

(1977) 04 DEL CK 0008

In the Delhi High Court

Case No : Civil Writ Appeal No. 245 of 1977

Mohinder Singh Gill and Another

APPELLANT

Vs

Chief Election Commissioner and Others

RESPONDENT

Date of Decision : 25-04-1977

Acts Referred:

Citation : (1977) ILR Delhi 265

Hon'ble Judges : Yogeshwar Dayal, J;T.V.R. Tatachari, J

Bench : Division Bench

Advocate : B.N. Sen, D.D. Chawla, V.P. Nanda, Ashwani Kumar, K.L. Bhandari, V.P. Raman, B. Kirpal, M.N. Phadke, Hardev Singh, S.S. Kang, B.S. Indra and R.S. Sodhi, for the Appellant;

Judgement

Yogeshwar Dayal, J.

(1) This is a petition under Article G 226 of the Constitution of India on behalf of Shri Mohinder Singh Gill, a Congress candidate from the "13-Ferozepore Parliamentary Constituency, Punjab" and Shri Nasib Singh, a voter and supporter of petitioner No. 1, for quashing the notification dated 22nd March, 1977, issued by the Election Commission of India, ordering the cancellation of poll held in the aforesaid Constituency and ordering the repoll in the entire aforesaid Parliamentary Constituency. A writ of mandamus is also prayed for directing the Chief Election Commissioner and Shri Gurbachan Singh, a Deputy Commissioner and Returning Officer, Ferozepore, (respondents 1 and 2 respectively) to declare the result of the election. In the alternative, it was prayed that writ of mandamus may be issued directing respondents No. 1 to act strictly in accordance with the provisions of Section 64A(2) of the Representation of the People Act, 1951 (43 of 1951), hereinafter referred to as "the Act", and to confine his directions in regard to postal ballot papers only.

(2) The other respondents to the writ petition are: Shri Mohinder Singh Sayanwala, M.L.A. Ferozepore, Akali candidate (respondent No. 3), Shri Avtar Singh Malhotra, a candidate of Communist Party of India (respondent No. 4) and

Shri Manohar Lal, Shri Makhan Singh and Shri I. B. Francis, all independent candidates as respondents 5, 6 and 7 respectively and Shri N. Khosla, Chief Electoral Officer, Punjab, as respondent No. 8.

(3) For appreciating the contentions of the learned counsel for the parties, it is necessary to state a few facts.

(4) The present petition is the aftermath of the recent general elections held for electing members for the Lok Sabha. Petitioner No. 1 and respondents 3 to 7 were contesting for the 13-Ferozepore Parliamentary Constituency for which the polling date was 16th March, 1977. The counting of the ballots in the aforesaid Parliamentary Constituency was to be completed in accordance with the Schedule given hereunder: Assembly Place of Counting Date Constituency Dharan Kot. Tehsil Office, Zira. 20-3-1977 Guru Har Sahai. Zila Parishad Building. Ferozepur City. 20-3-1977 Jallalabad. Fazilka. 20-3-1977 Ferozepur City. Town Hall, Ferozepur City. 20-3-1977 Balluana. Abohar. 20-3-1977 Zira. Tehsil Office, Zira. 21-3-1977 Ferozepur Cantt. Zila Parishad Bldg. Ferozepur City. 21-3-1977 Fazilka. Fazilka. 21-3-1977 Abohar. Abohar. 21-3-1977

(5) March 23, 1977, was fixed as the date before which Election "shall be completed".

(6) It will be noticed that there were nine assembly segments in the aforesaid Parliamentary Constituency. According to the averments in the petition, the polling as well as counting took place peacefully and without any untoward incident. After the counting was complete at each of four segments, the counting Supervisor duly filled in and signed Part II as well as result of the counting in form 16A and the same was also duly signed by the Assistant Returning Officer. The Assistant Returning Officer thereafter also made entries in the result sheets in form 20 and announced the number of votes received by the each candidate. No recounting was asked for by any candidate or his polling agent in any segment.

(7) A proforma containing the names of the candidates as well as the name of the assembly segment, the total votes polled and the votes polled by each candidate was prepared and signed by the Assistant Returning Officer and was handed over to each candidate or his polling agent after he had announced the number of votes polled by each candidate as entered by him in the result sheet in form 20. The Assistant Returning Officer of each segment also obtained the signature of the candidate or his polling agent in token of the delivery of the aforesaid proforma. Copies of the proforma relating to nine assembly segments are filed with the petition, marked as Annexures "A" to "I". All the ballot papers together with the duly completed result sheets in form 20 from the five assembly segments in which the counting had been completed on 20th March, 1977, were duly transmitted, and received intact by the Returning Officer in his office at Ferozepore.

(8) The ballot papers and result sheets duly completed in form 20 in respect of

the remaining four assembly segments where the counting had been completed on 21st March, 1977, were also duly transmitted by the Assistant Returning Officers concerned to the Returning Officer. All the result, sheets in form 20 so received by the Returning Officer, Ferozepore are lying intact in a sealed cover in the Government Treasury, Ferozepore.

(9) In accordance with the result sheets delivered to each candidate, including petitioner No. 1 and respondent No. 3, petitioner No. 1 secured 1,96,016 votes (excluding postal ballots) as against the next rival candidate (respondent No. 3) who secured 1,94,095 votes (excluding the postal ballots).

(10) The postal ballots had been received direct in the office of respondent No. 2 and the total number of such ballots was 769. As per programme, the counting of postal ballots was started by the Returning Officer at 3 P.M. on 21st March, 1977. According to the procedure, each ballot paper with the covering letter in form 13 was taken up and scrutinised. As a result 248 ballot papers out of 769 were rejected. Thereafter, the Returning Officer proceeded to enter the valid ballot papers in the accounts of "each candidate.

(11) Having realised that respondent No. 3 had lost the election and that the postal ballots, even if they were valid and were presumed to be in favor of respondent No. 3, they would not make any difference in the ultimate result, respondent No. 3 and his son incited unruly mob of his supporters to raid the office of the Returning Officer as a result of which a grave situation was created in which many officials received injuries. Even the Returning Officer was abused and threatened that his son and other members of his family would be murdered. All the postal ballot papers, excepting those which had been rejected, were destroyed by them.

(12) It is then alleged in the petition that according to the report of the Returning Officer made to respondent No. 1, some ballot papers of Fazilka assembly segment were alleged to have been destroyed in the course of their transit to the office of respondent No. 2 by the unruly mob which had been incited by respondent No. 3. The Assistant Returning Officer of Zira assembly segment was also attacked by the mob when he was coming to the Office of the Returning Officer and according to the report of the Returning Officer the mob snatched some of the envelopes containing the ballot papers, paper seal accounts and Presiding Officers' diaries. It was then alleged that the result sheets in form 20 of all the assembly segments in which the counting had been completed on 21st March, 1977, escaped the fury of the unruly mob and were duly received in the office of the Returning Officer in sealed covers and were deposited in the Government Treasury, Ferozepore.

(13) It is then alleged that in view of the grave violent situation created in the office of the Returning Officer, the Returning Officer was prevented from declaring the result of the election on the basis of result-sheets in form 20 and respondent No. 2 was constrained to sign a report about the happenings to

respondent No. 1 and respondent No. 8 besides, the Chief Secretary, Punjab Government, Chandigarh.

(14) The aforesaid report of the Returning Officer has also been filed as Annexure "K". This report is dated 21st March, 1977, but was received by the Election Commission through the S.D.M. Ferozepore on 23rd March, 1977 only.

(15) It appears that the Returning Officer had earlier sent a wireless message to the Election Commission on night of 21st/22nd March, 1977, inter alia, stating as under :

"THE counting of 13 Parliamentary Ferozepore Constituency has been adjourned due to certain circumstances which have been mentioned in the application presented by Shri Mohinder Singh Sayanwala regarding repoll of the Constituency and on the polling station in which the ballot boxes have been reported to be tampered with. This will be finally decided on receipt of instructions from the Election Commission and the result will be announced thereafter."

(16) The Election Commission had also posted an observer for this Parliamentary Constituency. The observer, Shri I. K. K. Menon, Under Secretary, Election Commission of India, had also sent a report to the Election Commission with respect to 20th and 21st March, 1977, the days of counting. The report of the Observer has been filed by way of Annexure Ii to the Return filed on behalf of the Election Commission. For facility of appreciating the submissions of the learned counsel for the parties later on, the report of the Observer is reproduced as under :

"REPORT of the 20th and 21st March, 1977-Days of Counting. As an observer of the Election Commission, I started my rounds at 8 A.M. on the 20th March, 1977 in the counting centres of 13-Ferozepore Parliamentary Constituency, first in Ferozepur and then in other centres. At the end of the day, I camped at Abohar. The list of place, days and time of counting centres is placed below.

DURING the process of counting at Ferozepore it was brought to my notice that at polling station No. 8 Chhanga Rai Hithar the Presiding Officer's seal on the tag as well as the paper seal of one box was broken. That box was kept separately and was not counted. It was calculated that the ballot papers contained in that box was below 300 and it would not have affected the result in the normal course. In another case in Jalalabad Assembly segment the Assistant Returning Officer had already rejected a number of ballot papers of a polling station on the ground that these were not signed by the Presiding Officer. I could not interfere in the matter although I showed him the provision that such ballot papers if found genuine, can be accepted in spite of this defect. In another case, the S. Akali Dal candidate had brought a complaint. It was reported that the ballot papers were neither signed by any Presiding Officer nor stamped but it was alleged that those ballot papers were accepted by the Assistant Returning Officer. This I could not check up from the Assistant Returning Officer due to an incident

which took place on the 20th March, 1977 as it was reported that the Assistant Returning Officers were also waylaid by an angry mob when they were coming with the result sheet. The other incident was later reported to me by the agent of S. Mohinder Singh Gill, candidate.

ON the 21st evening, the counting of postal ballot papers commenced in the Court Room of Deputy Commissioner, Ferozepore at 3 P.M. When the counting was going on, at about 4.30 P.M., a violent mob shouting slogans entered the counting hall and destroyed the postal ballot papers after seriously injuring some counting staff. Chairs, sticks, kirpans etc. were thrown at the platform on which Deputy Commissioner and I were sitting. Shouting, damaging of the office buildings, vehicles etc. continued and the police could not do much even though used tear gas and made a mild lathi charge. The situation was very tense until the military was summoned. The postal ballot papers that were snatched away and destroyed by the mob numbered 769.

IT was also ascertained that counting in all assembly segments was over by that time and S. Mohinder Singh Gill, the Congress Candidate was leading by about 1900 votes. As the postal ballot papers were snatched away, the Returning Officer stopped counting.

LATER on at about 10 P.M. it was also reported to me by the General Assistant to the Deputy Commissioner (Shri N. S. Tiwana) that a mob destroyed some counted ballot papers of Fazilka Assembly segment while they were being removed for safe custody and except the result sheet no other record was received from the Assistant Returning Officer. Similarly, he told me that some documents of Zira Assembly segment were also snatched away by hooligans. I had also asked the Returning Officer to send a detailed report."

(17) The Election Commission, as stated above, issued the impugned notification dated 22nd March, 1977, relevant part whereof reads as under:

"S.O. Where as the Election Commission has received reports from the Returning Officer of 13-Ferozepore Parliamentary Constituency that the counting on 21st March, 1977 was seriously disturbed by violence ; that the ballot papers of some of the assembly segments of the Parliamentary constituency have been destroyed by violence ; that as a consequence it is not possible to complete the counting of the votes in the constituency and the declaration of the result cannot be made with any degree of certainty ; And whereas the Commission is satisfied that taking all circumstances into account, the poll in the constituency has been vitiated to such an extent as to affect the result of the election;

Now, the Commission, in exercise of the powers vested in it under article 324 of the Constitution, Section 153 of the Representation of the People Act, 1951 and all other powers enabling it so to do, cancels the poll already taken in the constituency and extends the time for the completion of the election up to 30 April, 1977 by amending its notification No. 464/77 dated 10 February, 1977 issued u/s 30 as subsequently amended by the notification No. 464/77 dated 25

February, 1977 in respect of the above election....."

(18) The case of the petitioner in the writ petition is that the aforesaid notification was issued without affording an opportunity to petitioner No. 1 and in complete violation of the provisions of the Act and the Conduct of Election Rules, 1961. It was pleaded that the power to order fresh poll at any polling station in case of loss etc. of polling boxes before counting is circumscribed by the provisions of Section 58 of the Act and the power to order fresh poll at a particular polling station in the event of destruction, loss of any ballot papers before counting is completed is circumscribed by Section 64A of the Act. It was thus pleaded that in view of the provisions of Section 58 and Section 64A of the Act, the Election Commission had the power to order repoll for a particular polling station and that this power could be exercised only if the ballot papers are unlawfully taken out of the custody of the Returning Officer or intentionally or accidentally destroyed or lost or damaged or tampered with before the counting has been completed and not thereafter. It is thus pleaded that this power could be exercised only in respect of any particular polling station and not for the whole of the Parliamentary Constituency as such. It is further pleaded that in the instant case, the counting having already been completed, the alleged result-sheets in form 20 duly made and the particulars announced by the Assistant Returning Officers, no order for fresh poll could be made by the Election Commission in any of nine assembly segments of the Constituency.

(19) As regards the postal ballot papers, even if these are destroyed, there is no provision for repoll. However, it was pleaded that the power to order fresh poll in respect thereof could only be exercised u/s 64A(2)(b) if the Chief Election Commissioner was satisfied that the same would affect the result of the election. On the contrary, if the Chief Election Commissioner was satisfied that the result of a fresh poll in respect of postal ballots would not, in any way, affect the result of the election, it was incumbent upon him to direct the Returning Officer to further conduct and complete the election by declaration of the final result on the basis of the result sheets received from the nine assembly segments. It was pleaded that in view of the number of postal ballots cast, there could be no question of the Chief Election Commissioner of India coming to any other conclusion than that fresh poll of postal ballots would not, in any way, affect the result of the election.

(20) It was also pleaded that the Returning Officer had never recommended for any fresh poll and thus the notification dated 22nd March, 1977, ordering fresh poll was without jurisdiction and in violation, of the provisions of the Act and the Rules.

(21) Apart from pleading that the impugned order was passed without giving any opportunity to the petitioner, it was further stated in paragraph 31 that petitioner No. 1 approached the Election Commission and requested that the order/notification calling for repoll being invalid, the Election Commission should recall the impugned notification and declare the result but the representations bore no

fruit.

(22) Certain averments were made with respect to violation of Article 14 of the Constitution but it is not necessary to refer to them as no submissions have been made in that regard.

(23) The petition has been opposed on behalf of the Election Commission of India as well as on behalf of the main rival contestant, namely, Shri Mohinder Singh Sayanwala, an Akali candidate, who had filed separate return.

(24) In the returns filed on behalf of respondents 1 and 3, apart from giving their own version of the facts, certain preliminary objections have also been made.

(25) The facts as pleaded on behalf of the Election Commission of India are that after the schedule of poll was announced, the Election Commission, according to its practice, appointed various Deputy Commissioners of the area, so far as may be, as Returning Officers in respect of each of the Parliamentary Constituency by a notification dated 29th January, 1977, issued u/s 21 of the Act. The Deputy Commissioner of Ferozepore was also nominated as the Returning Officer. At that time, Shri G. B. S. Gosal was the Deputy Commissioner. Without prior intimation, on 8-2-1977, Shri Gurbachan Singh (respondent No. 2) was appointed as the Deputy Commissioner in place of Shri Gosal. It had been reported that Shri Gurbachan Singh, the new Deputy Commissioner, is closely related to the petitioner, Shri Gurbachan Singh's only son having been married to the daughter of the brother of Shri Mohinder Singh Gill, Congress candidate, petitioner herein.

(26) It is further averred that even before the polling took place, numerous representations were received from the Akali candidate and the other persons making various allegations. They, inter alia, requested that an Observer should be sent by the Election Commission at the time of the counting. Due to paucity of personnel, the Election Commission could and did appoint only one Observer at Ferozepore from 16th March, 1977, till 21st March, 1977, on which date the result was expected to be declared.

(27) It is also averred that on 22nd March, 1977, the Election Commission received a wireless message which has already been extracted above. The purport of the message was that a part of the postal ballot papers, excepting partly rejected ballot papers, and the ballot papers and other election material and steel trunks of Fazilka Assembly segment and Zira assembly segment had been destroyed by mob. On that very date, a report was also received from the Observer which has also been extracted above. The said Observer also orally apprised the Chief Election Commissioner of the various incidents at the lime of poll and counting in various assembly segments. Thereafter, on 23rd March, 1977, the Election Commission received a written report from the Returning Officer. It is further stated in the return that after going through the wireless report of the Observer and the oral and written reports, the Election Commission was satisfied that the poll in the entire Constituency had been vitiated to such an extent as to affect the result of the election and, Therefore, the said poll was

cancelled by the impugned notification. It was stated that the notification was issued prior to the receipt of the written report from the Returning Officer. In pursuance of the impugned notification, a fresh notification was issued dated 26th March, 1977, fixing the date of repoll as 17th April, 1977. It was stated at the bar that the poll has since been fixed for 26th April, 1977.

(28) It is further pleaded on merits on behalf of the Election Commission that it had received complaints, inter alia, to the effect that the poll as well as the counting was not carried out properly. It was also submitted that they had not verified from the records received whether the counting had been completed or not and as to whether the form had been filled and signed by the Assistant Returning Officers because no records had been received by the Election Commission at New Delhi. It was further stated that as per the report of the Returning Officer, the total number of votes polled by petitioner No. 1 and respondent No. 3 were calculated on the basis of telephonic intimations said to have been received by the Additional District Collection Officer from the Assistant Returning Officers of the Assembly segments. It was also denied that the result of assembly segments had been finally ascertained. It was submitted that it is always open to a candidate to ask for a recount after the counting had been completed and such a recount is ordered by the Returning Officer under his own supervision. In the instant case, the result of postal ballots had not been completed and it is only after the same had been completed and entered in the result-sheet that a candidate could have exercised his right to ask for recount. Unless and until such a recount takes place, if ordered, it cannot be stated that result of each assembly segment had been finally ascertained on the basis of which result could be declared.

(29) Regarding the averment of the petitioner that there were no ballot papers destroyed, it is stated in the affidavit in reply that according to the report of the Observer, to his knowledge, one ballot box had its seals broken and that the ballot papers contained therein were not counted. It was also stated that the petitioner has deliberately not mentioned that apart from postal ballot papers, some other ballot papers had also been destroyed even before the time for asking of recount could be reached. The said observer further reported that there was no uniformity adopted by the Assistant Returning Officers while rejecting ballot papers.

(30) The case of the Election Commission further is that the provisions of Section 58 of the Act are not applicable and the provisions of Section 64A of the Act do not completely circumscribe the power to order fresh poll in the entire Constituency and as such, in any event, that provision is not applicable because in the instant case, it was not known as to in respect of which polling station the ballot papers had been destroyed. It was submitted that this apart, the said provision does not apply where the postal ballot papers are destroyed. The total number of postal ballots issued to the electors were 1948 and mere non-recommendation of fresh poll by the Returning Officer cannot, in no way, affected

the jurisdiction of the Election Commission to order fresh poll. It is pleaded on behalf of the Election Commission that the power to order repoll had not been exercised u/s 64A of the Act alone but as is indicated by the notification itself, the repoll has been ordered in the exercise of inherent jurisdiction of the Commission vested in it under Article 324 of the Constitution as well as in exercise of all other powers enabling it to do so under the said Act. In the instant case, it was not only the postal ballot papers which had been destroyed but the ballot papers of at least two assembly segments wholly or partially were destroyed and further more there were complaints with respect to polling in other segments of the Constituency also.

(31) It is further stated in the affidavit that the decision to order redpoll is based on subjective satisfaction of the Election Commission and the same is not open to judicial scrutiny under Article 226 of the Constitution. The Election Commission had sufficient material before it to come to the conclusion that it did. It is the duty of the Election Commission to ensure that free and fair elections take place in the country. If on the basis of the reports received the Commission feels satisfied that it is a fit case where repoll should be ordered, not only at particular polling station but in the whole of the Constituency, it is the duty of the Commission to order such repoll in the interest of free and fair elections.

(32) Regarding the aforesaid averment in paragraph 31 of the writ petition, Shri V. Nagasubramanian, Secretary to the Election Commission, in his affidavit in reply stated that it was correct that after the impugned notification petitioner No. 1 had approached the Election Commissioner but the Commissioner was of the opinion that this was a fit case where repoll should be held in the entire Constituency.

(33) Regarding the averment of the petitioner that he was heard before the Election Commission passed the impugned order, a fresh affidavit was filed during the hearing of the petition on 14-4-1976 by Shri T. Swaminathan, Chief Election Commissioner of India (respondent No. 1) and in this affidavit it was stated that on the morning of March 22, 1977, at about 10.30 a.m. Shri Umrao Singh, Minister for Revenue and Elections, Government of Punjab and Shri Mohinder Singh Gill, the first petitioner herein, met him in his office and made representations to the effect that the Returning Officer should be directed to declare the result of the election in the- aforesaid Constituency. They gave him their reasons for this request which he agreed to consider before talking a decision.

(34) It is further stated in the said affidavit that on the same day, Shri I. K. K. Menon, Under Secretary, Election Commission of India, who had been deputed as Observer during the poll and the counting of votes in the said Constituency, apprised him of the various incidents and developments regarding the counting of votes in the Constituency and also submitted a written report. On the same day, the report of the Returning Officer of the aforesaid Parliamentary Constituency, by wireless message, which has already been reproduced earlier,

was received by him. It is further stated that after taking all the circumstances and information, including the oral representation of the first petitioner, into account, on March 22, 1977 itself, he passed the impugned order cancelling the poll in the said Parliamentary Constituency. It is further stated in the affidavit that in his view this was the only proper course to be adopted in the circumstances of the case and with a view to ensuring fair and free elections, particularly when even a recount had been rendered impossible by reason of the destruction of ballot papers.

(35) A preliminary objection has also been taken on behalf of the Election Commission that in view of the provisions of Article 329 of the Constitution, the petitioner has an alternative remedy by way of election petition and in the light of the provisions of Article 226(3), the present petition cannot be entertained.

(36) In view of the fresh affidavit of the Chief Election Commissioner mentioned above, petitioner No. 1 filed a supplementary affidavit in reply wherein it was admitted that petitioner No. 1 along with Shri Umrao Singh, Revenue Minister, Punjab, went to the Office of the Chief Election Commissioner as stated by him. It was further stated that petitioner No. 1 and the Revenue Minister wanted to know the reason about the delay in declaring the election results of the aforesaid Constituency. Shri I. K. K. Menon, Observer, aforesaid, was also present with the Chief Election Commissioner. On their inquiry, the Chief Election Commissioner told them that he had verified the facts from Shri Menon and he was satisfied that the counting of all the nine assembly segments was over and that disturbances took place only at the time of counting of the postal ballots, the destruction of which, in no way, affects the result of the election and that he was directing the Returning Officer to declare the result accordingly. On their specifically asking from Shri Menon as to whether the Alkalis had made any specific allegation, Shri Menon replied that there was no specific allegation. The deponent made no representation to the Chief Election Commissioner, nor was there any occasion to do so. Feeling satisfied they came back.

(37) It is further stated in this affidavit that petitioner No. 1 was never informed by the Chief Election Commissioner that respondent No. 3 has made any representation. Petitioner No. 1 was not informed that there was any proposal to cancel the entire poll. There was absolutely no talk, whatsoever, to this effect. In these circumstances, petitioner No. 1 has not been given any opportunity of being heard before cancelling the poll.

(38) Regarding the other averments in the affidavit of the Chief Election Commissioner, it was stated that it needed no reply. But it was stated that the Chief Election Commissioner had no jurisdiction to cancel the poll of the whole of the Parliamentary Constituency and order repoll.

(39) Separate affidavit was filed on behalf of Shri Mohinder Singh Sayanwala wherein the respondent supported the impugned order of the Election Commission and also raised identical preliminary objections. In this connection, it

was pleaded that the Election Commission has exclusive power of superintendence, direction and control of the preparation of the electoral rolls for and conduct of all elections to Parliament. It is his duty to see that the election result can be declared keeping in view the purity of the elections. Till the election result is declared the election process continues. In this particular case it became impossible for the election result to be declared and the Election Commissioner came to the conclusion on consideration of various materials before him. He was satisfied in the circumstances of this case that the result of the poll could not be declared and that the entire poll had been vitiated for various reasons. His jurisdiction is exclusive and is not liable to be challenged by way of a writ petition. The nomination papers are still there. The repoll has been ordered. No other candidate except the ones whose nomination papers had been accepted are entitled to contest the election. After the repoll, the result will be declared and the successful candidate will be notified. If the petitioner is aggrieved by the result of the election ultimately, he will have a right to challenge it by way of election petition. That stage has not yet reached as no election has been validly held.

(40) The counter-affidavit of respondent No. 3 also states the various circumstances which were available with the Election Commission for coming to the conclusion that the entire poll has been vitiated. In this connection, respondent No. 3 relied on the various circumstances mentioned in paragraph 2(a) to 2(c) (xi) of his affidavit, and gave in elaborate detail his version of how some ballot boxes were tampered with or how the paper seals in some ballot boxes were missing and how some papers were inserted in some ballot boxes with a view to assist petitioner No. 1. It was also stated in detail how the counting was conducted by the Assistant Returning Officers applying duplicate standards with respect of Fazilka, Jalalabad, Zira and Gum Har Sahai segments and how different standards were applied for accepting or rejecting votes of petitioner No. 1 and respondent No. 3. The affidavit states in detail as to how and why these irregularities were committed and in what circumstances the Returning Officer sent the wireless message and then later on gave an incorrect version in his report dated 21st March, 1977, which was received by the Commission on 23rd March, 1977. Respondent No. 3 also states that he had applied for recount but the recount was rendered impossible due to the destruction of the ballot papers with respect to Fazilka and Zira segments.

(41) It was also stated that the result sheets relied upon by the petitioner were fake. No result sheets were prepared and if a bogus result sheet was prepared he was not bound by it. The allegations that he and his supporters incited the crowd was also denied and respondent No. 3 gave his own version as to the circumstances in which the postal ballots got destroyed.

(42) It was denied that any result sheets in form 20 signed by the Assistant Returning Officers were received from the assembly segments and it was submitted that even the reports of the Returning Officer had been prepared

under the influence of petitioner No. 1.

(43) Mr. B. Sen, learned counsel for the petitioners, formulated his submissions as under :

(1)that the Election Commission has no jurisdiction to pass the impugned order, ordering repoll of the entire Parliamentary Constituency;

(2)that if it be assumed that the Election Commission had such a power, the impugned order could not be passed without giving an opportunity to the petitioner of being heard; and

(3)that the Court, while exercising its jurisdiction under Article 226 of the Constitution, could inquire into the matter in spite of the provisions of Article 329(b) of the Constitution.

(44) We shall now take up the three submissions in the order in which they have been made.

(45) It is true that the submission at Serial No. 3 above in fact relates to the preliminary objection urged on behalf of respondents 1 and 3 and should normally have been dealt with first but since the contentions of the parties on submission No. 1 are inter-mixed with the interpretation of Article 329(b) of the Constitution, we thought it proper to deal with them in the order in which they have been made.

(46) Since the Election Commission has sought to justify the impugned order for repoll in the entire Parliamentary Constituency on the basis of Article 324 of the Constitution, in construing this Article, reference was made by both the parties in the course of arguments to the other six Articles in Part Xv of the Constitution which deals with the topic "Elections". For the sake of ready reference, the Articles are reproduced hereunder :

Superintendence, and control of elections to be vested in an Election Commission.

"324(1). The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission.)

(2)The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.

(3)When any other Election Commissioner is appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission.

(4)Before each general election to the House of the People and to the Legislative

Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1).

(5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine :

PROVIDED that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment :

PROVIDED further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.

(6) The President, or the Governor of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1).

NO ELECTIONS to person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex.

325. There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them.

ELECTIONS to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage.

326. The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than twenty-one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election. Power of Parliament to make provision with respect to elections to Legislatures.

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

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

POWER of Legislature of a State to make provision with respect to elections to such Legislature.

328. Subject to the provisions of this Constitution and in so far as provision in that behalf is not made by Parliament, the Legislature of a State may from time to time by law make provision with respect to all matters relating to, or in connection with, the elections to the House or either House of the Legislature of the State including the preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses. Bar to interference by courts in electoral matters.

329. Notwithstanding anything in this Constitution but subject to the provisions of Article 329A-

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

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

(47) Under Article 327 read with entry No. 72 contained in List I of the Seventh Schedule to the Constitution, the Parliament passed three principal legislations which are in force. They are : (i) the Representation of the People Act, 1950 (43 of 1950) which deals mainly with allocation of seats and delimitation of constituencies, preparation of electoral rolls and registration of voters; (ii) the Representation of the People Act, 1951 (43 of 1951) which makes detailed provisions in regard to all matters and all stages connected with elections to the various Legislatures in this country and (iii) the Delimitation Act, 1972 (76 of 1972) replacing the Old Act, of 1950.

(48) The Representation of the People Act, 1951 is divided into Xi parts. Part I deals with merely the preliminaries and definitions and Parts II to XI deal with a variety of subjects. Part II deals with qualifications and disqualifications for membership. Part III deals with the notification of General Elections, Part IV provides for the administrative machinery for the conduct of elections and Part V makes provisions for the actual conduct of elections and deals with such matters as presentation of nomination papers, requirements of a valid nomination, scrutiny of nominations, etc and procedure for polling and counting of votes. Part VI deals with disputes regarding elections and provides for the manner of presentation of election petitions, the constitution of election tribunals and the

trial of election petitions. Part VII outlines the various corrupt and illegal practices which may affect the elections, and electoral offences.

(49) Part V of the aforesaid Act dealing with the conduct of elections, in Chapter IV deals with the topic "repoll". Section 56 in this Chapter provides for fixing time for poll. Section 57 provides for adjournment of poll in emergencies at a polling station. The circumstances in which the poll can be adjourned are also stated and give a fair amount of discretion to the Presiding Officer for such polling stations or the Returning Officer. Section 58 provides the circumstances in which the Election Commission, after taking all material circumstances into account, can declare the poll at a particular polling station to be void and appoint a day and time for taking fresh poll at that polling station. Section 58 provides as under: "58. Fresh poll in the case of destruction, etc. of ballot boxes.-(1) If at any election,-

(A) any ballot box used at a polling station or at a place fixed for the poll is unlawfully taken out of the custody of the presiding officer or the returning officer, or is accidentally or intentionally destroyed or lost, or is damaged or tampered with, to such an extent, that the result of the poll at that polling station or place cannot be ascertained, or

(B) any such error or irregularity in procedure as is likely to vitiate the poll is committed at a polling station or at a place fixed for the poll, the returning officer shall forthwith report the matter to the Election Commission.

(2) Thereupon the Election Commission shall, after taking all material circumstances into account, either-

(A) declare the poll at that polling station or place to be void, appoint a day, and fix the hours, for taking a fresh poll at that polling station or place and notify the day so appointed and the hours so fixed in such manner as it may deem fit or

(B) if satisfied that the result of a fresh poll at that polling station or place will not, in any way, affect the result of the election or that the error or irregularity in procedure is not material, issue such directions to the returning officer as it may deem proper for the further conduct and completion of the election.

(3) The provisions of this Act and of any rules or orders made there under shall apply to every such fresh poll as they apply to the original poll."

(50) It will be noticed from a reading of this section and the scheme of the other provisions that this provision relates to the power of the Election Commission to order fresh poll before the counting starts. Section 59 provides for the manner of voting at elections. Section 60 provides for the persons who can give vote by postal ballot. Section 62 provides as to the persons who are entitled to vote. This Chapter IV mentioned above relating to the poll finishes with Section 62.

(51) The next Chapter of Part V deals with "Counting of Votes". In this Chapter, by Section 64, it is provided that where a poll is taken, the votes shall be

counted under the supervision and direction of the Returning Officer and in the presence of the contesting candidates, their election agents or counting agents.

(52) Then comes Section 64A which provides as under : "64A. Destruction, loss, etc., of ballot papers at the time of counting,-

(1) If at any time before the counting of votes is completed any ballot papers used at a polling station or at a place fixed for the poll are unlawfully taken out of the custody of the returning officer or are accidentally or intentionally destroyed or lost or are damaged or tampered with, to such an extent that the result of the poll at that polling station or place cannot be ascertained, the returning officer shall forthwith report the matter to the Election Commission.

(2) Thereupon, the Election Commission shall, after taking all material circumstances into account, either-

(A) direct that the counting of votes shall be stopped, declare the poll at that polling station or place to be void, appoint a day, and fix the hours, for taking a fresh poll at that polling station or place and notify the date so appointed and hours so fixed in such manner as it may deem fit, or

(B) if satisfied that the result of a fresh poll at that polling station or place will not, in any way, affect the result of the election, issue such directions to the returning officer as it may deem proper for the resumption and completion of the counting and for the further conduct and completion of the election in relation to which the votes have been counted.

(3) The provisions of this Act and of any rules or others made there under shall apply to every such fresh poll as they apply to the original poll."

(53) As the opening words of Section 64A suggest, this power of fresh poll at a particular polling station can be exercised by the Election Commission "before the counting of votes is completed".

(54) Section 66 then provides for declaration of results and is as under:

"66. Declaration of results.-When the counting of the votes has been completed, the returning officer shall, in the absence of any direction by the Election Commission to the contrary, forthwith declare the result of the election in the manner provided by this Act or the rules made there under".

(55) It will be noticed that declaration of results u/s 66 has to be in the manner provided not only by the Act but also the Rules made there under.

(56) u/s 67, the Returning Officer is required to report the result to the appropriate authority and the Election Commission- and the appropriate authority is, thereafter, required to publish the declaration containing the names of elected candidates.

(57) Chapter Vii then gives the provisions regarding the election results.

(58) Part VIII deals with the powers of the Election Commission in connection with the inquiries as to the disqualifications of members.

(59) At this stage, some of the relevant provisions of the Rules framed u/s 169 of the Act may also be noticed. The Rules so framed are known as Conduct of Election Rules, 1961, (hereinafter referred to as "the Rules").

(60) Part III of the Rules deals with the topic

(61) Part IV of the Rules deals with the various aspects like the design of ballot boxes (rule 29), form of ballot paper (rule 30), arrangements at polling stations (rule 31), admission to polling stations (rule 32), preparation of boxes for poll (rule 33), issue of ballot papers to electors (rule 38), closing of poll (rule 43), sealing of ballot boxes after poll (rule 44), account of ballot papers (rule 45). Under rule 45, the Presiding Officer is required at the close of the poll to prepare a ballot paper account in form No. 16. The ballot paper account in form 16 contemplates the count of (i) the ballot papers received, (ii) ballot papers unused, (iii) ballot papers issued to voters, (iv) ballot papers cancelled, (v) ballot papers used as tendered ballot papers including their Serial numbers and total number. Form 16 is in two parts. The part I of it containing the aforesaid particulars is filled up by the Presiding Officer of the polling station and he sends it to the counting place and thereafter the result of initial counting as contained in this form is filled up in Part II by the Counting Supervisor. Part II of this form merely contains the total number of ballot papers found in the ballot boxes used at the polling station and the discrepancy, if any, shown between Part I and the counting of total number of ballot papers.

(62) The ballot papers of different polling stations are received at the fixed place of counting and the counting is done after mixing the ballot papers of different polling stations.

(63) Now, we come to the other relevant rules which deal with counting of votes which are contained in part V of the Rules. Rule 51 provides for time and place of counting of votes. Rule 53 provides for admission of persons at the place fixed for counting. Rule 55 provides for scrutiny and opening of ballot boxes. Rule 56 provides for counting of votes. This rule provides for various circumstances in which a ballot paper may be rejected by the Returning Officer and the circumstances in which certain ballot papers having defects as mentioned in clause (g) or (h) of sub-rule (2) may be rejected.

(64) Under sub-rule (4) of the said rule 56 all the ballot papers which are rejected have to be bundled together and after counting of ballot papers which are found valid, the Returning Officer is required to make entries in the first Part of form 20 known as final result sheet and as reproduced at page 309 of the Manual of Election Law, Eighth Edition, published by Ministry of Law, Justice and Company Affairs, Legislative Department, Government of India. The second part of this form 20 is on the reverse at page 310 of the aforesaid Manual. The first part of form 20 is filled up at the fixed place of counting. After counting the ballot

papers of each candidate, the rejected ballot papers are bundled separately and several bundles made up into separate packets which are then sealed.

(65) The counting of votes which are received by post is dealt with in rule 54A.

(66) After the counting of all the ballot papers, including postal ballot, is thus completed, the Returning Officer is required to record the result in the second part of result-sheet in form 20 mentioned above. This second-part of form 20 is filled up in pursuance of rule 63(1). After this second part of form 20 is filled in by the Returning Officer, the Returning Officer notes the total number of votes polled by each candidate in the said form and announces the same. After the announcement of the result as contained in part II of form 20, a right is given under rule 63(2) to a candidate or his election agent or counting agent to apply for recount either wholly or in part stating the grounds on which he demands such recount. Rule 63, for the sake of ready reference may be reproduced :

"63.Re-count of votes.-(1) After the completion of the counting, the Returning Officer shall record in the result sheet in Form 20 the total number of votes polled by each candidate and announce the same.

(2)After such announcement has been made, a candidate or, in his absence, his election agent or any of his counting agents may apply in writing to the returning officer to recount the votes either wholly or in part stating the grounds on which he demands such recount.

(3)On such an application being made the returning officer shall decide the matter and may allow the application in whole or in part or may reject it in toto if it appears to him to be frivolous or unreasonable.

(4)Every decision of the returning officer under sub-rule (3) shall be in writing and contain the reasons therefore.

(5)If the returning officer decides under sub-rule (3) to allow a recount of the votes either wholly or in part, he shall-

(A)do the recounting in accordance with rule 54A, rule 56 or rule 56A, as the case may be;

(B)amend the result sheet in Form 20 to the extent necessary after such recount; and

(E)announce the amendments so made by him.

(6)After the total number of votes polled by each candidate has been announced under sub-rule (1) of sub-rule (5), the returning officer shall complete and sign the result sheet in Form 20 and no application for a recount shall be entertained thereafter:

PROVIDED that no step under this sub-rule shall be taken on the completion of the counting until the candidates and election agents present at the completion thereof have been given a reasonable opportunity to exercise the right conferred

by sub-rule (2)."

(67) It will be noticed that a discretion is vested in the Returning Officer to order recount but a right, in any case, is conferred on either candidate or their agent to apply for the recount. If the Returning Officer decides to allow the recount wholly or in part, the result of recounting has to be mentioned to the extent necessary by amending the second part of the result sheet in form 20 and announce the amendments so made by him. It is only after the total number of votes polled by each candidate has been announced under sub-rule (1) and/or sub-rule (5) that the Returning Officer is competent to sign the result sheet in form 20. So long as the question of recount is not decided, the Returning Officer, even though he announces the result under sub-rule (1), does not sign the second part of form 20. The Returning Officer signs the result only after the procedure mentioned in sub-rules (3), (4) and (5) has been gone through. It is thereafter that we come to rule 64 which provides as under : "Declaration of result of election and return of election,- The returning officer shall, subject to the provisions of section 65 if and so far as they apply to any particular case, then-

(A)declare in Form 21C or Form 21D, as may be appropriate, the candidate to whom the largest number of valid votes has been given, to be elected u/s 66 and send signed copies thereof to the appropriate authority, the Election Commission and the chief electoral officer; and

(B)complete and certify the return of election in Form 21E and send signed copies thereof to the Election Commission and the chief electoral officer."

(68) The final result can thus be declared only after a right to apply for recount, if any, is availed of by a candidate or an opportunity is given in that behalf. Form No. 20, particularly the second part thereof at page 310 of the Manual, can be signed only thereafter.

(69) Then, again, the declaration of results is done u/s 66 of the Act. It will be noticed from Section 66 reproduced earlier that the Returning Officer can declare the result of the election only in the absence of any direction by the Election Commission to the contrary. If there is no direction to the contrary, the result of the election is declared and a candidate is declared as elected and thereafter a certificate is granted to the candidate so elected in Form 22.

(70) Another thing to be noticed is that rule 56(1) which relates to counting of votes came in the present form by amendment by notification No. S.O. 479A, dated 27th January, 1971. This amended rule 56(1) now contemplates that subject to such general or special directions, if any, as may be given by the Election Commission, the counting of any assembly segment relating to Parliamentary Constituency is at a fixed place of counting when the ballot papers taken out of all the boxes used in the segment are required to be mixed up together and then arranged in convenient bundles and scrutinised. After the ballot papers of all the polling stations in a segment get mixed up, naturally, it is not known thereafter which ballot papers belong to which polling station and if

during counting any ballot papers are destroyed in the circumstances mentioned in section 64A, referred to above, it will not be possible for the returning officer to make any report as to the polling station in respect of which the ballot papers get destroyed or lost or damaged or tampered with and consequently the Election Commission would not be in a position to pass order for repoll in respect of any particular polling station as contemplated by section 64A.

(71) Under rule 38 of the Rules, every ballot paper, before it is issued to elector, and the counterfoil attached thereto has to be stamped on the back with such distinguishing mark as the Election Commission may direct and every ballot paper before it is issued shall be signed in full on its back by the Presiding Officer. None of the parties has brought to our notice any general or special directions which may have been issued for purposes of the newly introduced rule 56(1).

(72) Mr. B. Sen, learned counsel for the petitioner, however, brought to our notice the report on the Fifth General Elections in India, 1971-72, published by the Election Commission of India, particularly its report at pages 231 to 233, explaining the circumstances how in spite of the provision of rule 56(1), effect could still be given to the provisions of section 64A and how it will still be possible in view of the directions given by the Election Commission under rule 56 to find out, after destruction of ballot papers in the circumstances mentioned in Section 64A as to for which polling station in a particular segment the ballots got destroyed etc.

(73) It is true that in the above report various situations are explained in which it will still be possible to comply with the provisions of Section 64A in spite of the amendment of rule 56(1) but, as stated earlier, nothing has been brought to our notice as to what general or special directions, if any, were issued for purposes of rule 56 during the present elections whereby it could have been possible even after destruction of some of the ballot papers, to find out and/or ascertain as to which polling station they could be related to. How ever it is not necessary to say finally whether Section 64A can still be utilised.

(74) A resume of the salient provisions of the Act and the Rules also shows that there is no provision in the Act or the Rules for a repoll with respect to postal ballot papers even if they are destroyed or lost or tampered with. There is also no provision in the Act or the Rules for order of repoll by the Commission after counting is completed and has gone up to the stage of completion of first part of Form 20 in accordance with rule 56(7).

(75) In this view of the situation, the position is that neither section 58 nor section 64A is available to the Commission on the facts in the present case. Has the Commission then the power to cancel the earlier poll and order for repoll ? The Commission, in passing the impugned order, has relied upon its power under Article 324 of the Constitution.

(76) Mr. B. Sen, learned counsel for the petitioners, however, denies this power

claimed on behalf of the Election Commission. It is submitted that Article 324 is merely a provision which vests executive power relating to elections in the Election Commission and thereafter the Election Commission has to act only in accordance with the legislation framed under Article 327. Article 324 of the Constitution does not authorise the Election Commission to do anything outside the legislations in force concerning the elections. The Election Commission's only powers are as detailed in the other provisions of the Constitution and/or in the provisions of the Act and/or the Rules made there under. The entire field of the elections is comprehensively and meticulously covered by the Act and there are no inherent powers under Article 324 of the Constitution in the Commission with respect to a matter not dealt with in the Act or the Rules with respect to the conduct of elections. It is submitted that sections 58 and 64A of the Act specifically deal with the power of the Commission to order repoll in the circumstances and at the stages mentioned therein. Since there is no power conferred by the Act or the Rules or any other provision of the Constitution, the Election Commission had no power to order repoll under the assumed inherent executive powers invoked under Article 324 of the Constitution by the Election Commission when the counting of votes had been completed.

(77) Elaborating the argument further, learned counsel submitted that since Article 324 merely conferred executive authority in the Commission to conduct the elections, as an executive authority, it could not affect the rights of third parties without legislative backing. In this connection, learned counsel further submitted that the provisions of Article 53 and 73 are analogous to the provisions of Article 324 read with Article 327 of the Constitution .

(78) Mr. B. Sen, in support of his submission that the purpose of Article 324 was merely to vest the executive authority as to the conduct of elections in the Election Commission without any legislative backing, and for the proposition that the entire machinery for the conduct of elections is contained in the Act and the Election Commission cannot travel outside it, relied on the following observations of the Supreme Court in *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others*, :

"Broadly speaking, before an election machinery can be brought into operation, there are three requisites which require to be attended to, namely, (1) there should be a set of laws and rules making provisions with respect to all matters relating to, or in connection with, elections, and it should be decided as to how these laws and rules are to be made; (2) there should be an executive charged with the duty of securing the due conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections. Articles 327 and 328 deal with the first of these requisites, article 324 with the second and article 329 with the third requisite.....
The Representation of the People Act, 1951, which was passed by Parliament under Article 327 of the Constitution, makes detailed provisions in regard to all matters and all stages connected with elections to the various legislatures in this

country. That Act is divided into 11 parts, and it is interesting to see the wide variety of subjects they deal with. Part II deals with "the qualifications and disqualifications for membership". Part III deals with the notification of General Elections, Part IV provides for the administrative machinery for the conduct of elections, and Part V makes provisions for the actual conduct of elections and deals with such matters as presentation of nomination papers, requirements of a valid nomination, scrutiny of nominations etc., and procedure for polling and counting of votes. Part VI deals with disputes regarding elections and provides for the manner of presentation of election petitions, the constitution of election tribunals and the trial of election petitions. Part VII outlines the various corrupt and illegal practices which may affect the elections, and electoral offences. Obviously, the Act is a self-contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the rules made there under."

(79) With respect to the ambit of the executive power as conferred by Article 53 and 73, the learned counsel relied upon the observations of the Supreme Court in *State of Madhya Pradesh and another v. Thakur Bharat Singh* : AIR 1967 S.C. 1170, *Bennett Coleman and Co. and Others Vs. Union of India (UOI) and Others*, and *Naraindas Indurkha Vs. The State of Madhya Pradesh and Others*, .

(80) It will be noticed that the case of *N. P. Ponnuswami* (supra) was a case where the principal question involved before the Supreme Court was as to the meaning and effect of Article 329(b) vis-a-vis the powers of the High Court under Article 226 of the Constitution to issue writs in a matter relating to elections. It was not a case dealing with the powers of the Election Commission under Article 324 and it was in that context that the Supreme Court made the observation that Article 324 fulfills the second requisite before an election machinery can be brought into operation. The Supreme Court was not concerned with determining the meaning scope and extent of Article 324 of the Constitution.

(81) A bare perusal of Articles 324, 327 and 328 shows that the power of Parliament under Article 327 or of the Legislature under Article 328 are "subject to the provisions of this Constitution". This means that the legislature power as conferred by Article 327 and 328 on the Parliament or the Legislatures of the State are subject to the provisions of the Constitution.

(82) The opening words of Article 324 of the Constitution, namely, "superintendence, direction and control" show that this article confers plenary executive powers on the Election Commission for two purposes : (i) preparation of electoral rolls and (ii) conduct of all elecns. The functions thus conferred on the Election Commission are specified in Article 324 itself. There are no limitations to these functions mentioned in Article 324. The fact that these three functions are "conferred by the Constitution on the Election Commission" also receives support from the provisions of Sub-Articles (4) and (6) of this Article. The functions of the Election Commission, so conferred, are clearly defined.

(83) The opening words of Article 324, as mentioned above, vest completely not only the executive power, inter alia, to conduct the elections on the Election Commission but also provides it not merely the legislative backing but also Constitutional backing for the superintendence, control and giving direction for the conduct of elections.

(84) Though Article 324 of the Constitution has not been made subject to the provisions of Article 327, it cannot be said that the Election Commission is not bound by the law as made in pursuance of Article 327 or Article 328 to the extent and for situations the law so framed provides. In so far as the Election Commission in such a situation derives its powers from the law so framed under Article 327 or Article 328 it cannot ignore it. The law so framed under Article 327 or 328 is in aid of the plenary powers already conferred on the Election Commission under Article 324. But, where the Act so framed under Article 327 or 328 omits to provide for a contingency or a situation, the said plenary executive power relating to conduct of elections conferred upon the Election Commission by Article 324(1) of the Constitution will become available to the Commission and the Election Commission will be entitled to pass necessary orders in the interest of free and fair elections.

(85) In this case, no question has arisen whether the Election Commission can act contrary to the Act and, Therefore, we need not give any final opinion with respect to it though the learned counsel for respondent No. 3 relied, for that proposition on the decision of the Division Bench of the Patna High Court in Amin Ahmad Vs. Nand Lal Sinha, . But on a combined reading of Articles 324, 327 and 328, we are of the considered view that for a situation which is not covered by the Act or the Rules framed there under, the powers are available to the Election Commission under Article 324, as stated above.

(86) For our above view, we are fortified also by the observations of the Division Bench of the Allahabad High Court in Moti Lal Vs. Mangla Prasad and Others, where the learned Judges, though by way of obiter, observed as under:

"IT is under this provision of the Constitution that the Representation of the People Act has been enacted by the Parliament and in matter governed by the Representation of the People Act, the position appears to be that the Election Commission is bound to follow the provisions of the Act in respect of the express directions contained in the Act passed by the Parliament, in "the exercise of its powers under Art. 327 of the Constitution. Article 327 has been made subject to the provisions of the Constitution and Art. 324(1) is one of such provisions, but the power contained in Art. 324(1) is a general power and the Election Commission, Therefore, would be bound to carry out the specific provisions contained in any Act passed by the Parliament.

BUT where the Act itself omits to provide for a contingency and does not contain any provision for meeting the situation, the general power conferred upon the Election Commission by Article 324(1) of the Constitution will come into play, and

the commission will have a right to pass the necessary orders, if they fall within the ambits of its powers, enumerated in Art. 324(1). The question whether a repoll should be held or not at a particular polling station is one which falls under the words "conduct of an election".

(23) For the above reasons, we are inclined to think that the Election Commission was empowered to direct a repoll under Art. 324(1)."

(87) The aforesaid judgment of the Allahabad High Court was again followed by Broome, Join Mohd. Yunus Saleem v. Shri Shiva Kumar Shastri and others : 46 E.L.R. 575 which related to a case of shifting the dates of poll of a part of a segment ; and powers of the Election Commission with respect to it.

(88) The above view also receives support from the decision of a Division Bench of the Andhra Pradesh High Court in case reported as K. R. Rao v. The Chief Election Commissioner and others : 29 E.L.R. 63, though the learned Judges fortified their decision in view of the provisions of Section 21(3) of the Act but also drew inspiration from the provisions of Article 324(1) of the Constitution.

(89) Puri J. of the Allahabad High Court in the decision reported as Jagdamba Prasad v. Sri Jagannath Prasad and others : 42 E.L.R. 465 also followed the foresaid decision of the Allahabad High Court and took the view that Section 64A of the Act is in aid of the paramount power of conduct of elections conferred on the Commission under Article 324(1).

(90) Again, the Madras High Court in the Election Commission, New Delhi v. P. Kakkan and others : 45 E.L.R. 101 notices the aforesaid views of the Allahabad High Court and the view of the Patna High Court in Amin Ahmad Vs. Nand Lal Sinha, , but does not accept the view of the Patna High Court.

(91) In G. Vasantha Pai v. The Election Commission of India and another: Writ Petition No. 1020 of 1976 decided by the Madras High Court on 15th April, 1976(11), a question arose whether the holding of biennial election to fill up vacancies in the Tamil Nadu Legislative Council from seven existing constituencies before expiration of the term is mandatory under the provisions of the Constitution and the Act and whether the Election Commission has jurisdiction or authority to postpone the said election. The Madras High Court took the view that Article 324 vests in the Commission powers of superintendence, direction and control over the conduct of elections and this power will include the power to postpone the elections if the circumstances are not conducive for fair and proper conduct of elections at any point of time.

(92) Learned counsel for the respondent also relied upon the decision of the Supreme Court in the "Symbols case" reported as Shri Sadiq Ali and Another Vs. The Election Commission of India, New Delhi and Others, and submitted that this decision recognises the inherent plenary powers of the Election Commission while conducting elections to issue necessary orders which the circumstances of the case may necessitate. This case before the Supreme Court related to the

recognition of a particular group by the Election Commission as representing the Congress party and allotting it a symbol under the Election Symbols (Reservation and Allotment) Order, 1968. The case of the petitioners in the aforesaid case was that paragraph 15 of this Order was vires the provisions of rules 5 and 10 of the Conduct of Election Rules, 1961. The Supreme Court took the view that rules 5 and 10 did not come into play in the facts of the case and yet paragraph 15 of the Election Symbols (Reservation and Allotment) Order under which the Election Commission passed the order was intra virus the Article 324 of the Constitution. The Supreme Court de hors of rules 5 and 10 of the Rules recognised that the Commission has an authority created under Article 324 of the Constitution was entitled to and had the power of resolving a dispute between the two rival groups of a political party and the Supreme Court declined to accept the contention of the petitioners that paragraph 15 of the aforesaid Election Symbols Order is ultra virus the powers of the Commission. This case lends considerable support to the submissions made on behalf of the Commission.

(93) Another decision is of Delhi High Court reported as *Shiromani Akali Dal and others v. The Election Commission of India and others* : (decided by Hagde, C. J. and Jagjit Singh, J.) 29 E.L.R. 53. In this case the Shiromani Akali Dal was one of the political parties which took part in the 1962 general election in the State of Punjab. After the election differences arose among the members of the Dal, and there came into being two groups, one headed by Sant Fateh Singh and the other headed by Master Tara Singh. Each of these groups claimed to represent the Shiromani Akali Dal. For the 1967 general election the Election Commission recognised both the groups as political parties. The group of the petitioners was named by the Election Commission as the Shiromani Akali Dal (Master Tara Singh Group) and was given the "hand" as its election symbol, the group of the second respondent was named by the Election Commission as Shiromani Akali Dal (Sant Fateh Singh Group) and was given the symbol of "scales". The petitioners filed a writ petition under Article 226 of the Constitution challenging the competence of the Election Commission to pass such orders. It was held :

"AFTER a reasonable enquiry the Election Commission came to the conclusion that the Shiromani Akali Dal had split into two groups. Both the groups were engaging themselves in political activities. Therefore it recognised both of them as political parties. In view of the powers of superintendence, direction and control of elections conferred by Art. 324 of the Constitution, the competence of the Election Commission to pass the impugned orders could not be disputed."

It was also held :

"BOTH the groups were making the claim that their group was the "Shiromani Akali Dal". For the purpose of recognising them as political parties and allotting them election symbols the Election Commission had to distinguish between them. The Commission found that the press as well as the public were calling one of the groups "Master Tara Singh Group" and the other as "Sant Fateh Singh Group". In accepting this nomenclature the Election Commission did not adopt

an arbitrary course. The power to do so is implied in the power conferred on it under Article 324. It is also included in its power to allot symbols."

IT will be noticed that this decision was given by Delhi High Court in relation to an election of 1967 even before promulgation of Election Symbols (Reservation and Allotment) Order, 1963.

(94) Free and fair elections are the very foundations of democratic institutions and just as it is said that justice must not only be done but must also seem to be done, similarly elections should not only be fairly and properly held but seem to be so conducted as to inspire confidence in the minds of the electors that everything has been above board and has been done to ensure free and fair elections.

(95) The argument of Mr. B. Sen, learned counsel for the petitioner built on the analogy of Article 53 read with Articles 73 and 246 of the Constitution has no application. There is no analogy in fact.

(96) From a persual of the Act and the Rules, it is clear that once polling begins it must reach the stage of declaration of results contemplated by section 66 of the Act. The declaration of the result u/s 66, as noticed earlier, has to be in the manner provided by the Act or the Rules made there under. After the counting of the votes in each segment of the Parliamentary Constituency and after complying with the provisions of rule 57 and the other relevant provisions, all the ballot papers whether accepted or rejected and the postal ballots have to be available along with the entire election material to the Returning Officer to enable him to make a declaration of the result of election and return of election under rules 64 and 66. But before the declaration of the result under rule 64, as noticed earlier, the Returning Officer cannot deprive the candidates of the rights available to them under sub-rules (2), (3), (4), (5) and (6) of rule 63. It is clear from the report of the Observer, the wireless message of the Returning Officer and the impugned order that not only the postal ballots got destroyed in the office of the Returning Officer but even the ballot papers of Fazilka and Zira assembly segments and other election material were lost in their transit from the place of counting of the aforesaid assembly segments to the office or the place where they were to be kept in safe custody till either of the candidates could exercise his right to apply for recount. In this situation, it became impossible to declare the result as contemplated by Section 66 of the Act read with rules 63 and 64. This conclusion is further fortified by Part I of Form 20 filed at page 41 along with the writ petition. Though the first part of Form 20 is headed as "final result sheet"-see rule 56(7)-it is really initial counting by the Assistant Returning Officers. The total valid votes in favor of petitioner No. 1 are shown as 1,96,016 and the total valid votes in favor of Shri Mohinder Singh Sayanwala are shown as 1,94,095. This proforma also shows that the number of rejected ballot papers was 11,350. It also shows that one ballot box relating to Guru Har Sahai assembly segment containing 292 ballot papers had not been counted as per the orders of the observer. It is also clear from the admitted case of the parties that

total postal ballots issued were 1948 but the postal ballots received were 769 out of which 248 ballots were rejected and the balance of the postal ballots were admittedly destroyed before counting. Though the alleged difference in the votes at the time of initial counting by various Assistant Returning Officers was a little less than 1900, excluding postal ballots, yet in view of the extent of rejected ballot papers and report of the Observer about different standards being applied for accepting and rejecting votes, it became impossible for the Returning Officer to comply with the provisions of rule 63(2) to 63(6). Without complying with rule 63, the Returning Officer could not declare the result

(97) Therefore, the position boils down to this that there is no provision in the Act or the Rules providing for cancellation of a poll or repoll in spite of the fact that the Returning Officer cannot declare the result in accordance with the Act or the Rules.

(98) What is the meaning of the order for repoll ? The order for repoll is nothing but a command or direction for poll. It clearly comes within the ambit of the power to give direction as to the conduct of election.

(99) It is, Therefore, clear that the Election Commission had ample powers to pass the impugned order.

(100) In support of his first submission, another limb of the argument of Mr. B. Sen, learned counsel for the petitioners, is that even if the ambit of the power under Article 324 is such as to include the power of cancellation of poll and order for repoll in a situation not covered by the Act or the Rules, yet such a power for cancellation of poll cannot be exercised on the grounds on which it may be possible for a candidate to support an election petition. In other words, the Commission is itself acting contrary to Art. 329(b) of the Constitution.

(101) No such limitation, however, as to the grounds on which the Election Commission can act are to be found in Article 324. Besides, as observed by the Supreme Court in the case of N. P. Ponnuswami (supra) at page 239 of the report, this argument displays great dialectical ingenuity. The Election Commission is performing its constitutional duty. In discharging the constitutional duty imposed on the Election Commission, the Commission does not call in question any election. An order for repoll is only a stage in the election process. It is one of the essential duties to be performed before the election can be completed and anything done towards the completion of the election proceedings can, by no stretch of reasoning, be described as questioning the election. The fallacy of the argument lies in treating the single step taken in furtherance of an election as equivalent to election.

(102) Another argument put forth was that even if on facts and in law, the Commission had the power to order repoll, it should have been confined to the assembly segments of Fazilka and Zira and with respect to the postal ballots. To order for repoll should not have been. with respect to the entire Parliamentary Constituency. For one thing, no basis was laid in the writ petition for the grant of

this relief and consequently the Election Commission had no opportunity to meet this part of the case to justify why the order for repoll could not be restricted to the aforesaid two segments and the postal ballots only. It was submitted that where a larger relief was claimed by the petitioner and the Court finds that a case is made out for lesser relief, the Court can grant the same without any specific prayer for it being made. The proposition, as stated, may be true generally in other cases but in the present case, in view of our decision on the bar of Article 329(b) of the Constitution, no useful purpose will be served by going into it any further as in any case a further opportunity will have to be given to the petitioner to amend his petition to make out a basis for the limited relief and also by giving an opportunity to the Election Commission to meet that part of the case. No prayer for amendment of the writ petition was, however, made during the arguments.

(103) During reply, Mr. Sen made another argument on the basis of Section 14(2) of the Act.

(104) Relevant part of sub-sections (1) and (2) of Section 14 are as under: "14. Notification For General Election To The House Of The PEOPLE-

(1)A general election shall be held for the purpose of Constituting a new House of the People on the expiration of the duration of the existing House or on its dissolution.

(2)For the said purpose the President shall, by one or more notifications published in the Gazette of India on such date or dates as may be recommended by the Election Commission, call upon all parliamentary constituencies to elect members in accordance with the provisions of this Act and of the Rules made there under : " The argument that since the notification which calls upon the holding of elections, and in pursuance of which the election in question was held, was issued under sub-section (2) of section 14 of the Act, the election has to be in accordance with the Act and the Rules made there under and the Commission could not go beyond the Act and the Rules and rely on its powers under the Constitution. This objection has merely to be stated to be rejected. What the President does under sub-section (2) is to call upon the parliamentary constituencies to elect members. That calling upon of the parliamentary constituencies to elect members has to be in accordance with the provisions of the Act and the Rules but it does not mean that the conduct of elections by the Commission has to be held only under the Act or the Rules. The Election Commission who is vested with the power of conducting the elections has still to hold the elections in accordance with the Act and the Rules as well as under the Constitution. There is thus no merit in this submission either.

(105) We now come to the second submission of the learned counsel for the petitioners that even assuming that the Commission had the power to cancel the poll and order for repoll, the impugned order is void as it was passed against the principles of natural justice without giving opportunity to the petitioner No. 1 of

being heard.

(106) The submission of the learned counsel for the respondents, however, was that looking at the scheme of the Act, no hearing before passing the impugned order is contemplated and in any case, even if the principles of natural justice, namely, "opportunity of being heard" before passing the impugned order are attracted, these principles on the facts of the present case have been complied with.

(107) If we look at the provisions of the Constitution, particularly Article 103 and Article 192 read with Section 146 of the Act, a hearing is contemplated before a decision is given on the question as to the disqualification of a member. Again, proviso to Section 22 of the Act contemplates a hearing when a question arises as to correctness of entries in electoral rolls and the proviso thereto provides for it. Similar is the position when an order is passed u/s 20(7). Similarly, a provision of hearing is contemplated while examining the question of scrutiny of nomination papers u/s 36 and again a hearing is also provided when the Election Petition is sought to be withdrawn u/s 109. It is thus clear from the scheme of the constitution and the Act that whenever a hearing is required to be given, it is either expressly so mentioned or is implicit in those provisions and when we come to issuance of a direction for adjournment of poll u/s 57 or repoll u/s 58 or section 64A no enquiry as such is contemplated and, Therefore, no hearing is intended. Same is the position when a direction like the present one is issued by the Election Commission.

(108) Learned counsel for the petitioners, however, sought to rely for his submission on the cases reported as Shri Bhagwan and Another Vs. Ram Chand and Another, , State of Orissa Vs. Dr. (Miss) Binapani Dei and Others, and A.K. Kraipak and Others Vs. Union of India (UOI) and Others, , but it appears to us that none of these cases has any applicability to the situation like the present one. The case which is most apt in a situation like the present one is the one decided by the Supreme Court in the case reported as The Bihar School Examination Board Vs. Subhas Chandra Sinha and Others, . In this case. the entire examination had been cancelled by the authorities who had ordered for re-examination. It was argued before the Supreme Court on behalf of the students that the order cancelling the earlier exam. and ordering for fresh examination was bad as no opportunity to represent their cases to all the candidates was given. The Supreme Court negated the contention and observed as under :

"12.This brings us to the crux of the problem. The High Court interfered on the ground that natural justice and fair play were not observed in this case. This was repeated to us by the respondents in the appeal.

13.This is not a case of any particular individual who is being charged with adoption of unfair means but of the conduct of all the examinees or at least a vast majority of them at a particular centre. If it is not a question of charging any one individually with unfair means but to condemn the examination as

ineffective for the purpose it was held, must the Board give an opportunity to all the candidates to represent their cases ? We think not. It was not necessary for the Board to give an opportunity to the candidates if the examinations as a whole were being cancelled. The Board had not charged any one with unfair means so that he could claim to defend himself. The examination was vitiated by adoption of unfair means on a mass scale. In these circumstances it would be wrong to insist that the Board must hold a detailed inquiry into the matter and examine each individual case to satisfy itself which of the candidates had not adopted unfair means. The examination as a whole had to go.

14. Reliance was placed upon Board of High School and Intermediate Education, U.P., Allahabad Vs. Ghanshyam Das Gupta and Others, to which we referred earlier. There the examination results of three candidates were cancelled, and this Court held that they should have received an opportunity of explaining their conduct. It was also said that even if the inquiry involved a large number of persons the Committee should frame proper regulations for the conduct of such inquiries but not deny the opportunity. We do not think that that case has any application. Surely it was not intended that where the examination as a whole was vitiated, say by leakage of papers or by destruction of some of the answer books or by discovery of unfair means practiced on a vast scale that an inquiry would be made giving a chance to every one appearing at that examination to have his say. What the Court intended to lay down was that if any particular person was to be proceeded against, he must have a proper chance to defend himself and this did not obviate the necessity of giving an opportunity even though the number of persons proceeded against was large. The Court was then not considering the right of an examining body to cancel its own examination when it was satisfied that the examination was not properly conducted or that in the conduct of the examination the majority of the examinees had not conducted themselves as they should have. To make such decisions depend upon a full-fledged judicial inquiry would hold up the functioning of such autonomous bodies as Universities and School Board. While we do not wish to whittle down the requirements of natural justice and fair play in cases where such requirement may be said to arise, we do not want that this Court should be understood as having stated that an inquiry with a right to representation must always precede in every case, however, different. It cannot hold a detailed quasi-judicial inquiry with a right to its alumni to plead and lead evidence etc. before the results are withheld or the examinations cancelled. If there is sufficient material on which it can be demonstrated that the university was right in its conclusion that the examinations ought to be cancelled then academic standards require that the university's appreciation of the problem must be respected. It would not do for the Court to say that you should have examined all the candidates or even their representatives with a view to ascertaining whether they had received assistance or not."

(109) The scheme of holding elections to the Parliament and legislative assemblies is governed by prescribed time-table for expeditious conclusion of

electoral process for purposes of issuing notification u/s 73 of the Act. In the election, apart from numerous candidates who may participate, all the eligible voters who have exercised their franchise are vitally interested in common with the candidates in its proper conclusion. Besides, a deferred hearing is also provided by way of Election Petition, and no vested or civil rights are involved till the declaration of the result.

(110) For all these reasons, we are of the view that the principles of natural justice are not provided specifically but are in fact by necessary intendment totally excluded while passing the impugned order.

(111) Let us now consider the case in the alternative that even if principles of natural justice were implied to be observed before passing the impugned order, whether those principles have been complied with or not.

(112) We have already noticed the pleadings of the parties in this regard. It is clear that the petitioner in his writ petition did not disclose at all the meeting which he along with Shri Umrao Singh, Revenue Minister of Punjab, had with the Chief Election Commissioner but the said meeting was alleged in the affidavit filed on behalf of respondent No. 3. During the hearing, Shri T. Swaminathan, the Chief Election Commissioner clearly mentioned his version of the meeting but the petitioner No. 1 in his supplementary affidavit took up the position as if the Election Commission was directing the Returning Officer to declare the results. Instead, the version of the Chief Election Commissioner was that after hearing the request of petitioner No. 1 to direct the Returning Officer to declare the result and after hearing the reasons for the same request he merely agreed to consider it before taking a decision. We would have very much appreciated had the petitioner given his version of the meeting which he had with the Chief Election Commissioner on 22-3-1977 in the writ petition itself instead of now giving his version in reply to the affidavit filed by Shri T. Swaminathan.

(113) We have no hesitation in accepting the version as given in the affidavit of Shri T. Swaminathan.

(114) It is also clear from the petitioner's own averment in paragraph 31 of the petition, as noticed earlier, that the petitioner No. 1 made a representation to respondent No. 1 to recall the notification and declare the result and he made a similar request to the Returning Officer. It is clear from the reply filed on behalf of respondent No. 1 noticed earlier that in spite of petitioner No. 1 approaching respondent No. 1 again the Election Commission was still of the opinion that this was a fit case where repoll should be held in the entire Constituency.

(115) In view of Article 371 of the Constitution, Section 21 of the General Clauses Act is clearly applicable and the Election Commission could have withdrawn its notification "under section 21 of the General Clauses Act (see the observations of the Supreme Court in the case reported as Sampat Prakash Vs. The State of Jammu and Kashmir and Another,

(116) In these circumstances, Since the petitioner No. 1 was heard not only before the issue of the notification but in any case after the notification, we are of the considered opinion that even if the principles of natural justice applied, they have been complied with. The petitioner has not suffered any injustice in that behalf.

(117) The second submission also, Therefore, fails.

(118) We now proceed to examine the third submission of the petitioners and the preliminary objections raised on behalf of respondents 1 and 3.

(119) Article 329(b), relevant for the purpose, has already been extracted in the earlier part of the Judgment.

(120) In the case of N. P. Ponnuswami (supra), the facts were that the appellant there was a candidate for election to the Legislative Assembly whose nomination paper was rejected by the Returning Officer. He applied to the High Court under Article 226 of the Constitution for quashing the order of the Returning Officer and to direct the Returning Officer to include his name in the list of valid nominations to be published. The High Court had dismissed the writ petition on the ground of the bar contained in Article 329(b). The Supreme Court agreed with the High Court and examined the meaning of Article 329(b) as well as the meaning of "election" and "questioning the election" and the policy of the Legislature with regard to elections as well as the effect of the remedy of the election petition provided by Section 80 of the Act. The Supreme Court in the case of N. P. Ponnuswami (supra) observed as under:

".....INview of the provision of article 329(b) of the Constitution and Sec. 80 of the Representation of the People Act, 1951, the High Court had no jurisdiction to interfere with the order of the Returning Officer.

THE word "election" has by long usage in connection with the process of selection of proper representatives in democratic institutions acquired both a wide and a narrow meaning. In the narrow sense, it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling, or a particular candidate being returned unopposed when there is no poll. In the wide sense, the word is used to connote the entire process culminating in a candidate being declared elected and it is in this wide sense that the word is used in Part Xv of the Constitution in which article 329(b) occurs.

THE scheme of Part Xv of the Constitution and the Representation of the People Act, 1951, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any court. Under the election law, the only significance which the rejection of a nomination paper has, consists in the fact that it can be used as a ground to call the election in question. Article 329(b) was apparently enacted to prescribe the manner in which and the stage at which this ground,

and other grounds which may be raised under the law to call the election in question, could be urged. It follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other court. If the grounds on which an election can be called in question could be raised at an earlier stage and en-ors, if any, are rectified, there will be no meaning in enacting a provision like article 329(b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by the High Court at the pre-polling stage and by the election tribunal which is to be an independent body, at the stage when the matter is brought up before it. Therefore, questioning the rejection of a nomination paper is "questioning the election" within the meaning of article 329(b) of the Constitution and sec. 80 of the Representation of the People Act, 1951." It was also held :

"WHERE a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of."

(121) The process of election starting with the issue of notification u/s 14 till the declaration of the result is one continuous process of election. The order for fresh poll is an integral part of the same process and the grounds for declaring the election to be void in the election petition are contained in Section 100 of the Act One of the grounds on which election can be declared void is contained in Section 100(l)(d)(iv). This provision reads is as under:

"100.Grounds for declaring election to be void.-(1) Subject to the provisions of sub-section (2) if the High Court is of opinion.....

(D)that the result of the election, in so far as it concerns a returned candidate has been materially affected-

(IV)by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act"

(122) The aforesaid ground came up for consideration before the Supreme Court in the case reported as Durga Shankar Mehta Vs. Thakur Raghuraj Singh and Others, and the Supreme Court observed as under :

"(9)It is argued on behalf of the respondent that the expression "non-compliance" as used in sub-section ("2) (e) would suggest the idea of not acting according to any rule or command and that the expression is not quite appropriate in describing a mere lack of qualification. This, we think, would be a narrow way of looking at the thing. When a person is incapable of being chosen as a member of a State Assembly under the provisions of the Constitution itself but has nevertheless been returned as such at an election, it can be said without impropriety that there has been non-compliance with the provisions of the Constitution material affecting the result of the election. There is no material

difference between "non-compliance" and "non-observance" or "breach" and this item in clause (e) of sub-section (2) may be taken as a residuary provision contemplating cases where there has been infraction of the provisions of the Constitution or of the Act but which have not been specifically enumerated in the other portions of the clause."

(123) The case of the petitioner No. 1 himself is that the order for the cancellation of the poll and the order for repoll is beyond the powers of the Election Commission vested in him under Article 324 of the Constitution and, Therefore, the Election Commission has acted in breach of the Constitution. Such a ground, in view of the aforequoted dicta of the Supreme Court, would clearly fall in the residuary clause (iv) of Section 100(1)(d) of the Act.

(124) Learned counsel for the petitioner, however, submitted that the word "non-compliance" denotes an omission to do what is directed to be done and not, "doing of an act which is prohibited nor provided for". In support of this submission, the learned counsel relied upon the observations of the Division Bench reported in Naunihal Singh Vs. Kishorilal Paliwal and Others, and Madhu Singh Mukh Ram Vs. Ram Saran Chand Mittal and Others, . It appears to us that the observations of the Division Bench of the Madhya Pradesh High Court were made as the case of Durga Shankar Mehra (supra) decided by the Supreme Court was not brought to their notice. Again, obiter in the judgment of the Punjab High Court also relies upon the aforesaid judgment of the Madhya Pradesh High Court without noticing the dicta of the Supreme Court in the aforesaid case.

(125) In view of the clear interpretation given to the expression "non-compliance" in the aforesaid decision by the Supreme Court, we respectfully disagree with the view taken by the Madhya Pradesh High Court and the Punjab High Court, in the aforesaid decisions,

(126) Etymologically, "compliance" means acting "in accordance with" and "non-compliance" would mean "not acting in accordance with". Since the petitioner is in a position to challenge the impugned notification by way of Election Petition, after the declaration of the result of the election on the ground that the order of the Election Commission is ultra virus of Article 324(1) of the Constitution, it must be held that this Court has no jurisdiction to entertain the petition in view of the bar contained in Article 329(b) of the Constitution.

(127) Another aspects of the matter is that the relief prayed, inter alia, is for a writ of mandamus directing the Returning Officer to declare the result of the election. A writ of mandamus is issued to call upon the authorities to do their duty in accordance with law. The Officers under the Act have got to act in accordance with the Act and the Rules and not in violation thereof and once it became impossible to give an opportunity to the candidate to apply turn repoll, no mandamus can be issued to an Officer to declare the result in violation of the Act or the Rules.

(128) For the aforesaid reasons, C.W. 245 of 1977 fails and is dismissed. The parties are, however, left to bear their own costs.