

(2019) 04 BOM CK 0056
In the Bombay High Court
Case No : Writ Petition No. 2251 Of 2019

Sandeep Yashwantrao Sarode

APPELLANT

Vs

Election Commission Of India And Ors

RESPONDENT

Date of Decision : 12-04-2019

Acts Referred:

Representation Of The People Act, 1951 — Section 86, 100, 100(1)(d)(iv), 147, 149, 150, 151, 151A

Constitution Of India, 1950 — Article 14, 21, 174, 174(1), 226, 324, 329(b)

Citation : (2019) 04 BOM CK 0056

Hon'ble Judges : Sunil B. Shukre, J; Pushpa V. Ganediwala, J

Bench : Division Bench

Advocate : S.P. Bhandarkar, M.G. Bhangde, N. Choubey, J. B. Kasat, S. V. Deopujari, N. R. Rode, J.M. Gandhi, A.M. Ghare, H.D. Dangre

Final Decision : Allowed

Judgement

Sunil B. Shukre, J

1. The petitioner, who is Chairman of Panchayat Samiti, Katol and Director of Agriculture Produce Market Committee, Katol, District Nagpur, has questioned the legality and correctness of the declaration of holding of bye-election to fill the casual vacancy, which has arisen in 48-Katol Assembly Constituency. Declaration has been made vide Election Commission of India ("ECI" for short), press note dated 10.03.2019 and the election is scheduled for 11.04.2019.

2. The petitioner submits that Legislative Assembly seat from Katol constituency was represented by Mr. Ashish Ranjit Deshmukh who, after completing four years of his term, tendered his resignation which was accepted by the Speaker of Legislative Assembly of Maharashtra on 06.10.2018 and since then, the legislative assembly seat has fallen vacant.

3. According to the petitioner, the declaration to hold the election to the casual vacancy on 11.04.2019, violates the mandate of Section 151 of the

Representation of the People Act, 1951 ("R.P. Act, 1951" for short) on two grounds.

a) Firstly, Section 151-A of the R.P. Act, 1951 mandates that a bye-election for filling any vacancy referred to in Sections 147, 149, 150 and 151, must be held within a period of six months from the date of occurrence of the vacancy and it is so notwithstanding anything contained in any of the provisions of these sections. The petitioner contends that the casual vacancy, which has arisen in the present case, is in terms of Section 150 of the R.P. Act, 1951 and it is with effect from 06.10.2018. He submits that if the period of six months is to be calculated from 06.10.2018, it would expire on 05.04.2019. He points out that the election is going to be held on 11.04.2019, which is beyond the period of six months, stipulated in Section 151-A of the R.P. Act, 1951.

b) Secondly, it is the case of the petitioner that the declaration made by the ECI to hold the election on 11.04.2019 is also hit by proviso (a) to Section 151-A of the R.P. Act, 1951. The petitioner submits that the proviso prescribes that Section 151-A would have no application, if the remainder of the term of a member, in relation to a vacancy, is less than one year. According to the petitioner, this would mean that it is not mandatory for the ECI to hold the election to fill the casual vacancy and the power is only discretionary in nature, which must be exercised reasonably. The petitioner submits that this power has not been exercised in a reasonable manner by the ECI and it has failed to take into consideration relevant factors such as; the larger public interest, huge expenditure being incurred for a very short period of time, putting of great stress upon the Governmental manpower and the final achievement of no significance for the electorate and the democratic process. He submits that all these factors are important as the next State General Assembly Elections are due for last week of October or anytime in November-2019. It is the further contention of the petitioner that proviso (b) to Section 151-A of the R.P. Act, 1951, has no application to the present case and, even if it does, it has not been followed by the ECI in its letter and spirit. The petitioner also submits that this declaration is discriminatory.

Mr. Bhandarkar, learned Advocate has fashioned his argument on the afore-stated two grounds.

4. The ECI-respondent no.1, has raised serious objections to this petition, on several counts, which we would now mention briefly.

(a) It is the submission of the ECI that casual vacancy in 48-Katol Constituency of the Maharashtra State Legislative Assembly, occurred on 06.10.2018 and the period of Maharashtra State Legislative Assembly is till 18.10.2019 and thus, the remainder of the term of the member, in relation to the vacancy in question, as contemplated under proviso (a) to Section 151-A of the R.P. Act, 1951, is not less than an year and, therefore, the ECI, by invoking the substantive part of Section 151-A, has notified bye-election in question.

(b) It is the further submission of the ECI that there is no prohibition upon the ECI to hold the election in a case where the vacancy is available for less than a year and, therefore, depending upon the facts and circumstances of the case, the ECI can hold election even when the remainder of the term of a member in relation to the vacancy, is less than one year. The ECI contends that in order to fulfill its constitutional obligations and its commitment to the democratic governance of the country, it has always provided opportunities to the persons appointed as Ministers, not being members of the appropriate legislature at the time of their such appointment, to acquire the requisite qualification of a member of the appropriate legislature and accordingly, it has held bye-election in appropriate cases, even when the vacancy was available for less than a year, or even less than six months.

(c) The ECI further submits that the expression used in proviso (a) to Section 151-A, "the remainder of the term of a member in relation to a vacancy", is important and when it is read in conjunction with the provisions of Section 147 or for that matter, Section 150 of the R.P. Act, 1951, it would become clear that it has been used in relation to the member, who has tendered resignation and whose seat has become vacant on account of acceptance of his resignation. It is, therefore, submitted by the ECI that the period of one year has to be reckoned in relation to the member, who has tendered resignation and that would mean; from the date on which the vacancy arises and not in relation to an incoming member or from the date on which the result of the bye- election is declared.

(d) It is further submitted by the ECI that republicanism and democracy are basic features of the Constitution and, therefore, if the petitioner's interpretation is accepted, it would violate these basic tenets and would cause a great prejudice to the constituency, which would remain unrepresented. The ECI has strongly denied the stand of the petitioner that declaration of election programme on 10.03.2019 and the further notification dated 18.03.2019, issued by the Returning Officer-respondent no.4, fixing the schedule of the election programme are the acts which are arbitrary, illegal and discriminatory.

(e) According to the ECI, it is factually incorrect to say that the remainder of the term of a member in relation to the vacancy, would be less than one year here and that the declaration of the election programme has been made after expiry of the mandatory period of six months. According to it, this action in the present case, is in due exercise of its powers under Section 150 of the R.P. Act, 1951. It submits that there is no command made anywhere in the R.P. Act, 1951 that wherever remainder of the term of a member in relation to a vacancy is less than one year, no bye-election should be held and the vacancy be filled by holding General Assembly Elections.

(f) The ECI has also taken exception to this petition also by relying upon the restraint of Article 329 (b) of the Constitution of India and the law laid down by the Hon'ble Apex Court to the effect that there is a blanket ban on raising of a challenge to any kind of electoral step taken by the ECI and its officers. It is

submitted that once the electoral process is set in motion, any challenge, if it is to be made, has to be postponed to an election petition, to be filed in terms of Section 100 of the R.P. Act, 1951.

(g) In the additional affidavit filed by the ECI, it has been averred that it has issued a certificate dated 25.02.2019 under proviso (b) to Section 151-A of the R.P. Act, 1951, in consultation with the Central Government, to the effect that it is difficult to hold bye-election within the period of six months prescribed in Section 151-A. The additional reply states that the ECI found it difficult to conduct bye-election within the period of six months, as all the concerned officials at State and District levels were engaged in various preparatory activities relating to general elections to the Lok Sabha. The certificate issued by the ECI is annexed to the additional reply.

Mr. Bhangde, learned Senior Advocate, has made his argument with a focus on the afore-stated contentions.

5. During the pendency of this petition, some intervention applications came to be filed. These applications are Civil Application Nos.989, 990, 997 and 998 of 2019. By these applications, the interested parties sought to intervene in this petition. Civil Application Nos.989 and 990 of 2019 were allowed on 02.04.2019. They support the stand of the ECI and want that election to Katol Assembly seat be held, as scheduled. Civil Application Nos. 997 and 998 of 2019 were also allowed and they take the side of the petitioner.

6. Mr. Ghare and Mr. Dangre, learned Advocates for intervenors in Civil Application Nos.997 and 998 of 2019, have argued on almost same lines as Mr. Bhandarkar, learned Advocate for the petitioner. They point out that large number of major political parties like Indian National Congress, Rashtrawadi Congress Party, Swabhimani Shetkari Sanghatana and other social organizations have stood in protest against holding of the election to fill the vacant seat and have sent their representations to the ECI, but, there has been no response from the ECI. They submit that personal hearing on the issue was sought by them but without any success. Both the learned Advocates for these intervenors submit additionally that Section 151-A of the R.P. Act, 1951, need to be construed strictly and when this Section mandates that election must be held within six months from the date of occurrence of the vacancy, it must be followed by the ECI. Mr. Dangre, in particular, submits that if the mandate of Section 151-A is not followed, it amounts to playing a fraud upon the statutory provision and fraud vitiates everything. He also submits that Section 151-A needs to be construed with reference to the legislative intent and if it is done, the conclusion would be that the section mandates that bye-election must be held within six months, unless the exceptions in clauses (a) or (b) of the proviso are shown to exist. He submits that apart from these exceptions, other exceptional situations could also be there.

7. Mr. Gandhi, learned Advocate for the intervenors in Civil Application Nos.989

and 990 of 2019, has submitted his argument in support of the ECI. He is of the opinion that the words "the remainder of the term of a member" must be understood as denoting the term of outgoing candidate and not of an incoming candidate. He submits that in the electoral matters, the power of the ECI under Article 324 of the Constitution of India is plenary and coupled with this power, there is also a provision under Article 329 (b), which prohibits calling in question the election or bye-election, except by an election petition as provided for by or under the law governing the elections, which is R.P. Act, 1951, so far as the present case is concerned.

8. Mr. Deopujari, learned Government Pleader appearing for respondent nos.3 to 5, submits that he would only place on record certain facts which he thinks, could be of assistance to this Court in adjudicating properly the issues involved in the petition, while making it clear that he should neither be understood as opposing the petition nor supporting the petition. He submits that now if the elections are to be held, it would not be possible for the ECI to do so on 11.04.2019 and this would further add to the expenses which may be of Rs.2,75,00,000/-. He also submits that the additional manpower of 3121 persons will have to be employed for completion of the election process.

9. The arguments canvassed across the bar on behalf of both the sides would lead us to say that the controversy raised here has found its expression in a more precise way in four questions, which are follows:

(i) Whether there is a violation of mandate of Section 151-A of the R.P. Act, 1951 by the ECI?

(ii) Whether the exceptions created in the proviso to Section 151-A, of the R.P. Act, 1951 apply to the present controversy and if so, by which of the clauses, clause (a) or clause (b) or both, is it covered?

(iii) Whether the decision taken by the ECI to hold the bye-election fell within its discretionary power and if so, whether it is exercised reasonably and not arbitrarily and without any discrimination, well in tune with the principle of rule of law?

(iv) Whether entertaining this petition would amount to interference in the election process?

10. Any endeavour to attempt answers to these questions, would have the hedging of statutory and constitutional limitations around it. It is well settled law that to the electoral matters, common law and equity principles are not applicable. It is not open for the Court, making an inquiry in such matters, to drift away from the parameters provided in the statute governing comprehensively all electoral matters and that no Court is permitted to stray out in the open sea of general body of law. In such cases, the statute providing for all the matters relating to the election and the constitutional principles form the anchor as well as beacon tower to guide the Courts to reach desired goals. These

principles have been settled by the Hon'ble Apex Court over a period of time and, we think that, an assurance in this regard can be had by making reference to the law laid down in the cases of Jyoti Basu and others vs. Debi Ghosal and others; reported in AIR 1982 SC 983, and Arikala Narsa Reddy Vs. Venkata Ram Reddy Reddygari and another; reported in (2014) 5 SCC 312.

11. The observations of the Hon'ble Apex Court in the case of Jyoti Basu and Ors.; supra, provide us complete insight into the approach to be adopted and the manner in which the disputes relating to electoral issues must be resolved. The observations are as follows :

"7. The nature of the right to elect, the right to be elected and the right to dispute an election and the scheme of the Constitutional and statutory provisions in relation to these rights have been explained by the Court in N. P. Ponnuswami V. Returning Officer, Namakkal Constituency, 1952 SCR 218: (AIR 1952 SC 64) and Jagan Nath v. Jaswant Singh, AIR 1954 SC 210. We proceed to state what we have gleaned from what has been said, so much as necessary for this case.

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

based on Common Law or Equity. We see that we must seek an answer to the question within the four corners of the statute. What does the Act say?"

12. Speaking in the same vein, the Hon'ble Apex Court in Arikala Narsa Reddy; *supra*, observed thus:

"13. It is a settled legal proposition that the statutory requirements relating to election law have to be strictly adhered to for the reason that an election dispute is a statutory proceeding unknown to the common law and thus, the doctrine of equity, etc. does not apply in such dispute. All the technicalities prescribed/mandated in election law have been provided to safeguard the purity of the election process and courts have a duty to enforce the same with all rigours and not to minimize their operation. A right to be elected is neither a fundamental right nor a common law right, though it may be very fundamental to a democratic set-up of governance. Therefore, answer to every question raised in election dispute is to be solved within the four corners of the statute..."

13. We would remain moored in these principles and also such as would emerge as our discussion gathers momentum while making an attempt to resolve the controversy, by providing our answers to the questions raised by it. We shall make the beginning by referring to Sections 150 and 151-A of the R.P. Act, 1951 and by considering the result of their analysis that we would make here. They read thus:

150. Casual vacancies in the State Legislative Assemblies.-

(1) When the seat of a member elected to the Legislative Assembly of a State becomes vacant or is declared vacant or his election to the Legislative Assembly is declared void, the Election Commission shall, subject to the provisions of sub-section (2), by a notification in the Official Gazette, call upon the Assembly constituency concerned to elect a person for the purpose of filling the vacancy so caused before such date as may be specified in the notification, and the provisions of this Act and of the rules and orders made thereunder shall apply, as far as may be, in relation to the election of a member to fill such vacancy.

(2) If the vacancy so caused be a vacancy in a seat reserved in any such constituency for the Scheduled Castes or for any Scheduled Tribes, the notification issued under sub-section (1) shall specify that the person to fill that seat shall belong to the Scheduled Castes or to such Scheduled Tribes, as the case may be.

151. ...

151-A. Time limit for filling vacancies referred to in sections 147, 149, 150 and 151.- Notwithstanding anything contained in section 147, section 149, section 150 and section 151, a bye-election for filling any vacancy referred to in any of the said sections shall be held within a period of six months from the date of the occurrence of the vacancy:

Provided that nothing contained in this section shall apply if-

(a) the remainder of the term of a member in relation to a vacancy is less than one year; or

(b) the Election Commission in consultation with the Central Government certifies that it is difficult to hold the bye-election within the said period.

14. It would be clear from the above referred provisions of law that they deal with a situation, where seat of a member elected to the legislative assembly of a State becomes vacant or is declared vacant. They also state the manner in which such a contingency is to be dealt with. On the happening of the contingency contemplated in Section 150 of the R.P. Act, 1951, a statutory duty bears itself upon the ECI to fill the casual vacancy within the stipulated period of time, as provided under Section 151-A of the R.P. Act, 1951. The duty under Section 151-A is imperative in nature, which is discernible from the overall structure of Section 151-A. The section starts with a non obstante clause making a declaration in terms, "Notwithstanding anything contained in section 147, section 149, section 150 and 151" and proceeds further employing a modal verb "shall", all showing the determinative nature of legislative instructions and assertions. The legislative determination is that a casual vacancy, as contemplated under Section 150 or, for that matter, other cognate sections like Section 147 or Section 149 or Section 151, be filled, in any case, within a period of six months from the date of occurrence of the vacancy suggesting thereby that it is in the interest of democratic process that no seat of legislative assembly may remain unrepresented for a long period of time. An emphatic expression of such a legislative intent, it seems, became necessary because of the fact that the R.P. Act, 1951, as it was enacted, did not contain any such time frame, thereby creating a possibility of not holding of election to fill a casual vacancy for indefinite period or very long time. To dispel all the doubts in this regard, Section 151-A came to be inserted by an amendment introduced through Act No. 21 of 1996, with effect from 01.08.1996, and the purpose, as we have stated, is clearly visible from the plain meaning of the language used in this section. With a view to find support to this conclusion, we also perused the text of the Act No.21 of 1996, a copy of which has been made available to us. We, however, could not come across any statement of objects and reasons made therein. Nevertheless, the object of this provision can be no different than what we have gleaned just now by considering the plain language of the section.

15. This would enable us to say that the provisions contained in Section 151-A of the R.P. Act, 1951, as regards the time line fixed for filling the casual vacancies, are imperative and the time limit would not apply only when the situation is covered by any one or the other or both the exceptions contained in the proviso.

16. Apart from the two exceptions specified in the proviso, there could also be some more exceptions to Section 151- A of the R.P. Act, 1951, depending upon the facts and circumstances of each case. A fair idea about such a proposition

can be had from the judgment of the Hon'ble Apex Court in the case of Election Commission of India Vs. Telangana Rashtra Samiti reported in 2011 (1) SCC 370, wherein the Hon'ble Apex Court has held; where a casual vacancy may have occurred within the meaning of Section 150 of the R.P. Act, 1951, it is possible to say that the vacancy has not become available for the purpose of being filled within the time prescribed under Section 151-A of the R.P. Act, owing to the pendency of the election petition. This would show that for filling a casual vacancy within the time limit prescribed in Section 151-A of the R.P. Act, it is also required to be examined, if the vacancy has actually become available to be filled or not, and if it has not become so available, the mandate of Section 151-A, as regards the time line, would not apply and this could possibly be another exception.

17. Now, the question is; whether or not there is any violation of mandate of Section 151 of the R.P. Act, 1951 on the part of the ECI, in the present case.

The answer to the question depends upon the resolution of the second question, that we have posed for ourselves, as hereinabove. If the second question is answered in terms that the exceptions given under the proviso to Section 151-A of the R.P. Act, 1951, have covered the situation of this case, the answer to the first question would be that there is no violation of mandate of Section 151-A as regards the time frame prescribed thereunder. In the reverse case, the first question would have to be answered as in the affirmative and we must say, if the answer is going to be in the affirmative, a different situation is going to arise to deal with as the consequences of such a situation are not specifically provided for in the R.P. Act, 1951 and we would then find ourselves landed in wilderness of election law. But, for the present, this is only hypothetical and so we would apply ourselves to that situation, only if the occasion arises.

18. Upon a careful reading of the proviso to Section 151- A, one can say with reasonable certainty that the situation involved herein is squarely covered by clause (a) of the proviso. In fact, in our opinion, it is also covered by clause (b) of the proviso. But, for the present, we would express our mind to clarify as to how the present case is covered by clause (a) of the proviso.

19. According to Mr. Bhangde, learned Senior Advocate, the situation herein is not at all covered by clause (a) of the proviso, for the reason that the expression "the remainder of the term of a member in relation to a vacancy", has to be understood as balance of the whole term of the member, whose seat has become vacant, as contemplated under Section 150 of the R.P. Act, 1951 and the meaning of this expression cannot be understood de hors the context of Section 150 of the R.P. Act, 1951. He submits that this is the view taken by the ECI and correctness of this view cannot be doubted. He also points out that owing to such a view entertained by the ECI, the ECI, as per the press note dated 09.10.2018 (Annexure-D, page 27-D), declared that there was no need to hold bye-election to the vacancies from the State of Andhra Pradesh because the remaining term of the members was less than one year from the date of occurrence of the

vacancies, which was 20.06.2018, and the term of 16th Lok Sabha was only up to 03.06.2019. He submits that thus, the remainder of the term of a member, for the purpose of clause (a) of the proviso, has always been understood by the ECI as balance term to be reckoned from, not the date of declaration of the result of the incoming candidate but, from the date of occurrence of the vacancy on account of acceptance of the resignation of the previously or firstly elected candidate.

20. The argument has been disagreed to by Mr.Bhandarkar, learned Advocate for the petitioner, Mr. Ghare and Mr. Dangre, learned Advocates for the intervenors, propping the stand of the petitioner. They submit that the use of indefinite article "a" in the said expression is significant and it conveys clearly the intention of the legislature that the expression "the remainder of the term" must be understood in relation to an incoming member and not the one who has vacated the seat.

21. According to us, the language employed in clause (a) of the proviso is unambiguous, plain and clear. It conveys unmistakably the intention of the legislature and, therefore, we do not think that it would be permissible for us to read the expression in the context of any other Section including Section 150 of the R.P.ACT, 1951 as a means of external aid for understanding the correct meaning of the language employed in the proviso. This rule, it is needless to say, is the rule of literal interpretation and has been considered to be the first principle on the anvil of which a statute must be interpreted. It is only when the language is ambiguous or unclear that any external aids for interpreting a statute can be resorted to. A useful reference, in this regard, may be made to the law laid down by the Hon'ble Apex Court consistently over a period of time in its various judgments; some of which are; S. P. Gupta Vs. Union of India, reported in 1981 (Supp) Supreme Court Cases 87, State of Maharashtra Vs. Marwanjee F. Desai and Ors.; reported in (2002) 2 SCC 318, and Principal Chief Conservator of Forest Vs. J. K. Johnson and Others; reported in (2011) 10 SCC 794. Just to lend support to what we have said now, we would like to refer to elucidation of this principle made by the Hon'ble Apex Court in S.P. Gupta Vs. Union of India, supra, particularly in paragraph 199, in the following words.

"199. But there is one principle on which there is complete unanimity of all the courts in the world and this is that where the words or the language used in a statute are clear and cloudless, plain, simple and explicit unclouded and unobscured, intelligible and pointed so as to admit of no ambiguity, vagueness, uncertainty or equivocation, there is absolutely no room for deriving support from external aids. In such cases, the statute should be interpreted on the face of the language itself without adding, subtracting or omitting words therefrom."

22. As stated earlier, language of clause (a) of proviso to Section 151 of the R.P. Act, 1951 is clear and leaves no doubt as regards what it connotes in the plain and grammatical sense of the words used therein and as such, we are of the view that, it is not necessary for us to understand the expression, in the context of any other Section, including Section 150 of the R.P. Act, 1951. This is all the

more so because Section 151-A begins with a non obstante clause, declaring the exclusion of other sections by the Parliament in the words, "Notwithstanding anything contained in Section 147, Section 148, Section 149, Section 150 and Section 151". This would necessitate exclusion of the consideration of the aforesaid sections for eliciting and understanding the meaning of the substantive part as well as the proviso part of Section 151-A.

23. When we consider the expression, "the remainder of the term of a member in relation to a vacancy", employed in clause (a) of the proviso, what comes forth, in a prominent manner, is the presence of definite and indefinite articles, "the" and "a" respectively. Article "the", conveying the certainty or specificity has been used for indicating the meaning of the word "term" and article "a" having indefinite and uncertain characteristic has been used to denote a person named as, "a member". The article "a" is again used to indicate "vacancy" for filling of which the bye- election could be held. It would mean that while the balance term is definite, a member as well as a vacancy are something which are not yet known or which are still unspecified. The overall meaning of the whole expression, as plainly conveyed by the language used, is that the balance term when reckoned from the date of declaration of the result of bye-poll, would be certain and the "member" contemplated in clause (a) is unspecified and so is a "vacancy", which such unspecified person is going to fill through the bye-election. If this were not so, the legislature would have used the definite article "the" to specify a particular person as the member whose vacancy has arisen owing to his resignation or occurrence of other contingency stipulated in Section 150 of the R.P. Act, 1951. The conclusion is inevitable. The remainder of the term of a member means the remaining term an incoming member would get from the date of declaration of the result of the bye- election from out of total term of five years.

24. Mr. Bhangde, learned Senior Advocate for the ECI in his further attempt to persuade us to his interpretation of clause (a) of the proviso to Section 151-A of the R.P. Act, 1951 invites our attention to the Hindi and Marathi official translations of the clause (a). We have perused them and we are not convinced that these translations of clause (a) of the proviso can be understood to convey a meaning that "the remainder of the term" must always be determined from the date of occurrence of the vacancy and in relation to the member who has resigned from the seat and not from the date on which incoming member is declared elected and also not in relation to such an incoming member.

25. There is one more reason for making such an interpretation, as we have just made for clause (a). If the balance term is to be understood in relation to the member who resigns and, therefore, it is to be reckoned from the date on which his resignation is accepted, in some cases, anomalous situation is likely to arise. To illustrate the point, we may give here one example. An elected representative, after occupying the seat for a period of one year out of the total term of five years, resigns upon completion of one year of the term and his resignation is

accepted. The consequent vacancy is then filled by another member through a bye-election held for the seat. The second elected member also resigns and his resignation is accepted, just about a few months, say for instance six months before the expiry of the total period of five years. Realistically speaking, in this case, the balance of the whole term of five years is only six months but, if we go by the interpretation canvassed on behalf of the ECI, this balance or the remainder of the term has to be reckoned from the date on which the vacancy arose for the first time, on account of resignation of the first elected member, which would always be more than one year though the ground reality is different. This is an anomaly which occurs if the view of the ECI is accepted. But, this is not the intention of the legislature. The intention is to ensure that a member, who is elected in a particular poll held for filling the casual vacancy, is assured of a reasonable term and not something which is ineffective and which makes the assembly seat a ceremonial or symbolic post. In order to avoid such a situation, the legislature has prescribed that the rigor of Section 151-A to hold a bye-election within the period of six months from the date of occurrence of the vacancy would be relaxed in a case where the period an incoming member would get, is less than one year.

26. According to Mr. Bhangde, learned Senior Advocate, the view of the ECI regarding calculation of the balance term also receives support from some of the observations of made by the Hon'ble Supreme Court in the case of Pramod Laxman Gudadhe Vs. Election Commission of India and Ors. reported in (2018) 7 SCC 550. Referring to the observations made in paragraph 18 of this case, Mr.Bhangde submits that the remainder of the term must be calculated from the date of occurrence of the vacancy.

This has been opposed to by the learned Advocate for the petitioner and the learned Advocates supporting the petitioner. They submit that there is no decision rendered nor any conclusion made in this case as to the manner of reckoning the remainder of the term.

27. On a closer scrutiny of the judgment in the said case of Pramod Laxman Gudadhe, supra, we find that there is no categorical determination made by the Hon'ble Apex Court that the remainder of the term means the balance term determined from the date of the occurrence of the vacancy. In paragraph 18, the Hon'ble Apex Court has noted some of the facts and on their basis, has observed that in that case the remainder of the term was not less than one year. It has been observed that factual score of that case showed that the vacancy occurred when the resignation was accepted by the Speaker of Lok Sabha on 14.12.2017, that it was beyond any dispute that the next general election of the Lok Sabha was in June-2019 and then a conclusion was reached in words, "Therefore, the remainder of the term is not less than one year." It is significant to note here that in that case, a casual vacancy had arisen for a Lok Sabha seat on 14.12.2017 and, as seen from the facts noted in paragraph 5 of the judgment, the election to fill the vacancy was proposed in the month of May, 2018 and the

High Court had found that the effective period, which the new member would get in that case was only up to March, 2019. It was in the context of these facts, the Hon'ble Apex Court held that when the elections to Lok Sabha were slated to be held in March, 2019, in any case, the remainder of the term was not going to be less than one year. It further held that the High Court was not correct to consider the application of Code of Conduct to a period, which was part of the remainder of the term, to say that the effective term was less as R. P. Act, 1951 did not contemplate so. It was also observed that it was the period alone that should be the governing factor subject to the pendency of the election petition because that is not controlled by non obstante clause. It would be thus clear that the observations made by the Hon'ble Apex Court are only in relation to these peculiar facts noted in the judgment and they do not constitute the principle that the remainder of the term is something which must be reckoned from the date of occurrence of the vacancy. We express our respectful disagreement with the learned Senior Advocate accordingly.

28. In the present case, as the resignation tendered by Mr. Ashish Deshmukh, was accepted by the Speaker on 06.10.2018, the vacancy as contemplated under Section 151-A arose on this very date i.e. 06.10.2018. This vacancy was admittedly available till 18.10.2018, the date on which the present State Legislative Assembly's term is to expire. So, theoretically, the vacancy is available for it's being filled for a term which is of slightly more than an year or to be precise for one year and 12 days. But, one can guess, it is practically impossible to complete the entire process of bye-election and declare the result within the extra period of 18 days that was otherwise available in the present case. The notification for holding of the bye-election was issued on 10.03.2019 and the scheduled date of the bye-poll is 11.04.2019. The result of the election is going to be declared on 23.05.2019. So, if the remainder of the term of an incoming member is to be calculated from anyone of these dates, the incoming member would have such remainder of the term, in relation to Katol Assembly Constituency vacancy, which is less than one year. The remainder of the term, would have to be calculated in this case, as per our interpretation of clause (a) of the proviso, from the date on which the result of the bye-poll is declared. This date would be 23.05.2019. So, from this date, the remainder of the term of the incoming candidate is not going to be of one year or more. This would firmly indicate that the situation in the present case is covered by clause (a) of the proviso and that would mean that it would not be mandatory for the ECI to hold the bye-poll within the period of six months from the date of occurrence of the vacancy and indeed, the scheduled bye-election here is not being held within this period of six months. Such an action of the ECI being covered by the exception made under clause (a) of the proviso, would not result in violation of the mandate of Section 151-A.

29. Additionally, we find that there is present here one more reason to say that the ECI, has not violated the mandate of Section 151-A, by announcing the bye-election after expiry of six months from the date of occurrence of the vacancy.

There is a certificate dated 25.02.2019, issued by the ECI in terms of clause (b) of proviso to Section 151-A of the R.P. Act, 1951, which to us, relaxes rigour of Section 151-A. It has been otherwise criticized by the learned Advocate for the petitioner and the learned Advocates for the intervenors, supporting the petitioner saying that it does not answer the requirements of clause (b) because it is generic in nature and not specific in relation to Katol Assembly Constituency, thereby indicating complete non application of mind on the part of the ECI. Learned Senior Advocate for the ECI, does not agree and we think that his disagreement is quite weighty.

30. A minute perusal of the certificate dated 25.02.2019 (Annexure R-1, Page P-54) indicates that certain factors have been considered by the ECI as commonly applicable to various casual vacancies listed therein and, therefore, the ECI in its wisdom, thought it fit to defer the bye-election to a date falling beyond the period of six months from the date of occurrence of the vacancy. There is, thus, some material which has been seen by the ECI to offering to it, in an objective manner, some criterion for taking such a decision and issuing the certificate. Once this is seen, it would not be permissible for this Court, as a Court of secondary review, under the doctrine of *Wednesbury Unreasonableness* (See *State of NCT of Delhi and anr. Vs. Sanjeev alias Bittoo*; reported in 2005 SCC (Cri) 1025 and *Associated Provincial Picture Houses Ltd Vs. Wednesbury Corporation*, (ALL ER pp. 682 H-683A), to go into sufficiency or otherwise of the material available on record. For us, there is some material, constituting objective criterion and it has been seen as adequate by the ECI for it to issue a certificate in terms of clause (b) of the proviso to Section 151-A of the R.P. Act, 1951 and, therefore, the judicial review on the *Wednesbury* principle must stop here. As such the argument that this certificate has not been issued in the spirit of this clause (b), is without any merit and we reject it.

31. Learned Advocate for the petitioner and learned Advocates supporting the petitioner, by relying upon the decision of the Hon'ble Apex Court in *Special Reference No. 1/2002, (Gujarat Assembly Election Matter)* reported in 2002 (8) SCC 237, submit that the ECI is required to take steps for holding elections immediately on expiry of term of the member or dissolution of the assembly and this has to be done by it on the first available occasion and, in any case, within six months from the date of the occurrence of the vacancy and as this has not been done by the ECI, in the present case, there is a violation of this part of the mandate of Section 151-A. They also submit that if any certificate in terms of clause (b) of proviso is to be issued, it must be based upon only those reasons, which are related to acts of God and normally not acts of man, as observed in the said reference case in paragraph 147 by the Hon'ble Apex Court. According to them, the Hon'ble Apex Court has considered the possibility of availability of myriad reasons for not holding the elections quickly and before expiration of the six months but only those reasons which arise from the acts of God have been approved by the Hon'ble Apex Court.

32. According to the learned Senior Advocate for the ECI, the ratio decidendi of the opinion rendered by the Hon'ble Supreme Court in the said reference Case, is not what the petitioner and his supporters say. He submits that if one applies the "Inversion Test", recently propounded by the Hon'ble Apex Court in the case of State of Gujarat and Ors. Vs. Utility Users' Welfare Association and Others; reported in 2018 (6) SCC 21, as clarified in paragraphs 112, 113 and 114 of the judgment, we would notice that the principle constituting the binding precedent for the subordinate Courts is not the one as the learned Advocate for the petitioner and other learned Advocates supporting him would want this Court to accept.

33. We find that the "Inversion Test", is a very useful tool to take us to our destination in our quest for getting a key to know what is ratio decidendi. The sum and substance of the "Inversion Test" has been succinctly given in paragraph 114 of the judgment in the aforesaid case of State of Gujarat and Ors. Vs. Utility Users' Welfare Association and Others supra. The principle is that when a particular proposition of law is to be regarded as ratio decidendi of the case, one has to decide the same by considering as to what happens to the final conclusion made in the case after such a proposition of law is inversed or removed from the text of the judgment as if it never formed the part of the judgment. If the result of the exercise is that the final conclusion made in the judgment still remains the same and does not change, the said particular proposition of law could not be held to be the ratio decidendi of the case. The observations made in paragraph nos. 112 to 114 in order to have more clarity on the issue, are reproduced thus:

"112. It is undoubtedly true that the question which the Court was seized of, related to the interpretation of Section 86 of the said Act and certain other matters, which are not connected with the controversy herein. Thus, the issue arises, whether the observations made, albeit to be construed as advisory or suggestive qua the appointment of a Chairman and a Member are to be treated as ratio decidendi or obiter dicta.

113. In order to determine this aspect, one of the well-established tests is "The Inversion Test" propounded inter alia by Eugene Wambaugh, a Professor at The Harvard Law School, who published a classic text book called "The Study of Cases" in the year 1892. This text book propounded inter alia what is known as the "Wambaugh Test" or "The Inversion Test" as the means of judicial interpretation. "The Inversion Test" is used to identify the ratio decidendi in any judgment. The central idea, in the words of Professor Wambaugh, is as under:

"In order to make the test, let him first frame carefully the supposed proposition of law. Let him then insert in the proposition a word reversing its meaning. Let him then inquire whether, if the court had conceived this new proposition to be good, and had it in mind, the decision could have been the same. If the answer be affirmative, then, however excellent the original proposition may be, the case is not a precedent for that proposition, but if the answer be negative the case is

a precedent for the original proposition and possibly for other propositions also."

114. In order to test whether a particular proposition of law is to be treated as the ratio decidendi of the case, the proposition is to be inversed, i.e., to remove from the text of the judgment as if it did not exist. If the conclusion of the case would still have been the same even without examining the proposition, then it cannot be regarded as the ratio decidendi of the case. This test has been followed to imply that the ratio decidendi is what is absolutely necessary for the decision of the case. "In order that an opinion may have the weight of a precedent", according to John Chipman Grey, "it must be an opinion, the formation of which, is necessary for the decision of a particular case."

34. For discovering the binding principle of the Gujarat Assembly Election Matter (supra), the "Inversion Test" prescribed by the Hon'ble Apex Court in the State of Gujarat and Others Vs. Utility Users' Welfare Association and Others; supra would certainly be one of the tools by which to discern the ratio decidendi of the case, still we think, it would be quite beneficial for us to first know the exact nature of the facts of the said reference matter which necessitated the Hon'ble Apex Court to make the observations, as the judgment is a precedent for what it decides in the context of the facts of its own case. This is on the principle that a decision is an authority for what it actually decides and what is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made therein. A useful reference, in this regard, be made to the judgments in Ambica Quarry Works Vs. State of Gujarat and Ors; reported in (1987) 1 SCC 213 and R. L. Jain (D) by LRS. Vs. DDA and Others; reported in (2004) 4 SCC 79.

35. In the Gujarat Assembly Election Matter, supra the facts were that the Legislative Assembly of the State of Gujarat was dissolved on 19.07.2002 before expiration of its normal duration till 18.03.2003, that Article 174 (1) of the Constitution provided that six months shall not intervene between last sitting of the legislative assembly in one session and the date appointed for its first sitting of its next session, that the ECI was of the opinion that the mandate of Article 174 prescribed that the Assembly must meet every six months even after dissolution of the House and that the ECI had not recommended any date for holding of election for constituting a new Legislative Assembly for the State of Gujarat, clarifying that it would consider framing of suitable schedule for the general election in November-December, 2002. These facts led to involvement of questions of law of public importance and, therefore, the matter was referred to the Hon'ble Apex Court for rendering its opinion on the questions of law framed in the reference. These facts indicated that the controversy in that case revolved around the holding of general election to the State Legislative Assembly within six months from the date of premature dissolution of the legislative assembly itself and the controversy was made more complex by virtue of the mandate of Article 174 of the Constitution, laying down that six months shall not intervene between last sitting of the legislative assembly and the date appointed for its

first sitting in the next session. These facts are entirely different and distinguishable from the facts of the present case.

36. Facts of instant case show that there is no premature dissolution of the State Legislative Assembly here and that there is also no question involved regarding applicability of the mandate of Article 174 rather the question involved here is only of applicability of mandate of Section 151-A of the R.P. Act, 1951. So, the present controversy moves within the limits of Section 151-A and as such, in our humble opinion, the answers given by the Hon'ble Apex Court in the said reference case would have no application to the facts of the present case. This could also be seen by applying the Inversion Test. If the contextual setting provided by the premature dissolution of legislative assembly and proposition of law arising from mandate of Article 174 of the Constitution saying that gap between two sessions must be of less than six months are removed, it cannot be said that the final conclusion made in the said case would still be the same and hence be a binding precedent. So, with due respect, we find that the case of Gujarat Assembly Election Matter, *supra* would be of no assistance to the proposition of the petitioner and his supporters that by not holding the election immediately upon occurrence of the vacancy and by proposing to hold the same after expiry of six months, the ECI has violated the mandate of Section 151-A. On the contrary, we have seen that not only the proviso (a) but also proviso (b) to Section 151-A apply here, which would cumulatively relax the rigor of Section 151-A of the R.P.A Act, 1951.

37. In view of above, we answer first and second questions in terms that in the present case, the ECI has committed no violation of mandate of Section 151-A in relation to following the time line prescribed therein and that the present controversy is covered by the exceptions of both clauses (a) and (b) of the proviso to Section 151 of the R.P. Act, 1951.

38. Now, the next questions that would fall for our consideration would be; whether the application of the exceptions under the proviso would make the power of the ECI to hold election as discretionary, in the sense, it may hold bye-election or defer the bye-election till the general elections, depending on fact situation of a given case, something going beyond the pale of substantive part of Section 151-A and if so, whether or not the exercise of such discretion would be subject to Constitutional limitations created by principle of absence of arbitrariness and unreasonableness and thus amenable to writ jurisdiction of High Court. The further question would also be that whether entertainment of this petition would be an interference in the election process or a taboo under Article 329 (b) of the Constitution of India? The first question can be answered without any difficulty as in the affirmative as once the prescription to hold bye-election in certain time-line goes, the matter becomes entirely discretionary and we do answer it accordingly.

39. The answers to other questions could be found in the two landmark judgments of the Constitution Bench of the Hon'ble Apex Court in N. P.

Ponnuswami Vs. Returning Officer, Namakkal, reported in AIR 1952 SC 64 and Mohinder Singh Gill Vs. Chief Election Commissioner, reported in AIR 1978 SC 851.

In fact, one gets a complete insight into these two judgments, if one considers the case of Election Commission of India, through Secretary Vs. Ashok Kumar and Ors., reported in (2000) 8 SCC 216. In Ashok Kumar supra, considering these two landmark cases and also other cases, Hon'ble Apex Court has made a summary of the conclusions arising from the law laid down in these cases. It is given in paragraph 32 of the judgment and it reads thus:

"32. For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:-

(1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.

(2) Any decision sought and rendered will not amount to "calling in question an election" if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

(3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

(4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the Court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the Court.

(5) The Court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329 (b) but brought to it during the pendency of election proceedings. The Court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the courts indulgence by filing a petition outwardly innocuous but essentially a

subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the Court would act with reluctance and shall not act, except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material."

40. In the very judgment of Ashok Kumar, Hon'ble Supreme Court has also referred to two postulates that went behind formalizing the principles laid down in the cases of N. P. Ponnuswami and Mohinder Singh Gill. It said that these principles are premised on two situations; (i) the imperative need to conclude the elections, as early as possible, according to time schedule and postponing of controversial matters till after the elections are over and; (ii) existence of a tribunal invested with special jurisdiction to deal with all electoral controversies. The relevant observations made in paragraph 18 of the judgment, are as under:

"18. Is there any conflict between the jurisdiction conferred on the High Courts by Article 226 of the Constitution and the embargoes created by Article 329 and if so how would they co-exist came up for the consideration of a Constitution Bench of this Court in N.P.Ponnuswami Vs. The Returning Officer, Namakkal Constituency & Ors. - AIR 1952 SC 64. The law enunciated in Ponnuswami was extensively dealt with, also amplified, by another Constitution Bench in Mohinder Singh Gill and Anr. Vs. The Chief Election Commissioner, New Delhi and Ors. - AIR 1978 SC 851. The plenary power of Article 329 has been stated by the Constitution Bench to be founded on two principles :

(1) The peremptory urgency of prompt engineering of the whole election process without intermediate 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 Constitution.

On these principles the conclusions arrived at in Ponnuswami case were so stated in Mohinder Singh Gill case:-

(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognised 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."

41. Now, it would be clear that disputes relating to electoral matters and election process must be postponed for their resolution to a stage, which is after completion of the proceedings in elections and, therefore, to such disputes, the embargo of Article 329 (b) would be applicable. However, there are certain situations where the action taken or orders issued by the ECI would be open to judicial review on the well settled parameters which enable judicial review of decision of the statutory bodies as, for example, in a case where there is mala fide or arbitrary exercise of power or where the action taken is contrary to law and postponement of the grievance till after the election proceedings are over, would bring no relief to the aggrieved person. This is on the principle, as observed by the Hon'ble Apex Court in the case of Mohinder Singh Gill *supra*, that in our Constitutional order, nobody is an imperium in imperio or an emperor within an emperor or State within a State. Same principle is also seen to be stated by the Hon'ble Apex Court in many of its other judgments relating to disputes of electoral matters, two of which, we would refer here.

42. In *Digvijay Mote Vs. Union of India*; reported in 1993 (4) SCC 175, it has been held that the power of the Election Commission under Article 324 of the Constitution is not unilateral and that it is subject to judicial review as it is a constitutional functionary and a statutory body exercising its functions affecting public law rights. The Hon'ble Apex Court emphasized that the power conferred on the ECI by Article 324 has to be exercised not meaninglessly nor mala fide nor arbitrarily nor with partiality but in keeping with the contours of the rule of law. This is reiterated by the Hon'ble Apex Court in the case of *Union of India Vs. Association for Democratic Reforms* and another; reported in 2002 (5) SCC 294.

43. Now, let us proceed to examine the decision of the ECI to hold election to fill casual vacancy in Katol Assembly Constituency. Election here is scheduled for 11.04.2019 and the result thereof is going to be declared on 23.05.2019. The term of this vacant seat is going to be determined on 18.05.2019. We have already seen that to the present case, clause (a) of the proviso is applicable fully and "the remainder of the term of a member" must reasonably mean the balance term reckoned from the date of declaration of the result of the election. Seen in this way, we would find that the remainder of the term of the incoming member is hardly going to be of about five months. So, the question would arise as to how far would it be fair and reasonable and also equal to have the casual vacancy filled for such an extremely short period of time. None would dispute that if the casual vacancy is to be filled, the newly elected member should get a reasonable period of time to function as the elected representative of the Constituency and it is the intention of the legislature that reasonableness of the remainder of the term could ordinarily be seen from the fact that it is available for at least one year. The ECI also seems to acknowledge this fact, which is clear

from its press note dated 09.10.2018 (Annexure-D, page No. 27- D). It states that in case of vacancies from Andhra Pradesh, the ECI has taken a decision not to hold the bye-election for the reason that the remainder of the term of the Lok Sabha is less than one year, though it is a different matter that the period of one year has been reckoned by the ECI from the date of occurrence of the vacancy. However, we have already found that the remaining period of the term has to be calculated not from the date of occurrence of the vacancy but from the date on which the incoming member is declared to be elected. Of course, the learned Senior Advocate would submit that the incoming person could not be said to be a member at all, he being not yet elected and, therefore, such calculation made from the date of declaration of result, is not permissible. With due respect to learned Senior Advocate, we would disagree. If a person who is going to be elected could not be called the member as contemplated under clause (a) of the proviso, same logic would apply to the person who is the former member, who on account of his resignation, is also not qualified to be called the member. In fact, the interplay between the definite article "the" and the indefinite article "a" appearing in the structure of clause (a) of the proviso clinches the issue in favour of interpretation that we have made while answering the first two questions. On this ground, we would say that the view of the ECI regarding the manner in which the remainder of the term is to be determined, is not correct and would further say that the remaining term of a member has to be reckoned from the date on which the incoming member is declared elected.

44. We must say, however, the manner of determination of the remainder of the term is not the issue to be debated any longer as the issue has been already answered by us. What is required to be considered in this part of the judgment is the rationale of the ECI in taking a decision to not hold bye-election to fill a casual vacancy, if the remainder of the term is less than one year. In the present case also the remaining term is less than one year. But, we find that same decision as has been taken by the ECI in the case of vacancies from the State of Andhra Pradesh has not been taken here. There is thus application of different yardstick by the ECI to vacancies from Andhra Pradesh and of another to a casual vacancy arising from Katol Assembly Constituency. Why is it so? The ECI, however, has not provided any answer to the application of such different standards to vacancies from Andhra Pradesh and vacancy from Katol, both equally situated in terms of the rationale adopted by the ECI. No answer and no reason having been given by the ECI for treating the present casual vacancy differently, we find that the decision taken by the ECI here to fill casual vacancy for a period of about five months is arbitrary, discriminatory and not reasonable. It is a violation of the principle of rule of law, which pervades Articles 14 and 21 of the Constitution of India with "brooding omnipresence", as held in the case of *Maneka Gandhi Vs Union of India*, reported in AIR 1978 SC 597.

45. Apart from what is stated above, in our considered view, the decision of the ECI impugned here, is also capable of being seen as something done without any application of mind on the part of the ECI. The intervenors supporting the

petitioner, as per their pleadings and representations made to the ECI, had organized themselves in large numbers to make a request to the ECI to not hold election for various reasons including the reason of availability of extremely short remainder of the term and that the legislative seat is not a ceremonial or a symbolic post, which could be filled like it is done for a revolving chair. Through these representations, intervenors demanded personal hearing but there was no response from the ECI. We think that non consideration of these yearnings has made the decision of the ECI, vulnerable on the yardstick of non application of mind.

46. Learned Senior Advocate for the ECI submits that it is not in contemplation of the R.P. Act, 1951 or Constitutional scheme that in such matters personal hearing should be granted by the ECI. There can ordinarily be no dispute about this proposition but it would not be so if the issue central to the decision is about acting fairly and objectively and not selectively by the ECI. As we proceed to address this issue by considering the relevant facts, we get in the end, only disappointment. This is noticeable from the communication dated 07.02.2019 made by the ECI to the Secretary, Ministry of Law and Justice, New Delhi. This communication is annexed to reply and additional affidavit of the ECI dated 09.04.2019. In paragraph 2 (at page no. 37), the ECI has stated thus,

"2. ...After accessing the ground realities through consultations with the stakeholders, the commission came to the unanimous view that the situation in the Thiruvavur district of Tamil Nadu is not conducive for holding election at this stage."

47. It is clear that the ECI does consult the stakeholders, and the stakeholders would necessarily include the major political parties, prominent citizens forming the electorate, etc. but here the ECI does not do so, and this is, in spite of the fact that there has been a ringing cry raised for hearing by some of the major political parties and some voters. Thus, we find that the impugned decision taken in the present case by the ECI is violative of principle of rule of law on the additional ground of non application of mind.

48. The discussion made thus far would impel us to say that the impugned decision of the ECI is arbitrary, discriminatory and unreasonable, which together agitate against the principle of rule of law and form a cause, as given in conclusion no.(3) in paragraph no.32 of the judgment in Ashok Kumar, supra, to assail it in the writ jurisdiction. This would meet one of the two requirements, as seen from the case of Ashok Kumar, supra, necessary to invoke jurisdiction of High Court under Article 226 of the Constitution of India. The other requirement is of availability of remedy in the nature of election petition. We would now deal with it.

49. Mr. Bhangde, learned Senior Advocate for the ECI, submits that even if impugned decision is held to be unreasonable and arbitrary, still the challenge can be postponed to an election petition, which can be filed under Section 100 of

the R.P. Act, 1951, on the ground stated in clause (d) (iv) of Sub Section (1) of Section 100. We respectfully disagree with the learned Senior Advocate. This ground is available only to the extent and insofar as it concerns a returned candidate and can be successfully pleaded in an election petition, if its twin conditions are fulfilled, namely; (i) non compliance with the provisions of Constitution or the R.P. Act, 1951 or any rules or orders made thereunder and; (ii) that due to such noncompliance, the election of the "returned candidate" is "materially affected". This can be understood upon careful reading of the provision. For the sake of convenience, it is reproduced thus:

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

(a) to (c)

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

(i) to (iii)

(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, [the High Court] shall declare the election of the returned candidate to be void.]"

50. In the present case, the arbitrariness and unreasonableness, which has gone into the impugned decision is in relation to the constituency itself and it would not be possible for the petitioner to demonstrate successfully that such unreasonableness has materially affected the result of the election of a particular candidate as this is something which could be proved only when it is shown that had it not been for such an arbitrary or unreasonable decision, a particular candidate would never have been elected or election of a particular candidate would have been materially affected. The challenge founded on the ground of unreasonableness and arbitrariness of a decision to fill casual vacancy by applying a different yardstick and by discriminating between two similarly situated constituencies, occupies a plane, different from the level on which stands the challenge raised on the ground of arbitrariness and unreasonableness shown in relation to a particular candidate. The reason being that the former challenge has a bearing upon the right of the electorate to have an elected representative for a reasonable period of time, though there can be no hard and fast rule about such period to be always of at least one year and all would depend upon the facts and circumstances and the strength of the reasons given by the ECI to fill a casual vacancy even for a period of shorter than one year, and the latter has material impact and that too directly on the result of the election of a returned candidate. So, the remedy of election petition under Section 100 (1) (d) (iv) of the R.P. Act, 1951, would not be available here and this would fulfill the remaining requirement for removal of prohibition contained in Article 329 (b) on the jurisdiction of this Court under Article 226 of the Constitution of India.

51. The State of Maharashtra, through respondent nos. 3 to 5, has placed on record certain facts and they relate to additional expenditure and employment of additional manpower for completion of the election proceedings in this case. However, these factors, as held in the case of Pramod Laxman Gudadhe, *supra* are irrelevant and we ignore them. But, this would not dilute the conclusions that we have made here.

52. In view of above discussion, we find that the decision of the ECI to hold bye-election to fill the casual vacancy of Katol Legislative Assembly Constituency, as per election programme dated 10.03.2019 and also the further notification dated 18.03.2019 issued by the respondent no.4-Returning officer, 48, Katol Constituency are arbitrary, discriminatory, unreasonable and violative of principle of rule of law, all of which are agitating against Articles 14 and 21 of the Constitution of India, and as such are liable to be quashed and set aside. It is further held that this petition is not hit by the embargo of Article 329 (b) of the Constitution of India. Third and fourth questions are answered accordingly.

53. In the result, we allow the petition in terms of prayer clauses (i) and (v). The election programme dated 10.03.2019 and the notification dated 18.03.2019 are hereby quashed and set aside. Other prayers introduced through amendments stand answered in these terms. We make it clear here that it would always be open to the ECI to take a fresh look at the issue involved herein, in accordance with law.

Rule is made absolute in the above terms. No order as to costs.