

(2001) 04 MAD CK 0007

In the Madras High Court

Case No : Writ Petition No's. 3346, 3633, 4417, 4454, 4466, 4945, 5077, 6038 and 6039 of 2001

All India Anna Dravida Munnetra Kazhagam and Others

APPELLANT

Vs

The Chief Election Commissioner, Election Commission of India and Others

RESPONDENT

Date of Decision : 10-04-2001

Acts Referred:

Conduct of Elections Rules, 1961 — Rule 49(A), 66A, 92(1A), 92(2), 93
Constitution of India, 1950 — Article 14, 143, 226, 246(1), 248
Representation of the People Act, 1951 — Section 169, 169(2), 49A, 49D, 49E

Citation : (2001) 04 MAD CK 0007

Hon'ble Judges : N.K. Jain, C.J.;K. Sampath, J

Bench : Division Bench

Advocate : P.P. Rao, assisted by, K.V. Viswanathan, for N. Jothi, in W.P. Nos. 3346 and 4945 of 2001, O.R. Abdul Kalaam, in W.P. No. 3633 of 2001, D. Gubendragunabalam, in W.P. No. 4417 and 5077 of 2001, P.M. Premnazar Khan, in W.P. No. 4456 of 2001 and P.K. Rajagopal, in W.P. Nos. 6038 and 6039 of 2001, for the Appellant; G. Rajagopal for M.R. Raghavan in W.P. Nos. 3346, 4417, 4454, 4466, 4945, 5077, 6038 and 6039 of 2001, V.T. Gopalan, Addl. Solicitor General for K. Ramakrishna Reddy, A.C.G.S.C. for 2nd Respondent in W.P. Nos. 3633, 4945, 5077 and 6038 of 2001 and 1st Respondent in W.P. No. 4454 of 2001, for the Respondent

Final Decision : Dismissed

Judgement

N.K. Jain, C.J.—J. Jayalalitha, former Chief Minister of Tamil Nadu, and the General Secretary of All India Anna Dravida Munnetra

Kazhagam with the allegation that AIADMK, a registered political party registered with the Election Commission of India has filed writ petition

W.P. No. 3346 of 2001 on 21.2.2001 seeking to issue a writ of prohibition or direction in the nature of writ prohibiting the Election Commission

of India from using Electronic Voting Machines in the constituencies in the

ensuing General Elections to the Tamil Nadu State Legislative Assembly.

A learned single Judge ordered notice on 22.02.2001 and further directed the Registry to place the matter before the First Bench as the matter involved public interest.

2. W.P. No. 3633 of 2001 was filed on 23.2.2001 by one Haneefa, who alleges to be a businessman and manufacturer of Electrical and

Electronic equipments, including Electronic Voting Machines, praying to issue a direction to remove, strike and declare Section 61-A of

Representation of People Act, 1951 (hereinafter referred to as Act) as invalid and ultra vires the Act and Articles of the Constitution and to direct

the Chief Election Commissioner of India to forbear from using EV Ms in the ensuing Assembly Elections in four States viz., Tamil Nadu,

Pondicherry, Kerala and West Bengal.

3. W.P. No. 4454 of 2001 was filed by the General Secretary of All India Forward Bloc (Tamil Nadu) on 8.3.2001, a recognised political party,

seeking for a direction to declare Section 61-A of the Act as ultra vires the Constitution and the Parent Act.

4. Another W.P. No. 4945 of 2001 was filed by the AIADMK on 13.3.2001 for a direction to declare Section 61-A of the Act, as ultra vires

and repugnant to Articles 324, 326, 327 and 328 of the Constitution of India, apart from the other provisions of the Act itself, for the reasons that

the said section was inserted on the ground of lack of guidelines, arbitrariness and exercise of vague, unfettered and uncanalised power given to the

Election Commission of India in selecting the constituency or constituencies for using Electronic Voting Machines. The learned single Judge

ordered notice on 14.3.2001, and directed to post the matter before the First Bench.

5. W.P. No. 5077 of 2001 was filed on 14.3.2001 by the President of the Pattali Makkal Katchi (PMK), a political party registered with the

Election Commission of India seeking for a direction to declare Section 61-A of the Act, as ultra vires and also to strike it down as the powers

conferred on the first Respondent - Election Commission are vague and without guidelines, in selecting constituencies for using Electronic Voting

Machines (in short EV Ms).

6. W.P. No. 6038 of 2001 was filed by the Communist Party of India (CPI), a

recognised and registered political party with the Election

Commission of India on 27.3.2001 praying for a direction to declare Section 61-A of the Act, 1951, on the same grounds, as stated in the other

writ petitions, stated above.

7. Similarly, W.P. No. 4417 of 2001, W.P. No. 4466 of 2001 and W.P. No. 6039 of 2001 were filed on 5.3.2001, 5.3.2001 and 27.3.2001

respectively by the Pattali Makkal Katchi (PMK), Indian National League and Communist Party of India, registered political parties, with the same

prayer to forbear the Election Commission of India from using the Electronic Voting Machines in the ensuing general elections 2001 to be

conducted for the Legislative Assembly Constituencies in Tamil Nadu, and also in the Union Territory of Pondicherry, and in the Tiruchirapalli

Parliament Constituency in Tamil Nadu.

8. There are two sets of writ petitions viz., one challenging the vires of Section 61-A of the Act, and the another for a direction not to use the

Electronic Voting Machines in the ensuing elections in Tamil Nadu, Pondicherry, Kerala and West Bengal.

9. The case put-forth by the writ Petitioners in the various writ petitions in brief is:

The manner of voting is enshrined in Section 59 of the 1951 Act and it shall be by ballot in the manner as may be prescribed. Section 61-A has

been inserted permitting the introduction of the use of EV Ms in respect of certain constituencies. Section 94 refers to the maintenance of secrecy

of voting and it should not be infringed upon under any circumstances. In the event of filing election petition, only when the ballot papers are made

available for Court's scrutiny, the Court could exercise its power. But no corresponding provision for safeguard is made in the event of EV Ms

being used, and nothing is said about the preservation of the contents in the EV Ms.

10. It is also pointed out that Chapter II of Part IV of the Conduct of Election Rules, 1961 (hereinafter referred to as the "Rules") deals with voting

by EV Ms. Rule 49-E speaks about the preparation of voting machines for the polls. Rule 49-E (2) speaks about the demonstration of the voting

machines by the Presiding Officer of the poll. Rule 49-E (3) and E (4) relate to sealing of the machines. The overall control of the machine is only

with the Presiding Officers of the polling booth. Section 49-L deals with the procedure for voting through EV Ms. Rule 49-0 allows an elector to

exercise no vote option to avoid his vote being impersonated or rigged. In the conventional system, a voter can get a ballot paper but need not

mark and the secrecy is maintained. There is no such provision in EV Ms for exercising no vote. The secrecy is thus lost.

11. It is alleged that the ballot box is made out of thick iron sheets, while EVM is a fragile instrument and the buttons to be used are meant for

feather touch operations. Any bad element could damage the same. During the pendency of the election petitions either before the High Court or

the Supreme Court, the preservation of EV Ms requires several supporting apparatus to be kept continuously running which will be very difficult.

12. As regards the actual working of EV Ms, doubt is raised as to whether an individual can press the button more than once and cast his vote

more than once. Another doubt is also raised as to when a person casts his vote, normally the next vote can be cast only after the lock is released

by the Presiding Officer in the booth, but if a voter and an officer connive, is it possible to exercise more than one vote. Whether a voter can know

that his vote has been duly registered is also a doubt raised by some of the Petitioners. Some writ Petitioners raised another doubt that after one

person has voted, if the Presiding Officer forgets to release the lock and the next voter presses the button of his choice and the vote does not

register, will the second voter know that his vote has not been registered. It is also asked as to what is the guarantee if a person presses a button

next to a particular symbol, that the vote has indeed been accounted in that symbol only, and not in any other symbol. Another question is also

posed to the effect that in the event of an election petition, how can the validity of each vote be accounted for. Another interesting question is

raised regarding the mode to ensure the prevention of mischief viz. introduction of computer bugs and viruses and internet hacking since EV

Ms are set up with computerised voting facility by a programmed microchip. Some writ Petitioners apprehend a situation that if a voter deliberately

or accidentally disconnects the EV Ms during election process or damages it in any way necessitating spot repair or even replacing of the machine,

what would happen to the votes already cast.

13. It is further pointed out that Section 61-A is somewhat restricted to use EV Ms in "Such constituency or constituencies" only as the Election

Commission (hereinafter referred to as "EC") may deem fit. The word "such" in the context cannot mean all constituencies. EV Ms cannot be used

for the whole lot of constituencies. This section also does not authorise the use of EV Ms in the ensuing General Elections to the State Legislative

Assembly. The machines, if at all necessary, could be initially tested in panchayat and local body elections on a large scale and only if found

successful, they could be used in General Elections. It is stated that Section 61-A of the Act is not a method to supplement or supplant the method

of voting as adequately indicated in the rest of the provisions of the Act but it is only an alternative method. It cannot displace or dislodge the

procedure laid down for voting by means of paper ballots. The Delegated legislation has no check over it and there is no way of obtaining redress.

No rules had been framed on the issue of how the study was made to use EV Ms in certain constituencies. With similar allegations that vague, and

unfettered and arbitrary powers have been given to the Election Commission in respect of use of EV Ms, the Petitioners are before us with the

prayer as stated above.

14. Detailed counters in respective writ petitions have been filed by the Election Commission denying the allegations, as alleged in the affidavits

filed in support of the writ petitions. It is stated that in view of the decision of the Supreme Court in A.C. Jose Vs. Sivan Pillai and Others, , the EV

Ms could not be used after 1983. But on the recommendation of the Election Commission, Act 1 of 1989 was introduced by the Parliament

introducing Section 61-A. Corresponding amendments were made in the Rules and a new chapter regarding EV Ms was inserted. The design and

model of the existing EV Ms were finalised by the EC in May 1989. By March 1990, the Commission procured 1,50,000 EV Ms from Electronic

Corporation of India Ltd. (ECIL for short) at a cost of Rs. 73.5 crores. It is also stated that the matter was referred to the Electoral Reforms

Committee known as "Dinesh Goswami Committee, which appointed another "Technical Experts Committee" consisting of distinguished scientists.

The Experts Committee examined the machines minutely from all technical angles and recommended its use. The Election Commission held

meetings in December 1995 and May 1997 in which a large number of parties were positive about the introduction of EV Ms. A conclusion was arrived at that the EV Ms had to be introduced in India initially in a limited manner and thereafter it should be expanded. In 1998 general elections, due to paucity of time EV Ms could not be used. However in November 1998 the use of EV Ms was started at the general elections to the Legislative Assemblies in Madhya Pradesh, Rajasthan and Delhi. In the counter, the proper preparations so made, regarding choosing of constituencies, preparation of materials to polling and counting agents and the conduct of special training programmes to them by the Election Commission are stated in detail. Mass Communication through media is also mentioned. The arrangements made for testing of each machine, by the personnel of mobile parties consisting of technical staff and the readiness for replacement of any machine, if machine developed any defect are also mentioned. The Election Commission engaged the "Centre for Study of Developing Societies, Delhi" to conduct a detailed study on the use of EV Ms in Madhya Pradesh and Delhi during 1999 bye-elections in which the awareness of public at 87.7% the favorable response for the use of EV Ms at 90.6% and time taken for counting by 2 to 3 hours, were revealed. It is stated that in June 1999 the EC extended the use of EV Ms to 45 Parliamentary constituencies for electing the 13th Lok Sabha involving 17 States including the State of Tamil Nadu and 3 Union Territories covering and 62,360 polling stations, the number of electors being almost 60 million. In Delhi, all the Parliamentary Constituencies with 9,132 polling stations were covered by EV Ms. The use of EV Ms during the general election to the Haryana Legislative Assembly in February 2000 is also spoken to. It is further stated that out of 1,01,245 machines used in the Lok Sabha and State Assembly Elections between 1998 and 2000, only 12 machines were found to have developed some defects in operation of memory with the error percentage 0.001. If any machine needed replacing, the memory of the votes recorded therein before the defect developed remains intact and can be retrieved at the time of counting the votes. In order to eliminate such defects, a further review by a team of officers of the EC with the representatives of ECIL at Hyderabad was held on 26.4.2000. The improvements made in the new machines pertaining to the provision of additional set of memory device to store data and an

Auxiliary Display Unit to read and display the data stored are also set out in the counter in detail. The technology is robust and simple. The

Government of India accepting the proposals of the EC provided funds for the purchase of more EV Ms during the general elections in April -

May 2001. The Commission accordingly placed orders for the purchase of 1,30,000 more EV Ms from the ECIL and BEL at a cost of 150 crores.

15. In the counter, elaborate mention is made about the design of EV Ms and the voting procedure, annexing the manuals prepared by BEL and

ECIL. It is categorically stated that by using the EV Ms the need for printing huge quantity of ballot papers is dispensed with saving the cost of

paper and printing to a great extent. Voting by EV Ms is smooth and easy and the result can be ascertained in 2 hours. No rigging is possible. The

functioning of EV Ms is narrated in the counter in detail. The present EVM can be used in a constituency where the number of contesting

candidates is up to 64. The voter can see a red light glowing against the name and symbol of the contested candidates and also here a "Beep

Sound" emanating from the control unit to indicate that his vote has been recorded for whom it was intended. Every vote will be recorded only

after releasing through the control unit for the next elector. Thus, no vote will be wasted. The control unit is like the brain of the whole system. It

can record 3,840 votes at a polling station. It is also stated that in the case of filing of an election petition, using the information so kept in the

memory of EV Ms, it can be retrieved.

16. Like conventional voting, Section 169(l)(h) empowers the making of rule for safe custody of voting machines and contents and by the insertion

of Rules 92(1-A), 92(2)(dd), 93(l)(dd), 93(l-A) and Rule 94(aa), safe custody and the preservation of voting machines are taken care of. Rules 49-

B, 49-E, 49-L, 49-M, 49-T and 49-U of the Rules provide for the preparation of voting machines, sealing and for securing and their applications

have been stated in detail in the counter.

17. It is stated that no single occasion of the smashing or damaging or tampering with the EVM has been reported. The memory of EV Ms shall

not be erased at least for 10 years. It is not possible for an individual elector to press the candidate's button on the balloting unit more than once.

The checking of the identity of the elector through agents is maintained in EV Ms also. Thus, no proxy vote can be franchised. The indication of glowing of green bulb when it is ready and the beep sound after casting the vote have been mentioned in the counter. It is also stated that the microchip, which is the brain of the whole system can never be replaced. The programme is written independently in the assembly language of the microprocessor by the two Public Sector Corporations ECIL and BEL, and fused on the microprocessor chip at the facility of the chip manufacturer, Hitachi Corporation, Japan. Once fused, the instructions cannot be altered or overwritten by anyone including the persons writing the programme. This is commonly known as Firmware. In the case of EV Ms, the microprocessor chip is soldered directly on the printed circuit motherboard. Since the distances between the contacts are too small to be handled even by highly skilled workers, the actual placement is done using machines with in-built robotic arms and contact leads are wave-soldered on to the motherboard. It is infeasible for the chip to be replaced through a manual process. It is further stated that general purpose computers such as Desktop, Personal Computers cannot be compared with the EV Ms produced in India.

18. It is also stated that Section 61-A of the 1951 Act empowers the Election Commission to use the EV Ms in such constituency or constituencies, as the Election Commission may deem fit, taking into consideration the circumstances of each case. In an appropriate case, the Commission may even decide to use the EV Ms in all Constituencies of a State if justified and warrant the use of such machines. The intention of the Parliament was to maximize the use of EV Ms in general election. The Constitution and the statutory provisions, collectively give the limited area where discretion should be exercised. With these, it is submitted that all the writ petitions deserve to be dismissed.

19. A detailed counter affidavit has been filed on behalf of the Union of India denying the allegations made by the writ Petitioners. It is stated that Section 61-A has been inserted by the Act 1 of 1989 in conformity with the pronouncement of A.C. Jose's case and corresponding Rules were made hereunder. Relevant portions from the Statement of Objects and Reasons are mentioned. It is categorically stated that there is no abdication

of power and sufficient guidelines are available to the Election Commission as evidenced by the Rules. It is further submitted that the manner of

voting through voting machines has been elaborately prescribed by the Rules. Most of the averments in the counter affidavit of the Election

Commission are reiterated in this counter affidavit. Huge amount to the tune of Rs. 150 crores has been spent for acquisition of EV Ms to conduct

elections in a free, fair and smooth manner. The apprehensions of the writ Petitioner are unfounded and Section 61-A is in no way repugnant to the

provisions of the Constitution and the Act. Therefore, the writ petitions have to be dismissed with exemplary cost.

20. W.P. Nos. 6038 and 6039 of 2001 were filed on 27.3.2001 and also posted before the Court on 29.3.2001.

21. As the points involved are same and identical and as agreed to, all the writ petitions are heard together.

22. Mr. P.P. Rao Learned Senior Counsel argued exhaustively on 27.3.2001 and 28.3.2001. The Learned Counsel for the Petitioners in other

writ petitions adopted the arguments of Mr. P. P. Rao Learned Senior Counsel.

23. Mr. P. P. Rao Learned Senior Counsel for the Petitioner in W.P. No. 3346 and 4945 of 2001 mainly attacked the decision of EC making use

of EV Ms, stating that Section 61-A of the Act suffers from arbitrariness on account of abdication of powers. He submitted that when power has

been conferred u/s 59 of the Act, the words ""Notwithstanding"" ""in such manner as may be prescribed"" and a such constituency or constituencies

used in Section 61-A will clearly reveal that there is abdication of powers. Therefore, the said Section is liable to be struck down. He relied upon

the decision in In re: Article 143, Constitution of India and Delhi Laws Act (1912) etc. AIR 1951 SC 332 wherein after referring to American and

English cases, it has been held as follows:

...The Policy may be particularised in as few or as many words as the legislature thinks proper and it is enough if an intelligent guidance is given to

the subordinate authority. The Court can interfere if no policy is discernible at all or the delegation is of such an indefinite character as to amount to

abdication, but as the discretion vests with the legislature in determining whether there is necessity for delegation or not, the exercise of such

discretion is not to be disturbed by the Court except in clear cases of abuse.

...The limits of the powers of delegation in India would therefore have to be ascertained as a matter of construction from the provisions of the

Constitution itself and as I have said the right of delegation may be implied in the exercise of legislative power only to the extent that it is necessary

to make the exercise of the power effective and complete½.

He submitted that essential things relating to the election must be provided only by the legislation and not by delegated legislation. He also relied on

paragraphs 231 to 234,246,252 and 262 of the aforesaid judgment. Learned Senior Counsel then referred to the portions in the decision wherein

it was held that "the delegation of legislative authority could be permissible but only as ancillary to, or in aid of the law making powers by the

proper legislature and not as a means to be used by the latter to relieve itself of its own responsibility or essential duties by devolving the same on

some other agent or machinery and it can, on no account throw the responsibility which the Constitution imposes upon it on the shoulders of an

agent or delegate and thereby practically abdicate its own powers. He further relied on the decision in B. Shama Rao Vs. The Union Territory of

Pondicherry, particularly referring to paragraph 5 wherein it has been stated that ""the legislatures had power to delegate within certain limits but

delegation of an essential legislative function which amounts to abdication even partial is not permissible"". Stressing the above proposition Learned

Senior Counsel submitted that in the instant case, there is a total abdication of legislative power by Parliament to the Election Commission. Learned

Counsel drew our attention to paragraph 24 of the aforesaid judgment in which majority view was expressed, paragraph 37 wherein the

classification was commented upon by Mahajan J and respective views expressed by their lordships in different paragraphs of the said judgment.

Learned Senior Counsel also referred to the decision in Hamdard Dawakhana and Another, Kalipada Deb and Another, Lakshman Shripati Itpure

@ Lakshman Shripati Impore and A.B. Choudhri and Another Vs. The Union of India (UOI) and Others, where the constitutionality of Drugs and

Magic Remedies Act 1954 was challenged on the ground of violation of the Articles in Part III of the Constitution of India and the impugned

Section therein was struck down. He further submitted that even when the words used were ""subject to"" in the above mentioned case, the

Supreme Court did not hesitate to strike down the offending Rule and the same principle would be squarely applicable to the present case where

the words "notwithstanding anything" have been used. Then the Learned Counsel relied upon the decisions in *Jyoti Pershad Vs. The Administrator*

for *The Union Territory of Delhi*, and *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, to show that excessive delegation is

present in this case. Relying upon the decision in *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, pertaining to the case

which arose under the Punjab General Sales Tax Act, Learned Senior Counsel submitted that guidelines are necessary to conduct election in the

manner as prescribed and in the absence of the same Section 61-A is liable to be struck down as it is ultra vires the act. He also relied upon the

decision in *Harakchand Ratanchand Banthia and Others Vs. Union of India (UOI) and Others*, and contended that there is excessive delegation in

the instant case.

24. Next he relied on the decision of the Supreme Court in *A.N. Parasuraman Etc. Vs. State of Tamil Nadu*, and contended that the legislature

cannot delegate its essential function of determining the legislative policy and Rule of Conduct. He also submitted that the mere fact that high

constitutional functionary, viz., Election Commission, has been invested with the power cannot make any difference. The Learned Senior Counsel

also relied on the decision of the Supreme Court in *Delhi Transport Corporation v. D.T.C Mazdoor Congress and Ors.* AIR 1991 SC 100

wherein it was observed, "fundamental rights can ill afford to be consigned to the limbo of undefined premises and uncertain applications. That will

be a mockery of them.

25. The Learned Senior Counsel also relied on the decision of the Supreme Court in *A.R. Antulay Vs. R.S. Nayak and Another*, and submitted

that no prejudice need to be proved for enforcing the fundamental rights. The violation itself is prejudice. In the instant case, no opportunity was

given to the public at large when particularly most of the voters are illiterate and are more accustomed to the traditional method of voting. Learned

Senior Counsel submitted that opportunity of being heard must have been given to the public when their rights are involved in the same way as

provided for delimitation of constituencies and reservation of constituencies for S

Cs and S Ts. Learned Senior Counsel then relied upon the decision in S.L. Kapoor Vs. Jagmohan and Others, in which it has been postulated that the requirements of natural justice are met only if opportunity to represent is given in view of proposed action. It is absent in this case and as such, it is a clear violation of principles of natural justice rendering the Act a nullity. Learned Counsel vehemently contended that though right to vote is not a fundamental right, it is a constitutional right and not a mere statutory right. He stoutly argued that violation of fundamental right itself renders the impugned action void.

26. He further contended that their lordships while setting aside the impugned election for want of jurisdiction, in A. C. Jose's case (cited supra)

observed that before the introduction of voting machines, people should have been given training and in the instant case, no training was given.

Therefore, Section 61-A is liable to be struck down as ultra virus.

27. Mr. Abdul Kalam, Learned Counsel for the Petitioner in W.P. No. 3633 of 2001 has raised two points viz. (i) right to vote is curtailed or

invaded rather it destroys the very purpose of the election and (ii) by delegation u/s 61-A whether it curtails the power of election tribunal.

28. Mr. V.T. Gopalan, learned Additional Solicitor General for the Respondent - Union of India commenced his argument reiterating the

averments made in the counter affidavit. It was submitted that after the decision of the Honorable Supreme Court in A. C. Jose's case (cited

supra) the defects pointed out therein have been removed by introducing Section 61-A on 15.3.1989. Thereafter, the Rules have been framed

exercising the power conferred u/s 169 of the Act. He also submitted that a detailed procedure for the EV Ms has been prescribed in the Act and

the Rules. He submitted that the Section should be read with the Rule framed under the Act. He submitted that a policy to use the EV Ms is there

in the Act and it is sufficient and there is no question of excessive delegation. He submitted that Rules only supplement the Section and they are not

overriding the Act. As such, no question of excessive delegation will arise. He also submitted that no question of absence of guidelines would arise

in this case. Learned Additional Solicitor General submitted that nothing is available to lay our hands on, to contend that Section 61-A has been

introduced arbitrarily. He further submitted that the Petitioners have not

challenged the Rules and only Section 61-A has been challenged. He pointed out that the Rules have been framed using delegated legislation and they are to be laid on the table of both the Houses of Parliament and the Parliament can make amendments, if necessary. He submitted that as stated above, the Parliament's control over the delegated legislation is present and no question of abdication of powers by the Parliament to the Government will arise. He drew our attention to Sub-sections (ee), (gg) and (h) of Section 2, which elaborately detail out the manner and the procedure to be followed at the Poling Stations, at the counting points and also about the preservation of EV Ms in safe custody. He implored that the Rules have to be read as part and parcel of the Act. He relied on the decision in *Peerless General Finance and Investment Co. Limited and Another Vs. Reserve Bank of India*, . He took us through Chapter II of the Conduct of the Election Rules particularly, Rules 49(A) to 49(X). According to the learned Additional " Solicitor General, a thorough reading of Section 61-A coupled with Section 169(2) and Chapter II of the Rules as stated above will show that there is a complete scheme and it is a code by itself for voting through Electronic Voting Machines. Rebutting the argument that Parliament alone can make provision for election matters, relying upon Article 312, where delegation is permitted, he submitted that the phrases used in Article 327 and Article 312 are more or less couched in similar language. He also relied on the decision in *D.S. Garewal Vs. The State of Punjab and Another*, . He relied on the decision in *Rajnarain Singh Vs. The Chairman, Patna Administration Committee, Patna and Another*, wherein it was held as follows.

Delegation is given to the Court to the extent of authorising an executive authority to modify the law, but not in any essential feature. As to what constitutes an essential feature cannot be enunciated in general terms. Thus there can be delegation of legislative functions to executive authorities within certain limits.

This decision, according to the Learned Additional Solicitor General, is a complete answer to the case of the Petitioner as in the instant case, the Rules were laid before the Parliament and once they got the seal of approval, nothing further could be decided against the rules.

29. On the question of interpretation of statutes, learned Additional Solicitor

General relying upon the decision in Sanjeev Coke Manufacturing

Company Vs. Bharat Coking Coal Limited and Another, , submitted that once a statute leaves Parliament House, the court is the only authentic

voice to echo the intent of the Parliament. He further submitted that keeping in mind the number of EV Ms available, the fact that elections are

going to be held only for five State Assemblies, the fact that the voting machines can be used only if the maximum number of candidates is less than

64, and the Election Commission is going to use EV Ms in such Constituencies and, therefore, it will not mean that there is an arbitrary exercise of

power.

30. On the question of violation of principles of natural justice, learned Additional Solicitor General submitted that there is no obligation to give

public hearing, rather opportunity was given to the political parties, and their suggestions have also been considered. Sufficient safeguards have

been given in the Rules.

31. The vires of the act is now challenged after an abnormal delay, even when on earlier occasion respective political parties participated in the

elections and voters have exercised their votes through the EV Ms. Only to forestall the election, the Vires of the Act is now challenged when the

elections are going to be held within two months. He further submitted that though the propositions enunciated in the case laws, cited by the

Learned Senior Counsel for the Petitioner are not disputed, yet they are not applicable, to the facts of the present case. Mr. G. Rajagopalan

Learned Senior Counsel appearing for the Respondent Election Commission took us through the chronological stages shown in the Representation

of People Act especially Chapter IV Poling, Chapter VII publication of results in Part V. and Sections 56 to 62 of the Act. He submitted that two

methods are contemplated for the conduct of election viz., one u/s 59 and another u/s 61-A of the Act which came to be inserted after the

pronouncement in A.C. Jose case (supra). He submitted that right to vote is not a constitutional right but statutory right. Therefore nobody can say

that he will vote in a particular way. Voting can be done either through Ballot as referred to u/s 59 or through voting machines as stated u/s 61-A.

He relied on the passages available in the book authored by Her Excellency T.S. Rama Devi, Governor of Karnataka and Mr. S.K. Mendiratta,

where in it has been mentioned that "" the huge consumption of papers, lakhs of ballot boxes, storage and upkeep during the non - election period is

a serious problem "".EV Ms are simpler and quicker. It was also submitted that EC was satisfied scientifically and technologically that these

machines cannot be tampered with and all the political parties are aware of the same.

32. Regarding the words ""not with standing anything "" used in Section 61-A, Learned Senior Counsel referred to various dictionaries viz. Black's

Law Dictionary 7th edition, Legal thesaurus by William C. Burton and Dictionary on Modern Legal usage and submitted that what is contained in

Section 61-A is nothing more and nothing less and it cannot be construed that it overrides the provision forever. He clarified that recording of vote

by machines is notwithstanding what is contained in Section 59 and the rules made thereunder. The phrase was used by way of abundant caution.

For that proposition, he relied on the decisions in Union of India (UOI) and Another Vs. G.M. Kokil and Others, ; Smt. Parayankandiyal Eravath

Kanapravan Kalliani Amma and others Vs. K. Devi and others, and the The Dominion of India and Another Vs. Shrinbai A. Irani and Another, .

He also submitted that the scheme of the Act is very clear and unambiguous to remove the defects pointed out in A.C. Jose case, which held that

there was want of legislative sanction, after due deliberations and consideration, the Parliament has enacted Act 1 of 1989 and Section 61-A has

been inserted. Lastly, he submitted that the word ""notwithstanding"" is to be read in the context of combined reading of Sections 59 and 61-A.

33. Learned Senior Counsel submitted that when there is no arbitrariness, the question of abdication of power does not arise. As regards

constituency or constituencies"", the same has to be decided by the Election Commission as per the available situation. The use of EV Ms is a

foolproof system, not prone to any error, and it was also confirmed by the various technical experts and Committees formed. Therefore, these writ

petitions are filed for nothing but to stall the election process for one reason or other. He submitted that the writ petitions are liable to be dismissed.

34. Mr. P. P. Rao Learned Senior Counsel, in rejoinder, brought to our notice the difference between the Sections 59 and 61-A and submitted

that there is no mandate in Section 61-A, like in Section 59. He further submitted that the procedural part is left with the Government of India. Rule

making power is given to Union of India u/s 169, and their power is notwithstanding anything contained in the Act and the Rules made there under, which amounts to abdication of powers. The words ""notwithstanding"" is the objectionable part. About the constituencies as to where it shall be

used, the legislation is silent. That apart, it is left completely to the EC, whereas Section 59 leaves nothing to the EC. Therefore, Sections 59 and

61-A are not pari materia. He also submitted that as far as EC is concerned, unfettered power of discretion is given to select the constituencies.

35. Regarding abdication of power Learned Senior Counsel submitted that Section 169 (3) talks of laying before Parliament which shall be for

delegation of power and not in the case of abdication of powers. Safeguards are contemplated in the case of delegated legislation and not in the

case of abdication, which goes to the root of the matter. He further submitted that Section 61-A does not say that voting machine means electronic

or non- electronic machine whereas Section 59 clearly says ballot. He also submitted that it is also not said in the Section that both the ballot and

voting machines can be side by side. He submitted that explanation to Section 61 -A refers to ballot or ballot papers whereas Section 61-A does

not use the word ballot. Learned Senior Counsel submitted that though right to vote is not a fundamental right, yet it is a constitutional right, not a

statutory right. He drew our attention to Article 246(1). Learned Senior Counsel submitted that the difference between Articles 312 and 327 has

already been specified and for that proposition, he relied on the decision in Harla Vs. The State of Rajasthan, .

36. Mr. N. Jothi, Learned Counsel for the Petitioner in rejoinder in reply to the stand of the EC, submitted that they can even over rule the

explanation given u/s 61-A in view of the words used ""anything"" contained in the Act and Rules. He submitted that no advantage has been shown

and the advantages stated cannot be a greater advantage at all. He further submitted that one of the advantages that invalid votes can be eliminated

is not at all an advantage, as the voters will do it intentionally. He also argued that there is no question of estoppel on the part of the Petitioner, as

every election gives fresh cause of action. Pertaining to election process, Learned Counsel submitted that it starts with finalisation of the

candidates, He further submitted that the machines are not sealed in the presence of any of the political parties prior to the finalisation of the

candidates. But they are now available with the revenue officials. He submitted that neither the political parties nor the public are permitted to see

them. So there is every possibility of setting the programme in such a way as to favour a particular party candidate. He apprehends that there is

every possibility of pressing ""Result"" button at the stage of voting itself. He also submits that EV Ms can be destroyed by banging on it. He further

submitted that in counting nobody knows how the votes are counted.

37. We have heard the Learned Counsel for the respective parties and perused the materials and the citations relied on by the counsel at bar. It

will be appropriate to extract the relevant Sections framed under the Act and the respective amendments, which are as follows:

Section 61-A:

Voting machines at elections-Notwithstanding anything contained in this Act or the rules made thereunder, the giving and recording of votes by

voting machines in such manner as may be prescribed may be adopted in such constituency or constituencies as the Election Commission may,

having regard to circumstances of each case, specify.

Explanation- For the purpose of the Section, ""Voting machines"" means any machine or apparatus whether operated electronically or otherwise

used for giving or recording of votes and any reference to a ballot box or ballot paper in this Act or the rules made thereunder shall, save as

otherwise provided, be construed as including a reference to such voting machine wherever such voting machine is used at any election.

Section 58: ""Fresh poll in the case of destruction, etc., of ballot boxes -(1) If at any election, -i½ (a) Any ballot box used at a polling station or at

a place fixed for the poll is unlawfully taken out of the custody of the presiding officer or the returning officer, or is accidentally or intentionally

destroyed or lost, or is damaged or tampered with, to such an extent, that the result of the poll at that polling station or place cannot be

ascertained; or (aa) any voting machine develops a me-chancel failure during the course of the recording of votes: or (b) Any such error or

irregularity in procedure as is likely to vitiate the poll is committed at a polling station or at a place fixed for the poll, the returning officer shall

forthwith report the matter to the Election Commission.

Section 59: ""Manner of voting at elections -At every election where a poll is

taken votes shall be given by ballot in such manner as may be prescribed, and no votes shall be received by proxy

Section 169: ""(1)... ""(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provided for all or any of the following matters, namely:

(ee) The manner of giving and recording of votes by means of voting machines and the procedures as to voting to be followed at polling stations

where such machines are used:

(gg) the procedure as to counting of votes recorded by means of voting machines;

(h) The safe custody of [ballot boxes, voting machines], ballot papers and other election papers, the period for which such paper shall be

preserved and the inspection and production of such papers;

(i).

(3) Every rule made under this Act shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total

period of thirty days which may be comprised in one session or [in two or more successive sessions, and if before the expiry of the session

immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses

agree that the rule should not be made,] the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so,

however, that any such modification, or annulment shall be without prejudice to the validity of anything previously done under that rule.

38. Let us first examine whether the new Section 61-A introduced by Act 1 of (1989) is ultra vires the Constitution and in particular. Articles 14,

248, 324, and 326 to 328. Learned Counsel for the Petitioner vehemently contended that Section 61-A suffers from arbitrariness, excessive

delegation, lack of guidelines, and by the use of the expression "notwithstanding" there is total "abdication" of legislative power.

39. So far as the law is concerned it is well settled that either the Rule or the notification cannot override the provisions of the Act but at the same

time it can supplement the act. Now, the question is whether the insertion of Section 61 -A overrides the other provisions of the act or not. It is

also settled that delegation of legislative authority could be permissible with restrictions/limitations but the Parliament can on no account throw the responsibility, which the Constitution imposes upon it on the shoulders of an agent or delegate. No doubt, if any provision of the act confers uncanalised and uncontrolled powers to the executive, it will be ultra vires. The crux of the argument of the Learned Senior Counsel for the Petitioners is that due to the words "notwithstanding" in the manner as may be prescribed and "such constituency or constituencies". Section 61-A is ultra vires of the act. It is seen that Section 61-A, which has been inserted to give effect to the decision in A.C. Jose Vs. Sivan Pillai and Others, , consists of three parts viz., the enacting part spelling out the wisdom and policy of Parliament, the non obstinate clause giving overriding effect to the enacting part, and the third part, viz., delegation of the power of manner of using the voting machine. Under Sections 169 (2)(ee) (gg) and (h) specific power has been given to make Rules and Rules have to be read as part of the Act. The Rules have to be laid before Parliament and we are told that the new Rules relating to EV Ms were laid before both the Houses of the Parliament. The Parliament indeed can make amendments if necessary. The Parliament's control over the legislation cannot be said to be absent. The legal and constitutional position as it then stood, has been summed up in A.C. Jose case to the effect that when there is no Parliamentary legislation or Rule made under the said legislation, the Commission is free to pass any orders in respect of the conduct of the elections. It is also made clear that when there is an Act and express Rules are made thereunder it is not open to the Commission to override the Act or the Rules and pass orders in direct disobedience to the mandate contained in the Act or the Rules. It has been specifically stated that the powers of the Commission are meant to supplement rather than supplant the law in the matter of superintendence. It is crystal clear that no man.-date is given a go-by by the enactment of Section 61-A. The word "notwithstanding" should mean that notwithstanding what is stated in Section 59 with regard to ballot papers, votes given by ballot shall mean and include the giving and recording of votes by voting machines. The word "notwithstanding" has been defined variedly as "despite, in spite of in Blacks Law Dictionary VII edition;" all the time, although, nevertheless ½ (William C. Burton); As rightly pointed out by Mr. G. Rajagopalan Learned Senior Counsel,

the said word cannot be construed to mean that it overrides every other provision. Sections 59 and 61-A can co-exist if a harmonious construction

is attempted. In *Union of India (UOI) and Another Vs. G.M. Kokil and Others*, , the word "notwithstanding" has been considered by the Supreme

Court and it is categorically stated that non- obstinate clause is a legislative device employed to give overriding effect to certain provisions.

Similarly in *Smt. Parayankandiyal Eravath Kanapraavan Kalliani Amma and others Vs. K. Devi and others*, , non obstinate clause has been dealt

with and found that the non obstinate clause will not be an impediment for the operation of the enactment. In *The Dominion of India and Another*

Vs. Shrinbai A. Irani and Another, , it has been absorbed that ""the non obstinate clause has to be read as clarifying the whole position and, must be

understood to have been incorporated in the enactment by the legislature by way of abundant caution and not by way of limiting the ambit and

scope of the operative part of the enactment."" A reference can also be made to the decision in *P.E.K. Kalliani Amma v. K. Devi (Supra)* wherein

their lordships held as follows:

Non obstinate clause is sometimes appended to a Section in the beginning with a view to give the enacting part of the Section, in case of conflict an

overriding effect over the provision of Act mentioned in that clause. It is equivalent to saying that in spite of the provision or Act mentioned in the

non obstinate clause, the enactment following it will have its full operation or that the provision indicated in the non obstinate clause will not be an

impediment for the operation of the enactment see *Union of India v. G.M. Kokil* 1984 supp. SC 196.

In view of the above discussion, so far as the word ""notwithstanding"" is concerned, we are of the view that the mere use of the word

notwithstanding in the facts and circumstances of the case, cannot be held to be amounting to abdication of powers.

40. Regarding the contention that the words ""in such manner as may be prescribed"" cannot be used in the absence of any guidelines, the Parliament

after the decision rendered in *A.C. Jose's* case, had deliberations and after consideration declared its policy to use EV Ms. We are of the view

that the Parliament cannot give elaborate details. Therefore, by merely saying that no guidelines have been given explicitly, Section 61- A cannot be

declared as ultra vires of the Act. This argument can be looked at from another angle also. A look at Section 59 which reads, ""at every election

where a poll is taken votes shall be given by ballot in such manner as may be prescribed,"" and no votes shall be received by proxy"" shows that the

Parliament has used the same words "" in such manner as may be prescribed"" employed in Section 61-A also, and it is prevailing from the

beginning. It is revealed that Parliament for conducting elections through ballot boxes have not given any guidelines as suggested but Rules have

been framed to conduct elections as that of papers ballot, in such a manner prescribed i.e. for that specific Rules are there. So, when such a system

was in vogue, it cannot be said that in the absence of guidelines, Section 61-A has to be struck down for using the words "" in such manner as may

be prescribed."" In other words, without any elaborate detail regarding the procedure of conducting elections through ballot box in Section 59 of

the Act, when the system was settled, the procedure was there. So on merely saying that no guidelines have been given u/s 61-A when under this

Section also Rules, and manner have been prescribed, no direction can be given and the argument of Mr. Rao is not acceptable. We are of the

firm view that when the Sections and the Rules form a complete code by themselves, no question of absence of guidelines will arise. That apart, as

stated above, Sub-sections (2) (ee), (2) (gg), and (2) (h) of Section 169 make it clear that sufficient power has been conferred upon the EC to

make Rules.

41. Regarding the contention that without specifying the constituency, mentioning "such constituency or constituencies", in Section 61 -A of the

Act, is ultra vires, on a perusal, we find that the scheme of the Act is very clear and the legislative policy is to permit EV Ms. Section 61-A

provides that the giving and recording of votes by EV Ms in such manner as may be prescribed may be adopted in such constituency or

constituencies as the EC may, having regard to the circumstances of each case, specify. According to the Learned Counsel for the writ Petitioners

to choose the constituency where EVM has to be used, more power has been given to the EC. As we have stated already, the use of EV Ms

depends upon the number of contestants, the stage of elections in a particular constituency, feasibility and the availability of machines. Taking into

account all these circumstances, the EC has to decide whether in such constituency, EV Ms can be used or not. Therefore, it cannot be said for the use of EV Ms and to exercise discretion, more power is given to the EC, and interference is required by this Court. For the reason discussed above, we are also of the view that no particular constituency can be earmarked in Section 61-A of the Act itself for the use of EV Ms because of the primacy of the EC under Article 324 of the Constitution. That apart as between Arts. 324 and 327, Article 324 is not subject to any provision of the Constitution. In such circumstances, if the Parliament makes any law, which has even indirect effect of interfering with the EC, that law would certainly be invalidated. Further as per Section 169 of the Act, the Central Government may consult with the Election Commission for making rules for carrying out the purposes of the Act. In view of this act, we are quite convinced that the policy of the Parliament alone is stated in the act, leaving the details to the Central Government to get implemented in consultation with the EC. Therefore, on this ground also, it cannot be said that Section 61-A smacks of arbitrariness.

42. So far as the argument regarding delegation of powers is concerned the Learned Senior Counsel relied on the decision *Tata Iron and Steel Co.*

Ltd. Vs. The Workmen and Others, wherein stressing the need for flexibility of procedure to meet the changing circumstances and that the

Parliamentary procedure and discussion in getting through a legislative measure is time consuming, the Supreme Court explained the necessity for

delegated legislation and observed as follows:

The legislature, it must be borne in mind, cannot abdicate its authority and cannot pass on to some other body the obligation and the responsibility

imposed on it by the Constitution. It can only utilise other bodies or authorities for the purpose of working out details within the essential principles

laid down by it. In such cases, therefore, it has to be seen if there is delegation of essential legislative function or if it is merely a case in which some

authority or body other than the legislature is empowered to work out the subsidiary and ancillary details within the essential guidelines, policy and

principles, laid down by the legislative wing of the Government.

43. If we examine the present situation in the light of note of caution found in the above judgment of the Supreme Court, as discussed above, the

conclusion is inescapable that there has been no abdication. The policy decision to use EV Ms is taken by Parliament and the details are to be worked out only by the EC in the fact situation.

44. u/s 169 of the Act, the Central Government in consultation with the EC by notification in the Official Gazette may make rules for carrying out the purposes of the 1951 Act. Incidentally, as already noticed Article 324 is supreme and is not subject to any provision in the Constitution and in fact, Articles 326 and 327 are subject to Article 324. The framers of the Constitution took care to leave scope for exercise of residuary power by the Commission in its own right and it is within the domain of the Election Commission to conduct election and it is for the Government to articulate its policy and the decision is to be carried out by EC, the details of which cannot be provided in the enacted law and further, it is bound to take some time to cope with the situation.

45. The power of superintendence, direction and control of the preparation of the electoral rolls and the conduct of all elections have been vested with the EC under Article 324 of the Constitution. This position is strengthened in view of the decision in Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, wherein it was held that every contingency could not be foreseen or anticipated with precision. That is why there is no hedging in Article 324. The commissioner may be required to cope with some situation, which may not be provided for in the enacted laws and the rules. The Supreme Court also extracted from Sutherland Statutory Construction, 3rd Edition, page 20 the following:

An express statutory grant of power or the imposition of a definite duty carries with it by implication, in the absence of a limitation, authority to employ all the means that are usually employed and that are necessary to exercise of the power or the performance of the duty.... That which is clearly implied is as much a part of a law as that which is expressed.

The Supreme Court ultimately found that the Election Commission is competent to order repoll in an appropriate case.

46. It is also noticed that the Rules framed u/s 169 of the 1951 Act have not been challenged. Merely saying that there has been excessive legislation is not enough. As already stated, the Parliament is not expected to say

every minute detail in the act itself and the desires and wishes of the Parliament are to be carried out and for that Rules have been made wherein elaborate procedure has been prescribed. That apart, the counsel has not been able to point out, which Rule is ultra vires the Act or the Constitution, in the instant case. We find substance in the argument of Mr. V.T. Gopalan, additional Solicitor General to the effect that the Rules framed and laid down before the House of Parliament will answer many of the queries raised by the Petitioners. The provisions of the 1951 Act and the Rules make a complete code by themselves. In view of the above discussion, we are of the view that the EC is not invested with arbitrary exercise of power in the matter of choice of constituency or constituencies.

47. So far as the argument that in this Statement of Objects and Reasons, it is only mentioned "modern electronic processes should be deployed, "side by side", with the existing conventional system in the voting process", but now, without determining and deciding certain constituencies, the Election Commission is going to use EV Ms in the entire elections, and therefore it is bad, is concerned, the counsel cannot take advantage of mentioning of the words "side by side" in this Statement of Objects and Reasons. It cannot be interpreted that even at one constituency or even in one booth, both systems can go side by side. It only means, the Election Commission has to decide about the constituency or constituencies for the use of EV Ms at present where the contestants do not exceed 64. It depends upon the feasibility and the other circumstances, which are within the domain of the Election Commission, by exercising its discretion to come to a conclusion. Moreover the Election Commission cannot implement the new system overnight to all the constituencies and it can be implemented in a phased manner and in doing so, it can be used as per the procedure in select constituencies and in other places, the old method will be adopted. That apart, it is well established that objects and reasons are only an external guide for making a provision. In AIR 1997 3127 (SC) , it has been held that if the words used in the statute are clear and unambiguous, then the statute itself declares the intention of the legislature and in such a case, it would not be permissible for a Court to interpret the statute by examining the Objects and Reasons for the statute in question. Therefore, the Section cannot be struck down on the ground of arbitrariness also

when the provisions are clear, as in the present case.

48. As already stated, the principles set out in the various decisions relied on by the Learned Senior Counsel for the Petitioners are not at all helpful

to decide the controversy in hand. However, the point to be considered is whether, as contended by the Learned Senior Counsel, in the present

case, there has been total abdication of legislative power by the Parliament to the EC. The position can be aptly summarised by borrowing liberally

from the judgment of Mukherjea, J. (as the learned Judge then was) In Re: Article 143, Constitution of India etc. AIR 1951 SC 332 particularly

paragraphs 246 and 262. After referring to the American and the English cases, the learned Judge has succinctly put the matter and the relevant

portions as follows:

The limits of the powers of delegation in India would therefore have to be ascertained as a matter of construction from the provisions of the

Constitution itself and as I have said the right of delegation may be implied in the exercise of legislative power only to the extent that it is necessary

to make the exercise of the power effective and complete½. The legislature must retain in its own hands the essential legislative functions, which

consist in declaring the legislative policy and laying down the standard, which is to be enacted into a rule of law, and what can be delegated is the

task of subordinate legislation, which by its very nature is ancillary to the statute which delegates the power to make it.

In Rajnarain Singh v. Chairman, Patna Administration Committee (supra), the Supreme Court dealt with u/s 3 of the Bihar and Orissa Act I of

1915, as amended in 1928, by which the Central Government was given power to frame rules in future* which may have the effect of adding,

altering, varying or amending the rules accepted u/s 4 as binding. The rules were laid on the table of Parliament for 14 days before they were to

come into force. The Supreme Court held that Parliament had in no way abdicated its authority but was keeping strict vigilance and control over its

delegate. The relevant portion runs as follows:

delegation is given to the Court to the extent of authorising an executive authority to modify the law, but not in any essential feature. As to what

constitutes an essential feature cannot be enunciated in general terms. Thus, there can be delegation of legislative functions to executive authorities

within certain limits.

49. In view of what we have stated above, we have no hesitation to hold that there is no abdication of powers. No excessive delegation also can

be traced out. Parliament has given sufficient powers to the Election Commission and it has been used in just, fair and proper manner. We are also

of the view that no arbitrariness is shown and there is no absence of guidelines in the introduction of Section 61-A, as stated above. So, we find no

good reason to declare that Section 61-A is ultra vires. We answer the question raised at the beginning in the negative. The writ petitions W.P.

Nos. 3346 and 3633 of 2001 challenging the vires of the Section are therefore dismissed.

50. Now, the other writ petitions, wherein some doubts and apprehensions have been raised about the satisfactory functioning of the E.V. Ms, can

be considered as per the respective arguments advanced by the parties. To understand the issue on hand and to decide the issue, we think it

necessary to repeat what had already been mentioned earlier. As the facts culled out from the records, it is seen that after the decision in Jose's

case, on the recommendation of the Election Commission, Section 61-A came to be introduced to the Representation of the People Act, 1951

and corresponding amendments were also incorporated in the conduct of Election Rules mentioning about the procedure of conduct of elections

using EV Ms. Section 49-A talks of design of EV Ms, fixing the label and set the number of contesting candidates. Section 49-D speaks about the

admission to polling stations of candidates and election agents. Section 49-E speaks about the preparation of voting machines and the

demonstration to the effect that no vote had already been recorded in the voting machine. The procedure regarding fixation of paper seal, affixing

signatures of agents, seal used for securing the control unit and closing the same were elaborately mentioned. Identification of electors, which is a

salient feature is talked in Section 49-H coupled with Section 49-J challenging the identity by the agents. Safeguards against impersonation are

spoken to in Section 49-K. Procedure for voting is elaborately narrated in Section 49-L and maintenance of secrecy of voting is mentioned in

Section 49-M(2). Section 49(0) talks about the procedure when elector decides not to vote. This will not amount to invalid vote. Section 49-P

speaks about tendered votes. We take such pains just to show that sufficient safeguards have been taken in introducing the above Sections

formulating the procedures to be followed while making use of EV Ms by introduction of Section 61-A.

51. The matter relating to the use of EV Ms was referred by the Government in February, 1990 to the "Dinesh Goswami Committee" consisting of

representatives of several recognised national and State parties, which in turn, for the technical evaluation of the machines, appointed a technical

experts committee, consisting of distinguished scientists. The technical experts committee examined the machines minutely from every angle and

unanimously recommended the machines for using in elections. The EV Ms were put to use during the general elections to the Legislative

Assemblies in Madhya Pradesh, Rajasthan and Delhi in November, 1998 and they worked efficiently and smoothly without any problem,

appreciated by one and all. Moreover, the "Centre for Study of Developing Societies" Delhi, engaged by the Election Commission, conducted a

detailed study on the use of EV Ms during these elections and the study indicated that the response to the use of EV Ms was very favourable with

90.6% saying that they preferred the EV Ms. Further in 45 constituencies, EV Ms were put to use in February, 2000 general elections to the

Haryana Legislative Assembly. Out of 1,01,245 machines used during these elections between 1998 and 2000 only 12 machines, working out to

0.001%, were found to have developed some problems. In order to eliminate even such marginal defects, a further review by a team of officers of

the Election Commission with the representatives of ECIL at Hyderabad was held and certain improvements were made. The Election

Commission had taken every precaution as a prudent normal person can take in this matter. Though the error margin is negligible, they did not

want to take any chance and made corrections in the machines. During the use of EV Ms in the Assembly Elections during 1998, they had

stationed mobile parties with spare EV Ms to replace in the event of any emergencies. They took various steps like mass media campaign and

holding public demonstrations about the use of the machines, for both the public and the agents of the political parties. Now, it is seen that they had

gained the confidence and only after they were satisfied, they went in for the use of the same.

52. It is settled that this Court while exercising the writ jurisdiction under Article 226 of the Constitution of India has no power to sit in appeal over

the conclusions arrived at by Technical Experts and eminent scientists. Nor has this Court the expertise to go into the technical aspects.

Nonetheless as some apprehensions are voiced, the Court can see whether a person, who is a voter in the voter's list, will be allowed to cast vote

of his choice and every vote will go and count for the account of the particular contestant to whom he voted and whether with the connivance of

the officers, a voter can cast more than one vote.

53. On considering this aspect, we find that specific rules are there. Merely on the apprehension, howsoever strong it may be, a decisive

conclusion cannot be arrived at. Assumptions and presumptions cannot lead to a decision in the absence of concrete materials placed, when the

entire case was argued on the basis of apprehension. This Court cannot come to the conclusion on the basis of such apprehension so as to defeat

the object of the Act and the purpose of using EV Ms. The mere statement that the Petitioner could demonstrate some EV Ms to show the

possibility of misuse, is not helpful as those machines are not going to be used in the polls. In view of the earlier discussion, this Court finds no

ground to witness the demonstration.

54. On a perusal of the Rules and the counter affidavits, as discussed above, it is clear that the identity of the voter is ascertained by proper identity

card or by the polling agents/representatives of the political parties at that particular booth. Each and every voter is subjected to that test. That is

not taken away. About the functioning of the EV Ms., it has been categorically stated that it contains two units, namely control unit and ballot unit,

which are inter-connected. Once a person casts a vote, a beep sound would emanate and he cannot again press the balloting unit and it would be

locked automatically. Unless the next voter arrives to vote after completing the formalities, the Presiding Officer will not release the lock.

Moreover, the agents/representatives of all the contestants are there to inform the Presiding Officer to release the lock if necessary. Only after the

polling officer releases the lock for the next person, the machine will become functional. Further when agents of all the contestants are there, it is

not possible for the Polling Officer to connive with anybody as suggested, in

releasing the locks. Furthermore, the responsibility of accountability to the number of persons voted in that booth is fixed on the Polling Officers concerned. So, the Polling Officer cannot at his own whims and fancies, release the lock. In any case, it is not possible for the Presiding Officer to connive with the voter to cast vote more than once. So, the apprehension of the Petitioners is uncalled for.

55. Learned Counsel submitted that as per the observations made in A.C. Jose case (supra), the EV Ms should be used initially in urban areas, which is lacking in this case and as such, the use of EV Ms should be stopped. As discussed and as seen from the counter, the machine is so simple, robust and the Election Commission has the discretion to select the constituency or constituencies where the EV Ms to be used, after ascertaining the feasibility. The argument of the Learned Counsel for the Petitioners is not appealing to us on this ground.

56. Next, it is contended that a doubt will always remain there as to whether the vote of an elector has been registered. A perusal of the machine manual produced before us reveals that whenever a person casts his vote, a beep sound will be heard to those who are present in the booth concerned, and that is the signal of the registration of the casting of vote. A safety measure is provided that if the concerned person or agents do not hear any sound, they will inform the Polling Officer to release the lock.

57. Next it was vehemently contended that there is no guarantee provided to the effect that an elector could be sure that the vote cast by him by pressing the button, has been registered to the account of the contestant whom the voter intended. In the counter of the Election Commission, it has been mentioned that the EV Ms have been so designed and manufactured in such a foolproof manner that each vote is recorded faithfully and correctly only for the candidate in whose favour it is cast by the elector. The programme in the microchip in the EVM cannot be re-written or replaced. It is also seen that the gap is so little that only robotic arms can solder the leads. Further it is seen that it is absolutely impossible, when a vote is registered to a particular contestant, it can be accounted to another candidate. It is also seen that this apprehension had been removed by a demonstration of the EV Ms before the Election Commission and the representatives of various political parties. The manufacturing process

involves the logical design of the electronic gadgets and the programme is written independently by the Public Sector Corporations ECIL and BEL

and fused with the chip at the facility of the manufacturer Hitachi Corporation, Japan. In view of this, the apprehension of the counsel that it will not

go in the account of the same contestant falls to the ground. As per Rule 49-E (2) of the Rules, the presiding officer, immediately before the

commencement of the poll, shall demonstrate to the polling agents and other persons present that no vote has already been recorded in the voting

machine. In view of the full safeguard in the Rules, the contention on preprogramming of EV Ms falls to the ground. For the same reason, the

argument that the polling agents and political parties are not permitted to see the EV Ms before polling and therefore there is a possibility of

programming in favour of a particular candidate is unfounded.

58. It is also seen that control unit is the brain of the whole system. It has various buttons, "ballot" "close" "total" and "result". Every branch of the

unit is safeguarded and only the officers concerned can operate those buttons by breaking a paper seal. At every branch, the seals of polling agents

are to be obtained. So, if there is any tampering, it could be noticed by one and all. So also, the apprehension of the counsel for the Petitioner that

at the time of polling itself, a voter can press the result button is misconceived. So far as the apprehension that nobody knows as to how the votes

are counted, elaborate procedure has been set out in Part V. and Rule 66-A. Chapters 5 in EVM Manuals submitted by the Election Commission

also speak about the counting procedure. The book titled "Election in India ½ Major Events & New Initiatives 1996-2000" published by

Election Commission elaborately details the procedure in the conduct of elections.

59. There is also no question of introducing any virus or bugs for the reason that the EV Ms cannot be compared to personal computers. The

programming in computers, as suggested, has no bearing with the EV Ms. The computer would have inherent limitations having connections

through Internet and by their very design, they may allow the alteration of the programmes but the EV Ms are independent units and the

programme in EVM is entirely a different system. The accidental damage of the EV Ms will not cause any danger to the votes already cast and the

poll can be continued with the new one, as mobile parties with spare EV Ms will

be requisitioned, as per the contention of the Election Commission.

60. The advantages of using EV Ms outweigh the advantages in conventional ballot boxes. Need for printing huge quantity of ballot papers is dispensed with saving on cost of paper and printing. The invalid votes in the old system play a major role in turning the result of the elections. In some cases, the margin between the elected and defeated candidate is below 500 whereas the invalid votes run to 1000. In the EV Ms, invalid vote does not arise and every vote will be accounted. No rigging is possible and results can be ascertained in a shorter time. In the ballot papers in the conventional system, the voters prefer to write some messages leaving a bad taste and also wasting the whole exercise. This is not possible in the EV Ms. It is worthwhile to mention that the former Chief Election Commissioner, presently adorning the Chair of Governor, Karnataka, praised the use of EV Ms in the election to the effect that it is cheaper, easy to use and quicker and the need for printing huge quantity of ballot papers is dispensed with saving the cost of paper and printing.

61. Learned Counsel submits that right of hearing was given pertaining to the provisions of SC/ST Act and Delimitation Act. No such provision is prescribed in Section 61-A. We feel that this argument is not laudable for the reason that notice of hearing afforded in the provisions of SC/ST and Delimitation Act will not have anything to do with this case, as the right of a voter is not curtailed in the instant case and the use of EV Ms in the elections cannot be said to be bad on this count. The cases relied upon by the Learned Counsel on this issue are not helpful. Further, individual notice of hearing to more than 100 millions of voters is beyond imagination. As already stated, in the meeting conducted by Election Commission, various political parties participated and wide publicity was made through TV, Cinema, AIR, Press, etc. So, the contention that after the last election, EC had not made any programme to start with the use of EV Ms in urban places, is not appealing and on this ground, the use of EV Ms cannot be stopped. That apart, it is seen that millions of people had cast their votes using EV Ms during the early occasions and wide publicity was given for the use of EV Ms. So, in view of the discussion we had earlier, we feel that the argument of the Learned Counsel for the Petitioners on

this aspect will not hold any field.

62. Mr. N. Jothi, Learned Counsel for the Petitioner, submitted that mere sitting of the Election Commission with political parties alleged is not

sufficient and it will not preclude them from challenging the use of EV Ms and he relied on AC. Jose case (supra). But this ground cannot be taken

advantage of by the Learned Counsel to contend that EVM itself is bad and no delay had occurred. As already stated there is no estoppel in

challenging the statute but once the Petitioners had participated in the discussions and thereafter participated in the earlier elections wherein EV Ms

were used after insertion of Section 61-A, the argument of the Learned Counsel for the Petitioners is not helpful. On the other hand, the argument

of the Learned Counsel for the Election Commission that the writ petitions are filed now only to forestall the ensuing elections has some force.

63. The argument of Mr. Rao. Learned Senior Counsel, that the ultimate decision to start using EV Ms taken by the Election Commission was not

disclosed to them and a wrong impression was given in the counter affidavit that all agreed is not helpful and as discussed, it cannot lead to banning

using the EV Ms for the reasons stated above. That apart, the Petitioners have not pointed out any single failure in the machines earlier used in

some of the constituencies in Tamil Nadu during the Bye-Elections 1999, nor it was challenged.

64. The mere wild allegation of Mr. N. Jothi, Learned Counsel for the Petitioners, that programme could have been written so as to suit the ruling

party, is not tenable. The election is being conducted by the Election Commissioner, who is an independent high constitutional functionary. So, we

are not acceding to the Learned Counsel for Petitioners to issue a direction to ban the use of EV Ms on this ground.

65. So also the apprehension of the Learned Counsel that a mere blow on the EVM will damage the entire system and the data stored already

would have jumped to other persons also is not tenable in view of the elaborate safeguards provided in the Rules.

66. The allegation of Mr. Jothi, Learned Counsel, that machines are not sealed before political parties and are with the revenue officers and they

are not permitted to see and on the basis of that they should be prohibited, in our view, it is uncalled for the reasons already stated.

67. The contention of the Learned Counsel that the use of EV Ms in Japan and United States proved to be failure also will not hold any water. In

India, we are not following the system prevailing in the United States of America or Japan.

68. The contention of the Learned Counsel that the objection raised by the political parties should have been taken into consideration, that the EV

Ms should have been used initially at urban places and thereafter only final decision should have been arrived at, is also not tenable. In fact, there is

clamour for use of EV Ms in more constituencies which would be evident from the letters on file, addressed to the Election Commission by political

parties, which are in opposition. In our view, the voter cannot dictate that he should be allowed to cast his vote in the method he chooses. In view

of the insertion of Section 61-A and the procedure prescribed and the Rules framed there under, we are satisfied that there is no bar on the

Election Commission to choose the constituencies to use the EV Ms and it is well within its jurisdiction in the exercise of the power conferred upon

it. Therefore, as held above, no direction as prayed for in these writ petitions can be granted.

69. Mr. N. Jothi, Learned Counsel for the writ Petitioners, contended that what all the Election Commission had contended before this Court had

already been negated by the Supreme Court in A.C. Jose case (supra) itself, that in A.C. Jose case, their Lordships found that the use of EV Ms

itself was bad for want of legislative power and accordingly, repelled the contentions of Election Commission advanced therein. In the said

decision, their Lordships also observed at para 37, "however, we refrain from making any comments on either the defects or advantages of voting

machines because it would be for the legislature and the Government, if it revises its decision at one time or the other, to give legal sanction to the

direction given by the Commission." In the instant case, after the introduction of Section 61-A, Rules were framed there under. In the meeting

conducted by Election Commission, several political parties participated and apprehensions raised by political parties were also clarified. In the

subsequent elections, millions of electors cast their votes using the EV Ms. In such a fact situation, the argument of the Learned Counsel for the

Election Commission that the purpose of the challenge of the writ Petitioners raising technical aspects, with inordinate delay of about 10 years is

only to forestall the ensuing elections to be held within two months, has some force. As already stated, since we have upheld Section 61-A, and on

merits also, we find no infirmity to call for our interference. Under these circumstances, it is not proper and necessary to dismiss the writ petitions

on this ground of delay.

70. As already discussed, the procedure has been fully set out in the Rules. That apart, no Rule has been challenged. On this ground also Section

61 -A, cannot be held to be bad. So, a direction to ban the election cannot be issued on that ground also.

71. Next it was contended that sufficient training was not given. This contention is also not tenable. As per the counter, sufficient training has been

given to the officials and officers concerned. As discussed, we are satisfied that the EV Ms are user friendly and they can be used with ease

without spending much of the time on training. As stated before us, the Election Commission will spread full awareness among the voters through

various programmes in the mass media and will ensure to impart proper and more training before the actual election. It is expected that the EC will

carry out its objectives expeditiously.

72. The other argument advanced on the other side is that no voter has approached the Courts anywhere in India and therefore, the writ petitions

filed by political parties cannot be entertained and are to be dismissed as not maintainable and no direction in the nature of Writ of Prohibition can

be issued as it is settled that a writ of prohibition is not a writ of course but can only be issued when there is a defect of the jurisdiction apparent on

the face of the proceedings if the authority exceeded the jurisdiction or assumed jurisdiction when there is no jurisdiction. According to the Election

Commission, political parties are not voters themselves. So they cannot take up the cause of voters and insist that they expected a particular voter

had voted in their favour, to defeat the secrecy of the voter in the democracy. Though the argument has some substance, since we have already

considered the vires and upheld Section 61-A, and have also gone into the merits of the case and satisfied that sufficient safeguard has been

provided as per the Rules, it will not be proper to throw out the writ petitions on the ground of maintainability at this stage. We are satisfied that

sufficient safeguard has been provided as per the Rules. So, we are of the view

that the writ petitions cannot be thrown to the ground on this score.

73. The argument of Mr. Jothi that the mere quick results and elimination of invalid votes cannot be a ground to have the EV Ms when they have

in-built danger, has no substance. Nothing has been shown to convince us what is the in-built danger. We are quite satisfied with the procedure

prescribed under the Rule for the use of EV Ms. From the counter also, we are satisfied with its functioning. It is very simple and perfectly sound

as per technology without defect. As stated, this Court, on an overall consideration, including the points alleged, has upheld the vires of the Act.

74. So far as W.P. No. 3633 of 2001 is concerned, a machine was designed by the Petitioner therein but it was not accepted by the Election

Commission and ultimately, it was turned down. He filed a writ petition challenging the same and it was dismissed. Now, the Petitioner has filed this

petition challenging the vires of Section 61-A of the Act. Election Commission has objected to stating that the present writ petition is not

maintainable. In our view, the writ Petitioner could have challenged the vires of the Section 61-A in his earlier writ petition itself. That apart, the

Petitioner was also not able to show that he is a voter in the electoral list and he filed the writ petition in the capacity of a voter. Since we have

already gone into the merits of the case, in its entirety, it will not be proper to dismiss the writ petition solely on the ground of maintainability of this

writ petition.

75. As stated above, though this Court is not inclined to go into technical aspects, but as argued vehemently, on an overall consideration, we find

that no two votes can be cast by a single voter, as every vote is recorded only after releasing the lock by the Polling Officer. Registration of vote is

ensured by glowing of the bulb in "green". The secrecy is thus maintained. There is a provision for demonstration before voting, and sealing at

every stage including at the counting stage. The result button can be touched only by piercing the paper seal and not otherwise. At every stage, the

agents of the respective parties are there. We are quite convinced that sufficient safeguards are maintained by framing of Rules to have the election

conducted in just, fair and proper manner. The data are stored in the EV Ms permanently and they can be retrieved and used in the event of any

Election Petition/s being filed before the Court of Law. The apprehension of the

Petitioners that the use of EV Ms will not serve any purpose because of lack of procedures on maintaining the secrecy, counting registration of votes to the person to whom it was intended by pressing button, is unfounded. The minor defects which occurred in earlier elections amounting to 0.001% are negligible. The Election Commission also informed us that by use of some more modern technology, such defects also would be eliminated. In view of what has been stated above, we are in entire agreement with the contentions of the EC and we find no good ground to prohibit the use of EV Ms in the ensuing elections. All objections raised on behalf of the Petitioners are not acceptable and liable to be rejected. No other points were argued. The writ petitions have no merit and are liable to be dismissed. Accordingly, all the writ petitions are dismissed.

76. We hope and trust that the EC will ensure that the various minus points attributed to EV Ms are taken proper note of and remedial measures are taken well in advance including wide publicity before EV Ms are put into operation so that a voter, whose name is in the voters' list, shall exercise his franchise and a free, fair and independent election can be held and the public can repose confidence in the system and the election process. All the writ petitions fail and are dismissed. There will be no order as to costs. Consequently, all the connected miscellaneous petitions are also dismissed. Office shall issue a copy of this order to the Election Commission of India.