
(2005) 04 KAR CK 0043

In the Karnataka High Court

Case No : Writ Petition No's. 35264, 35335, 35676, 35865, 35971, 36065, 36057, 36204, 36209, 36792 to 36794, 36835, 37839, 38012, 38013 and 39675 of 2004

H. Shivappa and Others

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 15-04-2005

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 243T, 243ZG, 243ZG (b)
Karnataka High Court Act, 1961 — Section 9
Karnataka Municipalities Act, 1964 — Section 21, 22 (1), 23, 42 (2-A), 42 (3)

Citation : (2005) 4 KarLJ 328 : (2005) 4 KCCR 318 SN

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Judgement

D.V. Shylendra Kumar, J.—In all these petitions, wherein mainly persons elected as councillors to various City Municipal Councils in the State figure as petitioners, the question that is involved is as to whether the Government Notification No. UDD 51 MLR 2004 (P-1), dated 1-9-2004 issued by the first respondent-State for the purposes of Section 42(2-A) of the Karnataka Municipalities Act, 1964 (for short, "the Act") providing for reservation of the posts of "President" and "Vice-President" in various City Municipal Councils; is in conformity with the very provisions, namely, Section 42(2-A) of the Act and if not as to whether any intervention is called for.

2. While it is the assertion of some of the petitioners that the reservations as provided in terms of Notification dated 1-9-2004 bristles with various anomalies, discrepancies, virtually flouting the very provisions; that while in respect of some of the Councils, the reservation had been provided in excess, in the sense that, the reservation has been provided repetitively. Complaint of some of the other petitioners not falling in this category is that there is a lacking in providing such reservation; that by not providing reservation in favour of a category statutorily provided for, reservation is being deprived in violation of the enabling provision;

that permitting the State Government to go ahead with the conduct of the election to the post of "President" and "Vice-President" in such Municipal Councils will only allow the respondents to perpetuate illegality and to the detriment of the petitioners that it calls for correction at the earliest and at any rate before the elections can be held.

3. While under the enabling provisions of Section 42(2-A) of the Act, enacted by way of amendment through Act No. 36 of 1994, for the purpose of giving effect to the provisions of Article 243-T of the Constitution of India and that the reservation as required is sought to be ensured and for a fair distribution amongst the various Councils by rotating the same, the allegation is that the notification virtually defeats not only the constitutional mandate under Article 243-T, but also the implementative statutory provision of Section 42(2-A) of the Act by providing reservation in a manner not in consonance with the statutory provisions.

4. Respondents have been put on notice and the respondents have also filed their statement of objections.

5. The matter was heard at length for the past more than six months. Respondents, in fact, initially took time with the assurance that the notification was in consonance with the statutory requirements that no violation had been committed; that the overall extent of reservation as provided for u/s 42(2-A) of the Act has been adhered to and therefore no intervention was required.

6. A series of orders came to be passed from time to time in the light of these developments and as a result of the hearing on each date of the hearing and the orders are as under:

"8-11-2004:

I.A. No. II of 2004 filed in W.P. No. 35676 of 2004 and I.A. Nos. III of 2004 and V of 2004 filed in W.P. No. 35335 of 2004 are for vacating an interim order of stay that has been granted in W.P. No. 35676 of 2004 staying the operation of a Government Notification dated 1-9-2004 whereunder the Government has indicated the reservations that have been provided for elections to the post of "President" and "Vice-President" in as many as 34 City Municipal Councils in the State.

The applicants who have moved for vacating the interim order of stay are persons who are Municipal Councillors who aspire to contest the election for the post of "President" and "Vice-President"; that the stay of the general Notification providing for reservation has stalled the election process; that in respect of many Municipal Councils, calendar of events had already been notified even before the stay order had been granted; that in respect of some City Municipal Councils, elections had been concluded based on the very Notification even prior to the Order dated 13-9-2004 passed by this Court; that an anomaly has crept in; that while in about six City Municipal Councils, such elected Presidents and Vice-

Presidents are functioning and all other City Municipal Councils are deprived of the same benefits; that in several City Municipal Councils, the reservation as notified under the Notification is not at all in violation of any of the provisions for reservation; that in terms of the law declared by the Supreme Court in election matters, the order of stay is required to be vacated.

3. Sri Ashok Haranahalli, learned Counsel appearing for the petitioner in W.P. No. 35335 of 2004 wherein the petitioner had challenged the very Notification insofar as it provided for reservation to the City Municipal Council, Raichur is concerned, submits that the prayer for vacating stay is opposed and it is to be rejected; that in this City Municipal Council, the violation is writ at large on the face of it; that the petitioner belonging to backward class community had not been provided an opportunity to contest the post of "President" as reserved candidate even in the fourth round of elections after ushering in of the reservation provisions and the cycle of rotation had been set into motion.

4. Similar is the grievance in the case of the petitioner in W.P. No. 35676 of 2004 where reservation has not been provided for persons belonging to backward class communities so far.

5. Some of these writ petitions were admitted as, prima facie, the action of the Government in issuing the Notification dated 1-9-2004 was found to be in violation of the reservation provided for in favour of persons belonging to backward class community and due to the anomalies of either providing excess reservation in some City Municipal Councils at the cost of corresponding benefit to other Municipal Councils in the sense that there was no reservation at all in other Municipal Councils. The case of the petitioners also appears to be one such as in the counter-filed on behalf of the State Government, the Notification is sought to be justified on the premise that reservation to the extent provided for in the statute has been overall provided under the Notification.

6. The applicants who have moved for vacating stay are complaining that their right to aspire to the post has been while put on hold, the period itself is getting reduced with the passage of time; that a period of four months has already elapsed and in such circumstances, further proceedings may be allowed to go ahead subject to the result of the writ petitions.

7. The Notification which is under challenge is in as many as 34 City Municipal Councils in the State. The fixation of reservation to any Municipal Council in the sense providing for it in a particular term cannot be done in isolation and reservation is required to be rotated amongst all City Municipal Councils depending upon the extent of reservation provided for in favour of the reserved category, namely, Scheduled Castes, Scheduled Tribes, Backward Classes and Women. Though it is sought to be contended by learned Counsel for the respondents that in the case of Chamarajanagar and in the case of Raichur, there is no violation of any reservation and there is no justification for stalling the elections. I find, prima facie, there is a denial of the right of reservation provided

for in the statute as persons like the petitioners belonging to backward class community have not been provided opportunity so far. While there is no justification for vacating the interim order in respect of these two Municipal Councils at this stage which will only amount to allowing the Government to go ahead with its action notwithstanding a clear and blatant violation of the statutory provision as in respect of other Councils also the vacating of the stay order could lead to many anomalies and complications and unless the cycle of rotation is clearly and definitely ascertained and fixed, elections based on notification providing for reservation in isolation or intermittently cannot be worked.

8. Though learned Counsel appearing for the applicant-respondents urged that election process once initiated or set into motion should not be stalled by granting interim orders, as laid down by the Supreme Court in Ponnuswamy's case and catena of other cases, I am of the view that the present situation calls for staying a Notification which is on the face of it in violation of the statutory provisions and may be as well as the reservation directed to be provided for under the Constitution itself. The stay order of the Notification cannot be modified or vacated at this stage. Consequences are inevitable. The exercise of conducting elections to the post of "President" and "Vice-President" who are elected by the councillors of these City Municipal Councils cannot be compared to a general election held for electing representatives either to the Assembly or to the Parliament where the exercise involved is gigantic and stalling of those proceedings will be of disastrous consequence. In the circumstances, applications for vacating stay is dismissed.

9. However, the Government is directed to place before the Court the data and particulars required to fix the rotation cycle which according to the Government is based on the population of Scheduled Caste and Scheduled Tribe Communities in various City Municipal Councils, the basis on which the rotation is made in the case of reservation in favour of Backward Classes as also the reservation in favour of women candidates. Such information should be placed before the Court within one week from today.

10. A copy of this order shall be furnished to the Government Advocate.

20-11-2004:

Sri Narayana, learned High Court Government Pleader appearing for the respondent submits that the learned Advocate General has been engaged to appear on behalf of the respondents in these matters and requests 10 days time to place the necessary materials for proceeding in these matters.

Call after 2 weeks.

7-12-2004:

Sri Narayana, learned High Court Government Pleader, appearing for the respondent-State Government submits that the counters in all these cases are

ready and will be filed in the course of the day and requests the matter to be listed again on Thursday the 9th December, 2004.

Call on Thursday as requested.

9-12-2004:

Respondent-State Government has not placed materials before this Court indicating the manner of rotation of reservation in respect of the categories of Backward Classes and Scheduled Castes as provided u/s 42(2-A) of the Karnataka Municipalities Act (in short, "the Act").

2. Sri Narayana, learned High Court Government Pleader, has filed a memo on behalf of the 1st respondent purporting to place on record the particulars regarding rotation of reservation in respect of elections to ten Municipalities held in December 2003 and also rotation of reservations for the elections to the posts of President and Vice-President to various categories. The material now placed on record obviously is only indicative of the manner in which reservation had been provided during the last four terms of elections to the posts of President and Vice-President in the Municipalities.

3. What the State Government had been directed to place on record is information regarding the population of Scheduled Castes and Scheduled Tribes as also backward classes based on which proportionate reservation is provided for and also identification of the Municipalities having regard to the population of reserved classes, information regarding in whose favour reservation is provided in which of the Municipalities so that order of rotation is fixed. That material has not at all been placed before this Court. Even the material placed before this Court is not supported by an affidavit sworn to by the responsible officer of the State Government.

4. In my view, the State Government is obviously dragging its feet and is not upto the task which is entrusted to it and is also reluctant to part with necessary information before this Court for proper determination of the issues involved in these writ petitions. Conduct on the part of the 1st respondent-State Government cannot be appreciated. It only demonstrates either its incompetence or deliberate attempt to suppress or withholding of material information from the scrutiny of the Court. In either event it is most unfortunate.

5. Sri Narayana, learned High Court Government Pleader, seeks another week's time to place the relevant material before this Court supported by affidavit of the responsible officer of the Government. He also submits that the learned Advocate General is not available and as such he is instructed to seek for an adjournment.

6. Call on 16-12-2004 at the request of Mr. Narayana, learned High Court Government Pleader.

16-12-2004:

1. Learned Advocate General appearing for the State requests this Court that all

these petitions shall be called tomorrow.

List all these matters on 17-12-2004.

17-12-2004:

These matters have been heard in part. Learned Advocate General appearing for the State Government in these petitions requests for further accommodation to receive full instructions particularly on the aspect of the reservation provided for the Scheduled Caste and Scheduled Tribe Community having regard to the population in the State and the manner of rotation for such reservation amongst the available City Municipal Councils.

2. Likewise, the reservation in favour of Backward Classes also is to be furnished and the manner of rotation in favour of different categories like the Scheduled Caste and Scheduled Tribe and Backward Classes also is to be indicated. So also the internal reservation of 1/3rd in each category in favour of woman candidates. Learned Advocate General submits that the data relating to the total population of the Scheduled Caste and Scheduled Tribe which is the determinative factor and the population of these communities within the City Municipal Councils will also be indicated which in turn can automatically fix the manner of rotation.

3. Learned Advocate General requests the matters to be taken up for further hearing on 5th January, 2005.

4. Bring up for further hearing on 5th January, 2005 along with W.P. Nos. 36209 of 2004 and 36835 of 2004.

5. Registry is directed to furnish a copy of this order to the learned High Court Government Advocate.

5-1-2005:

Learned Advocate General appearing for the respondent-State submits that to streamline the procedure particularly for rotating the reservation for constituencies amongst the various City Municipalities and to place a blue print of the same before the Court, the respondents may require some further time and requests the matter to be taken up for further hearing on 13-1-2005.

Call on 13-1-2005.

Copy of this order shall be furnished to Government Advocate.

13-1-2005:

Learned Advocate General, appearing for the State submits that the State is in the process of streamlining the rotation of reservation for the purpose of holding elections to the posts of Presidents and Vice-Presidents in various City Municipal Councils in the State. While the reservation provided for in the earlier three rounds of elections are also being taken note of for the purpose of streamlining the rotation of reservation henceforth and to ensure that a pattern which

emerges can ensure and automatically ensure that future rotations are to be in place, copies of statement showing the previous reservations made in favour of the different categories in the last three rounds of elections are also placed before the Court.

While this may indicate the factual position as to how the reservation had been provided in the City Municipal Councils in the last three rounds of elections, unless the State had followed a set pattern in the earlier three rounds, this in itself cannot be treated as a guideline or an indication that the pattern is now properly set for future elections. However, it is necessary that the State may have to take note of the earlier reservations for the purpose of providing such reservations in the present round and future rounds of elections.

Learned Advocate General submits that the State should be able to complete this exercise by or before 20-1-2005 and requests that the matters may be listed for further hearing on 25-1-2005.

List all these matters on 25-1-2005 for further hearing.

25-1-2005:

Learned Government Advocate submits that the learned Advocate General is not free today and requested that the matters may be adjourned to 3-2-2005.

Call on 3-2-2005 for further hearing.

3-2-2005:

Though the respondent-State has been taking adjournment after adjournment and praying for time with the assurance that the State will come up with a blueprint, indicating the pattern of reservation and the manner in which the reservations provided for to different reserved categories for the purpose of holding elections to the posts of Presidents and Vice-Presidents in various City Municipal Councils in the State will be rotated, so far nothing has been placed before the Court, either indicating as to the manner in which it is sought to be brought in conformity with the statutory provisions or what has been done now itself is in conformity with the statutory provisions.

Firstly, it is to be noticed that in various City Municipal Councils where the petitioners have sought to contest for the post of either President or Vice-President, the reservation that has been provided is not in conformity with the statutory provisions. It is because of this anomaly and lacuna, the State has been put on notice and called upon to defend the correctness of the notification under challenge.

The inaction on the part of the respondent-State, to show that it has a definite plan and the scheme insofar as providing reservation is concerned, clearly indicates the inability on the part of the State to come up with a definite scheme, which is in conformity with the statutory provisions. It also demonstrates the ill-preparedness on the part of the respondent-State for the purpose of conducting

elections to elect persons to the posts of President and Vice-Presidents in various City Municipal Councils.

Sri Narayana, learned Government Pleader, appearing for the respondents submits that the learned Advocate General is unable to attend this matter today, in view of his other engagements and requests that the matter may be called next week.

While there is no difficulty for fixing the date of hearing to the convenience of the learned Advocate General, what is noticed is that the State has not so far placed even the blueprint indicating the manner of providing for such reservation and rotation of the reservation in different City Municipal Councils, notwithstanding time having been given to place the same before the Court for past about six months. It is rather surprising may shocking to see the inaction on the part of the respondent-State on this aspect of the matter, which is of important and necessity for holding elections in accordance with the statutory provisions. Unless the respondents come up with their blueprint plan by next week, this Court will have to draw an inference that the respondents are incapable of doing so.

However, list all these matters next week for further hearing, as requested by Sri Narayana, learned Government Pleader.

10-2-2005:

Learned Advocate General, appearing on behalf of the State, made further submissions. It is submitted that in the light of the past experiences and having regard to the constitutional and statutory requirements for providing reservation to different categories and in order to streamline the provision for providing reservations in various City Municipal Councils in the State, a blueprint is prepared, wherein all these aspects are taken care of and with which a new beginning can be made and which can ensure that things fall in place automatically even in the coming round of elections. A draft copy of the blueprint is placed before the Court.

However, the learned Advocate General submits that even on examination of the blueprint, the respondents have noticed certain anomalies and they are also required to be removed and the blueprint as of now can be corrected to be a perfect one, conforming the statutory and constitutional requirements and to the extent possible, the petitioners can also be involved in this process for suggesting any corrections or improvement in the proposed pattern. Learned Advocate General assures that the draft copies of this blueprint will be made available to all the learned Counsel appearing for the petitioners also, and that they can also respond and once the respondents are able to finalize the matter, a fresh notification can be issued in accordance and in compliance with requirements of the statutory provisions.

Bring up all these matters for further orders on 15-2-2005, at the request of learned Advocate General.

15-2-2005:

A memo has been filed on behalf of the respondents on 14-2-2005 inter alia purporting to contain the pattern of reservation and the manner of rotation of reservation in favour of different categories for the purpose of holding elections to the post of "President" and "Vice-President" in the various City Municipal Councils in the State.

2. Learned Advocate General appearing for the respondents submits that the memo filed on 14-2-2005 with the contents as referred to above has been filed by mistake even before it was fully scrutinized; that the memo had been filed even before it was brought to the notice of the Advocate General and it had been filed when the learned Advocate General was out of town and on scrutiny of the same, it was found by the learned Advocate General that the matter was incomplete; that it called for certain corrections and in such circumstances seeks the permission of the Court to withdraw the memo with its contents with the assurance that a proper memo will be filed with the corrected pattern of rotation being indicated; that a copy of the same will be served on the learned Council for the petitioners also before placing the same before the Court.

3. Learned Counsel for the petitioners have no objection to permit the withdrawal of memo and its contents. In the circumstances, the order is passed permitting the respondents to withdraw the memo with its contents.

4. However, as it may not be physically possible to return the very papers, the memo with its contents may remain on record, but it will not be taken as one filed for the purpose of these cases and as the version on behalf of the respondents.

5. Respondents are permitted to file a memo with correct version of the contents.

6. Learned Advocate General requests the matter to be called on 21-2-2005 for such purpose.

7. Ordered accordingly. Call on 21-2-2005 for further hearing.

21-2-2005:

Learned Advocate General appearing on behalf of the State submits that though the State had taken sufficient time and several attempts were made for streamlining the rotation of reservations in favour of the various categories which have been provided reservation and even an attempt was made by preparing a draft indicating the comprehensive pattern of reservation to various sections in the background of the provision that had been made in the last three rounds of elections, as it was found totally not satisfactory, that exercise was given up and the learned Advocate General submits that the State is not in a position to come out with either a satisfactory version indicating the manner of providing reservation in all the constituencies nor are the respondents able to improve upon the present position in any manner; that assuming there are certain

anomalies and violations, they can all be taken care of in the normal course of functioning of the democratic systems; that particularly as it is found there is no controversy with regard to the manner of reservation or non-reservation in respect of as many as 19 City Municipal Councils and the present petitions at the best points out anomalies in respect of 13 City Municipal Councils, requests the Court to rather examine the merit of the petition City Municipal Council wise in the sense as to whether the reservation provided to the post of "President" and "Vice-President" in these City Municipal Councils are in conformity with the statutory and constitutional provisions and such examination need not detain the holding of elections to the posts of "Presidents" and "Vice-Presidents" in the other 1.9 City Municipal Councils in respect of which there is no controversy or dispute.

2. Learned Advocate General also points out that even such exercise may not be necessary for the Court to undertake in the light of the provisions of Article 243-ZG of the Constitution of India; that a specific bar is put on the Courts for interference in electoral matters in respect of situations contemplated in Clauses (a) and (b) of this Article and as such there is no further need to stall the holding of elections; that even if there are any errors or mistakes in the process of holding elections to these City Municipal Councils, the remedy as suggested in this article will take care of that situation; that the object of the Article is to ensure a democratic process is not derailed; that no interference is definitely called for at this stage by the Court even for correcting infractions or anomalies assuming that such infractions or anomalies exist.

3. Learned Advocate General requests that each petition may be examined on its merits and disposed of in the light of the above submissions; that even if each petition is required to be examined, the examination unless is one which is permitted as one not covered under Article 243-ZG of the Constitution of India, such examination cannot be undertaken by this Court.

4. Learned Counsel for the petitioners, on the other hand, submit that the provisions of Article 243-ZG of the Constitution of India is not attracted to a situation like the present one; that what is questioned is not an election to the Municipality or in the context of delimitation, but the manner of working out the reservation for the post of "Adhyaksha" and "Upadhyaksha" of various City Municipal Councils in the light of Section 42(2-A) as introduced by Act 36 of 1994 of the Karnataka Municipalities Act, 1964 to give effect to the provisions of Article 243-T of the Constitution of India.

5. Learned Counsel for the petitioners also point out that this Court had undertaken such examination in a few writ petitions that had been filed earlier such as in the case of Shikaripura Town Municipal Council i.e., Yellappa and Another Vs. State of Karnataka and Others, and the writ petition was allowed holding that the provision of reservation was not in conformity with the statutory provisions. Learned Counsel for the petitioners urged that the situation in the present petitions is almost identical and for the very reasons these petitions also

should be allowed.

6. Whether a given petition can be allowed or not can be decided only after examination of facts in a particular petition. However, learned Advocate General appearing for the respondent-State and learned Counsel for the petitioners request that the matter may be called again on 23-2-2005 to ascertain the position with regard to the writ appeals preferred by the State as against the decision in the case of Shikaripura Town Municipal Council.

7. List for further hearing on 23-2-2005.

23-2-2005:

Learned Advocate General appearing for the State submits that the writ appeals preferred by the State as against the decision rendered in the earlier writ petitions on identical question has already been heard before the Division Bench. A copy of the order may be available in a day or two and therefore the matter can be taken up on 2-3-2005.

Call on 2-3-2005.

2-3-2005:

Sri H.B. Narayana, learned Government Pleader, appearing for the respondents, requests that these matters may be taken up next week, for the reason that the certified copy of the judgment passed by the Division Bench is still awaited and submission is that the judgment will cover these matters.

Call next week.

11-3-2005:

Learned Advocate General appears on behalf of the State and submits that in terms of the decision in Division Bench in K.G. Vasantharaju v. State of Karnataka and Ors., W.A. NOS. 3914 and 4101 of 2004 connected with W.A. Nos. 4011 and 4012 of 2004, DD: 23-2-2005 it has been ruled that there is no occasion for this Court to examine such complaints as aired by the petitioners in these petitions in exercise of writ jurisdiction, particularly in view of the provisions of Articles 243-T and 243-ZG of the Constitution of India.

2. A copy of the judgment of the Division Bench is placed before the Court. Copy is also furnished to the learned Counsel for the petitioner.

3. Learned Counsel for the petitioner requests the matter to be called on Monday the 14th March, 2005 to look into the judgment and make his submissions.

Call on Monday the 14th March, 2005 as requested".

7. The developments as indicated in the above orders reveal that while the State attempted to justify the correctness of the impugned notification and later on assured the Court that steps are being taken to ensure that notification providing

for reservation in conformity with the provisions of Section 42(2-A) of the Act is being prepared and will be placed before the Court, at later stages, this stand was abandoned and the State raised a preliminary objection regarding the maintainability of the petitions on the premises that there is a threshold bar to entertain these petitions in terms of Article 243-ZG of the Constitution of India and therefore all these petitions should be dismissed relegating the petitioners to avail of the statutory remedy before the earmarked Election Tribunal for the redressal their grievance.

8. It is significant to note that even in the statement of objections that had been filed on behalf of the State as on 15-12-2004, it was never the stand of the State that the writ petitions were not tenable and are liable to be rejected outright in view of a constitutional bar/embargo to entertain the petitions. Not that, an objection of this nature cannot be raised if it is valid at a later stage. In fact, it only indicates that there was an attempt on the part of the State to justify its action on merits and even for correcting its action on realizing that there were some mistakes committed in the issue of the impugned notification and to bring it in conformity with the statutory requirements. But, that course of action was later abandoned and the State resorted to the technical plea of maintainability of the petitions and the purported embargo in view of the provisions of Clause (b) of Article 243-ZG of the Constitution of India.

9. Learned Advocate General appearing on behalf of the State having pressed into service the preliminary objection with regard to the maintainability of the writ petitions for examination by this Court of the questions raised by the petitioners in writ jurisdiction, particularly in view of the embargo under Article 243-ZG of the Constitution of India and having regard to the series of decisions of the Supreme Court in respect of the analogous provisions of the Constitution viz., Article 329(b) and also of the Division Benches of this Court, this aspect became the contentious issue in these petitions and therefore it became necessary for the Court to examine this aspect first before looking into any other aspect.

10. It is on the question of maintainability of the petitions that arguments have been addressed as of now and I have heard at considerable length Sri Subash B. Adi, Sri Kamath, Sri Chandrashekar, Advocates, Sri S.P. Shankar, learned Senior Counsel for M/s. Rangaram Associates, for and on behalf of the petitioners, learned Advocate General on behalf of the respondent-State assisted by learned Government Pleader, Sri H.B. Narayan, Sri Basavaraj, learned Counsel appearing for some of the respondents in some of the writ petitions.

11. Submission on behalf of the State by the learned Advocate General is that the Constitution has taken care to ensure free and smooth elections for the Municipalities by providing for the same in Part IX-A of the Constitution, beginning with Article 243-P to Article 243-ZG of the Constitution of India; that the bar envisaged under Article 243-ZG for interference by the Courts in electoral matters is clear and absolute; that 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 and therefore, the petitions cannot be entertained. It is the further submission that even an election to the post of "President" and "Vice-President" i.e., Chairperson of the Municipalities is also part of the election to the Municipality and therefore the bar envisaged under Article 243-ZG(b) equally applies to the election to the post of "President" and "Vice-President" of the Municipalities; that an Election Tribunal, in fact, has been provided for the purpose of calling in question an election to the post of "President" or "Vice-President" in terms of the Karnataka Municipalities (President and Vice-President) Election Rules, 1965, particularly, as provided under Rules 15, 16, 17 and 18 of these Rules (for short, "the Rules"); that these provisions constitute a Code by themselves and therefore there is no scope for examining the grievance of the petitioners through these writ petitions.

12. Submission on such preliminary objection and as a bar for entertaining the present writ petitions are sought to be fortified by placing reliance on the decisions of the Supreme Court as also of this Court, particularly, the decision of the Supreme Court rendered in the cases of Anugrah Narain Singh and Another Vs. State of U.P. and Others, and Election Commission of India Through Secretary Vs. Ashok Kumar and Others, equivalent to.

13. Submission of the learned Advocate General is that the caution sounded in Ashok Kumar's case is very clear and categorical that even in situations where the bar of Article 329(b) of the Constitution of India is not attracted, the Court should be very cautious and circumspect in interfering with such election matters, intervention if any, should be only for facilitating the conduct of elections and never for stalling the elections. The election process once set in motion should never be stopped or prevented; that the Court orders should not come in the way of the democratic process being worked out in accordance with the statutory provisions.

14. The learned Advocate General, placing reliance on the judgment of the Division Bench of this Court dated 23-2-2005 written in (K.G. Vasantharaju's case) W.A. No. 3914 of 2004 and connected cases wherein one K.G. Vasantharaju was the appellant and the State and the Deputy Commissioner and others were impleaded as respondents, submits that the Division Bench reversed the order passed in W.P. Nos. 30341 and 30342 of 2004 wherein, a Single Judge had allowed the petition and the Division Bench having held for such reversing and ordering that such petition itself was not tenable, in view of the preliminary objections pressed on behalf of the appellants and applying the ratio of this decision, these writ petitions should be dismissed as not maintainable.

15. In this regard the learned Advocate General has drawn the attention of this Court to paras 4, 7, 8 and 9 of this judgment in support of the submission in respect of the disputes and controversies in the matter of elections to the post of President and Vice-President to various Councils, the subject-matter cannot be

examined in the exercise of writ jurisdiction.

16. Further submissions of the learned Advocate General is that in the matter of holding of elections it has been the experience that there will always be aggrieved persons and disputes, where one or the other party is likely to approach the Court and if the Courts should concern themselves with the examination of each and every such grievances and keep interfering with the election process, the election process itself will not get under way; that it will be stalled for ever. No progress can be achieved in the matter of conduct of elections; that it is more important to allow the democratic process to roll on rather than the Courts keep interfering with the conduct of elections and the conclusion of the electoral process; that even assuming that there are anomalies, infractions and violations; that such violations and infractions should be deferred for correction after the conclusion of the electoral process; that such issues should be resolved only by the specially constituted election Tribunals for the very purpose and not by the writ Courts or other Courts even during the electoral process and has drawn specific attention of this Court to para 32 of Ashok Kumar's case about the caution sounded by the Supreme Court and about the scope of interference in election matters. The learned Advocate General contends that it has been the experience worldwide that there should be no interference in the electoral process by the Courts; that in fact in a democratic order such possibilities are inevitable. What is more important is to permit the democratic process to function rather than in the name of preventing violation and infractions bring the democratic process to a grinding halt. Learned Advocate General submits that even in the context of the functioning of the democratic system in Britain what is popularly understood as the British Constitution as evolved is attributed to the blundering of the British democratic system; that in the functioning of any democratic system blunders of such nature is inevitable. Court should not take cognizance of all such infractions or blunders, but should relegate the complaining parties to seek redressal before the statutorily constituted Tribunals. Learned Advocate General strongly contends that the interim order of stay, which has been granted in respect of the notification for reservations as per Notification dated 1-9-2004, should be vacated forthwith. Even if there are certain anomalies in the matter of providing reservations to the various categories, either they being strictly not in conformity with the provisions of Section 42(2-A) or even in the matter of rotating of such reservations, while all such infractions and anomalies can be worked out by the aggrieved persons before the Election Tribunal provided for under the Karnataka Municipalities (President and Vice-President) Election Rules, 1965, submits that in this view of the matter it is not necessary for the State to defend the correctness or otherwise of the impugned notification at this stage nor is there any necessity or scope for examination of the validity of this notification by this Court at this stage and prays for dismissal of these petitions.

17. Sri Basavaraj, learned Counsel for the respondents 8 and 9 in W.P. No. 34676 of 2004, while generally supporting the arguments advanced by the learned

Advocate General on behalf of the State and other respondents, further adds that even assuming for argument sake that Article 243-ZG by itself does not act as a bar for entertaining the writ petitions by this Court; the availability of an alternative remedy through an election petition provided for under the Rules by itself can act as a bar for writ petitions being entertained by this Court in respect of such disputes and in support of this proposition has placed reliance in the case of Smt. Raniyamma Vs. M. Hemala Nayaka and Others, . In this regard, the learned Counsel also places reliance on the decision of the Full Bench of this Court in the case of State of Karnataka and Another, etc. Vs. N.A. Nagendrappa and Others, and submits that even according to the ratio of this decision also, that the Writ Court should be rather weary of entertaining the petition for the redressal of grievances of parties in the matter of election to the post of President and Vice-President to the Councils as the provisions of Rules 15, 16, 17 and 18 of the Election Rules, 1965 constitute the Court by itself and therefore, remedy outside this Code could not be permitted.

18. Sri Basavaraj submits that in W.P. No. 35535 of 2004, the interim order passed having been modified by the Division Bench in W.A. Nos. 4783 to 4787 of 2004, elections have in fact been subsequently held and the result has also been declared and therefore nothing survives in this writ petition as of now and the writ petition should be dismissed as having become infructuous.

19. Certain other objections are also raised by Sri Basavaraj insofar as W.P. No. 35536 of 2004 is concerned. However, Sri Basavaraj is fair enough to submit that the question as to whether the remedy provided u/s 23 of the Karnataka Municipalities Act whether can include redressal of grievances with regard to the availability of the notification for reservation such as the one challenged in the present writ petition question had neither been examined nor any opinion expressed but had been left open. The Division Bench did not express its opinion one way or the other as to whether the legality of impugned notification can also be gone into by availing of the remedy u/s 23 of the Karnataka Municipalities Act. Basavaraj also submits that there has been a distinction with regard to the embargo placed under Article 243-ZG of the Constitution of India between the elections to Municipalities and elections to the post of President and Vice-President in the Municipality and that the bar under Article 243-ZG(b) does not automatically apply.

20. The preliminary objections raised on behalf of the State, by the Advocate General supported by the learned Counsel appearing for other respondents, is strongly refuted by the learned Counsel appearing for the petitioners. It is firstly contended that such preliminary objections had not been raised at the earliest and at the threshold that the State did not raise any preliminary objections even while the statement of objections were filed, but has come up with such a contention at a belated stage when the writ petitions had been set down for hearing and disposal that the State in fact had by itself agreed to correct the impugned notification so as to bring it in conformity with the statutory provision

and if they fail to defend the same, when in fact should the State for such purpose had taken time on several occasions, but instead of demonstrating the correctness of the notification before the Court, has while shying away from that responsibility comes up with the preliminary objection with regard to the maintainability of the writ petitions, raising of such preliminary objection is neither tenable nor bona fide and it should be rejected at the threshold.

21. However, the learned Counsel for the petitioners have defended the maintainability of the writ petitions on the merits also.

22. Submissions of Sri Shankar, learned Senior Counsel is that the ratio of the Division Bench decision rendered in W.A. No. 39144, dated 23-3-2005 is distinguishable that it does not squarely apply to the facts of this case; that judgments were rendered in the context that the petitioner had no locus standi to question the correctness of the notification as the petitioners were not even aggrieved persons; that the petitioners had approached the Court at a belated stage when electoral process had been set in motion and the Court felt that no interference is warranted applying the ratio in Ashok Kumar's case. In this regard, Mr. Shankar has drawn attention of this Court to the contents of paras 4 and 11 of the judgment of the Division Bench. Likewise attention is drawn to the affidavit of the Joint Secretary as explained in para 7 of the affidavit extracted in para 10 of the judgment with particular reference to para 7 of the affidavit, submits that the decision relied upon cannot be characterised as one to cover the present situation nor has laid down any ratio for situations other than the one referred to in the very judgment. Placing reliance on the decision of the Supreme Court in Lakshmi Charan Sen and Others Vs. A.K.M. Hassan Uzzaman and Others, . Sri Shankar submits that the Supreme Court itself had left open scope of Article 329(b) of the Constitution of India corresponding to the provisions of Article 243-ZG(b) on which reliance is placed by the learned Advocate General contending that the Article acts as an embargo to entertain the writ petitions and submits that if no opinion has been expressed by the Supreme Court that Article 329(b) speaks of such an embargo in such a situation; that it is equally so in the case of the present petitions even if a petition under Article 226 of the Constitution of India is presented seeking interference and relief. He has also drawn the attention of the Court to Election Commission of India Vs. Shivaji and Others, as also Anugrah Narain Singh's case, and submits that the words imminent and well under way should be understood as used only in the context of Articles 243-ZA and 243-ZG(a) and submits that there is no embargo on this Court to entertain the present writ petitions either based on the provisions of the Article 243-ZG or on the ratio of the decisions of the Supreme Court referred to above or even on the ratio of the judgment of the Division Bench in W.A. Nos. 3914 and 4101 of 2004 and connected writ appeal, dated 22-3-2005.

23. Sri Subash Adi, learned Counsel for the petitioners, in W.P. No. 3605 of 2004 and other writ petitions has lead the main arguments on behalf of the petitioners and has contended contends that there is neither any bar for this Court to

entertain the present writ petitions in view of the provisions of Article 243-ZG of the Constitution of India nor the provisions of Rules 15 to 18 of the Election Rules can be said to be providing an effective remedy to redress the complaint lodged by the petitioners in these writ petitions; that in fact there is no remedy provided for under such rule and therefore, it cannot be contended that in view of the availability of an alternative remedy, these writ petitions cannot be entertained.

24. It is also his submission that the judgment of the Division Bench in the W.A. No. 3914 of 2004 and connected cases does not conclude the matter against the petitioner on the aspect of maintainability; that the Division Bench in fact did not examine the contents and scope of such applicability in elections to the posts of officer-bearers in Municipalities; that the bar under Article 243-ZG to the elections of the Municipalities in the present situation is not governed by this article; that the scheme of constitutional provisions starting from Articles 243-P and 243-ZG clearly spells out that the provisions having made only in the context to the elections to the Municipalities of the Councils and therefore does not constitute an embargo for entertaining disputes relating to the election of office-bearers; that it becomes even more obvious on an examination of the provisions of Article 243-T of the Constitution of India where a clear distinction is maintained between the reservation provided to the Municipalities i.e., membership to the Municipalities and the reservation to be provided to the posts of Chairpersons; that while specific provisions have in fact been made under Sub-clauses (4), (5) and (6) of the Article 243-T of the Constitution of India in respect of the posts of Chairpersons of Municipalities such a provisions being conspicuously absent in respect of the very posts under Article 243-ZG(b) of the Constitution, the very intention and object was to confine the bar to election to Municipalities and not to extend it to elections to the post of Chairpersons.

25. Submission of Sri Subash B. Adi, learned Counsel for the petitioners, on the constitutional position with regard to the election to the Chairpersons of Municipalities is concerned, is that there is no constitutional embargo for the High Court to entertain writ petitions in exercise of its jurisdiction under Articles 226 and 227 of the Constitution of India, insofar as either the validity of such elections are concerned or on the aspects incidental to holding of such elections. Learned Counsel for the petitioner submits that while the understanding of the word "municipality" used in Article 243-ZG(b) of the Constitution of India and as defined in Clause (e) of Article 243-P, being an institution of self-Government as under Article 243-Q, which specifically indicates that such municipality being the body corporate for the urban area, the Chairpersons of Municipalities cannot be construed as Municipalities or elections to the posts of Chairpersons of municipality as the same as elections to the municipality itself.

26. It is also the submission of Sri Subash B. Adi, that the notifications providing for reservation of the posts of Chairpersons in various CMCs, which is under challenge in these writ petitions, is also not part of any electoral process; that

the notification is issued at the stage before the commencement of the electoral process and even if the electoral process is started, there is no embargo for the Court to examine the correctness or otherwise of a notification, in exercise of writ jurisdiction by this Court. In this regard, learned Counsel for the petitioners has drawn my attention to para 32(1) of the decision of the Supreme Court in the case of Ashok Kumar and points out that even on a wide interpretation of the term "election", it can only include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result, and on the date of issue of the impugned notification, the election process itself having not begun, the question of Courts applying the caution sounded in sub-para (5) of para 32 of the said decision viz., that the Courts must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of the election proceedings, does not apply to the present situation.

27. Further submission of Sri Subash B. Adi is that insofar as the legality of the notification is concerned and the grievance of the petitioners in the context of notification being not legal or being not in consonance with the provisions of Section 42(2-A) of the Act is concerned, the same cannot be made subject-matter of an election petition u/s 22 of the Act. Learned Counsel submits in this regard that Clause (4) of Sub-section (1) of Section 23 of the Act, wherein the grounds for invalidating the declaration of an election are mentioned, the same cannot be enlarged in respect of any and every situation, but it is only in the context of such non-compliance of the Act or the Rules or any orders which are relevant for the declaration of the result of an election of the candidate or even the other process such as scrutiny of nominations etc., during the electoral process and does not refer to such non-compliance before the electoral process. It is also the submission of the learned Counsel for the petitioners that the provisions of the Rules, particularly, Rules 15, 16, 17 and 18, do not provide for agitating the grievance of the petitioners vis-a-vis the validity of the notification; that the provisions of these rules are no remedy at all to the petitioners in a situation of the present nature and therefore it can never be contended that in view of availability of alternative remedy, particularly by means of an election petition, provided for under the Rules itself, this Court should not entertain writ petitions. Learned Counsel for the petitioners submits that while these provisions are not one which had been provided for redressal of a situation of present nature, particularly as the very provision was not on the statute book at the time when these rules had been framed, even the reference to Rule 17(a)(ii) that the result of the election has been materially affected by the non-compliance of the provisions of the Act or any of these rules etc., cannot be construed as one providing for relief beyond the provisions of Sections 22(1) and 23 of the Act itself, it cannot be bettered by reference to the Rules, as it is not a provision providing for a situation of the present nature.

28. Sri Subash B. Adi, learned Counsel for the petitioners in fact submits that all these provisions have been made in the context of an election petition that

should be filed u/s 21 of the Act, which is provided for challenging an election of a Councillor and not for challenging election to the posts of Chairpersons of the Municipal Council. Learned Counsel for the petitioners submits that at the best, it can be argued that Rules 15, 16, 17 and 18 of the Rules provide for a situation to challenge the legality or otherwise of the declaration of elections in respect of the Chairpersons itself and nothing beyond. It is accordingly submitted that the question of legality of the notification of the present nature providing for reservation is neither covered by these rules nor was the rules made in contemplation of a notification of this nature.

29. It is also the submission of Sri Subash B. Adi that even in terms of the judgment of the Division Bench in W.A. No. 3914 of 2004 and connected cases, the observation in para 9 indicates that this question has not been examined by the Division Bench, as in the light of the view taken by the Division Bench, on this aspect, there was no necessity to deal with such contentions and the question was being specifically left open to be agitated in further proceedings relating to the dispute brought before this Court in these cases and therefore the matter having been not concluded, it is open to the petitioners to urge such contentions and it is not correct on the part of the State, as submitted by the learned Advocate General, that the matter is covered and concluded by the judgment of the Division Bench on this aspect of the matter.

30. In the light of such constitutional and statutory provisions, Sri Subash B. Adi, learned Counsel for the petitioners submits that firstly there is no embargo under Article 243-ZG(b) of the Constitution of India for entertaining petitions of present nature on this Court in writ jurisdiction.

31. Secondly, that the provisions of the Rules, particularly Rules 15, 16, 17 and 18 do not provide for agitating the questions raised in the present writ petitions and therefore do not constitute either a bar or an alternative remedy and the same cannot be pleaded to persuade this Court not to entertain the present writ petitions.

32. Thirdly, that the judgment of the Division Bench in W.A. No. 3914 of 2004 and connected matters while does not act as a threshold bar for entertaining the writ petitions in the sense that the petitioners have an adequate remedy under the statutory provisions, the Division Bench on the other hand, had expressly left upon the examination of the contention that the parties are not left with any legal remedies etc.

33. Fourthly, it is contended that the ratio of the decision of the Supreme Court in Ashok Kumar's case also does not come in the way of this Court entertaining these writ petitions, as the notification is not issued as part of an electoral process, but one that preceded the electoral process.

34. Fifthly, it is submitted that even while there is no bar, the caution sounded in sub-para (5) of para 32 of this decision also does not apply to the present situation, as the caution is one that is applicable for intervention by Courts

during the electoral process. Submission of Sri Subash B. Adi is that on the other hand, the Division Bench of this Court had taken a view that where the illegality is writ large in the matter of conduct of elections to the posts of President and Vice-Presidents of the Municipalities, and in the context of Rules 4(4) and 17 of the Rules, availability of alternative remedy is not a bar to entertain a writ petition, as held in the case of T.H. Saganappa Vs. T.R. Srinivasamurthy and Others, and submits that as in the present case, while it is the stand of the petitioner that the Rules are not even an answer for the grievance of the petitioners in the sense that the Rules do not provide for remedy for the situation highlighted in the writ petition, assuming that it is one providing for remedy in such a situation also on the strength of the decision of the Division Bench in the case of T.H. Sangappa, this Court can definitely entertain a writ petition, as the availability of such alternative remedy is not a bar to entertain a writ petition. For the very proposition, learned Counsel for the petitioners relies on paras 40 and 41 of the decision of the Supreme Court in State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, .

35. It is in the light of such rival contentions, the preliminary objections that has been raised on behalf of the State with regard to the maintainability of the present writ petitions for examination in the exercise of writ jurisdiction is required to be considered.

36. If the Constitution provides an embargo for entertaining a writ petition by this Court in a situation mentioned therein, no further question arises, the matter ends there. There is no question of this Court looking into the matter any further irrespective of the irregularity or even illegality alleged in the petitions. The constitutional embargo acts as a threshold bar for entertaining a writ petition, provided it is there. The bar pleaded is in terms of Article 243-ZG(b) of the Constitution of India, which reads as under:

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

(a) x x x

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

The bar is in respect of the examination of the question of elections to the Municipalities. It is to be noticed that the election to Municipalities is not the same as elections to the Chairpersons of the Municipalities, as indicated in Article 243-P(e) of the Constitution.

37. Even in Article 243-P(e) in fact a clear distinction has been maintained between a municipality and the Chairpersons of the municipality. Separate provisions providing for reservations have been made in Article 243-T for elections to the Municipalities and for elections to the posts of Chairpersons in

the Municipalities. The word "municipality" does not automatically take in its fold the Chairpersons of the municipality. The bar contained in Article 243-ZG is in respect of the elections to any municipality and not elections to the Chairpersons of the Municipalities. The bar operates if it is actually so provided for and not by way of an analogy or by way of an extension, if one should understand the position on the settled principles of interpretation.

38. It is not possible to include the elections to the posts of Chairpersons to a municipality within the meaning of the word "municipality", as the provision is one which curtails the jurisdiction of the Courts, imposes fetters on the jurisdiction, until and unless the bar is express and unambiguous.

39. On a plain reading of Article 243-ZG(b) itself, it is obvious that elections to the posts of Chairpersons of a municipality do not find place in this Article. It is not a bar in respect of examination of the question arising in the context of elections to Chairpersons in Municipalities, by the Court.

40. In the absence of an express bar, the next stage is as to whether the Court can exercise its jurisdiction under Article 226 of the Constitution. It is no doubt true that under Article 226, where an alternative adequate remedy is provided for, the writ Court is rather slow in exercising jurisdiction, and in fact as a rule of practice such matters are relegated to be agitated before the very forum and in the manner provided for by the statute. Here again, on an examination of the provisions of Section 42(2-A) and 42(3) of the Act read with the provisions of the Rules, it clearly indicates that the rule does not provide for agitating the questions such as the validity of notifications such as the one dated 1-9-2004, challenged in this batch of writ petitions and therefore the provisions cannot even be construed as one providing for an alternative remedy.

41. Even if there is an alternative remedy, the rule is not one of absolute bar but a rule of prudence that the Court should not exercise writ jurisdiction unless merited and warranted.

42. In the light of the decision relied on by the learned for the petitioners, rendered by a Division Bench of this Court in Sangappa's case, referred to earlier, the bar, if any, is lifted holding that the examination of the grievances of the petitioners cannot be curtailed at the threshold.

43. Submission of Sri B.T. Parthasarathy, learned Advocate General, by way of the contentions urged on behalf of the State, is that the ratio laid down by the Supreme Court in Anugrah Narain Singh and Ashok Kumar's cases, is a complete answer to all the questions and contentions urged on behalf of the petitioners and therefore this Court should not entertain the present petitions, but should dismiss them in limine.

44. In fact, the Supreme Court has summed up the legal position with regard to the interference in election matters at para 32 of the judgment in Ashok Kumar's case as points (1) to (5).

45. Even here, on the application of these five principles enumerated in para 32 of Ashok Kumar's case, I do not find the situation wherein this Court cannot entertain present writ petitions, inasmuch as the stage at which the petitioners have approached this Court was one prior to commencement of the electoral process. May be in some later petitions, the calendar of events had been issued, but the notification impugned herein itself is one which precedes the electoral process and in fact is not one which was a part of the process of election in the sense that whatever happened happens under the notification before the commencement of the electoral process and the impact is not one that begins or which surfaces for the first time during the electoral process.

46. Provision for reservation having already been made under the notification, it acts as a threshold bar on such persons who do not come within the scope of the reservation and therefore such persons are prevented from contesting the election itself and a person who has not contested an election, cannot by himself maintain an election petition, even in terms of Rule 15(1) of the Rules, as an election petition can be filed by a person who was himself a candidate in the election or by three or more Councillors joined together as petitioners and cannot be by a single person if the person himself was not a candidate in the elections. In most of the cases, the grievances of the petitioners in the present batch of writ petitions being that they are being deprived of an opportunity of even contesting the elections to the posts of Chairpersons of the Municipalities, the petitioners by themselves cannot maintain an election petition, in which event a provision like Rules 15, 16, 17 and 18 of the Rules can never be said to be an adequate or efficacious remedy to act as a bar to exercise of writ jurisdiction. Even an examination of the relief that can be granted in terms of Rule 15(1) also clearly indicates that the Electoral Tribunal cannot grant any relief in favour of a person who is himself deprived of an opportunity to contest the elections due to the pattern of reservation being such, and at the best if a petition was tenable, the election of the returned candidate can be questioned and nothing beyond.

47. The only other bar that had been pleaded by the learned Advocate General is in terms of the judgment of the Division Bench in W.A. No. 3914 of 2004 and connected cases. Here again while the question is not free from doubt in the light of the observation contained in para 9 of the judgment, what is pointed out on behalf of the petitioners is that in terms of the judgment of the Division Bench in W.A. Nos. 4783 and 4784 of 2004 and connected cases, wherein it is expressly observed in para 4 of the judgment is thus:

... However, it is the contention of Sri R.L. Patil, learned Counsel for the contesting respondents that in the remedy provided u/s 23 of the Karnataka Municipalities Act, the validity of the impugned notification cannot be gone into. We need not express any opinion on this contention placed before us at this stage. Suffice it to state that if the validity of the notification could not be gone into in an election petition to be filed u/s 23 of the Act, that question can be gone into by this Court in the pending writ proceedings....

Is that if the validity of the impugned notification cannot be subject-matter of a petition in terms of Section 23 of the Act, that can be gone into by this Court even in a petition under Article 226 of the Constitution of India.

48. However, yet another contention that is urged is that any intervention in the electoral process must be only for the purpose of facilitating the election and not for intervening or putting a hold on the elections; that in view of pendency of the present batch of writ petitions, holding of elections to the posts of Chairpersons of the Municipalities has been held up for the past more than six months; that the interim stay of the notification has come in the way of holding the elections and therefore it is just and necessary to apply the principles as enunciated in sub-para (5) of para 32 of the judgment in Ashok Kumar's case, the stay should be vacated and the electoral process should be facilitated to move forward rather than putting a hold on the process.

49. Here again, the argument is rather casual, as in the first instance the electoral process had not begun when the writ petitions were filed. Secondly, the stay is only in respect of the notification providing for reservations and as it was found that prima facie the notification was in contravention of the provisions of Section 42(2-A) of the Act, providing for reservation and also the manner in which it was required to be rotated. The stay in fact provided an opportunity to make good the notification and the State had taken time for demonstrating that the notification is one in conformity with the statutory provisions. While this never happened, at one stage, the respondents, realizing that the notification and the basis of it was one which militated against the statutory provisions under Article 243 of the Constitution, took further time for the purpose of streamlining the process and issue of a proper notification, one in conformity with the requirements of the statutory provisions and went on taking time rather than addressing arguments on the merits of the writ petitions. The State was accommodated at the request of the learned Advocate General on any number of occasions. At one stage, the State had come up with a revised notification and according to the State, it was one which could meet fully the requirements. However, the State, for the reasons best known to it, withdrew the materials placed before the Court by seeking permission of the Court and later on came up with the plea of threshold bar or preliminary objections, rather strangely after a lapse of more than five months from the filing of the writ petitions. Plea of threshold bar was not even the case of the State in the statement of objections that had been filed.

50. The learned Advocate General contended with vehemence and conviction that the Court should not come in the way of holding elections in the name of anomalies and irregularities that may occur during the electoral process and in the functioning of a democratic system and cited the example of British democratic system; that the British Constitution itself has been evolved through the bungling march of the British democratic system.

51. May be in England, for want of a written Constitution, bungling procedures

had been recognised and permitted, and that is how they got their Constitution. Fortunately, in our country we have a written Constitution and statutory provisions governing the functioning of different organs of the State. The role of different organs of the State is rather well-defined and it is the bounden duty of the judiciary and Courts to examine the causes brought before the Court, as provided for and in conformity with the constitutional provisions and statutory provisions. If it is brought to the notice of the Court that a particular action under an Act by the Executive unit of the State is not only in violation of the statutory provisions but violates the spirit of the constitutional mandate and also incidentally affects the rights of the persons who come before the Court as petitioners, this Court cannot shirk its responsibility and duties in the name of bungling process of democratic functioning. That is not what this Court draws inspiration from to decline to exercise the power of judicial review of administrative/executive action.

52. The manner in which the State has conducted itself in the present situation and has been shifting its stand during the pendency of the proceedings and during the course of the hearing before the Court, only indicates that while the respondents do not have full confidence at all to defend their action but have called in aid the technical objections to avoid scrutiny. Such conduct also inevitably creates the impression that there is something lacking on the part of the State; that the respondent-State is feeling shy of revealing the correct position and things before this Court; that it wants to hide something from the scrutiny of the Court, in the name of holding up of the democratic process. I am afraid this cannot be and should not in a constitutional set up governed by a written Constitution.

53. I am of the clear view that the submission of the learned Advocate General that this Court should ignore the anomalies and irregularities to allow the democratic process functioning, is a submission which is neither realistic nor one justified in the present circumstance. In fact the scrutiny was only to ensure that the action of the respondent-State was in consonance with the statutory provisions and the constitutional requirements. The respondent-State shies away from that responsibility to satisfy the Court about such compliance. The State cannot contend that this Court should shut its eyes on such development.

54. I notice from the arguments advanced on behalf of the petitioners that the decision of the Division Bench in W.A. No. 3914 of 2004 and connected cases, is sought to be distinguished on the premise that W.A. No. 3914 of 2004, which was filed against the order in W.P. Nos. 30341 and 30342 of 2004, was decided mainly on the merits of that case on accepting the affidavit of the Joint Secretary to Government, as indicated in paras 5 to 9 of his affidavit, extracted in para 10 of the judgment of the Division Bench, that the stand of the State was that the notification providing for reservation was strictly in accordance with Section 42(2-A) of the Act as well as the rotation Rules, which was not disputed by the Counsel for the petitioners; that the elections to as many as 77 Municipal

Councils had already been completed and should not be disturbed by quashing the notification providing for reservation in Shikaripura Town Municipal Council alone; that such partial quashing of the notification can upset the pattern of rotation of reservation and directions for reserving the post in Shikaripura Town Municipal Council in favour of a candidate belonging to Scheduled Caste/ Scheduled Tribe Community will have the effect of further enhancing the overall reservation in favour of the said community, which will virtually be in the teeth of very provisions of Section 42(2-A) of the Act, as by the direction issued by the Court, the State is being compelled to provide for reservation in favour of a particular category over and above what is provided u/s 42(2-A) of the Act itself.

55. The situation in the present case is sought to be distinguished by pointing out that in the present batch of writ petitions, the respondents have not justified the correctness of the notification with reference to any facts and figures or with supporting documents, as had been done in W.A. No. 3914 of 2004. Also that the petitioners have approached the Court even before the issue of calendar of events in most of the City Municipal Councils and before any elections were held in any of the City Municipal Councils. It is urged that the situation in the present cases is totally different and on facts the ratio or decision rendered in W.A. No. 3914 of 2004 cannot be applied to the present petitions and the respondents cannot cite the judgment in W.A. No. 3914 of 2004 as a precedent for holding that the present writ petitions are not tenable.

56. I find considerable force in the arguments advanced as above by the learned Counsel for the petitioners. In fact it is the shying away of the State from defending the correctness or legality of the impugned notification on the merits of the matter that has compelled this Court to examine the issues, more particularly when allegations are levelled against the State that the power to issue a notification of this nature is being misused and is being manipulated to favour persons belonging to its own political affiliations and to harm the interests of others belonging to other political parties. While the allegation is such, the validity of the notification is questioned on the premise that the same being in contravention of the statutory provisions and in the teeth of the constitutional provisions of Article 243-T of the Constitution of India itself. Accordingly, the contentions that these writ petitions should be dismissed in limine, as urged by the learned Advocate General on behalf of the State and other contesting parties, cannot be accepted.

57. As the preliminary objections on threshold bar to entertain these writ petitions for examining the validity of the notification dated 1-9-2004 is not tenable and is rejected and I do not find any justification to vacate the interim order of stay at this stage, particularly having regard to the very conduct of the State and in view of the fact that the interim order never came in the way of the State, which is creating its own difficulties and mistakes, instead facilitating the way for holding proper elections, but only advances an argument that the order passed by this Court has come in the way of holding the elections. I am of the

view that it is only a made up defence for avoiding scrutiny at the hands of the Courts.

58. The concern for election being not held on time being displayed at a very belated stage on the part of the State, it is not a matter that should be taken serious note of, for the purpose of permitting the State to go ahead with all its illegalities and infractions. I am of the view that there is no justification to vacate the interim order at this stage, as I find the argument of election process being stalled is one called in aid only to avoid scrutiny by this Court in the exercise of the power of judicial review in respect of the alleged illegalities attributed to the respondent-State in the manner of exercise of power while issuing the impugned notification.

59. However, having regard to the conflicting views that having regard to the important questions of law that arise in these petitions, the questions of considerable importance involving interpretation of the provisions of the Act, particularly Section 42(2-A) of the Act, in the light of the Constitutional provisions found in Articles 243-P and 243-ZG of the Constitution of India, I am of the view that these matters are required to be considered by a Division Bench to have an authoritative pronouncement on the questions raised in these writ petitions and also to avoid the length of litigation before this Court, if the matter is once and for all considered by the Division Bench of this Court.

60. I notice that one another important question that arises for consideration in these petitions is with regard to the interpretation of Article 243-ZG(b) of the Constitution of India. While Article 243-ZG(b) acts as a bar for interference by the Court in electoral matters i.e., in elections to any municipality except by an election petition as is provided by or under any law made by the Legislature of a State, insofar as the elections to the posts of the Chairpersons of the Municipalities are concerned, the statutory provision that is pointed out as one constituting a bar is to be found in Section 42(3) of the Act. Unfortunately, Section 42(3) by itself does not provide for the filing of an election petition. The relief that can be claimed in such a petition and the grounds for declaration of election to be void, as are found in Sections 21, 22 and 23 of the Act in respect of the elections to the Municipal Councils is not to be found in Section 42(3) of the Act itself, but relegates the same to be provided for in accordance with the Rules that may be prescribed. That is the forum of an election Tribunal is not one that is constituted and regulated by an Act of the Legislature itself, but one which is provided for by the exercise of the rule making power by the Government i.e., as provided through subordinate legislation. The question is as to whether the bar of the nature envisaged under Article 243-ZG(b) can be made applicable equally in respect of a provision whereunder a forum is created by subordinate legislation also? The answer to this question can be found by understanding and interpreting the words " ...by or under any law made by the Legislature of a State", occurring not only in Article 243-ZG(b) but also in Article 243-O(b) as well as Article 329(b) of the Constitution of India.

61. In the circumstances, I refer all these writ petitions, u/s 9 of the Karnataka High Court Act, 1961, to be examined by a Division Bench of this Court. Petitioners shall file second set in two weeks. Registry is directed to place the matter before the Hon"ble Chief Justice for obtaining orders for listing these writ petitions before a Division Bench.