute unlimited power which, though established by law, was not controlled by it. According to him, under an ideal system, sovereignty was vested in the King by divine right. The King’s word was law. But, even according to Bodin, although the Sovereign was free from the trammels of positive law, as he was above it, yet, he was “bound by divine law and the law of nature as well as by the common law of nations which embodies principles distinct from these” (See: Dunning’s History of Political Theories”: Ancient and Medieval” p. 28). Hobbes, a century later continued this line of thinking on an entirely secular and non-moral plane. He opined: “Unlimited power and unfettered discretion as to ways and means are possessed by the sovereign for the end with a view to which civil society is constituted, namely, peace and escape from the evils of the state of nature”, in which the life of individuals was “nasty, brutish, and short.” Although, Hobbes visualised the existence of a social compact as the source of the authority of the sovereign, yet, he looked upon the compact only as a mode of surrender by the subjects of all their individual rights and powers to the sovereign who could be either an individual or a body of persons. Subjects, according to him, had no right to rely upon the compact as a means of protection against the sovereign. He provided the fullest theoretical foundations of a Machiavellian view of sovereignty.

538. As we know, in the 17th and 18th centuries, European monarchs came in sharp conflict with the representatives of their subjects assembled in “Parliament” in England and in “States-General” in France. And, theories were put forward setting up, as against the claims of Kings to rule as absolute sovereigns by indefeasible divine right, no lesser claims to inviolability and even divinity of the rights of the people. But, theories apart, practice of the art of Government proves that the effective power to govern, by the very nature of conditions needed for its efficient exercise, has had to be generally lodged in one or few especially in times of crisis, but not in all those who represent the people even under democratic forms of Government. Direct democracy, except in small city States such as those of ancient Greece, is not practically feasible.

539. Theories of popular sovereignty put forward by Locke and Rousseau came to the forefront in the 17th and 18th centuries— an era of revolutionary changes and upheavals. The theory of certain immutable individual natural rights, as the basis of a set of positive legal rights, essential and necessary to the fulfilment of the needs of human beings as individuals, was advanced by Locke. He visualised a social contract as a means of achieving the welfare of individuals composing Society. He also advocated separation of powers of Government in a Constitution as a method of securing rights of individual citizens against even their own Governments. Montesquieu elaborated this theory. The ideas of Rousseau were amongst those which contributed to produce that great conflagration, the French Revolution which was described

by Carlyle as the “bonfire of feudalism.” Government, according to Rousseau, in all its Departments, was the agent of the General Will of the sovereign people whose welfare must always be its aim and object, But, the General Will for the time being was also liable to err about the particular means chosen to achieve the ends of good Government. There was, according to Rousseau, also another part of the “General Will” which was more permanent and stable and unerring and decisive. He hinted that there was what Bosanquet (See: The philosophical Theory of the State – Chap. V) called the “Real Will”, the basis of which was found in Rousseau’s philosophy. As pointed out by T.H. Green, in his Lectures on “Principles of Political Obligation.” (1931 Edn P. 82) Rousseau’s theory of sovereignty was designed to bring out that:

“there’s on earth a yet adjuster thing, Veiled though it be, than Parliament and King.”

T.H. Green said: “It is to this ‘auguster thing’, not to such supreme power as English lawyers held to be vested in ‘Parliament and King’, that Rousseau’s account of the sovereign is really applicable.”

540. The ideas of Rousseau were subsequently used by Hegelian and Idealist political philosophers to deify the State as the repository of the “Real Will” of the people and by Marxists to build their theory of a dictatorship of the proletariat. But, the views of Locke and Montesquieu were sought to be given a practical form by American Constitution makers, who imbued with them devised a machinery for the control of sovereign power of the people placed in the hands of the three organs of State so that it may not be misused. Suspicion of Governmental power and fear of its misuse, which characterised liberal democratic thinking, underlay the doctrine of separation of powers embodied in the American Constitution.

541. “The merits of democracy”. According to Bertrand Russel (See: “Power: A new Social Analysis” p. 187) are negative: it does not insure good Government, but it prevents certain evils.” He pointed out (at p. 188):

“It is possible , in a democracy, for the majority to exercise a brutal and wholly unnecessary tyranny over a minority The safeguarding of minorities, so far as is compatible with orderly Government, is an essential part of the taming of power.”

He also said (at p. 192):

“Where democracy exists, there is still need to safeguard individuals and minorities against tyranny, both because tyranny is undesirable in itself, and because it is likely to lead to breaches of order. Montesquieu’s advocacy of the separation of legislative, executive and judiciary, the traditional English belief in checks and balances, Bentham’s political doctrines and the whole of nineteenth century liberalism, were designed to prevent the arbitrary exercise of power. But such methods have come to be considered incompatible with efficiency.”

542. Some quite honest, upright, and intelligent people think that the inefficiency, the corruption, the expense the waste of time and efforts, and the delay in accomplishing what they regard as much too urgently needed socio-economic and cultural transformations of backward peoples today, involved in treading the democratic path, are so great that they would readily sacrifice at least some of the democratic processes and such safeguards against their misuse as separation of powers and judicial review are meant to provide. They would not mind taking the risk of falling into the fire to escape from what they believe to be a frying pan. Some may even agree with Bernard Shaw, who liked to look at everything turned upside down in attempts to understand them, that Democracy, with all its expensive and time-consuming accompaniments, is even in the most advanced countries only a method of deluding the mass of the people into believing that they are the rulers whilst the real power is always enjoyed by the few who must be judged by the results they produce and not by their professions. Others regard democracy as the only means of achieving the highest good and the greatest happiness of the greatest number. They consider its maintenance to be inextricably bound up with the preservation of the basic individual freedom and a supporting mechanism or structure of checks and balances, separation of powers and judicial review. What some believe to be obstacles to any real progress are looked upon by others as almost sacred institutions essential for the protection of their lives and liberties, hearths and homes, occupations and means of livelihood, religious, languages, and cultures. Inevitability of change is, according to some, the basic and inescapable law of all life, the only questions to be considered being its pace and direction: how soon or how late and whether the change is to be for the better or for the worse? "El Dorado", some believe, lies ahead. Our march towards it, they say, should be orderly and disciplined. To others all change is anathema as it is generally for the worse. The Golden Age, some believe lay in the past. Salvation of mankind, they think lies in a return to the imagined pristine virtues of that past. Some assert that certain amendments of our Constitution have "defaced and defiled" it (See: Mr. Palkhivala's "Our Constitution"). Others maintain that these very amendments have made our Constitution a more potent instrument of those socio-economic and cultural transformations for which the Constitution was designed (See: Dr. V.A. Seyid Muhammad's "Our Constitution for Haves or Havenots?")

543. Judges must, no doubt, be impartial and independent. They cannot, in a period of intensified socio-economic conflicts, either become tools of any vested interests, or function, from the bench, as zealous reformers propagating particular course. Nevertheless, they cannot be expected to have no notions whatsoever of their own, or to have completely blank minds on important questions indicated above which though related to law, really fall outside the realm of law. They cannot dwell in ivory towers or confine their processes of thinking in some hermetically sealed chambers of purely legal logic artificially cut off from the needs of life around to which law must respond. Their differing individual philosophies, outlooks and attitudes on

vital questions, resulting from differences in temperament, education, tradition, training interests and experiences in life, will often determine their honest choices between two or more reasonably possible interpretations of such words as “amendment” or “constituent power” in the Constitution. But, on certain clear matter of principle, underlying the Constitution, no reasonable person could entertain two views as to what was or could be really intended by the Constitution makers. One of these matters, clear beyond the region of all doubt, seems to me to be that the judicial and law making functions, however broadly conceived, could not possibly have been meant to be interchangeable. They are not incapable of distinction and differentiation, in any constitutionally prescribed sphere of operation of power including that of "constituent power". Each has its own advantages and disadvantages and its own natural modus operandi.

544. A lamentable example of what took place in the course of English constitutional history when a House of Commons, composed of very intelligent and learned people, one of whom, Holt, subsequently became a distinguished Chief Justice of England, took upon itself to sit in judgement on a decision of two Judges of the King's Bench Division, one of whom was suspected of being a partisan of Royal prerogative and power at a time when a struggle for supremacy between the competing legal claims of the King, as the titular sovereign, and those of the House of Commons, as representing the people, was still going on. In strict law which was unwritten, the position on that problem of power was not quite clear at that time. The episode is thus described by Lord Denman, C. J., in *Stockdale v. Hansard*, (1839) 112 ER 1112 (at p. 1163):

"The next case to which I advert in truth embraced no question of privilege whatever, but, as one of the highest authorities in the States has thought otherwise, I shall offer some comments upon it, I mean *Jay v. Topham*, (112 How St. Tr. 821). The House of Commons ordered the defendant, their serjeant-at-arms, to arrest and imprison the plaintiff for having dared to exercise the common right of all Englishmen, of presenting a petition to the King on the state of public affairs, at a time when no Parliament existed. For this imprisonment an action was brought. The declaration complained, not only of the personal trespass, but also of extortion of the plaintiff's money practised by defendant under colour of the Speaker's warrant. The plea of justification under that warrant, which could not possibly authorise the extortion, even if it could the arrest, was overruled by this Court, no doubt with the utmost propriety, for the law was clear; Lord Ellenborough points this out in the most forcible manner, in 14 East 109. Yet for this righteous judgment C.J. Pemberton and one of his brethren were summoned before the Convention Parliament, when they vindicated their conduct by unanswerable reasoning, but were, notwithstanding, committed to the prison of Newgate for the remainder of the session. Our respect and gratitude to the Convention Parliament ought not to blind us to the fact that this sentence of imprisonment was as unjust and tyrannical as any of those acts of arbitrary power for which they deprived King James of his Crown. It

gave me real pain to hear the Attorney-General contend that the two Judges merited the foul indignity they underwent, as they had acted corruptly in concert with the Duke of York. In support of this novel charge, he produced no evidence, nor any other reason but that the plea, as set out in Nelson's Abridgement (a), appears to have been in bar, and not to the jurisdiction. But the Commons, who knew their own motives, made no such charge: the record produced there, on law, exhibits a bad plea for the reasons assigned by Lord Ellenborough, and the judgment punished by the Commons could not have been different without a desertion of duty by the Judges."

[*(a)* 2 Nels, Abr. 1248. The plea there is that pleaded, not in *Jay v. Topham*, but in *Verdon v. Topham*. Sec. 14 East, 102 Note (a).]

545. In *Stockdale v. Hansard*, (1839), 112 ER 1112 (*supra*) the action of the House of Commons, on *Jay v. Topham*, 112 How St Tr 821 (*supra*), was practically declared to be illegal or unconstitutional for arbitrariness. The sovereign British Parliament, however, did not alter but has acquiesced in the law as stated by Lord Denman who pointed out, by references to a number of precedents, that Common Law Courts had continuously been determining questions relating to the very existence of an alleged privilege and defining its orbit on claims based on the ground of a Parliamentary privilege. And English Courts have gone on doing this unhesitatingly after *Stockdale v. Hansard* (*supra*), just as they had done earlier, as part of their function and duty to interpret and declare the law as it exists.

546. Let me go back a little further to the time when another English Chief Justice, Sir Edward Coke, who, on being summoned, with his brother Judges, by King James the 1st, to answer why the King could not himself decide cases which had to go before his own Courts of justice, asserted:

"X X X X no King after the conquest assumed to himself to give any judgment in any cause whatsoever, which concerned the administration of justice within this realm, but these were solely determined in the Courts of Justice."

When the King said that "he thought the law was founded on reason, and that he and others had reason, as well as the Judges", Coke answered:

" True it was, that God had endowed his Majesty with excellent science, and great endowments of nature, but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgement of the law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it, and that the law was the golden metwand and measure to try the causes of the subjects, and which protected his Majesty in safety and peace."

(The "Higher Law" background of American Constitutional law by Edward S. Corwin p. 38–39)

547. We know that Coke even advanced the claim, in *Bonham's case* (1610) 8 Co. Rep 118A that Courts could invalidate acts Parliament if they contravened rules of natural justice such as that a man shall not be heard before he is condemned or that he should be a Judge in his own cause. As Iovr Jennings points out, in an appendix to "The Law and the Constitution" (5th Edn. 1959 p. 318) the theory of Parliamentary sovereignty or supremacy could, by no means, be said to be firmly established in England in Coke's time.

548. Blackstone, while enunciating the theory of Parliamentary sovereignty in the 19th century, as it was to be later expounded in the 20th century by Prof. A.V. Dicey, also claimed superiority for "the law of nature which was common to all mankind." He said about this law":

"It is binding over all the globe, in all countries and at all times: no human laws are of any validity if contrary to this, and such of them as are valid derive all their force and all their authority, immediately or immediately, from this original."

(See: Dicey – Law of the Constitution p. 62)

549. It is a matter of legal and Constitutional history that English Judges finally rejected claims based upon vague philosophical concepts or upon a law of nature or appeals to the "yet august thing" pitted against statutory law except in so far as certain rules of natural justice and reason could impliedly be read into acts of Parliament due to absence of statutory prohibition and the need to observe them having regard to the character of the function required by a statute to be performed. Constitutional historians such as Holdsworth, have pointed out how English Common Lawyers, some presiding as Judges over King's Courts of Justice, other sitting in Parliament as Legislators, joined hands to evolve, sustain, and give life to principles of "Sovereignty of Parliament" and the "Rule of Law" as understood by them. Dicey asserted, in his "Law of the Constitution", that both these principles so operated as to reinforce each other instead of coming into conflict with each other. One wonders whether this could be said of later times when the need for more rapid transformations of social and economic orders, in an effort to build up a welfare State in Britain, led to serious curtailment of what were at one time considered natural and inviolable rights and to adoption of legislative devices such as Henry VIIIth clause. We know that these developments evoked a powerful protest from a Chief Justice of England, Lord Hewart, who wrote a book on the subject: "New Despotism." Today, however, it cannot be said that the Courts of justice in England do not see the implications of a welfare Socialistic State which may demand the curtailment of liberties of subjects in many directions in order that the substance of democratic freedom, only attainable through removal of economic, social and educational disparities and barriers, may be attained.

550. Willis, dealing with the development of American Constitutional Law, wrote about the claim of Coke mentioned above, to invalidate Acts of

Parliament by reference to certain fundamental principles of natural justice and of common law (See Willis on Constitutional Law— Edn. 1936 p. 76).

“This dictum of Coke, announced in *Dr. Monham’s case* (1610) 8 Co. Rep. 118-A was soon repudiated in England, but the doctrine accounced in Coke’s dictum found fertile soil in the United States and sprouted into such a vigorous growth that it was applied by the United States Supreme Court in the decision of cases coming before it, and it has been said that the doctrine of the supremacy of the Supreme Court is the logical conclusion of Coke’s doctrine of control of the Courts over legislation.”

551. It seems to me that judicial review of all law making, whether it appertains to the sphere of fundamental law or of ordinary law, is traceable to this doctrine of judicial control by reference to certain basic principles, contained in a Constitution and considered too inviolable to be easily alterable. It may be that this doctrine is unsuitable for our country at a time when it is going through rapid socio-economic transformation. Nevertheless, so long as the doctrine is found embodied in our Constitution, we cannot refuse to recognise it.

552. In America, there was some doubt whether the doctrine of judicial review of al legislation naturally flowed out of the vesting of judicial power by Section 1 of Ariticle 3 of their Constitution which says:

“The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may, from time to time, ordain and establish.”

(Willis on Constitutional Law— p. 1020). There is no article there, like Article 13 of our Constitution, which declared any kind of legislation abridging or taking away fundamental rights to be “void”. The doubt was not without substance. It was removed by Chief Justice Marshall whose judgment in *Marbury v. Madison*, 1803 Cranch 137 firmly established the doctrine of judicial review and the supremacy of the Supreme Court of America, in the judicial field of interpretation, as the mouthpiece of the Constitution and therefore, of the “Real Will” of the people themselves. The Constitution, as the basic or fundamental law of the land, was to operate there as the touchstone of the validity of ordinary laws just as the validity of laws made by British colonial legislatures was tested by reference to the parental Act of the British Parliament.

553. Under our Constitution, by Article 141 of the Constitution, power is vested only in the Supreme Court and in no other organ or authority of the Republic to declare the law “which shall be binding on all courts within the territory of India.” Article 143 of the Constitution of India also shows that whenever questions of fact or law have either arisen or are likely to arise, the President of India may, in view of their public importance seek the opinion of the Supreme Court, by a reference made to the Court. The procedure on such a reference is that of a judicial authority which hears those interested and then gives its opinion. Article 32 of the Constitution gives a wide power to the

Supreme Court “to issue directions or orders or writs”, which is larger than that of the British Courts issuing prerogative writs, although it is confined to the enforcement of the rights conferred by part 3 dealing with fundamental rights. The power of the High Courts of the various State under Article 226 of the Constitution to issue appropriate directions, orders, or writs “to any person or authority including in appropriate cases any Government”, within the territories under its jurisdiction, extends to “any other purpose”, that is to say, to purposes other than enforcement of fundamental rights. Article 227 also contains the power of a High Court to superintend the functioning of “all Courts and Tribunals” within its jurisdiction. These powers of the High Courts are subject to appeals to the Supreme Court, which is also a repository of a special jurisdiction under Article 136 to grant special leave to appeal “from any judgment, decree determination, sentence or order in any cause or matter passed or made by any Court or Tribunal in the territory of India.” It is true that there is no mention or vesting of judicial power, as such, in the Supreme court by any Article of our Constitution, but , can it be denied that what vests in the Supreme Court and High Courts is really judicial power? The Constitution undoubtedly specifically vests such power, that is to say, power which can properly be described as “judicial power," only in the Supreme Court and in the High Courts and not in any other bodies or authorities, whether executive or legislative, functioning under the Constitution. Could such a vesting of power in Parliament have been omitted if it was the intention of Constitution makers to clothe it also with any similar judicial authority or functions in any capacity whatsoever?

554. The claim, therefore, that an amalgam or some undifferentiated residue of inherent power, incapable of precise definition and including judicial power, vests in Parliament in its role as a constituent authority, cannot be substantiated by a reference to any Article of the Constitution whatsoever, whether substantive or procedural. Attempts are made to infer such a power from mere theory and speculation as to the nature of the “Constituent power” itself. I do not think that, because the constituent power necessarily carries with it the power to constitute judicial authorities, it must also, by implication, mean that the Parliament, acting in its constituent capacity, can exercise the judicial power itself directly without vesting it in itself first by an amendment of the Constitution. The last mentioned objection may appear to be procedural only, but, as a matter of correct interpretation of the Constitution, and even more so, from the point of view of correct theory and principle, from which no practice should depart without good reason, it is highly important.

555. This impels me to consider such theories of sovereignty as we may find embedded in our Constitution. The term sovereign is only used in the preamble of our Constitution, which says.:

“We the people of India, having solemnly resolve to constitute India into a Sovereign Democratic Republic and to secure to all its citizens:

... ..

...

In our constituent Assembly this twenty sixth day of November, 1949 do hereby adopt enact and give to ourselves this Constitution.”

556. This Court, exercising the powers vested in it under the Constitution to declare the law of the land, cannot go behind the clear words of the Constitution on such a matter. We have to presume that the Constitution was actually made by the people of India by virtue of their political sovereignty which enable them to create a legally Sovereign Democratic Republic to which they consigned or entrusted, through the Constitution, the use of sovereign power to be exercised, in its different forms, by the three different organs of Government, each acting on behalf of the whole people, so as to serve the objects stated in the Preamble. This reference to “the people of India” is much more than a legal fiction. It is an assertion in the basic legal instrument for the governance of this country of the fact of a new political power. The legal effect of the terms of the instrument is another matter.

557. It has been pointed out, in the Kesvananda Bharati’s case (AIR 1973 SC 1461) (supra), that the preamble of our Constitution did not, like that of the American Constitution, “walk before the Constitution”, but was adopted after the rest of the Constitution was passed so that it is really a part of the Constitution itself. It means that the Constitution is a document recording an act of entrustment and conveyance by the people of India, the political sovereign, of legal authority to act on its behalf to a “Sovereign Democratic Republic.” “This Constitution” has a basic structure comprising the three organs of the Republic the Executive, the Legislature and the Judiciary. It is through each of these organs that the Sovereign Will of the People has to operate and manifest itself and not through only one of them. Neither of these three separate organs of the Republic can take over the function assigned to the other. This is the basic structure or scheme of the system of Government of the Republic laid down in this Constitution whose identity cannot, according to the majority view in Kesvananda’s cases (supra), be changed even by resorting to Article 368. It necessarily follows, from such view, that Sovereignty, as the power of taking ultimate or final decisions on broad politico-legal issues involved in any proposed changes in the law, becomes divisible. The people are not excluded from the exercise of it. They participate in all the operations of the Republic through the organs of the State. They bind themselves to exercise their individual and collective rights and powers only in the ways sanctioned and through agencies indicated by the Constitution. They Republic is controlled and directed by the Constitution to proceed towards certain destinations and for certain purposes only. The power to change even the direction and purposes is itself divided in the sense that a proposed change, if challenged, must be shown to have the sanction of all the three organs of the Republic, each applying its own methods and principles and procedure for testing the correctness or validity of the measure. This result, whether we like it or not, necessarily follows from our present constitutional structure and scheme. If the judicial power operates here like a brake or a veto, it is not one which can be controlled by any advice

or direction to the judiciary as is the case in totalitarian regimes. In our system, which is democratic, its exercise is left to the judicial conscience of each individual judge. This is also a basic and distinguishing feature of democracy as Prof. Friedman indicated in his "Law in a Changing Society" (p. 61) quoted by me in Kesvananda Bharti's case (supra) at p. 859.

558. In Kesvananda Bharti's case (AIR 1973 SC 1461) (supra), I had approvingly quoted the views of Prof. Earnest Barker, who in his "social and Political Theory". Claiming to be elaborating the theory underlying the preamble to our own Constitution, pointed out that in as much as the Constitution is the instrument which regulates the distribution between and exercise of sovereign power, by the three organs of the State, and it is there constantly to govern and to be referred to and to be appealed to in any and every case of doubt and difficulty. It could itself, conceptually, be regarded as the true or "ultimate" sovereign, that is to say, Sovereign as compared with "immediate" sovereignty of an organ of the Republic acting within its own sphere and at its own level.

559. Of course, inasmuch as the power of altering every feature of the Constitution remains elsewhere politically, the Constitution is neither the ultimate "political" sovereign nor a legally unalterable and absolute sovereign. All constitutional and "legal" sovereigns are necessarily restrained and limited sovereigns. I thought and still think that such a working theory should be acceptable to lawyers, particularly as the dignitaries of State, including Judges of superior Courts, and all the legislators, who have to take oaths prescribed by the Third Schedule of our Constitution, swear "allegiance" to the Constitution as though the documents itself is a personal Ruler. This accords with our own ancient notions of the law as "The King of Kings" and the majesty of all that it stands for: The Rightfulness of the Ends as well as of the means.

560. The theory outlined above would of course, be unacceptable if sovereignty must necessarily be indivisible and located in a determinate living person or persons..... a really medieval concept which is not generally employed today even to describe the titular hereditary monarchs as "sovereigns", although the dictionaries may still give the derivative meaning of "sovereign" as the human ruler. Modern theories of even political sovereignty advanced by the Pluralist School..... e.g. Gierke, Duguit, Mc Iver, Laski... look upon it as divisible and not as absolute and unlimited. Indeed, they go to the extent of practically denuding sovereignty of all its customary connotations, Duguit abandons "sovereignty" as an obsolescent doctrine and displaces it by the ruling principle of "social solidarity." Mc Ivor thinks that the traditional concept of sovereignty, dominated too long by legalistic Austinian views needs to be discarded. His conclusion is that the State. With which doctrine of sovereignty has been bound up, is "the association of associations", merely regulates the "principles of association" or relations between individuals and associations in the interests of Society as a whole. He wrote:

“At any moment the State is more the official guardian than the maker of the law. Its chief task is to uphold the rule of law, and this implies that it is itself also the subject of law, that it is bound in the system of legal values which it maintenance.”

(See: R.M. Mac Iver: “The Modern State” p. 478)

Laski, while mainly accepting this rather negative approach, reminiscent of 19th century Liberalism, would accord the State a much more positive role in the interests not only of social order but also of socio-economic engineering and progress.

561. Marxists, who saw in the State and its laws and all institutions supporting an existing social order, the means of oppression and exploitation of the mass of the people dreamt of the “withering away” of the State with its claims to ‘Sovereignty’. But, the Russian Revolution was followed by the vastly increased power of the State run for the benefit of the proletariat. Nevertheless, the Constitution of the U.S.S.R. guarantees to citizens not merely fundamental rights, including the right to work, but has a special department of the Procurator General to enforce due observance of legality, according to the law of the Constitution, by all the functionaries of State. Article 104 of their Constitution reads:

"104. The Supreme Court of the U. S. S. R. is the highest judicial organ. The Supreme Court of the U. S. S. R. is charged with the supervision of the judicial activities of all the judicial organs of the U. S. S. R. and of the Union Republic within the limits established by law."

(See : A denisov, M. Kirichenko, Soviet State-Law p. 400)

562. It is true that legality is enforced in the U. S. S. R. not merely through the organs of the State but the vigilance of the Communist Party which consists of selected persons keeping a watch on the policy of the State. A. Y. Vyshinski, however, explained (See : Fundamental Tasks of Soviet Law 1938) that Soviet "law can no more be reduced simple to policy than cause can be identified with effect". Strict observance of "Socialist Legality", under the supremacy of the Constitution, is entrusted to the care of the State, with its three organs, the Communist Party and the people of the U. S. S. R. (See : "The Soviet Legal System" by M/s. John N. Howard and Issac Shapiro). Although, Article 15 of the Constitution of the U. S. S. R. speaks of the "Sovereignty" and "Sovereign Rights" of the Union Republics, yet, it is made clear that these Republics function subject to the supremacy of the Constitution. Hence, the supremacy of the Constitution is a principle recognized by the Constitution of the U. S. S. R. also as operating above and limiting the Sovereignties of the Socialist Republics.

563. Gierke made a wide survey and a penetrating analysis of juristic thinking, upto the end of the 19th century, on sovereignty, derived, on the one hand, from theories of the sovereignty of the Ruler, and, on the other, from theories of popular sovereignty. He observed : (See: "Natural Law and

Theory of Society" by Otto Gierke translated by Ernest Barker, Vol. I, p. 153) about the approach of Kant :

"Kant sketches, indeed, an ideal Constitutional State in which popular sovereignty is nominally present, but no living 'subject' of supreme authority is anywhere really to be found in this State. The 'bearers' of the different powers (legislative, executive and judicial) are supposed to govern, but each is subject to a strict legal obligation appropriate to its own sphere, and over them all, as the Sovereign proper, the abstract Law of Reason is finally enthroned."

He concluded (at p. 153) :

"The history of the theory of constitutionalism shows how a doctrine derived from the principle of popular sovereignty could produce almost the same results as the other and apparently opposite) system of thought which started from the principle of the sovereignty of the Ruler. In the one case, just as in the other, the inviolability of sovereignty, and the unity of the personality of the State, are sacrificed, in order to attain the possibility of a constitutional law which is binding even on the sovereign."

564. A theory of a "Legal Sovereignty" must necessarily demarcate the sphere of its "legal" or proper operation as opposed to mere use of power either capriciously or divorced from human reason and natural justice. Ernest Barker's statement of it, quoted by me in Kesavananda's case (AIR 1973 SC 1461) (supra), seemed to me to satisfy this requirement. After pointing out that Sovereignty, by which I understand one recognised by law, is limited both by its own "nature" as well as its "mode of action", it concludes: (at pp. 867-868 (of SCR) = (at p. 1973 of AIR)) :

"Sovereignty moves within the circle of the legal association, and only within that circle it decides upon questions of a legal order, and only upon those questions. Moving within that circle, and deciding upon those questions, sovereignty will only make legal pronouncements, and it will make them according to regular rules of legal procedure. It is not a capricious power of doing anything in any way : it is a legal power of settling finally legal questions in a legal way." There should be no difficulty in accepting such a theory if one can conceive of an ordered system or "government of laws" as opposed to a "Government of men" placed beyond limitations of this kind. At any rate, it is implicit in the very idea of a Constitution. Our Constitution not only regulates the operations of the organs of State but symbolises the unity of the Republic and contains the inspiring hopes and aspirations and cherished goals of all the efforts of the nation. It operates not merely through the law but also on the minds and feelings of the people.

565. Prof. Willis, in his "Constitutional Law of the United States" advocates the doctrine of "sovereignty of the People" for which he finds support in Abraham Lincoln's well known description of the American system as "a Government of the people, for the people, by the people" as well as in a number of pronouncements of the American Supreme Court. After

considering and rejecting a whole host of theories of political philosophers and jurists, including those of Bodin, Hegel, Hooker, Hobbes, Locke, Rousseau, Fichte, Kant, Austin, Brown, Dicey, Willoughby, Duguit, and Laski, he opines: (at p. 51) :

"As Dewey says, the forces which determine the government are sovereign. The effective social forces are not the Union, nor the States, nor the oligarchy of States, nor the organs of Government, nor the Constitution, nor natural law, but those forces which created these organisations and agents and institutions, and to whom they are all ultimately responsible." According to him, the "Sovereignty of the People" which he advocates does not mean an anarchic license given to each individual or group to do as he or it pleases, but stands for the power of the people, "organised in Government to express and adjust their will either directly or through representatives". He explains in the rest of his work, how the government of the U. S. A. in the broader sense of all that social control which, operating through the three departments of State, has to take place in accordance with the Constitution. This concept of a nation "organised in Government" appears to me to clearly introduce the idea of a Constitution which lays down what that organisation is and how it must operate. Although Prof. Willis rejects the view that the Constitution is "Sovereign" because it can be altered by the people, he is obliged to accept something resembling it because he sees that the "people", thought of as a mere aggregation or an amorphous mass, is too nebulous. Any satisfactory theory of sovereignty must account for the power of the people to act in certain ways or to move in certain directions. A 'hydra-headed' multitude or mass of people will not know how to act or in which direction to move. It is its "Organisation" which provides that. And, its effort to organise itself and to rationalise will produce a Constitution for it which embodies its will as organised in the form of a government. The will of the people is thus inseparable from a constitution which enables it to be expressed and then to govern. The constitution neither is nor can be sovereign in the sense that the people who made it cannot unmake it or change it. It only prescribes the correct mode of doing everything, including that of changing the very system of Govt. It is only in this sense that it can be "Sovereign" or "supreme" and rule the life of a nation."

566. Another American writer, Willoughby, has put forward the view that sovereignty, as an attribute of the State, conceived of as a juristic entity apart from its governmental organs, cannot be legally limited. According to him, to limit it is to destroy it. He says (See: Willoughby on "Fundamental concepts of Public Law — Tagore Law Lectures, 1924, at p. 77): "There would seem to be no more value in attaching legal rights and duties to the sovereign State than there is in predicating the attributes of goodness and justice of a Divine Being who is regarded as Himself the creator, by His own unrestrained will, of all distinctions between goodness and badness". But, this seems more a metaphysical than a realistic, more amoral Hobbes-Machiavellian than a Dante-Gandhian stance. If one's concepts of the divine Being are to be introduced into law, one could refer to those also which see Divinity only in

that order and that law which seems to pervade and govern the whole physical world and the universe. Indeed, there are judicial dicta to the effect that God Himself considered himself bound by those elementary principles of justice whose love was planted in man by him. In *Cooper v. Wandsworth Board of Works*. (1863) 14 C. B. (N. S.) 180 Byles, J. observed:

"The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam' (says God), 'where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also".

567. It is clear that no simple theory of sovereignty fits the complex facts of modern life. Every theory of today, ultimately, rests on concepts more refined than the physical or spiritual might of some ruler, in whom executive, legislative, and judicial powers coalesce to take away all legal distinctions between them. Even if that was ever the concept of sovereignty anywhere, it was certainly not that of our Constitution makers and it is not ours today. Even Willoughby, dealing with constitutionalism (Willoughby on "Nature of the State" 1928, at p. 302) says: "the value of Constitutional government is not that places sovereignty in the hands of the people, but that it prescribes definite ways in which this sovereign power shall be exercised by the State". Hence, he too admits that the Constitution does place some limitation on exercise of sovereign power. That seems to me to be the essence of a Constitution and the rationale of its existence.

568. Still another American writer, Orfield, in the course of his discussion (see: "The Amending of the Federal Constitution" by Lester B. Orfield 1971), of a number of concepts of sovereignty, seems sometimes to almost consider Article 5 of the American constitution, containing the constituent power and its procedure, to be sovereign. He concludes his discussion on the subject as follows (at p. 166) :

"Each part of the amending body is subject to law, and may be altered or abolished. The amending body itself may be altered through the amending process, and limitations on the future amending capacity may be imposed. The amending body is an artificial sovereign deriving its being from a law in the form of Article Five. The amending groups hold office for but a short time and may be supplanted by others in the elections in which an increasingly larger electorate participates. The theory of sovereignty, moreover, presupposes the continued orderly existence of the government. In case of a revolution the commands of the sovereign would be disregarded, and authority could no longer be ascribed to the amending body either in fact or in law. The moral, religious, physical, and other factual limitations on the supposed sovereign are so important that it may perhaps be correct to say that they are also legal limitations, as there comes a time when law and fact shade into one another. Finally, when it is remembered that through out all history, American as well as European, there never has been a consensus as

to the meaning of sovereignty, it seems that term should be used only with the greatest circumspection".

He rejects the concept of sovereignty of the people as too vague and meaningless. And, for the reasons given above, he rejects the theory of a sovereignty of the amending body. His final conclusion seems to be that it is better to avoid altogether entanglement in the concept of sovereignty. This view, however, overlooks the fact that lawyers need a working theory of sovereignty to be able to decide legal questions before them. As between the sovereignty of the amending Article and the sovereignty of the constitution there should be little doubt that lawyers should and would prefer the sovereignty or supremacy of the whole constitution rather than of any part of it. On the face of it, it appears more reasonable and respectable to swear allegiance to the whole Constitution, as we actually do, rather than to Article 368 or to the amending powers contained in it. If there is a part of our Constitution which deserves greater devotion than any other part of it it is certainly the preamble to our Constitution.

568A. The American Supreme Court, in the context of the especially American conditions and needs, after leaning sometimes towards a recognition of "State Sovereignty" (See: *Ware v. Hylton*. (1876) 3 Dall 199. *Dred Scott v. Sandford* (1856) 19 How 393) and at others towards a recognition of the dual system of Government which has prevailed in America (See: e.g. *Gibbus v. Ogden*, (1824) 9 Wheat 1) has, on the whole opted for the "Sovereignty of the People" which unifies the nation (see: e.g. *White v. Heart*, (1871) 13 Wall 646: *Keith v. Clark*, (1878) 97 US 454: *National Prohibition Cases* (1920) 253 US 350).

569. I cannot, while I am on the subject of American conditions, resist the temptation to quote the trenchant comment of Prof. Willis on what he considers to be the dangers of the American system of government. He wrote (at pp. 68-69).

"But the greatest danger in popular sovereignty does not lie in the intellectual field but in the moral. While our intellectual level is not as high as it ought to be, our moral level is much lower than it can safely be if our form of government is to endure permanently. Millions of our citizens are already members of the criminal class. Millions of other citizens who are not yet members of the criminal class are in the economic world doing things just as bad as the things which members of the criminal class are doing. Millions of our people are concerned with their own selfish interests instead of the common good. Millions of our citizens are only too ready to ruin themselves and the rest of our people physically, intellectually, and morally by drugs and intoxicating liquors and vices. Our people do not seem to be much concerned with high ideals in any of the fields of human endeavour. Our people as a whole do not seem to be seriously concerned with social planning for the purpose of obtaining an ideal social order. They are more interested in rotation in office than they are in good government. They are more interested in winning law suits than in ideal system for the administration of justice.

They are more interested in making fortunes in the practice of medicine than in the prevention of disease. They are more interested in profits in the business world than they are in a wellplanned system of business organisation adapted to the needs of our social order. They are more interested in individualism than they are in collective planning for the good of all.

The effects of the moral standards of our people are already manifest. As a result of our political and economic theories, there has developed a concentration of wealth unparalleled in human history. While on the whole the economic level is comparatively high in the United States, the difference between the wealth of the many and that of the few is starting. One-fourth of the families in the United States before the depression had incomes of less than \$500 and two-thirds of the families in the United States incomes of less than \$1,000, while 2 per cent of our population owned 65 per cent of the wealth. There were four men any one of whom had an income as large as five million of the poorest people in the United States. This concentration of wealth was probably one of the primary causes of the depression, and the depression has threatened our capitalistic system. This only shows the danger inherent in our political organisation."

570. If the people of an advanced country like the U. S. A., left entirely to the concept of popular sovereignty, have revealed the need for a more positive guiding or moulding role of their State so as to overcome the dangers adverted to by Prof. Willis, how much greater are the needs of a people potentially so great but actually so backward economically and educationally as ours, taken en masse, still are? Our concepts of sovereignty must accord with the needs of the people of our country. Our Constitution, which has been described by G. Austin as "the cornerstone of the Nation", was devised as a means to serve those needs. It has not only the elevating preamble, deserving the allegiance of every rational human being, but, unlike the American Constitution, the whole of Part IV of our Constitution which contains "Directive Principles of state Policy" to guide the future course of State action particularly in the legislative field. It is true that provisions of Part IV are not enforceable through the courts against the State, but they are declared as fundamental in the governance of the country and are used to interpret the constitution and to fix its meaning. I think, from this point of view also, we can say that the concept of the Supremacy of the Constitution is, undoubtedly, more suited to the needs of our country than any other so far put forward. It not only places before us the goals towards which the nation must march but it is meant to compel our Sovereign Republic, with its three organs of Government to proceed in certain directions. It assumes that each organ of State will discharge its trust faithfully. Can we deny it that supremacy which is the symbol and proof of the level of our civilisation?

571. I find that the doctrine of the supremacy or sovereignty of the Constitution was adopted by a Bench of seven learned Judges of this Court in Special Reference No. 1 of 1964, (1965) 1 SCR 413 = (AIR 1965 SC 745) where

Gajendragadkar, C. J., speaking for six learned Judges of this Court said (at p. 446) (of SCR) = (at pp. 762-763 of AIR) :

"In a democratic country governed by a written Constitution, it is the constitution which is supreme and sovereign. It is no doubt true that the Constitution itself can be amended by the Parliament, but that is possible because Art. 368 of the Constitution itself makes a provision in that behalf, and the amendment of the constitution can be validly made only by following the procedure prescribed by the said article. That shows that even when the Parliament purports to amend the Constitution, it has to comply with the relevant mandate of the constitution itself. Legislators, Ministers, and Judges all take oath of allegiance to the Constitution, for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction and it is to the provisions of the Constitution that they owe allegiance. Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England, cannot be claimed by any Legislature in India in the literal absolute sense."

572. The principle of the supremacy of the Constitution was then declared by the majority of the learned Judges of this Court in Kesvananda's case (AIR 1973 SC 1461) (supra) to be a part of the basic structure of the Constitution. The minority opinion, while not specifically dissenting from this view, was that even what was considered by the majority to be a part of "basic structure" was alterable under article 368. But, no judge of this Court has so far held that, without even attempting to change what may be the basic structure of constitution itself, by appropriate amendments, judicial power could be exercised by Parliament under Article 368 on the assumption that it was already there.

573. M. C. Setalvad, a distinguished jurist of India, said (See: "The Common Law of India" Hamlyn Lectures-12th series — 1960) (at p. 174-175) :

"The Constitution divides the functions of the Union into the three categories of executive, legislative and judicial functions following the pattern of the British North America Act and the Commonwealth of Australia Act. Though this division of functions is not based on the doctrine of separation of powers as in the United States yet there is a broad division of functions between the appropriate authorities so that, for example, the legislature will not be entitled to arrogate to itself the judicial function of adjudication. "The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another'. (See: Rai Saheb R. J. Kapur v. State of Punjab, (1955) 2 SCR 225 at p. 235 = (AIR 1955 SC 549) at p. 555-56). This will no doubt strike one accustomed to the established supremacy of Parliament in England as unusual. In the course of its historical development Parliament has performed and in a way still performs judicial functions. Indeed the expression 'Court of Parliament' is not unfamiliar to English lawyers.

However, a differentiation of the functions of different departments is an invariable feature of all written constitutions. The very purpose of a written constitution is the demarcation of the powers of different departments of government so that the exercise of their powers may be limited to their particular fields. In countries governed by a written constitution, as India is, the supreme authority is not Parliament but the Constitution. Contrasting it with the supremacy of Parliament, Dicey has characterised it as the supremacy of the Constitution."

574. A. V. Dicey, the celebrated propounder of the doctrine of the sovereignty of Parliament, had criticized Austin for frequently mixing up "legal sovereignty" and "political sovereignty" (See: Law of the Constitution by A. V. Dicey — 10th Edn. p. 72). He contrasted the British principle of "Parliamentary Sovereignty" with what was described by him the "Supremacy of the Constitution" in America. He observed (at p. 165).

"But, if their notions were conceptions derived from English law, the great statesmen of America gave to old ideas a perfectly new expansion, and for the first time in the history of the world formed a constitution which should in strictness be 'the law of the land', and in so doing created modern federalism. For the essential characteristics of federalism — the supremacy of the constitution — the distribution of powers — the authority of the judiciary — reappear, though no doubt with modifications, in every true federal state."

He said (at p. 144) :

"a federal state derives its existence from the constitution, just as a corporation derives its existence from the grant by which it is created. Hence, every power, executive, legislative, or judicial, whether it belongs to the nation or to the individual States, is subordinate to and controlled by the constitution."

He wrote about the American Supreme Court (at p. 159) :

"Of the nature and position of the Supreme Court itself this much alone need for our present purpose be noted. The Court derives its existence from the Constitution, and stands therefore on an equality with the President and with Congress, the members thereof (in common with every Judge of the Federal Judiciary) hold their places during good behaviour, at salaries which cannot be diminished during a judge's tenure of office."

575. The theory of the Supremacy of the Constitution is thus not a new one at all. It is inherent in the very concept of "the august thing" which lies behind Parliament or king and is sought to be embodied in the Constitution of a country. The Judges, who are vested with the authority and charged with the duty to uphold the Constitution, do so as the mouthpieces of what has been called the "Real will" of the people themselves by political philosophers such as Bosanquet. That, as I have indicated earlier, is the theory underlying

the system of judicial review. Such a system may delay changes but should not, I think, speaking entirely for myself, deny or defeat the right of the people to bring about any change, whether basic or not, in the Constitution. Indeed, in Kesvananda's case (AIR 1973 SC 1461) (supra), I indicated that I thought that the most proper and appropriate function of the amending power in a Constitution, which is also a part of the Constitution, and, indeed, its most potent part — was that of making basic changes so as to avert constitutional break-downs and revolutions if possible. However, we are precluded from acting upon such a broad view of amending power in this case as we are bound by the majority opinion in Kesvananda's case (supra) that implied limitations of "a basic structure", operating from even outside the language of Art, 368, as it stood before the 24th amendment, restrict its scope. These limitations must however, be related to provisions of the Constitution.

576. It has not been argued before us that the introduction by the 24th amendment of the new clause (1) in Article 368, containing the "constituent power", itself amplifies or increases the contents or changes the character of the power in Article 368 by making it a composite power so as to include a new type of judicial or quasi-judicial power also within its fold now. It is evident from the judgments of learned judges of this Court in Golaknath's case (AIR 1967 SC 1643) (supra) that possible distinctions between amending power and "constituent power" and "Sovereign power" figured prominently in arguments in that case. Wanchoo, J., in his minority opinion (see: 1967 (2) SCR 762 at p. 833) = (AIR 1967 SC 1643 at p. 1679-80) said that it was not necessary, for the purposes of that case, to decide whether the amending power was as wide as the "sovereign power" of the Constituent Assembly which had framed our Constitution. After all the discussion that had taken place then, came the 24th amendment. It does not use the words "sovereignty" or "sovereign power". I presume that the words "constituent power" were advisedly used in it so as to clarify the position and not to put in or to include anything beyond constitution making power in Art. 368.

577. The "constituent power" is still bound by the exclusively prescribed procedure to "amend by way of addition, variation, or repeal" any provision of the Constitution. It is entirely a law making procedure elaborately set out in clause (2). In fact, Art. 368 contains so much of the fundamental law making or legislative procedure that five judges of this Court, led by Subba Rao, C. J. opined in Golaknath's case (AIR 1967 SC 1643) (supra), that it was confined to procedure and did not contain at all the substantive power to amend. Clause (1) of Art. 368, introduced by the 24th amendment, was, apparently, meant to remove this objection and to do no more. It could not be intended to pour some new amalgam of executive and judicial or quasi-judicial substantive powers into it also by some implication so as to do away with the very need for such an elaborate and carefully drawn up Constitution such as ours. The absence of any quasi-judicial procedure, from the comprehensively framed procedural provisions of Art. 368, seems extremely significant. It indicates that it was the clear intention of Constitution makers that no

judicial or quasi-judicial function could be performed by Parliament whilst operating in the special Constituent field of law making. An omission to provide any quasi-judicial procedure in Article 368, which, apparently, furnishes a self-contained code, means that no such power was meant to be included here at all. Proper exercise of judicial power is inseparable from appropriate procedure.

578. Learned counsel supporting the 39th Amendment tried to find the meaning of "constituent power" in theoretical speculations about the meaning of "the sovereignty of the people:", on the one hand, and the sovereignty of the medieval monarch on the other, instead of looking to the legislative history of the "constituent power". I have, therefore, also referred to some of these theories and practices from ancient times so as to be able to indicate the precise significance or relevance of various concepts and decisions placed before us. These theories and practices could have only an indirect bearing on the meaning of the term "constituent power" in Article 368. They are more germane to a statement of a correct theory of sovereignty which underlies what has been called the "basic structure" of our Constitution.

579. There are scattered dicta in the judgments of this Court speaking of the "sovereignty of the people" which, in my opinion, can only be related to the political sovereignty of the people recognised by the preamble to our Constitution where the people are described as the Constitution makers who gave the Constitution unto themselves. This, however, does not, in my opinion, mean that the people retained unto themselves any residue of legal sovereignty. They did not prescribe, apart from dividing the exercise of sovereign power roughly between the three organs of the Republic, each with its own *modus operandi*, any other or direct method, such as Initiative or Referendum, for exercising their politically sovereign power. The view I have tried to put forward in the foregoing pages is that the people entrusted to the three organs of the Sovereign Democratic Republic they constituted the exercise of three aspects of sovereign power on behalf of the people. This seems to me to be the only way of reconciling the idea of a sovereign people, in the political sense, and the sovereignty of the Republic, represented by a legally supreme constitution, so that the "sovereign" powers of each of the three organs of the Republic had to be exercised in conformity with the mandates, both positive and negative, express and implied, of the Constitution. I would prefer to describe this concept as one of the "supremacy of the constitution" instead of "sovereignty" of the Constitution because of the theoretical, speculative, and "emotive" clouds which have gathered around the term "sovereignty".

580. I have tried to point out that the term sovereignty in its origin is associated with the actual human ruler or authority wielding theoretically absolute or final powers. Political philosophers are particularly concerned with the problem of determining the location and manner of exercise of such powers if any. Jurists, however, have also occupied themselves with these problems partly because constitutional law, as Dicey once pointed out, has some overlapping territory with the political theory which underlies it. Some

constitutional lawyers such as Ivor Jennings, have said that it is flirtation with political theory which has brought into the juristic fold a term such as 'sovereignty'. On the other hand, political theorists, such as Mc Iver, have blamed, far less justly, jurists like Austin for infecting political theory with legalistic authoritarian notions of sovereignty. Political theorists, in their attempts to understand and rationalize, and sometimes to justify or condemn a system are more concerned with the operations of all those socio-economic-cum-political forces which govern society. Law is, for them, one of these forces and reflects them. Lawyers have been compelled to 'Flirt' (if I may employ the term used by Sir Ivor Jennings with sovereignty) only because they have to look for some final authority which determines the validity of the claims they have to deal with. Political theory, faced with the complexities of modern life, finds location of sovereignty as a power concept too elusive and difficult a task to be satisfactorily carried out. Some of them would like to banish the term to the region of purely moral philosophy where it could be reserved for such freedom of thought and will and action as even the most powerful totalitarian State, employing all the techniques based on Prof. Pavlov's theories for purposes of propaganda, cannot take away from the individual. Others find it of use only in International Law to denote that independence of the national State and the freedom which it claims and is entitled to from outside interference. Jurists as well as practical lawyers have to be content with finding an ultimate measuring rod in a fundamental law which could test the validity of exercise of every kind of Governmental power. Their quest for certainty is even more pressing and urgent than that of the political theorist. For their purposes, the supremacy of the Constitution, of which a very vital and necessary part is the constituent power, is sufficient. Of course, they have to determine the content of "constituent power" itself in the light of all relevant considerations which, as I have indicated above, may take us outside the ordinary range of Law. Nevertheless, our deviation from the orthodox canons of construction and interpretation, when faced with such a problem, must not be so wide as to rob our method of construction itself of legal propriety or give rise to the suspicion that we have ourselves clearly trespassed into the territory of law making. The lines of demarcation, though difficult to draw sometimes, are, nevertheless, there.

581. I do not think that it is at all helpful to refer to certain authorities of this Court which were, rather surprisingly, relied upon by learned counsel supporting the 39th amendment to discover the nature of the "constituent power" contained in Art. 368. I will content myself by citing a passage from the last of these cases relied upon which mentions the earlier cases of this Court also on the effect of a "Firman", in *Tilkayat Shri Govindlalji Maharaj v. The State of Rajasthan*, (1964) 1 SCR 561 = (AIR 1963 SC 1638) Gajendragedkar J., speaking for this Court said (at p. 591) (of SCR) = (at p. 1650 of AIR) :

"In appreciating the effect of this Firman, it is first necessary to decide whether the Firman is a law or not. It is matter of common knowledge that at the relevant time the Maharana of Udaipur was an absolute monarch in

whom vested all the legislative, judicial and executive powers of the State. In the case of an absolute Ruler like the Maharana of Udaipur, it is difficult to make any distinction between an executive order issued by him or a legislative command issued by him. Any order, issued by such a Ruler has the force of law and did govern the rights of the parties affected thereby. This position is covered by decisions of this Court and it has not been disputed before us, Vide *Madhaorao Phalke v. the State of Madhya Bharat*, (1960) ISCR 957 = (AIR 1961 SC 298) *Ammer-un-Nisa Begum v. Mahboob Begum*. (AIR 1955 SC 352), and *Director of Endowments, Government of Hyderabad v. Akram Ali*, (AIR 1956 SC 60)."

582. It is evident, from the quotation, relied upon by the Solicitor-General, that this Court was not deciding whether the Firman was even a "law" in the sense of a general norm which had to be applied to the decision of cases. It was held that whatever be its juristic character, it had the "force of law" inasmuch as the Ruler of Udaipur was an absolute ruler, who combined in his person the legislative, the judicial and executive authority of the State. That was the Constitution of Udaipur. The doctrine of separation of powers, in such a context, was really irrelevant. Art, 368 of our Constitution, however, is not a power acquired by our Republic by State Succession from the powers of Indian ruling princes. The legislative history behind it is entirely different.

583. As a matter of legislative history, we will find the source of the "constituent power" in Sections 6 and 8 of the Indian Independence Act passed by the British Parliament. Section 6 of that Act constituted a "Legislature" for each of two Dominions set up with plenary powers of legislation. The legislative powers of the Legislature of each Dominion were so enlarged by Sec. 8 that it could frame the Constitution of the dominion concerned. This was a transfer of only a legislative power. Sec 8 said: "for the purpose of making provision as to the Constitution of the dominion, the legislature of the dominion was recognised as the constituent assembly of the dominion". These powers were "plenary" in the sense in which this term is used in *Queen v Burah*. (1878) 5 Ind App 178 (PC) but they were confined to law making and did not extend to adjudication or decision of individual cases which is certainly distinguishable from a law making power. For purposes other than framing of the constitution, provisions of the Government of India Act operated until they were repealed and replaced by other relevant provisions. Such was the process of a legislative succession through which institutional transformation or transition to a new but corresponding set of institutions was brought about. In the eyes of law, this was an evolutionary process through constitutional channels and not a revolutionary break with the past.

584. It is true that, in the exercise of the law making constituent power, brought in by Sec. 8 of the Indian Independence Act. the legislatures could be armed with judicial powers as well if appropriate laws were made to that effect. But, as no law, either Constitutional or ordinary was passed, preceding 39th amendment, to repeal the Act of 1951 and then to vest a judicial power in Parliament, so as to enable it to take over and decide election disputes

itself directly, I do not see how clause (4) of Art. 329A, if it contained certain provisions on the assumption that such a judicial power was already there in Parliament, could be valid as a piece of mere law making. However, counsel supporting the 39th Amendment had submitted that Article 329A (4) evidenced and constituted an exercise of some "unbroken" or a combined legislative and judicial power — a proposition for which no precedent of any such consolidated action of a constituent body was cited from any part of the world. The Firmans of former Indian ruling princes were hardly suitable or applicable precedents.

585. An attempt was made to convince us that what may not have been otherwise possible for Parliament to do became possible by invoking presumed exercise of some judicial power imported by Art. 105 (3) of the Constitution which says:

"105 (3)the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution."

586. I am unable to see how what was not conferred upon Parliament itself in its constituent capacity could be impliedly assumed to be there by virtue of certain "powers privileges and immunities" which belong separately to each House of Parliament. Such a claim could not be based upon what is to be found directly in Art 368. It is sought to be derived from Art 105. This reasoning would obviously conflict with the provisions of Art 329 (b) of the Constitution which indicates that an election dispute can only be resolved by an election petition before a forum provided by an ordinary enactment. Article 329 (b) says:

"329 (b) No election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

587. In exercise of its powers under Art 329 (b) our Parliament had enacted the Act of 1951. The procedure provided by the Act had the binding force of a constitutionally prescribed procedure. It could not be circumvented unless with reference to cases covered by Art 329 A (4) it had been first repealed. Only after such a repeal could any other forum or procedure be legally adopted. It could not be assumed by reason of Article 105(3) that the prescribed forum had shifted to Parliament itself and that Parliament in exercise of its constituent function had both legislated and adjudicated. This is what we were asked to accept.

588. The well recognised rule of construction of statutes, which must apply to the interpretation of the Constitution as well is; "Expressio Unius Est Exclusio Alterius". From this is derived the subsidiary rule that an

expressly laid down mode of doing something necessarily prohibits the doing of that thing in any other manner. The broad general principle is thus summarised in CRAWFORD's "Statutory Constructions" (1940) at p. 334.

"Express Mention and Implied Exclusion (*Expressio Unius Est Exclusio Alterius*) – As a general rule in the interpretation of statutes the mention of one thing implies the exclusion of another thing. It therefore logically follows that if a statute enumerates the things upon which it is to operate everything else must necessarily and by implication be excluded from its operation and effect. For instance, if the statute in question enumerates the matters over which a court has jurisdiction no other matters may be included. Similarly, where a statute forbids the performance of certain things only those things expressly mentioned are forbidden. So also if the statute directs that certain acts shall be done in a specified manner or by certain person there performance in any other manner than that specified or by any other person than one of those named is impliedly prohibited."

589. It is interesting to note that in the Australian Constitution, where there is Art. 49 using language very similar to that of Art. 105 (3) of our Constitution there is also a separate but differently cast Article 47 of the Australian Constitution corresponding to Art. 329 (b) of our Constitution. This article runs as follows:

"Art. 47. Until the Parliament otherwise provides any question respecting the qualification of a senator or of a member of the House of Representatives or respecting a vacancy in either House of the Parliament and any question of a disputed election to either House shall be determined by the House in which the question arises."

590. What is separately expressly and especially provided for by Art. 329 (b) must necessarily fall outside the purview of Art. 105 (3) on the principle stated above. Moreover, Art 105 (3) contained a temporary provision until other provision was made by Parliament in that behalf. Appropriate provisions were enacted by the Act of 1951 in compliance with Art 329 (b) because that was the proper Article for it. It would be idle to contend that these provisions suddenly lapsed or ceased to exist as soon as Parliament took up consideration of the issue and the grounds of the decision on them by the High Court to which reference is made in Art. 329A (4). Again a purported exercise of power in enacting Article 329A(4) could only be a law making power and not any other power which could conceivably fall under Art. 105 sub-art. (3). Nevertheless it was suggested by copious references to the origin of the power of the House of Commons to decide disputes relating to elections that such a power exists in each House of our Parliament as its inherent power. Such an argument completely overlooks that, quite apart from the great difference made by providing both the forum and the procedure for deciding election disputes indicated by Art 329 (b) of our Constitution, Article 105 (3) itself could only refer to such powers as were still exercisable by the House of Commons at the time when our Constitution was passed long before that the House of Commons in England had ceased to

decide election disputes itself. It had transferred this power to Courts by statute and has not resumed it. In fact the law enacted in the Representation of People Act 1949, by the British Parliament confirmed this transfer or delegation of power. Section 107 of that Act makes it clear like Art 329 (b) of our Constitution that the statutory remedies are the only ones open for election disputes.

591. The reasons why the House of Commons itself saw the need for entrusting to a rota of High Court Judges the jurisdiction at one time exercised by it directly to determine its election disputes is found thus stated by BLACKSTONE, quoting Erskine May's "Parliamentary Practice and Procedure" (at p. 153-155);

"For a considerable time after the house had obtained this jurisdiction controverted elections were tried by committees specially nominated composed of privy councillors and burgesses, well qualified for the duties entrusted to them. But after 1672 it became an open committee, in which all who came had voices and at length a hearing at the bar of the House was considered preferable to an inquiry by a committee. Here again to use the words of Sir Erskine May, "the partiality and injustice of the judges was soon notorious. Parties tried their strength – the friends or rival candidates canvassed and manoeuvred, and seats corruptly gained, were as corruptly protected or voted away. Such were the results of the usurpation of judicial functions by a popular body."

In order to remedy, if possible, these unquestionable evils, the statute 10 Geo III C. 16 called from its author the Grenville Act, was passed in 1770 and the trial of election petitions transferred to a select committee of thirteen members, which it was thought would be 'a court independent of the house, though composed of its own members'. For a time there was a marked improvement in the decision of controverted elections. 'But too soon it became evident that corruption and party spirit had not been overcome. Crowds now attended the ballot, as they had previously come to the vote – not to secure justice but to aid their own political friends'. The party, whether of the petitioner or sitting member which attended in the greatest number inevitably had the numerical majority of names drawn for the committee and from this list, the petitioner and sitting member struck out alternately one name until the committee was reduced to thirteen: the majority of the house was necessarily a majority of the committee. The result it was not difficult to foresee. Though the members were sworn to do justice between the rival candidates yet the circumstances under which they were notoriously chosen, their own party bias and a lax conventional morality favoured by the obscurity and inconsistencies of the election law and by the conflicting decisions of incapable tribunals led to this equivocal result: that the right was generally discovered to be on the side of the candidate who professed the same political opinions as the majority of the committee'.

'By these means the majority of the house continued with less directness and certainty and perhaps with less open scandal to nominate their own

members as they had done before the Grenville Act. And for half a century this system with slight variations of procedure was suffered to prevail. In 1839 however the ballot was at length superseded by Sir Robert Peel's Act; committees were reduced to six members and nominated by an impartial body – the General Committee of Elections. The same principle of selection was adhered to in later Acts with additional securities for impartiality and the committee was finally reduced to five members. The evil was thus greatly diminished but still the sinister influence of party was not wholly overcome. In the nomination of election committees, one party or the other necessarily had a majority of one, and though these tribunals undoubtedly became far more able and judicial, their constitution and proceedings often exposed them to imputation of political bias.'

At length by the statute 31 and 32 Vict. C. 125 the trial of election petitions was transferred to certain of the puisne judges at Westminster who are selected annually to form a rota for this specific purpose; and who inquire upon the spot in open court into the allegations of a petitioner, either claiming a seat, or alleging an undue return or election. The decision of the judge, who has power to reserve his judgment until he has consulted the Common Pleas division of the High Court in which these proceedings are instituted is final to all intents and purposes; the House of Commons being bound to give the necessary directions for confirming or altering the returns or for issuing a writ for a new election or carrying such determination into execution as circumstances may require" And this abstract of the proceedings at elections of knights citizens and burgesses concludes our inquiries into the laws and customs more peculiarly relative to the House of Commons."

592. I do not think that it is possible to contend by resorting some concept of a succession to the powers of the medieval "High Court of Parliament" in England that a judicial power also devolved upon our Parliament through the Constituent Assembly, mentioned in Sec. 8 of the Indian Independence Act of 1947. As already indicated by me the Constituent Assembly was invested with law making and not judicial powers. Whatever judicial power may have been possessed once by English King sitting in Parliament constituting the highest Court of the realm in medieval England have devolved solely on the House of Lords as the final court of appeal in England. "King in Parliament" had ceased to exercise judicial powers in any other way long before 1950. And the House of Commons had certainly not exercised a judicial power as a successor to the one time jurisdiction of the "King in Parliament," with the possible exception of the power to punish for its contempts. I use the qualifying word "possible" because the more correct view of it today may be that this power is also as it is considered in America a mere incident of legislative power, necessary for the due performance of law making functions and not an "inheritance".

593. In Erskine May's Parliamentary Practice (18th Edn.) after citing the opinions of Judges to whom a reference was made by the House of Lords in Thorpe's case (1451) that "Lex Parliamenti" seemed something as strange

and peculiar as foreign law as for Common Law Courts it was explained (at page 187).

"These views belonged to a time when the distinction between the judicial and legislative functions of Parliament was undrawn or only beginning to be drawn and when the separation of the Lords from the Commons was much less complete than it was in the seventeenth century. Views about the High Court of Parliament and its powers which were becoming antiquated in the time of Coke, continued to be repeated far into the eighteenth century, although after the Restoration principles began to be laid down which were more in accord with the facts of the modern constitution. But much confusion remained which was not diminished by the use of the phrase 'privilege of Parliament'. This only means a body of rights common to both Houses, but it suggests joint action (or enforcement) by both Houses as in legislation whereas from Ferrers' case in Henry VIII's reign in 1543 each House enforced in own privileges separately.

These notions arise from this confusion or thought:

1. That the courts being inferior to the High Court of Parliament, can not call in question the decision of either House on a matter of privilege.

2. That the *lex et consuetudo* Parliament is a separate law, and therefore unknown to the courts.

3. That a Resolution of either House declaratory of privilege is a judicial precedent binding on the Courts."

594. The confusions mentioned above misled some people in this country due to the provision of Article 194(3) of our Constitution on the question whether a House of a Legislature had not only the power to punish a citizen for contempt but also to exercise what is really a judicial power to interpret and determine the ambit of its own jurisdiction. Gajendragadkar C.J. speaking for this Court in Special Reference No. 1 of 1964 = (AIR1965 SC 745) (*supra*) rejected this claim and explained the English law on the subject. The learned Chief Justice pointed out the incidental character of any claim to a power privilege or immunity which could be covered by Article 194 (3) a provision identically similar to Article 105 (3). He pointed out that the only exception to this rule was the power to punish for its own contempt which since the decision of Privy Council in *Keilly v. Carson* (1842) 4 Moo PC 63 could be thought of as a power of the House of Commons even acquired as a kind of "inheritance" from the powers once possessed by the High Court of Parliament in England. But, as all judicial or quasi-judicial power is, under our Constitution, expressly made exercisable under the supervision of the judicial organs of the State, it was held that a decision about the existence of the power to punish for contempt on the facts of a particular case, is vested in the High Court. Even Sarkar, J., in his dissenting minority opinion said (at p. 513) (of SCR) = (at p. 796 of AIR): "I do not think that the House of Commons was itself ever a Court. The History of that House does not support such a contention." The result is similar to that in England where Courts do

determine the orbit of a claim to a power as a Parliamentary preserve, on the facts of a case, although, once it is established that the claim is to a power confined to its proper sphere, they will not decide a mere question of its proper exercise.

595. Whatever view one may take of any other powers of Parliament, by reason of Article 105 (3) of the Constitution, I am unable to see how exercise of the jurisdiction to determine an election dispute, which was in accordance with Article 329 (b), already vested in the High Court by the Act of 1951 for all elections to House of the People, could not only be taken away by a Constitutional amendment, purporting to repeal retrospectively the provisions of the Act of 1951, a piece of ordinary legislation, in their application to particular class of cases, but at the same time making a declaration of the rights of the parties to a judgment, without first performing a judicial function also which was not included in the "constituent" or any other law making power.

596. The question was not clearly raised before us whether a Constitutional amendment could partially repeal the provision of an ordinary piece of legislation, that is to say the Act of 1951, in so far as its application to a certain class of cases is concerned. One of the submissions of the learned Counsel for the election petitioner, however, was that inasmuch as the Constitution lays down the norms to which ordinary legislation must conform, its proper sphere of operation is different from that of ordinary legislation which takes place under the provision of Articles 245 to 255 of the Constitution. The argument seemed to be, that if ordinary law making and constitution making took place in different orbits or on different place of law making power what could be done by one method was necessarily prohibited by the other. Learned Counsel relied upon a number of passages from the judgment in Kesavananda Bharti's case (AIR 1973 SC 1461) (supra), and, in particular, on what Ray, J., (as he then was) said (at p. 386) (of SCR) = (at p 1688 of AIR):

"The constituent power is sui generis. The majority view in Golak Nath case (AIR 1967 SC 1643) that Article 13 (2) prevails over Article 368 was on the basis that there was no distinction between constituent and legislative power and an amendment of the Constitution was law and that such law attracted the opening words of Article 245 which in its -turn attracted the provisions of Article 13 (2). Parliament took notice of the two conflicting views which had been taken of the unamended Article 368, took notice of the fact that the prepondering judicial opinion, namely, the decision in Shankari Prasad case, Saijan Singh case and the minority views of five learned Judges in Golak Nath case were in favour of the view that Article 368 contained the power of amendment and that power was the constituent power belonging to Parliament. Wanchoo, J., rightly said in Golak Nath case that the power under Article 368 is a constituent power to change the fundamental law, that is to say, the Constitution and is distinct from ordinary legislative power. So long as this distinction is kept in mind Parliament will have power under Article 368 to amend the Constitution and what Parliament does under

Article 368 is not ordinary law making which is subject to Article 13 (2) or any other Article of the Constitution. This view of Wancho., J., was adopted by Parliament in the Constitution 24th Amendment Act which made explicit that under Article 368 Parliament has the constituent power to amend this Constituion."

597. On the other hand, learned Counsel defending the 39th Amendment relied on a number of passages from various judgments including mine in Kesavananda Bharti's case (AIR 1973 SC 1461) (supra) indicating that at least the minority view there was that the power of amendment contained in Article 368 was only limited by the procedure laid down in Article 368 (2) of the Constitution and nothing else. It is true that this is what was emphasized by several learned Judges including myself in dealing with a case where the real question was whether the constituent power embraced an amedment of the Constitution in such a way as to take away fundamental rights. but neither the question whether "constituent power" itself contained judicial power within its hold nor the question whether "constituent power" operated on a plane or in a sphere which excluded altogether what could be done through ordinary legislation were under the consideration in Kesavananda's case (supra). Some passages were cited from my judgement in that case indicating that the constituent plane of basic changes excluded the ordinary law makig plane of legislation, the two belonging, so to speak, to different spheres or orbits of operation. I think I had only cited Prof. Ernest Barker's statement of his theory some of which could convey that sense. But, I had not committed myself to a view on the question whether there was a limit on the subject matter of constituent law making.

598. It could be and has been argued not without force that there are no legal limitations upon the subject matter which may be considered fit for inclusion or incorporatin in a constitution. This is left to the good sense of the Constitution makers. Constitutions differ greatly in this respect (See: Where's "Modern Constitution" pp. 49 to 51). What may be the ideal from this point of view is not always the actual. Reference was also made in support of this submission to Rottschaefer on "Constituional Law" (1939 Edn. p. 10). It is not necessary to pursue this question any further here.

599. I had said, in Kesavananda's case (AIR 1973 SC 1461) (supra) after dealing with amending power in Article 368, on the assumption that it was an exercise of a "Soverign power" (at p. 870) (of SCR) = (at p. 1975 of AIR).

"No doubt the judicial organ has to decide the question of the limits of a sovereign authority as well as that of other authorities in cases of dispute. But when these authorities act within these limits, it cannot interfere". In other words, I look upon a "sovereign power" itself, under the Constitution as limited by the supremacy of the Constitution.

600. If the constitutional provisions compel us to hold as I think they do that no form of judicial or quasi-judicial power is included in the "constituent power". contained in Article 368 of the Constitution, no further question need really be considered by us if we were to hold that the insertion of clause (4) in

Art 329A necessarily involved as a condition precedent to the making of the declaration found at the end of it, the performance of a quasi-judicial or judicial function. But, I do not think that we could go so far as that. The Act of 1951, enacted under the provisions of Article 329 (b) of the Constitution provided a procedure which could not be circumvented. This procedure was certainly applicable until 10-8-1975 when the 39th Amendment received Presidential assent. Rights of appeal under Section 116A of the Act having been invoked by the Original Respondent as well as by the election petitioner and the operation of the Hight Court's order having been suspended, the positin was in the eyes of law that the election dispute was continued by a proceeding, exclusively prescribed by article 329 (b) for the resolution of the dispute, pending in this Court. I do not think, that despite the impression created by the terms of the declaration at the end of clause (4) of Article 329A and the opening statement of the counsel for the original respondent we can assume that Parliament took over the case into its own hands to decide it and to incorporate the result in the form of Article 329A(4) so that this may take the place of a possible judgment of this Court. Parliament could not be deemed to be unaware of the bar created by Article 329 (b) and the 1951 Act.

601. At one stage, counsel supporting the 39th amendment said that the norms of the Act of 1951 together with the amendment of the Act in 1974 and the very recent ones of 1975 must have been present in the minds of members of Parliament and applied to the facts of the case. Such a contention, apart from overlooking the effect of the bar of Art 329 (b) which operated against the case being taken up in Parliament directly until at least 10--8-1975, just as Section 107 of the British Representation of People Act, 1949, operates against the adoptin of such a course in England, overlooked the legal effect of the deeming provision which, if valid would repeal such a submission of counsel supporting the 39th amendment. The deeming provision appeared to be quite sweeping. It said :

"No law made by Parliament before the commencement of the Constitution (Thirtyninth Amendment) Act. 1975, in so far as it relates to eletion petitions and matters connected therewith shall apply or shal be deemed ever to have applied to or in relation to the election of any such person as is referred to in clause (1) to either House of Parliament"

602. The effect of such a provision is thus stated in the oft quoted passage from *East End Dwellings Co. Ltd. v. Finsbury Borough Council* (1952) AC 109;

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it The statute says that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

603. When the effect of Art 329(b) and of the deeming provision was pointed out to learned counsel supporting the 4th clause of Art. 329A they took up the position that Parliament must have applied its own norms. We, however, do not know at all and cannot guess what matters were considered or the norms applied by Parliament. No speeches made in Parliament on the proposed 39th amendment were cited before or by either side. We only know that the Objects and Reasons of the 39th Amendment contain the following statements to show us why Article 329A (4) was believed to be necessary :

"Article 71 of the Constitution provides that disputes arising out of the election of the President or Vice-President shall be decided by the Supreme Court. The same article provides that matters relating to their election shall be regulated by a parliamentary law. So far as the Prime Minister and the Speaker are concerned matters relating to their election are regulated by the provisions of the Representation of the People Act 1951. Under this Act the High Court has jurisdiction to try an election petition presented against either of them.

2. The President, the Vice President, the Prime Minister and the Speaker are holders of high offices. The President is not answerable to a Court of law for anything done, while in office in the exercise of his powers . A fortiori matters relating to his election should not be brought before a court of law but should be entrusted to a forum other than a court. The same reasoning applies equally to the incumbents of the office of Vice-President, Prime Minister and Speaker. It is accordingly proposed to provide that dispute relating to the election of the President and Vice-President shall be determined by a forum as may be determined by a Parliamentary law. Similar provision is proposed to be made in the case of the election to either House of Parliament or, as the case may be, to the House of the People of a person holding the office of Prime Minister or the Speaker. It is further proposed to render pending proceedings in respect of such election under the existing law null and void. The Bill also provides that the Parliamentary law creating a new forum for trial of election matters relating to the incumbents of the high offices above mentioned shall not be called in question in any court."

604. I think that this statement of Objects and Reasons and other reasons mentioned above by me lend support to the submission to which Mr. Kaushal confined himself whilst other counsel supporting the validity of Art 329A (4) offered it only as an alternative submission. This was that the whole procedure adopted and needed being a law making procedure and nothing more there was no need to look for norms of for law applied as no judicial or quasi-judicial proceeding was involved. This approach certainly avoids the extraordinary anomalies and results involved in the proposition that "constituent power" embraces some indefinable or "unbroken" power to override laws and to withdraw and decide all disputes particularly in election matters in Parliament itself. As already indicated there is no provision anywhere for the exercise of overriding judicial or quasi-judicial powers by Parliament. It is difficult to conceive a case being considered by Parliament and the ratifying legislature as a case on trial. Parliament could not therefore

be assumed to have withdrawn and then to have decided a particular case in a particular way by applying its own norms. It is presumed to know the law. Ostensibly, Article 329 A (4) is part of an amendment of the Constitution for the purposes found in the Statement of Objects and Reasons. Only the declaration given at the end of it suggests that in the course of it the effect upon the case before us was considered and dealt with.

605. If Article 329A (4) constituted only a piece of purported law making the next question which deserves very serious consideration by us is whether such purported law making a not fully covered by the undoubted law making power of Parliament to make law prospectively as well as retrospectively, inter alia to get rid of the legal effect or result of a judgment considered erroneous by it or to retrospectively validate an election if considers valid whatever may be its reasons for reaching this conclusion. I will answer this question after considering the relevant case law cited on the subject.

606. A number of cases have been cited before us: some on retrospective validation of taxing provisions, by removing defects, others on removal of the basis of or grounds of decisions given by Courts making their judgments ineffective, others affecting the jurisdiction of Courts in cases pending, either in the original Courts or in Courts of Appeal so as to render proceedings infructuous, and still others curing legally defective appointment or elections. It is not necessary to discuss these cases separately and individually as the principles laid down there are well recognised. I will be content with mentioning the cases cited. They were *M.P.V. Sundararamier and Co. v. the State of Andh Pra*, 1958 SCR 1422 = (AIR 1958 SC 468); *Shree Vinod Kumar v. State of Him Pra*, 1959 Supp 1 SCR 160 = (AIR 1959 SC 223); *Jadab Singh v. the Himachal Pradesh Administration* (1960) 3 SCR 755 = (AIR 1960 SC 1008); *Udai Ram Sharma v. Union of India*; (1968) 3 SCR 41 = (AIR 1968 SC 1138) *Rustom Cavasjee Cooper v. Union of India* (1970) 3 SCR 530 = (AIR 1970 SC 564); *Jagannath v. Authorised Officer. Land Reforms* (1972) 1 SCR 1055 = (AIR 1972 SC 425); *Khyerban Tea co. Ltd. v. The State of Assam*, (1964) 5 SCR 975 = (AIR 1964 SC 925), *Tirath Ram Rajindra Nath, Lucknow v. State of U.P.* AIR 1973 SC 450, *Krishna Chandra Gangopadhyaya v. The Union of India*, AIR 1975 SC 1389, *Pandia Nadar v. The State of Tamil Nadu* (1974) 2 SCC 539 = (AIR 1974 SC 2044); *State of Orissa v. B.K. Bose* 1962 Supp 2 SCR 380 = (AIR 1962 SC 945).

607. Cases were also cited where rights having been altered during the pendency of proceedings. Courts had to give effect to the rights as altered, and judgments already given on the strength of the previous law had ceased to have a binding force as *res judicata* between parties or had to be set aside where appeals against them were pending. These were: *State of U.P. v. Raja Anand Brahma Shah*, (1967) 1 SCR 362 = (AIR 1967 SC 661); *Sh. Prithvi Cotton Mills Ltd. v. broach borough Municipality*, (1970) 1 SCR 388 at p. 392 = (AIR 1970 SC 192 at p. 194); *Janapada Sabha, Chhindwara v. The Central Provinces Syndicate Ltd*, (1970) 3 SCR 745 = (AIR 1971 SC 57); *Municipal Corporation of the City of Ahmedabad etc. v. New Shorock Spg. & Wvg co. Ltd.*, (1970) 1 SCR 288 = (AIR 1970 SC 1292); *State of Tamil Nadu v. M.R.*

Gounder. AIR 1971 SC 231; Amarjit Kaur v. Pritam Singh, AIR 1974 SC 2068; Qudrat Ullah v. Municipal Board, Bareilly, AIR 1974 SC 396.

608. Cases were also cited of the exercise of Constitutional power of amendment by placing Acts in the 9th Schedule under the provisions of Article 31-B of the Constitution, such as *Jagannath v. Authorised Officer. Land Reforms*, (AIR) 1972 SC 425) (supra) so that Acts so included in the 9th Schedule were immune from attack on the ground of alleged violation of any fundamental rights. It is not necessary to cite them as this is now a well recognised constitutional device whose validity has been upheld by this Court in *Kesavanand Bharti's case* (AIR 1973 SC 1461) (supra).

609. Our attention was especially invited to passages from *Udai Ram Sharma v. Union of India* AIR 1960 SC 1008 (supra) where it was said (at page 54);

"In our opinion no useful purpose will be served by referring to the clear demarcation between the judicial powers and legislative powers in America and attempt to engraft the said principle in the working of our Constitution. This development of the law, as pointed out in *A. K. Gopalan v. State* 1950 SCR 88 at p. 198 = (AIR 1950 SC 27) was due to historical reasons."

610. After that the following passage from the judgment of Das, J in *A.K. Gopalan's case* AIR 1950 SC 27 was quoted (at page 55):

"The Supreme Court of the United States, under the leadership of Chief Justice Marshall, assumed the power to declare any law unconstitutional on the ground of its not being in "due process of law."... It is thus that the Supreme Court established its own supremacy over the executive and the Congress. In India the position of the Judiciary is some-where in between the Courts in England and the United States. While in the main leaving our Parliament and the State Legislatures supreme in their respective legislative fields, our Constitution has, by some of the articles, put upon the Legislature certain specified limitations.... Our Constitution, unlike the English Constitution, recognises the Court's supremacy over the legislative authority, but such supremacy is a very limited one, for it is confined to the field where the legislative power is circumscribed by limitations put upon it by the Constitution itself. Within this restricted field the Court may, on a scrutiny of the law made by the Legislature, declare it void if it is found to have transgressed the constitutional limitations."

611. In *Udai Ram Sharma's case* (AIR 1960 SC 1008) (supra) the following passage from Willoughby's *Constitution of the United States*. Second Edition, Vol. 3. was also cited:

"If the legislature would prescribe a different rule for the future from that which the Courts enforce, it must be done by statute, and cannot be done by a mandate to the Courts which leaves the law unchanged, but seeks to compel the Courts to construe and apply it not according to the judicial, but according to the legislative judgment.... If the legislature cannot thus indirectly control the action of the Courts, by requiring of them a

construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry.”

612. Willoughby's statement of law in the United States of America showing that retroactive legislation which does not impair vested or substantial rights or constitutional prohibitions, is permissible and his conclusion, relying on Cooley's "Constitutional Limitations" was also quoted:

“The legislature does, or may, prescribe the rules under which the judicial power is exercised by the Courts; and in doing so it may dispense with any of those formalities which are not essential to the jurisdiction of the Court; and whatever it may dispense with by statute anterior to the proceedings, we believe it may also dispense with by statute after the proceedings have been taken, if the Court has failed to observe any of those formalities. But it would not be competent for the legislature to authorize a Court to proceed and adjudicate upon the rights of parties, without giving them an opportunity to be heard before it and for the same reason it would be incompetent for it, by retrospective legislation, to make valid any proceedings which had been had in the Courts, but which were void for want of jurisdiction over the parties.”

613. In *Udai Ram Sharma's* case (AIR 1960 SC 1008) (*supra*) an argument, based on some observations in *B.C. Ghose v. King Emperor*, 1944 FCR 295 = (AIR 1944 FC 86) was that the provisions of an amending Act amounted to passing a decree. But, this Court repelled this argument relying on principles laid down in *Q. v. Burah*. (1878) 5 Ind App 178 (*supra*):

“If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.”

614. A case strongly relied upon by learned Counsel supporting the validity of Article 329-A (4) was; *Kanta Kathuria v. Manak Chand Surana*, 1970 (2) SCR 835 = (AIR 1970 SC 694). In this case decided by five Judges of this Court, there was unanimity on the conclusion that the State Legislature had power to retrospectively remove the disqualification of a candidate. The following quotation from the judgment (at page 851 of SCR) shows the reasoning adopted:

“Mr. Chagla, learned Counsel for the respondent, contends that the Rajasthan State Legislature was not competent to declare retrospectively' under Art. 191 (1) (a) of the Constitution. It seems to us that there is no force in this contention. It has been held in numerous cases by this Court that the State Legislatures and Parliament can legislate retrospectively subject to the provisions of the Constitution. Apart from the question of fundamental rights, no express restriction has been placed on the power of the Legislature

of the State, and we are unable to imply, in the context, any restriction. Practice of the British Parliament does not oblige us to place any implied restriction. We notice that the British Parliament in one case validated the election: (Erskine May's Treatise on the Law, Privileges Proceedings & Usage of Parliament — Seventeenth (1964) Edition) —

“After the general election of 1945 it was found that the persons elected for the Coatbridge Division of Lanark and the Springburn Division of Glasgow were disqualified at the time of their election because they were members of tribunals appointed by the Minister under the Rent of Furnished Houses Control (Scotland) Act, 1943, which entitled them to a small fee in respect of attendance at a Tribunal. A Select Committee reported that the disqualification was incurred inadvertently, and in accordance with their recommendation the Coatbridge and Springburn elections (Validation) Bill was introduced to validate the irregular elections (H.C. Deb (1945-46) 414 c. 564-6) See also H.C. 3 (1945-46); *ibid*, 71 (1945-46) and *ibid*, 92 (1945-46).”

We have also noticed two earlier instances of retrospective legislation, e.g. The House of Commons (Disqualification) Act. 1813 (Halsbury Statutes of England p. 467) and Section 2 of the Re-election of Ministers Act, 1919 (*ibid*, p. 515).

Great stress was laid on the word 'declared' in Article 19(1) (a), but we are unable to imply any limitation on the powers of the Legislature from this word. Declaration can be made effective as from an earlier date.

The apprehension that it may not be a healthy practice and this power might be abused in a particular case are again no grounds for limiting the powers of the State Legislature.”

615. Another case on which a great deal of reliance was placed by Mr. A.K. Sen was the case of the validation of the elections of John Clarke George, Esquire, and Sir Roland Jennings, Knight, 1955 Law Reports Statutes 4 Elizabeth 2 by the British Parliament. Here, the two gentlemen named above were “discharged, freed and indemnified from all penal consequences whatsoever incurred by them respectively by sitting or voting as Members of the Commons House of Parliament while holding their said offices.” It was also declared that they “shall be deemed not to have been incapable of being elected members of the Commons House of Parliament, or to have been or to be incapable of sitting or voting as members thereof, by reason only of having at any time before the passing of this Act held office :

“(a) in the case of the said John Clarke George as Director appointed by the Minister of works of Scottish Slate Industries Limited.

(b) in the case of the said Sir Roland Jennings, as Approved Auditor appointed under the Industrial and Provident Societies Act. 1893, and the Friendly Societies Act. 1896.”

616. Learned Counsel for the election petitioner replied that it is noticeable that no English case could be cited where any attempt was made by

the British Parliament to circumvent Section 107 of the Representation of the People Act 1949, which lays down:

“Section 107, Method of questioning Parliamentary election.

- (1) No parliamentary election and no return of Parliament shall be questioned except by a petition complaining of an undue election or undue return (hereinafter referred to as parliamentary election petition) presented in accordance with this Part of this Act.
- (2) A petition complaining of no return shall be deemed to be a parliamentary election petition and the High Court may make such order thereon as they think expedient for compelling a return to be made or may allow the petition to be heard by an election court as provided with respect to ordinary election petitions.”

617. He also submitted that in none of the cases of validation, was any election dispute shewn to be pending. No judgment was actually set aside in contravention of the binding constitutionally prescribed procedure to decide such disputes. He submitted that, in the case of an election to a Parliamentary seat in this country, this could be done by Parliament itself only after first repealing the application of the 1951. Act and amending Article 329 (b) in such a way as to vest the power in itself to decide the dispute.

618. Learned Counsel, for the election petitioner relied upon the following statement in the American Jurisprudence, 2nd Edn. Vol. 46. at page 318:

“The general rule is that the legislature may not destroy, annual, set aside, vacate, reserve, modify, or impair the final judgment of a Court of competent jurisdiction, so as to take away private rights which have been vested by the judgment. A statute attempting to do so has been held unconstitutional as an attempt on the part of the legislature to exercise judicial power, and as a violation of the constitutional guaranty of due process of law. The legislature is not only prohibited from reopening cases previously decided by the Courts, but is also forbidden to affect the inherent attributes of a judgment. That the statute is under the guise of an Act affecting remedies does not alter the rule”.

619. On the other hand, learned Counsel supporting the validity of Article 329-A (4) relied on the following passage:

“It is worthy of notice, however, that there are cases in which judgments requiring acts to be done in the future may validly be affected by subsequent legislation making illegal that which the judgment found to be legal, or making legal that which the judgment found to be illegal”

They also pointed out:

“With respect to legislative interference with a judgment, a distinction has been made between public and private rights under which distinction a statute may be valid even though it renders ineffective a judgment

concerning a public right. Even after a public right has been established by the judgment of the Court, it may be annulled by subsequent legislation”.

620. It is contended that the election of a candidate is the result of the exercise of their rights of voting by the electorate. An election results from public action and produces a “public right” inasmuch as the electorate and the public become interested parties acquiring the right to be represented by the elected candidate. The right to challenge that election is a statutory right. What the statute gives can be taken away by statute. The grounds for challenging the election could also be altered. No one, it was urged, could be heard to say that he had any vested or inherent right to challenge an election. It was contended that once the applicability of all law previous to the 39th amendment to the class dealt with by Art. 329-A (4) was removed retrospectively, the resulting legislative declaration followed automatically even if it had not been inserted. Its inclusion was a superfluity. Article 329-A (4) was said to be merely incidental and consequential to what was done by earlier clauses (1) to (3). It is difficult to see how Article 329-A (4) which relates to what was past could be incidental or consequential to what was intended to be done in future. Moreover, more serious difficulties, dealt with below, are found here than those which could arise in ordinary cases of retroactive validation.

621. Learned Counsel for the election petitioner relied on *Don John Fancis Douglas Liyange v. The Queen*. (1967) 1 AC 259 where the Privy Council considered the validity of the Criminal Law Special Amendment Act of 1962, passed by the Parliament of Ceylon which had purported to legalise ex post facto the detention of persons for having committed offences against the State by widening the class of offences for which trial, without jury but nominated judges could be ordered. The scope of the offence of waging war against the Queen was widened and new powers to deal with offenders were given and additional penalties were prescribed. It was held that although no fundamental principles of justice could be said to have been violated by the Act, yet the Act of 1962 and an amending Act of 1965, were invalid on the ground summarised in the head-note as follows (at p. 260):

"That the Acts directed as they were to the trial of particular prisoners charged with particular offences on a particular occasion involved a usurpation and infringement by the legislature of judicial powers inconsistent with the written Constitution of Ceylon, which while not in terms vesting judicial functions in the judiciary manifested an intention to secure in the judiciary a freedom from political legislative and executive control and in effect left untouched the judicial system established by the Charter of Justice 1833. The silence of the Constitution as to the vesting of judicial power was consistent with its remaining where it was an inconsistent with any intention that it should pass to or be shared by the executive or the legislature. The Acts were accordingly ultra virus and void, and the convictions could not stand."

622. If the constituent bodies, taken separately or together, could be legally sovereign in the same way as the British Parliament is the Constitutional validity of no amendment could be called in question before us. But as it is well established that it is the Constitution and not the constituent power which is supreme here in the sense that the Constitutionality of the Constitution cannot be called in question before us, but the exercise of the constituent power can be we have to judge the validity of exercise of constituent power by testing it on the anvil of constitutional provisions. According to the majority view in Kesavananda's case (supra), we can find the test primarily in the Preamble to our Constitution.

623. A point emphasized by J. C. Gray (See : "Nature & Sources of Law" p. 96) is that unless and until Courts have declared and recognised a law as enforceable it is not law at all Kelsen (See : "General Theory of Law & State" p. 150) finds Gray's views to be extreme. Courts, however, have to test the legality of laws whether purporting to be ordinary or constitutional by the norms laid down in the Constitution. This follows from the Supremacy of the Constitution. I mention this here in answer to one of the questions set out much earlier : Does the "basic structure" of the Constitution test only the validity of a constitutional amendment or also ordinary laws? I think it does both because ordinary law making itself cannot go beyond the range of constituent power. At this stage, we are only concerned with a purported constitutional amendment. According to the majority view in Kesavananda Bharati's case (AIR 1973 SC 1461) the preamble furnishes the yard-stick to be applied even to constitutional amendments.

624. Learned Counsel for the election petitioner has strongly relied upon the very first purpose of the Constitution stated in the prembles to be Justice (with a capital "J") which includes "Political Justice". His contention is that if a majority party is to virtually act as the judge in an election dispute between itself and minority parties whose cause according to the learned Counsel the election petitioner represents it would be a plain denial of "political" justice. I do not know why this question should be termed as one of "Political justice" and not of plain and simple elementary justice except that the contending parties represent political causes which are for purposes of plain and simple justice with which we are really concerned irrelevant. We are not asked to judge a political issue directly as to who should be the Prime Minister of this country. We are only asked to hold that even a constitutional amendment, when made by Members of a majority party to enforce their own views of what is politically and legally right as against the views, on these matters of minority parties when the representative of the minority parties allege a misuse of constitutional powers by a deviation from a constitutionally laid down purpose such a legal question of fact and law should be capable of trial and decision by an independent authority on such exclusively legal grounds as may be open. That is the simple principle on which learned Counsel for the election petitioner rests his case irrespective of the rights and wrongs or the merits of his client's case and, I have found it impossible to decide it as I have decided it against the election petitioner without going into facts

and merits of the appeals – for the submission that our jurisdiction to try this case on merits cannot be taken away without injury to the basic postulates of the rule of law and of justice within a politically democratic constitutional structure. I do not think that we can consistently with the objects of justice including what is claimed as "political justice", which are parts of what is called the "basic structure", deny the right to claim and adjudication from this Court on exclusively legal issues (not political ones) between the majority party and the minority groups of parties, however, large and legally right the majority party may be and however small and legally wrong the minorities groups or parties may be. Can the legal rights and wrongs on such an issue be resolved in accordance with the objects of the Preamble anywhere other than this Court now? I think that it would be a very dangerous precedent to lay down that they can be and need be determined nowhere at all. That is what acceptance of total validity of Article 329-A (4) may mean if it bars our jurisdiction to hear and decide such a case on merits.

625. What was sought to be done by the Constitutional amendment may be politically very justifiable. The question before us however is whether it is also legally justifiable. Here we are back again in the realm of basic principles of justice. We are not to decide a political question here at all. But we have to decide legal questions even if they have as many legal issues have political consequences and repercussions which we cannot entirely ignore. Perhaps we have to go back to *Marbury v. Madison* (1803) 1 Cranch 137 (supra) where Chief Justice Marshall said (at. p. 162):

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of Government is to afford that protection. In great Britain the King himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the 3rd vol. of his Commentaries, p. 23 Blackstone states two cases in which a remedy is afforded by mere operation of law.

'In all other cases', he says it is a general and indisputable rule that where there is a legal right there is also a legal remedy by suit or action at law, whenever that right is invaded."

626. It is true that the right which the election petitioner claims is a purely statutory right. The right to come to this Court under Section 116-A of the Act of 1951 is also a creature of statute and can be taken away retrospectively. But where this taking away also involves the taking away of the right to be heard by this Court on a grievance whether justifiable or not, that a minority party is being oppressed by the majority, can we deny the spokesman of the minority even a right to be heard on merits? Such an issue is constitutional. Confession of our inability to resolve it judicially would be according to learned Counsel for the election petitioner a denial of "political justice". This issue is extrinsic so far as the Act of 1951 is concerned. The election petitioner has complained of the taking away of his right to be heard with a view to depriving him of "political" justice with an ulterior object and political motivation. I have dealt with the merits of the case to show that

from the legal aspect his grievance on the merits of his case is misconceived. He has no vested right under a palpably erroneous judgment which was the subject matter of the two appeals to this Court. Nevertheless this could only be demonstrated after we had gone into the merits of the case and rendered our decision on the issues in accordance with the law in the 1951 Act. Thus what is involved is the right of the election petitioner to be heard on merits and the power of this Court to look into the merits of the case in order to determine whether the election-petitioner's grievances could have any real legal foundations. I think that this is a basic consideration which must compel us in the light of the principles laid down by us in Kesavananda Bharati's case (AIR 1973 SC 1461) (supra) to hold that we must look into his grievances and determine for ourselves where his case stood on the law before it was amended. Our jurisdiction at any rate cannot be barred without creating the impression that what the election petitioner calls "political justice" is being denied to him.

627. The question which arises now is : Was CI (4) of 329-A read with clauses (5) and (6) really meant to bar our jurisdiction to consider the grievances of the petitioner and to decide them or can they be so interpreted as to preserve this court's jurisdictional?

628. Broadly speaking the election petitioner has two heads of grievance : firstly that the election of the original respondent is vitiated by corrupt practices which as I have indicated after considering the case set up by him and the evidence tendered and the law applicable could not possibly succeed even under the law as it stood before the amendment, and, secondly, that our very jurisdiction to go into these grievances is sought to be debarred by clauses (4), (5) and (6) of Article 329-A (4) with the political object of stifling opposition and therefore according to the election petitioner we must declare clause (4) and the connected clauses (5) and (6) of Article 329-A to be invalid. Although, the 1st set of complaints is based upon the provisions of the Act of 1951 the second set arises because of impugned clauses of the 39th Amendment. For the second set of grievances, the action complained of is that of the State itself acting through its law making organs. It is because of this interest of the Union of India, acting in its law making capacity, that we have heard the Attorney General and the Solicitor General. Although the second set of grounds may arise as a result of the 1st set yet they are different. Our jurisdiction to consider these different grounds of complaint does not ordinarily arise at all in the exercise of our jurisdiction under Section 116-A of the Act of 1951. It is for this reason that the election petitioner had filed a separate Writ Petition in the High Court to challenge an amendment of the Act. But, we decided to hear arguments on constitutional issues also without a separate proceeding. The causes of action arising out of the amendments have become attached if I may so put it to the appeals under Section 116-A of the Act because we could not, under the law, hear the appeals unless these obstacles if any, were overcome.

629. Indeed, so far as the original respondent is concerned the effect of Cls (4), (5) and (6) of Article 329-A would be if we were to hold that they bar our

jurisdiction to go into the merits of the appeals under Section 116-A of the Act. That her grievance against the judgment under appeal also could not be gone into or dealt with. In other words, the original respondent would also be denied an opportunity of asserting her rights under the 1951 Act and of vindicating her stand in the case by showing that there was really no sustainable ground for the findings given by the learned Judge of the High Court against her. We would, therefore, be prevented from doing justice to her case as well if we were to accept the contention that the 39th Amendment bars our jurisdiction to hear the appeals under Section 116-A of the Act on merits. The total effect would be that justice would appear to be defeated even if, in fact, it is not so as a result of the alleged bar to our jurisdiction it were held to be there. Could it be the intention of Parliament that justice should appear to be defeated? I think not.

630. It was also contended before us that we should not go at all into the merits of the case before us as it was a political matter. In other words, the "political question" doctrine was invoked in aid of the submission that we should voluntarily abstain from deciding a question of a "political nature". It is true that the "political question doctrine" has been sometimes invoked, in the past, by the American Supreme Court to abstain from taking a decision. In answer to this argument, learned Counsel for the election petitioner cited before us from comments on the Constitution of the United States of America (Analysis and Interpretation by the Congressional Research Service - 1973 Edn. p. 665) that the "political question" doctrine is the result of a "prudential" attitude Courts adopt when they find they their judgments may not be enforced. It was described there as "a way of avoiding a principled decision damaging to the Court or an expedient decision damaging to the principle". It was also pointed out there that this doctrine has been rationalized and considerably narrowed down by the American Supreme Court in *Baker v. Carr*. (1962) 369 US 186 where it was explained that "non-justiciability of a political question is primarily function of separation of powers." It really means that there are matters about which declarations made or certificate granted by the executive wing of Government would be treated as conclusive so that Courts will not go behind them. It was also said there:

"Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation and is a responsibility of this Court as ultimate interpreter of the Constitution".

631. Learned Counsel for the election petitioner also relied upon *H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur v. Union of India*. (1971) 3 SCR 9 = (AIR 1971 SC 530) where this Court said : (at p. 75) (of SCR) = (at p. 563 of AIR) :

"The functions of the State are classified as legislative, judicial and executive; the executive function is the residue which does not fall within the other two functions. Constitutional mechanism in a democratic policy does

not contemplate existence of any function which may qua the citizens be designated as political and orders made in exercise where of are not liable to be tested for their validity before the lawfully constituted courts : Rai Sahib Ram jaway Kapur v. State of Punjab (1955) 2 SCR 225= (AIR 1955SC 549); Jayantilal Amritlal Shodhan v. F.N. Rana ((1964) 5 SCR 294) = (AIR 1964 SC 648); and Halsbury's Laws of England 3rd Edn. Vol 7, Article 409, at p. 192.

632. Learned Solicitor General also contended that we were passing through critical times when a state of Emergency had been declared. He submitted that the decision of the constituent authorities, in excluding a particular case from the jurisdiction of this Court, should be treated as an exercise of very special power under very unusual conditions in which internal and external dangers, with which the country was surrounded, required that the position of the Prime Minister should be declared unequivocally unassailable so that the need for further examination of the question of her election to Parliament may not be raised anywhere else. This seems to be another form in which "political question" argument could be and was addressed to us. Undoubtedly, clause (4) of Article 329 A could be said to have a political objective in the context in which it was introduced and we could perhaps, take judicial notice of this context. Even if it was possible to go beyond the statement of objects and reasons and to hold that clause (4) of Article 329A is there essentially for demonstrating the strong position of the Government and of the Prime Minister of this country to all inside and outside the country so as to inspire the necessary confidence in and give the necessary political and legal strength to the Government to enable it to go forward boldly to deal with internal economic and law order problems and international questions. Yet, I fail to see why this could make it necessary to exclude that jurisdiction of this Court so as to prevent it from considering a case which would have been over much sooner if we had not been confronted with difficulties, at the very outset in examining the merits of the case. Speaking for myself. I fail to see what danger to the country could arise or how national interests could be jeopardised by a consideration and a decision by this Court of such a good case as I find that the Prime Minister of this country had on facts and law. Nevertheless I am prepared to concede that there may be and was some very useful political objective to be served by demonstrating the strength and ability of the Government of face the difficulties with which is had been conformed. It that be so we can certainly say that clause (4) of Article 329A had a political objective and utility which has been served. And, if that was the real object behind its enactment, it could not be really to injure the interests of minority political parties or groups which is what is contended for on behalf of the election petitioner. I think that the context and the political considerations placed before us could be relevant in understanding the real meaning of clause (4) of Article 329A of the Constitution.

633. It is a well established canon of interpretation that, out of two possible interpretations of a provision, one which prevents it from becoming unconstitutional should be preferred if this is possible- *ut res magis valeat*

quam pereat. It is true that the deeming provision seems to stand in the way of our examination of the merits of the case even though there is no direct provision taking away our jurisdiction to consider the merits of the appeals before us. It has, however, been repeatedly laid down that a deeming provision introducing a legal fiction must be confined to the context of it and cannot be given a larger effect: (See *Radha Kishan v. Durga Parsed*, AIR 1940 PC 167). In *Bengal Immunity Co. Ltd. v. The State of Bihar* (1955) 2 SCR 603 = (AIR 1955 SC 661) it was held by this Court that a legal fiction is created for some definite purposes and should not be extended beyond its legitimate field determined by its context. The same view has been expressed by this Court in other cases; *C.I.T. Bombay v. James Anderson*; (1964) 5 SCR 590 = (AIR 1964 SC 1761) *C.I.T., Madras v. Express Newspaper Ltd., Madras*; (1964) 8 SCR 189 = (AIR 1965 SC 33); *Sri Jagdguru Kari Basava Rajendraswami of Govimutt v. Commissioner of Hindu Religious Charitable Endowments, Hyderabad*. (1964) 8 SCR 252 = (AIR 1965 SC 502).

634. In *Ex-Parte Walton*, In re: *Levy*, (1881) 17 Ch D. 746 James LJ said:

"When a statute enacts that something shall be deemed to have been done, which in fact and in truth was not done, then the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to?" In other words, we have to examine the context and the purpose of the legal fiction and confine its effects to these.

635. If the purpose of the clause (4) of Article 329A was purely to meet the political needs of the country and was only partly revealed by the policy underlying the statement of objects and reasons it seems possible to contend that it was not intended at all to oust the jurisdiction of the Court, Hence, Art. 329A cl. (5) will not, so understood, bar the jurisdiction of the Court to hear and decide the appeals when it says that the appeal shall be disposed of in conformity with the provisions of clause (4).

636. In the circumstances of this case, it would seem that conformity with the declaration embodied in Article 329A clause (4) is possible, if we confine the meaning and effect of the deeming provision to what was needed only for the declaration to be given at the end of clause (4) by the constituent bodies, with a political object, and not for the purposes of affecting our jurisdiction which determines legal effects or what is sought to be done. Of course, the more natural interpretation would appear to be that the deeming provision should apply for all purposes including those for consideration of the appeals before us. But if it is not possible to decide those appeals without giving a different meaning to the deeming provision, on which the final declaration in clause (4) rests, and clause (5) leaves us free to decide how we could conform with clause (4) need our jurisdiction to decide factual and legal issues judicially be said to be affected? If the fiction was only a logical step in the process of the declaration to be made by constituent authorities but not of ours, it would only attach to the declaration contained at the end of clause (4). Perhaps it could be argued, by applying the doctrine of "reading down", that clause (4) was not intended to oust the jurisdiction of this Court

altogether to try the case. No such attempts at reading it down have, however, been made by learned Counsel supporting the validity of Article 329A (4). It is not unlikely that Article 329A (4) was based on the misapprehension that the High Court's judgment may be legally correct or that there was possibility, even for a case so ill founded in fact and in law as the one put forward on behalf of the election-petitioner, to succeed in this Court if it had succeeded in the High Court. We cannot indulge in guess work on these matters. In any case, no useful purpose will be served now by our declaring anything beyond that clause 329A (4) does not so operate as to bar the jurisdiction of this Court to go into and determine the merits of the appeals before us by applying the Act of 1951. Even if we were to consider matters of expediency and national interest, as we should in appropriate cases, it does not appear to me to be either expedient or in conformity with national interests to leave the matter in doubt whether the judgment under appeal before us could or could not legally stand on its own legs under the unamended law.

637. For the reasons given above. I declare that Article 329A (4) does not stand in the way of the consideration of the appeals before us on merits under the Act of 1951 or the validity of the amendment's of the Act. On a consideration of the merits of Appeals Nos. 887 and 909 of 1975, I have come to the conclusion, as indicated above, that Appeal No. 887 must be allowed and the Cross Appeal No. 909 of 1975 must fail. The result is that the judgment and orders passed by the learned Judge of the Allahabd High Court on the election case are set aside, and in such conformity with Article 329A clause (4) as is possible for us. I also declare the judgment and the findings contained in it to be void and of no effect whatsoever. It is not necessary for me to add that the order of the learned Judge, holding the original respondent disqualified from occupying her office, disappears ipso facto and it neither has nor will be deemed over to have had any legal effect whatsoever. In the circumstances of the case, I think the parties should bear their own costs throughout.

Chandrachud, J.: –

638. The Election Petition out of which these appeals arise involved the question of the validity of the election of Smt. Indira Nehru Gandhi to the Lok Sabha. In the General Parliamentary Elections of 1971, she was declared as the successful candidate from the Rae Bareli constituency in Uttar Pradesh. She won the election by a margin of 1.11.810 votes over her nearest rival, Shri Raj Narain.

639. Shri Raj Narain who was sponsored by the Samyukta Socialist Party, filed an election petition under Section 80 read with Section 100 of the Representation of the People Act, 1951, to challenge the election of the successful candidate. Originally the challenge was founded on numerous grounds but during the trail of the petition in the High Court of Allahabad, the challenge was limited to seven grounds.

640. A learned Single Judge of the High Court, M.L. Sinha, J., upheld the challenge on two grounds rejecting the other grounds of challenge. That explains the crossappeals.

641. The High Court held that the successful candidate was guilty of having committed two corrupt practices within the meaning of Section 123(7) of the Representation of the People Act : Firstly, she obtained the assistance of the Gazetted Officers of the Government of Uttar Pradesh for furthering her election prospects; and secondly, she obtained the assistance of Shri Yashpal Kapoor, a gazetted officer in the Government of India holding the post of Officer on Special Duty in the Prime Minister's Secretariat, for furthering the same purpose. Acting under Section 8-A of the Act the learned Judge declared that the successful candidate would stand disqualified for a period of six years from June 12, 1975 being the date of the judgment. Aggrieved by this part of the judgment, Smt. Indira Gandhi has filed appeal No. 887 of 1975.

642. The other five grounds of challenge were : (1) The successful candidate procured the assistance of the Armed Forces for arranging her flights by Air Force aeroplane and helicopters : (2) Her election agent Shri Yashpal Kapoor and other distributed clothes and liquor to induce the voters to vote for her : (3) She and her election agent made appeals to the religious symbol of cow and calf; (4) Her election agent and others procured vehicles for the free conveyance of voters to the polling stations : and (5) She and her election agent incurred or authorised expenditure in violation of Section 77(3) of the Act read with Rule 90 of the Conduct of Election Rules, 1961. These grounds having been rejected by the High Court, the defeated candidate has filed appeal No. 909 of 1975. The first two grounds were given up in appeal for the reason that the evidence on record was not likely to be accepted by this Court in proof thereof.

643. The defeated candidate did not lead evidence in the High Court to show that any part of the expenditure in excess of the permissible limit of Rs. 35,000 was incurred by the successful candidate or her election agent. His contention was that the expenditure incurred for her election by the political party which had sponsored her candidature, the Congress (R) was liable to be included in the expenses incurred or authorized by her. This contention was founded on a decision rendered by a Division Bench of this Court on October 3, 1974 in Kanwar Lal Gupta v. Amarnath Chawla, AIR 1975 SC 308.

644. On October 19, 1974 the President of India Promulgated 'The Representation of the People (Amendment) Ordinance, 1974' providing that "Notwithstanding any judgment, order or decision of any court to the contrary any expenditure incurred or authorized in connection with the election of a candidate by a political party or by any other association or body of persons or by any individual (other than the candidate or her election agent) shall not be deemed to be and shall not ever be deemed to have been expenditure in connection with the election incurred or authorized by the candidate or by his election agent" This provision was added by

the Ordinance by way of an Explanation to Section 77 (1) of the Representation of the People Act, 1951. It expressly excepted from its operation decisions of the Supreme Court voiding an election before the commencement of the Ordinance. Shri Amarnath Chawla feel outside the Ordinance. It also excepted similar decisions of High Courts provided that they had become final or unappealable. The Ordinance was replaced by the Representation of the People (Amendment) Act. 58 of 1974, which was brought into force retrospectively from October 19, 1974.

645. The defeated candidate filed Writ Petition 3761 of 1975 in the High Court to challenge the constitutional validity of the Ordinance and the Act of 1974. In view of his finding that the total amount of expenditure incurred or authorized by the successful candidate or her election agent together with the amount proved to have been incurred by the political Party or the State Government in connection with her election, did not exceed the prescribed limit, the learned Judge thought it unnecessary to inquire into the constitutionality of the Ordinance and the Act of 1974. He, therefore, dismissed the Writ Petition. An appeal was filed to a Division Bench of the High Court from the aforesaid order but by consent of parties this Court decided to hear the points involved in the Writ Petition and in the appeal therefrom.

646. During the pendency of these cross-appeals the Parliament passed the Election Laws (Amendment) Act, 40 of 1975, which came into force on August 6, 1975. This Act if valid virtually seals the controversy in the appeal filed in this Court by the successful candidate from the decision of the Allahabad High Court. It also takes care of a considerable gamut of the appeal filed in this court by the defeated candidate. It substitutes a new Section 8-A in the Representation of the People Act, 1951 empowering the President to decide whether a person found guilty of corrupt practice shall be disqualified and if so for what period. By Section 6, it amends Section 77 of the Act of 1951 making pre-nomination expenses a matter of irrelevant consideration. It declares that the expenditure incurred by a Government servant in the discharge of his official duty in connection with any arrangements or facilities and such arrangements or facilities shall not be deemed to be expenditure or assistance incurred or rendered for the furtherance of the election prospects of the candidate concerned. By Section 7, it re-defines a "candidate" to mean a person who has been or claims to have been duly nominated as a candidate at any election. By Section 8 it provides that no symbol allotted to a candidate shall be deemed to be a religious or a national symbol. And it says, to the extent relevant, that the publication in the Official Gazette of the resignation of a Government servant shall be conclusive proof of the fact of resignation. If the effective date of the resignation is stated in the publication, it shall also be conclusive proof of the fact that the Government servant ceased to be in service with effect from the particular date. The amendments made by Section 6, 7 and 8 of the amending Act have retroactive effect and expressly govern election appeals pending in this Court among other proceedings.

647. The amendments brought about by Act 58 of 1974 and Act 40 of 1975 have an incisive impact on the cross-appeals but their edge was blunted by the Constitution (Thirty-ninth Amendment) Act which came into force on August 10, 1975. The 39th Amendment introduces two new articles in the Constitution : Articles 71 and 329-A; and it puts in the Ninth Schedule three Acts : (i) The Representation of the People Act. 43 of 1951; (ii) The Representation of the People (Amendment) Act. 58 of 1974; and (iii) The Election Laws (Amendment) Act, 40 of 1975. The new Article 71 which replaces its precursor empowers the Parliament to pass laws regulating the elections of the President and the Vice-President including the making of a provision for the decision of disputes relating to their election. Article 329-A has six clauses out of which the first three deal with the future election to the Parliament of persons holding the office of Prime Minister or Speaker at the time of the election or who are appointed to these offices after their election to the Parliament. These clauses aim at depriving the courts of their jurisdiction to try election petitions in which the election of the Prime Minister or the Speaker to the Parliament is challenged. Clause 4 frees the disputed election of the Prime Minister and the Speaker to the Parliament from the restraints of all election laws. It declares such election as valid notwithstanding any judgment and clause 5 ordains that any appeal or crossappeal pending before the Supreme Court shall be disposed of on the assumption that the judgment under appeal is void that the findings contained in the judgment never had any existence in the eye of law and that the election declared void by the judgment shall continue to be valid in all respects. Clause 6 provides that Article 329-A shall have precedence over the rest of the constitution.

648. At first blush what remains to be decided judicially in face of the 39th Amendment? As an exercise of Constituent power the 39th Amendment must reign supreme. The political sovereign having reposed its trust in the legal sovereign, the doings of the Constituent Assembly have an aura of sanctity that legal ingenuity may be powerless to penetrate. But that is an uninformed approach to a field strewn with various shades of legal landmarks.

649. While repelling the challenge to the first Constitutional Amendment which was passed in June 1951, this Court held in *Sri Sankari Prasad Singh Deo v. Union of India and State of Bihar* (1952) 3 SCR 89 = (AIR 1951 SC 458) that the power of amendment conferred by Article 368 was not subject to any limitations express or implied, and that fundamental rights were within the sweep of the amending power. The Seventeenth Constitutional Amendment passed in June 1964 was similarly upheld by a majority decision of this Court in *Sajjan Singh v. State of Rajasthan*. (1965) 1 SCR 933=(AIR 1965 SC 845) which took the view that the fundamental rights were not intended by the framers of the Constitution to be finally and immutably settled when Constitution was passed. But the Seventeenth Amendment came to be challenged once again in *I.C. Golak Nath v. State of Punjab*. (1967) 2 SCR 762 = (AIR 1967 SC 1643). By a majority of 6:5 this Court held that the Seventeenth Amendment was ultra vires the Parliament's power to

amend the Constitution. Five out of the six learned judges held that Article 368 did not confer any power to amend but merely prescribed the procedure for amendment. The sixth learned Judge held that Article 368 did contain the power of amendment but that the Parliament must amend Article 368 to convoke another Constituent Assembly pass a law under item 97 of List I of Schedule 7 to call Constituent Assembly and then that Assembly may be able to abridge or take away, the fundamental rights if desired.

650. The decision of Golak Nath's case raised a debate of national dimensions as the Parliament's power to amend the Constitution so as to abridge or take away the fundamental rights virtually became a dead letter. Under the majority judgment, the Constituent Assembly alone, called by virtue of a law to be passed under Entry 97 of List I, could abridge or take away the fundamental rights. The Parliament, in a resolve to reaffirm its powers, passed the Constitution (Twenty-fourth Amendment) Act on November 5, 1971 and the Constitution (Twenty-fifth Amendment) Act on April 20, 1972. By the 24th Amendment, the Parliament amended Articles 13 and 368 of the Constitution so as to provide that nothing contained in Article 13 shall apply to any amendment of the Constitution made under Article 368 and that notwithstanding anything in the Constitution, Parliament may, in the exercise of its constituent power, amend by way of addition, variation or repeal any provision of the Constitution in accordance with the procedure laid down in article 368. As an instance of the amendatory power re-acquired under the 24th Amendment, Parliament, by the 25th Amendment, substituted a new clause (2) in Article 31 and introduced a new Art. 31-C in the Constitution. By the 29th Amendment Parliament placed the Kerala Law Reforms (Amendment) Acts of 1969 and 1971 in the Ninth Schedule.

651. A Bench of thirteen Judges of this Court sat to consider the constitutionality of the 24th, 25th and 29th Amendments. The eleven judgments delivered in that case are reported in *Kesavananda Bharti v. State of Kerala*, 1973 (Supp) SCR 1= (AIR 1973 SC 1461) commonly known as the Fundamental Rights case. Golak Nath's case stood over ruled as a result of the decision in this case But six learned Judges out of the thirteen (Sikri, C.J. and Shelat, Grover, Hegde, Reddy and Mukherjea, JJ.) accepted the contention of the petitioners that though Article 368 conferred the power to amend the Constitution, there were inherent or implied limitations on the power of amendment and therefore, Article 368 did not confer power to amend the Constitution so as to damage or destroy the essential elements or basic features of the Constitution. Fundamental Rights, being a part of the essential features of the Constitution, could not therefore be abrogated or emasculated in the exercise of the power conferred by Article 368, though a reasonable abridgement of those rights could be effected in the public interest. Brother Khanna, J. found it difficult, in face of the clear words of Article 368, to exclude from their operation the articles relating to fundamental rights in Part III of the Constitution. But proceeding to consider "the scope of the power of amendment under Article 368", the learned Judge held that the power to amend did not include the power to abrogate the

Constitution, that the word “amendment” postulates that the old Constitution must survive without loss of identity, that the old Constitution must accordingly be retained though in the amended form, and therefore the power of amendment does not include the power to destroy or abrogate the basic structure or framework of the Constitution. The remaining six Judges took the view that there were no limitations of any kind on the power of amendment, though three of them seemed willing to foresee the limitation that the entire Constitution could not be abrogated, leaving behind a State without a Constitution. Some scholars have clapped and some scholars have scoffed at the decision in the Fundamental Rights case. These criticisms, I cannot deny, cause a flutter in the ivory tower. But by Article 141 of the Constitution, the law declared by the Supreme Court is binding on all courts within the territory of India. The law declared by the majority of 7:6 in the Fundamental Rights case must therefore be accepted by us, dutifully and without reserve as good law. The history of law courts abounds with memorable decisions based on a thin majority.

652. These appeals have therefore to be decided in the light of the principle emerging from the majority decision in the Fundamental Rights case that Article 368 does not confer power on the Parliament to alter the basic structure or framework of the Constitution. Arguments of the learned counsel appearing on both sides have taken many forms and shapes but they ultimately converge on the central theme of basic structure.

653. I would like first to deal with the constitutional validity of the 39th Amendment. On that question, the arguments of Mr. Shanti Bhushan, who appears for Shri Raj Narain, may be summed up thus : (i) The 39th Amendment affects the basic structure or framework or the institutional pattern adopted by the Constitution and is therefore beyond the amending power conferred by Art. 368. It destroys the identity of the Constitution. (ii) Separation of powers is a basic feature of the Constitution and therefore every dispute involving the adjudication of legal rights must be left to the decision of the judiciary Clause (4) of Article 329-A introduced by the 39th Amendment takes away that jurisdiction and is therefore void. (iii) The function of the legislature is to legislate and not decide private disputes. In the instant case the Constituent Assembly has transgressed its constituent function by adjudicating upon a private dispute. (iv) Democracy is an essential feature of the Constitution. Free and fair elections are indispensable for the successful working of any democratic government. By providing that the election of the Prime Minister shall not be open to challenge and shall continue to be valid despite the judgment of the Allahabad High Court holding that the election is vitiated by corrupt practices, the Constituent Assembly has destroyed the very core of democracy. (v) Equality is an essential feature of a Republican Constitution. The 39th Amendment puts the Prime Minister and the Speaker above the law and beyond the reach of the equality principle. The classification made by the 39th Amendment bears no nexus with the sort of immunity granted to two high personages from the operation of election laws. (vi) Rule of law and

judicial review are also basic features of the Constitution. To free certain persons from the constraints of law and to place their conduct beyond judicial review is to destroy the identity of the Constitution. No freedom is secure without the court to project it. The organic balance between the three branches the legislature executive and the judiciary is upset by eroding the authority of the Supreme Court in a vital matter like elections. And the Rule of Law is abrogated by providing that the election of the Prime Minister shall continue to be valid and will be open to no challenge before any court or any authority whatsoever. (vii) The concept of political justic recognized by the Preamble is violated by the 39th Amendment. The Constitution can always be subverted by the revolutionary methods. The question is whether it is permissible to the Parliament to use the legitimacy of constitutional provisions for effecting revolutionary changes. (viii) The constituent power partakes of legislative power an can only be exercised within the highest ambit of the latter power. Therefore even with two-third majority the constituent body cannot exercise executive or judicial power. For example the power to appoint or dismiss a Government servant or the power to declare war which are executive power cannot be exercised by the Constituent Assembly. Similarly, it cannot, in the guise of amending the Constitution, provide that an accused arraigned before a criminal court shall be acquitted and shall be deemed to be innocent. The constituent body can make changes in the conditions of the exercise of judicial power but it cannot usurp that power: and lastly. (IX) The question in the Fundamental Right case was whether Parliament can in the excises of its power of amendment abridge or take away Fundamental Rights and whether there are any inherent or implied limitations on the Parliaments power of amendment. In other words, the question was whether the power of amendment can be exercised so as to destory or mutilate the basic structure of the Constitution. The Fundamental Rights case did not involve the consideration of the question as to what the power of amendment comprehends. Promoting and demoting Government servants passing and failing students who have appeared in an examination grating or withdrawing building contracts and last but not the least, declaring who has won and who has lost an election are matters clearly outside the scope of the amending power under Article 368, which means and implies the power to alter the fundamental instrument of country's governance.

654. Learned counsel appearing for the Union of India and for Smt. Indira Gandhi did not dispute the contention that the appeals before us must be disposed of on the basis of the law laid down by the majority in the Fundamental Rights case.

655. The learned Attorney General contended that : (i) The majority decision in the Fundamental Rights case is not an authority for the proposition that there could be no free or fair elections without judicial review. The Constitutions and laws of several countries leave the decision of election disputes to the judgment of the legislatures themselves. The history of the Representation of the People Act. 1951 as also various articles in our

Constitution show that judicial review can be excluded in appropriate cases as a matter of policy. (ii) That validation of elections is a process well-known to democratic forms of Government (iii) That a law may be constitutional even if it relates to a single individual if on accounts of special reasons, the single individual could be treated as a class by himself (iv) That it is clear from Articles 326 and 327 of the Constitution that the Constitution makers thought that as a matter of high policy elections ought to be dealt with by the Constitution itself and not by ordinary legislation passed within the framework of the Constitution. How much of election should be dealt with by the Constitution and how much should be relegated to ordinary legislation is not a matter for the courts to decide. If the constituent body thought that the offices of the Prime Minister and the Speaker are important enough to be dealt with by the Constitution itself in the matter of their elections to the Parliament, it cannot be said that the decision is frivolous or without jurisdiction ; and that (v) The contention that the 39th Amendment is not an exercise of constituent power should not be allowed to be taken up because every possible aspect of the matter was argued in Sankari Prasad's case, Sajjan Singh's case and the Fundamental Rights case. The basic question involved in these cases was as to what is the meaning of the word 'amendment'. The argument now is that there is a further limitation on the amending power. If it is the same question and has been decided, it cannot be reopened by saying that the question has a new aspect which was not considered then. If the question is new the principle of the Fundamental Rights case cannot be extended any further. Therefore, the constituent power must be held to be a plenary power on which the only limitation is as regards the inviolability of the basic structure.

656. The learned Solicitor-General who continued the unfinished arguments of the learned Attorney-General urged that (i) Article 14 is founded on a sound public policy recognised and followed in all civilised States. The exclusion of judicial review does not by itself mean the negation of equality. Article 31-B which on the face of it denied equality to different sections of the community attained the ideal of economic justice by bringing about economic equality. Article 33 also shows that the demands of public problems may require the adjustment of Fundamental Rights for ensuring greater equality (ii) What a Constitution should contain depends on what permanency is intended to be accorded to a particular provision included in the Constitution. (iii) Exclusion of judicial review is at least permissible in those fields where originally the Constitution did not provide for or contemplate judicial review. (iv) If the election law does not apply as it ceases to apply by virtue of Article 329-A (4) it is the function of the legislature to declare whether or not a particular election is good or bad: and that Rule of Law is not a part of the basic structure of the Constitution and apart from Article 14, our Constitution recognises neither the doctrine of equality nor the Rule of Law.

657. Shri A.K. Sen who appears for Smt. Indira Gandhi defended the 39th Amendment by contending that : (i) The Amendment flows the well-known

pattern of all validation Acts by which the basis of judgments or orders of competent courts and Tribunals is changed and the judgments and orders are made ineffective. (ii) The effect of validation is to change the law so as to alter the basis of any judgment which might have been given on the basis of old law and thus to make the Judgment ineffective. (iii) A formal declaration that the judgment rendered under the old Act is void, is not necessary. If the matter is pending in appeal the appellate court has to give effect to the altered law and reverse the judgment. If the matter is not pending in appeal then the judgment ceases to be operative and binding as *res judicata*. (iv) The rendering of a judgment ineffective by changing its basis by legislative enactment is not an encroachment on judicial power but a legislation within the competence of the legislature rendering the basis of the judgment non-est (v) The constituent power has retrospectively changed the law in so far as it relates to election. The constituent authority could have left the application of the changed law either to Parliament or to any other body. But it has chosen to assume the duty of determination in this particular case for itself. (vi) The determination of election disputes and the validity of elections is not an exercise of judicial power. This function may be left either to courts, properly so-called or to Tribunals or to other bodies including the legislature itself. (vii) The rigid separation of powers as it obtains in the United States or in a lesser degree under the Australian Constitution does not apply to India. Many powers, which are strictly judicial, have been excluded from the purview of the courts. There is, therefore, no question of any separation of powers being involved in matters concerning elections and election petitions. (viii) There is no question of separation of powers when the constituent authority exercises either a power which is allocated to the Legislature or to the Executive or to the Judiciary under the Constitution. In the hands of the constituent authority there is no demarcation of powers. But the demarcation emerges only when it leaves the hands of the constituent authority through well-defined channels into demarcated pools. The constituent power is independent of the fetters of limitations imposed by separation of powers in the hands of the organs of the Government amongst whom the supreme authority of the State is allocated. (ix) The Constituent power springs as the fountainhead and partakes of sovereignty and is the power which creates the organs and distributes the powers. Therefore in a sense, the constituent power is all-embracing and is at once judicial executive and legislative. It is, in a sense a "super power". (x) Even if the preamble lays down as its objective the attainment of equality, the 39th Constitution Amendment does not violate the side concept of equality as the same is based on a rational classification and has a reasonable nexus with the object of the Amendment. (xi) The Preamble to the Constitution only refers to securing "equality of status and opportunity". Equality of status and opportunity has got many facets: some of these facets are guaranteed as fundamental rights under Articles 14 to 18 of the Constitution. These facets alone can be considered to be basic features of the Constitution assuming that equality was a basic feature of the Constitution. (xii) "Free and fair election" does not postulate that there must be a constitutional provision for determining election

disputes by a separate Tribunal or Court. (xiii) The 39th Amendment Act does not affect the structure of a Republican Democracy, assuming that the same is a basic feature of the Constitution. The validation of one election does not alter the character of the democracy : and (xiv) A Constitutional amendment need not necessarily relate to the structural organisation of the State.

658. Shri Jagannath Kaushal supported the arguments of Shri Sen by citing pragmatic illustrations. He gave interesting statistics showing that a very small percentage of election petitions succeed eventually which according to him is evidence that such petitions are used by defeated candidates as an instrument of oppression against successful candidates. Parliament, therefore, wanted to save high personages from such harassment. A law may benefit a single individual and may still be valid. According to Shri Kaushal, the judgment of the Allahabad High Court became a nullity by reason of that Court ceasing retrospectively to have jurisdiction over the dispute and a judgment which is a nullity need not be set aside. It can even be challenged in a collateral proceeding.

659. I thought it only fair to indicate broadly the line of approach adopted by the various learned counsel to the question as regards the validity of the 39th Amendment. It will serve no useful purpose to take up each one of the points for separate consideration and indeed many an argument is interrelated. It would be enough for my purpose to deal with what I consider to be points of fundamental importance, especially as my learned Brethren have dealt with the other points.

660. This Court has strictly adhered to the view that in Constitutional matters one must decide no more than is strictly necessary for an effective adjudication of the points arising in any case. By that test a numerically substantial part of the 39th Amendment has to be deferred for consideration to a future occasion. We are clearly not concerned in these appeals with the new Article 71 introduced by the 39th Amendment which deals with the election of the President and the Vice-President. We are concerned with the new Article 329-A but not with the whole of it. Clauses (1) to (3) of that article deal with future events and the validity of those clauses may perhaps be examined when those events come to happen. Clauses (4) to (6) of Article 329-A are the ones that are relevant for our purpose and I propose to address myself to the validity of those provisions.

661. Clause (4) of Article 329-A, which is the real focus of controversy may conveniently be split up as follows for understanding its true nature and effect : (i) The Laws made by Parliament prior to August 10, 1975 in so far as they relate to election petitions and matters connected therewith cease to apply to the Parliamentary election of Smt. Indira Gandhi which took place in 1971. (ii) Such Laws are repealed retrospectively in so far as they governed the aforesaid election with the result that they must never be deemed to have applied to that election. (iii) Such an election cannot be declared to be void on any of the grounds on which it could have been declared to be void under the

Laws which were in force prior to August 10, 1975. (iv) The election shall not be deemed ever to have become void on any ground on which prior to August 10, 1975 it was declared to be void. (v) The election shall continue to be valid in all respects notwithstanding the judgment of any court which includes the judgment dated June 12, 1975 of the High Court of Allahabad. (vi) The judgment of the Allahabad High Court and any finding on which the judgment and order of that court is based are void and shall be deemed always to have been void.

662. Shri Shanti Bhushan has as it were a preliminary objection to the 39th Amendment that the election of a private individual and the dispute concerning it cannot ever be a matter of Constitutional amendment. Whether this contention is sound is another matter but I do not see the force of the argument of the Attorney-General that in view of the decisions in Sankari Prasad's case, Sajjan Singh's case and the Fundamental Rights case the contention is not upon to be taken. The question raised by Shri Shanti Bhushan was not raised or considered in either of the three aforesaid cases and I do not see how the question can be shelved. The argument is not a new facet of the theory of inherent or implied limitations on the amending power in which case it might have been plausible to contend that the last word was said on the subject by the Full Court in the Fundamental Rights case. The question now raised touches a totally new dimension of the amending power : Can the Constituent Assembly while amending the Constitution pronounce upon private disputes or must it only concern itself with what may be termed organisational matters concerning the country's governance? The question has the merit of novelty but I see no substance in it. But I must clarify that I prefer to examine the point in isolation that is divocered from considerations arising from the theory of separation of powers. Whether the amendment constitutes an encroachment on judicial functions and thereby damages one of the basic structures of the Constitutions may best be examined separately. The reason why I see no substance in Shri Shanti Bhushan's contention is that what the Constitution ought to contain is not for the Courts to decide. The touchstone of the validity of a Constitutional amendment is firstly whether the procedure prescribed by Article 368 is strictly complied with and secondly whether the amendment destroys or damages the basic structure of the Constitution. The subject-matter of constitutional amendments is a question of high policy and Courts are concerned with the interpretation of laws, not with the wisdom of the policy underlying them. I do not see why the Constitution cannot be amended so as to provide that wagering contracts shall be void or that bigamous marriages shall be unlawful or that economic offenders shall be visited with a higher penalty. The Indian Constitution is not like the American Constitution an instrument of few words. The range of topics it covers would bemuse any student of foreign Constitutions which do not even skirt the problems with which our Constitution deals in copious details. In fact there is hardly any important facet of national life which our Constitution does not touch. Along with matters of high priority like citizenship, Fundamental Rights, Directive Principles of State Policy and the

relations between the Union and the States, it deals with matters not normally considered constitutionally important like the salaries of high dignitaries the power of the Supreme Court to frame rules for regulating its practice and procedure, official language for communication between one State and another and last but not the least, elections to the Parliament and the State Legislatures. Those to whose wisdom and judgement the constituent power is confided will evoke scorn and derision if that power is used for granting or withdrawing building contracts passing or failing students or granting and denying divorces. But the electorate lives in the hope that a sacred power will not so flagrantly be abused and the moving finger of history warns of the consequences that inevitable flow when absolute power has corrupted absolutely. The fear of perversion is no test of power.

663. But the comparison is odious between the instances given by Shri Shanti Bhushan and the subject-matter of Article 329-A (4) of the Constitution. In the first place elections to legislatures were considered by Constitution-makers to be a matter of constitutional importance. Secondly, though the powers of the Prime Minister in a cabinet form of democracy are not as unrivalled as those of the President in the American system, it is undeniable that the Prime Minister occupies a unique position. The choice of the subject for constitutional amendment cannot, therefore, be characterized as trifling, frivolous or outside the frame-work of a copious Constitution. In America, the challenge to the 18th Amendment on the ground that ordinary legislation cannot be embodied in a constitutional amendment was brushed aside as unworthy of serious attention. Rottschaefer endorsed it as consistent with the ultimate political theory on which the American constitutional system is based. "The people, acting through the machinery provided by the existing Constitution, must be accorded the legal power to change their basic law by peaceable means."* In fact, it is wrong to think that elections to the country's legislatures are a private affair of the contestants. They are matters of public interest and of national importance. Every citizen's sake in legislative elections for his social and economic well-being depends upon the promises and performance of the legislators. Such elections, and more so the election of the Prime Minister who is at least *primus inter pares*, can legitimately form the subject-matter of a constitutional provision. The validity of what is brought into the Constitution has to be judged by different standards.

664. There was some discussion at the Bar as to which features of the Constitution form the basic structure of the Constitution according to the majority decision in the Fundamental Rights case. That, to me is an inquiry both fruitless and irrelevant. The ratio of the majority decision is not that some named features of the Constitution are a part of its basic structure but that the power of amendment cannot be exercised so as to damage or destroy the essential elements or the basic structure of the Constitution, whatever these expressions may comprehend. Sikri, C.J., mentions supremacy of the Constitution. Republican and Democratic form of the Government, secular

character of the Constitution, separation of powers, federalism and dignity and freedom of the individual as essential features of the Constitution. Shelat and Grover, JJ., have added to the list two other features: the mandate to build a welfare State and unity and integrity of the Nation. Hegde and Mukherjea, JJ. added sovereignty of India as a fundamental feature of the Constitution. Reddy J., thought that a sovereign democratic republic, Parliamentary democracy and the three organs of the State form the basic structure of the Constitution. Khanna. J. held that fundamental rights are not a part of the basic structure and therefore they can be abrogated like many other provisions. He observed that basic structure indicates the broad outlines of the Constitution and since the right to property is a matter of details, it is not a part of that structure. The democratic form of Government, the secular character of the State and possibly judicial review are according to Brother Khanna a part of the basic structure of the Constitution. It is obvious that these are merely illustrations of what constitutes the basic structure and are not intended to be exhaustive. Shelat and Grover, JJ., Hegde and Mukherjea. JJ. and Redy. J say in their judgments that their list of essential features which form the basic structure of the Constitution is illustrative or incomplete. For determining whether a particular feature of the Constitution is a part of its basic structure, one has perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of country's governance. But it is needless for the purpose of these appeals to ransack every nook and cranny of the Constitution to discover the bricks of the basic structure. Those that are enumerated in the majority judgments are massive enough to cover the requirements of Shri Shanti Bhushan's challenge.

665. I consider it beyond the pale of reasonable controversy that if there be any unamendable features of the Constitution on the score that they form a part of the basic structure of the Constitution they are that: (i) India is a Sovereign Democratic Republic; (ii) Equality of status and opportunity shall be secured to all its citizens; (iii) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion and that (iv) the Nation shall be governed by a Government of laws, not of men. These, in my opinion, are the pillars of our constitutional philosophy, the pillars, therefore, of the basic structure of the Constitution.

666. I find it impossible to subscribe to the view that the Preamble of the Constitution holds the key to its basic structure or that the preamble is too holy to suffer a human touch. Constitutions are written, if they are written in the rarefied atmosphere of high ideology, what-ever be the ideology. Preambles of written Constitutions are intended primarily to reflect the hopes and aspirations of people. They resonate the ideal which the Nation seeks to achieve, the target, not the achievement. In parts, therefore, they are metaphysical like slogans. For example, the concept of Fraternity which is referred to in our Preamble is not carried into any provision of the

Constitution and the concept is hardly suitable for encasement in a coercive legal formula. The Preamble, generally, uses words of "Passion and power" in order to move the hearts of men and to stir them into action.* Its own meaning and implication being in doubt, the Preamble cannot affect or throw light on the meaning of the enacting words of the Constitution.** Therefore, though our Preamble was voted upon and is a part of the Constitution, it is really "a preliminary statement of the reasons" which made the passing of the Constitution necessary and desirable.† As observed by Gajendragadkar, J. in *In re: Berubari Union and Exchange of Enclaves*, (1960) 3 SCR 250, 282 = (AIR 1960 SC 845 at p. 856) what Willoughby has said about the Preamble to the American Constitution, namely, that it has never been regarded as the source of any substantive power, is equally true about the prohibitions and limitations. The Preamble of our Constitution cannot therefore be regarded as a source of any prohibitions or limitations.

667. Judicial review, according to Shri Shanti Bhushan is a part of the basic structure of the Constitution and since the 39th Amendment, by Article 329A (4) and (5) deprives the courts, including the Supreme Court, of their power to adjudicate upon the disputed election, the Amendment is unconstitutional. The fundamental premise of this argument is too broadly stated because the Constitution, as originally enacted, expressly excluded judicial review in a large variety of important matters. Articles 31 (4), 31 (6), 136 (2), 227 (4), 262 (2) and 329 (a) are some of the instances in point. True, that each of these provisions has a purpose behind it but these provisions show that the Constitution did not regard judicial review as an indispensable measure of the legality or propriety of every determination. Article 136(2) expressly took away the power of the Supreme Court to grant special leave to appeal from the decisions of any court or Tribunal constituted by a law relating to the Armed forces. Article 262 (2) authorized the Parliament to make a law providing that the Supreme Court or any other court shall have no jurisdiction over certain river disputes. But what is even more to the point are the provisions contained in Articles 103 (1) and 329 (b). Article 102 prescribes disqualifications for membership of the Parliament. By Article 103(1), any question arising under Article 102 as to whether a member of the Parliament has become subject to any disqualification has to be referred to the President whose decision is final. The President is required by Article 103 (2) to obtain the opinion of the Election Commission and act according to its opinion. Thus, in a vital matter pertaining to the election for membership of the Parliament, the framers of the Constitution had left the decision to the judgment of the executive. Articles 327 and 328 give power to the Parliament and the State legislatures to provide by law for all matters relating to elections to the respective legislatures, including the preparation of electoral rolls and the delimitation of constituencies. By Article 329 (a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies cannot be called in question in any court.

668. The Provision contained in Article 329 (b) is decisive on the question under consideration. That article provides that no election to the parliament

or the State legislature shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature. It was, therefore, open to the legislature to leave the adjudication of election disputes to authorities other than those in the hierarchy of our judicial system. In fact, until the passing of the Representation of the People (Amendment) Act. 47 of 1966, by which High Courts were given jurisdiction to try election petitions, that jurisdiction was vested first in a tribunal consisting of three members and later in a tribunal consisting of a single member who was to be a sitting District Judge. The decisions of those tribunals could eventually be brought before the Supreme Court under Article 136 (1) of the Constitution but it is at least plausible that were the Legislatures to pass laws leaving the decision of election disputes to themselves, judicial review might have stood excluded. Since the Constitution, as originally enacted, did not consider that judicial power must intervene in the interests of purity of elections, judicial review cannot be considered to be a part of the basic structure in so far as legislative elections are concerned. The theory of Basic Structure has to be considered in each individual case not in the abstract, but in the context of the concrete problem. The problem here is whether under our Constitution, judicial review was considered as an indispensable concomitant of elections to country's legislatures. The answer, plainly is no.

669. In England, prior to 1770 controverted elections were tried by the whole House of Commons as mere party questions but in order “to prevent so notorious a perversion of justice”, the House consented to submit the exercise of its privilege to a Tribunal composed of its own members.* In 1868, the jurisdiction of the House to try election petitions was transferred by statute to the Courts of Law. A Parliamentary election petition is now tried by two judges from out of three puisne judges of the Queen's Bench Division who are put on the rota for trial of such petitions by selection every year by a majority of votes of the Judges of that Division. At the conclusion of the trial the Court must forthwith certify the determination to the Speaker. The determination, upon such certification is final to all intents and purposes. Thus in England, the Election Court is constituted by a special method, it exercises a jurisdiction out of the ordinary jurisdiction which is normally exercised by Courts of Law and its determination acquires finality upon certification to the Speaker of the House of Commons. No appeal lies against the decision of the Election Court save by leave of the Court and if leave is granted, the decision of the Court of Appeal is final and conclusive.**

670. Under Article 1, Section 5, Clause 1 of the American Constitution each House is the judge of the elections returns and qualifications of its own members. Each House, in judging of elections under this clause, acts as a judicial tribunal.* Any further review of the decisions of the two Houses seems impermissible.

671. I am, therefore, unable to accept the contention that Articles 329A (4) and (5) are unconstitutional on the ground that by those provisions, the election of the Prime Minister is placed beyond the purview of courts.

672. Equally, there is no substance in the contention that the relevant clauses of the 39th Amendment are in total derogation of 'political justice' and are accordingly unconstitutional. The concept of political justice of which the Preamble speaks is too vague and nebulous to permit by its yardstick the invalidation of a Constitutional amendment. The Preamble, as indicated earlier, is neither a source of power nor of limitation.

673. The contention that 'Democracy' is an essential feature of the Constitution is unassailable. It is therefore, necessary to see whether the impugned provisions of the 39th Amendment damage or destroy that feature. The learned Attorney-General saw an unsurmountable impediment in the existence of various forms of democracies all over the world and he asked. What kind and from of democracy constitutes a part of our basic structure? The cabinet system, the Presidential system, the French, the Russian or any other? This approach seeks to make the issue unrealistically complex. If the democratic form of government is the corner-stone of our Constitution, the basic feature is the broad form of democracy that was known to Our Nation when the Constitution was enacted, with such adjustments and modifications as exigencies may demand but not so as to leave the mere husk of a popular rule. Democracy is not a dogmatic doctrine and no one can suggest that a rule is authoritarian because some rights and safeguards available to the people at the inception of its Constitution have been abridged or abrogated or because, as the result of a constitutional amendment, the form of government does not strictly comport with some classical definition of the concept. The needs of the Nation may call for severe abnegation though never the needs of the Rulers and evolutionary changes in the fundamental law of the country do not necessarily destroy the basic structure of its government. What does the law live for, if it is dead to living needs? We cannot therefore, as lawyers and Judges, generalize on what constitutes 'Democracy' though we all know the highest form of that idealistic concept – the state of bliss – in political science.

674. The question for consideration is whether the provisions contained in Articles 329-A (4) and (5) are destructive of the democratic form of government. The answer does not lie in comparisons with what is happening in other parts of the world, those that stake their claim to 'democracy' because we are not concerned to find whether despite the 39th Amendment we are still not better off democratically, than many others. The comparison has to be between the pre-39th Amendment period and the post-39th Amendment period in the context of our Constitution.

675. "Those of us who have learned humility have given over the attempts to define law". This statement of Max Radin* may be used to express a similar difficulty in defining 'Democracy' but just as legal scholars, not lacking in humility, have attempted to define 'Law', so have political scientists attempted a satisfactory definition of 'Democracy'. The expression is derived from the Greek word 'Demos', which was often used by the Greeks to describe the many, as distinct from the few, rather than the people as a whole. And Aristotle defined democracy as the rule of the poor, simply

because they formed, always and necessarily, the more numerous class. But the word is commonly used “in the sense of the rule of the majority of the community as a whole, including 'classes' and 'masses'....., since that is the only method yet discovered for determining what is deemed to be the will of a body politic which is not unanimous. This will is expressed through the election of representatives”.** C.F. Strong defines democracy to mean “that form of government in which the ruling power of a State is legally vested, not in any particular class or classes, but in the members of a community as a whole”. This may more aptly be called a description rather than a definition of democracy because it is beyond human ingenuity to foresee the possible permutations and combinations of circumstances to which a generalisation may have to be applied.

676. Forgetting mere words which Tennyson said: 'Like Nature, half reveal and half conceal the Soul within', the substance of the matter is the rule of the majority and the manner of ascertaining the will of the majority is through the process of elections. I find myself unable to accept that the impugned provisions destroy the democratic structure of our government. The rule is still the rule of the majority despite the 39th Amendment and no law or amendment of the fundamental instrument has provided for the abrogation of the electoral process. In fact it is through that process that the electorate expressed its preference for Smt. Indira Gandhi over Shri Raj Narain and others. Article 326 of the Constitution by which the elections to the house of the People and to the State Legislative Assemblies shall be on the basis of Adult Suffrage still stands. Article 79 which provides that “There shall be a Parliament..... which shall consist of two Houses”, Article 80 and 81 which prescribe the composition of the two Houses. Article 83 which provides for the duration of the Houses, Article 85 which directs that six months shall not intervene between the two sessions of Parliament, Article 100 (1) which provides that all questions shall be determined by a majority of votes of the members present and voting article 105 which preserves the powers and privileges of the members of Parliament and the counterparts of these articles in regard to State Legislatures retain their pristine primacy. These articles, unimpaired as they remain even after the 39th Amendment, are enough assurance that the Parliament is not leading the country to a totalitarian path.

677. This is not to put a seal of approval on the immunity conferred on any election but it is hard to generalize from a single instance that such an isolated act of immunity has destroyed or threatens to destroy the democratic frame-work of our government. One swallow does not make a summer. The swallow with its pointed wings, forked tail, a curving flight and twittering cry is undoubtedly a harbinger of summer but to see all these in the 39th Amendment and to argue that the summer of a totalitarian rule is knocking at the threshold is to take an unduly alarmist view of the political scene as painted by the amendment. Very often, as said by Sir Fredrick Bollock, “If there is any real danger it is of the alarmist's own making”.*

678. The 39th Amendment is however, open to grave objection on other grounds, in so far as clauses (4) and (5) of Article 329-A are concerned.

Generality and equality are two indelible characteristics of justice administered according to law. The Preamble to our Constitution by which the people of India resolved solemnly to secure to all its citizens equality of status and opportunity finds its realization in an ampler measure in Article 14 which guarantees equality before the law and the equal protection of laws to all persons, citizens and non-citizens alike. Equality is the faith and creed of our Democratic Republic and without it, neither the Constitution nor the laws made under it could reflect the common conscience of those who owe allegiance to them. And if they did not they would fail to command respect and obedience without which any Constitution would be doomed to founder on the rocks of revolution. A Constitution which, without a true nexus, denies equality before the law to its citizens may in a form thinly disguised, contain reprisals directed against private individuals in matters of private rights and wrongs. The English Acts of Attainder beginning with the one passed by the English Parliament in 1459 after the commencement of the wars of Roses or the 'Privilegium' in Rome are only some of the historical instances in point. Speaking of Bracton's famous passage which contains the admonition that the King ought to be under the law because the law makes him King. Sir Frederick Pollock says that there you have in a nutshell the great point of Constitutional freedom that law is not merely the instrument of Government, but the safeguard of each individual citizen's public rights and liberties.†

679. Article 329-A (4) makes the existing election laws retrospectively inapplicable, in a very substantial measure, to the Parliamentary elections of the Prime Minister and the Speaker. The inapplicability of such laws creates a legal vacuum because the repeal, so to say of existing laws is only a step-in-aid to free the election from the restraints and obligations of all election laws, indeed of all laws. The plain intendment and meaning of clause (4) is that the election of the two personages will be beyond the reach of any law, past or present. What follows is a neat logical corollary. The election of the Prime Minister could not be declared void as there was no law to apply to that election; the judgment of the Allahabad High Court declaring the election void is itself void; and the election continues to be valid as it was before the High Court pronounced its judgment.

680. These provisions are an outright negation of the right of equality conferred by Article 14, a right which more than any other is a basic postulate of our Constitution. It is true that the right, though expressed in an absolute form, is hedged in by a judge-made restriction that it is open to the Legislature to make a reasonable classification so that the same law will not apply to all persons alike or different laws may govern the rights and obligations of different persons falling within distinct classes. The boast of Law that it is no respecter of persons is the despair of drawers of waters and hewers of wood who clamour for a differential treatment. The judge takes that boast to mean that in an egalitarian society no person can be above the law and that justice must be administered with an even hand to those who are situated equally. In other words, all who are equal are equal in the eye of Law and it will not accord a favoured treatment to persons within the same class. Laws, as Plato said, would operate "like an obstinate and ignorant

tyrant if they imposed inflexible rules without allowing for changed circumstances or exceptional cases.”*

681. This Court, at least since the days of Anwar Ali Sarkar's case 1952 SCR 284 = (AIR 1952 SC 75), has consistently taken the view that the classification must be founded on an intelligible differentia which distinguishes those who are grouped together from those who are left out and that the differentia must have a rational relation to the object sought to be achieved by the particular law. The first test may be assumed to be satisfied since there is no gainsaying that in our system of Government, the Prime Minister occupies a unique position. But what is the nexus of that uniqueness with the law which provides that the election of the Prime Minister and the Speaker to the Parliament will be above all laws, that the election will be governed by no norms or standards applicable to all others who contest that election and that a election declared to be void by a High Court judgment shall be deemed to be valid, the judgment and its findings being themselves required to be deemed to be void? Such is not the doctrine of classification and no facet of that doctrine can support the favoured treatment accorded by the 39th Amendment to two high personages. It is the common man's sense of justice which sustains democracies and there is a fear that the 39th Amendment, by its impugned part, may outrage that sense of justice. Different rules may apply to different conditions and classes of men and even a single individual may, by his uniqueness, form a class by himself. But in the absence of a differentia reasonably related to the object of the law, justice must be administered with an even hand to all.

682. It follows that clauses (4) and (5) of Article 329-A are arbitrary and are calculated to damage or destroy the Rule of Law. Imperfections of language hinder a precise definition of the Rule of Law as of the definition of 'Law' itself. And the Constitutional Law of 1975 has undergone many changes since A.V. Dicey, the great expounder of the rule of law, delivered his lectures as Vinerian Professor of English Law at Oxford, which were published in 1855 under the title, 'Introduction to the Study of the Law of the Constitution'. But so much, I suppose, can be said with reasonable certainty that the rule of law means that the exercise of powers of government shall be conditioned by law and that subject to the exceptions to the doctrine of Equality, no one shall be exposed to the arbitrary will of the Government. Dicey gave three meanings to rule of law: Absence of arbitrary power, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by ordinary law courts and that the Constitution is not the source but the consequence of the rights of individuals as defined and enforced by the Courts. The second meaning grew out of Dicey's unsound dislike of the French Droit Administratif which he regarded “as a misfortune inflicted upon the benighted folk across the Channel”.* Indeed, so great was his influence on the thought of the day that as recently as in 1935 Lord Hewart, the Lord Chief Justice of England, dismissed the term “administrative law” as “continental Jargon”. The third meaning is hardly apposite in the context of our written Constitution for, in India, the Constitution is the source of all rights and obligations. We may not, therefore,

rely wholly on Dicey's exposition of the rule of law but ever since the second World War the rule has come to acquire a positive content in all democratic countries.** The International Commission of Jurists, which has a consultative status under the United Nations, held its Congress in Delhi in 1959 where lawyers, judges and law teachers representing fifty-three countries affirmed that the rule of law is a dynamic concept which should be employed to safeguard and advance the political and civil rights of the individual in a free society. One of the committees of that Congress emphasised that no law should subject any individual to discriminatory treatment. These principles must vary from country to country depending upon the provisions of its Constitution and indeed upon whether there exists a written Constitution. As it has been said in a lighter vein to show the supremacy of the Parliament, the charm of the English Constitution is that "it does not exist". Our Constitution exists and must continue to exist. It guarantees equality before law and the equal protection of laws to every one. The denial of such equality, as modified by the judicially evolved theory of classification, is the very negation of rule of law.

683. The argument directed at showing the invalidation of the 39th Amendment on the ground that it abrogates the principle of 'Separation of Powers' is replete with many possibilities since it has several sidelights. But I will be brief since I have already held that clauses (4) and (5) of Article 329-A are unconstitutional. I cannot regard the point as unnecessary for my determination since the point seems to me of great constitutional importance.

684. The Indian Constitution was enacted by the constituent Assembly in the backdrop of the National struggle for Independence. The Indian people had gone through a travail and on the attainment of Independence, the country had to face unique problems which had not confronted other federations like America, Australia, Canada or Switzerland. These problems had to be solved pragmatically and not by confining the country's political structure within the straitjacket of a known or established formula. The Constituent Assembly, therefore, pursued the policy of pick and choose to see what suited the genius of the Nation best. "This process produced new modifications of established ideas about the construction of federal governments and their relations with the governments of their constituent units. The Assembly, in fact, produced a new kind of federalism to meet India's peculiar needs."* While introducing the Draft Constitution in the Constituent Assembly, Dr. Ambedkar who was one of the chief architects of the Constitution said that our Constitution avoided the tight mould of federalism in which the American Constitution was caught and could be "both unitary as well as federal according to the requirements of time and circumstances". We have what may perhaps be described by the phrase. 'co-operative federalism', a concept different from the one in vogue when the federations of United States or of Australia were set up.

685. The American Constitution provides for a rigid separation of governmental powers into three basic divisions—the executive, legislative and judicial. It is an essential principle of that Constitution that powers entrusted to one department should not be exercised by any other department. The

Australian Constitution follows the same pattern of distribution of powers. Unlike these Constitutions, the Indian Constitution does not expressly vest the three kinds of power in three different organs of the State. But the principle of separation of powers is not a magic formula for keeping the three organs of the State within the strict confines of their functions. As observed by Cardozo, J., in his dissenting opinion in *Panama Refining Company v. Ryan*. (1934) 293 US 388,440 the principle of separation of powers “is not a doctrinaire concept to be made use of with pedantic rigour. There must be sensible approximation, there must be elasticity of adjustment in response to the practical necessities of Govt. which cannot foresee today the developments of tomorrow in their nearly infinite variety.” Thus, even in America, despite the theory that the legislature cannot delegate its power to the executive, a host of rules and regulations are passed by non-legislative bodies, which have been judicially recognised as valid. See the judgment of Mukherjea. J., in the *Delhi Laws Act case*, 1951 SCR 747.964=(AIR 1951 SC 332 at p.394).

686. The truth of the matter is that the existence, and the limitations on the powers of the three departments of Government are due to the normal process of specialisation in governmental business which becomes more and more complex as civilization advances. The legislature must make laws, the executive enforce them and the judiciary interpret them because they have in their respective fields acquired an expertise which makes them competent to discharge their duly appointed functions. The Moghal Emperor, Jehangir, was applauded as a reformist because soon after his accession to the throne in 1605, he got a golden chain with sixty bells hung in his palace so that the common man could pull it and draw the attention of the Ruler to his grievances and sufferings. The most despotic Monarch in the modern world prefers to be armed, even if formally, with the opinion of his Judges on the grievances of his subjects.

687. The political usefulness of the doctrine of separation of powers is now widely recognized though a satisfactory definition of the three functions is difficult to evolve. But the function of the Parliament is to make laws, not to decide cases. The British Parliament in its unquestioned supremacy could enact a legislation for the settlement of a dispute or it could, with impunity legislate for the boiling of the Bishop of Rochester's cook. The Indian Parliament will not direct that an accused in a pending case shall stand acquitted or that a suit shall stand decreed. Princely India, in some parts, often did it.

688. The reason of this restraint is not that the Indian Constitution recognizes any rigid separation of powers. Plainly, it does not. The reason is that the concentration of powers in any one organ may, by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic government to which we are pledged. Sir Carleton K. Allen says in his *'Law and Orders'* (1965 Ed., p. 8) that neither in Montesquieu's analysis nor in Locke's are the governmental powers conceived as the familiar trinity of legislative, executive and judicial powers. Montesquieu's “separation” took the form not of impassable barriers and unalterable

frontiers, but of mutual restraints, or of what afterwards came to be known as “checks and balances”. (p. 10). The three organs must act in concert, not that their respective functions should not ever touch one another. If this limitation is respected and preserved, “it is impossible for that situation to arise which Locke and Montesquieu regarded as the eclipse of liberty – the monopoly, or the disproportionate accumulation, of power in one sphere”. (p. 19; Allen). In a federal system which distributes powers between three co-ordinate branches of government, though not rigidly, disputes regarding the limits of constitutional power have to be resolved by courts and therefore, as observed by Paton, “the distinction between judicial and other powers may be vital to the maintenance of the Constitution itself”.^{*} Power is of an encroaching nature, wrote Madison in “The Federalist”. The encroaching power which the Federalists feared most was the legislative power and that, according to Madison, is the danger of all republics. Allen says that the history of both the United States and France has shown on many occasions that the fear was not unjustified.^{**}

689. I do not suggest that such an encroaching power will be pursued relentlessly or ruthlessly by our Parliament. But no Constitution can survive without a conscious adherence to its fine checks and balances. Just as Court ought not to enter into problems entwined in the “political thicket”, Parliament must also respect the preserve of the Courts. The principle of separation of powers is a principle of restraint which “has in it the precept, innate in the prudence of self-preservation (even if history has not repeatedly brought it home), that discretion is the better part of valour”.[†] Courts have, by and large, come to check their valorous propensities. In the name of the Constitution, the Parliament may not also turn its attention from the important task of legislation to deciding court cases for which it lacks the expertise and the apparatus. If it gathers facts, it gathers facts of policy. If it records findings, it does so without a pleading and without framing any issues. And worst of all, if it decides a Court case, it decides without hearing the parties and in defiance of the fundamental principles of natural justice.

690. The Parliament, by clause (4) of Article 329-A, has decided a matter of which the country's Courts were lawfully seized. Neither more nor less. It is true, as contended by the learned Attorney-General and Shri Sen, that retrospective validation is a well known legislative process which has received the recognition of this Court in tax cases, pre-emption cases, tenancy cases and a variety of other matters. In fact, such validation was resorted to by the legislature and upheld by this Court in at least four election cases, the last of them being *Kanta Kathuria v. Manak Chand Surana*, (1970) 2 SCR 835 = (AIR 1970 SC 694). But in all of these cases, what the legislature did was to change the law retrospectively so as to remove the reason of disqualification, leaving it to the Courts to apply the amended law to the decision of the particular case. In the instant case the Parliament has withdrawn the application of all laws whatsoever to the disputed election and has taken upon itself to decide that the election is valid. Clause (5) commands the Supreme Court to dispose of the appeal and the cross-appeal in conformity with the provisions of clause (4) of Article 329-A, that is, in

conformity with the “judgment” delivered by the Parliament. The “separation of powers does not mean the equal balance of powers”, says Harold Laski, but the exercise by the legislature of what is purely and indubitably a judicial function is impossible to sustain in the context even of our co-operative federalism which contains no rigid distribution of powers but which provides a system of salutary checks and balances.

691. I find it contrary to the basic tenets of our Constitution to hold that the Amending Body is an amalgam of all powers—legislative, executive and judicial. “Whatever pleases the emperor has the force of law” is not an article of democratic faith. The basis of our Constitution is a well-planned legal order, the presuppositions of which are accepted by the people as determining the methods by which the functions of the government will be discharged and the power of the State shall be used.

692. So much for the 39th Amendment. The argument regarding the invalidity of the Representation of the People (Amendment) Act. 58 of 1974, and of the Election Laws (Amendment) Act. 1975 has, however, no substance. The Constitutional amendments may, on the ratio of the Fundamental Rights case, be tested on the anvil of basic structure. But apart from the principle that a case is only an authority for what it decides, it does not logically follow from the majority judgment in the Fundamental Rights case that ordinary legislation must also answer the same test as a constitutional amendment. Ordinary laws have to answer two tests for their validity: (1) The law must be within the legislative competence of the legislature as defined and specified in Chapter I, Part XI of the Constitution and (2) it must not offend against the provisions of Article 13(1) and (2) of the Constitution. 'Basic structure', by the majority judgment, is not a part of the fundamental rights nor indeed a provision of the Constitution. The theory of basic structure is woven out of the conspectus of the Constitution and the amending power is subjected to it because it is a constituent power. 'The power to amend the fundamental instrument cannot carry with it the power to destroy its essential features' – this, in brief, is the arch of the theory of basic structure. It is wholly out of place in matters relating to the validity of ordinary laws made under the Constitution.

693. Shri Shanti Bhushan thought it paradoxical that the higher power should be subject to a limitation which will not operate upon a lower power. There is no paradox, because certain limitations operate upon the higher power for the reason that it is a higher power. A constitutional amendment has to be passed by a special majority and certain such amendments have to be ratified by the Legislatures of not less than one-half of the States as provided by Article 368 (2). An ordinary legislation can be passed by a simple majority. The two powers though species of the same genus, operate in different fields and are therefore subject to different limitations.

694. No objection can accordingly be taken to the Constitutional validity of the too impugned Acts on the ground that they damage or destroy the basic structure. The power to pass this Acts could be exercised retrospectively as much as prospectively.

695. These Acts effectively put an end to the two appeals before us for they answer the totality of the objections which were raised by Shri Raj Narain against the election of Smt. Indira Gandhi. The basis of the findings on which the High Court held against the successful candidate is removed by Act 40 of 1975 retrospectively. Were the law as it is under the amendments introduced by that Act, the High Court could not have held that the election is vitiated by the two particular corrupt practices. In regard to the cross-appeal filed by Sri Raj Narain, Shri Shanti Bhushan thought that a part of it escapes through the crevices in the Act but I see no substance in that contention either. I would like to add that the findings recorded by the High Court in favour of Smt. Indira Gandhi are amply borne out by the evidence to which our attention was drawn briefly by the learned counsel for the parties. The expenses incurred by the political party together with the expenses incurred by her are not shown to exceed the prescribed ceiling. Apart from that, Act 58 of 1974 makes that issue academic.

696. Finally, there is no merit in the contention that the constitutional amendment is bad because it was passed when some members of the Parliament were in detention. The legality of the detention orders cannot be canvassed in these appeals collaterally. And from a practical point of view, the presence of 21 members of the Lok Sabha and 10 members of the Rajya Sabha who were in detention could not have made a difference to the passing of the Amendment.

697. In the result. I hold that clauses (4) and (5) of Article 329-A are unconstitutional and therefore void. But for reasons aforesaid I allow Civil Appeal No. 887 of 1975 and dismiss Civil Appeal No. 909 of 1975. There will be no order as to costs throughout.

Civil Appeal No. 887 of 1975, Allowed; Civil Appeal No. 909 of 1975, Dismissed.

SUPREME COURT OF INDIA *

(Civil Appeal No. 945 of 1977)^s

(Decision dated 12-9-1977)

All Party Hill Leaders' Conference, Shillong

..Appellant

Vs.

Captain W. A. Sangma and Others

..Respondents

SUMMARY OF THE CASE

The All Party Hill Leaders' Conference is a recognised State Party in the State of Meghalaya under the provisions of the Election Symbols (Reservation and Allotment) Order, 1968. A dispute arose between two groups of the party- one group claiming that the party had merged with the Indian National Congress, a recognised National party, in November, 1976, and the other group contending that the party had not merged and was still continuing as a separate party. The Election Commission heard both the rival groups of the party under paras 15 and 16 of the said Symbols Order and decided, by its order dated 1.2.1977, that the party had merged with the Indian National Congress and ceased to exist as a separate party.

Aggrieved by that order of the Election Commission, the present appeal was filed before the Supreme Court. The Supreme Court reversed the order of the Election Commission and held that the party has not merged with the Indian National Congress and continued to maintain its separate existence, despite majority of its members having joined the Indian National Congress. The Supreme Court laid down the principle that in the matter of merger of political parties, the general membership of the party has a vital say and has to be consulted, which had not been done in the present case. The Supreme Court also held that if the members who claimed to continue the party answered the test laid down in the Symbols Order for recognition as a State Party, the party would continue to be recognised by the Election Commission.

The Supreme Court also held that the Election Commission, while deciding a dispute under para 15 or 16 of the Symbols Order, is a Tribunal within the meaning of Article 136 of the Constitution and appeal from its orders under those paras would lie to the Supreme Court under the said Article 136.

Constitution of India, Arts. 136 (1), 324 — Tribunal — Meaning of — Authority must have been constituted by State and invested with some judicial power — Election Commission is a Tribunal within the Article — Decision of Election Commission derecognising APHLC held strong. (Election Symbols (Reservation and Allotment) Order (1968) Paras 6, 7, 5). Order D/- 1-2-1977 of Election Commission of India, Reversed.

Several tests have been laid down by the Supreme Court to determine whether a particular body or authority is a tribunal within the ambit of Art. 136. The tests are not exhaustive in all cases. It is also well settled that all the tests laid down may not be present in a given case. While some tests may be present others may be lacking. It is, however, absolutely necessary that the authority in order to come within the ambit of Art. 136 (1) as tribunal must be constituted by the State and invested with

some function of judicial power of the State. This particular test is an unfailing one while some of the other tests may or may not be present at the same time. The Election commission is created under the Constitution and is invested under the law with not only administrative powers but also with certain judicial power of the State, however fractional it may be. The Commission excessively resolves disputes, inter alia, between rival parties with regard to claims for being a recognised political party for the purpose of the electoral symbol. Therefore, the Commission fulfils the essential tests of the tribunal and falls squarely within the ambit of Art. 136 (1) of the Constitution. Case law rel. on.

(Paras 25, 27, 41, 42)

Notwithstanding the opposition, the meeting of All Party Hill leaders' Conference was held on November 16, 1976, which was attended by 81 delegates out of 121 and a resolution was passed unanimously in favour of merger with the Congress. By a letter dated November 28, 1976, the Joint Secretary of the erstwhile APHLC informed the Election Commission that the APHLC had merged with the Indian National Congress and consequently it stood dissolved. He requested the Commission in that letter to withdraw the election symbol (Flower) reserved for the erstwhile APHLC. As against this move the General Secretary of the Conference by a letter dated 30-11-1976 informed the Commission that the leaders who had left the party had no authority to decide dissolution of the party and that the party was still in existence. The Commission heard the parties on January 29, 1977. The Commission after hearing the parties passed its order on February¹ 1997, holding that the APHLC, a recognised State party in Meghalaya under the Election Symbols Order had ceased to exist and that therefore the name of that party and the symbol 'Flower' reserved for it should be deleted from the list of recognised State parties in the Election Commission Notification.

Held that the controversy raised before the Commission was not squarely within the scope of paragraph 15 of the Election Symbols (Reservation and Allotment) Order, 1968. That would, however, not conclude the matter as the controversy could well be adjudicated by the Commission, relating as it was, to derecognition of a recognised political party vis-a-vis the choice of their reserved symbol in connection with elections, although they might take place in future. The Commission had the jurisdiction to determine the controversy raised, clothed as it was with the power to conduct elections under Art. 324 and to give directions in general or in particular in respect of symbols which would involve the determination of claims as recognised political parties in the State. No objection, therefore, could be taken to the Commission's adjudication of the matter as being beyond the scope of its jurisdiction. The question which the Court was required to resolve was as to the character of the Commission in adjudicating the dispute with regard to recognition of APHLC as a continuing recognised political party in the State of Meghalaya. The power to decide this particular dispute was a part of the State's judicial power and power was conferred on the Election Commission by Art. 324 of the Constitution as also by R. 5 of the Conduct of Election Rules. The principal and non-failing test which must be present in order to determine whether a body or authority is a tribunal within the ambit of Art. 136 (1) was fulfilled in this case when the Election Commission was required to adjudicate a dispute between two parties, one group asserting to be the recognised political party of the State and the other group controverting the proposition before it, but at the same time not laying any claim to

be that party. The Commission fell into an error in holding that the Conference of the APHLC was the general body even to take a decision about its dissolution by a majority vote. The matter would have been absolutely different if in the general body of all members from different areas or their representatives for the purpose, assembled to take a decision about the dissolution of the party had reached a decision by majority. This had not happened in this case. At best the decision of the conference on November 16, 1976, was only a step in that direction and could not be held as final until it was ratified by the general membership. The fact that no membership registers were produced before the Commission or that there was controversy with regard to the existence of regular members of their enrolment would not justify the Conference to be indifferent to the consensus of the members as a whole whom they had always consulted in other momentous issues and but for whose active aid, support and participation they could not have achieved the statehood for Meghalaya. The decision of the Commission, therefore, was completely erroneous. The APHLC with 40 members still claiming to continue its reserved symbol answered the test laid down in the Commission's directions for being recognised as a State political party under paragraph 6 of the Symbols Order. They had, on the date of entertainment of the dispute by the Commission, still the requisite membership fulfilling the test for recognition as a State political party. The Commission was, therefore, required to follow the provisions of the directions which it has laid down in the Symbols Order when the question of derecognition of a party was raised before it. The Commission could not reasonably be satisfied on the materials before it that under paragraph 6 read with paragraph 7 of the Symbols Order the APHLC had ceased to be a recognised political party in the State. Even by application of the directions which it had set out in the Symbols Order the Commission's decision was absolutely untenable. Even after a major chunk of the APHLC had joined the INC, if those who still continued under the banner of the APHLC flag and symbol claimed to continue as APHLC and the directions in the Symbols Order did not authorise derecognition of the APHLC as a body represented by the remainder, no case was made out for any interference by the Commission with regard to reserved symbol. Thus the APHLC, as a recognised State political party in Meghalaya, stayed and was entitled to continue with their reserved symbol 'Flower'. The reserved symbol 'Flower' stood restored to the APHLC. Order dt. 1-2-1977 of Election Commission of India, Reversed.

(Paras 34, 35, 37, 53, 55, 57)

Cases Referred : Chronological

AIR 1974 SC 445 : (1974) 2 SCR 265	22
AIR 1972 SC 187 : (1972) 2 SCR 318 22, 32, 32A,	33
AIR 1965 SC 1595 : (1965) 2 SCR 366 24, 26,	39
AIR 1963 SC 677 : 1963 Supp (1) SCR 242	24
AIR 1963 SC 874 : 1963 Supp (1) SCR 625	24
AIR 1961 SC 1669 : (1962) 2 SCR 339	24
AIR 1956 SC 231 : (1955) 2 SCR 135	24
AIR 1954 SC 520 : (1955) 1 SCR 267 23,	26
AIR 1950 SC 188 : (1950) 1 SCR 459 23,	24
1931 AC 275 : 144 LT 421	

JUDGMENT

Present:- P. K. Goswami, A. C. Gupta and S. Murtaza Fazal Ali, JJ.

Mr. V. M. Tarkunde, Sr. Advocate (Mr. P. H. Parekh and Misses Manju Jetley and Manek Tarkunde, Advocates with him), for Appellant; Mr. P. Paraneswararao, Sr. Advocate (Mr. R. Nagaratnam Advocate with him), for Respondents Nos 1 and 2.

GOSWAMI, J. :— The All Party Hill Leaders' Conference (hereinafter to be described as the APHLC) was constituted as a political party in the composite State of Assam on July 6, 1960. In 1962 the APHLC contested the general election and secured 11 out of 15 seats in the Assam Legislative Assembly reserved for the Autonomous Hill Districts of the State of Assam and returned one member to the Lok Sabha. In 1967 it contested the general elections and secured 9 seats in the Legislative Assembly and returned one member to the Lok Sabha. In 1970 the autonomous State of Meghalaya within the State of Assam was constituted under Section 3 of the Assam Reorganisation Act, 1969, and the APHLC secured 34 seats in the Legislative Assembly. In 1972 the State of Meghalaya came into being as the 21st State of the Indian Union under Sec. 5 of the North-Eastern Areas (Reorganisation) Act, 1971. In the same year the APHLC contested the general elections and secured 32 seats in the Meghalaya Legislative Assembly out of the 60 and returned two members to the Lok Sabha and one member to the Rajya Sabha.

2. It is claimed by the appellant that the APHLC is a vibrant and fully functioning political party. It has a high reputation for its national and patriotic outlook and its adherence to non-violence, constitutionalism, communal harmony and the spirit of moderation. APHLC has been influential not only in securing stability in the area in which it operates but also in bringing the various tribes of the North-East into the national stream. In the implementation of national programmes APHLC has cooperated with the Indian National Congress but APHLC has always remained essentially a State party. The essence of APHLC, says the appellant, is the autonomy and security of the small hill tribes of the North-East whose party it is and who do not wish to lose their identity as such. The appellant further asserts that it is in the national interest no less than the interest of these small hill tribes that they should possess a sense of unity and organisation within the APHLC which in turn maintains the best of relations with the Indian National Congress which is a national party.

3. The appellant also claims that the APHLC functions at several levels, namely, Central, District, Circle and Village levels. At the Central level it has affiliated to it several other parties; these being the Garo National Council, the Eastern India Tribal Union, the Khasi Jaintia Conference and the Jaintia Durbar. There is the Central Office Bearers Committee comprising all the Central Office Bearers, namely, President, several Vice-Presidents, General secretary, Joint Secretaries and Treasurer. Furthermore, there are branches at the district level each district having its own office bearers, executive committee and other committees. Thereafter there are Circles within the area of the district which correspond to M.L.A. constituencies. Further below and nearest to the grass roots there are the village units comprising a village or a group of villages. There are about 300 village units in the State each unit having 50 to 200 members of APHLC according to the size of the village unit.

4. Originally the representatives of the District Congress Committees were also included in the APHLC but some time in 1961 the District Congress Committees left the APHLC.

5. It is also claimed that "the APHLC as a political party has thousands and thousands of members in the State of Meghalaya". As a counter to this assertion, it is stated by the respondents that "as per well-established convention of the erstwhile APHLC, the General Conference of the party was the supreme authority to discuss and to decide on any issue before it". It is pointed out by the appellant that the presence of a large membership has not been even denied by the respondents.

6. It is clear that the main object of the APHLC was to achieve statehood in the hill areas within the framework of the Constitution of India and to work out its own destiny maintaining its identity according to their own genius parting company with Assam. This was achieved finally on January 21, 1972, when the ruling party in the Central Government was the Indian National Congress. The APHLC election manifesto of 1972 while disclosing its programme and policy for the new State of Meghalaya announced as follows:—

"The APHLC, with the unreserved support of the people, has been instrumental in bringing about the creation of the Hill State, and it is confident that with the continued support and co-operation of the people, the party will, through its programme, succeed in ushering in for the people of Meghalaya an era of hope, of justice and of equality of opportunity."*

We have already shown above how the APHLC came out successful in the elections.

7. It appears that some time thereafter the question of merger of the APHLC with the Congress occupied the minds of the leaders. The 24th Session of the APHLC held at Shillong on June 19 and 20, 1973, considered "the future of the party and the question of merger with Congress" and "unanimously decided to maintain its identity and continue to serve the people as a party".** The issue of merger of APHLC with the Congress was, however, not dead and it again came up for consideration in the General conference of the APHLC of August 19 and 20, 1976. with notice of two months issued in June 1976. It was again, in line with the previous policy, decided in that Conference "that friendly relations with the Indian National Congress should be maintained and strengthened". But no merger.

8. On November 1, 1976, in a meeting of the Central Office Bearers Committee, which is the executive body of the APHLC, Captain Sangma, who was President of the APHLC as well as Chief Minister of Meghalaya, made an announcement that

"the Congress High Command had rejected the resolution of friendly relations passed at the APHLC Conference on the 19th and 20th August, 1976, and had insisted that APHLC should merge with the Indian National Congress."

Although there is some controversy about the correctness of the minutes of November 1, 1976, it appears therefrom that a General Conference of the APHLC was announced to be held at Mendipathar, Garo Hills District, on November 16, 1976, "to review the implementation of the political resolution of the Conference held at Shillong on the 19th and 20th August, 1976". The notice for this meeting was given with the agenda in the above quoted terms on November 3, 1976, and all delegates were requested to attend the conference on November 16, 1976. It is rather

intriguing that the agenda in the notice, with such a short interval, did not even specifically mention about discussion of the issue of "merger with the INC" even to facilitate the news of this move to trickle far and wide into larger areas of the populace. Even so there was a storm of protests from several quarters. On November 4, 1976, the Executive Committee of the Khasi Hills District APHLC expressed grave concern about the matter and requested the President. Captain Sangma, to postpone the Conference. On November 8, 1976, several leaders from Garo Hills, including the then Chief Executive Member of the District Council and the then Chairman of the Garo Hills District Council, presented a memorandum to Captain Sangma requesting postponement of the Conference "so that the leaders and the workers of the party have time enough to consider the matter" On November 10 and 11, 1976, the Executive Committee of the Khasi Hills District decided not to participate in the conference of 16th November, 1976. The committee further appealed to the President of the party for postponement the holding of the proposed Conference.

"to enable the leadership to take the rank and file of the party and the people into confidence on the issues involved and through calm and objective discussions, evolve a consensus decision to the satisfaction of all concerned in keeping with the tradition and genius of the hill people."

On November 14, 1976, two days prior to the Conference, the Shillong unit of the APHLC by a resolution requested Captain Sangma for giving the leaders and members of the party time and opportunity to consider all aspects of the merger issue "by mutual consultation at all levels, so that a consensus may be arrived at and thus maintain the unity of the party and the people."

9. Notwithstanding the opposition it went unheeded and the Conference was held on November 16, 1976, at Mendipathar which was attended by 81 delegates out of 121 and a resolution was passed unanimously in favour of merger with the Congress. The resolution

"recalls with fond memory their circumstances which actuated the people of the autonomous districts of the composite State of Assam to constitute a common political platform of their own, styled as the All Party Hill Legislators Conference with a view to certain issues vitally affecting their welfare and interest.

This meeting also recalls in this context that during the last few years the APHLC's relationship with the Indian National Congress, including the question of merger has often been discussed in different forums, and formally in the 24th session of the party on the 19th and 20th June, 1973 at Shillong. The 26th session of the party held on the 19th and 20th August 1976 reiterate its firm resolve to strengthen, through mutually agreed upon steps, the said relationship with the Indian National Congress.....

Taking into full account the political changes which have taken place in the meantime in the State and the country it is realised that the earlier resolutions have virtually become irrelevant and it is high time now to take concrete steps. This meeting therefore regrets that there are nevertheless some of our people who do not want to face facts and consequently fail to appreciate the importance of the changed

situation which will go against the interests of the State and the people to allow indecision to continue further.

Now, therefore, in view of the constant stand of the party to strengthen the good relationship with the Indian National Congress, and in view of the objective realities of the political situation obtaining in the country, and having noted the consensus of the people through their representatives and our following the plans and programmes of the Indian National Congress which has been consistently taking special care to promote the welfare and interests of the Scheduled Tribes as provided in the Constitution and having been convinced, after a most careful consideration, that there is no better way to give practical shape to the longstanding convictions of the party to come closer to the Prime Minister and her party than by merging with the Indian National Congress thereby providing us with an opportunity to take full advantage of the national forum together with other hill people of the north-eastern region who have similar problems as we, and taking all these factors into serious and realistic consideration, this meeting hereby unanimously resolves that the APHLC be merged with the Indian National Congress in response to the desire of the Prime Minister, Shrimati Indira Gandhi, and her party for the larger and fuller interests of the people of Meghalaya in particular and of the country in general."

10. The meeting further authorised the President, Captain Sangma,

"to form a committee consisting of 5 members to work out the modalities, technicalities and details of the merger with the Indian National Congress in consultation with the Congress High Command" and also authorised him "to announce the formal merger of the APHLC with the Indian National Congress and the consequent dissolution of the APHLC as a political party or association in the State of Meghalaya". The meeting also "appeal(ed) to the people of Meghalaya in particular to the leaders and supporters of the APHLC to extend their full support to th(e) resolution.

11. It is an irony that although the meeting recalled the part played by "the people" in constituting "a common political platform" styled as the APHLC, the appeal by a vocal section of the party to go back to 'the people' to clearly ascertain their wish as to obliteration of the 'platform' constituted by them fell on deaf ears.

12. The Conference of 81 members, unmandated for the purpose decided for the people and the President acquired from that small body absolute power to nominate his own committee and to do all that was necessary in order to announce the merger of the party with the INC. The saving grace of the resolution was "the appeal to the people of Meghalaya" to extend their support to the resolution.

13. The resolution had immediate repercussions. The very next day, November 17, 1976, four APHLC leaders, namely, Messrs. D. D. Pugh (General Secretary of APHLC), P. R. Kyndiah, S. D. D. Nichols Roy and B. B. Lyngdoh issued the following Press statement:—

"We deeply regret the decision taken by a section of APHLC leaders meeting at Mendipathar to leave the party and join the Congress despite the suggestion to postpone the meeting with a view to enable the leadership time to consult the rank and file of the party and to take the people into confidence. By this hasty decision

Shri W. A. Sangma and his followers have shown their complete disregard of the will of the people on whose mandate the APHLC Government was formed.

The APHLC will continue to serve the best interests of the people and make its own distinctive contribution to the progress of the State and the country as a whole. In this connection, a Conference of the APHLC is being convened by the General Secretary on the 7th December, 1976."

14. The following day, November 18, 1976, Messrs. B. B. Lyngdoh, S. D. D. Nichols Roy, P. R. Kyndiah and D. D. Pugh, who were Ministers in the Government of Meghalaya, resigned from the Cabinet and addressed a letter to the Chief Minister (Captain Sangma) as follows:—

"In view of the fact that you and the other three Cabinet colleagues have decided to leave the APHLC which had formed the present Government and that you have done so without a mandate of the people we feel it has become morally incumbent upon us to resign. We do, therefore, hereby submit our resignation from the Cabinet with immediate effect." Even then President Captain Sangma did not cry halt. On November 20, 1976, Captain Sangma made an announcement as follows:—

"Having been duly authorised by resolution of the 27th session of the All Party Hill Leaders' Conference held on 16th November, 1976 at Mendipathar, Garo Hills, Meghalaya, in pursuance of the decision of the Central Committee held on the 1st November, 1976 at Shillong, I, Capt. W. A. Sangma, President of the All Party Hill Leaders' Conference, after finalising the modalities of the merger as directed by the aforesaid resolution, hereby announce the merger of the All Party Hill Leaders' Conference with the Indian national Congress with effect from the afternoon of the 20th November, 1976. The All Party Hill Leaders' Conference stands dissolved as a Political Party or Association in the State of Meghalaya with effect from the afternoon of the aforesaid date, and its assets including bank balance and securities as also liabilities stand merged with the Indian National Congress."

15. Without further loss of time, the next move began. By a letter dated November 28, 1976, Shri O. L. Nongtdu, describing himself as "Joint Secretary of the erstwhile APHLC" informed the Election Commission (hereinafter to be described as the Commission) that the APHLC had merged with the Indian National Congress (hereinafter to be referred to as the INC) and consequently it stood dissolved. He requested the Commission in that letter to "withdraw the election symbol (Flower) reserved for the erstwhile APHLC." He enclosed with that letter several documents containing the resolutions of the party.

16. As against that move, by a letter dated November 30, 1976, Shri D. D. Pugh informed the Commission that some APHLC leaders including Captain Sangma had joined the INC and thus defected from the APHLC, that the leaders who had left the party had no authority to decide dissolution of the party or to approach the authorities on the question of recognition or derecognition, that the party was still in existence and that there was no provision whatever for a person or a group of persons to dissolve this party of people.

17. On December 9, 1976, the Commission forwarded to Shri D. D. Pugh, General Secretary, APHLC, copies of letters together with their enclosures received

from Shri O. L. Nongtdu, Joint Secretary, APHLC, and invited comments thereon before 31st December, 1976 "so as to enable the commission to take further necessary action in the matter". Shri D. D. Pugh forwarded his comments to the Commission on December 24, 1976, concluding his representation as follows:—

"The party having been recognised as a political party with the reserved symbol 'Flower' under the provisions of the Order, no occasion has arisen for not continuing the said symbol 'Flower' to the party which has admittedly 14 members in the State Legislature, 15 members in the district councils and thousands and thousands of members in the State of Meghalaya.

18. The Commission heard the parties on January 29, 1977, on which date Shri B. B. Lyngdoh filed an affidavit before the Commission. The Commission after hearing the parties passed its order on February 1, 1977, holding that —

"the APHLC, a recognised State Party in Meghalaya under the election Symbols Order has ceased to exist and that therefore the name of that party and the symbol 'Flower' reserved for should be deleted from the list of recognised State parties in the election Commission Notification No. S. O. 61 (E) dated 31st January, 1975 forthwith. The symbol 'Flower' shall remain frozen with immediate effect. I also direct that in order to avoid confusion the said symbol should not be included as a free symbol in respect of the States of Meghalaya and Assam."

19. It is against the above order of the Commission that the appellant brought this appeal by special leave.

20. At the outset a preliminary objection has been taken on behalf of respondents 1 and 2 (hereinafter to be described as the respondents) to the maintainability of this appeal by special leave under Art. 136 of the Constitution. The Commission being the 3rd respondent has not entered appearance.

21. It is submitted by Mr. Rao appearing on behalf of the respondents that the Election Commission is not a tribunal within the ambit of Art. 136 (1) of the Constitution.

22. This question centring round the Election Commission has been raised before this Court for the first time in this appeal. Although in two earlier decisions of this Court appeals were lodged in this Court by special leave from the decisions of the Election Commission, no objection with regard to the maintainability under Art. 136 was raised (See Sadiq ali v. Election Commission of India. (1972) 2 SCR 318 : (AIR 1972 SC 187) and Ramashankar Kaushik v. Election Commission of India, (1974) 2 SCR 265 : (AIR 1974 SC 445)). This would, however, not prevent the respondents from raising this question before us. We will, therefore, examine the matter first. If the answer is against the appellant nothing further will arise for decision.

23. The earliest decision of this Court as to the ambit of Article 136 (1) with reference to the order of a tribunal came up for consideration in the Bharat Bank Ltd., Delhi v. Employees of the Bharat bank Ltd., Delhi, (1950) 1 SCR 459 : (AIR 1950 SC 188). The question whether an Industrial Tribunal constituted under the Industrial Disputes Act, 1947, was a tribunal within the scope of Art. 136 was raised in that case. By majority the Constitution Bench of this Court held that the Industrial Tribunal was a tribunal for the purpose of Article 136. Having regard to the scheme of Art. 136, this Court was not prepared to place a narrow

interpretation on the amplitude of Art. 136. This court observed at pages 476/478 (of SCR) : (at pp. 195, 196 of AIR) of the report as follows:—

"As pointed out in picturesque language by Lord Sankey L. C. in *Shell Co. of Australia v. Federal Commissioner of Taxation* 1931 AC 275 , there are tribunals with many of the trappings of a Court which, nevertheless, are not Courts the strict sense of exercising judicial power. It seems to me that such tribunal though they are not full-fledged Courts, yet exercise quasi-judicial functions and are within the ambit of the word 'tribunal' in Art. 136 of the Constitution.

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Tribunals which do not derive authority from the sovereign power cannot fall within the ambit of Art. 136. The condition precedent for bringing a tribunal within the ambit of Art. 136 is that it should be constituted by the State. Again a tribunal would be outside the ambit of Art. 136 if it is not invested with any part of the judicial functions of the State but discharges purely administrative or executive duties. Tribunals, however, which are found invested with certain functions of a Court of justice and have some of its trappings also would fall within the ambit of Art. 136....."

Then after four years, B. K. Mukerjea. J. (as he then was) who was one of the dissenting Judges in *Bharat Bank (supra)*, true, to judicial discipline, spoke for the unanimous court in the Constitution Bench in *Durga Shankar Mehta v. Thakur Raghuraj Singh*. (1955) 1 SCR 267 : (AIR 1954 SC 520) in the following words at p. 522 of AIR.

"It is now well settled by the majority decision of this Court in the case of *Bharat Bank Ltd. v. Employees of the Bharat Bank Ltd. (supra)* that the expression 'Tribunal' as used in Art 136 does not mean the same thing as 'Court' but includes, within its ambit, all adjudicating bodies, provided they are constituted by the State and are invested with judicial as distinguished from purely administrative or executive functions.

24. The basic principle laid down in the *Bharat Bank (AIR 1950 SC 188) (supra)* has not been departed from by this Court and has been reiterated in several later decisions (see *J. K. Iron and Steel Co. Ltd., Kanpur v. The Iron and Steel Mazdoor Union, Kanpur*, (1955) 2 SCR 1315 : (AIR 1956 SC 231): *M/s. Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunjunwala*, (1962) 2 SCR 339 : (AIR 1961 SC 1969) : *Jaswant Sugar Mills Ltd., Meerut v. Lakshmidhand*, 1963 Supp (1) SCR 242 : (AIR 1963 SC 677). *The Engineering Mazdoor Sabha v. The Hind Cycles Ltd., Bombay*, 1963 Supp (1) SCR 625: (AIR 1963 SC 874) and *Associated Cement companies Ltd. v. P. N. Sharma*, (1965) 2 SCR 366 : (AIR 1965 SC 1595).

25. From a conspectus of the above decisions it will be seen that several tests have been laid down by this Court to determine whether a particular body or authority is a tribunal within the ambit of Art. 136. The tests are not exhaustive in all cases. It is also well settled that all the tests laid down may not be present in a given case. While some tests may be present others may be lacking. It is, however, absolutely necessary that the authority in order to come within the ambit or Art. 136 (1) as tribunal must be constituted by the State and invested with some function of judicial power of the State. This particular test is an unfailing one while some of the other tests may or may not be present at the same time.

26. It will be profitable to refer to an illuminating decision of the Constitution Bench in *Associated Cement Companies Ltd. (AIR 1965 SC 1595)* (supra). The question that was raised for decision in that case was as to whether the State Government of Punjab exercising its appellate jurisdiction under R. 6 of the Punjab Welfare Officers Recruitment and conditions of Service Rules, 1952, was a tribunal within the meaning of Art. 136 (1) of the Constitution. Section 49 (2) of the Factories Act, 1948, provides that the State Government may prescribe the duties, qualifications and conditions of service of Welfare Officers employed in a factory. The State Government framed the Rules under S. 49 (2) of the Factories Act and R. 6 (6) provides that a Welfare Officer upon whom a punishment is imposed may appeal to the State Government against the order of punishment and the decision of the State Government shall be final and binding. It is against a certain order passed by the State Government under R. 6 (6) that the company came to this Court by special leave and an objection was raised that the State Government exercising power under R. 6 (6) was not a tribunal within the meaning of Art. 136 (1). The objection was repelled in the following words:—

"Tribunals which fall within the purview of Art. 136 (1) occupy a special position of their own under the scheme of our Constitution. Special matters and questions of their own under the scheme of our Constitution. Special matters and questions are entrusted to them for their decision and in that sense, they share with the courts one common characteristic: both the courts and the tribunals are "constituted by the State and are invested with judicial as distinguished from purely administrative or executive functions." (vide *Durga Shankar Mehta v. Thakur Raghuraj Singh (AIR 1954 SC 520)* (supra). They are both adjudicating bodies and they deal with and finally determine disputes between parties which are entrusted to their jurisdiction. The procedure followed by the courts is regularly prescribed and in discharging their functions and exercising their powers, the courts have to conform to that procedure. The procedure which the tribunals have to follow may not always be so strictly prescribed, but the approach adopted by both the courts and the tribunals is substantially the same, and there is no essential difference between the functions that they discharge. As in the case of courts, so in the case of tribunals, it is the State's inherent judicial power which has been transferred and by virtue of the said power, it is the state's inherent judicial functions which they discharge. Judicial function and judicial powers are one of the essential attributes of a sovereign State, and on considerations of policy, the State transfers its judicial functions and powers mainly to the courts established by the Constitution; but that does not affect the competence of the State, by appropriate measures, to transfer a part of its judicial powers and functions to tribunals by entrusting to them the task of adjudicating upon special matters and disputes between parties. It is really not possible or even expedient to attempt to describe exhaustively the features which are common to the tribunals and the courts and features which are distinct and separate. The basic and the fundamental feature which is common to both the courts and the tribunals is that they discharge judicial functions and exercise judicial powers which inherently vest in a sovereign State".*

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"But as we already stated, the consideration about the presence of all of some of the trappings of a court is really not decisive. The presence of some of the trappings may assist the determination of the question as to whether the power exercised by

the authority which possesses the said trappings, is the judicial power of the State or not. The main and the basic test however, is whether the adjudicating power which a particular authority is empowered to exercise has been conferred on it by a statute and can be described as a part of the State's inherent power exercised in discharging its judicial function. Applying this test, there can be no doubt that the power which the State Government exercise under R. 6 (5) and R. 6 (6) is a part of the State's judicial power. It has been conferred on the State Government by a statutory Rule and it can be exercised in respect of disputes between the management and its Welfare Officers. There is, in that sense, a lis; there is affirmation by one party and denial by another, and the dispute necessarily involves the rights and obligations of the parties to it. The order which the State Government ultimately passes is described as its decision and it is made final and binding. Besides, it is an order passed on appeal. Having regard to these distinctive features of the power conferred on the State Government by R. 6 (5) and R. 6 (6), we feel no hesitation in holding that it is a Tribunal within the meaning of Art. 136 (1)".*

27. Mr. Rao submits that this Court in the above decision was particularly influenced by the fact that the State Government was exercising the power of appeal under R. 6 (5) and R. 6 (6). We are unable to hold that reference to the order being passed on appeal in the above passage had any decisive weight in arriving at the decision. The principal test which must necessarily be present in determining the character of the authority as tribunal is whether that authority is empowered to exercise any adjudicating power of the State and whether the same has been conferred on it by any statute or a statutory rule.

28. The Election Commission is a creature of the constitution. The Commission shall consist of a Chief Election Commissioner and also other Election Commissioners if so considered necessary and when other Election Commissioners are appointed, the Chief Election Commissioner shall act as Chairman of the Election commission. The Chief Election Commissioner is appointed by the President under Art. 324 (2) of the Constitution. Under Art. 324 (1), the superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of all election to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President shall be vested in the Election Commission. The Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and his conditions of service shall not be varied to his disadvantage after his appointment. However, unlike Judges of the Supreme Court or of the High Courts and the Comptroller and Auditor-General of India, he is not required to make and subscribe before the President an oath or affirmation under the Constitution. Again, the Comptroller and Auditor-General shall not be eligible for further appointment either under the Government of India or under the Government of any State after he has ceased to hold his office (Art. 148 (4)). Similar restrictions are there in the case of the Chairman of the Union Public Service Commission (Art. 319). But there is no such restriction in the case of the Chief Election commissioner. Even so, the Chief Election Commissioner is a high dignitary whose independence, impartiality and fairmindedness are intended to be guaranteed by the Constitution in the manner set out above. Since the Chief Election Commissioner is inter alia charged with the solemn duty of conducting elections, he has to discharge manifold functions and power in facilitating a fair and free election in our country avowedly wedded to

democratic principles. India is a Democratic Republic and the elements of democratic concept and process should imbue every phase and feature of life, social and political.

29. For the purpose of holding elections, allotment of symbol will find a prime place in a country where illiteracy is still very high. It has been found from experience that symbol as a device for casting votes in favour of a candidate of one's choice has proved an invaluable aid. Apart from this, just as people develop a sense of honour, glory and patriotic pride for a flag of one's country, similarly great fervour and emotions are generated for a symbol representing a political party. This is particularly so in a parliamentary democracy which is conducted on party lines. People after a time identify themselves with the symbol and the flag. These are great unifying insignia which cannot all of a sudden be effaced..

30. The Constitution as we have seen above, has vested conduct of all elections in the Commission. Amongst other things, conduct of elections would require decisions with regard to the allotment of symbols and solution of controversies regarding choice of symbols. Although under Art. 327 Parliament is empowered to make provisions with respect to all matters relating to or in connection with elections and other matters specified therein, the Representation of the People Act made thereunder by Parliament has not expressly provided for any provisions with regard to symbols. However, under S. 169 (1) of the Representation of the People Act, the Central Government is empowered to make rules after consulting the Commission for carrying out the purposes of this Act. Sub-section (2) of that section provides in particular, and without prejudice to the generality of the power under Section 169 (1), that such rules may provide for the matters specified from (a) to (i) Clause (c), thereof, provides for the manner in which votes are to be given both generally and in the case of illiterate voters or voter under physical disability. The last clause is a residuary clause with regard to any other matter that may be required to be prescribed by this Act. These rules, when made by the Central Government, have to be laid before each House of the Parliament under sub-s. (3) of S. 169 and parliamentary control is thus retained. The Conduct of Elections Rules, 1961, which have been framed in exercise of the power under S. 169 of the Act, provide in Part II thereof for various matters under the title 'General Provisions' Rule 5 in Part II thereof and sub-rules (4) , (5) and (6) of R. 10 therein deal with matters relating to symbols.

31. In exercise of the power vested in the Commission under Art. 324 and R. 5 and R. 10 of the Conduct of Elections Rules, 1961 (briefly the Rules) and all other powers enabling it in that behalf, the Election Commission made the Election Symbols (Reservation and Allotment) Order, 1968 (hereinafter to be referred to as the Symbols Order). The preamble of the Symbols Order says that it is an order to provide for specification, reservation, choice and allotment of symbols at elections in parliamentary and assembly constituencies, for the recognition of political parties in relation thereto and for matters connected therewith.

32. It is not necessary in this appeal to deal with the question whether the Symbols Order made by the Commission is a piece of legislative activity. It is enough to hold, which we do, that the Commission is empowered on its own right under Art, 324 of the Constitution and also under R 5 and 10 of the Rules to make directions in general in widest terms necessary and also in specific cases in order to

facilitate a free and fair election with promptitude. It is, therefore, legitimate on the part of the Commission to make general provisions even in anticipation or in the light of experience in respect of matters relating to symbols. That would also inevitably require it to regulate its own procedure in dealing with disputes regarding choice of symbols when raised before it. Further that would also sometimes inevitably lead to adjudication of disputes with regard to recognition of parties or rival claims to a particular symbol. [The Symbols Order is, therefore, a compendium of directions in the shape of general provisions to meet various kinds of situations appertaining to elections with particular reference to symbols. The power to make these directions, whether is a legislative activity or not, flows from Art, 324 as well as from Rules 5 and 10. It was held in Sadiq Ali (AIR 1972 SC 187) (supra) that]

"if the Commission is not to be disabled from exercising effectively the plenary powers vested in it in the matter of allotment of symbol and for issuing directions in connection therewith, it is plainly essential that the commission should have the power to settle a dispute in case claim for the allotment of the symbol of a political party is made by two rival claimants."

It has been held in Sadiq Ali (supra) that the Commission has been clothed with plenary powers by R. 5 and sub-rules (4) and (5) of R. 10 of the Rules in the matter of allotment of symbols.

32-A. In Sadiq Ali (AIR 1972 SC 187) (supra) the Election Commission entertained the dispute under paragraph 15 of the Symbols Order. The vires of paragraph 15 was challenged in that case and this Court held that paragraph 15 was not ultra vires the powers of the Commission.

33. In Sadiq Ali (AIR 1972 SC187) (supra) the dispute was between two rival sections of the same party, namely the Indian National Congress, and the dispute came squarely within the scope of paragraph 15 of the Symbols Order. Even the present impugned order is professedly passed by the Commission under paragraph 15 of the Symbols Order.

34. We may at once state that the controversy raised before the Commission is not squarely within the scope of paragraph 15 of the Symbols Order. That would, however, not conclude the matter as the controversy could well be adjudicated by the Commission, relating as it was, to derecognition of a recognised political party vis-a-vis the choice of their reserved symbol in connection with elections, although they may take place in future. The Commission will have the jurisdiction to determine the controversy raised, clothed as it is with the power to conduct elections under Art. 324 and to give directions in general or in particular in respect of symbols which would involve the determination of claims as recognised political parties in the State. No objection, therefore, can be taken to the Commission's adjudication of the matter as being beyond the scope of its jurisdiction.

35. The question which we are required to resolve is as to the character of the Commission in adjudicating this dispute with regard to recognition of APHLC as a continuing recognised political party in the State of Meghalaya. It appears that out of 121 members of the Conference 81 had decided by majority that APHLC stood dissolved and these members joined the INC. 40 members had opposed the move to dissolve the party and actually stayed away from the Conference when the

resolution to dissolve the party was passed. That has led to the dispute as to whether, notwithstanding the majority resolution in the Conference, the APHLC could still continue as a recognised political party in the State of Meghalaya for the purpose of allotment of the reserved symbol.

36. There is thus a lis between two groups of the Conference. The Commission is undoubtedly the specified and exclusive adjudicating authority of this lis. The Commission is created by the Constitution and the power to adjudicate the dispute flows from Art. 324 as well as from R. 5 and is thus conferred under the law as a fraction of judicial power of the State. The Commission has prescribed its own procedure in the Symbols Order, namely, to give a hearing to the parties when there is a dispute with regard to recognition or regarding choice of symbols. Paragraph 15 of the Symbols Order makes specific reference to the procedure to be adopted by the Commission in hearing like disputes and it is required to take into account all the available facts and circumstances of the case and to hear such representatives of the sections or the groups and other persons as desire to be heard. The decision of the Commission under paragraph 15 shall be binding on all rival sections or groups in the party. The Commission has followed, and if we may say so, rightly, this very procedure laid down in paragraph 15 in adjudicating the present dispute although the same may not be a dispute contemplated under this paragraph. The dispute with which the Commission was concerned in the present case was a dispute of more serious nature than that which may be envisaged between two rival sections of a political party or between two splinter groups of the same party claiming to be the party, since the respondents' claim, here, was to annihilate the party beyond recognition and for good. When therefore, the Commission has laid down a reasonable procedure, in the symbols order in dealing with such a dispute, it was incumbent upon the Commission to choose the same procedure, as, indeed, it actually did in adjudicating the present dispute. If the Commission were not specially required under the law to resolve this dispute within the framework of the scheme contemplated under Article 324 read with the Rules supplemented by the Symbols Order, the parties would have been required to approach the ordinary courts of law for determination of their legal rights with regard to their recognition or derecognition. Since, however, a special machinery has been set up under the law relating to this matter and the same has to be decided with promptitude, the State's power of adjudicating such a dispute has been conferred upon the Election Commission in this behalf. It is true that the Election Commission has various administrative functions but that does not mean that while adjudicating a dispute of this special nature it does not exercise the judicial power conferred on it by the State.

37. To repeat, the power to decide this particular dispute is a part of the State's judicial power and that power is conferred on the Election Commission by Art. 324 of the Constitution as also by R. 5 of the Rules. The principal and non-failing test which must be present in order to determine whether a body or authority is a tribunal within the ambit of Art. 136 (1), is fulfilled in this case when the Election commission is required to adjudicate a dispute between two parties one group asserting to be the recognised political party of the State and the other group controverting the proposition before it, but at the same time not laying any claim to be that party. The fact that the decision is not relevant immediately for the purpose of a notified election and that disputes regarding property rights belonging to the

party may be canvassed in civil courts or in other appropriate proceedings, is not of consequence in determination of the present question.

38. It is true that R. 5 (2) and sub-rules (4), (5) and (6) of R. 10 relate to an election which has been notified under R. 3 of the Rules. That, however, does not detract from the position that under R. 5 (1), the Election Commission is empowered to specify symbols in general terms and also the restrictions to which the choice of symbols will be subjected. As stated earlier, R. 5 is in Part II of the Rules under the title "General Provisions". The conferment of judicial power of the State on the Commission in the matter of adjudication of the dispute of the nature with which we are concerned clearly flows from R. 5 (1) read with Art. 324 of the Constitution.

39. Mr. Rao submits that the primary function of the Election commission is not adjudicatory and therefore, it cannot be a tribunal for the purpose of Art. 136. We are unable to accept this submission. The question is whether in deciding the particular dispute between the parties in a matter of the kind envisaged in the particular controversy, the Commission is exercising a judicial function and it has a duty to act judicially. Having regard to the character of the Commission in dealing with the particular matter and the nature of the enquiry envisaged and the procedure which is reasonably required to be followed, we hold that its primary function in respect of this subject-matter is judicial. It is not necessary that this should be the only function of the Election Commission in order to answer the character of a tribunal under Art. 136. Even in the Associated Cement Companies' case (AIR 1965 SC 1595) (supra) this Court had to deal with the exercise of power by the State Government under R. 6 (5) and (6) of the Punjab Welfare Officers Recruitment and Conditions of Service Rules, 1952 and it held that the State Government in acting under those rules was a tribunal within the ambit of Art. 136 (1). It goes without saying that the primary functions of the State Government is not exercise of judicial power. We have to determine this question keeping in view the exercise of power with reference to the particular subject-matter although in some other matters the exercise of function may be of a different kind.

40. Mr. Rao further contends that the decision of the Commission in such a case is only a tentative decision and, therefore, the Commission does not answer the legal concept of a tribunal. We are unable to hold that the decision which the Commission gives after hearing the parties in a controversy in respect of the claim of a party to continue as a recognised party in the State continuing the reserved symbol already allotted to it is only a tentative decision. The decision that the tribunal gives is a definitive decision and is binding on both the contending parties so far as the claim to the reserved symbol is concerned. The decision with regard to the reserved symbol or for the matter of that any symbol for the purpose of election is within the special jurisdiction of the Election Commission and it is not permissible for the ordinary hierarchy of courts to entertain such a dispute. The 'Commission does not decide any rights to property belonging to a political party or rival groups of a political party. That may be a matter for the ordinary civil courts with which we are not concerned in this appeal.

41. Thus the position that emerges from the above discussion is that the Commission is created under the Constitution and is invested under the law with not only administrative powers but also with certain judicial power of the State, however fractional it may be. The Commission exclusively resolves dispute inter

alia, between rival parties with regard to claims for being a recognised political party for the purpose of the electoral symbol.

42. We are, therefore, clearly of opinion that the Commission fulfils the essential tests of a tribunal and falls squarely within the ambit of Art. 136 (1) of the Constitution. The preliminary objection is, therefore, overruled.

43. Now on the merits.

44. Before we proceed further we may look at the nature of the dispute before the Commission. The APHLC has been recognised as a political party in the State of Meghalaya since 1962. Unlike the INC this party has no written constitution of its own. It is, however, not disputed that APHLC is a democratically run party. True in normal working in a democratic organisation the rule of majority must prevail and there can be no dispute about a decision being arrived at by recourse to a majority vote in case members of a party are not unanimous on a particular issue. That, however, will not conclude the matter in this case as the Commission seems to have thought it did.

45. The history of the party shows that it took its birth in 1960 and thereafter this party gathered momentum and strength to spearhead a peaceful constitutional movement for a separate hill State. Other matters were subordinate to this paramount issue which more or less unified the hills except certain areas which were happy to continue in the composite State of Assam. When the APHLC finally succeeded in 1972 in securing the statehood for Meghalaya they really won the battle for which they remained united with one common reserved symbol, namely, 'Flower'. After attainment of statehood the APHLC was returned in the elections that followed and took the reins of Government. No one then thought of liquidation or dissolution of the party because its paramount aim had been achieved.

46. The APHLC is a regional party but with high ideals of working out the salvation of the area as proud partners in a larger scheme of advancement of the whole nation without, at the same time, effacing their identity, culture and customs. We find from the records that the party as a whole believed in associating with the national stream of public life and indeed the last resolution of the APHLC in August 1976, before the split in November 1976, was to strengthen their tie with the INC.

47. When a party like this has to disappear from the political firmament as a distinct party, it is a very grave and serious decision to take. A party which has been successfully running a State Government cannot claim to be a party of mere leaders as is sought to be represented by the respondents and as the nomenclature may even apparently suggest. It is true the leaders took upon themselves the solemn task of fulfilment of the aspirations of the region and of the people but only on the basis as representatives of the people whose inner voice they articulated, whose ambition they strove to achieve. There could be no all Party Hill Leaders without the people to lead and without a general membership furnishing the infrastructure. Whether there has been regular membership for the party, about which also there is controversy between the parties, it would be a self-evident fact in a democratic party, which APHLC undoubtedly claims to be, that the leaders cannot operate from a superstructure without the base of the people.

48. We may in this context refer to a few incontrovertible facts while the APHLC was functioning in a normal way without any dispute. Take for example the notice

of Shri P. R. Kyndiah. General Secretary, APHLC dated July 15, 1976, addressed to secretaries of Khasi Hills District APHLC, Shillong, Garo Hills District APHLC. Tura, Jaintia hills District APHLC, Jewai, All India Garo National Council, Shillong, and district Garo National Council. Tura regarding the 26th Conference of the APHLC on 17th and 18th August, 1976. He writes in this letter:

"I request you kindly to inform the eligible delegates accordingly. Mean-while you are requested to send to me the list of the eligible delegates and invitees on or before the 6th August, 1976." The Note below the letter shows the persons who are entitled to join the Conference as full-fledged delegates. They are —

"(a) Members of the Party Central Committee.

(b) All M. Ps., M.L.As and M.D.Cs belonging to the APHLC.

(c) 5 representatives from each district branches and affiliated political parties.

(d) 2 nominees of the Party Chief Executive Members, District Councils and in the case of Khasi Hills District Branch its Chairman is authorised to nominate the nominees.

(e) 4 additional delegates from the host district."

It was also indicated in the Note that the following numbers of invitees are allotted to each district branches for attending the Conference:

"(i) Khasi Hills District Branch 15

(ii) Garo Hills District Branch 15

(iii) Jaintia Hills District Branch 3"

49. We are told that the numerical strength of the delegates to such a Conference is 121. It must, however, be borne in mind that they are "delegates", that is to say delegates of some body or persons who would in the usual course elect or authorise the delegates as their representatives to represent the larger body or assemblage in the Conference. There is clear evidence of the democratic feature in this very notice which showed the pattern of working of the APHLC. It is submitted on behalf of the respondents that the Conference of these delegates is authorised to take decisions on 'any issue'. Assuming that is so such authority in absence of anything more cannot authorise a Conference of the delegates to write off the organisation or to sign its death warrant. "Any issue" on which decision may normally be taken by the Conference must relate to live matters of a living organ and not to its death wish. Without the nexus with the generality of membership decisions will derive no force or vigour and no party or conference can hope to succeed in their plans efforts or struggle unless backed by the same There is no evidence authorising the Conference to dissolve itself by merger or otherwise, and so it is not possible to apply the rule of majority only in the Conference for such a decision affecting the entire body as an entity in the absence of a clear mandate from the general membership.

Assuming that the Conference on November 16, 1976, decided by a majority to dissolve the APHLC, it would have been in accord with democratic principles to place that decision before the general membership of the party for ratification prior to implementing the mere majority decision of the Conference without regard to the wishes of the members as a whole. The President of the APHLC and those who were in favour of dissolution fell into this error and they cannot blame the minority of 40

members who openly disassociated with the hasty move and only wanted time for further discussion by taking “the rank and file” into confidence. It is very difficult to appreciate why this reasonable request from a responsible section of the Conference was completely unheeded and the President thought it proper to agree to take upon himself the responsibility to announce the dissolution and hastily merge with the INC. The matter ought to have struck the President as a grave issue resulting as it had done in resignation of four members of the Meghalaya Cabinet on this very issue.

50. Again in this context it will be appropriate to refer to an admitted document being the resolution passed by the 20th Session of the All Party Hill Leaders Conference held at Tura on the 14th and 15th October, 1968 when the party was a unified body. It may be apposite to extract the following passage from the minutes.

“In its 19th Session held at Tura from the 17th to the 19th September, 1968, the APHLC discussed the Government of India decision announced on September 11, 1968 to constitute an Autonomous Hill State. It was then decided to place the Government of India plan before the people of the hill areas and obtain their reactions before the APHLC comes to a decision.

This 20th Session of the APHLC held at Tura on the 14th and 15th October, 1968 has received comprehensive reports of meetings held in this connection in the various parts of the hill areas. These reports convey that the consensus in the hill areas is that the people while expressing deep disappointment at the failure of the Government of India to meet their aspirations in full and reasserting that a fully separate State would be the best solution, nevertheless feel that the Plan may be given a trial.

Now therefore, having fully considered the public opinion in the hill areas, the political realities in the country and the larger interests of the country as a whole this Conference resolves to give the Autonomous Hill State Plan a fair trial with the clear understanding that the APHLC will continue all efforts to achieve a fully separate State comprising all the hill areas of the present State of Assam as envisaged in the resolution and Plan of the 3rd Session of the APHLC held at Haflong in November, 1960.”

51. The above resolution adopted in 1968 would clearly show that the APHLC has been always working on democratic lines mindful of the public opinion in the entire hill areas and whenever momentous decisions had to be taken they thought it absolutely mandatory to consult the wishes of the people before taking a decision. This is as it should be for democracy cannot thrive as democracy by being an oligarchy masquerading for democracy. There could not have been a more momentous decision than the dissolution of a ruling party in the State.

52. It was crystal clear that the house was emotionally divided on the issue of merger with the INC and that the history of the move in the direction of the merger brought forth discordant notes and opposite trends. The portents were sufficiently indicative of almost unbridgeable fissures affecting the harmony in the party. Leaders who had harmoniously chosen peaceful paths on various issues in the past could not have been expected to tear asunder the homogeneity which successfully built up the party. It appears, the finale of the proposed assimilation did not filter from within but was on the President's frank disclosure before the Central

Committee, 'wanted' from outside, a position to which several leaders immediately reacted.

53. The Commission fell into an error in holding that the Conference of the APHLC was the general body even to take a decision about its dissolution by a majority vote. The matter would have been absolutely different if in the general body of all members from different areas or their representatives for the purpose assembled to take a decision about the dissolution of the party had reached a decision by majority. This has not happened in this case. At best the decision of the Conference on November 16, 1976, was only a step in that direction and could not be held as final until it was ratified by the general membership.

The fact that no membership registers were produced before the Commission or that there is controversy with regard to the existence of regular members or their enrolment would not justify the Conference to be indifferent to the consensus of the members as a whole whom they had always consulted in other momentous issues and but for whose active aid, support and participation they could not have achieved the statehood for Meghalaya. The decision of the Commission therefore, is completely erroneous.

53-A. There can be no flower without its sap. There cannot be leaders without people. There cannot be a party without members. Action of leaders ignoring the generality of membership is ineffective. Such action cannot be equated with the consensus of the membership which alone supplies the base for its sustenance.

54. There is another aspect of the matter. The controversy arises not during an election after it has been notified under R. 3. The dispute relates to the consideration whether a recognised State party has ceased to be recognised, under the Symbols Order. The Commission has undertaken the enquiry in the context of paragraph 15 of the Symbols Order. We have already indicated that the dispute does not come within the scope of paragraph 15. Even so, the Commission would have the jurisdiction to adjudicate the dispute with regard to cancelling recognition of a recognised political party in terms of the directions under the Symbols Order. Under paragraph 7, sub-para (3) of the Symbols Order, notwithstanding anything contained in sub-paragraph (1) with which we are not concerned, every political party which immediately before the commencement of this Order is in a State a recognised political party shall on such commencement be a State party in that State and shall continue to be so until it ceases to be a State party in that State on the result of any general election held after such commencement Under paragraph 6 sub-para (2) of the Symbols Order a political party shall be treated as a recognised political party in a State if and only if either the conditions specified in Cl. (A) are, or the condition specified in Cl (B) is fulfilled by that party and not otherwise, that is to say:

“(A) that such party—

(a) has been engaged in political activity for a continuous period of five years; and

(b) has, at the general election in that State to the House of the People, or as the case may be to the Legislative Assembly, for the time being in existence and functioning, returned— either (i) at least one member to the House of the People for every twenty-five members of that House or any fraction of that number elected from that State; or

(ii) at least one member to the Legislative Assembly of that State for every thirty members of that Assembly or any fraction of that number:

(B) that the total number of valid votes polled by all the contesting candidates set up by such party at the general election in the State to the House of the People, or, as the case may be to the Legislative Assembly for the time being in existence and functioning (excluding the valid votes of each such contesting candidate in a constituency as has not been elected and has not polled at least one-twelfth of the total number of valid votes polled by all the contesting candidates in that constituency is not less than four per cent of the total number of valid votes polled by all the contesting candidates at each general election in the State (including the valid votes of those contesting candidates who have forfeited their deposits).”

55. It is not disputed that the APHLC with 40 members still claiming to continue its reserved symbol answers the test laid down in the Commission's directions for being recognised as a State political party under paragraph 6 of the Symbols Order. They had on the date of entertainment of the dispute by the Commission, still the requisite membership fulfilling the test for recognition as a State political party. The Commission was, therefore, required to follow the provisions of the directions which it has laid down in the Symbols Order when the question of derecognition of a party was raised before it. It is not a dispute between two factions of the same party each claiming to be the party so that the Commission has to allow the symbol to one of them. The claim of the respondents before the Commission was that the APHLC had ceased to function as a recognised political party in the State and Captain Sangma's group having merged with the INC requesting the Commission to scrap the APHLC out of existence with its reserved symbol so that the APHLC would be effaced from the political arena. The Commission was entirely wrong in its decision in view of its own directions embodied in the Symbols Order. The Commission could not be reasonably satisfied on the materials before it that under paragraphs 6 read with paragraph 7 of the Symbols Order the APHLC had ceased to be a recognised political party in the State Even by application of the directions which it has set out in the Symbols Order the Commission's decision is absolutely untenable.

56. Even after a major chunk of the APHLC led by Captain Sangma had joined the INC, if those who still continued under the banner of the APHLC flag and symbol claimed to continue as APHLC and the directions in the Symbols Order did not authorise derecognition of the APHLC as a body represented by the remainder, as we have found, no case is made out for any interference by the Commission with regard to the reserved symbol. Thus the APHLC as a recognised State political party in Meghalaya, stays and is entitled to continue with their reserved symbol “Flower”.

57. In the result the appeal is allowed and the decision of the Election Commission is set aside. The reserved symbol “Flower” stands restored to the APHLC. In the entire circumstances of the case there will be no order as to costs.

Appeal allowed.

SUPREME COURT OF INDIA *

Civil Appeal No. 1114 of 1976^s
(Decision dated 28-7-1977)

Narendra Madivalapa Kheni

..Appellant

Vs.

Manikarao Patil and Others

...Respondents

SUMMARY OF THE CASE

The election to the Karnataka Legislative Council from the Bidar Local Authorities' Constituency, held in May, 1974, was called in question by an election petition. According to the calendar for the election notified by the Election Commission, 17th April, 1974 was the last date for making nominations in the constituency. Nominations on that day could be filed upto 3 p.m. It was alleged in the election petition that certain names of electors were fraudulently entered into the electoral roll after 3 p.m. on the last date for filing nominations, in contravention of Section 23 (3) of the Representation of the People Act, 1950. The High Court accepted the plea of the election petitioner and declared the election of the returned candidate as void, holding that the electors whose names were added to the electoral roll in contravention of Section 23 (3) of the R.P. Act, 1950 had no right to vote and their votes were improperly accepted which materially affected the result of election.

The returned candidate whose election was declared void by the High court filed the present appeal before the Supreme Court. The Supreme Court upheld the order of the High Court, holding that the electoral roll for any election becomes final at 3 p.m. on the last date for making nominations and that no inclusion, deletion or correction could be made in the electoral roll thereafter, which would be illegitimate and illegal in view of Section 23 (3) of the Representation of the People Act, 1950.

(A) Representation of the People Act (1951), Ss. 86, 87, and 123 – Election petition for setting aside election inter alia under S. 123 (7) – Allegation of corrupt practice – Framing of issue – Procedure.

Processual proprieties are designed to ensure fair play in adjudications and while such prescriptions are not rigid punctilios, their observance serves to help the Judge do effective justice between parties and the disputants have faith in the intelligent impartiality and full opportunity so necessary for the success of the rule of law. In election proceedings where the whole community is silently present and the controversy is sensitive and feelings suspicious, the principles of procedural rectitude apply a fortiori. The Judge is the guardian of processual justice and must remember that judgment on judgment belongs, in the long run, to the people.

(Para 3)

In the case in question no issue was originally framed on the critical question of corrupt practice but the court permitted evidence thereon to be adduced - a procedure difficult to appreciate. After the trial was virtually closed and the arguments finished the Court discovered the need for framing this decisive issue. On objection as to the absence of material facts and/or material particulars, the Court framed an issue also on the actual vagueness and legal flawsomeness of pleadings on

corrupt practice. Naturally, this latter question demanded prior decision, but curiously, the Court delivered all its findings on the day of judgment, a faux pas which must be pointed out.

(Para 3)

(B) Representation of the People Act. (1951), S. 123 – Corrupt Practice – Nature of proof.

A Court must, as usual, ask for proof beyond reasonable doubt from the party setting up corrupt practice even when there is a veneer of power politics stooping to conquer and officers thereby becoming vulnerable to 'higher' displeasure. The trial Court erred in substituting suspicion for certitude and drawing untenable inferences where paucity of evidence snapped the nexus needed for collusion.

(Para 12)

(C) Representation of the People Act (1951), Ss. 30 and 33 – Representation of the People Act (1950), S. 23 (3) – Provision of S. 23(3) is mandatory – Inclusion of name in electoral roll after last date for making nomination is illegal.

Inclusion of the names in the electoral roll of a constituency after the last date for making nominations for an election in that constituency, must be visited with fatality. Such belated arrivals are excluded by the talons of the law, and must be ignored in the poll.

(Para 18)

There is a blanket ban in S. 23 (3) on any amendment, transposition or deletion of any entry or, the issuance of any direction for the inclusion of a name in the electoral roll of a constituency and the last date for making nominations for an election in that constituency.... This prohibition is based on public policy and serves a public purpose. Any violation of such a mandatory provision conceived to pre-empt scrambles to thrust into the rolls, after - the appointed time, fancied voters by anxious candidates or parties spells invalidity and if in flagrant violation of S23 (3), names have been included in the electoral roll, the bonus of such illegitimate votes shall not accrue, since the vice of voidance must attach to such names. Such void votes cannot help a candidate win the contest. In our electoral scheme as unfolded in the 1951 Act, every elector ordinarily can be a candidate. Therefore, his name must be included in the list on or before the date fixed for nomination. Otherwise he loses his valuable right to run for the elective office. It is thus vital that the electoral registration officer should bring in the names of all the electors into the electoral roll before the date and hour fixed for presenting the nomination paper. There is another equally valid reason for stressing the inclusion of the names of all electors before the hour for delivering to the returning officer the nomination paper. In the light of S.33 (4) the returning officer, on receipt of the nomination paper, satisfies himself that the candidate's name and electoral roll number are correctly entered. Necessarily, this is possible only if the electoral roll contains the names of all the electors. Likewise, S.33 (5), which deals with a candidate who is an elector from a different constituency, requires of the candidate the production of a certified copy of the relevant entry showing his name in such a roll. The inference is inevitable that there must be a completed electoral roll when the time for filing the nomination paper expires. The argument is therefore incontrovertible that the final electoral roll must be with the returning officer when the last minute for delivering the nomination paper ticks off. Subsequent additions to the electoral register will inject confusion and uncertainty about the constituents or electors, introduce a disability for such subsequently included electors to be candidates for the election and run

counter to the basic idea running through the scheme of the Act that in the preponderant pattern of elections, viz. for the legislative assemblies and parliament, the electors shall have the concomitant right of being candidates.

(Paras 17, 18)

(D) Representation of the People Act (1951), S. 33 – Representation of the People Act (1950), S.23 – Inclusion of name in electoral roll – It can be carried out till last date for making nomination – Last date terminates when the reception of nomination is closed.

Section 33 (1) specifies inflexibly that the nomination paper shall be presented 'between the hours of 11 O' clock in the forenoon and 3 O' clock in the afternoon. That means that the duration of the day for presentation of nomination papers terminates at 3 O' clock in the afternoon. If an elector is to be able to file his nomination paper, his name must be on the electoral roll at 3 p.m. on the last day for filing nominations. So the temporal terminus adquem is also the day for finalisation of the electoral register and by the same token, that day terminates at just that hour when the returning officer shuts the door. The day is truncated to terminate with the time when reception of nominations is closed.

(Para 20)

There can hardly be any doubt that the expression 'last date for making nominations' must mean the last hour of the last date during which presentation of nomination papers is permitted under Sec. 33 of the 1951 Act. In short, Sec. 23 (3) of the 1950 Act and S. 33 (1), (4) and (5) of the 1951 Act interact, fertilise and operate as a duplex of clauses. So viewed, the inclusion of the names in the electoral roll after 3 p.m. is illegitimate and illegal.

(Paras 21, 24)

Cases Referred: Chronological Paras

AIR 1976 SC 2573: (1977) 1 SCR 741 22, 23

AIR 1975 SC 2299 : (1976) 2 SCR 347, 28

AIR 1970 SC 314 : (1970) 1 SCR 839, 17, 18

JUDGMENT

Present:- V.R. Krishna Iyer and P.K. Goswami, JJ.

Mr. L.N. Sinha, Sr. Advocate (M/s K.R.D. Karanth and B.P. Singh Advocates with him), for Appellant Mr. K.N. Bhat and Miss S. Pramila Advocates, (for No. 1) and Mr. Y.S. Chitley, Sr. Advocate (Mr. Narayan Nettar, Advocate with him) (for No. 2), for Respondents.

KRISHNA IYER, J.:- Four heavy volumes of case records confronted us in this appeal, as counsel open the arguments, but some socratic processing seemed to condense the controversy and forensic prolixity so much so we first thought the case had shrunk to such small dimensions as to be disposed of in a short judgement. But what we initially felt when the brief narration of facts was given, proved a snare. For when we read out in court our opinion on the only crucial aspect of the case, counsel for the 1st respondent hopefully insisted that the factual grounds requiring our ploughing through ponderous tomes of testimonial collection, pleadings and what not, should be investigated as he expected to sustain the invalidation of the election by the High Court on the score of corrupt practice and the consequential

disqualification of the rival candidate i.e., the appellant before us. He was entitled to press that part of his case and so we agreed to hear both sides extensively thereon.

2. However, hours of argument after, we were back to square one. At this stage, some relevant facts and circumstances need narration. The Karnataka Legislative Council has, in its composition, some members elected from the local authorities constituencies. One such member is elected by the local bodies of Bidar district and the specific election that falls for decision was held on May 12, 1974. According to the calendar for the poll contemplated in Sec. 30 of the Representation of the People Act, 1951 (hereinafter called the 1951 Act), the last date for presenting the nominations was appointed as April 17, 1974. Section 33 (1) requires that each candidate shall deliver to the returning officer a nomination paper as set out in the section 'between 11 o'clock in the forenoon and 3 o'clock in the afternoon.' The appellant and the first respondent did file their nominations in conformity with the law; their scrutiny over, they entered the fray and, after the poll was over, the appellant was declared elected, having secured 64 votes as against the 1st respondent's 54 votes. The frustrated 1st respondent found 16 illegitimate votes having been cast in favour of the successful candidate and further discovered that these 16 electors were ineligible to figure on the electoral roll but had been surreptitiously introduced therein by collusion, fraud and other improper machinations in which the returned candidate and the returning officer were collaborative actors. The purity of the election was polluted. The result of the poll was materially affected. The electoral process was vitiated by 'corrupt practice' in which the appellant and the 2nd respondent were *particeps criminis*. He ventured on an election petition with the prayer to set aside the poll verdict *inter alia* under Section 123 (7) of the 1951 Act and also sought a declaration that he was duly elected on the score that the exclusion of the invalid votes, very probably cast in favour of the appellant, led inevitably to his arithmetical success as the one who had secured the larger number of valid votes. Such was his case.

3. The petitioner had made somewhat vague, sweeping and speculative allegations about government, higher and lower echelons of officialdom and the rival candidate but, if an apology for specificity is partially present in the petition, it is about the charge of corrupt practice roping in the returning officer-cum-electoral registering officer (2nd respondent) and the successful candidate (appellant). No issue was originally framed on the critical question of corrupt practice but the learned Judge permitted evidence thereon to be adduced – a procedure difficult to appreciate. After the trial was virtually closed and the arguments finished, the Court discovered the need for framing this decisive issue. On objection as to the absence of material facts and/or material particulars, the learned Judge framed an issue also on the actual vagueness and legal flawsomeness of pleadings on corrupt practice. Naturally, this latter question demanded prior decision but, curiously, the Court delivered all its findings on the day of judgment, a *faux pas* which we must point out. Processual proprieties are designed to ensure fair play in adjudications and while such prescriptions are not rigid punctilios, their observance serves to help the Judge do effective justice between parties and the disputants have faith in the intelligent impartiality and full opportunity so necessary for the success of the rule of law. In election proceedings where the whole community is silently present and the controversy is sensitive and feelings suspicious, the principles of procedural rectitude apply *a fortiori*. The judge is the guardian of processual justice and must

remember that judgment on judgment belongs, in the long run, to the people. We state this stern proposition here not merely because a forensic stitch in time saves cassational nine but because courts are on continuous trial in a democracy. In this case we are not satisfied that either party has suffered in substance and procedural breaches, unless they spell unmerited prejudice, may be brushed aside at the appellate level.

4. Having said this we hasten to add that had not the learned Judge uncovered the suspect happenings sinisterly hovering around the last day for finalising the electoral roll, the dubious doings of the political government in a seat-hungry setting might not have been ventilated for public edification. The electoral events brought out in evidence are 'power' portents to be prevented preemptively by law and this prompts us to deal with the testimonial circumstances surrounding the inviolable roll of voters having been adulterated after the final hour zealous officers frantically exerting themselves in what seems at first sight to be a series of belated circus operations geared to inclusion of additional names in the rolls before 17th midnight drew the curtain. Caesar's wife must be above suspicion and wielders of public power must fill this bill. A moral matrix administrative culture must nurture the power process if democracy is not to commit suicide.

5. We will make good the relevance of these critical statements with reference to the incontrovertible facts of this case. However, we do not delve into the minutiae of evidence or span the entire factual range, that being otiose. A catalogue of circumstances, fair to both sides, will tell its own moral tale and so we set it out.

6. The last date for completing the electoral roll was April 17, 1974. The rival candidates (the appellant and the 1st respondent) belonged to opposing political parties but the appellant's party was in power. Both the candidates had semi-V. I.P. status in their respective parties. One member more in the Legislative Council would pro tanto, strengthen the Ministry. This political backdrop belights some of the things which occurred on the dates proximate to the completion of the electoral roll. The administrative locomotion and the human motivation behind what the trial Judge had described as 'manouvres' is simple to understand, although, as will be shown below, we do not agree wholly with all the deductions of the High Court. A particular party is in office. The strength of its members in both houses is therefore of political significance, especially if fluid politics turns out to be the field of all possibilities.

6A. Karnataka has a bicameral legislature and it is reasonable to suppose that the political government has an understandable concern in the election of a member of the Legislative Council, who will be of their party. Bidar district in Karnataka has a local authorities constituency seat, to be elected by the members of the local bodies there. It follows that the potential electors who are likely to favour their candidate must be brought on the rolls to ensure his victory. Inevitably there was therefore keen interest in incorporating in the electoral roll the members of the Taluk Development Board, Bidar (for short, the Bidar Board). The election to the Bidar Board had taken place years ago, 11 of them having been elected way back in 1968 and 8 later. The election of the 11 members had been duly notified in 1968 but the Board itself stood suspended an administrator having been appointed to run its affairs 8 members who had been later elected to the Board landed up in the High Court on account of writ petitions filed by their rivals. Stay had been granted by the

High Court and this led to an absence of 2/3 of the total members being able to function, statutory necessitating the appointment of administrator. Long later the High court disposed of the writ petition whereby 3 returns were set aside and 5 upheld. The arithmetical upshot of these happenings was that there were 16 members duly elected to the Bidar Board, and the High Court having disposed of the writ petitions in June 1972, the local body could have been liberated from the bureaucratic management of an administrator and allowed to function through elected representatives. All that was needed to vivify this body for local self government was a notification under the Mysore Village Panchayats Act X of 1959, terminating the administrator's term, and perhaps another extending the terms of some members.

7. Elections to local bodies and vesting of powers in units of self-government are part of the Directive Principles of State Policy (Art. 40 of the Constitution) and, in a sense, homage to the Father of the Nation, standing as he did for participative democracy through de-centralisation of power. Unfortunately, after holding elections to the Bidar Board and making people believe that they have elected their administrative representatives at the lowest levels, the State Government did not bring to life the local board even long after the High Court had disposed of the challenges to the elections in June 1972. A government, under our Constitution, must scrupulously and energetically implement the principles fundamental to the governance of the country as mandated by Art. 37 and, if even after holding elections Development Boards are allowed to remain moribund for failure to notify the curtailment of the administrator's term, this neglect almost amounts to dereliction of the constitutional duty. We are unhappy to make this observation but power to the people, which is the soul of a republic, stands subverted if decentralisation and devolution desiderated in Art. 40 of the Constitution is ignored by executive inaction even after holding election to the floor-level administrative bodies. The devolutionary distance to ideological Rajghat from power-jealous State capitals is unwillingly long indeed, especially in view of the familiar spectacle of long years of failure to hold elections to local bodies, supersession aplenty of local self-government units and gross inaction even in issuing simple notifications without which elected bodies remain stillborn. 'We, the people' is not constitutional mantra but are the power-holders of India from the panchayat upward.

8. Back to the main trend of the argument. It became now compulsive for the party-in-power to denotify the administrator and revive the elected body if they wanted the members of the Bidar Board to vote perhaps in favour of their candidate. The 11 members elected long back in 1968 could not vote on account of the expiry of the 4 year term unless in view of S. 108 of Act 10 of 1959, the government issued another notification extending the term of office of these members. So the elective interest of the candidate of the party-in-power could be promoted only if three or four quick administrative steps were taken. Firstly, there was to be a notification ending the administrator's term over the Bidar Board. Secondly, there was to be a notification extending the term of the 11 members elected in 1968. Thirdly there was to be a notification of the election of the 5 members whose return had been upheld in the High Court in June 1972. Fourthly, the electoral roll had to be amended by inclusion of these 16 names. If these steps were duly taken, 16 additional members would become electors and the party-in-power (if these electors belonged to that party or were under its influence) could

probably expect their votes. The poll results show that the contest was keen and these 16 votes would have been of great moment. In this high risk predicament, long bureaucratic indolence in issuing notifications and political indifference to the functioning of local bodies produced a situation where the electoral roll did not contain the names of the 16 members of the Bidar Board.

9. Only a few days prior to April 17, 1974 – the D-day — the affected candidate, i.e., the appellant, moved the government for initiation of the steps mentioned above, but nothing happened. On April 16, the day before the crucial date for closing the electoral roll, i.e., the last date for making nominations, the appellant moved the Minister concerned who was in Bidar to get the necessary administrative steps taken quickly. He also moved the returning officer, RW 2. We find the Minister making an endorsement on the petition. We notice the returning officer seeking telegraphic instructions from government. We see government sending an Under Secretary, PW 3, by air from Bangalore to Hyderabad and onward by car to Bidar with some orders. This PW 3 probably apprised the returning officer RW 2 about orders having been passed paving the way for inclusion of the 16 names in the electoral roll. PW 3, the Under Secretary, for reasons not known, makes a bee-line the same evening to Gulbarga where he meets the Minister. The returning officer does not have with him any gazette notifications, as we see that under S. 2 (20) of Act X of 1959, a notification must possess the inalienable attribute of publication in the official gazette. Admittedly, the returning officer did not come by any of the necessary notifications before the evening of the 17th. Admittedly, he did not have any gazette notifications before April 25th. Under S.27 of the Representation of the People Act, 1950, the electoral registration officer who, in this case, is also the returning officer, had to have before him gazette notifications which clearly he did not have till the 25th, i.e., 8 days after the relevant date. Nevertheless he, obligingly enough, including the 16 names which was in breach of the legal provisions.

10. Frenzied official movements on and after April 16 are visible in this case. The scenario excites suspicion. The candidate meets the Minister of his party on the 16th. The returning officer takes the unusual steps of sending a telegram for instructions from government for inclusion of names in the electoral roll. The Secretariat despatches an Under Secretary to reach Bidar by air dash and long car drive. A meeting between the Under-Secretary and the electoral registration officer follows and then the Under Secretary winds up the day by meeting the Minister, presumably to report things done, and the registration officer supplements the electoral roll by including 16 more names, without getting the gazette notification. We have no doubt, as we will presently explain that this inclusion is invalid, but what we are presently concerned with is the protracted inaction for years of the State government in issuing simple notifications to resuscitate the Bidar Board and the sudden celerity by which a quick chase and spurt of action resulting in a Minister's endorsement, the registration officer's telegram. Secretariat hyper-busyness, the unusual step of an Under Secretary himself journeying with Govt. orders to be delivered to the registration officer, the electoral registration officer hastening to amend the electoral roll slurring over the legal requirement of a gazette notification and making it appear that everything was done on the 17th before midnight, and a few other circumstances, make up a complex of dubious doings designed to help a certain candidate belonging to the party-in-power.

11. The officers had no personal interest as such and, in fairness, we must state the High Court has exonerated them of any oblique conduct to further their own interests. We wish to state clearly that having taken a close look at the developments we are not inclined to implicate any of the officers – and there are quite a few involved – with mala fide conduct or collusion with the returned candidate. Legal peccadilloe are not fraud or collusion without more. However, the performance of the political government and the pressurization implicit in the hectic activities we have adverted to, read in the light of the likely political gains accruing to the party-in-power generate apprehensions in our mind about the peril to the electoral process if political bosses in office rubberise the public services to carry out behests which are contrary to the law but non-compliance with which might be visited with crypto-punitive consequences. We would have taken a harsher view against the public servants had we something more than what may even be a rather strong suspicion of obliging deviance. Sometimes they are transfixed between Scylla and Chary bids. Even strong suspicion is no substitute for proof. It has often been said that suspicion is the upas tree under whose shade reason fails and justice dies. There is a core of truth in this caveat.

12. Shri Bhat, counsel for the first respondent, argued his case to strenuously but could not make out that vital nexus between the candidate who stood to gain and the officers whose action he impugned. More-over, the movements of the Minister at about that time raises doubts and the huge expenditure involving in rushing an Under Secretary from Bangalore by air and road to Bidar were a drain on the public exchequer which could have been avoided if action had been taken in time by a few postal communications. But the trial Judge erred in substituting suspicion for certitude and drawing untenable inferences where paucity of evidence snapped the nexus needed for collusion. A court must, as usual ask for proof beyond reasonable doubt from the party setting up corrupt practice even when there is a veneer of power politics stooping to conquer and officers thereby becoming vulnerable to 'higher' displeasure.

13. The faith of the people in the good faith of government is basic to a republic. The administrative syndrome that harms the citizens' hopes in the State often manifests itself in callously slow action or gravely suspicious instant action and the features of this case demonstrate both. Admittedly, the Bidar Board elections were substantially over in 1968 and were more or less complete in 1972 and yet the necessary notifications in the gazette, which are the statutory pre-condition for the local body to be legally viable, were, for years, not published and, when the critical hour for the electoral list to be finalised fell at 3 p.m. on April 17, 1974, the government and its officers went through exciting exercises unmindful of legal prescriptions and managed the illegitimate inclusion of 16 names in the electoral roll. We hope that the civil services in charge of electoral processes which are of grave concern for the survival of our democracy will remember that their masters in statutory matters are the law and law alone, not political superiors if they direct deviance from the dictates of the law. It is never to be forgotten that our country is committed to the rule of law and therefore functionaries working under statutes, even though they be government servants, must be defiantly dedicated to the law and the Constitution and, subject to them, to policies, projects and directions of the political government.

“Be you ever so high, the law is above you” – this applies to our Constitutional order.

14. Shri Bhat, counsel for the 1st respondent ultimately argued these aspects of the case. But, when we were more than half-way through, it became clear that the material link to make out invalidation of the election on account of 'corrupt practice' under S. 123 (7) of the 1951 Act was missing because it had not been made out in the evidence that there was collusion between the 2nd respondent and the appellant. At that stage, taking a realistic stance, counsel acceded to our view that while there was sufficient room for the 1st respondent to be disturbed about the electoral verdict on the score of the inclusion of 16 names there was not any telling material, other than speculation or weak suggestion, that there was corrupt participation on the part of the officers. If this position were right – and we hold it is — what remains to be done is to ascertain the legal effect of the inclusion in the electoral roll of the new names after the expiry of the appointed hour and date.

15. According to the calendar for the poll contemplated in S.30 of the 1951 Act the last date for making the nominations was appointed as April 17, 1974. Section 33 (1) of the 1951 Act requires that each candidate shall deliver to the returning officer a nomination paper as set out in the section: “between 11 O'clock in the forenoon and 3 O'clock in the afternoon.” The appellant and the 1st respondent did file their nominations in conformity with Ss. 30 and 33 of the 1951 Act but the electoral registration officer (2nd respondent in the appeal), included the names of 16 persons representing the Bidar Board after 3 p.m. of April 17, 1974. There is a dispute between the parties as to whether such inclusion was directed on the 17th (after 3 p.m.) or on the 18th, the former being the case of the appellant as well as the 2nd respondent, the latter being the case of the 1st respondent and upheld by the High Court. The Court held that, in law, any inclusion of additional names in the electoral roll of a constituency after 3 p.m., on the last date for making nomination fixed under S. 30 (a) of the 1951 Act was illegal. Consequently, it arrived at the follow-up decision that the 16 votes which had been cast by those objectionably added, had to be ignored. On a further study of the evidence, the Court concluded that these 16 votes had been cast in favour of the elected candidate and should therefore be deducted from his total tally. The appellant, who had secured 64 votes as against respondent No. 1's 54, had only a lead of 10 votes. He slumped below the 1st respondent when 16 votes were deducted from his total. The necessary result, in the view of the High Court, was that not only had the appellant's election to be set aside but the 1st respondent deserved to be declared duly elected. This was done.

16. An appreciation of the evidence bearing on the question as to whether the 2nd respondent i.e., the registration officer had acted under the appellant's oblique influence in including the additional names after the last date for such inclusion, has led us to overturn the affirmative answer from the learned trial Judge. The holding that a 'corrupt practice', within the ambit of Sec. 123, had been committed by the appellant who was therefore disqualified under Section 8A led to two consequences. The appellant, who had won the election at the polls, lost the election in the court and, worse still, suffered a six year disqualification. The doubly aggrieved appellant has challenged the adverse verdict and the wounded 2nd respondent (electoral registration officer) has separately appeared to wipe out the damaging effect of the obliging inclusion of names of electors after the time set by the law was over. We

have already set aside the finding under S. 123 (7) of the 1951 Act of corrupt practice and with it falls the disqualification.

17. The short point, whose impact maybe lethal to the result of the election, is as to whether Sec. 23 of the 1950 Act should be read down in conformity with Ss. 30 and 33 of the 1951 Act. the proposition, which has appealed to the High Court, has the approval of the ruling in Baidyanath (1970) 1 SCR 839: (AIR 1970 SC 314). The Court, there, observed:

“In our opinion, Cl. 23 (a) takes away the power of the electoral registrtrion officer or the chief electral officer to correct the entries in the electoral rolls or to include new names in the electoral rolls of a constituency after the last date before the completion of that election.....

It interdicts the concerned officers from interfering with the electoral rolls under the prescribed circumstances. It puts a stop to the power conferred on them. Therefore it is not a question of irregular exercise of power but a lack of power x - x - x - x - x (p. 842 of SCR): (at p. 317 of AIR).

We have earlier come to the conclusion that the electoral registration officer had no power to include new names in the electoral roll on April 27, 1968. Therefoe votes of the electors whose names were included in the roll on that date must be held to be void votes.” (p. 843 of SCR): (at p.317 of AIR)

There is a blanket ban in sec. 23 (3) on any amendment, transposition of deletion of any entry or the issurance of any direction for the inclusion of a name in the electoral roll of a constituency, 'after the last date for making nominations for an election of that constituency' This prohibition is based on public policy and serves a public purpose as we will presently bring out. Any violation of such a mandatory provision conceded to pre-empt scrambles to thrust into the rolls, after the appointed time fancied voters by anxious candidate or parties spells invalidity and we have, therefore, no doubt that if inflagrant violation of Section 23(3) names have been included in the electoral roll, the bonus of such illegitimate votes shall not accrue, since vice of voidance must attach to such names. Such void votes cannot help a candidate win the contest.

18. Why do we say that such there is an underlying public policy and paramount public purpose served Section 23 (3)? In our electoral scheme as unfolded in the 1951 Act, every elector ordinarily can be a candidate. Therefore his name must be included in the list on or before the date fixed for nomination. Otherwise he loses his valuable right to run for the elective office. It is thus vital that the electoral registration officer should bring in the names of all the electors into the electoral roll before the date and hour fixed for presenting the nomination paper. There is another equally valid reason for stressing the inclusion of the names of all electors before the hour for delivering to the returning officer the nomination paper. Section 33 (4) of the 1951 Act reads:

"(4) On the presentation of a nomination paper, the returning officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls:

X X X X"

In the light of this provision the returning officer, on receipt of the nomination paper satisfies himself that the candidate's name and electoral roll number are correctly entered. Necessarily this is possible only if the electoral roll contains the names of all the electors. Likewise, Section 33 (5), which deals with a candidate who is an elector from a different constituency requires of the candidate the production of a certified copy of the relevant entry showing his name in such a roll. The inference is inevitable that there must be a completed electoral roll when the time for filing the nomination paper expires. The argument is therefore incontrovertible that the final electoral roll must be with the returning officer when the last minute for delivering the nomination paper ticks off. Subsequent additions to the electoral register will inject confusion and uncertainty about the constituents or electors, introduce a disability for such subsequently included electors to be candidates for the election and run counter to the basic idea running through the scheme of the Act that in the preponderant pattern of elections, viz., for the legislative assemblies and parliament the electors shall have the concomitant right of being candidates. The cumulative effect of these various strands of reasoning and the rigour of the language of S. 23(3) of the 1950 Act leaves no doubt in our minds that inclusion of the names in the electoral roll of a constituency after the last date for making nominations for an election in that constituency must be visited with fatality. Such belated arrivals are excluded by the talons of the law and must be ignored in the poll. It is appropriate to quote from Baidyanath (1970) 1 SCR 839 at page 842 : (AIR 1970 SC 314 at p. 317) here :

"The object of the aforesaid provision is to see that to the extent possible all persons qualified to be registered as voters in any particular constituency should be duly registered and to remove from the rolls all those who are not qualified to be registered. Sub-section (3) of S. 23 is an important exception to the rules noted earlier. It gives a mandate to the electoral registration officers not to amend transpose or delete any entry in the electoral roll of a constituency after the last date for making nominations for election in that constituency and before the completion of that election. If there was no such provision there would have been room for considerable manipulations particularly when there are only limited number of electors in a constituency. But for that provision, it would have been possible for the concerned authorities to so manipulate the electoral rolls as to advance the prospects of a particular candidate."

19. A more tricky issue now arises. Assuming April 17, 1974 to be the last date for filing nominations (and it is so in this case) can the electoral roll be amended on that date to include additional names but after the hour set for presenting the nomination paper?

20. Section 33 (1) specifies inflexibly that the nomination paper shall be presented 'between the hours of 11 o'clock in the forenoon and 3 o'clock in the afternoon'. That means that the duration of the day for presentation of nomination papers terminates at 3 o'clock in the afternoon. If an elector is to be able to file his nomination paper his name must be on the electoral roll at 3 p.m. on the last day for filing nominations. So the temporal terminus ad quem is also the day for finalisation of the electoral register and by the same token, that day terminates at just that hour when the returning officer shuts the door. The day is truncated to terminate with the time when reception of nomination is closed.

21. Section 23 of the 1950 Act does state that the inclusion of the names in the electoral roll can be carried out till the last date for making nominations for an election in the concerned constituency. What then is the last date? When does the last date cease to be? If the purpose of the provision were to illumine its sense if the literality of the text is to be invigorated by a sense of rationality, if conscionably, commonsense were an attribute of statutory construction there can hardly be any doubt that the expression 'last date for making nominations' must mean the last hour of the last date during which presentation of nomination papers is permitted under S. 33 of the 1951 Act. In short, S. 23 (3) of the 1950 Act and S. 33 (1), (4) and (5) of the 1951. Act interact, fertilise and operate as a duplex of clauses. So viewed, the inclusion of the names in the electoral roll after 3 p.m., on April 17, 1974 is illegitimate and illegal.

22. At this stage, it may be appropriate to make reference to Ramji Prasad Singh (1977) 1 SCR 741 : (AIR 1976 SC 2573) to which one of us was a party. Indeed, attention of counsel was invited to this decision by the Court. That case turned on the inclusion of 40 voters in contravention of S. 23 (3) of the 1950 Act. By incorporating in the electoral roll new names *after* the last date for filing nomination, this Court held that such inclusion of new names would be clearly in breach of the mandate contained in Section 23(3) of the 1950 Act and therefore, beyond the jurisdiction of the electoral registration officer. This view is precisely what we have taken in the present case.

23. In that case this Court, on facts, took the view that the communication from the Chief Executive Officer of the local authority to substitute certain new names in the electoral roll could not have been acted upon before April 6, 1972, the last date of nomination being April 5, 1972. This is clear from the following observation in the judgment :

"In fact the letter was 'diarised' by Shri Bose's office on the 6th The fact of the matter seems to be that the notifications of the 4th April came too late for being acted upon before the deadline, which was the 5th. The red tape moved slowly, the due date expired and then everyone awoke to the necessity of curing the infirmity by hurrying with the implementation of the notifications. But it was too late and the law had already put in seal on the electoral roll as it existed on the 5th April. It could not be touched thereafter, until the completion of the election." This Court, in that case, observed that it was 'impossible to accept the half-hearted claim of Shri Bose that he passed orders for inclusion of the new names on the 5th itself'. This Court was not called upon to go in to the question as to what would be the legal position if the electoral rolls were actually amended at 11.30 p.m. On 5th April after the last hour for the nomination, viz., 3 p.m. On that day. This finer facet which falls for consideration in the present appeal viz., whether the 'last day' contemplated in S. 23 (3) of the 1951. Act ends at 3 p.m. On that day for the purpose, or continues until midnight did not actually arise for judicial investigation in Ramji Prasads case (AIR 1976 SC 2573).

24. The upshot of the above the interpretation is that the 16 name which have been brought into the electoral register subsequent to 3 p.m. of April 17, 1974 must be excluded from the reckoning to determine the returned candidate.

25. The learned Judge has declared the 2nd respondent duly elected on the strength, mainly of inference drawn from the oral evidence of the rival candidates.

The ballots are alive and available and speak best. Why, then, hazard a verdict on flimsy foundation of oral evidence rendered by interested parties? The vanquished candidate's ipse dixit or the victor's vague expectations of voters' loyalty – the grounds relied on – are shifting sands to build a firm finding upon, knowing how notorious is the cute art of double-crossing and defection in electoral politics and how undependable the testimonial lips of partisans can be unless authenticated by surer corroboration. Chancy credulity must be tempered by critical appraisal, especially when the return by the electoral process is to be overturned by unsafe forensic guesses. And where the ground for recount has been fairly laid by testimony, and the ballot papers, which bear clinching proof on their bosoms, are at hand, they are the best evidence to be looked into. No party can run away from their indelible truth and we wonder why the learned Judge avoided the obvious and resorted to the risky. May be, he thought reopening and recount of ballots may undo the secrecy of the poll. We are sure that the correct course in the circumstances of this case is to send for and scrutinize the 16 ballots for the limited purpose of discovering for whom, how many of the invalid sixteen have been cast. Secrecy of ballot shall be maintained when scrutiny is conducted and only that part which reveals the vote (not the persons who voted) shall be open for inspection.

26. What, then is the result of the reasoning which have prevailed with us? It is simply this, viz., that the 16 votes of the members of the Bidar Board should be excluded and the consequential tilting of the result re-discovered. We are, therefore, constrained to direct the High Court to send for the ballot papers and pick out the 16 ballots relating to the Bidar Board members, examine them without exposing the identity of the persons who have voted and to whom they have voted and record a re-tally excluding these 16 tainted votes from the respective candidates. If the resultant balance-sheet shows that the appellant has polled less valid votes than the 1st respondent, his election will be set aside and the 1st respondent declared duly elected. If on the other hand, despite these deletions the appellant scores over the 1st respondent, his return will be maintained. Anyway, counsel on both sides agree that the best course will be to call for a report from the High Court in the light of the operations above indicated. The learned single Judge who heard the case will examine the 16 ballots as directed above consistently with natural justice, record the number of votes out of the 16 each has got and forward to this Court a comprehensive and correct statement with the necessary particulars. This report shall be made within 3 weeks from the receipt of the records from this Court and the appeal shall be posted for disposal immediately the report reaches. With these directions we dispose of the appeal pro tempore.

27. By way of post-script, we may state that counsel for the 1st respondent submitted, after we crystallized the directions indicated above, that he was not too sure whether the 16 ballot papers could be identified. The appellant's counsel, however, asserted that there were number indelibly imprinted on the reverse of the ballot papers and, as such the identification of 16 impugned votes may not present a problem. In the event of impossibility of fixing identity, a report to that effect will be forthcoming from the High Court and we may notwithstanding the observations about the oral evidence made above, re-hear the case with a view to record our finding as to which way the voting went out of the offending 16, so that we may determine whether the result of the election has been materially affected. If it is not possible, further suitable directions will be considered.

28. We may also mention that at one stage of the arguments Shri L. N. Sinha drew our attention to a designedly wide amendment to the Act of 1951 made in the wake of the election case of Smt. Indira Gandhi, Its validity, for our provisions, has been upheld by this Court in Smt. Indira Nehru Gandhi v. Raj Narain (1976) 2 SCR 347 : (AIR 1975 SC 2299). It was pressed before us that with the re-definition of 'candidate' in S. 79 (b) and the addition of a proviso to S. 127 (7), by Act XL of 1975, the present election petition had met with its statutory Waterloo. But Shri Bhat urged that his averments of officials' abetment of promotion of the appellant's candidacy related also to a point of time *after* the nomination paper was filed. He also submitted that the imputations against the electoral registration officer were so far beyond his duties that the blanket proviso could not protect the acts. Since we have taken the view that corrupt practice, even under the amended S. 123 (7) has not been established, the pronouncement on the exonerative efficacy of the amended Act does not arise. But officials must realise – and so too the highest in administration – that the proviso to S. 123 (7) does not authorise out-of-the-way doings which are irregular. A wrong does not become right if the law slurs over it.

29. We part with this case with an uneasy mind. There is finding by the High Court that an influential candidate had interfered with officials to adulterate an electoral roll. We have vacated the finding but must warn that the civil services have a high commitment to the rule of law, regardless of covert commands and indirect importunities of bosses inside and outside government. Lord Chesham said in the House of Lords in 1958: "He is answerable to law alone and not to any public authority." A suppliant, obsequious, satellite public service — or one that responds to allurements, promotional or pecuniary — is a danger to a democratic polity and to the supremacy of the rule of law. The courage and probity of the hierarchial election machinery and its engineers, even when handsome temptation entices or huffy higher power browbeats, is the guarantee of electoral purity. To conclude, we are unhappy that such aspersions against public servants affect the integrity and morale of the services but where the easy virtue of an election official or political power-wielder has distorted the assembly-line operations, he will suffer one day. Be that as it may, we express no final opinion beyond what has already been said.

Ordered accordingly.

SUPREME COURT OF INDIA*

**Civil Appeal No. 1297 of 1977^s
(Decision dated 2-12-1977)**

Mohinder Singh Gill and Another

..Appellants

Vs.

**The Chief Election Commissioner,
New Delhi and Others**

..Respondents.

SUMMARY OF THE CASE

At the 1977-general election to the House of the People, the poll in the Firozpur Parliamentary Constituency was taken on 16th March, 1977. The said Parliamentary Constituency consists of 9 assembly segments. Counting in five of these assembly segments was completed on the 20th March, 1977 and in the remaining four on 21st March, 1977. The respective Assistant Returning Officers made entries in the result sheet in Form-20 and announced the number of votes received by each candidate in their assembly segments. According to these result sheet, Shri Mohinder Singh Gill, the petitioner, was leading over his nearest rival by 1921votes. Only 769 postal ballot papers then remained to be counted by the Returning Officer. He took up the counting of these postal ballot papers at his Headquarters at Firozpur on 21st March, 1977 at 3 pm, and rejected 248 out of the said 769 postal ballot papers. At that stage, there was some mob violence in the counting hall and the postal ballot papers remaining to be sorted out and counted candidate-wise were burnt. Further, all the ballot papers and the others election records of the Fazilka assembly segment were also burnt and destroyed when these ballot papers and records were under transit from Fazilka to Firozpur. Furthermore, some envelopes containing some ballot papers and other election records of Zira assembly segment were also likewise destroyed when under transit from Zira to Firozpur. The Election Commission, on 22nd March, 1977, on receipt of reports about these disturbances and destruction of election records, including a report from one of its own Under Secretaries who was present at Firozpur as an Observer, declared the poll taken on 16th March, 1977 in the entire Firozpur Parliamentary Constituency as void and directed a fresh poll to be taken on a date to be notified by it later. This order of the Election Commission was challenged by the petitioner, Shri Mohinder Singh Gill, by a writ petition before the Delhi High Court. The Delhi High Court dismissed the writ petition, upholding the order of the Election Commission, and also holding that the writ petition was barred by the provisions of Article 329 (b) of the Constitution.

The present appeal before the Supreme Court was filed by Shri Mohinder Singh Gill, being aggrieved by the High Court's order. The Supreme Court dismissed the appeal, holding that the order of the Election Commission directing a re-poll was a step in the process of election and as the election process was not yet complete, the writ petition under Article 226 the challenging Commission's order was not maintainable in view of the bar under Article 329 (b) of the Constitution. The Supreme Court examined at length the provisions of Article 324 of the Constitution and held that the Election Commission may be required to cope with some situation

in the conduct of elections which may not be provided for in the enacted laws and the rules and that Article 324 of the Constitution was a reservoir of power for the Election Commission to act in such vacuous area, in its own right, as a creature of the Constitution. The Supreme Court also held that Article 329 (b) was a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers to complete an election. Election, in this context, has a very wide connotation commencing from the notification calling the election and culminating in the final declaration of the returned candidate.

(A) Constitution of India, Art. 226 — Order by statutory authority — Validity of — How to be judged.

When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. AIR 1952 Sc 16, Rel. on.

(Para 8)

Anno: AIR Comm. Const of India, Art. 226, Note 184.

(B) Constitution of India, Art. 324 — Amplitude of powers and width of functions to be exercised by Election Commission under Art. 324 — Power to cancel poll in the entire constituency — Election Commission has such power under Art. 324.

Functions as referred to in Article 324 (6) include powers as well as duties. It is incomprehensible that a person or body can discharge any functions without exercising powers. Powers and duties are integrated with function. The Chief Election Commissioner has to pass appropriate orders on receipt of reports from the returning officer with regard to any situation arising in the course of an election and power cannot be denied to him to pass appropriate orders. Moreover, the power has to be exercised with promptitude. Whether an order passed is wrong, arbitrary or is otherwise invalid, relates to the mode of exercising the power and does not touch upon the existence of the power in him if it is there either under the Representation of the People Act or the rules made in that behalf, or under Art. 324 (1). The Commission is entitled to exercise certain powers under Art. 324 itself on its own right, in an area not covered by Representation of the People Acts and the rules.

It is clear even from Sec. 58 and Section 64A of the Representation of the People Act (1951) that the legislature envisaged the necessity for the cancellation of poll and ordering of repoll in particular polling stations where situation may warrant such a course. When provision is made in the Act to deal with situations arising in a particular polling station, it cannot be said that if a general situation arises whereby numerous polling stations may witness serious mal-practices affecting the purity of the electoral process, that power can be denied to the Election Commission to take an appropriate

decision. The fact that a particular Chief Election Commissioner may take certain decisions unlawfully, arbitrarily or with ulterior motive or in mala fide exercise of power, is not the test in such a case. The question always relates to the existence of power and not the mode of exercise of power. Although Sec. 58 and Section 64A mention "a polling station" or "a place fixed for the poll" it may, where necessary, embrace multiple polling stations. It is true that in exercise of powers under Art. 324 (1) the Election Commission cannot do something impinging upon the power of the President in making the notification under Sec. 14 of the Representation of the People Act.

But after the notifications has been issued by the President, the entire electoral process is in the charge of the Election Commission and the commission is exclusively responsible for the conduct of the election without reference to any outside agency. There is no limitation in Art. 324 (1) from which it can be held that where the law made under Article 327 or the relevant rules made thereunder do not provide for the mechanism of dealing with a certain extraordinary situation, the hands of the Election Commission are tied and it cannot independently decide for itself what to do in a matter relating to an election. The Election Commission is competent in an appropriate case to order re-poll of an entire constituency where necessary. It will be an exercise of power within the ambit of its functions under Art. 324.

(Paras 91, 112, 114, 115, 117, 119)

Anno: AIR Comm. Constitution of India, Art. 324, Notes 1, 3.

(C) Constitution of India, Art. 324 (1), 329 (b), 226 — Election — Meaning of — Order for fresh poll — Whether can be said to be during course of election — Writ petition challenging cancellation integrated with re-poll whether barred under Article 329 (b).

Election covers the entire process from the issue of the notification under Section 14 of the Representation of the People Act to the declaration of the result under Sec. 66 of the Act. When a poll that has already taken place has been cancelled and a fresh poll has been ordered, the order therefore, with the amended date, is passed as an integral part of the electoral process. When the Election Commission amended its notification and extended the time for completion of the election by ordering a fresh poll, it is an order during the course of the process of 'election'. Even if it is a wrong order it does not cease to be an order passed by a competent authority charged with the conduct of elections with the aim and object of completing the elections. Although that is not always decisive, where the impugned order has been passed in the exercise of power under Art. 324 (1) of the Constitution and Sec. 153 of the representation of the People Act, such an order, relating, as it does, to election cannot be questioned except by an election petition under the Act. If during the process of election, at an intermediate or final stage, the entire poll has been wrongly cancelled and a fresh poll has been wrongly ordered, that is a matter which may be agitated after declaration of the result on the basis of the fresh poll, by questioning the election in the appropriate forum by means of an election petition in accordance with law. The petitioner, then,

will have a remedy to question every step in the electoral process and every order that has been passed in the process of the election including the countermanding of the earlier poll.

(Paras 121, 122)

The catch-all jurisdiction under Article 226 cannot consider the correctness, legality or otherwise of the direction for cancellation integrated with re-poll. For, the prima facie purpose of such a re-poll is to restore a detailed poll process and to complete it through the salvatory effort of a re-poll. A writ petition challenging the cancellation coupled with re-poll amounts to calling in question a step in 'election' and is therefore barred by Art. 329 (b).

(Paras 31, 32, 91)

Anno: AIR Comm. Const of India, Art. 226, Note; 26; Art. 324 Note 1; Art. 329, Note 2.

(D) Representation of the People Act (1951), Ss. 100 (1) (d) (iv), 80 — Noncompliance with provisions of the Constitution — What constitutes — Order under Art. 324 of the Constitution — Illegality in exercise of the power — Remedy. (Constitution of India, Arts. 329 (b), 226).

Where the Election Commission has passed an order professedly under Art. 324 of the Constitution and Section 153 of the Representation of the People Act 1951 and the order is within the scope and ambit of Art. 324 of the constitution, if there is any illegality in the exercise of the power under Art. 324 or under any provision of the Act, Sec. 100 (1) (d) (iv) will be attracted to it. If exercise of a power is competent either under the provisions of the Constitution or under any other provision of law, any infirmity in the exercise of that power is, in truth and substance, on account of non-compliance with the provisions of law, since law demands of exercise of power by its repository, as in a faithful trust, in a proper, regular, fair and reasonable manner. Art. 329 (b) of the Constitution rules out the maintainability of the writ application in such a case. An election can be challenged only under the provisions of the Act. All the substantial reliefs which the party seeks in the writ application, including the declaration of the election to be void and the declaration of the party to be duly elected, can be claimed in the election petition. It will be within the power of the High Court, as the election court, to give all appropriate reliefs to do complete justice between the parties. In doing so it will be open to the High Court to pass any ancillary or consequential order to enable it to grant the necessary relief provided under the Act. The writ application is therefore barred under Art. 329 (b) of the Constitution. AIR 1954 SC 520, Rel. on.

(Paras 124, 125)

Anno: AIR Manual Representation of the People Act, S. 80 Note 1, S. 100 Note 5; AIR Comm. Const of India, Art. 329 Note 2; Art. 226, N. 26.

(E) Constitution of India, Arts. 324 (1), 226 — Cancellation of poll — Obligation to act in accordance with natural justice on part of Election Commission.

Per Beg C. J. and Bhagwati and Krishna Iyer JJ.:— Fair hearing is a postulate of decision-making cancelling a poll, although fair abridgment of that process is permissible. It can be fair without the rules of evidence or form of trial. It cannot be fair if apprising the affected and appraising the representations is absent. The philosophy behind natural justice is, in one sense, participatory justice in the process of democratic rule of law. The silence of a statute has no exclusionary effect except where it flows from necessary implication. Art. 324 vests a wide power and where some direct consequence on candidates emanates from its exercise one must read this functional obligation.

(Paras 75, 76, 91)

Anno: AIR Comm. Const. of India, Art. 226 Note 59; Art. 324 Notes 1, 3.

(F) Representation of the People Act (1951), S. 98 — Powers of Election Tribunal.

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 Art. 329 (b) of the constitution 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.

(Para 91)

Anno: AIR Man. Representation of the People Act, S. 98 Note 1.

Cases Referred: Chronological Paras

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(1976) 1 All ER 12, Selvarajan v. Race Relations Board	56
AIR 1975 SC 2299 : (1976) 2 SCR 10, 24, 38, 46	347
(1974) 3 WLR 660 : (1974 3 ALL ER 862, Howard V. Borneman	62
AIR 1973 SC 1461	38
(1972) 1 WLR 534: (1972) 2 All ER (HL), Pearlber v. Varty	6 73
AIR 1971 SC 40 : (1971) 1 SCR (1971) AC 297: (1969) 3 All ER (HL), Wiseman v. Borneman	791, 65, 66 275 56, 70, 71
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AIR 1967 SC 1269	66
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(CA), Cozen v. North Devon Hospital Management Committee	71
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AIR 1962 SC 1110 : (1962) Supp 3 SCR 36	69
AIR 1958 SC 698 : 1959 SCR 611	15
AIR 1957 SC 896 : (1958) SCR 308	39
AIR 1956 SC 44 : (1955) 2 SCR 925	89
AIR 1955 SC 233 : (1955) 1 SCR 1104	24, 30
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AIR 1952 SC 16	8
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(1949) 335 US 538:93 Law ed 222, American Federation of Labour v. American Sash and Door Co.	79.

JUDGMENT

Present:- M.H. Beg, C.J., P.N. Bhagwati, V.R. Krishna Iyer, P.K. Goswami and P.N. Shinghal, JJ.

Mr. P.P. Rao, Sr. Advocate (M/s. A.K. Ganguli and Mr. Ashwani Kumar, Advocates with him), for Appellant; Mr. Soli J. Sorabjee, Addl. Sol. Genl. (M/s. E.C. Agrawala, B.N. Kirpal and Girish Chandra, Advocates with him) (for No. 1) and Mr. M.N. Phadke, Sr. Advocate (M/s. S.S. Bindra, Hardev Singh and R.S. Sodhi, Advocates with him) (for No. 3), for Respondents.

The following Judgment of Beg. C.J. and P.N. Bhagwati and V.R. Krishna Iyer, JJ. was delivered by

KRISHNA IYER, J.:- What troubles us in this appeal, coming before a Bench of 5 Judges on a reference under Art. 145 (3) of the Constitution, is not

the profusion of controversial facts nor the thorny bunch of lesser law, but the possible confusion about a few constitutional fundamentals, finer administrative norms and jurisdictional limitations bearing upon elections. What are those fundamentals and limitations? We will state them, after mentioning briefly what the writ petition, from which this appeal, by special leave, has arisen, is about.

The basics

2. Every significant case has an unwritten legend and indelible lesson. This appeal is no exception, whatever its formal result. The message, as we will see at the end of the decision, relates to the pervasive philosophy of democratic elections which Sir Winston Churchill vivified in matchless words.

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

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

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

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

(Vivian Grey, BK. VI. Ch. 7)

Aside from these is yet another, bearing on the play of natural justice its nuances, non-applications, contours, colour and content. Natural justice is no mystic testament of judge-made juristics but the pragmatic, yet principled, requirement of fairplay in action as the norm of a civilised justice system and minimum of good government — crystallised clearly in our jurisprudence by a catena of cases here and elsewhere.

The conspectus of facts

4. The historic elections to Parliament, recently held across the country, included a constituency in Punjab called 13-Ferozepore parliamentary constituency. It consisted of nine assembly segments and the polling took place on March 16, 1977. According to the calendar notified by the Election Commission, the counting took place in respect of five assembly segments on March 20, 1977 and the remaining four on the next day. The appellant and the third respondent were the principal contestants. It is stated by the appellant that when counting in all the assembly segments was completed at the respective segment headquarters, copies of the results were given to the candidates and the local tally telephonically communicated to the returning

office (respondent 2). According to the scheme the postal ballots are to arrive at the returning officer's headquarters at Ferozepore where they are to be counted. The final tally is made when the ballot boxes and the returns duly reach the Ferozepore headquarters from the various segment headquarters. The poll proceeded as ordained, almost to the very last stages, but the completion of the counting at the constituency headquarters in Ferozepore was aborted at the final hour as the postal ballots were being counted — thanks to mob violence allegedly mobilised at the instance of the third respondent. The appellant's version is that he had all but won on the total count by a margin of nearly 2000 votes when the panicked opposite party havocted and halted the consummation by muscle tactics. The postal ballot papers were destroyed. The ballot boxes from the Fazilka segment were also done away with end route, and the returning officer was terrified in to postponing the declaration of the result. On account of an earlier complaint that the returning officer was a relation of the appellant, the Election Commission (Hereinafter referred to as Commission) had deputed an officer of the Commission — Shri IKK Menon — as observer of the poll process in the constituency. He was present as the returning officer started the last stage operations on March 21st, from 3 p.m. onwards. Thus the returning officer had the company of the observer with him during the crucial stages and controversial eruptions in the afternoon of March 21. Shortly after sunset, presumably, the returning officer who under compulsion had postponed the concluding part of the election, reported the happenings by wireless message to the Election Commission. The observer also reached Delhi and gave a written account and perhaps an oral narration of the untoward events which marred what would otherwise have been a smooth finish to the election.

5. Disturbed by the disruption of the declaratory part of the election, the appellant, along with a former Minister of the State, met the Chief Election Commissioner (i.e. the Commission) at about 10.30 A.M., on March 22nd with the request that he should direct the returning officer to declare the result of the election. Later in the day, the Commission issued an order which has been characterised by the appellant as a lawless and precedent less cancellation of the whole poll, acting by hasty hunch and without rational appraisal of facts. By the 22nd of March, when the Election Commission made the impugned order, the bulk of the electoral results in the country had beamed in. The gravamen of the grievance of the appellant is that while he had, in all probability, won the poll, he had been deprived of this valuable and hardwon victory by the arbitrary action of the Commission going contrary to fairplay and in negation of the basic canons of natural justice. Of course, the Commission did not stop with the cancellation but followed it up a few days later with a direction to hold a fresh poll for the whole constituency, involving all the nine segments, although there were no complaints about the polling in any of the constituencies and the ballot papers of eight constituencies were available intact with the returning officer and only fazilka segment ballot papers were destroyed or damaged on the way, (plus the postal ballots). It must also be mentioned here that a demand was made,

according to the version of the third respondent, for recount in one segment which was, unreasonably, turned down. The observer, in his report to the Election Commission, also mentioned that in two polling stations divergent practices were adopted in regard to testing valid and invalid votes. To be more precise, Shri IKK Menon mentioned in his report that at polling station No. 8, the presiding officer's seal on the tag as well as the paper seal of one box was broken. But the ballot papers contained in that box were below 300 and would not have affected the result in the normal course. In another case in Jalalabad assembly segment, the assistant returning officer had rejected a number of ballot papers of a polling station on the score that they were not signed by the presiding officer. In yet another case it was reported that the ballot papers were neither signed nor stamped but were accepted by the assistant returning officer as valid, although the factum was not verified by Shri Menon with the assistant returning officer. Shri Menon, in his report, seems to have broadly authenticated the story of the mob creating a tense situation leading to the military being summoned. According to him only the ballot papers of Fazilka assembly segment were destroyed, not of the other segments. Even regarding Fazilka, the resultsheet had arrived. So far as Zira assembly segment was concerned, some documents (not the ballot papers) had been snatched away by hooligans. The observer had asked the returning officer to send a detailed report over and above the wireless message. That report, dated March 21, reached the Commission on March 23, but, without waiting for the report — we need not probe the reasons for the hurry— the Commission issued the order cancelling the poll. The Chief Election Commissioner has filed a laconic affidavit leaving to the Secretary of the Commission to go into the details of the facts, although the Chief Election Commissioner must himself have had them within his personal ken. This aspect also need not be examined by us and indeed cannot be, for reasons which we will presently set out.

6. Be that as it may, the Chief Election Commissioner admitted in his affidavit that the appellants met him in his office on the morning of March 22, 1977 with the request that the returning officer be directed to declare the result. He agreed to consider and told him off, and eventually passed an order as mentioned above. The then Chief Election Commissioner has mentioned in his affidavit that the observer Shri Menon had apprised him of 'the various incidents and developments regarding the counting of votes in the constituency' and also had submitted a written report. He has also admitted the receipt of the wireless message of the returning officer. He concludes his affidavit: 'that after taking all these circumstances and information including the oral representation of the 1st petitioner into account on 22nd March, 1977 itself I passed the order cancelling the poll in the said parliamentary constituency. In my view this was the only proper course to adopt in the circumstances of the case and with a view to ensuring fair and free elections, particularly when even a recount had been rendered impossible by reason of the destruction of ballot papers'. The order of the Election Commission, resulting in the demolition of the poll already held, may be read at this stage:

ELECTION COMMISSION OF INDIA

New Delhi

Dated 22 March, 1977

Chaitra 1, 1899 (SAKA)

NOTIFICATION

S.O. Whereas the Election Commission has received reports from the Returning Officer of 13-Ferozepore Parliamentary Constituency that the counting on 21 March, 1977 was seriously disturbed by violence; that the ballot papers of some of the assembly segments of the parliamentary constituency have been destroyed by violence; that as a consequence it is not possible to complete the counting of the votes in the constituency and the declaration of the result cannot be made with any degree of certainty.

And whereas the Commission is satisfied that taking all circumstances into account, the poll in the constituency has been vitiated to such an extent as to affect the result of the election;

Now, therefore, the Commission, in exercise of the powers vested in it under Art, 324 of the Constitution, Section 153 of the Representation of the People Act, 1951 and all other powers enabling it so to do, cancels the poll already taken in the constituency and extends the time for the completion of the election up to 30 April, 1977 by amending its notification No. 464/77 dated 25 February, 1977 in respect of the above election as follows:—

In clause (d) of item (i) of the said notification relating to the completion of election—

(a) in the existing item (i), after the words “State of Jammu and Kashmir”, the words “and 13-Firozpur Parliamentary constituency in the State of Punjab” shall be inserted: and

(b) The existing item (ii) shall be renumbered as item (iii) and before the item (iii) as so renumbered, the following item shall be inserted, namely:-

“(iii) 30 April 1977 (Saturday) as the date before which the election shall be completed in “13-Firozpur parliamentary constituency in the State of Punjab.” [464/77]

By order

Sd/- A.N. Sen.

Secretary

The Commission declined to reconsider his decision when the appellant pleaded for it. Shocked by the liquidation of the entire poll, the latter moved the High Court under Article 226 and sought to void the order as without jurisdiction and otherwise arbitrary and violative of any vestige of fairness. He was met by the objection, successfully urged by the respondents 1 and 3, that the High Court had no jurisdiction in view of Art. 329 (b) of the

Constitution and the Commission had acted within its wide power under Art, 324 and fairly. Holding that it had no jurisdiction to entertain the writ petition, the High Court nevertheless proceeded to enter verdicts on the merits of all the issues virtually exercising even the entire jurisdiction which exclusively belonged to the Election Tribunal. The doubly damnified appellant has come up to this Court in appeal by special leave.

7. Meanwhile, pursuant to the Commission's direction a re-poll was held. Although the appellant's name lingered on the ballot he did not participate in the re-poll and respondent 3 won by an easy plurality although numerically those who voted were less than half of the previous poll. Of course, if the Commission's order for re-poll fails in law, the second electoral exercise has to be dismissed as a stultifying futility. Two things fall to be mentioned at this stage, but, in passing, it may be stated that the third respondent had complained to the Chief Election Commissioner that the assistant returning officer of Fazilka segment had declined the request for recount unreasonably and that an order for re-poll of the Fazilka assembly part should be made after giving personal hearing'. Meanwhile, runs the request of the third respondent: 'direct returning officer to withhold declaration of result of 13 Ferozepore Parliament constituency'. We do not stop to make inference from this document but refer to it as a material factor which may be considered by the tribunal which eventually has to decide the factual controversy.

8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in *Gordhandas Bhanji* (AIR 1952 SC 16) (at p. 18):

"Public orders publicly made, in exercise of a statutory authority can not be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are address and must be construed objectively with reference to the language used in the order itself".

Orders are not like old wine becoming better as they grow older.

A. Caveat

9. We must, in *laminae*, state that anticipating our decision on the blanket ban on litigative interference during the process of the election clamped down by Art. 329 (b) of the Constitution — we do not propose to enquire into or pronounce upon the factual complex or the lesser legal tangles, but only narrate the necessary circumstances of the case to get a hang of the major issues which we intend adjudicating. Moreover, the scope of any factual investigation in the event of controversion in any petition

under Art. 226 is ordinarily limited and we have before us an appeal from the High Court dismissing a petition under Art. 226 on the score that such a proceeding is constitutionally out of bounds for any court, having regard to the mandatory embargo in Art, 329 (b). We should not, except in exceptional circumstances, breach the recognised, though not inflexible boundaries of Article 226 sitting in appeal even assuming the maintainability of such a petition.

Indeed, we should have expected the High Court to have considered the basic jurisdictional issue first, and not last as it did, and avoided sallying forth into a discussion and decision on the merits, self-contradicting its own holding that it had no jurisdiction even to entertain the petition. The learned Judges observed:

“It is true that the submission at serial No. 3 above in fact relates to the preliminary objection urged on behalf of respondents 1 and 3 and should normally have been dealt with first but since the contentions of the parties on submission No. 1 are intermixed with the interpretation of article 329 (b) of the Constitution, we thought it proper to deal with them in the order in which they have been made.”

This is hardly a convincing alibi for the extensive per in curiam examination of facts and law gratuitously made by the Division Bench of the High Court, thereby generating apprehensions in the appellant's mind that not only is his petition not maintainable but he has been damned by damaging findings on the merits. We make it unmistakably plain that the election court hearing the dispute on the same subject under S. 98 of the R.P. Act, 1951 (for short, the Act) shall not be moved by expressions of opinion on the merits made by the Delhi High Court while dismissing the writ petition. An obiter binds none, not even the author, and obliteration of findings rendered in superogation must allay the appellant's apprehensions. This Court is in a better position than the High Court, being competent, under certain circumstances, to declare the law by virtue of its position under Article 141. But, absent such authority or duty, the High Court should have abstained from its generosity. Lest there should be any confusion about possible slants inferred from our synoptic statements, we clarify that nothing projected in this judgment is intended to be an expression of our opinion, even indirectly. The facts have been set out only to serve as a peg to hand three primary constitutional issues which we will formulate a little later-Operation Election.

10. Before we proceed further, we had better have a full glimpse of the constitutional scheme of elections in our system and the legislative follow-up regulating the process of election. Shri Justice Mathew in *Indira Nehru Gandhi*, (1976) 2 SCR 347 : (AIR 1975 SC 2299) summarised skeletal fashion this scheme following the pattern adopted by Fazal Ali, J. in *Ponnuswami*, 1952 SCR 218 : (AIR 1952 SC 64). He explained:

“The concept of democracy as visualised by the Constitution presupposes the representation of the people in parliament and state legislatures by the method of election. And, before an election machinery can be brought into operation, there are three requisites which require to be attended to, namely,

(1) there should be a set of laws and rules making provisions with respect to all matters relating to, or in connection with, elections, and it should be decided as to how these laws and rules are to be made; (2) there should be an executive charged with the duty of securing the due conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections. Arts, 327 and 328 deal with the first of these requisites, Art, 324 with the second and Article 329 with the third requisite (see N.P. Ponnuswami v. Returning Officer, Namakkal constituency, 1952 SCR 218, 229): (AIR 1952 SC 64) (at p. 68): Art 329 (b) envisages the challenge to an election by a petition to be presented to such authority as the parliament may, by law, prescribe. A law relating to election should contain the requisite qualifications for candidates, the method of voting, definition of corrupt practices by the candidates and their election agents the forum for adjudication of election disputes and other cognate matters. It is on the basis of this law that the question determined by the authority to which the petition is presented. And, when a dispute is raised as regards the validity of the election of a particular candidate, the authority entrusted with the task of solving the dispute must necessarily exercise a judicial function, for the process consists of ascertaining the facts relating to the election and applying the law to the facts so ascertained.” Smt. Indira Gandhi v. Raj Narain, 1976-2 SCR 347, at pages 504-505): (AIR 1975 SC 2299 at pp. 2372, 2373).

11. A short description of the legislative project in some more detail may be pertinent, especially touching on the polling process in the booths and the transmission of ballot boxes from the polling stations to the returning officer’s ultimate counting station and the crucial prescriptions regarding announcements and recounts and declarations. We do not pronounce upon the issues regarding the stage for and right of recount, the validity of votes or other factual or legal disputes since they fall for decision by the Election Court where the appellant has filed an election petition by way of abundant caution.

12. A free and fair election based on universal adult franchise is the basic: the regulatory procedures vis-a-vis the repositories of functions and the distribution of legislative, executive and judicative roles in the total scheme, directed towards the holding of free elections are the specifics, Part XV of the Constitution plus the Representation of the People Act, 1950 (for short, the 1950 Act) and the Representation of the People Act, 1951 (for short, the Act), Rules framed thereunder, instructions issued and exercise prescribed, constitute the package of electoral law governing the parliamentary and assembly elections in the country. The super-authority is the Election Commission, the king pin is the returning officer, the minions are the presiding officers in the polling stations and the electoral engineering is in conformity with the elaborate legislative provisions.

13. The scheme is this. The President of India (under Sec. 14) ignites the general elections across the nation by calling upon the People, divided into several constituencies and registered in the electoral rolls, to choose their representatives to the Lok Sabha. The constitutionally appointed authority, the Election Commission take over the whole conduct and supervision of the

mammoth enterprise involving a plethora of details and variety of activities, and starts off with the notification of the time table for the several stages of the election (Section 30). The assembly line operations then begin. An administrative machinery and technology to execute these enormous and diverse jobs is fabricated by the Act, creating officers, powers and duties, delegation of functions and location of polling stations. The precise exercises following upon the calendar for the poll, commencing from presentation of nomination papers, polling drill and telling of votes, culminating in the declaration and report of results are covered by specific prescriptions in the Act and the rules. The secrecy of the ballot, the authenticity of the voting paper and its later identifiability with reference to particular polling stations, have been thoughtfully provided for. Myriad other matters necessary for smooth elections have been taken care of by several provisions of the Act.

14. The wide canvas so spread need not engage us sensitively, since such diffusion may weaken concentration on the few essential points concerned in this case. One such aspect relates to repoll. Adjournment of the poll at any polling station in certain emergencies is sanctioned by Sec. 57 and fresh poll in specified vitiating contingencies is authorised by Sec. 58. The rules run into more particulars. After the votes are cast comes their counting. Since the simple plurality of votes clinches the verdict, as the critical moment approaches, the situation is apt to hot up, disturbances erupt and destruction of ballots disrupt. If disturbance or destruction demolishes the prospect of counting the total votes, the number secured by each candidate and the ascertainment of the will of the majority, a re-poll confined to disrupted polling stations is provided for. Section 64A chalks out the conditions for and course of such repoll, spells out the power and repository thereof and provides for kindred matters. At this stage we may make a closer study of the provisions regarding repoll systematically and stagewise arranged in the Act. It is not the case of either side that a total repoll of an entire constituency is specified in the sections or the rules. Reliance is placed for this wider power upon Article 324 of the Constitution by the Commission in its order, by the first respondent in his affidavit, by the learned Addl. Solicitor General in his argument and by the third respondent through his counsel. We may therefore have to study the scheme of Art. 324 and the provisions of the Act together since they are integral to each other. Indeed, if we may mix metaphors for emphasis, the legislation made pursuant to Art. 327 and that part of the Constitution specially devoted to elections must be viewed as one whole picture, must be heard as an orchestrated piece and must be interpreted as one package of provisions regulating perhaps the most stressful and strategic aspect of democracy-in-action so dear to the nation and so essential for its survival. The lis and the issues.

15. Two prefatory points need to be mentioned as some reference was made to them at the bar. Firstly, an election dispute is not like an ordinary lis between private parties. The entire electorate is vicariously, not inertly, before the court. (See 1959 SCR 611 at pp. 616, 622 : (AIR 1958 SC 698 at pp. 701, 703). We may, perhaps call this species of cases collective litigation where judicial activism assures justice to the constituency, guardians the

purity of the system and decides the rights of the candidates. In this class of cases, where the common law tradition is partly departed from, the danger that the active judge may become, to some extent, the prisoner of his own prejudices exists; and so, notwithstanding his powers of initiative, the parties' role in the formulation of the issues and in the presentation of evidence and argument should be substantially maintained and care has to be taken that the circle does not become a vicious one, as pointed out by J.A. Jolowicz in 'Public Interest Parties and the Active Role of the Judge in Civil Litigation' (ss. p. 276). Therefore, it is essential that courts, adjudicating upon election controversies, must play a warily active role, conscious all the time that every decision rendered by the Judge transcends private rights and defends the constituency and the democracy of the country.

16. Secondly, the pregnant problem of power and its responsible exercise is one of the perennial riddles of many a modern constitutional order. Similarly, the periodical process of free and fair elections, uninfluenced by the caprice, cowardice or partisanship of hierarchical authority holding it and unintimidated by the threat, tantrum or vandalism of strong-arm tactics, ex-acts the embarrassing price of vigilant monitoring. Democracy digs its grave where passions, tensions and violence, on an overpowering spree, upset results of peaceful polls, and the law of elections is guilty of sharp practice if it hastens to legitimate the fruits of lawlessness. The judicial branch has a sensitive responsibility here to call to order lawless behaviour. Forensic non-action may boomerang for the court and the law are functionally the bodyguards of the People against bumptious power, official or other.

17. We now enter the constitutional zone relating to the controversy in this case. Although both sides have formulated the plural problems with some divergence, we may compress them into three cardinal questions.

1. Is Art. 329 (b) a blanket ban on all manner of questions which may have impact on the ultimate result of the election, arising between two temporal termini viz., the notification by the President calling for the election and the declaration of the result by the returning officer? Is Art. 226 also covered by this embargo and, if so, is S.100 broad enough to accommodate every kind of objection, constitutional, legal or factual, which may have the result of invalidation of an election and the declaration of the petitioner as the returned candidate and direct the organisation of any steps necessary to give full relief?

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

3. Assuming a constitutionally vested capacity under Art. 324 to direct repoll, is it exercisable only in conformity with natural justice and geared to the sole goal of a

free, popular verdict if frustrated on the first occasion? Or, is the Election Commission immune to the observance of the doctrine of natural justice on account of any recognised exceptions to the application of the said principle and unaccountable for his action even before the Election Court?

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

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

Chief Justice Hidayatullah perceptively articulated the insight:

“One must, of course, take note of the synthesized authoritative content or the moral meaning of the underlying principle of the prescriptions of law, but not ignore the historic evolution of the law itself or how it was connected in its changing moods with social requirements of a particular age.” (Judicial Methods, B.N. Rau Memorial Lecture).

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

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

The invulnerable barrier of Article 329(b)

20. Right at the forefront stands in the way of the applicant's progress the broad-spectrum ban of Art. 329 (b) which, it is claimed for the respondent, is imperative and goal-oriented. Is this Great Wall of China set up as a preliminary bar, so impregnable that it cannot be bypassed even by Art. 226? That, in a sense, is the key question that governs the fate of this appeal. Shri P.P. Rao for the appellant contended that, however wide Art. 329 (b) may be, it does not debar proceedings challenging, not the steps promoting, election but dismantling it, taken by the Commission without the backing of legality. He also urged that his client, who had been nearly successful in the poll and had been deprived of it by an illegal cancellation by the Commission, would be left in the cold without any remedy since the challenge to cancellation of the completed poll in the entire constituency was not covered by S.100 of the Act. Many subsidiary pleas also were put forward but we

will focus on the two inter-related submissions bearing on Art. 329(b) and S.100 and search for a solution. The problem may seem prickly but an imaginative application of principles and liberal interpretation of the Constitution and the Act will avoid anomalies and assure justice. If we may anticipate our view which will presently be explained, Sec. 100 (1) (d) (iv) of the Act will take care of the situation present here, being broad enough, as a residual provision, to accommodate, in the expression 'non-compliance', every excess, transgression, breach or omission. And the span of the ban under Art. 329 (b) is measured by the sweep of S.100 of the Act.

21. we have to proceed heuristically now. Article 329 (b) reads.

Notwithstanding anything in this Constitution “(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.”

Let us break down the prohibitory provision into its components. The sole remedy for an aggrieved party, if he wants to challenge any election, is an election petition. And this exclusion of all other remedies includes constitutional remedies like Art. 226 because of the non obstante clause. If what is impugned is an election the ban operates provided the proceeding 'calls it in question' or puts it in issue; not otherwise. What is the high policy animating this inhibition? Is there any interpretative alternative which will obviate irreparable injury and permit legal contests in between? How does S. 100 (1) (d) (iv) of the Act integrate into the scheme? Let us read S.100 here:

“Subject to the provisions of sub-section (2) if the High Court is of opinion—

* * * *

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—

* * * *

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act

[the High court shall declare the election of the returned candidate to be void.]

The companion provision, viz., Section 98 also may be extracted at this stage:

“At the conclusion of the trial of an election petition the High Court shall make an order—

(a) dismissing the election petition; or

(b) declaring the election of all or any of the returned candidates to be void; or

(c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected.”

Now arises the need to sketch the scheme of S.100 in the setting of Art. 329 (b). The troublesome word 'non-compliance' holds in its fold a teleologic signification which resolves the riddle of this case in a way. So we will address ourselves to the meaning of meanings, the values within the words and the project unfolded. This will be taken up one after the other.

22. At the first blush we get the comprehensive impression that every calling in question of an election save, at the end, by an election petition, is forbidden. What, then, is an election? What is 'calling in question'? Every step from start to finish of the total process constitutes 'election', not merely the conclusion or culmination. Can the cancellation of the entire poll be called a step in the process and for the progress of an election, or is it a reverse step of undoing what has been done in the progress of the election, non-step or anti-step setting at nought the process and, therefore, not a step towards the goal and hence liberated from the coils of Art. 329 (b)? And, if this act or step were to be shielded by the constitutional provision, what is an aggrieved party to do? This takes us to the enquiry about the ambit of S.100 of the Act and the object of Art. 329 (b) read with Article 324. Such is the outline of the complex issue projected before us.

The election philosophy and the principle in Ponnuswami (AIR 1952 SC 64).

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

24. Ponnuswami (AIR 1952 SC 64) is a landmark case in election laws and deals with the scope, amplitude, rationale and limitations of Art. 329 (b). Its ratio has been consistently followed by this Court in several rulings through Durga Shankar Mehta (1955) 1 SCR 267: (AIR 1952 SC 520) and Hari Vishnu Kamath (1955) 1 SCR 1104: (AIR 1955 SC 233) and Khare (AIR 1950 SC 211) down to Indira Gandhi (1976) 2 SCR 347: (AIR 1975 SC 2299). The factual setting in that case may throw some light on the decision itself. The appellant's nomination for election to the Madras Legislative Assembly was rejected by the Returning Officer and so he hurried to the High Court praying for a writ of certiorari to quash the order of rejection, without waiting for the entire elective process to run its full course and, at the end of it, when the results also were declared, to move the election tribunal for setting aside the result of the election conducted without his participation. He thought that if the election proceeded without him irreparable damage would have been caused and therefore sought to intercept the progress of the election by filing a writ petition. The High Court dismissed it as unsustainable, thanks to Art. 329 (b) and this Court in appeal, affirmed that holding. Fazal Ali J. virtually spoke for the Court and explained the principle underlying Art. 329 (b). The ambit and spirit of the bar imposed by the Article was elucidated with reference to the principle that 'it does not require much argument to show that in a country with a democratic constitution in which the legislatures have to play a very important role, it will lead to serious consequences if the elections are unduly protracted or obstructed.' In the view of the learned Judge, immediate individual relief at an intermediate stage when the process of election is under way has to be sacrificed for the paramount public good of promoting the completion of elections. Fazal Ali J. ratiocinated on the

ineptness of interlocutory legal hold-ups. He posed the issue and answered it thus (at p. 68 of AIR 1952 SC):

***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 extra ordinary 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 describe 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 Art. 329 (b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by the High Court at the prepolling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought before it.”**

25. Having thus explained the *raison d'etre* of the provision, the Court proceeded to interpret the concept of election in the scheme of Part XV of the Constitution and the Representation of the People Act, 1951. 'Articles 327 and 328 take care of the set of laws and rules making provisions with respect to all matters relating to or in connection with elections'. Election disputes were also to be provided for by laws made under Art. 327. The Court emphasised that part XV of the Constitution was really a code in itself, providing the entire ground work for enacting the appropriate laws and setting up suitable machinery for the conduct of elections. The scheme of the Act enacted by Parliament was also set out by Fazal Ali, J. (at p. 69 of AIR 1952 SC):

“Part VI deals with disputes regarding elections and provides for the manner of presentation of election petitions, the Constitution of election tribunals and the trial of election petitions. Part VII outlines the various corrupt and illegal practices which may affect the elections, and electoral offences. Obviously, the Act is a self-contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the rules made thereunder. The provisions of the Act which are material to the present discussion are Sections 80, 100, 105 and 170, and the provisions of Chapter II of Part IV dealing with the form of election petitions, their contents and the reliefs which may be sought in them.

Section 80, which is drafted in almost the same language as Article 329 (b) provides that 'no election shall be called in question except by an election petition presented in accordance with the provisions of this Part'. Section 100, as we have already seen, provides for the grounds on which an election may be called in question, one of which is the improper rejection of a nomination paper. Section 105 says that 'every order of the Tribunal made under this Act shall be final and conclusive. Section 170 provides that 'no civil court shall have jurisdiction to question the legality of any action taken or of any decision given by the Returning Officer or by any other person appointed under this Act in connection with an election.'

There have been amendments to these provisions but the profile remains substantially the same. After pointing out that the Act, in Section 88, and the Constitution, in Art. 329 (b), speak substantially the same language and inhibit other remedies for election grievances except through the election tribunal, the Court observed (at p.69 of AIR 1952 SC):

“That being so, I think it will be a fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage.”

There is a non obstante clause in Article 329 and, therefore, Art. 226 stands pushed out where the dispute takes the form of calling in question an election, except in special situations pointed at but left unexplored in Ponnuswami (AIR 1952 SC 64).

26. The heart of the matter is contained in the conclusions summarised by the Court thus (at page 70 of 1952 SC):

“(1) 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.

(2) In conformity with this principle, the scheme of 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.”

After elaborately setting out the history in England and in India of election legislation vis-a-vis dispute-resolution, Fazal Ali J. stated (at p. 71 of 1952 SC):

“If the language used in Art, 329 (b) is considered against this historical background, it should not be difficult to see why the framers of the Constitution framed that provision in its present form and chose the language which had been consistently used in certain earlier legislative provisions and which had stood the test of time”. Likewise the Court discussed the connotation of the expression “election” in Art. 329 and observed (at p.67 of 1952 SC):

“That word has by long usage in connection with the process of selection of proper representatives in democratic institutions, acquired both a wide and a narrow meaning. In the narrow sense, it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling or a particular candidate being returned unopposed when there is no poll. In the wide sense, the word is used to connote the entire process culminating in a candidate being declared elected..... it seems to me that the word “election” has been used in Part XV of the Constitution in the wide sense that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature.... That the word “election” bears this wide meaning whenever we talk of elections in a democratic country, is borne out by the fact that in most of the books on the subject and in several cases dealing with the matter, one of the questions mooted is, when the election begins.”

The 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. The paramount policy of the Constitution-framers in declaring that no election shall be called in question except the way it is provided for in Art. 329(b) and the Representation of the People Act, 1951, compels us to read, as Fazal Ali, J. did in Ponnuswami (AIR 1952 SC 64) the Constitution and the Act together as an integral scheme. The reason for postponement of election litigation to the post-election stage is that elections shall not unduly be protracted or obstructed. The speed and promptitude in getting due representation for the electors in the legislative bodies is the real reason suggested in the course of judgment.

27. Thus far everything is clear. No litigative enterprise in the High Court or other court should be allowed to hold up the on-going electoral process because the parliamentary representative for the constituency should be chosen promptly. Article 329 therefore covers “electoral matters”. One interesting argument, targeted without success in Ponnuswami (AIR 1952 SC 64) elicited a reasoning from the Court which has some bearing on the question in the present appeal. That argument was that if nomination was part of election a dispute as to the validity of the nomination was a dispute relating to election and could be called in question only after the whole election was over, before the election tribunal. This meant that the Returning Officer could have no jurisdiction to decide the validity of a nomination, although Sec. 36 of the Act conferred on him that jurisdiction. The learned Judge dismissed this argument as without merit, despite the great dialectical ingenuity in the submission. In this connection the learned Judge observed (at p.72 of 1952 SC):

“Under Section 36 of the Representation of the People Act, 1951, it is the duty of the Returning Officer to scrutinize the nomination papers to ensure that they comply with the requirements of the Act and decide all objections which may be made to any nomination. It is clear that unless this duty is discharged properly, any number of candidates may stand for election without complying with the provisions of the Act and a great deal of confusion may ensue. In discharging the statutory duty imposed on him, the Returning Officer does not call in question any election. Scrutiny of nomination papers is only a stage, though an important stage, in the election process. It is one of the essential duties to be performed before the election can be completed, and anything done towards the completion of the election proceeding can by no stretch of reasoning be described as questioning the election. The fallacy of the argument lies in treating a single step taken in furtherance of an

election as equivalent to election. The decision of this appeal however turns not on the construction of the single word 'election', but on the construction of the compendious expression— “no election shall be called in question” in this context and setting with due regard to the scheme of Part XV of the Constitution and the Representation of the People Act, 1951. Evidently, the argument has no bearing on this method of approach to the question posed in this appeal, which appears to me to be the only correct method.”

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 (AIR 1952 SC 64) 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 facilitated 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 Art. 329 (b) rests on two principles: (1) The peremptory urgency of prompt engineering of the whole election process without intermediate interruptions by way of legal proceedings challenging the steps and stages in between the commencement and the conclusion. (2) The provision of a special jurisdiction which can be invoked by an aggrieved party at the end of the election excludes other form, the right and remedy being creatures of statutes and controlled by the Constitution. Durga Shanker Mehta (1955 (1) SCR 267: (AIR 1954 SC 520)) 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 over all power to interfere under Art. 136 springs into action. In Hari Vishnu (1955-1 SCR 1104): (AIR 1955 SC 233) this Court upheld the rule in Ponnuswami (AIR 1952 SC 64) excluding any proceeding, including one under Art. 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 Art. 329 (b) does not bind.

31. If 'election' bears the larger connotation, if 'calling in question' possesses a semantic sweep in plain English, if policy and principle are tools for interpretation of statutes, language permitting, the conclusion is irresistible, even though the argument contra may have emotional impact and ingenious appeal, that the catch-all jurisdiction under Art. 226 cannot consider the correctness, legality or otherwise of the direction for cancellation integrated with re-poll. For, the prima facie purpose

of such a re-poll was to restore a detailed poll process and to complete it through the salvatory effort of a re-poll. Whether, in fact or law, the order is validly made within his powers or violative of natural justice can be examined later by the appointed instrumentality, viz., the Election Tribunal. That aspect will be explained presently. We proceed on the footing that re-poll in one polling station or in many polling stations, for good reasons, is lawful. This shows that re-poll in many or all segments, all pervasive or isolated, can be lawful. We are not considering whether the act was bad for other reasons. We are concerned only to say that if the regular poll, for some reasons, has failed to reach the goal of choosing by plurality the returned candidate and to achieve this object a fresh poll (not a new election) is needed, it may still be a step in the election. The deliverance of Dunkirk is part of the strategy of counter-attack. Wise or valid, is another matter.

32. On the assumption, but leaving the question of the validity of the direction for re-poll open for determination by the Election Tribunal, we hold that a writ petition challenging the cancellation coupled with re-poll amounts to calling in question a step in 'election' and is therefore barred by Art. 329 (b). If no re-poll had been directed the legal perspective would have been very different. The mere cancellation would have been thwarted the course of the election and different considerations would have come into play. We need not chase a hypothetical case.

33. Our conclusion is not a matter of textual interpretation only but a substantial assurance of justice by reading S.100 of the Act as covering the whole basket of grievances of the candidates. Shri P.P. Rao contended that the Court should not deny relief to a party in the area of elections which are the life-breath of democracy and people's power. We agree.

34. This dilemma does not arise in the wider view we take of S.100(1) (d) (iv) of the Act. Sri Rao's attack on the order impugned is in substance based on alleged non-compliance with a provision of the Constitution viz., Art. 324 but is neatly covered by the widely worded, residual catch-all clause of S.100. Knowing the supreme significance of speedy elections in our system the framers of the constitution have, by implication, postponed all election disputes to election petitions and tribunals. In harmony with this scheme S.100 of the Act has been designedly drafted to embrace all conceivable infirmities which may be urged. To make the project fool-proof S.100 (1) (d) (iv) has been added to absolve everything left over. The Court has in earlier rulings pointed out that S.100 is exhaustive of all grievances regarding an election. 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 S.15 and the Commissioner publishes the calendar for the poll under S.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.

35. A poll is part—a vital part — of the election but with the end of the poll the whole election is not over. Ballots have to be assembled, scrutinised, counted, recount claims considered and result declared. The declaration determines the election. The conduct of the election thus ripens into the elector's choice only when processed, screened and sanctified, every escalatory step up to the formalized finish being unified in purpose, forward in movement, fair and free in its temper. Art. 329 (b) halts judicial intervention during this period, provided the act possesses the prerequisites of 'election' in its semantic sweep. That is to say, immunity is conferred only if the act impeached is done for the apparent object of furthering a free and fair election and the protective armour drops down if the act challenged is either unrelated to or thwarts or taints the course of the election.

36. Having held against the maintainability of the writ petition, we should have parted with the case finally. But counsel for both the candidates and, more particularly, the learned Addl. Solicitor General, appearing for the Election Commission, submitted that the breadth, amplitude and implications, the direction and depth of Art. 324 and, equally important, the question of natural justice raised under Art. 324 are of such public importance and largely fallow field, going by prior pronouncements, and so strategic for our democracy and its power process that this Court must decide the issue here and now. Article 141 empowers and obligates this Court to declare the law for the country when the occasion asks for it. Counsel, otherwise opposing one another, insistently concurred in their request that, for the working of the electoral machinery and understanding of the powers and duties vested in the functionaries constituting the infrastructure, it is essential to sketch the ambit and import of Article 324. This point undoubtedly arises before us even in considering the prohibition under Art. 329 and has been argued fully. In any view, the Election Tribunal will be faced with this issue and the law must be laid down so that there may be no future error while disposing of the election petition or when the Commission is called upon to act on later occasion. This is the particular reason for our proceeding to decide what the content and parameters of Art. 324 are, contextually limited to situations analogous to the present.

37. We decide two questions under the relevant article, not *arguendo*, but as substantive pronouncements on the subject. They are:

(a) What, in its comprehensive connotation, does the 'conduct' of elections mean or, for that matter, the 'superintendence, direction and control' of elections?

(b) Since the text of the provision is silent about hearing before acting, is it permissible to import into Article 324 (1) an obligation to act in accord with natural justice?

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 Art. 324 has to be read in the light of the constitutional scheme and the 1950 Act and the 1951 Act. Sri Rao is right to the extent he insists that if competent legislation is enacted as visualised in Art. 327 the Commission cannot shake himself free from the enacted prescriptions.

After all, as Mathew, J. has observed in *Indira Gandhi (AIR 1975 SC 2299)*:

“In the opinion of some of the judges constituting the majority in Bharati's case (AIR 1973 SC 1461) (supra) 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 through-out the whole range of government in the sense of excluding arbitrary official action in any sphere.” (p. 523 of SCR): (at p.2384 of AIR).

And the supremacy of valid law over the Commission argues itself. No one is an imperium in imperio in our constitutional order. It is reasonable to hold that the Commissioner cannot defy the law armed by Art. 324. Likewise, his functions are subject to the norms of fairness and he cannot act arbitrarily. Unchecked power is alien to our system.

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 Art. 324 to take care of surprise situations. That power itself has to be exercised, not mindlessly nor mala fide, not arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential 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 may be 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. Whether we make a triumph or travesty of democracy depends on the men as much as on the Great National Parchment. Secondly, when a high functionary like the Commissioner is vested with wide powers the law expects him to act fairly and legally. Article 324 is geared to the accomplishment of free and fair elections expeditiously. Moreover, as held in Virendra (1958) SCR 308: (AIR 1957 SC 896) and Harishankar (1955) 1 SCR 380: (AIR 1954 SC 465) discretion vested in a high functionary may be reasonably trusted to be used properly, not perversly. If it is misused, certainly the Court has power to strike down the act. This is well established and does not need further case law confirmation. Moreover, it is useful to remember the warning of Chandrachud, J. (at p. 2465 of AIR 1975 SC):

“But the electorate lives in the hope that a sacred power will not so flagrantly be abused and the moving finger of history warns of the consequences that inevitably flow when absolute power has corrupted absolutely. The fear of perversion is no test of power.”

40. The learned Additional Solicitor General brought to our notice rulings of the Court and of the High Courts which have held that Art. 324 was a plenary power which enabled the Commission to act even in the absence of specific legislation though not contrary to valid legislation.

Ordering a re-poll for a whole constituency under compulsion of circumstances may be directed for the conduct of elections and can be saved by Art. 324 – provided it is bona fide necessary for the vindication of the free verdict of the electorate and the abandonment of the previous poll was because it failed to achieve that goal.

While we repel Sri Rao's broadside attack on Art. 324 as confined to what the Act has conferred, we concede that even Art. 324 does not exalt the Commission into a law unto itself. Broad authority does not bar scrutiny into specific validity of the particular order.

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

42. Now we move on to a close-up of the last submission bearing on the Commission's duty to function within the leading strings of natural justice.

43. Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognised from earliest times and not a mystic testament of judge-made law. In-deed, from the legendary days of Adam – and of Kautilya's Arthashastra – the rule of law has had this stamp of natural justice which make it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not newfangled. Today its application must be sustained by current legislation, caselaw or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system.

44. The dichotomy between administrative and quasi-judicial functions vis-a-vis the doctrine of natural justice is presumably obsolescent after Kraipak (1970) 1 SCR 457: (AIR 1970 SC 150) in India and Schmidt (1969) 2 Ch 149 in England.

45. Kraipak (1970) 1 SCR 457: (AIR 1970 SC 150) marks the watershed, if we may say so, in the application of natural justice to administrative proceedings. Hegde, J., speaking for a bench of five judges observed, quoting for support Lord Parker in *In re: H. K. (an infant)* (1967) 2 QB 617, 630;

“It is not necessary to examine these decisions as there is a great deal of fresh thinking on the subject. The horizon of natural justice is constantly expanding (p. 467): (of SCR): (at p. 156 of AIR).”

* * * * *

“The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not

supplant the law of the land but supplement it (p. 468): (of SCR): (at page 156 of AIR).”

* * * * *

“The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative inquiries. Oftentimes it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in *Suresh Koshy George v. The University of Kerala* (1969) 1 SCR 317: (AIR 1969 SC 198) the rules of natural justice are not embodied rules, What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the Constitution of the Tribunal or body of persons appointed for that purpose. Whenever, a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case (p.469): (of SCR): (at p. 157 of AIR).”

46. It is an interesting sidelight that in America it has been held to be but fundamental fairness that the right to an administrative hearing is given. (See *Boston University Law Review* Vol. 53 p.899). Natural justice is being given access to the United Nations (See *American Journal of International Law* Vol. 67 p. 479). It is notable what Mathew, J. observed in *Indira Gandhi* (AIR 1975 SC 2299):

“If the amending body really exercised judicial power that power was exercised in violation of the principles of natural justice of *audi alteram partem*. Even if power is given to a body without specifying that the rules of natural justice should be observed in exercising it, the nature of the power would call for its observance.” (p. 513) (of SCR): (at p.2378 of AIR). Lord Morris of Borthy-y-Gest in his address before the Bentham club concluded:

“We can, I think, take pride in what has been done in recent periods and particularly in the field of administrative law by invoking and by applying those principles which we broadly classify under the designation of natural justice. Many testing problems to their application yet remain to be solved. But I affirm that the area of administrative action is but one area in which the principles are to be deployed. Nor are they to be invoked only when procedural failures are shown. Does natural justice qualify to be described as a “majestic” conception? I believe it does. Is it just a rhetorical but vague phrase which can be employed, when needed to give a gloss of assurance? I believe that it is very much more. If it can be summarised as being fair play

in action—who could wish that it would ever be out of action? It denotes that the law is not only to be guided by reason and by logic but that its purpose will not be fulfilled if it lacks more exalted inspiration.” (Current Legal Problems 1973, Vol. 26 p.16)

47. It is fair to hold that subject to certain necessary limitations natural justice is now a brooding omnipresence although varying in its play.

48. Once we understand the soul of the rule as fairplay in action – and it is so – we must hold that it extends to both the fields. After all, administrative power in a democratic set-up is not allergic to fairness in action and discretionary executive justice cannot degenerate into unilateral injustice. Nor is there ground to be frightened of delay, inconvenience and expense, if natural justice gains access. For fairness itself is a flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a china shop, nor a bee in one's bonnet. Its essence is good conscience in a given situation; nothing more – but nothing less. The 'exceptions' to the rules of natural justice are a misnomer or rather are but a shorthand form of expressing the idea that in those exclusionary cases nothing unfair can be inferred by not affording opportunity to present or meet a case. Text-book excerpts and ratios from rulings can be heaped, but they all converge to the same point that *audi alteram partem* is the justice of the law, without, of course, making law lifeless, absurd, stultifying, self-defeating or plainly contrary to the commonsense of the situation.

49. Let us look at the jurisprudential aspects of natural justice, limited to the needs of the present case, as the doctrine has developed in the Indo-Anglican systems. We may state that the question of nullity does not arise here because we are on the construction of a constitutional clause. Even otherwise, the rule of natural justice bears upon construction where a statute is silent save in that category where a legislation is charged with the vice of unreasonableness and consequential voidness.

50. Article 324, on the face of it, vests vast functions which may be powers or duties, essentially administrative and marginally even judicative or legislative.

(See judgment in C.A. No. 945 of 1977 d/- 12-9-77) All Party Hill Leaders' Conference, Shillong v. Capt. W.A. Sangma (AIR 1977 SC 2155). We are not fascinated by the logomachic exercise suggested by Sri P.P. Rao, reading 'functions' in contradistinction to 'powers' nor by the trichotomy of diversion of powers, fundamentally sound but flawsome in several situations if rigidly applied.

These submissions merely serve to draw the red-herring across the trial. We will now zero-in on the crucial issue of natural justice vis a vis Article 324 where the function is so exercised that a candidate is substantially prejudiced even if he has not acquired a legal right nor suffered 'civil consequences', whatever that may mean.

51. We proceed on the assumption that even if the cancellation of the poll in this case were an administrative act, that per se does not repel the application of the natural justice principle. Kraipak (AIR 1970 SC 150) nails the contrary argument. Nor did the learned Addl. Solicitor General contend that way, taking his stand all through, not on technicalities, easy victories or pleas for reconsideration of the good and progressive rules gained through this Court's rulings in administrative law but on the foundational thesis that any construction that we may adopt must promote and be geared to the great goal of expeditious, unobstructed, despatch of free and fair elections and leaving grievances to be fully sorted out and solved later before the election tribunal set out by the Act. To use a telling word familiar in officialese; 'Election Immediate'.

51-A. So now we are face to face with the naked issue of natural justice and its pro term exclusion on grounds of necessity and non-stultification of the on-going election. The Commission claims that a direction for re-poll is an 'emergency' exception. The rules of natural justice are rooted in all legal systems, not any 'new theology' and are manifested in the twin principles of *nemo iudex in sua causa* and *audi alteram partem*. We are not concerned here with the former since no case of bias has been urged. The grievance ventilated is that of being condemned unheard. Sporadic applications or catalogue of instances cannot make for a scientific statement of the law and so we have to weave consistent criteria for application and principles for carving out exceptions. If the rule is sound and not negated by statute, we should not devalue it nor hesitate to hold every functionary who affects others' right to it. The *audi alteram partem* rule has a few facets two of which are (a) notice of the case to be met; and (b) opportunity to explain. Let us study how far the situation on hand can co-exist with canons of natural justice. While natural justice is universally respected, the standards vary with situations contracting into a brief, even post-decisional opportunity, or expanding into trial-type trappings.

52. *Ridge v. Baldwin* (1964) AC 40: is a leading case which restored light to an area 'benighted by the narrow conceptualism of the previous decade', to borrow Professor Clark's expression (Natural Justice Substance and Shadow - 'Public Law' Journal-Spring 1975). Good administration demands fairplay in action and this simple desideratum is the fount of natural justice. We have already said that the classification of functions as 'judicial' or 'administrative' is a stultifying shibboleth, discarded in India as in England. Today, in our jurisprudence, the advances made by natural justice for exceed old frontiers and if judicial creativity belights penumbral areas it is only for improving the quality of government by injecting fairplay into its wheels.

53. The learned Additional Solicitor General welcomed the dramatic pace of enlargement in the application of natural justice. But he argued for inhibiting its spread into forbidden spaces lest the basic values of Art. 329 be nullified. In short, his point is that where utmost promptitude is needed - and that is the *raison d'être* of exclusion of intermediate legal proceeding in

election matters - natural justice may be impractical and may paralyze, thus balking the object of expeditious completion. He drew further inspiration from another factor to validate the exclusion of natural justice from the Commission's actions, except where specifically stipulated by statute. He pointed out what we have earlier mentioned - that an election litigation is one in which the whole constituency of several lakhs of people is involved and, if the Election Commission were under an obligation to here affected parties it may, logically, have to give notice to lakhs of people and not merely to candidates. This will make an ass of the law and, therefore, that is not the law. This *reductio ad absurdum* also has to be examined.

54. Law cannot be divorced from life and so it is that the life of the law is not logic but experience. If, by the experimental test, importing the right to be heard will paralyse the process, law will exclude it. It had been said that no army can be commanded by a debating society, but it is also true that the House of Commons did debate, during the days of debacle and disaster, agony and crisis of the second World War, the life-and-death aspects of the supreme command by the then British Prime Minister to the distress of all our friends and to the delight of all our foes' – to historic to be lost on jurisprudence. Law lives not in a world of abstractions but in a cosmos of concreteness and to give up something good must be limited to extreme cases. If to condemn unheard is wrong, it is wrong except where it is overborne by dire social necessity. Such is the sensible perspective we should adopt if *ad hoc* or haphazard solutions should be eschewed.

55. Normally, natural justice involves the irritating inconvenience for men in authority, of having to hear both sides since notice and opportunity are its very narrow. And this principle is so integral to good government, the onus is on him who urges exclusion to make out why. Lord Denning expressed the paramount policy consideration behind this rule of public law (while dealing with the *nemo iudex* aspect) with expressiveness:

“Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking 'the judge was biased'.”

We may adapt it to the *audi alteram* situation by the altered statement:

“Justice must be felt to be just by the community if democratic legality is to animate the rule of law. And if the invisible audience sees a man's case disposed of unheard, a chorus of 'no-confidence' will be heard to say, 'that man had no chance to defend his stance'.”

That is why Tucker L J in *Russell v. Duke of Norfolk* (1949) 1 All ER 109 (at 118 E) emphasised that 'whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case'. What is reasonable in given circumstances is in the domain of practicability; not formalised rigidity. Lord Upjohn in *Fernando* ((1967) 2 AC 337) observed that:

'while great urgency may rightly limit such opportunity timeously, perhaps severely, there can never be a denial of that opportunity if the principles of natural justice are applicable'. It is untenable heresy, in our view, to lockjaw the victim or act behind his back by tempting invocation of urgency, unless the clearest case of public injury flowing from the least delay is self-evident. Even in such cases a remedial hearing as soon as urgent action has been taken is the next best. Our objection is not to circumscription dictated by circumstances, but to annihilation as an easy escape from a benignant, albeit inconvenient obligation. The procedural pre-condition of fair hearing, however minimal, even post-decisional, has relevance to administrative and judicial gentlemanliness. The Election Commission is an institution of central importance and enjoys far reaching powers and the greater the power to affect others' right or liabilities the more necessary the need to hear.

56. We may not be taken to say that situational modifications to notice and hearing are altogether impermissible. They are, as the learned Addl. Solicitor General rightly stressed. The glory of the law is not that sweeping rules are laid down but that it tailors principles to practical needs, doctors remedies to suit the patient, promotes, not freezes, life's processes, if we may mix metaphors. Tucker L. J. drove home this point when he observed in the Duke of Norfolk case ((1949) 1 All ER 109) (supra):

“There are no words which are of universal application to every kind of inquiry..... The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.”

This circumstantial flexibility of fair hearing has been underscored in *Wiseman v. Borneman* (1971) AC 297 by Lord Reid when he said he would be “sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules.”

Lord Denning, with lovely realism and principled pragmatism, set out the rule in *Salvarajan* (1976) 1 All ER 12 at p.19:

“The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress or, in some such way adversely affected by the investigation and report, when he should be told the case made against him and be afforded a fair opportunity of answering it. The investigation body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the

investigating body itself must come to its own decision and make its own report.”

Courts must be tempered by the thought while compromise on principle is unprincipled, applied administrative law in modern complexities of government must be realistic, not academic. The myriad may be and the diverse urgencies are live factors. Natural justice should not destroy administrative order by insisting on the impossible.

57. This general discussion takes us to four specific submissions made by the learned Addl. Solicitor General. He argued that the Election Commission, a high constitutional functionary, was charged with conducting elections with celerity to bring the new House into being and the tardy process of notice and hearing would thwart this imperative. So no natural justice. Secondly, he submitted that there was no final determination to the prejudice of any party by directing a re-poll since the Election court had the last word on every objectionable order and so the Commission's order was more or less provisional. So no natural justice. Thirdly, he took up the position that no candidate could claim anything more than an expectation or spes and no right having crystallised till official declaration of the result, there was no room for complaint of civil consequences. What was condemned was the poll, not any candidate. So no natural justice. Finally, he reminded us of the far-flung futility of giving a hearing to a numerous constituency which too was interested in proper elections like the candidates. So no natural justice.

58. De Smith was relied on and Wiseman (1967) 3 All ER 1045 as well as Pearlberg (1971-1 WLR 728) were cited in support of these propositions. We may add to these weighty rulings the decision of the House of Lords in Pearlberg. The decision of this Court in the ruling in Bihar School Examination Board v. Subhas Chandra Sinha (1970) 3 SCR 963: (AIR 1970 SC 1269) where a whole university examination was cancelled without hearing any of the candidates but was upheld against the alleged vice of non-hearing was relied on.

59. We must admit that the law, in certain amber areas of natural justice, has been unclear. Vagueness haunts this zone but that is no argument to shut down. If it is twilit, we must delight. So we will lay down the guidelines but guard ourselves against any decision on the facts of this case. That is left for the Election Court in the light of the law applicable.

60. Nobody will deny that the Election Commission in our democratic scheme is a central figure and a high functionary. Discretion vested in him will ordinarily be used wisely, not rashly, although to echo Lord Camden, wide discretion is fraught with tyrenical potential even in high personages, absent legal norms and institutional checks, and relaxation of legal canalisation on generous 'VIP' assumptions may boomerang. Natural justice is one such check on exercise of power. But the chemistry of natural justice is confused in certain aspects, especially in relation to the fourfold exceptions put forward by the respondents.

61. So let us examine them each. Speed in action versus soundness of judgment is the first dilemma. Ponnuswamy (AIR 1952 SC 64) has emphasised what is implicit in Art. 329 (b) that once the process of election has started, it should not be interrupted since the tempo may slow down and the early constitution of an elected parliament may be halted. Therefore, think twice before obligating a hearing at a critical stage when a quick repoll is the call. The point is well taken. A fair hearing with full notice to both or others may surely protract; and notice does mean communication of materials since no one can meet an unknown ground. Otherwise hearing becomes hollow, the right becomes a ritual. Should the cardinal principle of 'hearing' as condition for decision making be martyred for the cause of administrative immediacy? We think not. The full panoply may not be there but a manageable minimum may make-do.

62. In *Wiseman v. Borneman* (1967) 3 All ER 1045 there was a hint of the competitive claims of hurry and hearing. Lord Reid said 'Even where the decision has to be reached by a body acting judicially, there must be a balance between the need for expedition and the need to give full opportunity to the defendant to see material against him'. (emphasis added). We agree that the elaborate and sophisticated methodology of a formalised hearing may be injurious to promptitude so essential in an election under way. Even so, natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances. To burke it altogether may not be a stroke of fairness except in very exceptional circumstances. Even in *Wiseman* where all that was sought to be done was to see it there was a prima facie case to proceed with a tax case where inevitably, a fuller hearing would be extended at a later stage of the proceedings, Lord Reid, Lord Morris of Borth-Gost and Lord Wilberforce suggested "that there might be exceptional cases where to decide upon it ex parte would be unfair, and it would be the duty of the tribunal to take appropriate steps to eliminate unfairness" (Lord Denning M.R., in *Howard v. Borneman* (1974) 3 WLR 660 summarised the observations of the Law Lords in this form). No doctrinaire approach is desirable but the Court must be anxious to salvage the cardinal rule to the extent permissible in a given case. After all, it is not obligatory that counsel should be allowed to appear nor is it compulsory that oral evidence should be adduced. Indeed, it is not even imperative that written statements should be called for. Disclosure of the prominent circumstances and asking for an immediate explanation orally or otherwise may, in many cases, be sufficient compliance. It is even conceivable that an urgent meeting with the concerned parties summoned at an hour's notice, or in a crisis, even a telephone call, may suffice. If all that is not possible as in the case of a fleeing person whose passport has to be impounded lest he should evade the course of justice or a dangerous nuisance needs immediate abatement, the action may be taken followed immediately by a hearing for the purpose of sustaining or setting aside the action to the extent feasible. It is quite on the cards that the Election Commission, if pressed by circumstances, may give a short hearing. In any view, it is not easy to appreciate whether before further steps

got under way he could not have afforded an opportunity of hearing the parties, and revoke the earlier directions. We do not wish to disclose our mind on what, in the critical circumstances, should have been done for a fair play of fair hearing. This is a matter preeminently for the election tribunal to judge, having before him the vivified totality of all the factors. All that we need emphasize is that the content of natural justice is a dependent variable, not an easy casualty.

63. The learned Addl. Solicitor General urged that even assuming that under ordinary circumstances a hearing should be granted, in the scheme of Art. 324 and in the situation of urgency confronting the Election Commission it was not necessary.

64. Here we must demur. Reasons follow.

65. It was argued, based on rulings relating to natural justice, that unless civil consequences ensued, hearing was not necessary. A civil right being adversely affected is a sine qua non for the invocation of the audi alteram partem rule. This submission was supported by observations in Ram Gopal (1970) 1 SCR 472: (AIR 1970 SC 158), Col. Sinha (1971-1 SCR 791): (AIR 1971 SC 40). Of course, we agree that if only spiritual censure is the penalty temporal laws may not take cognisance of such consequences since human law operates in the material field although its vitality vicariously depends on its morality. But what is a civil consequence, let us ask ourselves, by passing verbal booby-traps? 'Civil consequences' undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence.

'Civil' is defined by Black (Law Dictionary, 4th Edn.) at p. 311):

“Ordinally, pertaining or appropriate to a member of a civitas of free political community; natural or proper to a citizen. Also, relating to the community, or to the policy and government of the citizens and subjects of a state.

The word is derived from the Latin civilis, a citizen... In law, it has various significations.”

* * * * *

'Civil Rights' are such as belong to every citizen of the State or country, or, in a wider sense, to all its inhabitants, and are not connected with the organisation or administration of government. They include the rights of property, marriage protection by the laws, freedom of contract, trial by jury, etc..... Or, as otherwise defined, civil rights are rights appertaining to a person in virtue of his citizenship in a state or community. Rights capable of being enforced or redressed in a civil action. Also a term applied to certain rights secured to citizens of the United States by the thirteenth and

fourteenth amendments to the Constitution, and by various acts of congress made in pursuance thereof.

(p. 1487? Black's Legal Dictionary).

The interest of a candidate at an election to Parliament regulated by the Constitution and the laws comes within this gravitational orbit. The most valuable right in a democratic polity is the 'little man's' little pencil-marking, assenting or dissenting, called his vote. A democratic right, if denied, inflicts civil consequences, Like-wise, the little man's right, in a representative system of government, to rise to Prime Ministerhip or Presidentship by use of the right to be candidate, cannot be washed away by calling it of no civil moment. If civics mean anything to a self-governing citizenry, if participatory democracy is not to be scuttled by the law, we shall not be captivated by catchwords. The straightforward conclusion is that every Indian has a right to elect and be elected and this is a constitutional as distinguished from a common law right and is entitled to cognizance by courts subject to statutory regulation. We may also notice the further refinement urged that a right accrues to a candidate only when he is declared returned and until then it is incipient, inchoate and intangible for legal assertion — in the twilight zone of expectancy, as it were. This too, in our view, is legicidal sophistry. Our system of 'ordered' rights cannot disclaim cognisance of orderly processes as the right means to a right end. Our jurisprudence is not so jejune as to ignore the concern with means as with the end, with the journey as with the destination. Every candidate, to put it cryptically, has an interest or right to fair and free and legally run election. To draw lots and decide who wins, if announced as the electoral methodology, affects his right, apart from his luckless rejection at the end. A vested interest in the prescribed process is a processual right, actionable if breached, the Constitution permitting. What is inchoate, viewed from the end, may be completed viewed midstream. It is a subtle fallacy to confuse between the two. Victory is still an expectation; quo modo is a right to the statutory procedure. The appellant has a right to have the election conducted not according to humour or hubris but according to law and justice. And so natural justice cannot be stumped out on this score. In the region of public law locus standi and person aggrieved, right and interest have a broader import. But, in the present case, the Election Commission contends that a hearing has been given although the appellant retorts that a vacuous meeting where nothing was disclosed and he was summarily told off would be strange electoral justice. We express no opinion on the factum or adequacy of the hearing but hold that where a candidate has reached the end of the battle and the whole poll is upset, he has a right to notice and to be heard, the quantum and quality being conditioned by the concatenation of circumstances.

66. The rulings cited, bearing on the touchstone of civil consequences, do not contradict the view we have propounded. Col. Sinha (AIR 1971 SC 40) merely holds – and we respectfully agree – that the lowering of retirement age does not deprive a government servant's rights, it being clear that every

servant has to quit on the prescribed age being attained. Even Binapani (AIR 1967 SC 1269) concedes that the State has the authority to retire a servant on superannuation. The situation here is different. We are not in the province of substantive rights but procedural rights statutorily regulated. Sometimes processual protections are too precious to be negotiable, temporised with or whittled down.

67. Ram Gopal (AIR 1970 SC 158) for the same reason, is inapplicable. A temporary servant has only a temporary tenure terminable legally without injury. Even he, if punished, has procedural rights in the zone of natural justice, but not when the contract of employment is legally extinguished. Interest and right are generous conceptions in this jurisdiction, not narrow orthodoxies as in traditional systems.

68. We move on to a consideration of the argument prolix plurality making hearing impracticable and therefore expendable. Attractively ingenious and seemingly precedented but, argumentum ab inconvenienti had its limitations and cannot override established procedure. Maybe, argumentum ab impossibili has grater force. But here neither applies for it is a misconception to equate candidates who have fought to the bitter finish with the hundreds of thousands of voters who are interested in electoral proprieties. In law and life, degrees of difference may, at a substantial stage, spell difference in kind or dimensions. Is there an impossible plurality which frustrates the feasibility of notice and hearing if candidates alone need be notified?

69. In Subhash Chander Sinha (1970) 3 SCR 963: (AIR 1970 SC 1269) Hidayatullah, C.J., speaking for the Court repelled the plea of natural justice when a whole examination was cancelled by the concerned university authorities. The reasons given are instructive. The learned Judge said that “the mention of fairplay does not come very well from the respondents who were grossly guilty of breach of fairplay themselves at the examinations.” The court examined the ground for cancellation of examinations and satisfied itself that there was undoubted abundance of evidence that students generally had outside assistance in answering questions. The learned Judge went on further to say:

“This is not a case of any particular individual who is being charged with adoption of unfair means but of the conduct of all the examinees or at least a vast majority of them at a particular centre. If it is not a question of charging anyone individually with unfair means but to condemn the examination as ineffective for the purpose it was held, must the Board give an opportunity to all the candidates to represent their cases? We think not. It was not necessary for the Board to give an opportunity to the candidates if the examinations as a whole were being cancelled. The Board had not charged any one with unfair means so that he could claim to defend himself. The examination was vitiated by adoption of unfair means on a mass scale. In these circumstances it would be wrong to insist that the Board must hold a detailed inquiry into the matter and examine each individual case to satisfy

itself which of the candidates had not adopted unfair means. The examination as a whole had to go.” (967-968): (of SCR): (at p.1272 of AIR)

* * * * *

If at a centre the whole body of students receive assistance and manage to secure success in the neighbourhood of 100% when others at other centres are successful only at an average of 50%, it is obvious that the university or the Board must do something in the matter. It cannot hold a detailed quasi-judicial inquiry with a right to its alumni to plead and lead evidence etc. before the results are withheld or the examinations cancelled. If there is sufficient material on which it can be demonstrated that the university was right in its conclusion that the examinations ought to be cancelled then academic standards require that the university's appreciation of the problem must be respected. It would not do for the Court to say that he should have examined all the candidates or even their representatives with a view to ascertaining whether they had received assistance or not. To do this would encourage indiscipline if not also perjury (968-969 of SCR): (at p. 1273 of AIR).”

These propositions are relied on by the learned Addl. Solicitor General who seeks to approximate the present situation of cancellation of the poll to the cancellation of an examination. His argument is that one has to launch on a public enquiry allowing a large number of people to participate in the hearing if the cancellation of the poll itself is to be subjected to natural justice. He further said that no candidate was condemned but the poll process was condemned. He continued to find a parallel by stating that like the university being responsible for the good conduct of examinations, the Election Commission was responsible for the proper holding of the poll. We do not consider the ratio in *Subash Chandar* (supra) as applicable. In fact, the candidates concerned stand on a different footing from the electorate in general. They have acquired a very vital stake in polling going on properly to a prompt conclusion. And when that is past there may be a vicarious concern for the constituency, why, for that matter, for the entire country, since the success of democracy depends on country-wide elections being held periodically and properly. Such interest is too remote and recondite, too feeble and attenuated, to be taken note of in a cancellation proceeding. What really marks the difference is the diffusion and dilution. The candidates, on the other hand, are the spearheads, the combatants, the claimants to victory. They have set themselves up as nominated candidate organised the campaign and galvanised the electorate for the crowning event of polling and counting. Their interest and claim are not indifferent but immediate, not weak but vital. They are more than the members of the public. They are parties to the electoral dispute. In this sense, they stand on a better footing and cannot be denied the right to be heard or noticed. Even in the case of university examinations it is not a universal rule that notice need not be given. *Ghanshyam Das Gupta's* (1962) Supp 3 SCR 36 : (AIR 1962 SC 1110) case illustrates this aspect. Even there, when an examination result of three

candidates was cancelled the Court imported natural justice. It was said that even if the enquiry involved a large number of persons, the committee should frame proper regulations for the conduct of such enquiries but not deny the opportunity. That case was distinguished in *Subhash Chander* the differentia being that in one case the right exercised was of the examining body to cancel its own examinations since it was satisfied that the examination was not properly conducted. It may be a parallel in electoral situations if the Election Commission cancels a poll because it is satisfied that the procedure adopted has gone awry on a wholesale basis. Supposing wrong ballot papers in large numbers have been supplied or it has come to the notice of the Commission that in the constituency counterfeit ballots had been copiously current and used on a large scale, then without reference to who among the candidates was more prejudiced, the poll might have been set aside. It all depends on the circumstances and is incapable of generalisation. In a situation like the present it is a far cry from natural justice to argue that the whole constituency must be given a hearing. That is an ineffectual over-kill.

70. Lastly, it was contended by the learned Addl. Solicitor General, taking his cue from *Wiseman* (1971 AC 297) that the Election Commission's direction for a re-poll has only a provisional consequence since the election court was the ultimate matter of the destiny of the poll, having power to review the decision of the Commission. It is true that *Wiseman* deals with the assessment of the evidence at a preliminary stage merely to ascertain whether there is a prima facie case. The proceeding had still later stages where the affected party would enjoy a full opportunity. Lord Reid said plainly that there was a difference:

“It is very unusual for there to be a judicial determination of the question whether there is a prima facie case.... there is nothing inherently unjust in reaching such a decision (i.e. a prima facie decision) in the absence of the other party.”)

Lord Wilberforce however took the view that there was a 'residual duty of fairness'. Lord Denning in *Pearlberg v. Varty* (1971) 1 WLR 728, 737 added in parenthesis.

“Although the tribunal, in determining whether there is a prima facie case, is itself the custodian of fairness, nevertheless its discretion is open to review.” (pp. 737-738)

Buckley, J. made the point about natural justice and administrative action.

“I do not forget the fact that it has been said that the rules of natural justice may apply to cases where the act in question is more properly described as administrative than judicial or quasi-judicial. See *Ridge v. Baldwin* (1964) AC 40 and *Schmidt v. Secretary of State for Home Affairs* (1969) 2 Ch 149. (p.747)

71. The Indian parallel would be an argument for notice and hearing from a police officer when he investigated and proceeded to lay a chargesheet because he thought that a case to be tried by the court had been made out. The present case stands on a totally different footing. What the Election Commission does is not to ascertain whether a prima facie case exists or an ex parte order, subject to modification by him is to be made. If that were so Pearlberg, (1971-1 WLR 728) would have been an effective answer. For, Lord Denning Luminously illustrates the effect.

“I would go so far with him as to say that in reaching a prima facie decision, there is a duty on any tribunal to act fairly; but fairness depends on the task in hand. Take an application to a court by statute, or by the rules, or as a matter of practice is made ex parte. The Court itself is a custodian of fairness. If the matter is so urgent that an order should be made forthwith, before hearing the other side, as in the case of an interim injunction or a stay of execution the court will make the order straight-way we do it every day. We are always ready, of course, to hear the other side if they apply to discharge the order. But still the order is made ex parte without hearing them. It is a prima facie decision. I agree that before some other tribunal a prima facie decision may be a little different. The party affected by it may not be able to apply to set it aside. The case must go forward to a final decision. Here again, I think the tribunal itself is under what Lord Wilberforce described as a residual duty of fairness.”

(1971 A.C. 297, 320)

When Pearlberg reached the House of Lords, the Law Lords considered the question again. Lord Hailsham of St. Marylebone L.C. observed:

“The third factor which affects mind is the consideration that the decision, once made does not make any final determination of the rights of the taxpayer. It simply enables the inspector to raise an assessment, by satisfying the commissioner that there are reasonable grounds for suspecting loss of tax resulting from neglect, fraud, or wilful default, that is that there is a prime facie probability that there has been neglect, etc., and that the Crown may have lost by it. When the assessment is made, the taxpayer can appeal against it, and, on the appeal, may raise any question (inter alia) which would have been relevant on the application for leave, except that the leave given should be discharged.”

(P. 539)

* * * * *

“The doctrine of natural justice has come in for increasing consideration in recent years, and the courts generally, and your Lordships' House in particular, have, I think rightly, advanced its frontiers considerably. But at the same time they have taken an increasingly sophisticated view of what it requires in individual cases.” (p. 540) Viscount Dilhorne observed in that case:

“I agree with Lord Donovan's view (*Wiseman v. Borneman* (1971) AC 297, 316) that it cannot be said that the rules of natural justice do not apply to a judicial determination of the question whether there is a prima facie case, but I do not think they apply with the same force or as much force as they do to decide decisions which determine the rights of persons.”

(p.546)

Lord Pearson's comment ran thus:

“A tribunal to whom judicial or quasi-judicial functions are entrusted is held to be required to apply those principles in performing those functions unless there is a provision to the contrary. But where some person or body is entrusted by Parliament with administrative or executive functions there is no presumption that compliance with the principles of natural justice is required, although, as 'Parliament' is not to be presumed to act unfairly', the courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness. Fairness, however, does not necessarily require a plurality of hearings or representations and counter-representations. If there were too much elaboration of procedural safeguards, nothing could be done simply and quickly and cheaply. Administrative or executive efficiency and economy should not be too readily sacrificed. The disadvantage of a plurality of hearings even in the judicial sphere was cogently pointed out in the majority judgments in *Cozens v. North Devon Hospital Management Committee* (1966) 2 QB 330, 343, 346-347.”

(page 547)

Lord Salmon put the matter pithily.”

“No one suggests that it is unfair to launch a criminal prosecution without first hearing the accused.” (p.550) Indeed, in *Malloch* (1971) 1 WLR 1578, 1598 E. Lord Wilberforce observed:

“A limited right of appeal on the merits affords no argument against the existence of a right to a precedent hearing, and, if that is denied, to have the decision declared void.”

(Foot note 30, Public Law Spring 1975 Stevens p.50 from *Natural Justice; Substance and Shadow* by D.H. Clerk)

After all, the Election Court can exercise only a limited power of review and must give regard to the Commission's discretion. And the trouble and cost of instituting such proceedings would deter all but the most determined of parties aggrieved, and even the latter could derive no help from legal principle in predicting whether at the end of the day the court would not condone their summary treatment on a subjective appraisal of the demerits of the case they had been denied the opportunity to present. The public interest would be ill-served by judicially fostered uncertainty as to the value to be set upon procedural fair play as a canon of good administration. And further the wiseman (1971 AC 297) law Lords regarded the cutting out of 'hearing' as

quite unpalatable but in the circumstances harmless since most of the assesses know the grounds and their declaration was one mode of explanation.

72. We consider it a valid point to insist on observance of natural justice in the area of administrative decision making so as to avoid devaluation of this principle by 'administrators already, alarmingly insensitive to the rationale of audi alteram partem'.

“In his lecture on “the Mission of the Law' Professor H.W.R. Wade takes the principle that no man should suffer without being given a hearing as a cardinal example of a principle 'recognised as being indispensable to justice, but which (has) not yet won complete recognition in the world of administration..... The goal of administrative sporadic and ex post facto judicial review. The essential mission of the law in this field is to win acceptance by administrators of the principle that to hear a man before he is penalised is an integral part of the decision-making process. A measure of the importance of resisting the incipient abnegation by the courts of the firm rule that breach of audi alteram partem invalidates, is that if it gains ground the mission of the law is doomed to fail to the detriment of all.”

(P. 60: Public Law Spring 1975 Stevens Natural Justice: Substance and shadow)

73. Our constitutional order pays more than lip service to the rule of reasonable administrative process. Our people are not yet conscious of their rights; our administrative apparatus has a hard-of-hearing heritage. Therefore a creative play of fair play, irksome to some but good in the long run, must be accepted as part of our administrative law. Lord Hailsham L. C. in *Pearlberg* presaged 1972-1 WLR 534):

“The doctrine of natural justice has come in for increasing consideration in recent years, and the courts generally, and (the House of Lords) in particular, have.... advanced its frontiers considerably. But at the same time they have taken an increasingly sophisticated view of what is required in individual cases.

(P. 63, Public Law Spring 1975 supra)

And in India this case is neither the inaugural nor the valedictory of natural justice.

74. Moreover, Sri Rao's plea that when the Commission cancels, viz., declares the poll void it is performing more than an administrative function merits attention, although we do not pause to decide it. We consider that in the vital area of elections where the people's faith in the democratic process is hyper-sensitive it is republican realism to keep alive audi alteram even in emergencies, 'even amidst the clash of arms'. Its protean shades apart we recognise that 'hearing' need not be an elaborate ritual and may, in situations of quick despatch, be minimal, even formal, nevertheless real. In this light,

the Election Court will approach the problem. To scuttle the ship is not to save the cargo; to jettison may be.

75. Fair hearing is thus a postulate of decision-making cancelling a poll, although fair abridgement of that process is permissible. It can be fair without the rules of evidence or forms of trial. It cannot be fair if appraising the affected and appraising his representations is absent. The philosophy behind natural justice is, in one sense, participatory justice in the process of democratic rule of law.

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

77. There was much argument about the guidelines in Ss. 58 and 64A being applicable to an order for constituency-wide repoll. It may be wholesome to be guided; but it is not illegal not to do so, provided homage to natural justice is otherwise paid. Likewise, Sri P.P. Rao pressed that the Chief Election Commissioner was arbitrary in ordering a re-poll beyond Fazilka segment or postal ballots. Even the 3rd respondent had not asked for it; nor was there any material to warrant it since all the ballots of all the other segments were still available to be sorted out and recounted. A whole re-poll is not a joke. It is almost an irreparable punishment to the constituency and the candidates. The sound and fury, the mammoth campaigns and rallies, the whistle-stop speeches and frenzy of slogans, the white-heat of tantrums, the expansiveness of the human resources and a hundred other traumatic consequences must be remembered before an easy re-poll is directed, urges Shri Rao. We note the point but leave its impact open for the Election Court to assess when judging whether the impugned order was scary, arbitrary, whimsical or arrived at by omitting material considerations. Independently of natural justice, judicial review extends to an examination of the order as to its being perverse, irrational, bereft of application of the mind or without any evidentiary backing. If two views are possible, the Court cannot interpose its view. If no view is possible the Court must strike down.

78. We have projected the panorama of administrative law at this length so that the area may not be befogged at the trial before the Election Court and for action in future by the Election Commission. We have held that Art. 329 (b) is a bar for intermediate legal proceedings calling in question the steps in the election outside the machinery for deciding elections disputes. We have further held that Art. 226 also suffers such eclipse. Before the notification under S.14 and beyond the declaration under Rule 64 of Conduct of Election Rules, 1961 are not forbidden ground. In between is provided, the

step challenged is taken in furtherance of, not to halt or hamper the progress of the election.

79. We have clarified that what may seem to be counter to the march of the election process may in fact be one to clear the way to a free and fair verdict of the electorate. It depends. Taking the Election Commission at his word (the Election Court has the power to examine the validity of his word) we proceed on the prima facie view that writ petition is not sustainable. If it turned out that the Election Commission acted in bizarre fashion or in indiscreet haste, it forbodies ill for the Republic. For if the salt lose their savour, wherewith shall they be salted? Alan Barth in his 'Prophets with Honour', quotes Justice Felix Frankfurter regarding the standard for a judicial decision thus.

“Mr. Doolay's “th' Supreme Court follows th' iliction returns”, expressed the wit of cynicism, not the demand of principle. A Court which yields to the popular will thereby licences itself to practice despotism, for there can be no assurance that it will not on another occasion indulge its own will. Courts can fulfil their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable.”

(Quotation from American Federation of Labor v. American Sosh and Door Co. (1949) 335 US 538 p.15 of Alan Barths's book published by Light and Life Publishers, New Delhi)

The above observation would equally apply to the Election Commission.

80. Many incidental points were debated but we have ignored those micro-questions and confined ourselves to macro-determinations. It is for the Election Court, not for us, to rule on those variegated matters. Certain obvious questions will claim the Election Court's attention. Did the Commission violate the election rules or canons of fairness? Was the play, in short, according to the script or did the dramatic personae act defiantly, contrary to the text? After all, democratic elections may be likened to a drama with a solemn script and responsible actors, officials and popular, each playing his part, with roles for heroes but not for villains, save where the text is travestied and unscheduled antiheroes intervene turning the promising project for the smooth registration of the collective will of the people into a tragic plot against it. Every corrupt practice, partisan official action, basic breach of rules or deviance from the fundamental of electoral fair play is a danger signal for the nation's democratic destiny. We view this case with the seriousness of John Adam's warning.

“ ‘Rememer’, said John Adams, ‘remember’, democracy never lasts long. It soon wastes, exhausts and murders itself. There never was a democracy that did not commit suicide.”

(Quoted from M. Hidayatullah in “Democracy in India and the Judicial Process, Lajpat Rai Memorial Lecture: p.16)

81. Only one issue remains. Is the provision in S.100 read with Sec. 98 sufficient to afford full relief to the appellant if the finding is in violation or mal-exercise of powers under Article 324? Sri Rao says 'NO' while the opposition says 'YES'.

82. Let us follow the appellant's apprehension for a while to test its tenability. He says that the Commissioner has no power to cancel the election to a whole constituency. Therefore, the impugned order is beyond his authority and in excess of his functions under Art. 324. Moreover, even if such power exists it has been exercised illegally, arbitrarily and in violation of the implied obligation of audi alteram partem. In substance, his complaint is that under guise of Art. 324 the Commissioner has acted beyond its boundaries, in breach of its content and oblivious of its underlying duties. Such a mal-exercise clearly tantamounts to non-adherence to the norms and limitations of Art. 324 and, if true, is a non-compliance with that provision of the Constitution. It falls within S.100 (1) (d) (iv). A generous, purpose-oriented, literally informed statutory interpretation spreads the wings of 'non-compliance' wide enough to bring in all contraventions, excesses, breaches and subversions.

83. We derive support for this approach from Durga Mehta (AIR 1954 SC 520). The court there considered the same words, in the same sections, in the same Statute. Sec. 100 (2) (c) interpreted in that case re-incarnates as S.100 (1) (d) (iv) later. Everything is identical. And Mukherjea, J., explained (at p.524 of AIR).

“It is argued on behalf of the respondent that the expression “non-compliance” as used in sub-sec. (2) (c) would suggest the idea of not acting according to any rule or command and that the expression is not quite appropriate in describing a mere lack of qualification. This, we think, would be a narrow way of looking at the thing. When a person is incapable of being chosen as a member of a State Assembly under the provisions of the Constitution itself but has nevertheless been returned as such at an election, it can be said without impropriety that there has been non-compliance with the provisions of the Constitution materialy affecting the result of the election. There is no material difference between “non-compliance” and “non-observance” or “breach” and this item in clause (c) of sub-sec. (2) may be taken as a residuary provision contemplating cases where there has been infraction of the provisions of the Constitution or of the Act but which have not been specifically enumerated in the other portions of the clause.”

Lexical significations are not the last work in statutory construction. We hold that it is perfectly permissible for the Election Court to decide the question as one falling under Section 100 (1) (d) (iv). A presumatic view of the Act and Art. 324 helps discern 'an organic synthesis. Law sustains, not fails.

84. A kindred matter viz, the scope of Sec. 100 and Sec. 98 has to be examined, parties having expressed anxious difference on the implied powers of the Election Court. Indeed, it is a necessary part of our decision but we

may deal with it even here. Sri Rao's consternation is that if his writ petition is dismissed as not maintainable and his election petition is dismissed on the ground that the Election Court had no power to examine the cancellation of poll, now that a fresh poll has taken place, he will be in the unhappy position of having to forfeit a near-victory because a gross illegality triumphs irremediably. If this were true the hopes of the rule of law turn into dupes of the people. We have given careful thought to this tragic possibility and are convinced – indeed, the learned Addl. Solicitor General has argued for upholding, not subverting the rule of law and agrees – that the Election Court has all the powers necessary to grant all or any of the reliefs set out in Sec. 98 and to direct the Commissioner to take such ancillary steps as will render complete justice to the appellant.

85. Section 98, which we have read earlier, contemplates three possibilities when an election petition is tried. Part VI of the Act deals with the complex of provisions calculated to resolve election disputes. A march past this Part discloses the need to file an election petition. (S.80) the jurisdiction to try which is vested in the High Court (80A). Regulatory of the further processes on presentation of a petition are Secs. 81 to 96. If a candidate whose return is challenged has a case invalidating the challenger's election he may set it up subject to the provision in Sec. 97. Then comes the finale in Sec. 98. The High Court has three options by way of conclusive determinations. It may (a) dismiss the petition (b) declare the election void; and (c) go further to declare the petitioner duly elected. Side-stepping certain species of orders that may be passed under S.99 we have to explore the gamut of implied powers when the grant of power is wide and needs incidental exercises to execute the substantive power.

86. A few more sections exist which we may omit as being not germane to the present controversy.

87. What is that controversy? Let us project it with special reference to the present case. Here the poll proceeded peacefully, the counting was almost complete, the ballots of most stations are available and postal votes plus the votes of one or two polling stations may alone be missing. Shri P.P. Rao asks and whenever counsel in court or speaker on a podium asks rhetorical questions be sure he is ready with an answer in his favour. If the court holds that the cancellation by the Commissioner of the whole poll is illegal what relief can it give me since a fresh election based on that demolition has been already held? If the court holds that since most of the ballots are intact, re-poll at one or two places is enough how can even the court hold such limited re-poll? If the Court wants to grant the appellant the relief that he is duly elected how can the intervening processes lying within the competence of the Commissioner be commandeered by the Court? The solution to this disturbing string of interrogations is simple, given a creative reading of implied powers writ invisibly, yet viably, into the larger jurisdiction under Sec. 98. Law transcends legalism when life is baffled by surprise situations. In this larger view and in accordance with the well-established doctrine of

implied powers we think the Court can – and if justified, shall – do, by its command, all that is necessary to repair the injury and make the remedy realisable. Courts are not luminous angels beating their golden wings in the void but operational authority sanctioning everything to fulfil the trust of the rule of law. That the less is the inarticulate part of the larger is the jurisprudence of power. Both Sri Sorabjee and Sri Phadke agree to this proposition and Sri Rao, in the light of the election petition filed and is pending cannot but assent to it. By way of abundant caution or otherwise, the appellant has declaration of the 3rd respondent as challenged, in his election petition, the returned candidate. He has also prayed for his being declared the duly elected candidate. There is no dispute — there cannot be — that the cornerstone of the second constituency-wide poll is the cancellation of the first. If that is set aside as invalid by the High Court for any good reason then the second poll falls and the 3rd respondent too with it. This question of the soundness of the cancellation of the entire poll is within the Court's power under S.98 of the Act. All are agreed on this. In that eventuality, what are the follow-up steps? Everything necessary to resurrect, reconstruct and lead on to a consummation of the original process. Maybe, to give effective relief by way of completion of the broken election the Commissioner may have to be directed to hold fresh poll and report back together with the ballots. A recount of all or some may perhaps be required. Other steps suggested by other developments may be desired. If anything integrally linked up with and necessitated by the obligation to grant full relief has to be undertaken or ordered to be done by the election machinery, all that is within the orbit of the Election Court's power.

88. Black's Law Dictionary explains the proposition thus:

“Implied powers are such as are necessary to make available and carry into effect those powers which are expressly granted or conferred, and which must therefore be presumed to have been within the intention of the constitutional or legislative grant.”

(p. 1334 Black's Legal Dictionary 4th Edn.)

89. This understanding accords with justice and reason and has the support of Sutherland. The learned Addl. Solicitor General also cited the cases in *Matajog Dubey v. H.C. Bhari* (1955) 2 SCR 925 at p. 937: (AIR 1956 SC 44 at pp. 50, 51) and *Commissioner of Commercial Taxes v. R.S. Jhaver* (1968) 1 SCR 148 at pp. 154, 155: (AIR 1968 SC 59 at pp. 62, 63) to substantiate his thesis that the doctrine of implied powers clothes the Commissioner with vast incidental powers. He illustrated his point by quoting from Sutherland (Frank E. Horack Jr. Vol. 3).

“Necessary implications; Where a statute confers powers or duties in general terms, all powers and duties incidental and necessary to make such legislation effective are included by implication. Thus it has been stated. “An express statutory grant of power or the imposition of a definite duty carries with it by implication, in the absence of a limitation, authority to employ all

the means that are usually employed and that are necessary to the exercise of the power or the performance of the duty..... That which is clearly implied is as much a part of a law as that which is expressed.” The reason behind the rule is to be found in the fact that legislation is enacted to establish broad or general standards. Matters of minor detail are frequently omitted from legislative enactments, and “if these could not be supplied by implication the drafting of legislation would be an interminable process and the true intent of the legislature likely to be defeated.

The rule whereby a statute, is by necessary implication extended has been most frequently applied in the construction of laws delegating powers to public officers and administrative agencies. The powers thus granted involve a multitude of functions that are discoverable only through practical experience.

* * * * *

A municipality, empowered, by statute to construct sewers for the preservation of the public health, interest and convenience was permitted to construct a protecting wall and pumping plant which were necessary for the proper working of the sewer, but were essential to public health. A country school superintendent, who was by statute given general supervisory power over a special election, was permitted to issue absentee ballots. The powers to arrest has been held to include the power to take finger prints, and take into custody non-residents who were exempted from the provisions of a if licensing statute.”

90. Having regard to statutory setting and comprehensive jurisdiction of the Election Court we are satisfied that it is within its powers to direct a re-poll of particular polling stations to be conducted by the specialised agency under the Election Commission and report the results and ballots to the Court. Even a re-poll of postal ballots, since those names are known can be ordered taking care to preserve the secrecy of the vote. The Court may, if necessary, after setting aside the election of R.3 (if there are good grounds therefor) keep the case pending, issue directions for getting available votes, order recount and or partial re-poll, keep the election petition pending and pass final order holding the appellant elected if — only if – valid grounds are established. Such being the wide ranging scope of implied powers we are in agreement with the learned Addl. Solicitor General that all the reliefs the appellant claims are within the Court's powers to grant and Sri Rao's alarm is unfounded.

91. Diffusion, even more elaborate discussion, tends to blur the precision of the conclusion in a judgment and so it is meet that we synopsise 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 Art. 324 is a reservoir of power to act for the avowed purpose of not divorced from, pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice in so far as conformance to such canons can reasonably and realistically be required of it as fairplay-in-action in a most important area of the constitutional order, viz, elections.

Fairness does import an obligation to see that no wrong-doer candidate benefits by his own wrong. To put the matter beyond doubt, natural justice 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 things necessary for fulfilment of the jurisdiction to undo illegality and injustice and do complete justice within the parameters set by the existing law.

92. In sum, a pragmatic modus vivendi between the Commission's paramount constitutional responsibility vis a vis elections and the rule of law vibrant with fair acting by every authority and remedy or every right breached, is reached.

93. We conclude stating that the bar of Art. 329 (b) is as wide as the door of S.100 read with S.98. The writ petition is dismissible but every relief

(given factual proof) now prayed for in the pending election petition is within reach. On this view of the law ubi jus ibi remedium is vindicated, election injustice is avoided and the constituency is allowed to speak effectively. In the light of and conditioned by the law we have laid down, we dismiss the appeal. Where the dispute which spirals to this Court is calculated to get a clarification of the legal calculus in an area of national moment, the parties are the occasion but the people are the beneficiaries, and so costs must not be visited on a particular person. Each party will bear his own costs.

94. A word of meed for counsel, Shri Soli Sorabjee did, with imaginative, yet emphatic, clarity and pragmatic, yet persuasive, advocacy, delight the twilight, yet sensitive, zones of the electoral law; Shri P.P. Rao did, with feeling for justice and wrestling with law, drive home the calamities of our system if right did not speak to remedy; and Shri Phadke did, without overlapping argument, but with unsparing vigour, bring out the legal dynamics of quick elections and comprehensive corrections. We record our appreciation to the bar whose help goes a long way for the bench to do justice.

The judgment of Goswami and Shinghal JJ. was delivered by

GOSWAMI, J.:— **95.** This appeal by special leave is directed against the judgment of the Delhi High Court dismissing the writ application of the appellant under Art, 226 of the Constitution.

96. By a notification of February 10, 1977, made under Section 14 of the Representation of the People Act, 1951, (briefly the Act), the President called upon the Parliamentary Constituencies to elect members to the House of the People in accordance with the provisions of the Act and the rules and order made thereunder, Simultaneously, a notification was issued by the Chief Election Commissioner with a calendar of dates for different Parliamentary Constituencies in the country. In this appeal we are concerned with No. 13-Ferozepore Parliamentary Constituency in the State of Punjab where the poll was scheduled to be held on March 15, 1977, and March 23 was fixed as the date before which the election shall be completed, Counting, according to the schedule, was to commence on March 20, 1977 and it actually continued on March 21, 1977. This Parliamentary Constituency consisted of nine Assembly Constituencies including the Fazilka and Zira Assembly segments.

97. We may now briefly state the appellant's case so far as it is material;

98. The poll in the entire Parliamentary Constituency was peacefully over on March 16, 1977. Counting in five Assembly segments was completed on March 20, 1977, and in the remaining four it was completed on March 21. The Assistant Returning Officers made entries in the result sheets in form 20 and announced the number of votes received by each candidate in the Assembly segments. No recounting was asked for by any candidate or his polling agent in any segment. Copies of the result sheets in Form 20 were handed over to the candidates or to their polling agents. The ballot papers and the result sheets of all the nine Assembly segments were transmitted by the Assistant Returning Officers concerned to the Returning Officer at the

Headquarters. According to the result sheets the appellant, who was the Congress candidate, secured 1,96,016 votes, excluding postal ballots, as against his nearest rival candidate, respondent No. 3, belonging to the Akali Party, who secured 1,94,095 votes, excluding postal ballots. The margin of votes between the appellant and correspondent No. 3 at that stage was 1921. There were 769 postal ballots. As per programme, counting of postal ballot papers was started by the Returning Officer (respondent No. 2) at 2.00 p.m. on March 21. 248 ballot papers out of 769 were rejected in the counting. At this stage, it is said respondent No. 3 and his son incited an unruly mob of his supporters to raid the office of the Returning Officer as a result of which a grave situation was created in which many officers received injuries. The Returning Officer was abused and was threatened that his son and other members of his family would be murdered. All the postal ballot papers, except those which had been rejected, were destroyed by the mob. Some ballot papers of Fazilka Assembly segment are also said to have been destroyed by the mob in the course of their transit to the office of the Returning Officer. The Assistant Returning Officer of the Zira Assembly segment, on his way to the office of the Returning Officer, was attacked by the mob and some of the envelopes containing ballot papers, paper seal accounts and presiding officer's diaries were snatched away from him. However the result sheets in Form 28 of all the Assembly segments in which the counting had been completed by March 21, 1977, could be preserved and were deposited in Government Treasury, Ferozepore. In view of the violent situation created in the office of the Returning Officer, he was prevented from ascertaining the result of the postal ballot papers and declaring the result of the election. He was made to sign a written report about the happenings to the Chief Election Commissioner (respondent No. 1). The above, briefly, is the version of the appellant.

99. Deputy Commissioners are usually appointed as Returning Officers and originally Shri G. B. S. Gosal, who was the Deputy Commissioner, was nominated as the Returning Officer of the aforesaid constituency, as per notification dated January 29, 1977. It appears on February 8, 1977, Shri Gosal was transferred and Shri Gurbachan Singh, a close relation of the appellant, was appointed as the Deputy Commissioner in place of Shri Gosal, Shri Gurbachan Singh (respondent No. 2) thus became the Returning Officer. There were complaints and allegations against him and after being apprised of the same the Chief Election Commissioner (respondent No. 1) appointed Shri I.K.K. Menon Under Secretary, Election Commission, as an Observer to be present at Ferozepore from March 16 till March 21 on which date the result was expected to be declared.

100. On March 22, 1977, the Chief Election Commissioner received a wireless message from the Returning Officer which may be quoted;

"Mob about sixteen thousand by over-powering the police attacked the counting hall where postal ballot papers were being counted. Police could not control the mob being out-numbered. Part of postal ballot papers excepting

partly rejected ballot paper and other election material destroyed by the mob. Lot of damage to property done. The undersigned was forced under duress to give in writing the following: "The counting of 13 Parliamentary Ferozepore Constituency has been adjourned due to certain circumstances which have been mentioned in the application presented by Shri Mohinder Singh Sayenwala regarding re-poll of the constituency and on the polling station in which the ballot boxes have been reported to be tampered with. This will be finally decided on receipt of instructions from the Election Commission and the result will be announced thereafter.; Counting adjourned and result postponed till receipt of further instructions from Election Commission. Incident happened in the presence of Observer at Ferozepore. Mob also destroyed the ballot papers and other election material and steel trunks of Fazilka Assembly segment at Ferozepore after the counting part of election material of Zira Assembly segment was also snatched and destroyed by the mob at Ferozepore."

.....

On the same day the Chief Election Commissioner received a written report from the Observer. The Observer also "orally apprised the Chief Election Commissioner of the various incidents at the time of poll and counting in various Assembly segments." No other report from the Returning Officer was however, received on that day.

101. On the materials mentioned above which he could gather on March 22, 1977, the Chief Election Commissioner passed the impugned order on the same day. It may even be appropriate to quote the same:

"Election Commission of India

New Delhi

Dated 22, March, 1977

Chaitra 1, 1899 (SAKA)

NOTIFICATION

S.O. Whereas the Election Commission has received reports from the Returning Officer of 13-Ferozepur Parliamentary Constituency that the counting on 21 March, 1977 was seriously disturbed by violence; that the ballot papers of some of the assembly segments of the parliamentary constituency have been destroyed by violence; that as a consequence it is not possible to complete the counting of the votes in the constituency and declaration of the result cannot be made with any degree of certainty;

And whereas the Commission is satisfied that taking all circumstances into account, the poll in the constituency has been vitiated to such an extent as to affect the result of the election;

Now, therefore, the Commission, in exercise of the powers vested in it under Article 324 of the Constitution, Section 153 of the Representation of

the People Act, 1951 and all other powers enabling it so to do, cancels the poll already taken in the constituency and extends the time for the completion of the election upto 30 April, 1977....."

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102. The appellant approached the Chief Election Commissioner to revoke the impugned order and to declare the result of the election, but without success. That led to the writ application in the High Court with prayer to issue —

(1) a writ of certiorari calling forth the records for the purpose of quashing the impugned order; and

(2) a writ of mandamus directing the Chief Election Commissioner and the Returning Officer to declare the result of the election;

(3) Alternatively, a writ of mandamus directing the Chief Election Commissioner to act strictly in accordance with the provisions of Sec. 64A (2) thus confining its directions in regard to postal ballot papers only.

103. The appellant made three contentions before the High Courts. Firstly, that the Election Commission had no jurisdiction to order re-poll of the entire Parliamentary constituency. Secondly, the impugned order was violative of the principles of natural justice as no opportunity of a hearing was afforded to the appellant before passing the order. Thirdly, that the High Court under Art. 226 of the Constitution was competent to go into the matter notwithstanding the provisions of Art. 329 (b) of the Constitution.

104. The application was resisted by the Chief Election Commissioner (respondent No.1) and respondent No. 3, the rival candidate.

105. A preliminary objection was raised by respondents 1 to 3 with regard to the manageability of the writ application on the ground that Article 329 (b) of the Constitution was a bar to the High Court's entertaining it. Another objection was taken that the writ petition was not maintainable in view of the amended provisions of Art 226 of the Constitution. The High Court dismissed the writ application. The High Court held that Art 324 confers "plenary executive powers" on the Election Commission and there were no limitations on the functions contemplated in Article 324. The High Court observed that the law framed under Art 327 or Article 328 was in aid of the plenary powers already conferred on the Election Commission under Art. 324 and where the law so made under Art. 327 or Art. 328 omitted to provide for a contingency or a situation, the said plenary executive power relating to conduct of elections conferred upon the Election Commission by Art 324 (1) of the Constitution would become available to it and the Election Commission would be entitled to pass necessary orders in the interest of free and fair elections. The High Court also held that the Returning Officer could not deprive the candidates of the rights of recount available to them under Rule 63 of the Conduct of Election Rules, 1961, and after going into the facts

observed that "it became impossible for the Returning Officer to comply with the provisions of Rule 63 (2) to 63 (6)." Repelling the contention of the appellant that the Commission could not travel beyond the Act and the rules by simply relying on its powers under the Constitution, the High Court observed

"that calling upon of the parliamentary constituencies to elect members has to be in accordance with the provisions of the Act and the Rules but it does not mean that the conduct of elections by the Commission has to be held only under the Act or the Rules. The Election Commission who is vested with the power of conducting the elections has still to hold the elections in accordance with the Act and the Rules as well as under the Constitution."

The High Court further held that the principles of natural justice were not specifically provided for in Art 324 but were "totally excluded while passing the impugned order." The High Court further observed that even if the principles of natural justice were impliedly to be observed before passing the impugned order the appellant was "heard not only before the issue of the notification but in any case after the notification." The High Court also held that it had no jurisdiction to entertain the writ petition in view of the bar contained in Art 329 (b) of the Constitution.

106. This appeal has come up for hearing before this Constitution Bench on a reference by a Two-Judge Bench as substantial questions of law have arisen as to the interpretation of the Constitution, in particular Art 324 and Art 329 (b) of the Constitution. We should, therefore, immediately address ourselves to that aspect of the matter.

107. What is the scope and ambit of Art 324 of the Constitution? The Constitution of our country ushered in a Democratic Republic for the free people of India. The founders of the Constitution took solemn care to devote a special chapter to Elections niched safely in Part XV of the Constitution. Originally there were only six articles in this Part opening with Art 324. The penultimate Article in the chapter, as it stands is Art, 329 which puts a ban on interference by courts in electoral matters. We are not concerned in this appeal with the newly added Art 329A which is the last Article to close the chapter.

108. Elections supply the vis viva to a democracy. It was, therefore, deliberately and advisedly thought to be of a paramount importance that the high and independent office of the Election Commission should be created under the Constitution to be in complete charge of the entire electoral process commencing with the issue of the notification by the President to the final declaration of the result. We are not concerned with the other duties of the Election Commission in this appeal.

109. Article 324 came to the notice of this Court for the first time in *N. P. Ponnuswami v. Returning Officer Namakkal Constituency*, 1952 SCR 218: (AIR 1952 SC 64). This Court observed (at p. 68 of AIR):

"Broadly speaking, before an election machinery can be brought into operation, there are three requisites which require to be attended to, namely, (1) there should be a set of laws and rules making provisions with respect to all matters relating to, or in connection with, elections, and it should be decided as to how these laws and rules are to be made; (2) there should be an executive charged with the duty of securing the due conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections. Articles 327 and 328 deal with the first of these requisites, Art. 324 with the second and Art. 329 with the third requisite." Further below this Court observed as follows (at p. 69 of AIR):—

"Obviously, the Act is a self-contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the rules made thereunder."

Lower down this Court further observed:

"it is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of."

X X X

"..... it will be a fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage."

110. Ponnuswami's case (AIR 1952 SC 64) (supra) had to deal with a matter arising out of rejection of a nomination paper which was the subject-matter of a writ application under Art 226 of the Constitution which the High Court had dismissed.

111. With regard to the construction of Art. 329 (b) it was held that "the more reasonable view seems to be that Art 329 covers all 'electoral matters'". This Court put forth its conclusions in that decision as follows (at p. 70 of AIR):—

"(1) 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.

(2) In conformity with this principle, the scheme of 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."

This Court also explained the connotation of the word "election" in very wide terms as follows (at page 68 of AIR):—

"It seems to me that the word 'election' has been used in Part XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature. The use of the expression 'conduct of elections' in Art, 324 specifically points to the wide meaning, and that meaning can also be read consistently into the other provisions which occur in Part XV including Art, 329 (b)."

This Court further observed that —

"..... it (is) 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.

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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 Art. 329 (b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by the High Court at the pre-polling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought up before it."

The above decision is locus classicus on the subject and the parties before us seek to derive support from it for their contentions.

112. The important question that arises for consideration is as to the amplitude of powers and the width of the functions which the Election Commission may exercise under Art. 324 of the Constitution. According to Mr. Rao appearing on behalf of the appellants, there is no question of exercising any powers under Art 324 of the Constitution which, in terms, refers to "functions" under sub-art. (6). We are however, unable to accept this submission since functions include powers as well as duties (see Stroud's Judicial Dictionary, p. 1196). It is incomprehensible that a person or body can discharge any functions without exercising powers. Powers and duties are integrated with function.

113. Article 324 (1) vests in the Election Commission the superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State

and of elections to the offices of the President and Vice President held under the Constitution. Article 324 (1) is thus couched in wide terms. Power in any democratic set up, as is the pattern of our polity, is to be exercised in accordance with law. That is why Arts. 327 and 328 provide for making of provisions with respect to all matters relating to or in connection with elections for the Union Legislatures and for the State Legislatures respectively. When appropriate laws are made under Art. 327 by Parliament as well as under Article 328 by the State Legislatures, the Commission has to act in conformity with those laws and the other legal provisions made thereunder. Even so, both Arts. 327 and 328 are "subject to the provisions" of the Constitution which include Art. 324 and Art. 329. Since the conduct of all elections to the various legislative bodies and to the offices of the President and the Vice-President is vested under Article 324 (1) in the Election Commission the framers of the Constitution took care to leaving scope for exercise of residuary power by the Commission in its own right, as a creature of the Constitution, in the infinite variety of situations that may emerge from time to time in such a large democracy as ours. Every contingency could not be foreseen, or anticipated with precision. That is why there is no hedging in Article 324. The Commission may be required to cope with some situation which may not be provided for in the enacted laws and the rules. That seems to be the *raison d'etre* for the opening clause in Articles 327 and 328 which leaves the exercise of powers under Article 324 operative and effective when it is reasonably called for in a vacuous area. There is, however, no doubt whatsoever that the Election Commission will have to conform to the existing laws and rules in exercising its powers and performing its manifold duties for the conduct of free and fair elections. The Election Commission is a high-powered and independent body which is irremovable from office except in accordance with the provisions of the Constitution relating to the removal of Judges of the Supreme Court and is intended by the framers of the Constitution to be kept completely free from any pulls and pressures that may be brought through political influence in a democracy run on party system. Once the appointment is made by the – President, the Election Commission remains insulated from extraneous influences, and that cannot be achieved unless it has an amplitude of powers in the conduct of elections of course in accordance with the existing laws. But where these are absent, and yet a situation has to be tackled, the Chief Election Commissioner has not to fold his hands and pray to God for divine inspiration to enable him to exercise his functions and to perform his duties or to look to any external authority for the grant of powers to deal with the situation. He must lawfully exercise his power independently, in all matters relating to the conduct of elections, and see that the election process is completed properly in a free and fair manner.

"An express statutory grant of power to the imposition of a definite duty carries with it by implication, in the absence of a limitation, authority to employ all the means that are usually employed and that are necessary to the exercise of the power or the performance of the duty That which is clearly implied is as much a part of a law as that which is expressed."*

114. The Chief Election Commissioner has thus to pass appropriate orders on receipt of reports from the returning officer with regard to any situation arising in the course of an election and power cannot be denied to him to pass appropriate orders. Moreover, the power has to be exercised with promptitude. Whether an order passed is wrong, arbitrary or is otherwise invalid, relates to the mode of exercising the power and does not touch upon the existence of the power in him if it is there either under the Act or the rules made in that behalf or under Article 324 (1).

115. Apart from the several functions envisaged by the two Acts and the rules made thereunder, where the Election Commission is required to make necessary orders or directions, are there any other functions of the Commission? Even if the answer to the question may be found elsewhere, reference may be made to S. 19A of the Act which, in terms, refers to functions not only under the Representation of the People Act, 1950 and the Representation of the People Act, 1951 or under the rules made thereunder, but also under the Constitution. The Commission is therefore, entitled to exercise certain powers under Art. 324 itself on its own right, in an area not covered by the Acts and the rules. Whether the power is exercised in an arbitrary or capricious manner is a completely different question.

116. Mr. Rao submits referring to Ss. 58 and 64A of the Act, that the Chief Election Commissioner has no power to cancel the poll in the entire constituency. He submits that this is a case of complete lack of power and not merely illegal or irregular exercise of power. He points out that there is a clear provision under S. 58 of the Act. for reordering of poll at a polling station. Similarly under S. 64A there is provision for declaring the poll at a polling station void when the Election Commission is satisfied that there is destruction or loss etc. of ballot papers before counting. Counsel submits that while law has provided for situations specified in S. 58 with regard to loss or destruction of ballot boxes and under S. 64A with regard to loss and destruction of ballot papers before counting of votes no provision has been made for such an unusual exercise of power as the cancellation of the poll in the entire constituency after it has already been completed peacefully. It is, therefore; argued that this is a case of complete lack of power of the Commission to pass the impugned order.

117. It is clear even from S. 58 and S. 64A that the legislature envisaged the necessity for the cancellation of poll and ordering of repoll in particular polling stations where situation may warrant such a course. When provision is made in the Act to deal with situations arising in a particular polling station, it cannot be said that if a general situation arises whereby numerous polling stations may witness serious mal-practices affecting the purity of the electoral process, that power can be denied to the Election Commission to take an appropriate decision. The fact that a particular Chief Election Commissioner may take certain decisions unlawfully, arbitrarily or with ulterior motive or in mala fide exercise of power is not the test in such a case. The question always relates to the existence of power and not the mode of exercise of power. Although Section 58 and S. 64A mention "a polling station"

or "a place fixed for the poll" it may, where necessary embrace multiple polling stations.

118. Both under S. 58 and under S 64A the poll that was taken at a particular polling station can be voided and fresh poll can be ordered by the Commission. These two sections naturally envisage a particular situation in a polling station or a place fixed for the poll and cannot be said to be exhaustive. The provisions in Ss. 58 and 64A cannot therefore be said to rule out the making of an order to deal with a similar situation if it arises in several polling stations or even sometimes as a general feature in a substantially large area. It is, therefore, not possible to accept the contention that the Election commission has no power to make the impugned order for a re-poll in the entire constituency.

118A. Mr. Rao submits that once the Presidential notification has been made, it is left to the President alone to amend or alter the notification and power, in an appropriate case may be exercised by the President in which case the action of the President will be on the advice of the Cabinet which will be responsible to the Legislature. He submits that it was not the intention of the Constitution makers in the entire scheme of the electoral provisions to entrust such an extraordinary power to the Election Commission. He further submits that in an appropriate case the President may also promulgate an ordinance under Art. 123 (I) of the Constitution cancelling the poll in the entire constituency.

119. The contention that the President can revoke, alter or amend the notification under Section 14 of the Act or that he can promulgate an ordinance in an appropriate case does not however answer the question. The question will have to be decided on the scope and ambit of power under Art. 324 (1) of the Constitution which vests the conduct of elections in the Election Commission. It is true that in exercise of powers under Article 324 (1) the Election Commission can not do something impinging upon the power of the President in making the notification under Sec. 14 of the Act. But after the notification has been issued by the President the entire electoral process is in the charge of the Election Commission and the Commission is exclusively responsible for the conduct of the election without reference to any outside agency. We do not find any limitation in Art. 324 (1) from which it can be held that where the law made under Art. 327 or the relevant rules made thereunder do not provide for the mechanism of dealing with a certain extraordinary situation the hands of the Election Commission are tied and it cannot independently decide for itself what to do in a matter relating to an election. We are clearly of opinion that the Election Commission is competent in an appropriate case to order re-poll of an entire constituency where necessary. It will be an exercise of power within the ambit of its functions under Article 324. The submission that there is complete lack of power to make the impugned order under Art. 324 is devoid of substance.

120. The ancillary question which arises for consideration is that when the Election Commission amended its notification and extended the time for completion of the election by ordering a fresh poll, is it an order during the course of the process of 'election; as that term is understood?

121. As already pointed out, it is well-settled that election covers the entire process from the issue of the notification under Section 14 to the declaration of the result under Sec. 66 of the Act. When a poll that has already taken place has been cancelled and a fresh poll has been ordered the order therefore, with the amended date is passed as an integral part of the electoral process. We are not concerned with the question whether the impugned order is right or wrong or invalid on any account. Even if it is a wrong order it does not cease to be an order passed by a competent authority charged with the conduct of elections with the aim and object of completing the elections. Although that is not always decisive, the impugned order itself shows that it has been passed in the exercise of power under Art. 324 (1) and Section 153 of the Act. That is also the correct position. Such an order, relating, as it does to election within the width of the expression as interpreted by this Court, cannot be questioned except by an election petition under the Act.

122. What do the appellants seek in the writ application? One of their prayers is for declaration of the result on the basis of the poll which has been cancelled. This is nothing short of seeking to establish the validity of a very important stage in the election process, namely, the poll which has taken place and which was countermanded by the impugned order. If the appellants succeed, the result may, if possible, be declared on the basis of that poll, or some other suitable orders may be passed. If they fail, a fresh poll will take place and the election will be declared on the basis of the fresh poll. This is, in effect, a vital issue which relates to questioning of the election since the election will be complete only after the fresh poll on the basis of which the declaration of the result will be made. In other words, there are no two elections as there is only one continuing process of election. If, therefore, during the process of election, at an intermediate or final stage, the entire poll has been wrongly cancelled and a fresh poll has been wrongly ordered, that is a matter which may be agitated after declaration of the result on the basis of the fresh poll, by questioning the election in the appropriate forum by means of an election petition in accordance with law. The appellants, then, will not be without a remedy to question every step in the electoral process and every order that has been passed in the process of the election including the countermanding of the earlier poll. In other words, when the appellants question the election after declaration of the result on the basis of the fresh poll, the election court will be able to entertain their objection with regard to the order of the Election Commission countermanding the earlier poll, and the whole matter will be at large. If, for example, the election court comes to the conclusion that the earlier poll has been wrongly cancelled, or the impugned order of the Election Commission is otherwise invalid, it will be entitled to set aside the election on the basis of the fresh poll and will have

power to breathe life into the countermanded poll and to make appropriate directions and orders in accordance with law. There is, therefore, no foundation for a grievance that the appellants will be without any remedy if their writ application is dismissed. It has in fact been fairly conceded by counsel for the other side that the election court will be able to grant all appropriate reliefs and that the dismissal of the writ petition will not prejudice the appellants.

123. Indeed it has been brought to our notice that an election petition has been filed by the appellants, *ex abundanti cautela*, in the High Court of Punjab and Haryana, challenging the election which has since been completed on the basis of a fresh poll ordered by the Election Commission. The High Court of Punjab and Haryana will therefore be free to decide that petition in accordance with law.

124. It is submitted by Mr. Rao that in *Ponnuswami* (AIR 1952 SC 64) (*supra*) the question was of improper rejection of nomination paper which is clearly covered by Section 100 (1) (c) of the Act. Counsel submits that the only ground which can be said to be raised in the election petition, in the present case, is Section 100 (1) (d) (iv), namely, non-compliance with the provisions of the Constitution or of the Representation of the People Act, 1951, or of any rules or orders made under that Act. According to counsel, there is no non-compliance with Art. 324 of the Constitution as the Election Commission has no power whatsoever to pass the impugned order under Article 324 of the Constitution. That, according to him, is not "non-compliance with the provision of the Constitution" within the meaning of Section 100 (1) (d) (iv). We are unable to accept this submission for the reasons already given. The Election Commission has passed the order professedly under Art. 324 and Section 153 of the Act. We have already held that the order is within the scope and ambit of Art 324 of the Constitution. It therefore, necessarily follows that if there is any illegality in the exercise of the power under Article 324 or under any provision of the Act, there is no reason why Section 100 (1) (d) (iv) should not be attracted to it. If exercise of a power is competent either under the provisions of the Constitution or under any other provision of law, any infirmity in the exercise of that power is, in truth and substance, on account of non-compliance with the provisions of law, since law, demands of exercise of power by its repository, as in a faithful trust, in a proper regular fair and reasonable manner (See also *Durga Shankar Mehta v. Thakur Raghuraj Singh* (1955) 1 SCR 267 : (AIR 1954 SC 520).

125. The above being the legal position, Art. 329 (b) rules out the maintainability of the writ application. Article 329 (b) provides that

"notwithstanding anything in this Constitution.... no election to either house of Parliament ... shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

It is undisputed that an election can be challenged only under the provisions of the Act indeed Section 80 of the Act provides that "no election shall be called in question except by an election petition presented in accordance with the provisions of" Part VI of the Act. We find that all the substantial reliefs which the appellants seek in the writ application, including the declaration of the election to be void and the declaration of appellant No. 1 to be duly elected, can be claimed in the election petition. It will be within the power of the High Court, as the election court, to give all appropriate reliefs to do complete justice between the parties. In doing so it will be open to the High Court to pass any ancillary or consequential order to enable it to grant the necessary relief provided under the Act. The writ application is therefore barred under Art. 329 (b) of the Constitution and the High Court rightly dismissed it on that ground.

126. In view of our conclusion that the High Court had no jurisdiction to entertain the writ application under Art. 226 of the Constitution, it will not be correct for us, in an appeal against the order of the High Court in that proceeding to enter into any other controversy, on the merits, either on law or on facts, and to pronounce finally on the same. The pre-eminent position conferred by the Constitution on this Court under Art. 141 of the Constitution does not envisage that this Court should lay down the law, in an appeal like this, on any matter which is required to be decided by the election court on a full trial of the election petition, without the benefit of the opinion of the Punjab and Haryana High Court which has the exclusive jurisdiction under Sec. 80A of the Act to try the election petition. Moreover, a statutory right to appeal to this Court has been provided under S. 116A, on any question, whether of law or fact, from every order made by the High Court in the dispute.

127. So, in view of the scheme of Part VI of the Act, the Delhi High Court could not have embarked upon an enquiry on any part of the merits of the dispute. Thus it could not have examined the question whether the impugned order was made by the Election Commission in breach of a rule of natural justice. That is a matter relating to the merits of the controversy and it is appropriately for the election court to try and decide it after recording any evidence that may be led at the trial. It may be that if we pronounce on the question of the applicability of the rule of natural justice, the High Court will be relieved of its duty to that extent. But it has to be remembered that even for the purpose of deciding that question, the parties may choose to produce evidence, oral or documentary, in the trial court. We therefore refrain from expressing any opinion in this appeal on the question of the violation of any rule of natural justice by the Election Commission in passing the impugned order.

128. At the same time we would like to make it quite clear that any observation, on a question of law or fact, made in the impugned judgment of the Delhi High Court, bearing on the trial of the election petition pending in the Punjab and Haryana High Court, will stand vacated and will not come in

the way of that trial. That High Court will thus be free to decide the petition according to the law. We would also like to make it quite clear, with all respect to the learned Judges who have delivered a separate judgment, that we may not be taken to have agreed with the views expressed therein about the applicability of audi alteram partem or on the applicability of the guidelines in Sections 58 and 64A to the facts and circumstances of this case, or the desirability of ordering a re-poll in the whole constituency, or the ordering of a re-poll of postal ballots etc. Election is a long, elaborate and complicated process and as far as we can see, the rule of audi alteram partem, which is in itself a fluid rule, cannot be placed in a strait-jacket for purposes of the instant case. It has also to be remembered that the impugned order of the Election Commission could not be said to be a final pronouncement on the rights of the parties as it was in the nature of an order covering an unforeseen eventuality which had arisen at one stage of the election. The aggrieved party had all along a statutory right to call the entire election in question, including the Commission's order, by an election petition under Section 80 of the Act, for the trial of which an elaborate procedure has been laid down in the Act. Then, as has been stated, there is also a right of appeal under Section 116A. These and perhaps other relevant points may enter the scales in considering at the trial of the election petition whether there may not be sufficient justification to negative the existence of any implied duty on the part of the Commission, at that stage to hear any party before taking its decision to order or not to order a repoll. We do not therefore think it necessary or desirable to foreclose a controversy like this by any general observations and will leave any issue that may arise from it for trial and adjudication by the election court.

129. Being not altogether certain of all the facts and circumstances that may be made available, in the appropriate forum, it may be a premature exercise by this Court even to lay down guidelines when there is no hidebound formula of rules of natural justice to operate in all cases and at all times when a decision has to be made. Justice and fair play have often to be harmonised with exigencies of situations in the light of accumulated totality of circumstances in a given case having regard to the question of prejudice not to the mere combatants in an electoral contest but to the real and larger issue of completion of free and fair election with rigorous promptitude. Not being adequately informed of all the facts and circumstances, this Court will not make the task of the election court difficult and embarrassing by suggesting guidelines in a rather twilight zone.

130. As we find no merit in this appeal, it is dismissed in the circumstances of the case, there will be no order as to the costs in this Court.

Appeal dismissed.

