
(2003) 04 RAJ CK 0062
In the Rajasthan High Court
Case No : Civil Writ Petition No. 2507 of 2000

Bheru Singh Rathore

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 29-04-2003

Acts Referred:

Constitution of India, 1950 — Article 243F, 243O
Rajasthan Panchayati Raj Act, 1994 — Section 19, 38, 39, 39(3)
Rajasthan Panchayati Raj Rules, 1996 — Rule 80

Citation : (2003) 3 RLW 1409 : (2003) 3 WLC 481

Hon'ble Judges : Anil Dev Singh, C.J.;Rajesh Balia, J

Bench : Division Bench

Advocate : P.P. Choudhary and Amit Dave, for the Appellant; Sagar Mal Mehta, General, H.R. Rathore and Kusum Rao, for the Respondent

Final Decision : Allowed

Judgement

Singh, C.J.—By this writ petition, the petitioner challenges the orders, dated 7.7.2000 (Annex.P/8) and 11.07.2000 (Annex.P/9), passed by the Divisional Commissioner, Ajmer; and Development Officer, Panchayat Samiti, Mandal (Bhilwara), respectively. By the first order dated 7.7.2000 the petitioner, who was elected as Sarpanch of Gram" Panchayat, Dhunwala (Tehsil Mandal) on 31.1.2000, was placed under suspension by the Divisional Commissioner and a recommendation was made to the State Government for declaring the seat vacant since he was elected as a general category candidate, against a reserved seat. Even by the second order dated 11.07.2000 the petitioner was placed under suspension from the elected post of Sarpanch, Gram panchayat, Dhunwala, by the Development Officer, Panchayat Samiti, Mandal.

2. The facts giving rise to the petition, are as follows:-

The District Election Officer published a list of wards and constituencies specifying the seats for Scheduled Castes, Scheduled Tribes, women, other backward classes and general candidates (Annex.P/1 to the writ petition). The

petitioner as well as other two candidates, namely, Ashok Kumar Birla and Shanker Lal Jat submitted their nomination papers and contested the election for the post of Sarpanch, Gram Panchayat, Dhunwala. While the petitioner and Ashok Kumar Birla were candidates belonging to the general category, Shanker Lal Jat was a candidate belonging to the Other Backward Classes. In the election, the petitioner was declared elected as Sarpanch on 31.01.2000 by the Returning Officer, since he had polled the largest number of votes, as against the other candidates.

3. Pursuant to his election as Sarpanch, the petitioner was administered the oath of office, for which the Returning Officer issued the certificate, dated 01.02.2000. On 03.05.2000, Section 19 of the Rajasthan Panchayati Raj Act, 1994 (for short, "the Act") was amended by way of insertion of Clauses (n), (o) and (p) with effect from 27.12.1999. At this stage, it will be appropriate to reproduce the relevant provisions of Section 19 of the Act, which runs as under:-

"19. Qualification for election as a Panch or a member.--Every person registered as a voter in the list of voters of a panchayati Raj Institution shall be qualified for election as a Panch or as the case may be a member of such Panchayati Raj Institution unless such person-

(n) in case of a seat reserved for the Scheduled Castes or Scheduled Tribes or Backward Classes of the State, is not a member of any those Castes or Tribes or classes, as the case may be;

(o) in the case of a seat reserved for the women, is not a woman; and

(p) in the case of a seat reserved for women belonging to Scheduled Castes or Scheduled Tribes or Backward Classes, is not a member of any of these Castes or tribes or Classes, as the case may be, and is not a woman."

4. Besides the aforesaid addition of Clauses (n), (o) and (p), in Section 19 of the Act, amendment was also carried out in Section 38 and 39 of the Act. Sections 38 and 39 of the Act, as amended, read as follows:-

"38. Removal and suspension.--(1) the State Government may, by order in writing and after giving him an opportunity of being heard and making such enquiry as may be deemed necessary, remove from office any member including a chairperson or a deputy chairperson of a Panchayati Raj Institution, who

(a) refuses to act or becomes incapable of acting as such;

(b) is guilty of misconduct in the discharge of duties or any disgraceful conduct;

Provided that any enquiry under this sub-section may, even after the expiry of the term of the Panchayati Raj Institution concerned be initiated or, if already initiated before such expiry, be continued thereafter and in any such case, the State Government shall, by order in writing record its findings on the charges leveled.

39. Cessation of membership-(1) A member of a Panchayati Raj Institution shall not be eligible to continue to be such member if he-

- (a) is or becomes subject to any of the disqualifications specified in Section 19; or
- (b) has absented himself from three consecutive meeting of the Panchayati Raj Institution concerned without giving information in writing to such Panchayati Raj Institution; or
- (c) is removed from the membership; or
- (d) resigns from the membership; or
- (e) dies; or
- (f) fails to make the prescribed oath or affirmation of the office of membership within three months from the date of election or appointment.

(2) Whenever it mace to appear to the competent authority that a member has become ineligible to continue to be a member for any of the reasons specified in Sub-section (1), the concerned authority may, after giving him an opportunity of being heard, declare him to have become so ineligible and thereupon he shall vacate his office as such member.

Provided that until a declaration under this sub-section is made he shall continue to hold his office."

5. After the amendment to Section 19 of the Act, an order was issued by the Secretary, Gramin Vikas, to the Divisional Commissioners on 06.06.2000, for taking action, in accordance with the amended provisions of Section 19, read with Section 39 of the Act, in respect of the persons, who were declared elected against the reserved seats, though they belonged to the other categories. Copies of the letter were sent to various authorities, including the District Collectors.

6. The District Election Officer cum the Collector, Bhilwara, by his letter dated 06.06.2000 informed the Divisional Commissioner, Ajmer that petitioner, a general category candidate was elected against the seat reserved for a Scheduled Caste candidate and this mistake occurred due to typing error in the list which was issued specifying reserved and unreserved seats. Another letter dated 7.6.2000 was sent by the Additional Chief Executive Officer, Zila Parishad, Bhilwara to the Divisional Commissioner, Ajmer for declaring the post of Sarpanch vacant, in accordance with the decision of a writ petition being S.B. Civil Writ Petition No. 973/2000.

7. It is pertinent to point out that in that petition a dispute was raised with regard to election to the office of Sarpanch of village Jagpura (Tehsil Asind), Bhilwara. It was claimed in that writ petition that the post of Sarpanch of the aforesaid village was reserved for a Scheduled Caste candidate, but election to the said post was held treating the seat to be unreserved. In the writ petition, it was inter alia, prayed that the seat be declared vacant, since a general category

candidate was elected to the post. A learned Single Judge of this Court disposed of the writ petition with the direction that in case the petitioner files a representation before the Chief Election Officer, the same shall be considered strictly in accordance with law.

8. On 16.06.2000, the Divisional Commissioner issued a notice to the petitioner, seeking his reply in regard to his election as a general category candidate against a seat, which was reserved for a scheduled caste candidate. The petitioner on 04.07.2000 submitted a reply, in which it was, inter alia, stated that the seat was declared to be unreserved seat; he had contested the election and was duly elected. He also claimed that the provisions of Sections 39 and 19 (n) to (p) were ultra vires of the Constitution, since they were given retrospective effect.

9. On 7.7.2000, as already pointed out, the petitioner was placed under suspension by the Divisional Commissioner, and a recommendation was made to the State Government, for declaring the set of Gram Panchayat, Dhunwala, as vacant. On similar lines, an order dated 11.07.2000 was issued by the Development Officer, Panchayat Samiti, Mandal, by virtue of which the petitioner was placed under suspension. On 10.8.2000, the Director & Special Secretary to the Govt. of Rajasthan in Panchayati Raj Department addressed a letter to the Divisional Commissioner, whereby he conveyed the decision of the Government to the effect that the post of Sarpanch, Dhunwala shall stand vacated by the petitioner. The petitioner, being aggrieved by the aforesaid orders (Annex.P/8 & P/9) filed the instant writ petition on 23.1.2001.

10. We have heard the learned counsel for the parties.

11. The learned counsel for the petitioner pointed out that Clause (n) was added to Section 19, by Rajasthan Act 9 of 2000, with effect from 27.12.1999 whereby a person was to be treated as disqualified for election as a Panch or as a member of a Panchayati Raj Institution, in respect of a seat reserved for the Scheduled Castes or Scheduled Tribes or Backward Classes, if he was not a member of any of those castes or tribes or classes, as the case may be. He also pointed out that as a result of the amendment of Section 39 of the Act, a member of a Panchayati Raj Institution is not eligible to continue as member, if he is or becomes subject to any of the disqualifications, specified in Section 19. The learned counsel also invited our attention to the fact that these provisions were made applicable with retrospective effect from 27.12.1999, rendering already elected persons, disqualified in the event they were elected against the seats reserved for Scheduled Castes/Scheduled Tribes or Backward Classes in case they did not belong to those categories, he vehemently contended that the retrospective operation given to the provision is contrary to the provisions of the Constitution of India. It was also urged that the provisions of Section 19(n) are unreasonable against the democratic principles and contrary to the mandate of Articles 14 and 243-O (b) of the Constitution. It was canvassed by the learned counsel that in case a person is declared elected as a member or Sarpanch of a Panchayat, his election can only be challenged under Rule 80 of the Rajasthan Panchayati Raj

(Election) Rules, 1994 (for short the "Rules") before the District Judge having jurisdiction over the panchayat area, within thirty days from the date on which the result of such election is declared. The impugned orders passed by the so called competent authorities, placing the petitioner under suspension and declaring the seat occupied by him, to be vacant flies in the face of Rule 80 of the Rules and Article 243-O (b) of the Constitution. According to the learned counsel once a person has been declared to be elected, his election can be challenged only by an election petition under Article 243-O (b) of the Constitution. Section 39 of the Act to the extent it vests power in the competent authority to declare an elected member of the Panchayati Raj Institution to have become ineligible to be a member, whereupon mandatorily he is required to vacate his office, is violative of Article 243-O(b) as it amounts calling in question the election of the member without filing an election petition.

12. On the other hand, the learned counsel for the respondents submitted that the retrospective effect given to the aforesaid amendment is not violative of any of the provisions of the Constitution. The learned counsel also submitted that sub-section 2 of Section 39 of the Act provides that whenever it is made to appear to the competent authority that a member has become ineligible to continue to be a member for any of the reasons, specified in sub-section (1) of Section 39 thereof, the competent authority is empowered to declare him to have become ineligible and thereupon he is bound to vacate his office as a member. The learned counsel canvassed that the case in which disqualification was incurred, ab initio or at a later stage under Sub-section (1) of Section 39 of the Act is clearly distinguishable from the case where election is liable to be challenged by filing an election petition under Rule 80 of the Rules. Setting aside of an election through an election petition and declaration of ineligibility to continue as a member u/s 39 of the Act read with Section 19 are two independent situations, which stand on different footings. Action u/s 39 of the Act against a member of a Panchayati Raj Institution on the ground of his ineligibility or disqualification does not amount to challenge to his election as a member. Therefore, such an action is not covered by Rule 80 of the Rules and Article 243-O(b) of the Constitution.

13. The question, whether or not Section 39 of the Act, which empowers the competent authority to declare an elected member of the Panchayati Raj Institution to have become ineligible as a result of which he is required to vacate the office transgresses Article 243-O(b) of the Constitution appears to be the central issue between the parties. In order to determine the question it would be necessary to set out Article 243-O(b) of the Constitution. Article 243-O(b) of the Constitution reads as follows:-

"243-O. Notwithstanding anything in this Constitution-

(a)... ..

(b) no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or

under any law made by the Legislature of a State."

Thus from a reading of the aforesaid provision it is clear that once a person has been declared to have been elected as a member of the Panchayati Raj Institution, his election cannot be called in question except by an election petition, presented to such an authority and in such manner as may be provided for or under any law made by the appropriate Legislature. Under Rule 80 of the Rules, an election can be challenged only by presenting a petition to the District Judge having jurisdiction in the matter. The meaning of the word "Election" occurring in Article 243-O(b) is the key to the issue.

14. In order to understand the precise connotation of the word "Election" we may now examine the provisions of Article 329(b) of the Constitution, which are in parimateria with the provisions of Article 243-O(b) of the Constitution. Article 329(b) of the Constitution reads as under:

"329. Notwithstanding anything in this Constitution-

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

It is well settled that "Election" in the context of Article 329(b) means entire course and all the stages of election culminating in a candidate being declared elected.

15. As early as in 1952, in N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, the Supreme Court took the same view and held as under:

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

This decision was followed in the case of Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, in which it was held that the word "election" in Article 329(b) is used in a wider sense including entire process of election commencing with the issue of notification and terminating with the declaration of result of a candidate. In this regard the Supreme Court observed as follows:

"On a plain reading of the Article, what is prohibited therein is the "initiation" of proceedings for setting aside an election otherwise than by an election petition presented to such authority and in such manner as provided therein. A suit for

setting aside an election would be barred under this provision."

16. In *Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi and Another*, 1979 (1) SCC 405, the Supreme Court observed that Article 329(b) places a blanket ban on all challenges to the electoral steps till the determination of the result of the elections. In this regard the Supreme Court observed as follows:

"92. Diffusion, even more elaborate discussion, tends to blur the precision of the conclusion in a judgment and so it is meet that we synopsise for formulations. Of course, the condensed statement we made is for convenience, not for exclusion of the relevance or attenuation of the binding impact of the detailed argumentation. For this limited purpose, we set down our holdings:

(1) (a) Article 329(b) is a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of the result.

(b) Election, in this context, has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate.

(3) The conspectus of provisions bearing on the subject of elections clearly expresses the rule that there is a remedy for every wrong done during the election in progress although it is postponed to the post-election stage and procedure as predicated in Article 239(b) and the 1951 Act. The Election Tribunal has, under the various provisions of the Act, large enough powers to give relief to an injured candidate if he makes out a case and such processual amplitude of power extends to directions to the Election Commission or other appropriate agency to hold a poll, to bring up the ballots or do other thing necessary for fulfillment of the jurisdiction to undo illegality and injustice and do complete justice within the parameters set by the existing law."

17. In *Election Commission of India Through Secretary Vs. Ashok Kumar and Others*, it was held by the Supreme Court that the term "Election" as occurring in Article 329 connotes the entire process of election from the issue of the notification u/s 14 of the Representation of People Act, 1951 to the declaration of the result u/s 66 of the Act.

18. The aforesaid decision of the Supreme Court in *Ashok Kumar's* case (supra) and several other decisions are based on the basic decision rendered in *Ponnuswami's* case (supra) which sets out the scope and amplitude of Article 329(b) of the Constitution. The law of election in this country as contemplated by Article 329(b) contemplates only one attack and challenge to the election of the returned candidate and that too only by way of an election petition after a candidate has been elected. All the intermediary stages of election come to a climax with the election of a candidate. The *raison d'être* of Article 329(b) is that the disputes with regard to the election of a candidate are to be determined

by an election petition and by no other means. Since Article 243-O(b) is identically worded as Article 329(b), the former must be construed in the same manner as Article 329(b) has been interpreted by the Supreme Court in various decisions. Therefore, once a candidate is elected as a member of the Panchayati Raj Institution, his election can be challenged only by means of an election petition.

19. Our quest, however, does not come to an end with the aforesaid exposition of Article 243-O (b) which is based on the judgments of the Supreme Court rendered in construing Art. 329(b) of the Constitution. The question which still needs to be determined is whether bar of Article 243-O(b) will come into play when the case fall u/s 19/39 of the Act of 1994? To answer the question we shall refer to Article 243F of the Constitution. Article 243F reads as follows:-

"(1) A person shall be disqualified for being chosen as, and for being, a member of a Panchayat-

(a) if he is so disqualified by or under any law for the time being in force for the purposes of elections to the legislature of the State concerned:

Provided that no person shall be disqualified on the ground that he is less than twenty-five years of age, if he has attained the age of twenty-one years;

(b) if he is so disqualified by or under any law made by the Legislature of the State.

(2) If any question arises as to whether a member of a Panchayat has become subject to any of the disqualifications mentioned in Clause (1), the question shall be referred for the decision of such authority and in such manner as the Legislature of a State may, by law, provide."

This Article lays down disqualifications for being a member as well as for continuing as a member of Panchayat. According to Sub-clause (a) of Clause (1) of Article 243F, a person is disqualified for being chosen as and for being a member of the Panchayat if he is disqualified by or under any law for the time being in force for the purposes of elections to the Legislature of the State concerned. This means that the disqualifications which are prescribed for being chosen as and for being a member of the State Legislative Assembly or the Legislative Council in Article 191 of the Constitution ipso facto apply to a person who elects to fight election for being a member of a Panchayat. Besides as per Article 243F(1)(b) Legislature of the State has been empowered to prescribe disqualification for being chosen as and for being a member for the Panchayat under any law made by it this empowered Legislature of the State in Section 19 of the Act of 1994 has laid down disqualifications for a person being chosen as a member of a Panchayat. As already pointed out Clauses (n), (o) and (p) were inserted in Section 19 of the Act of 1994 on 3.5.2000. These clauses, inter alia, create disqualification for persons who are not members of Scheduled Caste, Scheduled Tribe or Backward Classes, in the State to stand for elections against

seats reserved for such castes, tribes and classes, as the case may be. Even in case of a seat reserved for a woman candidate, a person should be disqualified to contest against such seat if the candidate is not a woman. We may at this stage set out Article 243D of the Constitution, which deals with reservation of seats for Scheduled Castes, Scheduled Tribes and Women in Panchayats. This article lays down as follows:-

"(1) Seats shall be reserved for-

(a) the Scheduled Castes; and

(b) the Scheduled Tribes,

in every Panchayat and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by directed election in that Panchayat as the population of the Scheduled Castes in that Panchayat area or of the Scheduled Tribes in that Panchayat area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Panchayat

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

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

(4) the offices of the Chairpersons in the Panchayats at the village or any other level shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide:

Provided that the number of offices of chairpersons reserved for the Scheduled Castes and the Scheduled tribes in the Panchayats at each level in any State shall bear, as nearly as may be, the same proportion to the level as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State bears to the total population of the State.

Provided further that not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level shall be reserved for women.

Provided also that the number of offices reserved under this clause shall be allotted by rotation to different Panchayats at each level.

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

(6) Nothing in this Part shall prevent the Legislature of a State from making any

provision for reservation of seats in any Panchayat or offices of Chairpersons in the Panchayats at any level in favour of backward class of citizens."

Thus Article 243D provides for reservation of seats for Scheduled Castes, Scheduled Tribes and Women in every Panchayat. In fact the Legislature by inserting Clause (n), (o) and (p) in Section 39 of the Act of 1994 has given effect of the mandate of Article 243D of the Constitution.

20. The Act of 1994 not only makes provision for disqualification but it also creates a machinery for cessation of membership of a candidate u/s 39 thereof. The question of disqualification goes to the root of the matter. The Constitution itself in Article 243F empowers the Legislature of the State to prescribe an Authority to determine whether a member of Panchayat has become subject to any of the disqualifications mentioned in Clause (1) thereof.

21. An analysis of the provisions of Article 243F and Article 243-O(b) of the Constitution show that they deal with different situations, namely, when the election of a candidate is in question and when a question arises as to whether or not a member of Panchayat is or has become subject to any of the disqualifications. For both the situations the Constitution itself provides separate remedies. The first situation is covered by Article 243-O(b). It allows challenge to the election only by means of an election petition to be presented to such authority and in such manner as is provided for by or under any law. Rule 80 of the Rules provides for the forum where an election petition can be presented. As per Rule 80 the election to any panchayat can be challenged by an election petition presented before the District Judge. The second situation is covered by art. 243F where a candidate is ineligible or has become ineligible to continue as a member in view of the disqualifications which are prescribed by law framed by the Legislature. As already pointed out Sections 19 and 39 of the Act of 1994 derive power from Article 243F for laying down the disqualifications and for prescribing the authority which can declare a candidate ineligible or disqualified to be a member of a Panchayat. While Section 19 and 39 of the Act of 1994 wholly and solely deal with disqualifications incurred by a member before the election or even after the election art. 243-O(b) of the Constitution read with Rule 80 of the rules make provision for calling in question the election of a candidate by means of an election , petition. Both set of provisions cover different situations and remedies. They must be allowed to operate in their own fields. Questioning the qualification of a returned candidate for being eligible to hold the membership of a Panchayat, does not amount to challenge to his election. A Candidate who is disqualified to be a member, does not have the license to continue till his election is challenged by someone. Article 243-O(b) caters to a situation where election to any Panchayat is called in question. In a case of disqualification of a candidate he ceases to be a member and only a declaration is needed to be issued by the Competent Authority to the effect that he has incurred disqualification u/s 39 read with Section 19 of the Act of 1994. In the latter case, his election to the Panchayat cannot be said to be in question.

Bar of Article 243-O(b) will not come into play when the cases falls under Article 243F read with Section 19 and 39 of the Act of 1994.

22. We may also keep in view Articles 190, 191, and 192 of the Constitution to appreciate the questions which confronts us. While Articles 190 and 191 deal with disqualification of members of both Houses of Legislature of a State, Article 192 deals with decision on questions as to disqualifications.

These articles read as follows:

"190(1) No person shall be a member for both house of the Legislature of a State and provision shall be made by the Legislature of the State by law for the vacation by a person who is chosen a member of both Houses of his eat in one House or the other.

(2) No person shall be a member of the Legislatures of two or more States specified in the First Schedule and if a person is chosen a member of the Legislatures of two or more such States, then, at the expiration of such period as may be specified in rules made by the President, that person's seat in the Legislatures of all such States shall become vacant, unless he has previously resigned his seat in the Legislatures of all act one of the Sates.

(3) If a member of a House of the Legislature of State-(a) becomes subject to any of the disqualifications mentioned in Clause (1) or Clause (2) of Article 191;

(b) resigns his seat by writing under his hand addressed to the Speaker or the Chairman, as the case may be, and his resignation is accepted by he Speaker or the Chairman, as the case may be, his set shall thereupon become vacant:

Provided that in the case of any resignation referred to in Sub-clause (b), if from information received or otherwise and after making such inquiry as he thinks fit, the Speaker or the Chairman, as the case may be, is satisfied that such resignation is not voluntary or genuine, he shall not accept such resignation.

(4) If for a period of sixty days a member of a House of the Legislature of a State is without permission of the House absent from all meetings thereof, the House may declare his seat vacant.

Provided that in computing the said period of sixty days no account shall be taken of any period during which the House is prorogued or is adjourned for more than four consecutive days.

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

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

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

(c) If he is an undischarged insolvent;

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

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

Explanation.--For the purposes of this clause, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

(2) A person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule.

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

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

23. The scope and ambit of these articles and Art. 329 were considered by the Supreme Court in *Election Commission, India Vs. Saka Venkata Subba Rao* and, In that case, respondent was convicted and sentenced to a term of seven years rigorous imprisonment sometimes in the year 1942. He was prematurely released after five years on August 15, 1947 on the occasion of Independence Day. The respondent fought by-election to a reserved seat. He was declared elected. A question arose as to whether or not the respondent was disqualified to be elected as a member of the Legislative Assembly since he had incurred disqualification under the Representation of the People Act as five years had not elapsed from the date of his release when he stood for elections. The matter was referred by the Speaker of the Legislative Assembly to the Governor of Madras. Pursuant to Clause (2) of Article 192 of the Constitution, the Governor of Madras, before giving any decision on the question, referred the matter to the Election Commissioner for its opinion. The Supreme Court, inter alia, held to the effect that a member who incurs a disqualification under Articles 190(3) and 191(1), his election for such a disqualification is not liable to be challenged under Article 329(b) read with Section 5 of the Representation of People Act, 1951. Thus, it follows that disqualifications covered by Articles 190(3) and 191(1) do not fall within the scope of Article 329 of the Constitution. Therefore, when a case falls under Articles 190(3), 191(1), Article 329(b) does not come into operation. Articles 190(3), 191(1), 192 on the one hand, and Article 243F on the other hand are almost mirror images of each other except that the former fall in Chapter III of the Constitution dealing with the subject of State Legislature and the latter falls in Chapter IX dealing with Panchayats. On the basis of the decision of the

Supreme Court in Saka Venkata Rao's case (supra), it must be held that Article 243F of the constitution read with Sections 19 & 39 of the Act of 1994 on the one hand, dealing with disqualifications incurred before or after the election as a member of Panchayat and Article 243-O(b) on the other hand, dealing with challenge to election of any member of the Panchayat, stand independently of each other since they present different and separate remedies for dissimilar situations.

24. Sub-clause (2) of Article 243F states that if any question arises as to whether a member of a Panchayat has become subject to any of the disqualifications mentioned in Clause (1), the question shall be referred for the decision of such authority and in such manner as the Legislature of a State may, by law, provide. The words "has become" occurring in Clause (2) of Article 243F, are significant. This conveys that Article 243F would be applicable only to disqualifications to which a member becomes subject to after he is elected as a member of the Panchayat. In other words, if a member was disqualified before his elections, his disqualification will not be covered by Article 243F(2) of the Constitution. Though Section 39(1) of the Act of 1994 relates that a member of the Panchayati Raj Institution shall not be eligible to continue to be a member if he is or becomes subject to any of the disqualifications specified in Section 19 of the Act of 1994, he can not be declared to have ceased to hold office u/s 39(2) of the in case he was disqualified prior to his election. Section 39(2) is applicable only to cases in which the member becomes ineligible after his election. This is so because of the words a member has become ineligible to continue to be a member" occurring in Sub-section (2) of Section 39. It appears that the words has become ineligible occurring in Sub-section (2) of Section 39, have been used by the Legislature since Article 243F(2) also uses almost the same words, viz., has become subject to any of the disqualifications in Clause I. Section 39(2) is in consonance with the provisions of Section 243F(2) of the Constitution.

25. We are guided in the interpretation of the words "has become" by the law laid down by the Supreme Court in Saka Venkata Rao's case (supra). The Supreme Court construing the words "becomes subject to any of the disqualifications" occurring in Article 192, held that Article 192 would cover a situation where the member of a House of the Legislature of the State incurs disqualification after his election. In K. Venkatachalam Vs. A Swamickan and Another, the Supreme Court while relying upon the decision in Saka Venkata Rao's case, held that where a member was not an elector from the constituency from which he was elected, he lacked the basic qualification even prior to his election and, therefore, his case was not covered by Article 192 of the Constitution. Applying the ratio of the decisions of Supreme Court in Saka Venkata Rao's case & K. Venkatachalam's case, we are of the view that Section 39(2) of the Act of 1994 covers a case where a member of a panchayat acquires disqualification after his election. Where a member was disqualified ab initio i.e. to say he was disqualified before the election, action u/s 39(2) of the Act of 1994 cannot be taken against him. He cannot be declared to have become ineligible

and no direction can be given to him to vacate his office as a member of sarpanch o the panchayat. Since in the instant case, the petitioner's disqualification is deemed to have arisen before the election, in as much as he was elected against a seat which was allegedly reserved for a Scheduled Caste candidate, he cannot be declared disqualified u/s 39(2) of the act. In this view of the matter the writ petition deserves to be allowed. Having said this it is not necessary for us to go into the other question raised by the petitioner. But having regard to the fact that our determination on the aforesaid question is not the last word, we consider it appropriate to deal with yet another submission of the learned counsel for the appellant.

26. It was canvassed by the learned counsel for the petitioner that the competent authority was not right in declaring the petitioner to have illegally held the seat reserved for a Scheduled Caste candidate. Consequently, the suspension of the petitioner from the post of Sarpanch was also illegal. We have given our deep consideration to the submission. We are of the view that the submission of the learned counsel for the petitioner must be sustained. This conclusion we have reached on examination of Section 16 of the Act and various provisions contained in the Rules dealing with the publication of lists of Wards and Constituencies.

27. Publication of list of Wards and Constituencies and reservation of seats for Scheduled Castes/Scheduled Tribes and Women, and the procedure for the same, is embodied in Chapter II of the Rules. These rules have to be read with Section 16 of the Act. Taking the latter provision first, we may point out that under the various sub-sections of Section 16 of the Act, the offices of Sarpanchas, Pradhans and Pramukhs, are required to be reserved for the Scheduled Castes, Scheduled Tribes and the Backward Classes and for women. As per Sub-section (2), the number of each of such offices reserved for the Scheduled Castes and Scheduled Tribes is mandatorily required to bear as nearly as may be, the same proportion of the total number of each such offices in the State as the population of such castes, or as the case may be, such tribes in the State bears to the total population of the State. Sub-section (3) lays down that such percentage, not exceeding twenty-one, of the offices of Sarpanch or Pradhan in a Panchayat Samiti or Zila Parishad, as the case may be, shall be reserved for backward classes, as the percentage of the combined population of such Panchayat Samiti or Zila parishad area, as the case may be, falls short of fifty, provided that at least one office of Sarpanch, or Pradhan, in a Panchayat Samiti or Zila Parishad, is reserved for Scheduled Castes or Scheduled Tribes where the combined population Samiti or Zila Parishad area, as the case may be, does not exceed seventy per cent of the total population of the Panchayat Samiti or Zila Parishad area.

28. Sub-section (4) fixes the percentage of the offices to be reserved for women.

29. It is not necessary to notice the other sub-sections of Section 16. We may now notice Chapter II of the Rules.

30. Under Rule 4, the officer, authorized by the Government is required to make publication of wards and constituencies. The publication is required to be made by affixing a statement thereof on the notice-board of the office of the District Election Officer (Panchayats) and the office of the Panchayat Samiti in respect of constituencies for Zila Parishads as also on the notice-board of the District Election Officer (Panchayats), the Panchayat Samiti and Panchayats in respect of constituencies for Panchayat Samiti and on the notice-board of the Panchayat and on a conspicuous place, in every village of the Panchayat in respect of wards of the Panchayats. Sub-rule (2) of Rule 4 authorises any adult inhabitant of the Panchayat area/constituency to object to anything contained in the statement affixed under Sub-rule (1) pertaining to the ward or constituency relating to the Panchayati Raj Institution of which he is a voter. The objections are to be submitted in writing to the officer authorized by the Government within seven days from the date of affixation of such statement. The officer authorized by the Government on receipt of objections is required to consider the objections and other material before him and record his decision thereon, in case, there is any change in the original publication, he is to amend the statement according to his decision and determine the wards and constituencies. He is also required to notify the same by affixing final statement at the places specified in Clauses (a), (b) and (c) of Sub-rule (4).

31. Rule 5 empowers the officer authorized by the Government to reserve number of wards or constituencies for persons belonging to Scheduled Castes/ Scheduled Tribes or other backward classes.

32. Rule 6 specifies the officer, authorized by the Government to determine the seats to be reserved for women. One third of the seats reserved for Scheduled Castes/Scheduled Tribes or other backward classes are also required to be reserved for women belonging to such castes/tribes, as the case may be.

33. Rule 7 prescribes procedure for reservation. The officer authorized by the Government is required, for the purpose of reservation of seats for persons belonging to Scheduled Castes, first to identify the wards or constituencies which consist of population of the Scheduled Castes and such wards or constituencies shall be serially arranged in the descending order of percentage of population of Scheduled Castes, excluding the wards and constituencies. Where such percentage is less than five it is to be assigned serial numbers, as SC 1, SC 2, and so on. The serial numbers, so assigned, shall be known as "special serial numbers" for Scheduled Castes.

34. According to Rule 9, the Officer authorized by the Government is also entitled to determine the number of offices of Sarpanchas and Pradhans, as required to be reserved in a Panchayat Samiti or in a Zila Parishad area for persons belonging to Scheduled Castes/Scheduled Tribes, or backward Classes and women, in accordance with the provisions of Section 16(1) of the Act, the same procedure, which has been laid down in Rule 7 is application for reservation of offices of Sarpanchas and Pradhans.

35. A conjoint reading of the Rules leave no manner of doubt in our minds that a list of wards and constituencies and reservation of seats for Scheduled Castes, Scheduled Tribes, Other Backward Classes and Women requires to be circulated and notified prior to the holding of Panchayat elections.

36. In the instant case, the concerned District Election Officer, i.e. the District Collector, Bhilwara published the list of wards and constituencies and against each ward or constituency, the category of the seat, either reserved or unreserved was indicated. The said list was published as the first step before holding the elections for the year 2000. Item No. 44 o the list mentions, "Dhunwala Mandal". Against this entry, no reservation has been mentioned. The seat was declared to be a general seat. In contrast, reserved constituencies/wards were specifically mentioned in the list. It is not the case of the respondents that any objections were filed to the list.

37. This way the only list, which was circulated and notified to the candidates and electors. The elections were fought and results were declared on the basis of the aforesaid list. Therefore, it was this lit which was binding and effective. The case set up by the respondents that reservations etc. were made on the basis of lottery and due to typographical error the list (Annex.P/1) did not mention "Dhunwala Mandal" as reserved for Scheduled Caste candidate, is of no consequence at all. The explanation appears to be purile and can not affect the sanctity of the aforesaid list of wards and constituencies and reservations of seats for Scheduled Castes/Scheduled Tribes etc. issued prior to the elections. As per the list Annexure-P/1 Dhunwala Mandal seat was not reserved for the scheduled caste candidate. Therefore, viewed in that light it cannot be said that Section 19(n) was applicable since the petitioner did not fight election for a reserved seat. Annexure-P/1 was the sole notified list issued as per the provisions of the Act. Such a list cannot be retrospectively amended after elections are held and result is declared, so as to set at naught the whole process of election. The competent authority cannot be allowed to change the very foundation on which the election has been conducted. The qualification of candidates to contest the election or not to contest election must be examined with reference to the notification in force at the time of commencement of election process. When the Electorate goes to polls on the basis of existing notifications relating to delimitation of constituencies, electoral rolls and reserved constituencies, in case any alteration in such notifications is permitted subsequent to the completion of the process of election, it will subvert the very basis of democratic institution of election by one who may or may not be even an elector. The so called additions and alterations in the new list of wards/constituencies and reservations which were intended to bring about drastic changes in the list of wards/constituencies and reservation cannot be termed as mere corrections of typographical errors. To give effect to the aforesaid new list will be akin to changing the foundation of a building after the same has been erected. Such a change is like changing a foundation stone after entire building has been erected on such edifice. Change of such a foundation is not an addition

or alteration in a completed building, but amounts to demolition of the same. Such a course is not permissible.

38. In view of the aforesaid discussions, the writ petition succeeds and the same is allowed. The impugned orders are set aside.