
(2016) 03 BOM CK 0102

In the Bombay High Court

Case No : Writ Petition Nos. 11278 of 2012 and 1016 of 2013

Anil and Others

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 11-03-2016

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 5(b)
Constitution of India, 1950 — Article 173, Article 190(3), Article 191, Article 192,
Article 192(1), Article 193, Article 226, Article 227, Article 243 (2G), Article 243-P, Arti

Citation : (2016) 3 AIRBomR 51 : (2016) 3 ALLMR 314 : (2016) 3 BCR 481 :
(2016) 2 MhLJ 708

Hon'ble Judges : S.C. Dharmadhikari, K.R. Shriram and B.P. Colabawalla, JJ.

Bench : Full Bench

Advocate : J.M. Puranik, for the Appellant; A.B. Vagyan, Government Pleader,
Vishal B. Thadani, AGP and Tintina Hazarika, for the Respondent

Final Decision : Disposed Off

Judgement

S.C. Dharmadhikari, J.—1. This Full Bench has been constituted to answer the following question:--

"Whether a remedy of election dispute under Section 16 of the said Act or Section 21 of the said Act of 1965 is available to a voter who is entitled to vote in General Ward Elections for challenging the election/nomination of a nominated Councillor?"

2. Some facts necessary for the purpose of a decision on the question and the backdrop of the reference be noted now.

3. The Petitioner in Writ Petition No. 11278 of 2012 had been an elected Councillor of the Ulhasnagar Municipal Corporation and completed his tenure of five years from 2007 to 2012. He claims that he is eligible as well as qualified for being nominated as a Councillor, in terms of the Maharashtra Municipal Corporation (Qualifications and Appointment of Nominated Councillors) Rules,

2012. Apart from impleading the State of Maharashtra, the Corporation, Mayor/ Presiding Officer, the Petitioner therein has impleaded Respondent Nos. 4 to 8, who were nominated as Councillors of that Corporation by the State, in terms of the above Rules. These Rules were notified vide Notification dated 28th February, 2012.

4. The Petitioner also relies upon the General Body Resolution passed at a meeting of the Council dated 9th April, 2012, by which, these five persons were nominated as Councillors.

5. The Petitioner challenges the process of nomination and thereafter refers to the Rules of 2012 in detail. The Petitioner applied for being nominated as a Councillor and forwarded his form. Apart from the Petitioner, 14 others also filled in their application forms. The scrutiny was undertaken of such forms and the Municipal Commissioner, then, made the recommendations. Taking into consideration these recommendations, it was expected that the nominations would be made in terms thereof. However, the Resolution nominating Respondent Nos. 4 to 8 was passed. It has been challenged on the ground that that these persons were not eligible. They were nominated even without considering the recommendations of the Municipal Commissioner.

6. It is in these circumstances that after registering their protest and seeking information under the Right to Information Act, 2005 that the Petitioner challenged the nominations on various grounds set out in the Petition.

7. The prayer in the Petition is to call for the records and proceedings pertaining to these nominations and to declare the Resolution nominating Respondent Nos. 4 to 8 as illegal, unconstitutional, unjust and unfair. By prayer clause (b), the Petitioner is seeking a declaration that he should be nominated as Councillor of the Ulhasnagar Municipal Corporation.

8. The other reliefs are ancillary and incidental to the above principal reliefs.

9. Writ Petition No. 1016 of 2013 is filed by an Association of practicing Architects and Engineers, Bhivandi. That Association is aggrieved and dissatisfied with the nominations of Councillors on Bhivandi Nijampur Municipal Corporation. It is also challenging part of Rule 5(1) of the Nomination Rules of 2012.

10. This Petition arrays and impleads several parties as Respondents other than statutory authorities. Respondent Nos. 13 to 15 to this Petition are nominated Councillors of the Bhivandi Nijampur Municipal Corporation. Apart from elected Councillors, relying upon the 2012 Rules, the Municipal Secretary, on 20th October, 2012, wrote to various political parties and groups requesting to recommend names for nomination of Councillors.

11. Thereafter, various municipal Councillors of certain political parties recommended the name of Respondent No. 7, who is also member of the Petitioner Association. It is averred in the Petition that on 27th November, 2012, the Municipal Commissioner, on the advice of the political parties, recommended

names of Respondent Nos. 13 to 15, along with others to be nominated, but none from the Petitioner's members was recommended. Alleging that the Rules have been violated by seeking to nominate ineligible candidates and persons, the notice and agenda of the General Body Meeting convened for the purpose of nominating Councillors are challenged in this Writ Petition on various grounds. The Petitioner apprehends that the nominations would be made and contrary to the Rules. Prayer clauses (b) and (c) of this Writ Petition read as under:--

"(b) Respondent No. 2 and 3 be directed to fill one vacancy out of five nominated Councillors in accordance with Sec. 5(b) of the B. P. M.C. Act read with Rule 4(d) and second proviso of Rule 5 of the Maharashtra Municipal Corporation Qualification and Appointment of nominated councillors Rules, 2012 by nominating a member of Petitioner Association.

(c) Respondent Nos. 2 and 3 be directed to quash the nominations of two Respondents out of Respondent Nos. 13 to 15 as nominated Councillors of Respondent No. 2, which are contrary to 2nd proviso of Rule 5 and the vacancies created may be filled in accordance with sec.5(b) of B. P. M.C. Act read with Rule 4(a) to (d) and (f) read with second proviso of Rule 5 of Maharashtra Municipal Qualification and Appointment of Nominated Councillors Rules, 2012."

12. Both Petitions were placed before a Division Bench of this Court on 12th August, 2014 and the Court noted a preliminary objection raised by the contesting Respondents to the effect that remedy of presenting a Election Dispute under section 16 of the Maharashtra Municipal Corporations Act, 1949 (for short "the MMC Act") is available to the Petitioner. Reliance was placed on a judgment delivered on 20th September, 2003 by a Division Bench of this Court in Writ Petition No. 5665 of 2002 in the case of Ashok Bodha v. The Municipal Corporation of the City of Ulhasnagar and Ors. The Division Bench specifically considered the issue whether a remedy of Election Dispute is available to challenge the nomination/election of the nominated Councillors and held that such a remedy is available.

13. However, there was another judgment of a Division Bench later in point of time, delivered on 10th June, 2014 in Writ Petition No. 8962 of 2013 (Sharanbasappa Rachappa Khambad v. State of Maharashtra and Ors.). Similar provision of the Maharashtra Municipal Council, Nagar Panchayat and Industrial Township Act, 1965 (for short "the Municipal Councils Act") (section 21) was considered and it was held by that Division Bench that the remedy of an Election Dispute/Petition is not available to challenge the appointment of nominated Councillors and, finding that there is a clear conflict in the views of the two Division Benches that the above question has been referred.

14. Once having cleared the background in which the question has been referred, we now turn to the rival contentions.

15. Mr. Gorwadkar, learned Senior Counsel appearing for the Petitioner in Writ Petition No. 1016 of 2013 submits that the definition of the term "Councillor" as

appearing in section 2(11) in the MMC Act has not been referred in its entirety in Ashok Bodha's case (supra). Mr. Gorwadkar submits that there is a fundamental error in the view taken in Ashok Bodha's case (supra), for, a nominated Councillor cannot be equated with elected one. His position in the Council is peculiar. A nominated Councillor, as the statute itself indicates, does not have a right to vote at any meeting of the Corporation and Committees of the Corporation and to get elected as a Mayor of the Corporation or a Chairperson of any of the Committees of the Corporation. Thus, an elected Councillor possessing such rights does not stand at par with a nominated Councillor. The nominated Councillor enters the Municipal Corporation for his special knowledge or experience in municipal administration and his nomination is by the Corporation in such manner as may be prescribed. The term prescribed means prescribed by the Rules. Mr. Gorwadkar then relies upon the Rules of 2012 to submit that the qualifications for nomination are laid therein. Mr. Gorwadkar was at pains to point out that these qualifications and the eligibility criteria evolved by the Rules so also the process of nomination are peculiar to a nominated Councillor. These qualifications and eligibility criteria cannot be applied for elections and by the voters, meaning thereby they do not have to be fulfilled by a candidate at the Ward elections. Then, he invites our attention to Rule 5 of the Rules and submits that this Rule would indicate that nomination is nothing but an appointment. There are recommendations made by the Commissioner and the Corporation, in terms of Rule 5(2), after considering their recommendations, nominates the Councillor. This provision is extremely important and the strength of the nominated Councillors is also indicated. This is not a popular election and hence, the difference or distinction between election and nomination is apparent. There is no provision and there is no remedy or procedure to question the nomination. In the circumstances, the Petitioner cannot avail of the remedy of an Election Petition or dispute and can only present a Writ Petition under Article 226 of the Constitution of India. Since the authorities are performing a statutory/public duty, a Writ Petition to question the nomination and the nomination process as well is perfectly maintainable. Hence, Ashok Bodha's case (supra) does not lay down the correct law and should be overruled.

16. Mr. Gorwadkar, then, invites our attention to the language of section 16 of the MMC Act. He submits that on a plain reading of that section, it is apparent that the process of nomination or nominated Councillors are not included in the same. The Election Petitions lie to the Judge for the determination of the dispute or question raised in terms of subsection (1) of section 16 of the MMC Act. By sub-section (2) of section 16, the State Election Commissioner may, if it has reason to believe that an election has not been a free election by reason of the large number of cases in which undue influence or bribery has been exercised or committed, he may, by order in writing, authorise any officer of the Commission to make an application to the Judge at any time within one month after the result of the election has been declared for declaration that the election of the returned candidate or candidates is void. By sub-section (2A), it is specified that

no election to any Corporation shall be called in question except by an Election Petition presented to the Judge referred to in sub-section (1) and no Judge other than the Judge referred to in sub-section (1) shall entertain any dispute in respect of such election. Then, there is an Explanation which defines what is corrupt practice. Mr. Gorwadkar submits that the legislature has advisedly not inserted the word "nomination" in any of these sub-sections. The word "nomination" appearing in sub-section (1) of section 16 is not referring to the nomination of Councillor but a nomination paper at a election to elect a Councillor. Hence, the basic difference between an election and nomination is clearly outlined in this provision. Nomination is a selection and for selection, the constitutional bar enshrined in Article 243ZG(b) is not attracted. Hence, the premise upon which the judgment in the case of Ashok Bodha (supra) proceeds is erroneous and illegal. The scheme of 2012 Rules and other sections or Rules is different and not identical. It is in these circumstances the judgment in Sharanbasappa's case (supra) lays down the correct law. The bar enacted in Article 243ZG is applicable only to elections. This Article, therefore, should be strictly interpreted and construed. If it is construed in this manner, a Writ Petition under Article 226 of the Constitution of India to challenge the appointment of nominated Councillors is maintainable.

17. In support of his above contentions, Mr. Gorwadkar placed reliance on the following judgment:--

"(i) Uttar Pradesh Power Corporation Limited v. Ayodhya Prasad Mishra and Anr., , (2008) 10 SCC 139."

18. Mr. Gorwadkar is supported in his arguments by another Counsel Ms. Neeta Karnik. She would submit that we must also look at section 31A of the MMC Act, as that throws light on the controversy. That refers to appointment by nomination to certain Committees, the nomination made by proportional representation. She would, therefore, submit that we must follow the judgment in Sharanbasappa's case (supra) and overrule the earlier view.

19. Mr. A.A. Kumbhakoni, learned Senior Counsel appearing for the Respondents opposed the arguments of Mr. Gorwadkar and Ms. Karnik. Mr. Kumbhakoni submits that we are dealing with two different statutes and which are involved in the two Writ Petitions. First is the MMC Act and the second is the Municipal Councils Act. In the earlier Act, namely the MMC Act, the definition of the term "nominated Councillor" must be noticed in its entirety. So noticed, it would be apparent that the MMC Act is enacted to provide for the establishment of Municipal Corporations for larger urban areas except Greater Mumbai in the State of Maharashtra. Section 2(11) is a definition of the word "Councillor". As the definition section opens, any definition can be read in the provisions of the MMC Act, unless there is something repugnant in the subject or context. Therefore, to read this definition, as it stands, for deciding the issue of maintainability of an Election Petition, would not be proper and correct. The distinction made in section 16 of the MMC Act and Section 21 of the Municipal Councils Act for the

purpose of maintainability of Election Dispute or Petition is incorrect and erroneous. The view taken in the case of Sharanbasappa (*supra*), which was the statute involved in that case, that "presence of the words or nomination of a Councillor may be called in question only at the instance of a candidate at the election or by any person entitled to vote at the election" in section 21 would not take within its purview or import a person who was seeking nomination is a very narrow and restricted interpretation of the provision. The words employed by the legislature and reproduced above would mean that even a person interested is nominated as a Councillor is included. The words being plain and unambiguous, they should be given full effect. With such broad words and phrases being used, the statutory provision should be allowed to run its full course. The view taken in Sharanbasappa's (*supra*) cannot be sustained for it whittles down and dilutes the scope of the remedy unnecessarily. It is erroneous to assume that the remedy of Election Petition or raising an Election Dispute under section 21 is available only to a Councillor elected at a general election and not to others. The remedy is available to both, a person seeking to nominate himself as a nominated Councillor because he is a candidate within the meaning of sub-section (1) of section 21 and also to a person entitled to vote at the general election. In short, no distinction can be made as far as this remedy is concerned between a direct election or any indirect process, more so, a nomination.

20. In broad sense, both, direct election and nomination are nothing but elections. The word election is not defined in the statute and must, therefore, take its meaning from common parlance. In the context and backdrop in which it is appearing in the statute, it must take within its fold even a nomination.

21. Once, according to Mr. Kumbhakoni, this ground is cleared, then, the presence or absence of the word "nomination", particularly in another statutory provision like section 16 of the MMC Act is not relevant. The remedy of Election Petition is available for both categories of persons noted above.

22. Pertinently, Mr. Kumbhakoni submits that by subsection (2) of section 16, other remedies to challenge the election are expressly barred. There, the word "Councillor" is absent.

23. Once sub-sections (1) and (2) so also sub-section (2A) of section 16 are read together and harmoniously, it would be apparent that even the selection or appointment or election of a nominated Councillor can be challenged. As far as a Municipal Corporation is concerned, according to Mr. Kumbhakoni, Mr. Gorwadkar's arguments concede the position that after all the applications are received by the Commissioner and he verifies and scrutinises them and makes the recommendations, his recommendations are placed before the General Body of the Corporation. That General Body, in a way elects one of the candidates or applicants and nominates him to the Municipal Corporation. Therefore, in a way, it is an election and must be brought within the purview of sub-section (1) of section 16 of the MMC Act. It cannot be that the legislature contemplates that one set of election, namely general election can be questioned only by a Election

Petition under the statute, whereas, other process equally of election must be subjected to scrutiny under general law. That would give rise to multiplicity of proceedings and adversely affect the municipal administration. Eventually, municipal and local administration is nothing but an assurance and guarantee of Government at the local level under the constitution. All these are local units of self Government and therefore, strive to improve the life of the residents. They are constituted and given a status by the Constitution of India so that they serve the public at large, efficiently and effectively. If these are such units and managed and administered for the public, then, an interpretation which would facilitate the governance smoothly and not obstruct or hinder it, must be placed on this provision. Merely because the words "candidate at the election" are absent in sub-section (1) of section 16 that does not make any difference. The interpretation as placed on these provisions would indicate that the remedies under both statutes are available even in cases of appointments and selection as nominated Councillors. Hence, the judgment in the case of Sharanbasappa (supra) to the above extent be held to be incorrectly and erroneously decided and the view in Ashok Bodha's case (supra) be confirmed.

24. Though Mr. Kumbhakoni was appearing for one of the contesting Respondents, at our request, he has rendered invaluable assistance to the Court. We appreciate his fair stand. For an Advocate designated as Senior Advocate by this Court, the first and foremost duty is to assist the Court in interpreting and construing the legal provision. The duty to the client is subservient and secondary in this case. The Court looks upon him for assistance. The Court looks to him for valuable inputs while construing and interpreting a statute or deciding a vexed question of great public importance. Thus, both views were presented by Mr. Kumbhakoni effectively.

25. Mr. Kumbhakoni relied upon the following decisions in support of his contentions:--

"(i) The Vanguard Fire and General Insurance Co. Ltd., Madras v. M/s. Fraser and Ross and Another, , (1960) 3 SCR 857.

(ii) State of Maharashtra v. Indian Medical Association and Ors., , (2002) 1 SCC 589.

(iii) Dinesh Prasad Yadav v. State of Bihar and Ors., , 1995 Supp (1) SCC 340."

26. As far as the State is concerned, Mr. Vagyani, learned AGP has more or less supported Mr. Gorwadkar and contended that the Petitioner in Writ Petition No. 11278 of 2012 was an ex-Municipal Councillor from Ulhasnagar Municipal Corporation and is presently not an elected Municipal Councillor. The Petitioner is therefore not entitled to vote at the election of a nominated Councillor. The Petitioner has, by way of the present Writ Petition, challenged the election of Respondent Nos. 4 to 8 to the Petition, who are nominated Councillors. However, in view of the fact that the Petitioner is admittedly not a elected Councillor, and not entitled to vote in the election of a nominated Councillor, he cannot challenge

the election of Respondent Nos. 4 to 8 as the remedy of filing an Election Petition is available only to elected Councillor who is a voter in the election process of a nominated Councillor. Therefore, the Writ Petition itself is not maintainable. In Writ Petition No. 1016 of 2013, the Petition has been filed by an Association challenging the nomination of any two nominated Councillors, namely, from Respondent Nos. 13 to 15. The challenge to the nomination of a nominated Councillor can only be by way of an Election Petition which can be filed only by an elected Councillor who is entitled to vote in the election of a nominated Councillor. In a way, Mr. Vagyani supports the narrow and restricted view.

27. For properly appreciating the rival contentions, we would reproduce the two relevant sections, namely section 16 of the MMC Act and section 21 of the Municipal Councils Act. They read as follows:--

"In the MMC Act:

"16. Election petitions.

(1) If the qualification of any person declared to be elected a councillor is disputed, or if the validity of any election is questioned, whether by reason of the improper rejection by the State Election Commissioner of a nomination, or of the improper reception or refusal of a vote, or by reason of a material irregularity in the election proceedings corrupt practice, or any other thing materially affecting the result of the election, any person enrolled in the municipal election roll may at any time within ten days after the result of the election has been declared submit an application to the Judge for the determination of the dispute or question.

(2) The State Election Commissioner may, if it has reason to believe that an election has not been a free election by reason of a large number of cases in which undue influence or bribery has been exercised or committed by order in writing, authorise any officer of the Commission to make an application to the Judge at any time within one month after the result of the election has been declared for declaration that the election of the returned candidate or candidates is void.

(2A) No election to any Corporation shall be called in question except by an election petition presented to the Judge referred to in sub-section (1) and no Judge other than the Judge referred to in subsection (1) shall entertain any dispute in respect of such election.

(3) The Judge shall decide the applications made under sub-section (1) of (2) after holding an inquiry in the manner provided by or under this Act.

Explanation.--For the purposes of this section-

(1) "Corrupt practice" means one of the following practices, namely:--

(a) any gift, offer or promise by a candidate or his agent or by any person with the connivance of a candidate or his agent of any gratification, pecuniary or

otherwise to any person whomsoever, with the object directly or indirectly of inducing a person to stand or not to stand as, or to withdraw from being a candidate at an election or a voter to vote or refrain from voting at an election or as a reward to a person for having so stood or not stood or for having withdrawn his candidature or a voter for having voted or refrained from voting;

(b) any direct or indirect interference or attempt to interfere on the part of a candidate or his agent or of any other person with the connivance of the candidate or his agent with the free exercise of any electoral right, including the use of threats of injury of any kind or the creation or attempts to create fear of divine displeasure or spiritual censure, but not including a declaration of public policy or a promise of public action or the mere exercise of a legal right without intent to interfere with a legal right;

(c) the procuring or abetting or attempting to procure by a candidate or his agent or by any other person with the connivance of a candidate or his agent, the application by a person for a voting paper in the name of any other person whether living or dead or in a fictitious name or by a person for a voting paper in his own name when, by reason of the fact that he has already voted in the same or some other ward, he is not entitled to vote;

(d) the removal of a voting paper from the polling station during polling hours by any person with the connivance of a candidate or his agent;

(e) the publication by a candidate or his agent or by any other person with the connivance of the candidate or his agent of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election;

(f) any acts specified in paragraphs (a), (b), (d) and (e) when done by a person who is not a candidate or his agent or a person acting with the connivance of a candidate or his agent;

(g) the application by a person at an election for a voting paper in the name of any other person, whether living or dead, or in a fictitious name, or for a voting paper in his own name when, by reason of the fact that he has already voted in the same or another ward, he is entitled not to vote; or

(h) the receipt of, or agreement to receive, any gratification of the kind described in paragraph (a) as a motive or reward for doing or refraining from doing any of the acts therein specified.

(2) a corrupt practice shall not be deemed to have been committed in the interests of a returned candidate if the Judge is satisfied that it was of a trivial and limited character which did not affect the result of the election, that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents, that it was committed without the sanction or connivance or contrary to the orders of the candidate or his agents, and that the

candidate and his agents took all reasonable means for preventing the commission of corrupt practices at the election.

In the Municipal Councils Act:

"21. (1) No election, or nomination of a Councillor may be called in question, except by a petition presented to the District Court, by a candidate at the election or by any person entitled to vote at the election, within ten days from the date of publication of the names of the Councillors in the Official Gazette under section 19 or 20, as the case may be.

(2) Any such petition-

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

(b) shall, with sufficient particulars, set forth the ground or grounds on which the election, or nomination is called in question; and

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

(3) A petitioner may claim all or any one of the following declarations:--

(a) that the election of all or any of the returned candidates is void; or

(b) that the election of all or any of the returned candidates is void and that he himself or any other candidates has been duly elected; or

(c) that the nomination of all or any of the nominated Councillors is void.

(4) A petitioner shall join as respondents to his petition -

(a) where the petitioner claims a declaration under clause (a) of sub-section (3), the returned candidate or candidates in respect of whom such declaration is claimed;

(b) where the petitioner claims a declaration under clause (b) of sub-section (3), all the contesting candidates other than the petitioner;

(c) any other candidate against whom allegations of any corrupt or illegal practice are made in the petitions;

(d) where the petitioner claims a declaration under clause (c) of sub-section (3), all or any of the nominated Councillors in respect of whom such declaration is claimed and the Council who nominated the Councillor member.

(5) Such petition shall be inquired into and disposed of by the District Judge or by any Judge not lower in rank than an Assistant Judge to whom the case or such cases generally may be referred to by the District Judge.

(6) All petitions under sub-section (1)-

(a) in which the validity of the election of Councillors elected to represent the same ward is in question shall be heard by the same Judge; and

(b) in which the validity of the election of the same Councillor elected to represent the same ward is in question shall be heard together.

(7) For the trial of such petition, the Judge shall have all the powers of a Civil Court including powers in respect of the following matters:--

(a) discovery and inspection;

(b) enforcing the attendance of witnesses and requiring the deposit of their expenses;

(c) compelling the production of documents;

(d) examining witnesses on oath;

(e) granting adjournments;

(f) reception of evidence on affidavit; and

(g) issuing commissions for the examination of witnesses; and the Judge may summon and examine suo motu any person whose evidence appears to him to be material. The Judge shall be deemed to be a Civil Court, within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898.

(8) Notwithstanding anything contained in the Code of Civil Procedure, 1908 the Judge shall not permit-

(a) any application to be compromised or withdrawn; or

(b) any person to alter or amend any pleading, unless he is satisfied that such application for compromise or withdrawal or the application for such alteration or amendment is bona fide and not collusive.

(9) The Judge, after such inquiry as he deems necessary, may pass suitable order and his order shall be conclusive.

(10) If the petitioner has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the Judge is satisfied that-

(a) the petitioner or such other candidate received sufficient number of valid votes to have been elected; or

(b) but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a sufficient number of valid votes to have been elected; the Judge may, after declaring the election of the returned candidate void, declare the petitioner or such other candidate to have been duly elected :

Provided that-

(i) for the purpose of such computation, no vote shall be reckoned as valid if the Judge finds that any corrupt practice was committed by any person known or unknown in giving or obtaining it;

(ii) after such computation, if any equality of vote is found to exist between any candidates and the addition of one vote would entitle any of the candidates to be declared elected, one additional vote shall be added to the total number of valid votes found to have been recorded in favour of the candidate, or candidates, as the case may be, selected by lot drawn in the presence of the Judge in such manner as he may determine.

(11) Where any charge is made in the petition of any corrupt practice, the Judge shall make an order recording the names of all persons including any candidates, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice and may disqualify any such person for becoming a Councillor or Member of any other local authority for such period not exceeding six years but not less than two years from the date of the order, as the Judge may specify in the order :

Provided that, no person shall be named in such order unless-

(a) he has been given notice to appear before the Judge and to show cause why he should not be so named; and

(b) if he appears in pursuance of the notice, he has been given an opportunity of cross-examining any witness who has already been examined by the Judge and has given evidence against him, of calling evidence in his defence and of being heard.

(11A) If the validity of any election is called in question only on the ground of an error made by an officer charged with carrying out the provisions of clause (b) or (c) of sub-section (2) of section 9 or of the rules made under section 17 or of an irregularity or informality not corruptly caused, the Judge shall not set aside the election.

(12) If the Judge sets aside the election of candidate on the ground that a corrupt practice has been committed by the returned candidate or his election agent or by any other person with the consent of the candidate or his election agent and if such candidate's name has not been included in any order made under sub-section (11), the Judge shall declare such candidate disqualified for becoming a Councillor or Member or any other local authority of such period not exceeding six years but not less than two years from the date of the order, as the Judge may specify in the order.

(13) The Judge may also make an order fixing the total amount of costs payable and specifying the person by and to whom costs shall be paid. Such costs shall be recoverable as if they had been awarded in a suit under the Code of Civil Procedure, 1908."

28. In all fairness to the learned Counsel appearing for respective parties, we must note that the term "election" is defined in the Municipal Councils Act in section 2(12) to mean an election to a Council and including any by-election.

29. The term "Councillor" is identically defined in both enactments and the definition in that behalf in the MMC Act and Municipal Councils Act reads as under:--

"In the MMC Act:--

"2(11) "Councillor" means a person duly elected as a member of the corporation; and includes a nominated Councillor who shall not have the right,-

(i) to vote at any meeting of the Corporation and Committees of the Corporation; and

(ii) to get elected as a Mayor of the Corporation or a Chairperson of any of the Committees of the Corporation"

In the Municipal Councils Act:--

2(7) "Councillor" means a person duly elected as member of the Council and includes the nominated Councillor, who shall not have the right,-

(i) to vote at any meeting of the Council and Committees of the Council; and

(ii) to get elected as a President of the Council or a Chairperson of any of the Committees of the Council."

30. The Maharashtra Municipal Corporation Act is the earlier Act of 1949. We would refer to it in the first instance.

31. That Act is divided into several Chapters. The first Chapter contains the preliminary sections, including the definitions. Though we have referred to the definition of the term "Councillor" and reproduced it in the foregoing paragraph, some other definitions are also relevant. The terms "Assembly Constituency" and "Assembly Roll" are defined respectively in section 2(2B) and (2C). The word "Commissioner" is defined in section 2(9) and the word "Corporation" is defined in section 2(1). The word "the Judge" is defined in section 2(29) to mean in the city of Pune, the Judge of the Court of Small Causes and in any other city, the Civil Judge (Senior Division) having jurisdiction in the city. The other definition is that of the term "prescribed" appearing in section 2(46A). The word "Regulation" is defined in section 2(55) and the word "Rules" and "Schedule" are defined in section 2(58) and 2(59) respectively. The other sections which are under Chapter II titled as Constitution are divided into Municipal authorities, Municipal Election Roll, Qualifications and disqualifications of Voters and Councillors.

32. The other important sub-heading is of election of Councillors. Then there are other sub-headings, and we need not make a detailed reference to the same.

33. By section 5, the Corporation is constituted. It is constituted by name as a

Municipal Corporation of the city to be a body corporate and has perpetual succession and a common seal and by such name may sue and be sued. The number of Councillors are specified in section 5(2). Clause (a) thereof provides for Councillors elected directly at ward elections and clause (b) provides for nominated Councillors not exceeding five having special knowledge or experience in Municipal administration to be nominated by the Corporation in such manner as may be prescribed.

34. The obligation of the State Election Commission to divide the city into Wards for election of Councillors is set out and we are then not concerned with the sub-sections of this section.

35. A bare perusal of this provision will indicate as to how the Corporation shall consist of Councillors elected directly at ward elections and nominated Councillors.

36. By section 5A, the reservation of seats for scheduled caste, scheduled tribe, backward class citizens and women may be determined by the State Election Commission in the prescribed manner and by section 5B the requirement for a reserved category candidate to furnish Caste Validity Certificate is set out.

37. By section 6, the duration of the Corporation and by section 6A term of office of Councillors and by section 6B election to constitute Corporation are the provisions which, together with section 7, provide for a resignation of the office by the Councillors. By section 7A preparation of Municipal Election Roll for facilitating election are the provisions inserted in The Maharashtra Municipal Corporation Act. Section 8 reads as under:

"8. Person qualified to vote.

Every person whose name is in a ward roll, shall be deemed to be entitled to vote at the ward election, and every person whose name is not in the said roll shall be deemed to be not entitled to vote."

38. A perusal of this provision would indicate as to who are the persons qualified to vote at the ward election. The manner of voting is set out by section 8A and that states that voting at an election shall be by ballot or by electronic voting machine and no votes shall be received by proxy.

39. Section 9 sets out the qualification for election as Councillor and by section 10 disqualification for being a Councillor is set out.

40. Such provisions would indicate as to how the term Councillor is understood and equally election. The manner of voting at an election, the disqualifications, are provisions which are commonly understood as capable of being attracted and applicable to all Councillors.

41. By section 11 the Act sets out disabilities from continuing as Councillor and by section 12 questions as to disqualification to be determined by the Judge. By section 13, liability of Councillors to removal from office is set out and all three

sections would indicate as to how they would apply to the Councillors irrespective of the mode of their election.

42. The State Election Commission is put in charge of all elections to the Corporations and that power vesting in it is to be exercised through the State Election Commissioner. By section 14A, there is a power in the State Election Commissioner to issue directions to prevent impersonation and by section 15, the manner of filling up casual vacancies is set out.

43. Section 16 is titled as "Election Petitions", which we have already reproduced hereinabove.

44. A detailed perusal of section 16 would indicate as to how if qualification of any person declared to be elected a Councillor is disputed or if the validity of any election is questioned, whether by reason of the improper rejection by the State Election Commissioner of a nomination or of the improper reception or refusal of a vote or by reason of a material irregularity in the election proceedings corrupt practice, or any other thing affecting the result of the election, then, that can be a subject matter of a election petition and the dispute or question can be determined by the Judge.

45. Mr. Gorwadkar would read all the sections preceding section 16 and equally section 16 in a manner suggesting a determination of the qualifications of a Councillor declared to be elected or validity of any election as restricted to a direct election process. He would submit that any person enrolled in the Municipal election roll can alone submit an application to the Judge for the determination of the dispute or question and a nominated Councillor having been elected by an indirect process the question of his qualification or the process of his appointment is out of the purview of section 16 of the MMC Act.

46. With greatest respect, not only to the learned counsel but to the Division Bench on whose view he relies upon, we do not think that such a restricted or narrow interpretation would uphold the object and purpose of the Act. It is not correct to presume that the residents or voters at a direct election would not be interested in questioning the qualification of any person nominated to be a Councillor.

47. We have already noted that nominated Councillors derive their designation as such because they are nominated on account of their having special knowledge or experience in Municipal administration. Now, Municipal administration is a joint effort of the Councillors and the Municipal officers. If the public at large is interested in the affairs of a Municipal Corporation it is erroneous to assume that it would be so interested only in disputing or questioning a direct election or popularly known as a Ward election. It would be interested and rather is expected to be interested even when some persons are nominated illegally. Eventually, it is the public who keeps a watch on the performance of the affairs of a Municipal Corporation and which comprises of Councillors, Municipal Officers etc. They would not rest content only if the elections are held in accordance with

the Act and the Rules. If the Maharashtra Municipal Corporations Act contains provisions so as to question or dispute the qualifications of a Councillor even post election and provides a remedy for the voter to make an application for determination of the question arising out of such issues, then, to hold that a nominated Councillor will be out of the rigour or purview of such provisions would hardly subserve public interest. Eventually, all such provisions and which ensure purity and sanctity of the election process concluded, whether directly or indirectly, are inserted so as to uphold larger public interest and public good. It must be remembered that by Part IX-A the Municipalities have been given a constitutional status. Articles 243-P, 243-Q and 243-R all ensure that the Municipality functions as an institution of self-Government (see Article 243P(e)). In discussing and elaborating the status of Panchayats and Municipalities in the Constitution and the model, scheme and role thereof, two decisions of the Hon''ble Supreme Court are extremely relevant. In the case of Cantonment Board, Secunderabad v. G. Venketram Reddy and Ors. reported in , AIR 1995 SC 1210, the Hon''ble Supreme Court has held as under:--

"3. How the expression, "Municipality" in the State" should be understood? The word "Municipality" has been defined in Webster's New Dictionary as, "a town, city or borough which has local self government". In Black's Law Dictionary it is extended to "legally incorporated or duly authorised association of inhabitants of limited area for local government or other public purposes". A body politic created by the incorporation of the People of a prescribed locality invested with the subordinate powers of legislation to assist in the civil government of the State and to regulate and administer local and internal affairs of the community". This word thus has a wide connection. The constitution also understands it in broad sense. Chapter (IX-A) deals with the Municipality. Clause (e) of Article 243-P defines Municipality to mean, "an institution of self-government constituted under Article 243-Q. Article 243-Q reads as under:

"243-Q. Constitution of Municipalities:--

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

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

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

(c) a Municipal Corporation for a larger urban area, in accordance with the provisions of this Part: Provided..... "

This definition indicates that a Corporation or a Municipal Council or Nagar Panchayat is constituted on strength of population and the area or place where it is constituted namely rural or urban. But all the three are deemed to be municipality. A Municipal Corporation with a larger area is as much a municipality as a council with smaller area. The expression, "Municipality in the State" thus has to be read in broad and larger sense."

47(A) In the case of State of Uttar Pradesh and Others v. Pradhan Sangh Kshettra Samiti and Others reported in , AIR 1995 SC 1512, the Hon"ble Supreme Court has held as under:--

"7. It is common knowledge that the needs of the people change with the development in the economic, scientific and technological fields as also with the developments in transport and communication. With them, the concept of self-sufficiency and the means, mode and range of self-governance also change. What is more, the units of self-governance at the lower level being interrelated and integrated with those at the higher levels as parts of the whole scheme of administration and development in the State, have to respond to and fall in line with the growth in the size and operation of the units at the higher level to form a coordinated democratic polity and administrative machinery. The concept of grassroot or lowest level administration must, therefore, necessarily change with the advance and progress at other levels. The governing units at all levels have to fit in in a pattern, and a scheme for administration both for law and order and economic growth. They have to act as vehicles of overall stability and progress. For that purpose, their constitution and functioning have to be in conformity with the larger social, political and economic goals.

Hence there cannot be any immutable social, political, economic or organisational concept of village as a self governing unit. In a developing country like ours, where the population is growing fast, where the society is in ferment on all fronts, where divisive forces of all kinds abound, where the vast majority of population is illiterate and is the victim of ignorance, superstition, blind-faith, biases and prejudices, and is shackled by tradition, and irrational customs and practices, there is an urgent need to evolve means to unite and integrate the society, to expose the populace to larger and higher goals, to imbibe in them the wider perspectives and to forge a socially cohesive front for breaking the barriers of race, caste, class, religion and region rather than to pander to the age-old, self-centered physical and mental barriers.

..... There is further nothing in the Mahatma Gandhi"s advocacy of "village panchayat raj" from which the High Court has taken support to suggest that the village that Mahatmaji had in mind was of a particular description or dimension. It is amusing in this respect to note that the High Court in support of its concept of village has even gone to the extent of observing that "it must be remembered that in considering the aspirations of the people, more so at the first level of democracy, the phenomena of a case of identity of the people, their sentiments, feelings and chauvinism, cannot be forgotten" the considerations which were, with respect, farthest from the mind of Mahatmaji and against which he fought throughout his life. If separate identities, chauvinism, divisible sentiments and feelings are nurtured from the grassroot level, they are bound to erode the foundation of the unity and integrity of the country and should be the last thing on the social and political agenda of the country. On the other hand, the need of the day is to create social, political and economic entities crossing all barriers

and wedded to the nationhood as the ultimate goal. Anthropological and sociological entities may be natural so far as the blood and familial relationships and attachments go and have their place in certain limited spheres. But they have no place while shaping democratic political and administrative units. Nor are they necessarily conducive to social and economic progress. On the other hand, they may prove and have in the past proved a positive hindrance to them. Sometimes, smaller the social, political and administrative entities, the greater the dominance of one section or the other and deeper the prejudices. The need is to organise viable social, political, economic and administrative units of optimum size at the lowest level on a rational basis keeping in mind the size of population, the needs of social and economic development, availability of resources, the transport and communication facilities, convenience of administration and other relevant factors.

What is further forgotten is that over the years, not only the population in the rural areas has grown enormously but the complexion of the rural areas has also undergone a change. With the increasing pressure on land, there has been a steady migration from the rural to the urban and semi-urban areas. Some villages are almost deserted while others survive much below the poverty line. At the same time, some have emerged as small packets of comparative prosperity, thanks to marginal industrial and commercial activities around them and the nearness to the urban and semi-urban areas."

48. In that regard Article 243-R is relevant and reads as under :

"243-R. Composition of Municipalities.--(1) Save as provided in clause (2), all the seats in a Municipality shall be filled by persons chosen by direct election from the territorial constituencies in the Municipal area and for this purpose each Municipal area shall be divided into territorial constituencies to be known as wards.

(2) The Legislature of a State may, by law, provide-

(a) for the representation in a Municipality of-

(i) persons having special knowledge or experience in Municipal administration;

(ii) the members of the House of the People and the members of the Legislative Assembly of the State representing constituencies which comprise wholly or partly the Municipal area;

(iii) the members of the Council of States and the members of the Legislative Council of the State registered as electors within the Municipal area;

(iv) the Chairpersons of the Committees constituted under clause (5) of article 243S:

Provided that the persons referred to in paragraph (i) shall not have the right to vote in the meetings of the Municipality;

(b) the manner of election of the Chairperson of a Municipality."

49. A bare perusal of clause (2) of this Article would indicate as to how the Legislature of a State is empowered by law to provide for the representation in a Municipality of persons having special knowledge or experience in Municipal administration. By Article 243-S and 243-T, the Constitution of wards, committees and reservation of seats is provided for so as to give a representative character to the Municipal administration. That representation is expected to be broad-based and involving all sections of the society. It is by constitutional prescription vide Article 243-U and Article 243-V that duration of Municipalities and disqualifications for membership is provided. Such provisions disqualify a person for being chosen as, and for being a member of a Municipality. Now, Article 243-V is the source on which all the provisions referred by us hereinabove are founded. Once a broad and wide term, namely, "member of a Municipality" is used in clause (1) of Article 243-V, then, we cannot whittle down or dilute the scope and ambit of such constitutional provision. More so, in the light of Article 243-W which reads as under :

"243-W. Powers, authority and responsibilities of Municipalities, etc. Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow -

(a) the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to-

(i) the preparation of plans for economic development and social justice;

(ii) the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule;

(b) the Committees with such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including those in relation to the matters listed in the Twelfth Schedule."

50. The further Articles in this Part, namely, Articles 243-X, 243-Y, 243-Z and 243-ZA would indicate together with the above reproduced Article as to how Municipal Corporations or Municipalities as are popularly known perform various functions and are endowed with powers, authorities and responsibilities. The elections to such a body is a matter of State intervention. That is because the State is obliged to set up an independent Commission so as to supervise, conduct and hold the elections to Municipalities. These elections have to be impartial and fair. The Municipal affairs as such have to be transparent. The Committee for District Planning, which is a body constituted by Article 243-ZD and a Committee for Metropolitan Planning by Article 243-ZE would indicate as to how the Constitution envisages a Municipality to perform the duties and functions

so also responsibilities conferred upon it, including those in relation to the matters listed in the XII Schedule.

51. Since great emphasis has been laid before us on Articles 243-ZF and 243-ZG, we reproduce them :

"243ZF. Continuance of existing laws and Municipalities.--Notwithstanding anything in this Part, any provision of any law relating to Municipalities in force in a State immediately before the commencement of the Constitution (Seventy-fourth Amendment) Act, 1992, which is inconsistent with the provisions of this Part, shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until the expiration of one year from such commencement, whichever is earlier:

Provided that all the Municipalities existing immediately before such commencement shall continue till the expiration of their duration, unless sooner dissolved by a resolution passed to that effect by the Legislative Assembly of that State or, in the case of a State having a Legislative Council, by each House of the Legislature of that State.

243ZG. Bar to interference by courts in electoral matters. -Notwithstanding anything in this Constitution,-

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243ZA shall not be called in question in any court;

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

52. Mr. Gorwadkar submits that the words "election" "voter" and the word "Election petition" have all to be construed to cover only such process which is completed in a direct manner. According to him, if the Councillors sit and consider the recommendations of the Commissioner for nomination of certain recommended candidates as nominated Municipal Councillors, then, that process is not an election, but an appointment. This argument presupposes that this is an internal mechanism or process in which public at large is not interested. This argument also presupposes that even in the broadest and widest sense, the term or word "election" cannot be held to be taking in its fold the process of nomination. We are unable to accept these arguments for more than one reason.

53. For the consideration of these arguments, it would be vital to reproduce some Rules relating to nomination. Before that, the Rules as such require a closer look and we would scan them briefly.

54. These Rules have been notified by the Notification issued by the Urban Development department, dated 28th February, 2012 and styled as Maharashtra Municipal Corporation (Qualification and Appointment of Councillors) Rules, 2012.

Rule 1 is short title and Rule 2 contains definitions. The words "Corporation" and "Commissioner" carry the same meaning as is understood by the Act, namely, "Corporation" means a Municipal Corporation constituted under the relevant Act and "Commissioner" means the Commissioner of the relevant Municipal Corporation. The definition of the term "Relevant Act" is to be found in Rule 2(c). Rules 3, 4 and 5 are material for our purpose and read as under:--

"(3) Meeting for nomination of Councillors:-- Subject to the provisions of rule 4, the corporation shall, in the first meeting of the Corporation after the selection of the Mayor and Deputy Mayor, after general elections, nominate five persons to be nominated Councillors.

(4) Qualification for nomination:-- A person shall be eligible for being nominated as a candidate for the office of the nominated Councillors if he has special knowledge or experience in municipal administration and he,-

(a) has been a recognized and registered medical practitioner in the State for a minimum period of five years, or

(b) has been an educationist including retired Professor, Lecturer, Principal, Head-master, etc. of a recognized school or college for a minimum period of five years; or

(c) has been Chartered Accountant or Cost Accountant for a minimum period of five years, or;

(d) possesses a degree in engineering from a recognized University and has professional experience for a minimum period of five years, or

(e) has been an Advocate for a minimum period of five years or is a person possession degree in Law from a recognized University with an experience in the legal field in the State for a minimum period of five years, or

(f) has experience of working for not less than five years as the Chief Officer of a Municipal Council or as Assistant Commissioner of the Deputy Commissioner or has experience of not less than two years as the Commissioner of a Municipal Corporation, and has retired from service, or

(g) has experience of not less than five years as an office bearer of a Non-Government Organization registered under the Bombay Public Trusts Act, 1950, engaged in Social Welfare activities, working within the area of a Municipal Corporation or a Council.

5. Nomination of Councillors:-- (1) For the purpose of nomination of Councillors, the Commissioner shall, after consulting the leader of each recognized or registered party or group in the Corporation, and after taking into account the relative strength of such parties and groups recommend the names of suitable persons to the Corporation for being nominated as a nominated Councillor. The names of such persons recommended shall not exceed the number of Councillors to be nominated in accordance with rule 3.

(2) The Corporation shall, after considering the recommendation by the Commissioner, nominate the Councillors.

Provided that, if the Corporation decides not to accept the recommendation of the Commissioner with respect to a person so recommended, it shall record the reasons therefor.

Provided further, that every endeavour shall be made to ensure that one Councillor each possessing any of the qualifications referred to in clause (a) to (g) of rule 4 has been nominated."

55. A perusal of these Rules would indicate as to how subject to the provisions of Rule 4, the Corporation shall, in the first meeting of the Corporation after the election of the Mayor and Deputy Mayor, after general elections, nominate five persons to be nominated Councillors. A person shall be eligible for being nominated as a candidate for the office of the nominated Councillors, if he has special knowledge or experience in municipal administration and he is a professional or an educationist or possessing a degree in engineering from a recognized university and has professional experience for a minimum period of five years or has been an Advocate for minimum period of five years or is a law graduate from the recognized university and has experience in the legal field in the State for a minimum period of five years or has worked as Chief Officer of a Municipal Council or as Assistant Commissioner or Deputy Commissioner or Commissioner of a Municipal Corporation or has some experience as a office bearer of a non-Government organization.

56. Thus, anybody cannot claim to be nominated but he has to possess the qualifications for it. The eligibility criteria is that the candidate must be possessing special knowledge or experience in municipal administration and either is a professional, namely, Doctor, Chartered Accountant or Cost Accountant or an Advocate or possesses experience and standing in terms of clauses (a) to (g) of Rule 4.

57. The process of nomination is set out in Rule 5 and first, it is the Commissioner who comes into play. He must consult the leader of the house, leader of the opposition and leader of each recognized or registered party or group in the Corporation and after taking into account the relevant strength of such parties and groups, recommend the names of suitable persons to the Corporation for being nominated as a nominated Councillor. The names of such recommended candidates shall not exceed number of Councillors to be nominated in accordance with Rule 3. Ultimately, it is the Corporation which considers the recommendation of the Commissioner and nominates the Councillors. The proviso to sub-Rule (2) of Rule 5 requires the Corporation to record reasons if it decides not to accept the recommendation of the Commissioner with respect to a person recommended by him. The second proviso requires an endeavor being made to ensure that one Councillor each possessing any of the qualifications referred to in clauses (a) to (g) of Rule 4 has

been nominated. It is the Corporation's decision to accept or not to accept the recommendation of the Commissioner. To say that when the Corporation takes a decision, it is only choosing or appointing some of the persons recommended or all of them and therefore this is not an election would not be proper.

58. The Corporation in undertaking the above exercise has to consider the recommendation and decide in terms of Rule 5(2) of the Rules. That is the decision of the Corporation. Since the Corporation comprises of elected Councillors and its meetings are presided over by the Mayor, it is the house or the general body before which the recommendations of the Commissioner are placed. These are discussed by the general body and the decision then is taken either unanimously or by majority. The above is apparent from Rule 3 because it says that subject to the provisions of Rule 4, the Corporation shall, in its meeting, nominate five persons to be nominated Councillors. That eventually is nothing but an election. It may not be comparable to a general election or a Ward election at which the members of the public and who are qualified voters and entitled to cast their votes. Nonetheless, it is an election and of a person for being nominated as a nominated Councillor. From amongst the names recommended by the Commissioner, it is the Corporation, which is making a selection or choice. The recommendations ordinarily have to be accepted, but they can be rejected as well and in terms of the first proviso to sub-Rule (2) of Rule 5, reasons have to be assigned for the same. However, if the recommendations were to be placed before the State Government or the appointment is to be made by any other authority than the Corporation, one can understand the submission of Mr. Gorwadkar. However, once the recommendations of the Commissioner are placed before the Corporation and the Corporation nominates the Councillors, then, a narrow or restricted meaning cannot be given to the term or word "election" appearing in section 16.

59. We are, in this reference, concerned with only the meaning to be assigned to the term "Election Petition" and whether it can be presented to challenge the nomination of Councillors. If the section provides the remedy to question the election, then, to make a distinction as is sought between "election" and "nomination" would run counter to the object and purpose of the Act. The Act envisages a Municipal Corporation comprising of both, the elected and the nominated Councillors. If that is how the Corporation is understood as a body or a legal entity, then, to hold that only such of the Councillors as are elected at a general election would have to face a challenge to their elections but the nominated Councillors are out of the purview of section 16 would mean plural remedies created for challenging an identical process.

60. The word "election" is not defined in the Act and the Rules. The words such as these would therefore have to be given their ordinary and plain meaning. The words "election" and "nomination" have been understood as "to choose, to pick out, to select from a number or to make a choice of". It also means to cast vote for the purpose of selecting members of any legislative, municipal or other

authority of whatever character. Thus, it would have to be construed in the context and the circumstances in which the process is required to be undertaken. It is well settled rule of interpretation that a word not defined in a statute its meaning has to be gathered from the context in which it has been used [see , AIR 1995 SC 1620 (Regnl. Executive Kerala F. W.F. Board v. M/s. Fancy Food, para 8 at page 1623)]

61. It is in this sense that this word is employed and reliance therefore is rightly placed on the judgment of Hon"ble Supreme Court of India in the case of Dinesh Prasad Yadav v. State of Bihar and Others reported in , 1995 (Supp) 1 SCC 340. In the context of a similar challenge but with a marginal difference, in that, the State Government had a right to nominate on the managing committee not more than two persons, one of whom shall be a Government servant, the Hon"ble Supreme Court considered the argument that the term of office of this managing committee would have to be counted from the beginning of the cooperative year, in which election by ballot is held or it is to be counted from when the nominations are made by the State Government. The Hon"ble Supreme Court, in paras 7, 8 and 9 of this decision, held as under:--

"7. The provision of the Act and the Rules, quoted above, clearly indicate that the scheme of the Act gives wide powers to the State Government to control those societies in which it has considerably contributed towards the share capital. The State Government can nominate even up to two-third of the total members of the Managing Committee including the Chairman. It would, therefore, be in tune with the scheme of the Act to hold that the Managing Committee cannot assume office till the time the nominations are made by the State Government. Proviso to Rule 22(2) of the Rules rightly provides that the Managing Committee shall not be treated as complete unless the members thereof have been duly elected and/or nominated by the authority empowered to do so under the Act, Rules and Bye-laws of the society.

8. The expression "election" has not been defined under the Act. In the absence of any definition by the legislature we have to follow the ordinary meaning given to the said expression. Collins English Dictionary defines "election" as under :

"The selection by vote of a person or persons from among candidates for a position, esp. a political office. The act or an instance of choosing."

Webster's Comprehensive Dictionary, International Edn., gives the following meaning to the expression "election".

"The selection of a person or persons for office as by ballot. A choice, as between alternatives, choice in general."

9. The expression "election", therefore, means selection of a person by vote or even otherwise. When a person is nominated by way of selection on the basis of a given criteria from amongst several persons, then in the broader sense he is elected to the office. We are of the view that the expression "elections", in the

first proviso to Section 14(1) of the Act, has been used in the broader sense. It includes election by ballot as well as the choice by nomination. This interpretation would make Rule 22(2) of the Rules workable. Section 14(2) of the Act vests the management of a registered society in a Managing Committee constituted in accordance with the Rules. Section 14(4) further provides that even up to two-third members of the Managing Committee can be nominated. Sub-section (8) of Section 14 further imposes bar on the members of the Managing Committee for re-election after they have held two consecutive terms. Rule 22(2) read with Section 14(2) of the Act makes it abundantly clear that constitution the Managing Committee is to be treated complete only when the elections by ballot as well as the nominations are finalised. Even otherwise, to fulfill the avowed object of the Act and to encourage and promote the cooperative movement in the State, it is necessary that the Managing Committee as constituted under Rule 22(2) of the Rules should be given its full tenure of three cooperative years. Having provided for three years" term in office to the Managing Committee of a society, it could not be the intention of the legislature to leave it to the State Government to reduce the same to as short a period as three weeks, which would be a mockery. We, therefore, hold that in the first proviso to Section 14(1) the expression "the cooperative year in which elections are held" means not only the elections by way of ballot, but also the nominations under the Act. The net result in that the term of the Managing Committee under the Act and the Rule is to commence from the beginning of the cooperative year in which the nominations by the State Government are completed and the Managing Committee is constituted in terms of Rule 22(2) of the Rules."

62. It is therefore clear that when the scheme of the Act and Rules is understood as denoting that the Corporation shall consist of Councillors elected directly at Ward election and nominated by it, then, it would not be proper to divide the exercise and then hold whether it is "election" or "nomination". As urged by the learned Senior Counsel Mr. Gorwadkar, an election means voting as set out in section 8A of the MMC Act. That manner of voting would decide whether it is a election else the process cannot be termed as such would be really missing the point. The act of electing can be held to be performed after the vote is caste. It may be by ballot meaning inserting a paper marking one's choice in the box or by pressing the button against a name in the electronic machine.

63. The word "nomination" also is assigned the same meaning, namely, "to select the candidate to be voted for a public office or a member of legislative or representative assembly, to name or to recommend for confirmation". One nominates a person in order to propose him or appoint him to an office and that could be as understood in the Law Lexioan by appointment or it could be to propose a person for election or appointment.

64. Once we understand that it is the Corporation as a whole which considers the recommendations of the Commissioner and then takes a decision on nominations of the candidates, then, the process can be equated with an election. Albeit the

mode may be by voting in the manner understood above.

65. That such a decision of the Corporation is also capable of being challenged by an Election Petition is therefore evident. One cannot construe section 16(1) in the backdrop of the locus of a person challenging the elections. Advisedly, the words employed in section 16 are that if the qualification of any person declared to be elected a Councillor is disputed or if the validity of the election is questioned for the reasons indicated in sub-section (1), then, any person enrolled in the municipal election roll can submit an application to the Judge for determination of dispute or question. Thus, the dispute is about the qualification of any person declared to be elected as a Councillor, whereas the question is with regard to the validity of any election. On both counts, the application can be presented by the person enrolled in the municipal election roll. Equally, by sub-section (2), a discretion is given to the State Election Commissioner to make an application within the meaning of that sub-section. The locus of the person entitled to make the application is not decisive or conclusive and that cannot control the interpretation and construction of sub-section (1). If the Election Petition can be presented by any person enrolled in the municipal election roll, then, the elected Councillors fulfill that criteria. To be elected as Councillors, they have to fill a nomination form. That can be filled in only by those whose name appear in the municipal election roll. Sub-section (1) of section 9 sets out this condition. Even a voter or a person whose name appears in the municipal election roll as such can submit that application to the Judge. Such a person may not be an elected Councillor. Equally, a elected Councillor can also submit above referred application. Both can be equally interested in raising the dispute or in questioning the validity of election. If a person who has not been nominated despite being recommended by the Commissioner desires to question the validity of the nomination process or the qualification of any person nominated, he can also submit the application within the meaning of sub-section (1) of section 16 of the MMC Act, provided his name is enrolled in the municipal election roll. The argument that a person qualified for nomination or eligible for being nominated need not be one whose name is reflected in the municipal roll and therefore, he may as well question the process and therefore, an addition is being made in sub-section (1) of section 16, particularly on the issue of locus to submit an application, is without any merit. This person may be falling in the category of a candidate at an election, but if he is not enrolled in the municipal election roll, he will not be able to submit that application. That does not mean that the locus or the eligibility to submit the application would govern the construction or interpretation of the provision. It is one thing to say that the locus of a person to maintain or bring an action would not be a decisive or conclusive factor in determining the availability of or right to avail of a remedy and quite another to grant locus or right to avail of that remedy when it is expressly not in the statute. The latter one would not be a permissible exercise. The former is only a issue of construction of the statutory provision conferring a right to avail of a remedy and hence permissible. It is aimed at giving meaning to the words and

expressions already existing in the statute.

66. There is a distinct departure in the language of subsection (1) of section 21 of the Municipal Councils Act and the above provision. This gives us an opportunity to refer to the Municipal Councils Act. This Act seeks to unify, consolidate and amend the law relating to Municipal Councils and to provide for constitution of Nagar Panchayats and Industrial Townships in the State of Maharashtra.

67. Since it was expedient to provide for unified pattern for the constitution, administration and powers of municipalities in the State of Maharashtra and to make better provision therefor that this Act has been enacted. In Chapter I, there are preliminary provisions and by section 2(6) in the definitions, the word "Council" is defined to mean a municipal council constituted or deemed to have been constituted for a smaller urban area specified in a notification issued in this respect under clause (2) of article 243-Q of the Constitution of India or under sub-section (2) of section 3 of this Act. The word "Councillor" is defined in section 2(7) to mean a person duly elected as member of the Council, and includes the nominated Councillor, who shall not have the right to vote at any meeting of the Council and Committees of the Council and to get elected as a President of the Council or a Chairperson of any of the Committees of the Council. The word "election" is defined in section 2(12) to mean an election to a Council, and includes any by-election. The word "Industrial Township" is defined in section 2(18A) and the word "Nagar Panchayat" is defined in section 2(25A). The word "prescribed" is defined in section 2(35) to mean prescribed by rules. The words "President" and "Vice President" are defined in section 2(36) and the word "State Election Commission" is defined in section 2(47B).

68. Chapter II is titled as "Municipal Councils". Sub-heading (1) thereof is titled as "Municipal areas and their classification". Sections 3 to 6 deal with this aspect and subheading (2) is titled as "Municipal Authorities and Establishment of Councils". By section 7, the municipal authorities are specified and section 8 deals with establishment and incorporation of Councils. Section 9 deals with composition of Councils and reads as under:--

"9. (1) Every Council shall consist of-

"(a) Councillors elected at ward elections, by direct elections; and

(b) such number of Councillors, not exceeding ten per cent of the total number of elected Councillors or five, whichever is less, having special knowledge or experience in municipal administration, to be nominated by the Collector in such manner as may be prescribed.

(1A) In every Council seats shall be reserved for the Scheduled Castes, the Scheduled Tribes, Backward Class of Citizens and women as provided in subsection (2).

(2) The Director shall, from time to time by an order published in the Official

Gazette, fix for each municipal area-

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

(b) the number of seats to be reserved for women in the case of municipal area of each class of councils on the basis of [one-half] (including the number of seats reserved for women belonging to the Scheduled Castes, the Scheduled Tribes and the Backward Class of Citizens of the total number of seats to be filled in by direct election for the purpose of any general election held after the commencement of the Maharashtra Municipal Corporations and Municipal Councils (Amendment) Act, 1993.

(c) the number of seats, if any, to be reserved for the Scheduled Castes or the Scheduled Tribes so that such number shall bear, as nearly as may be, the same proportion to the number of elected Councillors as the population of the Scheduled Castes or the Scheduled Tribes, in the municipal area bears to the total population of that area.

[A fraction of such proportion if less than one-half shall be ignored and if one-half or more shall be reckoned as one in determining the number of seats :]

Provided that, while making such reservation [one-half] of the total number of seats so reserved shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes; and where only one seat is reserved for the Scheduled Castes or, as the case may be, for the Scheduled Tribes, then no seat shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(d) the number of seats to be reserved for the [Backward Class of Citizens] in the case of municipal area of each Class of Council [shall be twenty seven per cent.] of the total number of seats to be filled in by direct election for the purpose of any general election held after the commencement of the Maharashtra Municipal Corporations and Municipal Councils (Amendment) Act, 1993 :

Provided that, while making such reservation [one-half] of the total number of seats so reserved shall be reserved for women belonging to the Backward Class of Citizens.

(3) The reservation of seats for Scheduled Castes and Scheduled Tribes made by an order under subsection (2) shall cease to have effect when the reservation of seats for those Castes and Tribes in the Legislative Assembly of the State ceases to have effect under the Constitution of India :

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

(4) Every order under sub-section (2) shall take effect for the purposes of the

next general election of the Council immediately following after the date of the order."

69. A bare perusal of the above provisions and particularly section 9 reveals that the Councillors elected at Ward election by direct election and such Councillors, not exceeding 10% of the total number of elected Councillors or 5, whichever is less, are to be nominated by the Collector. They must possess special knowledge or experience in municipal administration.

70. The third sub-heading is titled as "Election and publication of names of elected and nominated Councillors". That commences from section 10, which provides for division of municipal area into wards and reservation of wards for Women, Scheduled Castes and Scheduled Tribes. Section 10A is titled as "State Election commissioner" and states by sub-section (1) that superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Municipal Councils shall be vested in the State Election Commissioner. By section 10AA, the State Election Commissioner is powered to issue directions to prevent impersonation. Preparation of list of voters is dealt with by section 11 and section 12 reads as under:--

"12. (1) Every person whose name is in the list of voters maintained under section 11 shall be qualified to vote, and every person whose name is not in such list shall not be qualified to vote, at the election of a Councillor for the ward to which such list pertains.

(2) The list of voters maintained under section 11 shall be conclusive evidence for the purpose of determining under this section whether a person is qualified or is not qualified to vote, as the case may be, at any election."

71. A bare perusal thereof would reveal that it deals with right to vote and by further provisions, namely, 13 and 14, the manner and restriction of voting is provided for. By section 15, qualifications for becoming Councillors are set out and by section 16, disqualifications for becoming Councillors are set out. Section 17 gives power to the State Government to make Rules, generally to provide for or to regulate matters in respect of elections to be held under the Municipal Councils Act, but this power has to be exercised in consultation with the State Election Commissioner. By sub-section (2) of section 17, the matters in regard to which the Rules may be made are set out and the consequences of failure to elect are set out in section 18. The declaration of results of election is dealt with by section 19 and by section 20, the State Election Commission is obliged to publish the names of nominated Councillors.

72. Then comes section 21, which appears under the further sub-heading, namely, "Disputes in respect of election or nomination of Councillors". Section 21 reveals as to how the election or nomination of a Councillor may be called in question by a petition presented to the District Court by a candidate at the election or by any person entitled to vote at the election.

73. Corrupt practices and other electoral offences are dealt with in further sub-heading (5) and in which appear sections 22 to 34.

74. Power of requisitioning for election purposes are narrated in sub-heading (6), in which appear sections 35 to 39 and by the section, which appears in sub-heading (7), duration of Council and term of office of the Councillors is set out. Section 41 deals with the later and by section 41A, the election to constitute Council has to be held and liability of Councillors to removal from office is dealt with by section 42 and by section 43, resignation not to affect subsequent disqualification of a Councillor is dealt with. Disqualification of councilor during his term of office is covered by section 44 and there are special provisions regarding disqualification for failure to pay taxes due to the Council. That is covered by sections 45 and 46 and section 47 deals with vacation of all the offices held by a Councillor on his ceasing to be such. The casual vacancies are to be filled in terms of section 48. Further Chapter enumerates the duties of the Council, which could be obligatory and discretionary, special provisions for undertaking water supply scheme, President and Vice President, Committees etc.

75. The above are to be found in Chapter III and by Chapter IV, Director of Municipal Administration and Collector is appointed vide section 74. Chapter V contains provisions regarding officers and servants. Chapter VI deals with conduct of business and by section 81 falling under sub-title "Meetings", provisions regarding meetings of Council are enumerated.

76. We have referred to these provisions in some detail simply because it was argued that in the scheme of the Municipal Councils Act, the remedy of Election Petition can be availed of in case of both, an elected Councillor or nominated Councillor. Further, this Petition can call in question the election and can be presented by a candidate at the election or by any person entitled to vote at the election. Mr. Gorwadkar underlines this difference and submits that such words and phrases are absent in section 16 of the MMC Act. Though such words are there, the Division Bench of this Court in Sharanbasappa's case (supra), according to Mr. Gorwadkar, held that the remedy of election Petition cannot be availed of by a person not entitled to vote at the election/nomination of the nominated Councillors. The Petitioner, in that case was not an elected Councillor. He had not filed a nomination and therefore, this remedy is unavailable to him. Though the Petitioner, in that case was a listed voter residing within the limits of Municipal Council and entitled to vote for general Ward election electing the Councillors, but the elected Councillors are entitled to nominate/appoint nominated Councillor. Therefore, such a person or individual cannot avail of the remedy of Election Petition under section 21 of the Municipal Councils Act. Paras 12 to 16 of this judgment read as under:--

"12 Now, we turn to the objection raised by the sixth respondent to the locus of the petitioner. In paragraph 1 of the petition, the petitioner has stated that he is a resident of the town Maindargi and he is a registered voter in the said Municipal Council. This factual statement has not been disputed by the sixth

respondent in his reply. Section 21 of the said Act of 1965 provides for a remedy of a filing a dispute in respect of election or nomination of the Councillor. Subsection (1) of section 21 of the said Act reads thus:

"21(1) No election or nomination of a Councillor may be called in question, except by petition presented to the District Court, by a candidate at the election or by any person entitled to vote at the election, within ten days from the date of publication of the names of the Councillors in the Official Gazette under Sections 19 or 20, as the case may be"

13 Nominated Councillor is to be elected/nominated by the Municipal Council which consists of elected Councillors in the General Body Elections. The petitioner was not entitled to vote at the election/nomination of the nominated Councillors, as the petitioner is admittedly not an elected Councillor. He had not filed nomination. Thus, the remedy under section 21 is not available to the petitioner to challenge the nomination of the nominated Councillor.

14 Even bar created by clause (b) of Article 243 (2G) of the Constitution of India will not apply as the petitioner has not challenged the election but the petitioner has challenged the nomination of the sixth respondent. If the petitioner had challenged an election of an elected Councillor in the General Ward Elections, the said constitutional bar would have certainly applied.

15 A contention has been raised by the sixth respondent that remedy under sub-section (2) of section 42 is available to the petitioner and in fact, the petitioner by addressing letters dated 9th August 2013 and 15th August 2013 has invoked the said remedy. Sub-section (2) of section 42 confers power on the State Government to remove any Councillor from office if such Councillor has in the opinion of the State Government become incapable of performing his duties as a Councillor. In the facts of the present case, obviously the State Government cannot exercise powers under sub-section (2) of section 42 of the said Act.

16 The petitioner is admittedly residing within the limits of the said Municipal Council and he is a registered voter within the limits of the said Municipal Council. The petitioner is entitled to vote at General Ward Election for electing the Councillors. The elected Councillors are entitled to nominate/appoint nominated Councillor. The petitioner as a voter and as a citizen residing within the limits of concerned Municipal Council has a right to ensure that only the qualified and eligible persons are appointed as the nominated Councillors. Therefore, the petitioner has certainly a locus to challenge the nomination of the sixth respondent by filing present Writ Petition under Article 226 of the Constitution of India. We cannot ignore that by accepting nomination of the sixth respondent who was ineligible, the provision of subsection (1) of section 9 of the said Act of 1965 is set at naught. The object is to have a benefit of presence of a person who has a special knowledge or experience in municipal administration having one of the qualifications provided in Rule 9. Thus, the basic object of nominating a Councillor is completely frustrated in the case of the sixth

respondent."

77. It is evident that the Division Bench, in Sharanbasappa"(supra) was dealing with a case under the Municipal Councils Act, whereas Ashok Bodha's case was under the MMC Act. With greatest respect to the Division Bench deciding Sharanbasappa's case (supra), we are unable to agree with the reasoning which is reproduced above. With great difficulty we could lay hands on the Maharashtra Municipal Councils and Nagar Panchayats (Qualifications and Procedure for Appointment of Nominated Councilors) Rules, 2010. These Rules read as under:--

"1. Short title - These rules may be called the Maharashtra Municipal Councils and Nagar Panchayats (Qualifications and procedure for appointment of nominated Councillors) Rules, 2010.

2. Definitions. - (1) In these rules, unless the context otherwise requires:--

(a) "Act" means the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (Mah XL of 1965);

(b) "Council" means a Municipal Council, constituted under the Act and includes a Nagar Panchayat.

(2) Words and expressions used but not defined herein shall have their respective meanings as assigned to them in the Act.

3. Determination of number of nominated Councillors. - Subject to the provisions of Rule 4, the Collector shall nominate such number of Councillors, not exceeding ten per cent of the total number of elected councillors or five, whichever is less, at the first meeting of the Council after the election of the President and Vice-president:

Provided that, while determining the number of nominated Councillors, a fraction of less than one-half shall be ignored and a fraction of one-half or more shall be reckoned as one.

4. Qualification for nomination. - A person shall be eligible for being nominated as a candidate for the office of the nominated Councillors if he has special knowledge or experience in municipal administration and he, -

(a) has been a recognized and registered medical practitioner in the State for a minimum period of five years, or

(b) has been an educationist including retired Professor, Lecturer, Principal, Head-master, etc. of a recognised school or college for a minimum period of five years, or

(c) has been a Chartered Accountant or Cost Accountant for a minimum period of five years, or

(d) possesses a degree in engineering from a recognized University and has professional experience for a minimum period of five years, or

(e) has been an Advocate for a minimum period of five years or is a person possessing degree in Law from a recognized University with an experience in the legal field in the State for a minimum period of five years, or

(f) has experience of working for not less than five years as the Chief Officer of a Municipal Council or as Assistant Commissioner or the Deputy Commissioner or experience of not less than two years as the Commissioner of a Municipal Corporation, and has retired from service, or

(g) has experience of not less than five years as an office bearer of a Non-Government Organization registered under the Bombay Public Trusts Act, 1950 engaged in Social Welfare activities, working within the area of a Municipal Corporation or a Council.

5. Nomination of Councillors. - In nominating the councillors, the Collector shall take into account the relative strength of recognized parties or registered parties or groups, and nominate the members, as nearly as may be, in proportion to the strength of such parties or groups in the Council, after consulting leader of each of such parties or groups:

Provided that, nothing containing in this rule shall be construed as preventing the Collector from nominating any member not belonging to any such party or group:

Provided further that, every endeavour shall be made to ensure that one Councillor each possessing any of the qualifications referred to in clauses (a) to (g) of Rule 4 has been nominated.

6. Publication of names of nominated Councillors. - The Collector shall, as soon as may be, send the names of the Councillors so nominated, for publication in the Maharashtra Government Gazette.

7. Casual vacancies. - When a seat of a nominated Councillor becomes vacant, the provisions of these rules shall mutatis mutandis, apply to filling the vacancy.

8. Certificate to Nominated Councillors. - After publication of the names of the nominated Councillors in the Maharashtra Government Gazette, the Collector shall issue a Certificate in Form, appended herewith, to each of the nominated members."

78. Though it is the power of the Collector to nominate, but he has to be guided by the Rules. The Rules lay down the qualifications for nomination and by taking into account the relative strength of recognized parties or registered parties or groups and in nominating the members, the Collector, as nearly as may be, nominates them in proportion to the strength of such parties or groups to the Council and after consulting leader of each of such parties or groups.

79. First proviso to Rule 5 states that nothing contained in this Rule shall be construed as preventing the Collector from nominating any member not belonging to any such party or group and, by the second proviso to this Rule, the Collector has to make every endeavour to ensure that one Councillor each

possessing any of the qualifications referred to in clauses (a) to (g) of Rule 4 has been nominated.

80. We find that the attention of the Division Bench deciding Sharanbasappa's case (supra), with respect, was not invited to the judgment of the Hon'ble Supreme Court of India construing the words "election" and "nomination" and the paras reproduced above. With further respect, its attention was not invited to the Rules and the scheme of the Act. The attention of the Division Bench was not invited to the constitutional provisions which we have extensively referred above. Had the attention being invited of these aspects, the Division Bench deciding Sharanbasappa's case (supra) may not have arrived at the above conclusions.

81. With the greatest respect to the Bench, we are unable to agree with the distinction made while interpreting sub-section (1) of section 21 of the Municipal Councils Act. Its attention also was not invited to Ashok Bodha's case (supra) though in that case the different statutory scheme was analysed, but identical issue and controversy was raised. The crucial words "by a candidate at the election or by any person entitled to vote at the election" would denote as to how the remedy can be availed of by a person seeking to nominate himself as a nominated Councillor and equally by a voter who is entitled to vote at the election. That such a voter being entitled to vote at the Ward elections or direct elections and eligible to contest for the election of the post of Councillor by this method and manner is equally entitled for nomination as a nominated Councillor, provided he qualifies by possessing special knowledge or experience in municipal administration and fulfills the requirements specified in clauses (a) to (g) of Rule 4 of the above Rules of 2010. Therefore, it would not be proper to hold that if he is aggrieved by the election or nomination of any Councillor, he cannot present an Election Petition to the District Court. He being entitled to vote at the election and if that requirement is fulfilled, he is entitled to present the Election Petition. Therefore, it will not be possible to agree with the consideration and interpretation of sub-section (1) of section 21 of the Municipal Councils Act. Once this view is taken, it is not required to construe the ambit and scope of section 42 of the Municipal Councils Act.

82. Our view finds support in the various provisions of the Municipal Councils Act, which we have reproduced above. If the Council itself comprises of those elected and at what is termed as a direct election and those nominated, then, merely because the nomination is by the Collector, would not mean such persons who are nominated would necessarily be termed as non elected Councillors. The distinction between elected and non elected Councillors is made by construing the provision related to composition of Councils narrowly. By sub-section (1) of section 9, it is provided that the Council shall consist of Councillors elected at Ward election, by direct elections and the nominated Councillors. The nomination by the Collector has to be made in such manner as may be prescribed. The word "prescribed" means prescribed by rules. That would mean the Collector, taking into account, the views of all the recognized parties or registered parties or

groups in the Council, shall nominate members as nearly as may be in proportion to the strength of such parties or groups in the Council and after consulting the leader of such parties or groups. Though this is not an absolute rule and the Collector can nominate any member not belonging to any such party or groups, nonetheless, the person has to fulfill the qualification for nominations. The words "having special knowledge or experience in municipal administration" would denote as to how persons vitally connected with, conversant so also possessing special knowledge or experience in municipal administration have to be nominated. This provision is enacted to subserve larger public interest. The Council ought to be broad based and fully representative character. Its composition must reflect not only those whom people choose as their representatives at direct elections held qua each Ward, but also those who are nominated on account of their special knowledge or experience in municipal administration. In a way, they also represent the people residing in the limits of the Municipal Council. They have to voice the grievances of the residents and cutting across party or group affiliations. They may not be connected with such groups or such parties, but having been chosen only because of their professional expertise, their special knowledge and experience, then, that nomination and the process for the same can be equated with an election. With respect, sub section (1) of section 21 of the Municipal Councils Act has not been construed by the Division Bench to mean that nomination of a Councillor cannot be questioned at all by a Petition presented to the District Court. The issue was about the locus of the Petitioner in that case and whether a voter in the Ward election can question the nomination by filing an Election Petition. Having held that the remedy under section 21(1) can be availed of by such a person, namely, the voter at the Ward election, then, we cannot agree with the above observations and conclusions of the Division Bench. They would have to be overruled. In a way, both cases Ashok Bodha and Sharanbasappa (supra) were considering the question of locus of parties in those Petitions/proceedings to question the nominations of Councillors. Once we find that the remedy of Election Petition can be availed by a voter and entitled to vote at the general or direct election, then, to the extent indicated above, we would prefer to agree with and accept the view taken in the case of Ashok Bodha (supra). Pertinently, the narrow view in Sharanbasappa (supra) and those supporting it overlooks the fact that the MMC Act in section 16(2) permits even the State Election Commissioner, to approach the Judge, if he has reason to believe that an election has not been a free election by reason of the large number of cases in which undue influence or bribery has been exercised or committed. The restricted meaning assigned to the term "election" would then not enable the State Election Commissioner to move or authorise moving of a Petition even if the process of nomination is tainted and vitiated as above.

83. Once the above view is taken, then, all that remains is to refer to the judgments cited by Mr. Gorwadkar. He cited the judgment in the case of Uttar Pradesh Power Corporation Limited v. Ayodhya Prasad Mishra and Anr. reported

in , (2008) 10 SCC 139 only for the principle laid down therein that equals cannot be treated unequally likewise unequals cannot be treated equally. The basic argument being that the nominated Councillor cannot be equated with Councillor elected at the Ward election or the direct election. Once we do not accept that distinction and for the purposes of the remedy to challenge the nomination, then, this judgment to the extent it lays down this principle can have no application. Ultimately, the principle laid down in this decision would apply depending upon the facts in each case.

84. The argument of absence of certain words in section 16(1) of the MMC Act and presence of certain words in section 21(1) of the Municipal Councils Act need not detain us simply because we have found that in a broad and wide manner, both processes can be termed as elections. It may not be the intent of the legislature to leave out one process from the purview of the Act and to enable aggrieved parties to challenge that process either by resorting to general law or by filing Writ Petition under Article 226 of the Constitution of India. If that intent was clear and explicit, the legislature would have spoken so. The legislature has not ruled out the inclusion of the process of nomination and therefore, employed broad words in both sections of both enactments. This would denote as to how the municipal administration has to be smooth, efficient and effective and anything which comes in the way or presents a hurdle in the management of affairs of the Corporation and the Council in above manner, should not be read into these enactments. Ultimately, they have a constitutional status. The composition and constitution is guided by Part IXA, and both categories of Councillors being subject to more or less identical disqualifications and disabilities, are capable of being removed by democratic process or by intervention of the State Government, then, all the more the above distinction and made by Mr. Gorwadkar and others has no basis.

85. The last controversy remains about the availability of Writ Jurisdiction.

86. In that regard, Articles 226 and 243ZG of the Constitution of India need to be carefully perused. They are reproduced herein below:--

"226. Power of High Courts to issue certain writs. - (1) Notwithstanding anything in article 32, every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is

not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made, on or in any proceedings relating to, a petition under clause (1), without -

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard,

makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

243ZG. Bar to interference by Courts in electoral matters. - Notwithstanding anything in this Constitution, -

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243-ZA shall not be called in question in any Court.

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

87. Article 226 of the Constitution of India enacts the powers of High Court to issue certain Writs and those can be issued to any person or authority including in appropriate case any Government for the enforcement of any of the rights conferred by part III of the Constitution of India and for any other purpose. It is well settled that the right to elect, right to be elected and the right to dispute an election has to be determined by the scheme of the constitutional and statutory provisions in relation to these rights. They would indicate as to how this is neither a fundamental right nor common law right. It is a pure and simple statutory right. Paras 7 and 8 of the decision in the case of Jyoti Basu and Ors. v. Debi Ghosal and Ors. reported in , AIR (1982) SC 983 read as under:--

"7. The nature of the right to elect, the right to be elected and the right to dispute an election and the scheme of the constitutional and statutory provision in relation to these rights have been explained by the Court in N.P. Ponnuswami v. Returning Officer, Namakkal Constituency, , 1952 SCR 218 : (AIR 1952 SC 64)

and Jagan Nath v. Jaswant Singh, , AIR 1954 SC 210. We proceed to state what we have gleaned from what has been said, so much as necessary for this case.

8. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act, 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self-contained code within which must be found any right claimed in relation an election or an election dispute. We are concerned with an election dispute. The question is who are parties to an election dispute and who may be impleaded as parties to an election petition. We have already referred to the Scheme of the Act. We have noticed the necessity to rid ourselves of notions based on Common Law or Equity. We see that we must seek an answer to the question within the four corners of the statute. What does the Act say?"

88. Therefore, it is not that in all cases and as a matter of course the power to issue the Writs under Article 226 of the Constitution of India would be exercised. After the bar enacted under Article 243ZG as well, the exercise of this power depends upon several factors and which need not be enumerated. The reasons for refusing to exercise the power to issue prerogative Writs are also well settled. Once the constitutional Articles referred above are understood in such perspective, then, it would be evident that there is a bar to interference by Courts in electoral matters. That is notwithstanding anything in the constitution and if the matter is covered by clause (a) of Article 243ZG and clause (b), then, this aspect becomes clear and apparent.

89. In the written submissions of the State, this bar is highlighted, but by

supporting the arguments of Mr. Gorwadkar. We are unable to understand this line of argument, for, despite the presence of Article 243ZG, as held in Ashok Bodha's case (supra), this Court will not exercise its jurisdiction under Article 226 of the Constitution of India when equally efficacious remedy is provided by the statute. The presence of Article 243ZG is referred in Ashok Bodha's case (supra) by the Division Bench in the context of a bar to interference by Courts exercising constitutional powers in electoral matters. However, with greatest respect again, there cannot be any absolute principle. The matter will have to be considered in the facts and circumstances of each case. We need not say anything on this aspect, as in all fairness, the counsel appearing for parties have urged that if a Writ Petition is filed and to question the process of nomination either by the Municipal Corporation or by the Collector qua Municipal Council, then, depending upon the facts and circumstances therein and if the dispute and question raised touch the election or raises issues which can be dealt with adequately and efficaciously by the remedies under the statute, then, the Court may refuse to interfere.

90. We only invite the attention of the learned Counsel appearing for all parties to the judgments rendered by the Hon"ble Supreme Court of India from time to time. In the case of Gurdeep Singh Dhillon v. Satpal and Ors. reported in (2006) 10 SCC 616 the Hon"ble Supreme Court of India applied Article 243ZG and held as under:--

"ORDER

1. At the request of the learned counsel appearing for the petitioner, the names of Respondents 18 to 20 (both inclusive) are hereby deleted from the array of parties.

2. Leave granted.

3. We have heard the learned counsel appearing for the parties.

4. The only issue involved in this appeal is whether the High Court could have entertained a writ petition filed under Articles 226/227 of the Constitution of India to interfere with an election to a Municipal Council. The answer unhesitatingly is in the negative in view of the specific bar under Article 243-ZG(b) of the Constitution of India which provides as follows:

"243-ZG. Bar to interference by courts in electoral matters. - notwithstanding anything in this Constitution, -

(a) ***

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

5. There is no dispute that the writ petition was moved only to challenge the election of the appellant to Municipal Council, Ferozepur City. Instead of

challenging the said election by an election petition under section 74 of the Punjab State Election Commission Act, 1994 Respondents 1 to 13 took a short cut by filing a writ petition and invoking the constitutional jurisdiction of the High Court under Articles 226/227 of the Constitution. This petition ought not to have been entertained in view of the specific bar under Article 243-ZG(b) of the Constitution of India. The only remedy available to challenge the election was by raising an election dispute under the local statute.

6. In this view of the matter, we allow this appeal and set aside the impugned judgment of the High Court. The parties are left to resolve their election dispute in the manner permitted by the Constitution of India and the law.

7. The appeal is allowed accordingly. No order as to costs."

91. However, in this decision, it made no reference to a prior judgment rendered by it in the case of *Manda Jaganath v. K.S. Rathnam and Ors.* reported in , (2004) 7 SCC 492. The discussion in this judgment is important and we reproduce certain paragraphs as under:--

"12. In our opinion, whether the Returning Officer is justified in rejecting this Form B submitted by the first respondent herein or not, is not a matter for the High Court to decide in the exercise of its writ jurisdiction. This issue should be agitated by an aggrieved party in an election petition only.

13. It is to be seen that under Article 329(b) of the Constitution of India there is a specific prohibition against any challenge to an election either to the Houses of Parliament or to the Houses of Legislature of the State except by an election petition presented to such authority and in such manner as may be provided for in a law made by the appropriate legislature. The parliament has by enacting the Representation of People Act, 1951 provided for such a forum for questioning such elections hence, under Article 329(b) no forum other than such forum constituted under the R.P. Act can entertain a complaint against any election.

14. The word "election" has been judicially defined by various authorities of this Court to mean any and every act taken by the competent authority after the publication of the election notification.

15. In *Ponnuswami* (supra) this Court held:

"The law of elections in India does not contemplate that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Art. 226 of the Constitution (the ordinary jurisdiction of the Courts having been expressly excluded)" and another after they have been completed by means of an election petition."

16. The above view of this Court in *Ponnuswami*'s case has been quoted with approval by the subsequent judgment in *M.S. Gill* (supra) wherein this Court after quoting the passages from said judgment in *Ponnuswami*'s case held that

there is a non-obstante clause in Article 329 and, therefore, Article 226 stands pushed out where the dispute takes the form of calling in question an election, except in special situations pointed out but left unexplored in Ponnuswami's case. It is while considering the above unexplored situations in Ponnuswami (supra) in M.S. Gill's case (supra) this Court held thus : (SCC p. 429, para 34)

"34. This dilemma does not arise in the wider view we take of Section 100(1)(d) (iv) of the Act. Sri Rao's attack on the order impugned is in substance based on alleged non-compliance with a provision of the Constitution viz., Article 324 but is neatly covered by the widely-worded, residual catch-all clause of Section 100. Knowing the supreme significance of speedy elections in our system the framers of the Constitution have, by implication postponed all election disputes to election petitions and tribunals. In harmony with this scheme Section 100 of the Act has been designedly drafted to embrace all conceivable infirmities which may be urged. To make the project fool-proof Section 100(1)(d)(iv) has been added to absolve everything left over. The Court has in earlier rulings pointed out that Section 100 is exhaustive of all grievances regarding an election."

17. In the very same paragraph this Court, however, demarcated an area which is available for interference by the High Court and the same is explained as follows:

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

18. Of course, what is stated by this Court herein above is not exhaustive of a Returning Officer's possible erroneous actions which are amenable to correction in the writ jurisdiction of the courts. But the fact remains such errors should have the effect of interfering in the free flow of the scheduled election or hinder the progress of the election which is the paramount consideration. If by an erroneous order conduct of the election is not hindered then the courts under Article 226 of the Constitution should not interfere with the orders of the Returning Officers remedy for which lies in an election petition only.

19. In Election Commission of India v. Shivaji (supra) this Court while considering a challenge to the election notification which included certain Zila

Parishads within a notified constituency, held following the judgment in Ponnuswami (supra) that even if there was any ground relating to the non-compliance with the provisions of the Act and the Constitution on which the validity of any election process could be questioned, the person interested in questioning the election has to wait till the election is over and institute a petition in accordance with Section 81 of the Act calling in question the election of the successful candidate.

20. Learned counsel for the writ petitioner before the High Court had relied upon a judgment of this Court in *S.T. Muthusami v. K. Natarajan & Ors.* (, 1988 1 SCC 572) wherein this Court had held following the judgment in Ponnuswami's case (supra) that entertaining of a writ petition by the High Court under Article 226 of the Constitution cannot be supported and consequently it set aside the judgment of the Division Bench of the High Court and dismissed the writ petition filed in the High Court. In that case the question involved was a dispute between two candidates claiming the official symbol of a political party. This judgment came to be distinguished by the High Court on the basis of facts though the law laid down there was squarely applicable against the maintainability of the writ petition.

21. Learned senior counsel for the respondent candidate contended that case of the first respondent before the High Court came within the exceptions noted by this Court in *M.S. Gill's* case (supra) which permits filing of a writ petition under Article 226 of the Constitution in certain exceptional cases. He contended that the facts in this case also show that but for the intervention of the High Court the progress in the election would have been stalled. With due respect to learned counsel we do not agree with this argument because by not allotting a symbol claimed by the first respondent the Returning Officer has not stalled or stopped the progress of the election. Said respondent has been treated as an independent candidate and he is permitted to contest with a symbol assigned to him as an independent candidate, and consequently there is no question of stalling the election. His grievance as to such non- allotment of the symbol will have to be agitated in an election petition (if need be) as held in *S.T. Muthuswami* (supra).

22. Learned counsel then contended that non-allotment of a symbol which the first respondent was legally entitled to would not be a ground of challenge available to him in the election petition under section 100 of the Representation of the People Act, 1951 therefore the High Court is justified in entertaining the petition. We do not think this argument of learned counsel is correct because as has been held by this Court in *M.S. Gill's* case (supra) sub-clause 4 of section 100(1)(d) of the Representation of the People Act, 1951 is widely worded residual clause which this Court in the said judgment of *M.S. Gill* case termed as "catch all clause". It is further stated in the said judgment that the said section has been added to absolve everything left over and the same is exhaustive of all grievances regarding an election, hence, in our opinion this argument of learned counsel for the first respondent should also fail."

92. Thus, for correcting errors which have the effect of interfering in the free flow of election and hinder the process of election which is the paramount consideration then jurisdiction under Article 226 of the Constitution of India would be exercised depending upon the facts and circumstances in every case. Eventually, the democratic process must be allowed to run its course.

93. In the case of K. Venkatachalam v. A. Swamickan and Anr. reported in , AIR 1999 SC 1723 despite the power enacted by similar Article, namely Article 329(b), the Hon"ble Supreme Court of India sustained the interference under Article 226 of the Constitution of India by the Madras High Court by the following reasoning:--

"20. In all these cases there is a common message that when the poll or re-poll process is on for election to the Parliament or Legislative Assembly, High Court cannot exercise its jurisdiction under Article 226 of the Constitution and that remedy of the aggrieved parties is under the Act read with Article 329(b) of the Constitution. The Act provides for challenge to an election by filing the election petition under Section 81 on one or more grounds specified in sub-section (1) of Sections 100 and 101 of the Act. There cannot be any dispute that there could be a challenge to the election of the appellant by filing an election petition on the ground improper acceptance of his nomination inasmuch as the appellant was not an elector on the electoral roll of Lalgudi Assembly Constituency and for that matter also by any non-compliance, with the provisions of the Constitution or of the Act. If an election petition had been filed under Section 81 of the Act High Court would have certainly declared the election of the appellant void. It was, therefore, submitted that respondent could not invoke the jurisdiction of the High Court under Article 226 of the Constitution in view of Article 329(b) of the Constitution read with Sections 81 and 100 of the Act and only an election petition was maintainable to challenge the election of the appellant. That right the respondent certainly had to challenge the election of the appellant. Election petition under Section 81 of the Act had to be filed within forty-five days from the date of election of the returned candidate, that is the appellant in the present case. This was not done. There is no provision under the Act that an election petition could be filed beyond the period of limitation prescribed under Section 81 of the Act. That being so the question arises if the respondent is without any remedy particularly when it is established that the appellant did not have the qualification to be elected to the Tamil Nadu Legislative Assembly from Lalgudi Assembly Constituency.

21. Mr. Balakrishnamurthy, learned counsel for the first respondent submitted that in such circumstances where the appellant lacked basic and fundamental qualification to be elected as required by the Constitution, it could not be said that a petition under Article 226 of the Constitution was not maintainable. Here jurisdiction under Article 226 is sought to be exercised after declaration of the election of the appellant. He referred to Article 193 of the Constitution which provides for penalty for sitting and voting when a person is not qualified to be a

member of the Legislative Assembly.

22. In support of his submission reference was made to a decision of this Court in *Election Commission, India v. Saka Venkata Rao*, , AIR (1953) SC 210. In this case the respondent was convicted and sentenced to a term of seven years rigorous Imprisonment in the year 1942. He was released on the occasion of celebration of the Independence Day on August 15, 1947. In June, 1952 there was to be a by-election to a reserved seat in the Kakinada constituency in Madras Legislative Assembly and the respondent, desiring to offer himself as a candidate but finding himself disqualified under the Act, as five years had not elapsed from his release, applied to the Election Commission on April 2, 1952 for exemption so as to enable him to contest the election. The respondent did not receive any reply till May 5, 1952, the last date of filing nominations. He filed his nomination on that day. No exception was taken to it either by the Returning Officer or any other candidate. Election was held on June 14, 1952 and the respondent was declared elected on June 16, 1952 and the result of the election was duly published in the Gazette on June 19, 1952. Respondent, thereafter took his seat as member of the Assembly on June 27, 1952. Meanwhile the Election Commission rejected the respondents application for exemption and communicated such rejection to the respondent by its letter dated May 13, 1952, which it is alleged was not received by him. The Speaker of the Legislative Assembly on July 3, 1952 brought the aforesaid communication of the Election Commission to the notice of the respondent. As a question arose as to the respondent's disqualification the Speaker referred the matter to the Governor of Madras, who in turn forwarded the case to the Election Commission for its opinion as required under Article 192 of the Constitution. In the writ petition filed by the respondent in the High Court under Article 226 of the Constitution one of the submissions made by the Election Commission was that Article 192 was, on its true construction, applicable to cases of disqualification which arose both before and after the election and that the reference of the question as to respondent's disqualification to the Governor of Madras and the latter's reference of the same to the Election Commission for its opinion were competent and valid. This Court referred to articles 190(3), 191, 192 and 193 of the Constitution and observed as under:-- (at p. 215 of AIR)

"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 pre-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) indicates 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, therefore, 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 farfetched 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."

Finally, this Court said 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 Election Commission has jurisdiction to inquire into the respondent's disqualification which arose long before his election.

.....

25. In the present case the appellant was not an elector in the electoral roll of Lalgudi Assembly Constituency. He, therefore, could not be elected as a member from that constituency. How could a person who is not an elector, from that constituency could represent the constituency? He lacked the basic qualification under Clause (c) of Article 173 of the Constitution read with Section 5 of the Act which mandated that a person to be elected from an Assembly constituency has to be elector of that constituency. The appellant in the present case is certainly disqualified for being a member of the Legislative Assembly of Tamil Nadu. His election, however, was not challenged by filing an election petition under Section 81 of the Act. Appellant knows he is disqualified. Yet he sits and votes as a member of the Legislative Assembly. He is liable to penalty of five hundred rupees in respect of each day on which he so sits or votes and that penalty is recoverable as debt due to the State. There has not been any adjudication under the Act and there is no other provision of the Constitution as to how penalty so incurred by the appellant has to be recovered as a debt due to the State. Appellant is liable to penalty nevertheless as he knows he is not qualified for membership of the Legislative Assembly and yet he acts contrary to law.

26. The question that arises for consideration is if in such circumstances High Court cannot exercise its jurisdiction under Article 226 of the constitution declaring that the appellant is not qualified to be member of the Tamil Nadu Legislative Assembly from Lalgudi Assembly Constituency. On the finding recorded by the High Court it is clear that the appellant in his nomination form impersonated a person known as "Venkatachalam s/o Pethu", taking advantage of the fact that such person bears his first name. Appellant would be even criminally liable as he filed his nomination on affidavit impersonating himself. If in such circumstances he is allowed to continue to sit and vote in the Assembly his action would be fraud to the constitution.

27. In view of the judgment of this Court in the case of Election Commission of

India v. Saka Varikata Rao, , AIR (1953) SC 210 it may be that action under Article 192 could not be taken as the disqualification which the appellant incurred was prior to his election. Various decisions of this Court, which have been referred to by the appellant that jurisdiction of the High Court under Article 226 is barred challenging the election of a returned candidate and which we have noted above, do not appear to apply to the case of the appellant now before us. Article 226 of the Constitution is couched in widest possible term and unless there is clear bar to jurisdiction of the High Court its powers under Article 226 of the Constitution can be exercised when there is any act which is against any provision of law or violative of constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. In circumstances like the present one bar of Article 329(b) will not come into play when case falls under Articles 191 and 193 and whole of the election process is over. Consider the case where the person elected is not a citizen of India. Would the Court allow a foreign citizen to sit and vote in the Legislative Assembly and not exercise jurisdiction under Article 226 of the Constitution?

28. We are, therefore, of the view that the High Court rightly exercised its jurisdiction in entertaining the writ petition under Article 226 of the Constitution and declared that the appellant was not entitled to sit in Tamil Nadu Legislative Assembly with consequent restraint order on him from functioning as a member of the Legislative Assembly. The net effect is that the appellant ceases to be a member of the Tamil Nadu Legislative Assembly. Period of the Legislative Assembly is long since over. Otherwise we would have directed respondent No. 2, who is Secretary to Tamil Nadu Legislative Assembly, to intimate to Election Commission that Lalgudi Assembly constituency seat has fallen vacant and for the Election Commission to take necessary steps to hold fresh election from that Assembly Constituency. Normally in a case like this Election Commission should invariably be made a party."

94. The reasoning in this case and which the Hon"ble Supreme Court termed as exceptional one was explained in the case of Kurapati Maria Das v. Dr. Ambedkar Seva Samajan and Ors. reported in , (2009) 7 SCC 387 as under:--

"27. We are afraid, we are not in position to agree with the contention that the case of K. Venkatachalam v. A Swamickan & Anr. [, (1999) 4 SCC 526] is applicable to the present situation. Here the appellant had very specifically asserted in his counter affidavit that he did not belong to the Christian religion and that he further asserted that he was a person belonging to the Scheduled Caste. Therefore, the Caste status of the appellant was a disputed question of fact depending upon the evidence. Such was not the case in K. Venkatachalam v. A Swamickan & Anr. Every case is an authority for what is actually decided in that. We do not find any general proposition that even where there is a specific remedy of filing an Election Petition and even when there is a disputed question of fact regarding the caste of a person who has been elected from the reserved constituency still remedy of writ petition under Article 226 would be available.

.....

32. Counsel for the appellant rightly urged that the question of caste and the election are so inextricably connected that they cannot be separated. Therefore, when the writ petitioners challenged the continuation of the appellant on the ground of his not belonging to a particular caste what they in fact challenged is the validity of the election of the appellant, though apparently the petition is for the writ of quo warranto.

33. There is yet another distinguishing feature in case of K. Venkatachalam v. A Swamickan & Anr. In that case there is a clear finding that the elected person therein played a fraud with the Constitution inasmuch as that he knew that his name was not in Electoral Roll of that constituency and he impersonated for some other person taking the advantage of the similarity of names. The appellant herein asserts on the basis of his Caste Certificate that he still belongs to Scheduled Caste. We are, therefore, of the clear opinion that the case of K. Venkatachalam v. A Swamickan & Anr. [, 1999 (4) SCC 526] is not applicable to the present case and the High Court erred in relying upon that decision.

34. Once it is held that the aforementioned case was of no help to the respondents, the only other necessary inference which emerges is that the bar under Article 243ZG would spring in action."

95. Hence, beyond inviting the attention of the parties to this aspect and the interpretation of the constitutional provisions, we say nothing more.

96. In the view that we have taken, it is not necessary to refer to other judgments relied upon by Mr. Kumbhakoni. Those are on the principle as to how definitions can be construed depending upon the context and if the context otherwise requires, they may be construed not going by the definition of that word or term or expression in the definition section of an Act.

97. In the light of the above discussion, we answer the question referred in the following words:--

"(i) The remedy of election dispute under section 16 of the MMC Act or section 21 of the Municipal Councils Act is available to a voter entitled to vote in general Ward election to dispute or question the nomination of nominated Councillor.

(ii) We clarify that the availability of this remedy to a candidate at the said election would depend upon the language of the two provisions and the difference therein as outlined by us in the forgoing paragraphs of this judgment in detail."

98. Having answered the question referred as above all individual matters shall go back to the respective Benches for decision on other questions and issues in accordance with law.

99. We record our appreciation for the efforts taken by all Counsels in order to enable us in arriving at the above answer. Their assistance was indeed valuable.