

(1981) 08 GUJ CK 0025
In the Gujarat High Court

Case No : Special Civil Application No's. 2964 and 3007 of 1980

Ravjibbai Bhikhabhai Patel

APPELLANT

Vs

Bilimora Nagar Palika

RESPONDENT

Date of Decision : 19-08-1981

Acts Referred:

Constitution of India, 1950 — Article 226
Gujarat Municipalities Act, 1963 — Section 14

Citation : AIR 1982 Guj 163 : (1982) 1 GLR 611

Hon'ble Judges : B.K. Mehta, J;B.J. Divan, J

Bench : Division Bench

Advocate : H.L. Patel and D.D. Vyas, R.N. Shah, for the Appellant; H.M. Mehta, B.J. Shela and B.J. Shethna, M.B. Shah, Asstt. Govt. Pleader and Purnanand and Co., for the Respondent

Judgement

G.K. Mehta, J.—Since in these two applications the election of Bilimora Municipality and Bulsar Municipality held in Oct., 1980 have been challenged mainly on the ground of breach of the relevant provisions of the Gujarat Municipalities Act, 1963 or the Gujarat Municipalities Election Rules, 1964 pertaining to the preparation of electoral rolls, we intend to dispose of these two applications by this common order. Before we address ourselves to the contentions urged by the respective petitioners it would be profitable to set out a few relevant facts of both these applications, so that the contentions can be appreciated in proper context.

2. Petitioners of Special Civil Application No. 2964/80 are the defeated candidates in the elections of Bilimora Municipality and they seek to challenge the elections to wards Nos. 2, 6, 7, 8, and 9 of the said Municipality. Respondents Nos, 4 to 6 are elected candidates from ward No, 2; respondents Nos. 7 to 9 are elected from ward No. 6; respondents Nos. 10 and 11 are elected from ward No. 7; respondents Nos. 12 to 14 are elected from ward No. 8 and respondents Nos. 15 to 17 are elected from ward No. 9. It should be stated that respondent No. 4 was also elected from ward No. 9 besides ward No. 2. He

therefore, resigned from ward No. 2 and, therefore, respondent No. 18 was 27, 20 elected in his place from ward No. 2, According to the election programme declared by the Collector. Bulsar-respondent No. 2 herein, in exercise of his powers under R. 7 (1) of the Gujarat Municipalities Election Rules. 1964 (hereinafter referred to as "the Election Rules"), the date for publication of the notice about the list of voters was specified as Aug. 20, 1980. The last date for filing nomination papers under R. 8 was Sept. 20, 1980. The scrutiny of the nomination papers as required under R. 10 was to be held on Sept. 22, 1980. The last date for withdrawal under R. 21 (1) was Sept. 24, 1980. The last date for retirement from the contest under R. 12 (1) was Oct. 1, 1980 and the preparation and publication of the list of validly nominated candidates was Oct 3, 1980. The date of the poll as fixed under R. 25 was October 12, 1980 and the counting of votes under R. 35 was to be held on Oct. 13, 1980.

3. The list of voters was prepared and finally published by the Chief Officer of the said Municipality on Aug. 18, 1980. However the said Chief Officer by his order of Oct. 11, 1980 (hereinafter referred to as "the impugned order") only a day prior to the date of the poll effected certain changes in the lists of voters of wards Nos. 2, 6, 7, 8 and 9 the elections to which are under challenge in this application. By that order of Oct. 11, 1980 what the Chief Officer did was that he omitted specified voters from one ward and included them in another ward and also deleted the names of certain voters from the said wards. The main grievance of the petitioners of this petition is that no amendment deletion or addition of any entry in the lists of voters for a ward can be legally effected between the publication of the notice about the lists of voters under R. 4, that is, Aug 20, 1980 and the date of the poll, that is, Oct. 12, 1980, since S. 9(5) of the Gujarat Municipalities Act, 1963 (hereinafter referred to as "the Act") prohibits such amendment, deletion or addition of any entry in the list of voters for a ward during the period between such date as the State Government may, by general or special order, notify in this behalf, and the date of the completion of any concerned election in the ward. It is common ground that the State Government has by a special order issued in the Panchayat Housing and Urban Development Department dated March 6, 1979 notified the date on which the list of voters consisting of both its parts is finally published in accordance with the provision of sub-section (7) of S. 9 as the date for purposes of the said sub-section (5). Inasmuch as the Chief Officer by his impugned order deleted 130 voters from ward No. 6; 181 voters from ward No. 9 and about 42 voters from ward No. 7 besides omitting hundreds of voters from one ward and including them in another ward, the elections to which are under challenge, the results of the petitioners in the elections in the said wards were materially affected and, therefore, the elections of these wards are liable to be quashed and set aside particularly because the denial of right of vote to the persons who were included in the voters lists and whose names were deleted only on the eve of the actual poll was discriminatory and, therefore, violative of the fundamental right guaranteed under Arts. 19(1) and 14 of the Constitution of India. It is in this

context that the petitioners have prayed for a writ of Mandamus for setting aside the elections of wards Nos. 2, 6, 7, 8 and 9 and to grant such other appropriate reliefs as may be thought fit in the discretion of this Court.

4. P. D. Desai. J. by his order of oct, 24, 1980 referred the matter to a larger bench having regard to the importance of the question of alternative remedy under S. 14 of the Act since the legal position required to be considered in depth. The Division Bench of this court by its order of Oct. 28, 1980 issued Rule and made it returnable on Nov. 4, 1980.

5. The petition was resisted by Bilimora Municipality on whose behalf reply affidavit of the Chief Officer has been filed. Three preliminary objections have been urged in the reply affidavit. In the first place, it is contended that since the alternative remedy under S. 14 of the Act for determining the validity of the municipal election is not availed of, the Court should not exercise its jurisdiction under Art. 226 of the Constitution. In the second place it has been urged that the petition is barred on account of acquiescence on the part of the petitioners inasmuch as they have participated. In the elections in question without any demurrer against the elections being held on the basis of the voters list, as amended by the impugned order, Thirdly, it was urged that since the application raises disputed questions of fact, this Court should not exercise its jurisdiction and the petitioners must be directed to obtain the redress of their grievances by the special remedy provided in the Act, namely election petition or by appropriate remedy in Civil Court, if the jurisdiction of the Election Tribunal cannot be invoked on the merits of the grievances of the petitioners. It has been stated in the reply affidavit that by the impugned order, no additions or alterations were made as alleged during the prescribed period but only these changes were specified which have been introduced in the electoral rolls up to the first terminal of the prohibited period, that is, August 18, 1980 which was the date on which the notice about the final electoral rolls was published. In other words, the shifting of the voters from one ward to another ward or the deletion of the names of some of the voters had been already carried out before the final electoral rolls were published on August 18, 1980. This exercise, which was carried out before the publication of the final electoral rolls was necessary according to the Chief Officer, because the local areas of Bilimora town as shown in the Gujarat State Legislative Assembly rolls did not coincide with the electoral rolls of the local area of Bilimora Municipality in context of the municipal elections and he had therefore to re-arrange the electoral rolls so as to ensure that the voters' list for the Municipality of Bilimora, as taken from the Assembly electoral rolls, is confined to the local area of the Municipality only.

6. The petition was permitted to be amended by insertion of paragraphs 17A to 17E in the petition. The petitioners have, by this amendment, averred that the impugned order has also resulted in the changes in the limits of the wards, which the Chief Officer could not have done without following the procedure prescribed in S. 7 of the Act. The impugned order, according to the petitioners, effected the

change of wards in the following circumstances: Under S. 4 of the Act, the local area Of the Bilimora town is declared to be municipal borough for the Bilimora Municipality. Originally the railway line of Bilimora-Vaghai was passing through Bilimora. town and was going up 10 Bilimora bunder. The said line has been removed since last several years, The land on which the railway line was passing is now occupied by hutment dwellers. The local area of Bilimora town admittedly is an both sides of the old railway line. The voters whose names have been deleted from wards Nos. 6. 7 and 9 reside in the huts constructed on the said land. It is, therefore, urged on behalf of the petitioners that the effect of the impugned order by deleting the names of the voters is to effect change in the constitution of the wards.

7. The case of the Municipality as urged in the reply affidavit of the Chief Officer in this connection is that the land from which the railway line has been removed is not within the local limits of Bilimora Municipality as constituted and notified by the State Government by notification published on Dec. 13, 1973 and the map of Bilimora town prepared accordingly on Feb. 16, 1,974 by the Overseers of the Municipality. The notification and the map, according to the Chief Officer. clearly show that the municipal limits end at the point of the commencement of the railway line and, therefore, it cannot he said that by deletion of the names of some of the voters by the impugned order it would have effect of change in the limits of the wards.

8. Petitioner No.1 of Special Civil Application No. 3007/80 is a voter entitled to vote at the elections of Bulsar Municipality. Petitioners Nos. 2 and 3 claim themselves to be the residents and tax-Payers within limits of the said Municipality and as such they are entitled to be included in the voters" list for the purpose of elections held in Oct., 1980. The grievance of the petitioners is mainly twofold. In the first places, their objection is that the notice regarding the places of the publication of the voters" list as required under R. 4 of the Election Rules was not published in any of the local newspapers. Secondly, according to the election programme notified by the Collector, Bulsar-respondent No. 2 herein, by his notification of August 11, 1980, the last date for filing the nomination papers as required under R.4 of the Election Rules was not published in any of the local newspapers. Secondly, according to the election programme notified by the Collector, Bulsar-respondent No. 2 herein, by his notification of August 11, 1980, the last date for filing the nomination papers as required under R. 8 was Sept. 20, 1980. Since the notification announcing the election programmers by the Collector was made on August 11,1980 fixing Sept, 20,1980 as the last date for filing nomination papers, the minimum period of six weeks as prescribed under R. 7 (2) of the Election Rules was not maintained. Having realized this infirmity, respondent No.2 had issued a corrigendum dated Sept. 15, 1980 amending the earlier notification by stating that the last date for filing the nomination papers would be September 21, 1980 and not September 20, 1980. In spite of this corrigendum, the grievance of the petition ners is that the minimum period of 42 days is not left between the two terminals, namely the publication of the election

schedule, that is, August 11, 1980 and the last date for filing the nomination papers, that is, Sept. 21, 1980 as required by R. 7 (2.) of the Election Rules. The minor grievances of the petitioners are firstly that notice regarding the retirement of the candidates was not placed in the office of the Returning Officer nor at each Polling station within the constituency before the commencement of the poll. Secondly the list of validly nominated candidates was also not published at the municipal office, respective Polling stations and other conspicuous Places before seven days of the date Of the Poll as required under Rule 14 of the Elections Rules. Thirdly, the specimen of voting papers had not been pasted at any conspicuous place of the Polling station as required under R. 21 of the Election Rules. The poll took place on Oct 12, 1980 and the counting was held on Oct. 13, 1980 as a result of which respondents Nos. 6 to 31 have been declared elected at the said, elections. The Petitioners also complain that the elections were held in an atmosphere surcharged with threats of disturbances of peace and order as evidenced by the fact that the District Magistrate was required to issue notification u/s 144 of the Code of Criminal Procedure in the area at the relevant time and, therefore, the election is also vitiated. The petitioners have, therefore, prayed for a writ of certiorari to quash and set aside the elections to the Bulsar Municipality held on October 12, 1980 and such other reliefs as may be necessary in the circumstances of the case.

9. This second petition has been resisted by Bulsar Municipality on whose behalf the reply affidavit of its Chief Officer has been filed. A preliminary objection has been raised that since this very election is the subject matter of Election Petition No. 2 of 1980 on the file, of the District Court, Bulsar at Navsari, filed by Hari Nath Mishra and five others this Court should not exercise its jurisdiction by entertaining and hearing this application of the petitioners who must also avail of the alternative remedy provided under S. 14 of the Act. As regards the objection of the non-publication of the notice in the newspapers about the publication of voters' list, it has been stated that the same had been in fact published in the issue of local daily "Gujarat Mitra" of Aug. 20, 1980 and the same was also published on the notice-board of the office of the Municipality and at the important places in each of the seven wards. As regards the non-publication of the list of retired candidates it is stated that in all two candidates retired; one from ward No. 1 and another from ward No.6 and the list was placed in the office of the Returning Officer and at each of the polling stations within the constituency, before the commencement of the poll. Similarly the list of validly nominated candidates was pasted at the municipal office as well as public library and also at each of the polling stations. Similarly the specimen of voting-papers was pasted at each and every polling station as directed by him by his order of October 9, 1980.

10. It is in this context that we have to determine whether the petitioners of these two applications are entitled to any reliefs and, if so, what. Broadly stated, the following questions arise in these petitions.

11. The first and the important question is, whether the petitioners are entitled to invoke the jurisdiction of this Court under Article 226 of the Constitution when an alternative remedy is available and they have failed to avail of the said remedy.

Implicitly" therefore, the second question which arises is, whether the alternative remedy of election petition u/s 14 is not an efficacious remedy so as to effectively adjudicate the questions raised in these Petitions and more particularly when either the elections of as many as five wards have been challenged or where the entire election has been challenged and therefore, in these exceptional circumstances, the Court must exercise its jurisdiction under Article 226 of the Constitution of India.

The third question is, whether the Court should refuse to exercise the jurisdiction on the ground either because the petitioners have acquiesced by participating in the election as is the case in Special Civil Application No. 2964/80 or because there are disputed questions of fact as urged in Special Civil Application No. 3007/80.

The 4th question is, whether there is any merit in the challenge that the election to the Bilimora Municipality or Bulsar Municipality is vitiated on account of the alleged breach of the relevant provisions of the Act and or the Rules.

The 5th question is that even assuming that there is breach of the provisions of the Act or the Election Rules, whether the Court should not exercise its jurisdiction because it has not been prima facie shown much less conclusively established that the results of the election have been materially affected as a result of the alleged breach of the Act or/and the Election Rules...

12. We will address ourselves to these questions in the same order in which they have been raised,

Re: Questions 1, 2, 3 and 5 :-

Shortly stated, the crux of the problem is, whether the petitioners are entitled to invoke the jurisdiction of this Court under Art. 226 of the Constitution without availing of the special remedy provided under the Act for adjudication of the validity of the election challenged. S. 14 of the Act provides for the determination of the validity of the election. The relevant provisions of the said section which are material for the purposes of the present petitions are contained in sub-sections (1), (2), (5) (a) (iv) and (7). They read as under:

"14. (1) If the validity of any election of a councilor is brought in question by any person qualified to vote at the election to which such question refers or by any candidate for such election such person may at any time within fifteen days after the date of the declaration of the result of the election, apply to the District Court of the district within which the election has been or should have been held, for the determination of such question.

(2) An inquiry shall thereupon be held by a Judge, not below the grade of an Assistant Judge appointed by the State Government either specially for the case or for such cases generally; and such Judge may, after such inquiry as he deems necessary and subject to the provisions of sub-section (5) pass an order confirming or amending the declared result of the election or setting the election aside for the purposes of the said inquiry the said Judge may summon and enforce the attendance of witnesses and compel them to give evidence as if he were a Civil Court, and he may also direct by whom the whole or any part of the costs of any such inquiry shall be paid such costs shall be recoverable as if they had been awarded in a suit under the Code of Civil Procedure, 1908. The decision or order shall be conclusive.

(3) & (4) xx xx xx

(5) (a) If the Judge is satisfied -

(i)-(iii) xx xx xx

(iv) that the result of the election, in so far as it concerns the elected candidate, has been materially affected by the improper acceptance of any nomination or by any corrupt practice committed in the interests of the elected candidate by an agent other than his election agent, or by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or by any non-compliance with the provisions of this Act or of any rules or orders made under this Act. the Judge shall set aside the election, of the elected candidate and where the election is set aside, on a ground mentioned in item (i) or (ii) shall declare the candidate disqualified for the purpose of such fresh election as may be held under sub-section (2) of Section 42.

(b) xx xx xx

(6) xx xx xx

(7) If the validity of the election is brought in question only on the ground of an error by the officer or officers charged with carrying out the rules made under sub-section (5) of Section 6 or under sub-section (6) of Section 9C or of an irregularity or informality not correctly caused, the Judge shall not set aside the election.

Explanation:- The expression "error" in this clause does not include any breach of or any omission to carry out or any non-compliance with the provisions of this Act or the rules made there under whereby the result of the election has been materially affected."

13. It should be recalled that the election to the Bilimora Municipality has been mainly challenged on two grounds: (i) amendment and deletion of the lists of voters in contravention of S. 9(5) of the Act, 1963 and (ii) change in the limits of the wards without following that procedure prescribed under S. 7 of the Act. Similarly the election to Bulsar Municipality is challenged mainly on the ground of

the noncompliance with the provisions contained in the Election Rules inasmuch as notice of election of a minimum period of six weeks as required under R.7(2) of the Election Rules was not given by the Collector, and also because the mandatory provisions contained in R. 4 about the notice of the places where the lists of voters were available was not published as required by law, and also on the ground of the breach of the mandatory provisions contained in Rules 14 and 21 of the Election Rules regarding publication of the lists of retired candidates, validly nominated candidates and the pro forma voting papers.

14. What is the scope and amplitude of the jurisdiction of High Courts under Art, 226 of the Constitution in connection with the election disputes has been succinctly determined by the Supreme Court in N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, though the context was under Art. 329 of the Constitution. The ratio of Ponnuswami's decision has been reiterated by the Supreme Court consistently in several decisions, namely Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, ; Nanhoo Mal and Others Vs. Hira Mal and Others, ; K.K. Shrivastava and Others Vs. Bhupendra Kumar Jain and Others, and Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, . In Ponnuswami's case (supra) the appellant's nomination for election to the Madras Legislative Assembly from the Namakhal Constituency was rejected by the Returning Officer and so he moved the High Court of Madras praying for a writ of Certiorari to quash the order of rejection without waiting for the election being over and consequently moving the Election Tribunal for setting aside the result of the election without his participation. The High Court dismissed the petition as unsustainable and the Supreme Court affirmed the same where Fazl Ali, J., principally speaking for the Court, explained the rationale underlying Art. 329(b) of the Constitution. The Court examined, in the first place, as to whether the law of election in the country envisaged two attacks on matters connected with the election proceedings; one while they are going on by invoking the extraordinary jurisdiction of High Court under Art 226 of the Constitution, and another after completion by means of an election petition. The Court ruled that this was contrary to the scheme of Part XV of the Constitution and the Representation of the People Act, 1951. It was further held that in perspective of Art. 229(b) and the relevant provisions of the Representation of the People Act 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. The rejection of nomination paper can be used as a ground to call the election in question in the manner prescribed under Art. 329 (b) of the Constitution, and it cannot be urged in any other manner, at any other stage and before any other Court, Fazl Ali, J. thereafter considered Arts. 327 & 328 of the Constitution and summarised the position at page 70 as under:-

"(16)

(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

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

It should be emphasized that the decision in Ponnuswami's case (AIR 1958 SC 64) (supra) was rendered by a Bench of six Judges of the Supreme Court.

15. The same principle was again reiterated by the Supreme Court by a Bench of seven Judges in Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, . That decision was also again in the context of Art 329 of the Constitution and the Representation of the People Act, 1951. In Kamath's case (supra) the appellant and respondents Nos.1 to 5 before the Supreme Court were nominated for election to the House of People from Hoshangabad Constituency in the State of Madhya Pradesh. Respondents Nos. 4 and 5 withdrew from the election. The appellant Kamath secured 65201 votes while the first respondent secured 65375 votes at the poll. The other respondents had secured less votes than the first respondent. The Returning Officer declared the first respondent as duly elected. The appellant filed an election petition for setting aside the election on the ground that 301 out of the votes counted in favour of the first respondent were liable to be rejected under R. 47 (1) (c) under the Representation of People (Conduct of Elections and Election Petitions) Rules, 1951 since the ballot papers did not have the distinguishing marks prescribed under R. 29 and by the reason of their improper rejection, the result of the election has been materially affected. The Election Tribunal by a majority held in favour of the appellant Kamath. The third member held in favour of respondent No. 1. The Tribunal, however, was unanimous in its opinion that the result of the election has not been materially affected by the erroneous reception of the votes and on that ground dismissed the petition. Kamath moved the High Court of . Nagpur under Arts 226 and 227 of the Constitution. The petition was heard by a Bench of three Judges who differed in their conclusions. Two members of the bench held that no writ could be issued under Art 226, and in any case, the writ could not go to the Tribunal which had become functus officio. The third member agreed with the conclusion but rested it on the second ground. On merits, the two members held

that the result of the election had not been materially affected by the erroneous reception of votes since that finding of the Tribunal was within its jurisdiction and it could not be quashed under Art 226. The third member held that the Tribunal took into consideration irrelevant matters and, therefore, it acted, in excess of its jurisdiction and the decision was liable to be quashed. , However the petition, was dismissed in accordance with the majority opinion. In that context, the Supreme Court referred to its, earlier decision in Ponnuswami's case WR 1952 SC 64) (supra) and held that on plain reading of Art. 329(b) of the Constitution what was prohibited was the intimation of proceedings for setting aside the election otherwise than by an election petition presented to such authority and in such manner as provided therein and therefore, a suit for setting aside an election would be barred under this provision. The Court further held that once an election petition has been filed and determined, whether its decision is open to attack and if so where and to what extent must be determined by the general law applicable to decisions of Tribunals since it cannot be disputed an matter of principle that these Tribunals are subject to supervisory jurisdiction of High Courts under Arts. 226 and 227 of the Constitution and a writ of certiorari would be competent against the decision of Election Tribunal.

16. Again in Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, a question arose whether the jurisdiction of the High Court could be invoked under Art. 226 of the Constitution to challenge the cancellation of the poll in the entire constituency by the Election Commission in exercise of its power under Art 324 of the Constitution in view of the prohibition contained in Art, 329 (b) of the Constitution. Krishna Iyer, J. speaking for the Court again referred to the decision N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, as a Landmark case in election laws and found that its ratio has been consistently followed by the Supreme Court in several rulings through Durga Shankar Mehta Vs. Thakur Raghuraj Singh and Others, ; Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, ; down to Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another, , After elaborately setting out the passages from N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, the Court, speaking through Krishna Iyer. J. rules as under at pages 867-868:

"28. What emerges from this perspicacious reasoning, if we may say so with great respect, is that any decision sought and rendered will not run counter to "calling in question an election if it sub serves the progress of the election and facilitates the completion of the election -. We should not slur over the quite essential observation "Anything done towards the completion of the election proceeding can by no stretch of reasoning be described as questioning the election."

29. Thus. there are two types of decisions two types of challenges. The first relates to proceedings, which interlace with the progress of the election the second accelerates the completion of the election and acts in furtherance of an election. So, the short question before us. in the light of the illumination derived

from N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, is as to whether the order for re-poll of the Chief Election. Commissioner is "anything done towards the completion of the election proceeding" and whether the proceedings before the High Court facilitated the election process or halted its progress. The question immediately arises as to whether the relief sought in the writ petition by the present appellant amounted to calling in question the election. This, in turn, revolves round the point as to whether the cancellation of the poll and the reordering of fresh poll is "part of election, and challenging it is calling it in question".

30. The plenary bar of Art. 329(b) rests on two principles- (1) The preemptory urgency of prompt engineering of the whole election process without immediate interruptions by way of legal proceedings challenging the steps and stages in between the commencement and the conclusion, (2) The provision of a special jurisdiction which can be invoked by an aggrieved party at the end of the election excludes other form, the right and remedy being creatures of statutes and controlled by the Durga Shankar Mehta Vs. Thakur Raghuraj Singh and Others, has affirmed this position and supplemented it by holding that, once the Election Tribunal has decided, the prohibition. is extinguished and the Supreme Courts over all power to interfere under Art. 136 springs into action, In Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, this Court upheld the rule in N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, excluding any proceeding, including one under Art. 226 during the on-going process of election, Understood in the comprehensive sense of notification down to declaration. Beyond the declaration comes the election petition. but beyond the decision of the Tribunal the ban of Art. 329(b) does not bind.

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32. On the assumption, but leaving the question of the velocity of the direction for re-poll open for determination by the Section Tribunal, we hold that a writ petition challenging the cancellation coupled with re-poll amounts to calling in question. a in election" and is therefore barred by Art. 329(b) If no re-Poll had been directed the legal Perspective would have been very different. The mere cancellation would have then thwarted the course of the election and different considerations would have come into play, we need not chase a hypothetical case."

The above decisions we rendered in the context of the Representation of the People Act read in the perspective of Art, 329 (b) of the Constitution, The Principles enunciated and reiterated in these decisions have been projected by the Supreme Court in those cases where the validity of election to the Municipal Or Bar Council or Panchayats was challenged.

17. In Nanhoo Mal and Others Vs. Hira Mal and Others, the election to the office of the President of the Municipal Board of Soron town in Etah district Of Uttar Pradesh was challenged by Moving Allahabad high Court under Art. 226 of the

Constitution on the ground that the procedure adopted by the District Magistrate for holding the election was illegal, inasmuch as it did not conform to the provisions of R. 6 of the U. P. Municipalities (Conduct of Election of Presidents and Election Petitions) Order, 1964, which, inter alia, enjoins the District Magistrate to appoint a date for making nominations for the election to the office of the President of the Board which date shall be a date at least 4 days after the date of the notification, and in so far as the District Magistrate appointed 26th Sept., 1974 as the date for filing nomination, it did not give requisite period of 4 days since the election programme declared by the notification of 21st Sept., 1974 was published in the Gazette on 24th Sept., 1974. No interim relief was granted on the petition staying the election, which was to be held on 1st Oct., 1974 with the result that in the election held on the said day, the appellant before the Supreme Court was declared elected. He was imp. led as a party in the petition, which was allowed by the set aside the entire election proceedings. The elected candidate, therefore took the matter in appeal before the supreme court. The court speaking through Alagiriswami, J. was of the view that there was hardly any room for High Court to entertain application under Art. 226 of the Constitution in the matters relating to elections after the decision of the Supreme Court in N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, . The Supreme Court, in that context, referred to S. 43-B of the U. P. Municipalities Act, which provided as to how the election of President was to be questioned. The main enactment contained in sub-section (1) of S. 43-B provided that no election of the president shall be called in question except by election petition presented in accordance with the provisions of the Act. Sub-section (2) provided the grounds on which such election can be challenged. Sub-section (2) (c) (ii) provided that election petition may be presented by a voter or a defeated candidate on the ground that the result of the election has been materially affected by any non-compliance with the provisions of the Act or of any Rules or Orders made under the Act. The Court, on consideration of the provisions ruled that the election of President can be called in question only by means of an election petition on one of the three grounds mentioned, therein and that too only if the Election Tribunal comes to the conclusion that such non-compliance has materially affected the result of the election. The Court, therefore, concluded that in the circumstances there was no room for the High Court exercising its power under Art. 226 to set aside the election and the High Court clearly erred particularly because it did not consider whether the result of the election had been materially affected by the non-compliance of the rule in question. The Supreme Court thereafter referred to the passages which we have set out above from the decision of the Supreme Court in N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, and concluded as under:

"4 . In absence of any ex-press provisions in the Act to the contrary these principles are applicable equally to cases of elections to local bodies also. This Court also pointed out that, the right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject

to the limitations imposed by it. It referred to the decision in *Wolverhampton New Water Works Co. v. Hawksford* (1959) 6 CB (NS) 336 where it had been held:

"There are three classes of cases in which a liability may be established founded upon statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, whether the statute gives the right to sue merely, but provides no particular form of remedy; there the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing itThe remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to". and after referring to the provision of the Representation of the People Act pointed out that it will be a fair inference that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage. This court also held that the word "election" connotes the entire procedure to be gone through to return a candidate whenever we talk of elections in a democratic country,

5. It follows that the right to vote or stand for election to the office of the President of the Municipal Board is a creature of the statute, that is, the U.P. Municipalities Act and it must be subject to the limitations imposed by it. Therefore, the election to the office of the President could be challenged only according to the procedure prescribed by that Act and that is by means of an election petition presented in accordance with the provisions of the Act, and in no other way, The Act provides only for one remedy, that remedy being an election petition to be presented after the election is over and there is no remedy provided at any intermediate stage. These conclusions follow from the decision of this Court in *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others*, in its application to the facts of this case. But the conclusions above stated were arrived at without taking the provisions of Article 329 into account. The provisions of Art. 329 are relevant only to the extent that even the remedy under Article 226 of the Constitution is barred as a result of the provisions But once the legal effect above set forth of the provision of law which we are concerned with is taken into account there is no room for the High Courts to interfere in exercise of their powers under Article 226 of the Constitution. Whether there can be any extraordinary circumstances in which the High Courts could exercise their power under Art. 226 in relation to elections it is not now necessary to consider"

18. In K. K. Shrivastava's case (AIR 1977 SC 1073) (supra) the Supreme Court was concerned with the scope for invoking the jurisdiction under Arts. 226 and 227 of the Constitution in the context that Rule 31 of the Election Rules of Bar Council of Madhya Pradesh. The facts were that the election to the said Bar Council was held under the Indian Advocates Act and the Rules framed by the Madhya Pradesh Bar Council with the approval of the Bar Council of India regulating the disputes regarding election. Elaborate machinery for resolving the election disputes was provided in the said R. 31 (4) of the said Election Rules provided that all disputes arising under the said sub rule shall be decided by a Tribunal to be known as an Election Tribunal. An election petition was filed before the Tribunal challenging the validity of the election to the said Bar Council of 20 returned candidates. Notwithstanding the said election petition, two voters out of whom one was a defeated candidate moved the High Court of Madhya Pradesh under Arts. 226 and 227 of the Constitution challenging the validity of the entire election. An objection was raised on behalf of the respondents, before the High Court that in view of the pending election petition the Court should not exercise its extraordinary jurisdiction under the said Articles and the petition should not be entertained. The High Court rejected this objection as it was of the view that where the entire election was challenged, an election petition would not be appropriate remedy and, therefore, it cannot be considered as an equally efficacious remedy so as to prevent the aggrieved persons from invoking the jurisdiction under Arts. 226 and 227 of the Constitution. The Supreme Court, speaking through Krishna Iyer, J., while allowing the appeal, held as under :

"4. It is well settled law that while Art. 226 of the Constitution confers a wide power on the High Court there are equally well settled limitations which this Court has repeatedly pointed out on the exercise of such power. One of them which is relevant for the present case is that where there is an appropriate or equally efficacious remedy the Court should keep its hands off. This is more particularly so where the dispute relates to an election. Still more so where there is a statutorily prescribed remedy which almost reads in mandatory terms. While we do not in this case go to the extent of stating that if there are exceptional or extraordinary circumstances the Court should still refuse to entertain a writ petition it is perfectly clear that merely because the challenge is to a plurality of returns of elections, therefore a writ petition will lie, is a fallacious argument. It is important to notice what the High Court has overlooked is that the period of limitation prescribed by the rules is 15 days and if writ petitions are to be entertained long afterwards it will stultify the statutory provision. Again in the present case an election petition covering the same subject-matter is actually pending. There is no foundation whatever for thinking that where the challenge is to an "entire election" then the writ jurisdiction springs into action. On the other hand the circumstances of this case convince us that exercise of the power under Art. 226 may, be described as mis-exercise. It is unfortunate that an election petition, which probably might have been disposed of long ago, is still pending because the writ petition was pending in the High Court and later on special

leave having been granted these appeals have been pending in this Court How injurious sometimes the repercussions of entertaining with petitions are where they should not be is illustrated this very case".

19. In Bar Council of Bar Council of Delhi and Others Vs. Surjeet Singh and Others, , the Supreme Court was concerned as to the competency of the petition under Art. 226 of the Constitution having regard to the alternative remedy of election petition being available under Rule 34 of the Bar Council of Delhi Election Rules, 1968 when election was held on the basis of the electoral roll prepared pursuant to the proviso to Rule 3 (j) of the said Rules, which was ultra vires the power of the State Bar Council and, therefore, invalid, and it was held that notwithstanding the alternative remedy provided and notwithstanding the fact that the petitioners came to challenge the election, before the Court after it was over such a petition is competent. The said proviso to Rule 3 (j) was found to be ultra vires; by the Delhi High Court as well as by the Supreme Court in the following circumstances: There were about 5000 and odd advocates on the Advocates' Roll of the Delhi High Court. A proviso was added to Rule 3 (j) of the said Rules of Delhi Bar Council in the year 1978. A copy of the declaration form was sent in accordance with that proviso to all the Advocates whose names found place on the State Roll of the Advocates asking them to return the declaration form duly filled in and signed within specified period. A public notice was also issued in some of the newspapers. The qualifications and conditions entitling an advocate to vote at the election or for being chosen as a member of the State Bar Council were to be prescribed by the Bar Council of India according to Section 3(4) of the Advocates Act, 1961. The State Bar Council has merely to prepare and revise from time to time the electoral roll of the qualified voters in accordance with the Rules made by the Bar Council of India concerning the qualifications and conditions of such persons. The power of the Bar Council to prepare and revise electoral roll u/s 15(2)(a) of the said Act was subject to the overriding provisions made in Sections 3(4) and 49(1)(a) of the Advocates Act. By the impugned proviso added to Rule 3 (j) of the State Bar Council Election Rules, failure on the part of an Advocate to submit the required declaration within the specified period that the declaring proposes to practice within the State of Delhi and that he undertakes further to practice ordinarily and regularly within the jurisdiction of the Bar Council of Delhi and would inform the Bar Council of any change in his address of residence or place of practice, entitled the State Bar Council to, exclude his name from the electoral roll. The date for submission of the declaration was extended from time to time but the last date so extended was 14th September, 1978. The electoral rolls prepared on the basis of such declarations were published on 16th September 1979 excluding the names of about 2000 Advocates who had failed to submit such declaration forms within time. The election to the Bar Council of the was held according to these electoral rolls on 17th Nov. 1978 with the result that about 3000 and odd Advocates could not participate in the election. The Delhi High Court entertained the petition under Art. 226 of the Constitution and granted appropriate writ to

quash and set aside the election. Three appeals were preferred by the Bar Council of Delhi and Bar Council of India from the common judgment of the Delhi High Court allowing the writ petitions filed by the respondent Surjeet Singh and others. On behalf of the appellants, five contentions were urged namely (i) the impugned proviso was *vela*- (2) the electoral rolls once published were final and beyond the pale of challenge in a writ petition; (3) the petitioner Surjeet Singh and others who had participated in the election were stopped from challenging the election,, and in any case there was a bar of laches since they approached the High Court after the election was over-, (4) it was not shown before the High Court that the results of the election were materially affected by the operation of the impugned proviso, and (5) the pectin under ArL 226 was not competent as an, adequate efficacious remedy by way of election petition was available The Supreme Court, speaking through Entail J., agreed with the Delhi High court that the impugned proviso was beyond the competence of the State BW Council and was, therefore. *ultra vires* its powers and the electoral roll prepared in accordance with the said proviso was, therefore, vitiated, the plea of estoppels and laches raised by the appellants was also rejected. The contention about the want of evidence as to the election being materially affected was also negative- The last contention about the incompetence of the petition in view of the alternative remedy provided by the Advocates Act was rejected as of without any substance sieve the scope X 34 providing for election petition was held not to be wide enough so as to cover the challenge of election on the ground of the election held on the basis of the electoral rolls prepared according to the extra vires provision was vitiated. The Supreme Court found that R 34 in light of the change to the election by the respondents was not an appropriate and adequate alternative remedy so as to justify refusal of exercise of the jurisdiction under Art. 226 of the Constitution. The Supreme Court noted that the case with which it was dealing was not a case where the name of any voter was wrongly omitted from the electoral roll but it was a case where the preparation of whole electoral roll was null and void because of the invalidity of the impugned proviso before the Supreme Court. The right of filing election petition in Delhi Bar Council Election Rules was circumscribed by the provision contained in R. 34 which provided that no petition shall lie on the ground that any nomination paper was wrongly rejected or the name of any voter " was wrongly included in or omitted from the electoral roll or any error or irregularity which is not of a substantial character. The Supreme Court, therefore, held that the electoral roll was prepared on the basis of the Rule, which was found to be void and *ultra vires*. That being so, even though the contesting respondents came to challenge the elected after it was held, they could do so because of the gravity of the infraction of the law in the preparation of the electoral roll. Entail J. speak in for the Court, referred to the two decisions of Patna High Court in (i) Parmeshwar Mahaseth and Others Vs. State of Bihar and Others, UmakantSingh v. Binda Choudhary, AIR 1965Pat 459, where the Patna High Court has taken the view that when the entire election is challenged as violative of the essential provisions of the Election Rules and the Act, the election petition is no efficacious remedy. Same view was

adopted by a Full Bench of the Punjab High Court in *Dev Prakash Balmukand Vs. Babu Ram Rewti Mal and Others*, and by Madhya Pradesh High Court in *Bhupendra Kumar Jain Vs. Y.S. Dharmadhikari and Others*, that where the nature of relief is setting aside of the whole election, the election petition cannot be said to be an effective alternative remedy. *Untwalia J.*, speaking for the Court, disapproved this view of these High Courts and referred with approval the "earlier decision of the Supreme Court in *K.K. Shrivastava and Others Vs. Bhupendra Kumar Jain and Others*, where *Krishna Iyer J.*, speaking for the Court held that there is no foundation whatever for thinking that where the challenge is to an "entire election" then the writ jurisdiction springs into action. *Untwalia J.*, then observed as under :

"18

We may add that the view expressed some of the High Courts in the cases referred to above that merely because the whole election has been challenged by a writ petition, the petition would be maintainable in spite of there being an alternative remedy being available, so widely put, may not be quite correct and especially after the recent amendment of Art. 226 of the Constitution. If the alternative remedy fully covers the challenge to the election then that remedy and that remedy alone must be resorted to even though it involves the challenge of the election of all the successful candidates. But if the nature and the ground of the challenge of the whole election are such that the alternative remedy is no remedy in the eye of law to cover the challenge or, in any event, is not adequate and, efficacious remedy, then the remedy of writ petition to challenge the whole election is still available in the present case we have pointed out above that the Election Tribunal would have found itself incompetent to declare the proviso to R. 3 (3) of the Delhi Bar Council Election Rules ultra vires and that being so the alternative remedy provided in R. 34 (8) was no remedy at all."

20. A Full Bench of this Court in *Ahmedabad Cotton Mfg, Co. Ltd. v. Union of India* (1977) 18 Guj LR 714 : (AIR 1977 Guj 1,13) was concerned with the precise width and scope of Clause (3) of Art. 226 as amended by the Constitution (42nd Amendment) 1976, which enjoins High Court not to entertain any petition for the redress of any substantial injury by reason of the contravention of the Constitution or any enact merit or Ordinance or other subordinate legislation or by reason of procedural illegality resulting in substantial failure of justice without the aggrieved party exhausting the alternative remedy provided for by or under any other law for the time being in force. The Full Bench was required to consider the scope and width of clause (3) of Art. 226 in the context of a petition filed for enforcement of the fundamental rights to hold property under Art. 31(1) of the Constitution when the excise authorities were seeking to enforce the demand of excise duty by assuming jurisdiction to themselves in departure of the settled basis of excise levy for the blended yarn for considerable period in past. In that context, the Full Bench, speaking through *J. B. Mohta J.*, held as under in

paras 22 and 23 at page 731,,

"22. Therefore, the principle which emerges from flies decisions is that when the petitioner is to be asked to exhaust his alternative remedies provided under the Act before entertaining the writ petition, this distinction would always be material where the order is a nullity as being ex facie without jurisdiction or due to non-compliance with the provisions of the Act or the essential principles of justice or on any other ground, as explained in Union of India (UOI) Vs. Tarachand Gupta and Bros, or Bhopal Sugar Industries case (AIR 1967 SC 549) or Molid. Nooh"s case (AIR 1958 SC 86) (supra) it is a purported order or a nullity. In such a context the alternative remedy would be a futile remedy because it did not affect the inherent nullity in the challenged decision. which would result in the material distinction that the party may appeal against such decision but he was not bound to do so.

23. As pointed out in Koli Dana Nathu Vs. G. Ghosh, if the order of the executive authority is an ultra vires order, it would be a nullity and even if an appeal is filed, the order confirmed in appeal would also be a nullity. Therefore, in such cases where the challenge is on the ground that the order is an ultra vires order, the question of exhausting alternative remedy could hardly arise as the petitioner could straightway seek remedy of judicial review J. B. Mehta, J., speaking for the Full Bench, pointed out the distinction in the context of election laws in the following terms:

"26. Even in Hari Prasad Mulshanker Trivedi Vs. V.B. Raju and Others, , such wide amplitude was held to be of the election laws in question for preparation of electoral rolls and an intention was inferred to withhold a judicial review by treating even the causation of ordinary residence for the purpose of entering a person"s name in the electoral roll as a decision on a jurisdictional fact within the exclusive jurisdiction of the registering officers and the appellate authorities so that there would be no question of any judicial review by any collateral attack either in a civil court or even before an election tribunal, In that decision the distinction was noted of cases even in election matters as in Baidyanath Panjiar Vs. Sitaram Mahto and Others, which took the view that violation of section 23 (3) of the 1950 Act in entering or deleting the names of persons in the electoral rolls after the last date for deleting the name relates to lack of power. Such exceptional cases where the Act is made a complete Code so that the authority is conferred a wide jurisdiction by making all activities as falling within its jurisdiction and not as collateral, even such purported orders would not be nullities and they would be subject to direct challenge under the normal remedy under the Act and that is why there would be no scope of challenge by collateral attack in a civil Court or in writ jurisdiction without exhausting the wide obligatory nominal remedy provided under the Act"

I. B. Mehta J., thereafter concluded the position emerging from the various decisions to which he referred in course of his judgment as under:

"27. The aforesaid discussion clearly reveals that every Act would have to be examined when such a question of the existence of alternative remedy arises and it would have to be found out as to what is the amplitude of the normal Act remedies for appeal or revision so that the question of real or purported order would be decisive, If the Act remedy is so wide as to cover even purported orders so that no part of the activity of the authority is a collateral activity, the Act having provided for direct remedies to such a wide extent, that remedy would have to be first exhausted. On the other hand, where the Act remedies are not of such wide amplitude but only for orders under the Act in cases of such purported orders, the appeal remedy could not come in the way of the petitioner as it would not be said to have been provided for such purported orders which are null and void and which it would not be obligatory for the petitioner to exhaust for the simple reason that such an appeal remedy would not be able to cure the defect even if the appeal confirms the original order bearing this indelible mark of nullity.

28. Similarly in cases where the question raised is of legislative competence or of excessive delegation, the authorities created by the Act being creatures of the statute, such questions of ultra vires of the provisions of the Act would be foreign to the scope of that jurisdiction and they could not dispose of such questions of ultra vires of the provisions of the statute, orders, rules or instruments made there under as per the settled legal position after the decision in K.S. Venkataraman and Co. Vs. State of Madras, . The same would be true of the orders, which are totally d-hors the Act and, therefore, ex facie without jurisdiction even in the narrow sense as complete nullities, which could be ignored as creating no rights and obligations whatever. The amplitude of the appeal provision could be a relevant consideration in cases of purported orders without "jurisdiction", as interpreted in the wider sense as explained in the Anisminic decision as aforesaid. These are only illustrative cases, which we have considered to bring out the true scope and ambit of this fetter created under Art. 226(3) for considering this question of abatement of such writ petitions and, therefore, these illustrations are not intended to be exhaustive."

21. In Baidyanath Panjiar Vs. Sitaram Mahto and Others, the question was whether in view of the provisions of S. 23(3) of the Representation of the People Act, 1950 the name of any person can be entered in the electoral roll subsequent to the last date for making nomination, and whether that question can be tried by election Tribunal. S. 23(3) of the Representation of the People Act, as amended by the Representation of the People Act (Act 47 of 1966) provided in effect that no amendment, transposition or deletion of any entry shall be made under S. 22 and that no direction for the inclusion of a name in the electoral roll of a constituency shall be given under S. 23 after the last date for making nomination for an election in that constituency or in the Parliamentary constituency within which that constituency is comprised and before the completion of that election, S. 23(3), in other words, took away the power of the Electoral Registration officer or for that matter the Chief Electoral Officer to

correct the entries in the electoral rolls or to include new names in the electoral rolls of a constituency after the last date for making the nominations for election in that constituency and before the completion of that election, The contention before the Court in Baidyanath's case was that 35 names of new voters were entered in the electoral rolls in violation of the provision of S. 23(3) and that was without power, authority or jurisdiction and, therefore. the votes cast by these persons were invalid. Hegde J., speaking for the Court read a mandate in the said provision to the Registration Officer not to amend the electoral rolls after the last date for making nomination, and before the completion of the election in the constituency otherwise in absence of such a provision there would be considerable scope for manipulations. In other words, he held that the entries in the electoral rolls of the constituency as they stood on the last date for making nominations for that constituency would be considered as final for purposes of that election. Negating the contention that objection to the inclusion of new voters in course of the prohibited period in the electoral rolls was not within the purview of the alternative remedy of election petition, Hegde J., held as under at page 317:

"10. It was next urged that even if we hold that in including fresh electors in the electoral roll on April 27, 1968 the electoral registration officer contravened S. 23(3) of the same cannot be made validating the election in question does not the purview of sub-section 100 of the Act. does not appear to be sound . Clause (d) (iii) of sub-section (1) of section 100 of the Act provides that if the High Court is of the opinion that the result of the election in so far as it concerns the returned candidate has been materially affected by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, it shall declare the election void. We have earlier come to the conclusion that the electoral registration officer had no power to include new names in the electoral roll on April 27, 1968. Therefore votes of the electors whose names were included in the roll on that date must be held to be void votes .That conclusion satisfies one of the conditions prescribed in S. 100(1)(d) . We have now to see whether the High Court on the material before the result of the election in so far as it concerned been materially affected because of the reception of the votes which are void"

Hegde J., in this Baidyanath Panjiar Vs. Sitaram Mahto and Others, however , distinguished the earlier decision of the Supreme Court in B.M. Ramaswamy Vs. B.M. Krishnamurthy and Others, which was rendered in the context of Mysore Village Panchayats and Local Boards Act (10 of 1959). Under the said Act, the relevant part of electoral roll of Mysore Legislative Assembly was deemed to be the list of voters for the Panchayat constituency and the Secretary of the Panchayat had to maintain a duly authenticated separate list of voters of the said constituency. Subba Rao J., delivering judgment of the Court said that no civil Court has jurisdiction to question the legality of any decision taken by or under the authority of the Electoral Registration Officer as the terms of Section 30 were clear that the action of the electoral registration officer in including the name of

the person in the electoral roll, though illegal, cannot be questioned in a civil court and that it could be rectified only in the manner prescribed by law by resorting to appropriate remedy. In other words, the Supreme Court held in Ramaswamy's case (supra) that the Court trying election petition has no jurisdiction to go behind the electoral roll and find out whether the name was legally entered or deleted. In Baidyanath's case (supra) therefore Hegde J., was correct in the facts of that case because, as found by the High Court, the names were added in the electoral rolla before the last date prescribed for filing the nomination and the Supreme Court, therefore, rightly held that the High Court was not justified in reaching the conclusion that the electors newly added to the list were not qualified to be voters once their names had been entered in the rolls. The decision of the Supreme Court in B.M. Ramaswamy Vs. B.M. Krishnamurthy and Others, in other words was that the electoral roll, as it stood on the last date for filing nomination for election was final and therefore once the addition has been made by the Registration Officer within his power or jurisdiction, it cannot be a subject matter of any proceeding in the court or before the election tribunal.

22. The principle enunciated in Baidyanath Panjiar Vs. Sitaram Mahto and Others, was again affirmed in Kabul Singh Vs. Kundan Singh and Others, where the question was, whether the vote of a person whose name was entered in the electoral roll of the constituency after the last date for making nomination was valid, and since the Registration Officer had no power or authority to enter his name in violation of the mandatory provision of S. 23(3) of the Representation of the People Act, it was a case of lack of power and the Court trying election petition had jurisdiction to go into the question.

23. Same view was adopted by the Supreme Court in Wopansao Vs. N.L. Odyuo and Others, .

24. In Hari Prasad Mulshanker Trivedi Vs. V.B. Raju and Others, a five Judges' Bench of the Supreme Court was concerned with the question as to whether the High Court can entertain a writ petition under Art. 226 where the Electoral Officer has wrongly decided the question of ordinary residence of a voter and can go into the question of the validity of his consequent inclusion in the roll in such a petition Mathew J., speaking for the court held, as under after referring to the earlier decisions of the Supreme Court in B.M. Ramaswamy Vs. B.M. Krishnamurthy and Others, , Baidyanath Panjiar Vs. Sitaram Mahto and Others, , Kabul Singh Vs. Kundan Singh and Others, and Wopansao Vs. N.L. Odyuo and Others, .

"27. We think that neither the decision of this Court in Baidyanath Panjiar Vs. Sitaram Mahto and Others, which took the view that violation of S. 23(3) of the 1950 Act in entering or deleting the names of persons in the electoral rolls after the last date for making nomination relates to lack of power nor the decision in Wopansao Vs. N.L. Odyuo and Others, which also suggests that where there was lack of power, the question can be gone into by the court trying an election

petition, can, by analogy, be extended to an entry in the electoral roll on the basis of a wrong adjudication of the question of ordinary residence. Though the dividing line between lack of jurisdiction or power and erroneous exercise of it has become thin with the decision of the House of Lords in the *Anisminic Case* (1967) 3 W.L.R. 82; we do not think that the distinction between the two has been completely wiped out. We are aware of the difficulty in formulating an exhaustive rule to tell when there is lack of power and when there is an erroneous exercise of it. The difficulty has arisen because the word "jurisdiction" is an expression which is used in a variety of senses and takes its colour from its context (see per Diplock J. at p. 394 in the *Anisminic Case*). Whereas the "pure" theory of jurisdiction would reduce jurisdictional control to a vanishing point, the adoption of a narrower meaning might result in a more useful legal concept even though the formal structure of law may lose something of its logical symmetry. "At bottom the problem of defining the concept of jurisdiction for purpose of judicial review has been one of public policy rather than one of logic. And viewed from the aspect of public policy as reflected in the provisions of the 1950 and 1951 Acts, we do not think that a wrong decision on a question of ordinary residence for the purpose of entering a person's name in the electoral roll should be treated as a jurisdictional error which can be judicially reviewed either in a civil court or before an election tribunal."

25. A Division Bench of the Bombay High Court consisting of Mody and Chandrachud, JJ, in *Dagdu Vithoba Patil Vs. The State of Maharashtra*, was concerned with a challenge that the delimitation of constituencies as well as allotment of reserved seats for women were arbitrary and discriminatory and that the list of voters was not kept open for public inspection for the requisite period. In that context, the Division Bench, speaking through Chandrachud, J. held that except in unusual circumstances, as for example, when there is a flagrant violation of law, or a gross abuse of the discretion conferred on the Government or its Executive Officers, or when the provisions of the Maharashtra Municipalities Act, 1965 are utilized for a purpose not duly appointed under the Act. the machinery prescribed by the Act must be adopted for the redress of grievances arising out of an alleged violation of rights conferred by the Act since the right of franchise is a statutory right and not a common law right and it is, therefore, necessary that normally statutory remedies must be adopted.

26. Our attention was invited to two decisions of the Gujarat High Court which have a bearing on the question of "the plea of estoppel and acquiescence and one decision pertaining to the competency of election petition when the entire election is under challenge, .

27. In *Laxmanbhai Bhagwanbhai Sukhadia v. Kunkavav Vaida Taluka Panchayat* (1969) 10 Guj LR 8, a Division Bench of this Court held that before exercising jurisdiction under Art. 226 of the Constitution in favour of the petitioner and granting a writ of quo warrantor, it is necessary to see that the realtor is a fit person to be entrusted with the writ, and if he has acquiesced in the wrongful

act, the Court would refuse to grant the writ and the petitioner before the Division Bench was found to have acquiesced as he had not only failed to take objection or approach the proper authorities and having himself again taken part in the election itself, he cannot successfully pray for a writ of quo warrantor,

28. In *Indravadan Parshotamdas Desai and Another Vs. Indravadan Ambalal Mehta and Others*, the learned single Judge of this Court had taken the view that since the person challenging the election before the learned single Judge was a voter who was not present at the time of scrutiny either in person or through an agent, the principle of estoppel cannot be pleaded against! Him

29. In *Patel Khemabhai Hargovandas v. Jantral Village Panchayat* (1971) 12 Guj LR 439, the learned single Judge, on combined reading of S. 22(1) and S. 24 (1) of the Gujarat Panchayats Act, held that since the petitioner before him was challenging the validity of the election of all the members of the respective Gram Panchayats elected from different electoral divisions of each Gram Panchayat, he could not have filed election petition under S. 24 of the Act on the grounds on which he had challenged the election of all the members of the respective Panchayats in the petitions.

30. It should be noted that the decision of the Division Bench of this Court in *Kunkavav Taluka Panchayat's case* (1969-10 Guj LR 8) (supra) would not apply without any qualification and with all its force and rigour in view of the decision of the Supreme Court in *Delhi Bar Council's case* (AIR 1980 SC 1612) (supra). Similarly the decision of the learned single Judge in *Mantra Village Panchayat's case* (1971 12 Guj LR 439) (supra) would not be a good law in view of the decision of the Supreme Court in *Delhi Bar Council's case* (supra).

31. Another decision of a Division Bench of this Court in *Narubha Ramsano v. State of Gujarat* (1974) 15 GuJ LR 528 was in the context of the question as to what is the effect of breach of a mandatory provision contained in R. 7 (1) and R. 7 (4) of the Gujarat Gram and Nagar Panchayats Election Rules, 1962, and it was held that unless the breach of such a mandatory provision materially affects the result of the election, an aggrieved petitioner is not entitled to, as a matter of right, the appropriate writ prayed for. This decision also, in our opinion, would be required to be read-down in view of the decision of the Supreme Court in *Delhi Bar Council's case* (AIR 1980 SC 1612) (supra) where the Court has ruled that if the entire election is void at its inception due to the fact such as it being held in accordance with or run to an ultra vires provision of a given Act or the Statute, the perspective of the substantial prejudice or the election result being materially affected is not relevant.

32. The following principles emerge from the various authorities cited above.,

(1) Though the extraordinary jurisdiction of High Court under Arts. 226 and 227 of the Constitution is very wide, the Court should be slow in exercising the said jurisdiction where an alternative efficacious remedy under the Act is available. However, if the impugned order is an ultra vires order or is a nullity as being ex

facie without jurisdiction, the question of exhausting the alternative remedy could hardly arise.

(2) It is well recognised on principle and in authority that where a right or liability is created by a statute which gives a special remedy for enforcing it only the remedy provided by that statute must be availed of.

(3) The right to vote or stand as a candidate at the election is not a civil right but is a creature of a statute or a special law and must be subject to limitations imposed on it. If the legislature entrusts the determination of all matters relating to election to a special Tribunal, and invests it with a new and unknown jurisdiction, that special jurisdiction alone could be invoked for enforcement of that right,

(4) In matters of election disputes, the Court should refuse to exercise jurisdiction under Article 226 of the Constitution of India when the statute conferring right to vote or stand at the election prescribes a statutory remedy embracing the disputes pertaining to all aspects of the entire process of election.

(5) Merely because the challenge is to the plurality of returned candidates or for that matter to the entire election, it is fallacious to urge that it can be only redressed by a writ petition.

(6) It is a well recognised principle and a matter of public importance that elections should be concluded as early as possible according to the time schedule and all controversial matters as well all disputes arising out of the elections should be postponed till after the elections are over so as to avoid an impediment or hindrance in the election proceedings. In other words, there is a provisional finality in matters pertaining to the various stages of elections.

(7) The bar of estoppel cannot be pleaded against a person challenging the election merely because he takes part in the said election by standing as a candidate or by exercise of his right of franchise therein especially when the impugned election is patentlv illegal and void initio due to the fact such as it being held pursuant to an ultra vires provision in a statute or the Rules. There is no question of approbation and reprobation in case of a person standing or voting at the election, nor is there any bar of laches if he does not challenge such void election at the initial stage and approaches the Court after the said election is over.

(8) Subject to the principle stated immediately hereinabove, if the entire conduct of a petitioner is so eloquent that he can be said to have acquiesced in the act which subsequently he has been complaining as a wrongful act, it may be one of the factors which the Court exercising jurisdiction under Article 226 of the Constitution in a petition for a writ of quo warrantor would bear in mind and may, in appropriate circumstances, refuse to exercise its extraordinary jurisdiction of granting a writ in the nature of quo warrantor.

(9) The High Court, in exercise of its extraordinary jurisdiction under Article 226

of the Constitution, is not required to examine the question when the election is challenged on the ground of it being vitiated at its inception due to the fact such as it being held in pursuance of or in accordance with an ultra vires provision of the statute or the "Rules. as to whether the election of a returned candidate is materially affected at such election by operation of the ultra vires provision.

(10) Subject to the principles stated immediately hereinabove, in order to successfully challenge an election by a writ petition on the ground of breach of any mandatory provision contained in the Municipal Act or the Panchayat Act or the Rules hereunder, it must be established that the election of the returned candidate was materially affected thereby.

33. It is in this perspective of the settled legal principles that we have to answer questions Nos. 1, 2, 3 and 5. We are afraid that having regard to the entire context of the challenge in these two petitions, the petitioners cannot successfully invoke the jurisdiction of this court under Art. 226 of the Constitution obviously, for the following reasons: In the first place, the plenary bar contained in Section 14 of the Act provides for a special jurisdiction which can be invoked by an aggrieved party at the end of the election only. Now this special jurisdiction excludes the other forms of redress since the rights to vote and stand at the municipal elections are the rights conferred by the Gujarat Municipalities Act and, therefore, the remedy provided by that statute must be exhausted before the extraordinary jurisdiction of this Court can be invoked. The right and -remedy being creatures of a statute, an aggrieved party is not entitled to avail of any other form of remedy dehorn the Act, if the Act remedy is wide enough so as to redress his grievance effectively. The election to membership of a body under a special statute can be challenged only according to the procedure prescribed by that statute unless the statutory remedy provided in the Act would not effectively redress the grievance ventilated by such a challenge. In the second place, though Art. 226 confers a wide power on the High Court, the limitations " are also well recognised. One of the well-recognised limitations is that the High Court should be slow in exercise of its extraordinary jurisdiction under Article 226 of the Constitution when an appropriate or equally efficacious remedy is available under a given Act in cases where the provisions of such Act are said to have been violated according to the aggrieved party. This limitation is more prominent in election disputes. and particularly where the legislative intent is clearly apparent in the relevant provisions of the Act prescribing the statutory remedy in mandatory terms. Thirdly, the scope and amplitude of the relevant provision contained in S. 14 of the Act is so wide that the validity of the election of a councilor can be challenged on any of the conceivable grounds such as non-qualification or disqualification of an elected candidate, corrupt practice by an elected candidate or his agent or any other person with his or his agent's consent, improper rejection of nomination, or the election results being materially affected by improper acceptance of any nomination paper, or by a corrupt practice committed in the interest of an elected candidate by his agent, or by the improper reception, revisal or rejection of any vote, or by the reception

of any vote which is void, or by non-compliance with the provisions of the Act or any Rules or Orders made hereunder. Even if the election is challenged on the grounds other than those mentioned immediately hereinabove, the Tribunal can direct for scrutiny and computation of votes recorded in favor of each such candidate. The jurisdiction and power of the District Judge who is constituted Election Tribunal is very wide and he can set aside the election, or direct to the scrutiny or computation of votes in course of which he can decide the validity of votes and declare which candidate is elected, What is corrupt practice is also defined precisely by sub-section (6) of Section 14. He has also a right to disqualify, while setting aside the election, any person responsible for the corrupt practice from being a candidate in that or other municipal borough election for a term not exceeding seven years. The only limitation on his power is to be found in sub-section (7) which, in effect, provides that mere irregularities or informalities not corruptly caused or an error on the part of the officer or officers charged with carrying out the Rules made u/s 6(5) of the Act, would not invalidate the election. However, any breach or any omission to carry out, or any non-compliance with the provisions of the Act or the Rules affecting materially the results at the elections would not amount to an error so as to disentitle the Judge in quashing and setting aside the elections. The power of the Election Tribunal to set aside an election on its being satisfied that the result of the election of an elected candidate was materially affected by the improper reception, refusal or rejection of any vote, or reception of any vote which is void, is also wide enough to include the election disputes about the change in the entry in the electoral rolls between the last date of filing nominations and the completion of the election which would be the date of actual polling, since it would be patent illegality and in excess of jurisdiction. The failure on the part of the election officers in complying with the different provisions of the Election Rules, namely, as to the notice about the places of publication of voters' lists under Rule 4, or the list of retired candidates or the list of validly nominated candidates under R. 14, or the publication of specimen voting paper under Rule 2 1, or his failure to give notice of requisite period as prescribed under Rule 7 (2) of the Election Rules are clearly within the competence of the Election Tribunal since, in effect and substance, they relate to the non-compliance with the provisions of the Act or the Election Rules, and if such non compliance has materially affected the election results, it would not amount to an error disentitling the Tribunal from setting aside the elections as provided in sub-section (7) of Section 14 of the Act. In that view of the matter we are, therefore, of the opinion that the questions Nos. 1, 2, 3 and 5 must be answered against the petitioners as under Question 1: In the negative. Question 2 : In the negative because the alternative remedy of election petition is an adequate and equally efficacious remedy and the Court should not exercise jurisdiction merely because there is a challenge to the plurality of the returned candidates or for that matter the entire election. Question 3 : First part in the negative that there is no bar of acquiescence or estoppel. Second part in the affirmative particularly because it involves disputed questions of fact as to whether the voters whose

names were deleted were the residents within the limits of Billimora Municipality and, therefore, entitled to vote or the deletion of the names of those voters resulted in the change of wards. question 5 :The question does not arise in the view which we are taking in the matter that the petitioners should approach the Election Tribunal u/s 14 of the Act for adjudication of their disputes against the validity of the elections of Billimora Municipality and Bulsar Municipality.

34.The 4th question is not required to be answered since it pertains to the merits of the objections raised by the petitioners to the validity of the elections in question.

35.The petitioners of both these petitions shall have, therefore, to file election petitions in the Court having jurisdiction in the matter and we are of the opinion that the Election Tribunal concerned may entertain the petitions without any objection of limitation since the petitioners have moved this Court by invoking the jurisdiction under Art. 226 of the Constitution since they were challenging the validity of the election of "the returned candidates in about five wards of Billimora Municipality and the entire election. of the Bulsar Municipality in view of the decision of this Court in Jantral Village Panchayat's case (1971-12 Guj LR 429). (supra) which is now no more a good law in view of the two decisions of the Supreme Court in K.K. Shrivastava and Others Vs. Bhupendra Kumar Jain and Others, and Bar Council of Delhi and Others Vs. Surjeet Singh and Others, particularly because in Special Civil Application No. 2964/80 there are disputed questions of fact which can be effectively adjudicated upon in light of the evidence that may be adduced by the parties, and also because the validity of the elections of Bulsar Municipality, which is the subject matter of Special Civil Application No. 3007/80, is also challenged by an election petition under S. 14 of the Act by other aggrieved persons,

36. The result is that both these petitions fail and are dismissed with the liberty to the petitioners to file election petitions before the competent Election Tribunal within a fortnight from the date of this order which the Election Tribunal may entertain as directed above. There should be no order as to costs having regard to the facts and circumstances of these petitions.

37. Petitions dismissed.