

(2015) 09 AHC CK 0206

In the Allahabad High Court

Case No : Civil Misc. Writ Petition Nos. 53941, 53854, 54042, 54057, 54074, 53845, 53978, 54066, 54225, 54094, 54291, 54253, 54268, 54398, 54400, 54407, 54423, 54425, 54411, 54435, 54455, 54503, 54549, 54589, 54612, 54606, 54620, 54625, 54627, 54643, 54655, 54666,

Suresh Jaiswal

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 29-09-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 191, 193, 226

Citation : (2015) 9 ADJ 1 : (2015) 4 ESC 2375

Hon'ble Judges : Arun Tandon and Ashwani Kumar Mishra, JJ.

Bench : Division Bench

Advocate : S.K. Singh Paliwal, Shashi Nandan, Krishan Ji Khare, Satish Kumar Tyagi, J.H. Khan, Imran Khan, W.H. Khan, P.N. Tripathi, Shashwat Shukla, Sanjay Kumar, Alok Sharma, Anubhav Chandra, Gautam Chaudhary, Namit Srivastava, M.C. Chaturvedi, Parul Srivastava, Sengar Vineet Singh, Gaurav Tiwari, P.C. Pandey, S.K. Mishra, Hari Pratap Gupta, Gajala Srivastava, Manish, Nipun Singh, Anurag Khanna, Manoj Dubey, Sudhir Dixit, Rishi Kant Rai, Mahipal Singh, Prashant Kumar Singh, S.Q. Khan, Meraj Ahmad Khan, Santosh Kumar Singh, Rajesh Kumar Dubey, Om Prakash Pandey, Shamshad Ahmad, Gulab Chandra, Santosh K. Srivastava, D.C. Yadav, R.N. Singh, Vishal Kashyap, K.M. Asthana, Ram Mohan, Anil Kumar Aditya, Udayan Nandan, Arif Ikbal, Rajesh Gupta, S.N. Srivastava, Ramesh Chandra Tripathi, Satendra Pratap Singh, K.D. Tiwari, B.D. Mishra, Slok Dwivedi, Ajai Kumar Srivastava, J.P. Singh, R.P.S. Chauhan, Rajesh Kumar Singh, Satish Chand, Ghanshyam Dwivedi, S. Pratap Singh, J.P.N. Singh, P.N. Saxena, Akhilesh Kumar Ojha, D.K. Tiwari, Shashi Kant Kushwaha, P.N. Kushwaha, A.K. Malviya, A.L. Yadav, S.K. Nigam, Rama Nand Pandey, Pradeep Narayan Pandey, Pavan Kishore, Piyush Srivastav, Anupam Shyam Dwivedi, Chandra Bhushan Yadav and Kirtikar Pande, for the Appellant; Tarun Agrawal, Tahira Kazmi, S.I. Siddiqui, S.N. Ahmad, V.K. Dixit, Chhaya Gupta and K.P. Singh, for the Respondent

Judgement

1. State of Uttar Pradesh has initiated process for holding of elections of Panchayats assigned constitutional recognition under Part-IX introduced by

Constitutional 73rd Amendment Act, 1992. Article 243-B, falling in Part-IX of the Constitution provides for constituting in every State Panchayat at the village level intermediate level and district level. State of U.P. had already enacted U.P. Panchayat Raj Act, 1947 (hereinafter referred to as "Act of 1947") as well as U.P. Kshetra Panchayat and Zila Panchayat Adhiniyam, 1961 (hereinafter referred to as "Adhiniyam of 1961"), for the purposes of establishing Panchayats and these enactments came to be amended vide U.P. Act No. 9 of 1994 so as to bring them in conformity with the provisions of Part IX of the Constitution. Rules have also been framed by the State under the Act of 1947 and Adhiniyam of 1961 for the purposes of holding of elections. Delimitation/creation of constituencies, reservation of seats, principle of rotation to be applied etc. have all been provided under the Acts and Rules. Government order from time to time have also been issued for the purposes. For the elections to be held in 2015, a Government order dated 11.8.2015 has been issued modifying the previous Government order dated 9.7.2010 in the matter of reservation of seats. It is at this stage that these bunch of writ petitions came to be filed by different petitioners, challenging the manner and methodology followed by the State in holding of Panchayat elections on the ground that the same are in violation of the constitutional provisions, as well as the provisions of the Acts and Rules so that the very holding of elections is rendered farce. This Court proceeded to entertain these writ petition and the grievances of the petitioners were being examined within the limits of self-imposed restriction to be exercised in matter of elections by a writ Court. Following orders came to be passed by us in leading writ petition No. 53941 of 2015 on 22.9.2015:

"Petitioners in this bunch of petitions complain about gross infraction of the applicable provisions of the U.P. Kshetra Panchayat and Zila Panchayat Adhiniyam, 1961 and Rules framed thereunder in holding of elections for Zila Panchayat. Violation of constitutional provisions contained in Part-IX are also alleged.

Reservation in respect of the seats of Zila Panchayat is provided for under Section 18-A of the U.P. Kshetra Panchayat and Zila Panchayat Adhiniyam, 1961. Reservation under the said section is to be provided for Scheduled Castes, Scheduled Tribes and Backward Classes. The section provides for the mechanics for determination of number of seats to be reserved in each category. After such determination takes place and the number of seats to be reserved for each category is determined under the said section, the issue of allotment of seats and offices for the reserved category comes into picture, and it is at this stage that the Uttar Pradesh Kshetra Panchayat and Zila Panchayat (Reservation and Allotment of Seats and Offices) Rules, 1994, applies. Therefore, it is first to be ascertained as to whether there has been determination of reservation of total seats of Zila Panchayat in accordance with Section 18-A, and if such reservation has been done, the details thereof must be furnished to the Court. After the said issue is examined, the Court would be required to examine as to whether the allocation of seats for the reserved category has been done in accordance with

the Rules of 1994 or not.

Since the elections for the Kshetra Panchayats and Zila Panchayats have already been notified, we direct that this bunch of petitions shall continue on day-to-day basis. Standing Counsel is directed to summon all relevant records from the State Government, which may disclose the compliance of Section 18-A of the Adhiniyam of 1961 in the matter of determination of the number of post to be reserved and also to summon the original records from the office of District Magistrate in the matter of application of Rules 1994, for applying reservation in respect of particular seats in each Districts.

Put up tomorrow i.e. on 23.9.2015."

Thereafter, following orders were passed on 23.9.2015:

"Advocate General, State of Uttar Pradesh Sri V.B. Singh as well as Sri Kamal Singh Yadav, Additional Advocate General, State of Uttar Pradesh and Sri H.S. Mishra, District Panchayat Raj Officer, Azamgarh are present in the Court alongwith original records with regard to the determination of the seats of Zila Panchayat to be reserved with reference to the writ petition filed challenging the said reservation.

Praroop-1 has been produced before us, which records the block-wise population of various categories of residents as per the census of 2011 and the percentage of population of various categories with reference to the said census block-wise of district Azamgarh.

Praroop-2 has also been produced before us, which reflects the total population, population caste-wise and the percentage block-wise of various categories alongwith notification dated 31.7.2015 issued in exercise of powers under Section 12(5) of the U.P. Determination of Other Backward Classes Rules, 1994, as amended, read with Rule 10(2) published by the District Magistrate, Azamgarh, which reflects the population of Other Backward Classes ward-wise in respect of various Kshetra Panchayat of Zila Panchayat of District-Azamgarh.

A chart has also been produced today, signed by the District Panchayat Raj Officer, Azamgarh dated 23.9.2015, which according to him is the determination of number of seats to be reserved for Scheduled Caste, Scheduled Tribes and Other Backward Classes categories for the Zila Panchayat elections of District Azamgarh. These records are taken on record.

It has been stated before us that this determination of population of Other Backward Classes category has been done on the basis of survey conducted in terms of the Government Order dated 19th May, 2015, copy whereof has been supplied to the Court today, with specific reference to Clause 5(Gha) of Part-3.

We may record that it is stated that there are no other records in the matter of determination of population of Scheduled Caste, Scheduled Tribes and Other Backward Classes and reservation to be applied.

Arguments are in progress. Put up tomorrow i.e. 24.9.2015 alongwith connected matters."

Certain records were produced before us on 24.9.2015 which got noticed in our order of the day.

"The Praroop-I, as produced by the District Panchayat Raj Officer bearing the signatures of the District Magistrate, Azamgarh, records the name of the Gram Panchayats, number of persons belonging to Scheduled Caste, Scheduled Tribe, Other Backward Class categories and General Category in each Gram Panchayat with reference to the Census of 2011. In the last column is mentioned the total population.

It has been stated before this Court by Shri Kamal Singh Yadav, Additional Advocate General on the instruction from District Panchayat Raj Officer, D.P. Yadav that in the census of 2011, which was published in the official gazette, there was no identification of Other Backward Class category persons. This Court, therefore, enquired as to how the number of persons belonging to Other Backward Class category with reference to Census of 2011 have been depicted in Praroop-I, he stated that the figure of Other Backward Class category persons depicted therein is not with reference to Census of 2011 but based on rapid survey done. This Court again enquired from the Additional Advocate General, as to which part of Praroop-I, such a fact flows, no answer could be given.

It may be noticed that Praroop-I contains the signatures of the Chief Development Officer and the District Panchayat Raj Officer on the last page and bears the date 30.7.2015 and dated 31.7.2015 respectively.

After the matter was heard at some length, following issues arise for consideration:

"how can the elections for Zila Panchayat be held without the first level of three tier panchayat elections, namely, village panchayat elections being first held and then the intermediary level elections of kshetra panchayat."

The State has decided to postpone the village panchayat elections because it has not been able to determine the reservation to be applied against the panchayat seats.

We may record that Zila panchayat is to comprise of pramukh, up-pramukh and members of kshetra panchayat as well as other members who are to be elected from the territories to be carved out from Panchayat Area. Similarly, Kshetra Panchayat is to comprise of Gram Pradhans and other persons, who are to be elected directly from the constituency carved out from the Panchayat Area.

Panchayat Area has been provided under Section 11-F of the Uttar Pradesh Panchayat Raj Act, 1947 and under the proviso to Section 11-F it provides that revenue village or any hamlet shall not be divided, while determining the Panchayat Area.

Census of 2011 necessarily contains the details of population, revenue village wise population of Scheduled Caste and Scheduled Tribes as well as other category of persons, which will include the General Category and Other Backward Class category.

Therefore, we are of the prima facie opinion that it does have the figures of Scheduled Castes, Scheduled Tribes population residing in the constituencies, which have been constituted for Zila Panchayat, as it is to comprise of various village panchayats.

We direct the State to explain to the Court as to how figures of Other Backward Class Category persons have been collected. All material in that regard shall be produced before this Court. If it has been done on door to door survey then the relevant details which may reflect such door to door survey shall be produced before this Court.

The District Panchayat Raj Officer shall file his personal affidavit in that regard and disclose the names of persons, who have conducted the door to door survey and during which period. If only sample survey had taken place on random basis then the material collected during such random survey shall be produced before this Court.

The aforesaid issues have only been recorded so that the State is aware of what is to be examined by the Court.

The learned Standing Counsel is permitted obtain original records produced before this Court for making of photo copies of such records.

The records of other relevant districts may also be summoned.

The District Panchayat Raj Officer shall also explain the figures which have been depicted in the documents, which have been produced before us on the next date by means of an affidavit including the figures of the total population, population of Other Backward Class Category, Scheduled Caste Category, Scheduled Tribes Category and General Category alongwith the basis for the figures being so recorded.

The arguments are in progress. Put up this matter on Monday i.e. 28th September, 2015."

2. It was during the continuation of hearing of the writ petitions that an objection was raised by the State that identical writ petitions filed before this Court have been dismissed. Reliance have been placed upon the judgments of a Coordinate Bench in the case of Rishipal Singh v. State of U.P. and others: Public Interest Litigation No. 54008 of 2015, as well as in Rajesh Kumar Singh v. State of U.P. and others: Public Interest Litigation No. 51785 of 2015. Order dated 24.9.2015 passed in the case of Rishipal Singh (supra) is reproduced:

"The relief which has been sought in these proceedings which have been instituted as a public interest litigation is as follows:

"A. Issue a writ order or direction in the nature of mandamus directing the Respondent Authorities to cancel the reservation of the seat of Ward No. 18 of Zila Panchayat, Meerut to the other backward class (OBC) category and instead of it the said seat may be declared as Unreserved (UR) in the coming Zila Panchayat Elections."

On 21 September 2015, the State Election Commission has issued a notification for elections to the Zila Panchayats. In view of the constitutional bar contained in the Constitution, it would not be appropriate or proper for the Court to entertain the petition once the electoral process has been initiated. Hence, we decline to exercise our writ jurisdiction under Article 226 of the Constitution on that ground. The petition is, accordingly, dismissed. There shall be no order as to costs."

Having noticed orders passed by the coordinate bench, following orders were passed by us yesterday i.e. on 28.9.2015;

"In view of order dated 24.9.2015 passed by the Division Bench of this Court in the case in Public Interest Litigation No. 54008 of 2015, Rishipal Singh and another v. State of U.P. and another, Sri Kamal Singh, learned Additional Advocate General submits that the writ petitions, which are being heard by this Court, are liable to be dismissed in view of the constitutional bar contained in Article 243-O of the Constitution.

Sri Shashi Nandan, learned counsel for the petitioner has submitted that constitutional remedies as are provided under Article 226 of the Constitution of India is a basic feature of the Constitution which cannot be taken away. It is contended that the High Court under Article 226 of the Constitution of India can examine the legality of statutory provisions in case they are in violation of the constitutional provisions, including the provision contained under Article 14 of the Constitution of India. It is submitted that the Hon'ble Supreme Court has already held that even laws put under the 9th Schedule are amenable to exercise of writ jurisdiction. The provisions of the Uttar Pradesh Zila Panchayat Kshetra Panchayat Adhiniyam, 1961 therein cannot be elevated to any higher position than an Act put in the 9th Schedule.

In our opinion, the matter does need examination. Therefore, the matter may come up tomorrow i.e. 29.9.2015 for determination of the question raised above.

The personal appearance of the District Panchayati Raj Officer, Azamgarh is exempted. The relevant records may be produced before this Court as and when direction is so issued."

3. In light of the objection raised by Sri Kamal Singh Yadav, learned Additional Advocate General appearing for the State, with reference to the order of the Division Bench dated 24.9.2015, we have heard counsel for the parties and in view of the discussions noticed hereinafter, we are not entirely in agreement with the view taken by the Coordinate Bench.

4. The Division Bench in its order dated 24.9.2015 has taken note of the fact that the notification for holding of elections of Zila Panchayat have been issued by the State on 21.9.2015, and therefore, the constitutional bar under Article 243-O of the Constitution of India in entertaining of writ petitions got attracted.

5. Sri Shasi Nandan, learned Senior Counsel appearing for the petitioner in the leading writ petition, has attacked the process initiated by the State to constitute Panchayats alleging that the entire process is a mockery and farce. Following three submissions have been pressed:

(1) It is contended that composition of Zila Panchayat, election of which has been notified on 21.9.2015, has been provided for under Section 18 of the Adhiniyam of 1961. Sub-section (1) of Section 18 provides that a Zila Panchayat shall consist of an Adhyaksha who shall be its Chairperson and; (a) Pramukhs of all Kshettra Panchayats in the district; and (b) elected members, who shall be chosen by direct election from the territorial constituencies in the Panchayat area and for such purpose the Panchayat area shall be divided into territorial constituencies in such manner that, so far as practicable, each territorial constituency shall have a population of fifty thousand. Similarly, composition of Kshettra Panchayat has been provided for in Section 6, which is to consist of a Pramukh, who shall be its Chairperson and; (a) all the Pradhans of the Gram Panchayats in the Khand; and (b) elected members who shall be chosen by direct election from the territorial constituencies in the Panchayat area and for such purpose Panchayat shall be divided into territorial constituencies in such manner that so far as practicable, each territorial constituency shall have a population of two thousand, for the purposes of election of Pramukh of Kshetra Panchayat.

Section 12 of the Act of 1947 provides for constitution of Gram Panchayat for every Panchayat area, which shall consist of a Pradhan and specified number of members depending upon the population of Panchayat.

It is submitted that constitution of Panchayat at village level constitute the base upon which Panchayat at intermediate level and district level are formed. Submission is that in the absence of constitution of gram Panchayats and election of Pradhans, it would not be possible to constitute Kshettra Panchayat and in absence of Kshettra Panchayat the constitution of Zila Panchayat would be impermissible. It is further submitted that electoral roll prepared for the Gram Panchayat under Section 9 of the Act of 1947 is also the electoral roll for elections to the Kshettra Panchayat by virtue of Section 6-B(2) of the Adhiniyam of 1961 and for holding of elections of Zila Panchayat by virtue of Section 18-B(2) of the Adhiniyam of 1961.

Attention of the Court has been invited to the notification issued by the Principal Secretary of the State Government at 5.9.2015, contained in Annexure-7 to the leading writ petition, whereby the proceedings for reservation and allotment of seats in respect of the elections of Gram Pradhan and members of Gram Panchayat have been deferred until further orders, but the process for holding of

elections of Pramukh and member of Kshettra Panchayat and Zila Panchayat in accordance with the schedule is to continue. It is submitted that basic data for the purpose of holding elections of Gram Panchayat are incomplete and since it form basis for intermediate and district level panchayat, the holding of elections for intermediate and district level are flowed. It is submitted that holding of elections of Kshettra Panchayat and Zila Panchayat, in the manner as is being proceeded with by the State, without holding the elections of Gram Panchayat is clearly contrary to the statutory scheme framed in accordance with Part-IX of Constitution.

(2) The second limb of submission advanced on behalf of the petitioners is with regard to reservation of constituencies in excess of ceiling prescribed under the Act, and by doing away with the process of rotation, as a result of which petitioners' right to contest the elections have been taken away.

(3) It is submitted that the petitioners have no other remedy except filing of the writ petition, inasmuch as the illegal reservation resorted to by the State for holding of the elections would not be a ground available for challenging the elections by way of an election petition by a person who cannot contest the elections because of reservation and the petitioners would be rendered remedy-less, unless this Court intervenes under Article 226 of the Constitution of India.

6. Sri Kamla Singh Yadav, learned Additional Advocate General, in addition to the order dated 24.9.2015 passed by the Coordinate Bench of this Court has relied upon the following judgments:

1. N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, .

2. Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, .

3. Anugrah Narain Singh and Another Vs. State of U.P. and Others, .

7. Various other decisions have been relied upon for the proposition that a writ petition would not lie under Article 226 of the Constitution of India, once a notification has been issued for holding of elections.

8. Sri T.P. Singh, learned Senior Counsel appearing for the State Election Commission has also advanced similar submissions.

9. On behalf of the petitioners reliance has been placed upon the judgments of the Honable Supreme Court in the case of L. Chandra Kumar Vs. Union of India and others, , Waman Rao and Ors Vs. Union of India (UOI) and Others, , Minerva Mills Ltd. and Others Vs. Union of India (UOI) and Others, , His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala, , in order to contend that the constitutional remedy of judicial review provided under Article 226 of the Constitution of India is a part of the basic structure of the Constitution, which cannot be taken away. Reliance has also been placed upon the judgment of the Honable Supreme Court in the case of Election Commission

of India Through Secretary Vs. Ashok Kumar and Others, , Chand Prasad and Others Vs. State of Bihar and Others--> , Smt. Sk. Khasim Bee Vs. The State Election Commissioner and others, and judgment of the Madhya Pradesh High Court in Ashok Kumar Tripathi v. Union of India and others, delivered on 17th December, 1999 in Writ Petition No. 2059 of 1999 alongwith other connected matters.

10. Having considered the submissions advanced by learned counsels at bar with reference to the judgments relied upon, we find that the self-imposed restrictions by a Writ Court under Article 226 of the Constitution of India in matters of holding of elections have been stringently resorted to, and any interference in the process of elections is ordinarily discouraged. In matters where process of election has commenced interference by Writ Court at the intermediate stage is ordinarily not to be resorted. It has been emphasized time and again by the Hon'ble Supreme Court that once the process of election has commenced, any person aggrieved should be allowed to raise his grievance by filing an election petition only. However, in cases where election is not being held in accordance with the Constitution or there are inherent defects or breaches of election law rendering the whole election itself a farce, would warrant an interference under Article 226 of the Constitution of India is the moot question?

11. A Division Bench consisting of Hon'ble Justice D. Dharmadhikari (as His Lordship then was) speaking for a Division Bench judgment of the Madhya Pradesh High Court in the case of Ashok Kumar Tripathi Vs. Union of India (UOI) and Others, , observed as under in para-graph-29:

"29. The bar, however, cannot be read as meaning to curtail the constitutional power of judicial review conferred on Constitutional Court like High Court under Article 226 of the Constitution of India. Provisions of Articles 243O and 243ZG require the Constitutional Court to exercise self restraint, in interfering with the election when the process for holding it has already commenced. No election should be interdicted or stalled merely on the ground of some alleged infraction of Rules or Procedure in holding the election and all disputes should be relegated to a stage after the conclusion of the election, through the election petition and on grounds available in election law. The Articles, however, cannot be read that where the election has not been held in accordance with the Constitution or there are inherent defects or breaches of the election law rendering the whole election a farce or a mockery, the Court "should still refuse to interfere. In taking the above view, we are supported by the observations of the Supreme Court in the cases of Lakshmi Charan Sen and Others Vs. A.K.M. Hassan Uzzaman and Others, , and K. Venkatachalam Vs. A Swamickan and Another, where irrespective of the constitutional bar for interference in election matter, if the election is found to be inherently vicious and fundamentally defective in law, Constitutional power of the Court under Article 226 has been held to be available. In the case of K. Venkatachalam (supra) a candidate who lacked basic qualification of being a voter to be able to contest for the Assembly Constituency

had been elected and participated in the deliberations of the Assembly. When his election was challenged bar of Article 329(b) of the Constitution was urged in support of his elected status. It was held that power of the Court under Article 226 is not taken away by Article 329(b) when it is found that the person elected had committed a fraud as he was not qualified to seek election in accordance with the Constitutional provisions in Articles 191 and 193 . In our considered opinion, therefore, Articles 243O and 243ZG to not create absolute bar on the power of the Court under Article 226 . This Constitutional Court is competent, to examine whether there are any fundamental breaches of the Constitution and the laws calling for its interference. The power of this Court would, however be exercised not unmindful of the fact that the Constitution and the Legislature of the State discourage interference in the process of election only on stray and trivial breaches of procedure and laws. Any alleged inherent and vital defects in election cannot, however, be held to be beyond judicial scrutiny of this Court under Article 226 of the Constitution."

12. The Division Bench of the Madhya Pradesh High Court had the occasion to observe so in the context of a preliminary objection raised with regard to maintainability of the writ petition raised by State on the strength of the judgment of the Hon"ble Supreme Court in the case of Anugrah Narain Singh and Another Vs. State of U.P. and Others, . The Division Bench took note of the judgment of the Hon"ble Supreme Court in Lakshmi Charan Sen and Others Vs. A.K.M. Hassan Uzzaman and Others, , as well as the judgment of the Apex Court in the case of K. Venkatachalam Vs. A Swamickan and Another, .

13. Subsequent to the aforesaid Division Bench judgment of the Madhya Pradesh High Court, Hon"ble Supreme Court in the case of Election Commission of India Through Secretary Vs. Ashok Kumar and Others, , while referring to the provisions of Article 329 of the Constitution of India, after referring to the judgment of the Hon"ble Supreme Court in N.P. Ponnuswami (supra) and Mohinder Singh Gill (supra), has been pleased to observe as under in paragraphs 20 and 21:

"20. Vide para 29 in Mohinder Singh Gills case, the Constitution Bench noticed two types of decisions and two types of challenges: The first relating to proceedings which interfere with the progress of the election and the second which accelerate the completion of the election and acts in furtherance of an election. A reading of Mohinder Singh Gills case points out that there may be a few controversies which may not attract the wrath of Article 329 (b) . To wit:

(i) power vested in a functionary like the Election Commission is a trust and in view of the same having been vested in high functionary can be expected to be discharged reasonably, with objectivity and independence and in accordance with law. The possibility however cannot be ruled out where the repository of power may act in breach of law or arbitrarily or mala fide.

(ii) A dispute raised may not amount to calling in question an election if it

subverses the progress of the election and facilitates the completion of the election. The Election Commission may pass an order which far from accomplishing and completing the process of election may thwart the course of the election and such a step may be wholly unwarranted by the Constitution and wholly unsustainable under the law.

In Mohinder Singh Gills case, this Court gives an example (vide para 34). Say after the President notifies the nation on the holding of elections under Section 15 and the Commissioner publishes the calendar for the poll under Section 30 if the latter orders returning officers to accept only one nomination or only those which come from one party as distinguished from other parties or independents, which order would have the effect of preventing an election and not promoting it, the Courts intervention in such a case will facilitate the flow and not stop the election stream.

21. A third category is not far to visualise. Under Section 81 of the Representation of the People Act, 1951 an election petition cannot be filed before the date of election, i.e., the date on which the returned candidate is declared elected. During the process of election something may have happened which would provide a good ground for the election being set aside. Purity of election process has to be preserved. One of the means for achieving this end is to deprive a returned candidate of the success secured by him by resorting to means and methods falling foul of the law of elections. But by the time the election petition may be filed and judicial assistance secured material evidence may be lost. Before the result of the election is declared assistance of Court may be urgently and immediately needed to preserve the evidence without in any manner intermeddling with or thwarting the progress of election. So also there may be cases where the relief sought for may not interfere or intermeddle with the process of the election but the jurisdiction of the Court is sought to be invoked for correcting the process of election taking care of such aberrations as can be taken care of only at that moment failing which the flowing stream of election process may either stop or break its bounds and spill over. The relief sought for is to let the election process proceed in conformity with law and the facts and circumstances be such that the wrong done shall not be undone after the result of the election has been announced subject to overriding consideration that the Courts intervention shall not interrupt, delay or postpone the ongoing election proceedings. The facts of the case at hand provide one such illustration with which we shall deal with a little later. We proceed to refer a few other decided cases of this Court cited at the Bar."

After noticing the judgments of the Apex Court in the cases of Lakshmi Charan Sen and Others Vs. A.K.M. Hassan Uzzaman and Others, and Election Commission of India Vs. State of Haryana, , following observations were also made in paragraphs 30 to 32:

"30. To what extent Article 329 (b) has an overriding effect on Article 226 of the Constitution? The two Constitution Benches have held that Representation of the

People Act, 1951 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. The non-obstante clause with which Article 329 opens pushes out Article 226 where the dispute takes the form of calling in question an election (see para 25 of Mohinder Singh Gills case, supra). The provisions of the Constitution and the Act read together do not totally exclude the right of a citizen to approach the Court so as to have the wrong done remedied by invoking the judicial forum; nevertheless the lesson is that the election rights and remedies are statutory, ignore the trifles even if there are irregularities or illegalities, and knock the doors of the Courts when the election proceedings in question are over. Two-pronged attack on anything done during the election proceedings is to be avoided - one during the course of the proceedings and the other at its termination, for such two-pronged attack, if allowed, would unduly protract or obstruct the functioning of democracy.

31. The founding fathers of the Constitution have consciously employed use of the words no election shall be called in question in the body of Section 329(b) and these words provide the determinative test for attracting applicability of Article 329(b) . If the petition presented to the Court calls in question an election the bar of Article 329(b) is attracted. Else it is not.

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."

14. Hon"ble Aftab Alam, J. (as His Lordship then was) in a judgment delivered by the Patna High Court in the case of Chand Prasad and Others Vs. State of Bihar and Others--> , relied upon the aforesaid observations of the Hon"ble Supreme Court in Election Commission of India v. Ashok Kumar (supra) that the Court proceed to issue directions to take remedial visits after noticing the provisions of Article 243-O of the Constitution. Similarly a Division Bench of the Andhra Pradesh High Court in the case of Smt. Sk. Khasim Bee Vs. The State Election Commissioner and others, , proceeded to observe that the power under Article 226 of the Writ Court will be available, where constitutional validity of Act or Rule or Notification affecting the election is challenged, notwithstanding Article 243-O of the Constitution. It is to be noticed that after the judgment of the Constitution Bench in His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala, , recognizing the basic feature of the Constitution as being immune from power of amendment and even the laws put to 9th Schedule of the Constitution of India were also subjected to judicial review in Minerva Mills case (supra) and in Woman Rao v. Union of India case (supra). Hon"ble Chief Justice Y.V. Chandrachud speaking for a Constitution Bench observed as under in Woman Rao (supra) in paragraph 63 subclause (1), (2) & (3):

"63. These then are our reasons for the order which we passed on May 9, 1980 to the following effect: (SCC pp. 588-89, paras 1-6)

(1) The Constitution (First Amendment) Act, 1951 which introduced Article 31A into the Constitution with retrospective effect, and Section 3 of the Constitution (Fourth Amendment) Act, 1955 which substituted a new Clause (1), Sub-clause (a) to (e), for the original Clause (1) with retrospective effect, do not damage any of the basic or essential features of the Constitution or its basic structure and are valid and constitutional, being within the constituent power of the Parliament.

(2) Section 5 of the Constitution (First Amendment) Act 1951 introduced Article

31-B into the Constitution which reads thus:

31-B.....

In *Keshvananda Bharati* (1973, Suppl., SCR 1) decided on April 24, 1973 it was held by the majority that Parliament has no power to amend the Constitution so as to damage or destroy its basic or essential features or its basic structure. We hold that all amendments to the Constitution which were made before April 24, 1973 and by which the 9th Schedule to the Constitution was amended from time to time by the inclusion of various Acts and Regulations therein, are valid and constitutional. Amendments to the Constitution made on or after April 24, 1973 by which the 9th Schedule to the Constitution was amended from time to time by the inclusion of various Acts and Regulations therein, are open to challenge on the ground that they, or any one or more of them, are beyond the constituent power of the Parliament since they damage the basic or essential features of the Constitution or its basic structure. We do not pronounce upon the validity of such subsequent constitutional amendments except to say that if any Act Regulation included in the 9th Schedule by a Constitutional amendment made on or after April 24, 1973 is saved by Article 31A , or by Article 31C as it stood prior to its amendment by the 42nd Amendment, the challenge to the validity of the relevant Constitutional Amendment by which that Act or Regulation is put in the 9th Schedule, on the ground that the Amendment damages or destroys a basic or essential feature of the Constitutional or its basic structure as reflected in Articles 14 , 19 or 31 , will become otiose.

(3) Article 31C of the Constitution, as it stood prior to its amendment by Section 4 of the Constitution (42nd Amendment), Act, 1976, is valid to the extent to which its constitutionality was upheld in *Keshvananda Bharati*. Article 31C , as it stood prior to the Constitution (42nd Amendment) Act does not damage any of the basic or essential features of the Constitution or its basic structure."

15. We record that a Constitution Bench of Seven Hon''ble Judges in the case of *L. Chandra Kumar Vs. Union of India and others*, , had the occasion to interpret the judgments in *Kesavanand Bharti* case (supra) as interpreted in subsequent decision in *Minerva Mills Ltd. case* (supra) and in *Woman Rao case* (supra). After noticing the subsequent decisions of the Constitution Bench, the Constitution Bench went on to hold that power of judicial review were by High Court under Article 226 of the Constitution and Hon''ble Supreme Court under Article 32 is an integral and essential feature of the Constitution, and therefore, constitute part of its basic structure. The Court ultimately went on to hold Clause 2(d) of Article 323-A and Clause 3(d) of Article 323-B to the extent that they exclude the jurisdiction of High Court under Article 226 /227 and the Hon''ble Supreme Court in Article 32 of the Constitution as being unconstitutional. Paragraphs 78 and 99 of the judgment of the Supreme Court are reproduced:

"78. The legitimacy of the power of Courts within constitutional democracies to review legislative action has been questioned since the time it was first

conceived. The Constitution of India, being alive to such criticism, has, while conferring such power upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the Framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the independence of the judiciary. These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review. While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior Courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed by such provisions, the superior Courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions. The Judges of the superior Courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate Courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the Judges of the superior judiciary, are not available to the Judges of the subordinate judiciary or to those who man Tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Articles 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.

99. In view of the reasoning adopted by us, we hold that Clause 2(d) of Article 323A and Clause 3(d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226 /227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323A and 323B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226 /227 and upon the Supreme Court "under Article 32 of the Constitution is part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other Courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226 /227 and 32 of the Constitution. The Tribunals created under Article 323A and Article 323B of the Constitution are possessed of the

competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the concerned Tribunal falls. The Tribunals will, nevertheless, continue to act like Courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated."

16. It is to be noticed that judgment of the Constitution Bench in L. Chandra Kumar case (supra) has been rendered by the Seven Hon''ble Judge after the judgment of the Division Bench of the Hon''ble Supreme Court in Anugrah Narain Singh and another v. State of U.P. (supra).

17. Subject to the inherent of limitation on the scope of the exercise of power of High Court under Article 226 in matters relating to holding of election, we are of the considered opinion that the constitutional bar contained in Article 243-O of the Constitution would not bar of jurisdiction or constitutional Courts under Article 226 and Article 32 of the Constitution of India, and therefore, with great respect to the Coordinate Bench delivering the judgment dated 24th September, 2015, we find ourselves it difficult to agree to views expressed therein.

18. We further take note of the fact that the Hon''ble Supreme Court has been pleased to entertain challenge to a similar notification issued by the State of Haryana in Writ Petition (C) No. 671 of 2015 Rajbala and others v. State of Haryana and others. Following orders have been passed on 17.9.2015:

"Taken on board.

Issue notice.

In the meanwhile, there shall be interim stay of the notification. The Haryana Panchayat Raj (Amendment) Act, 2015 (Haryana Act No. 8 of 2015) dated 7.9.2015."

19. This Bench finds it difficult to accept the law as laid down by the Division Bench of this Court in Public Interest Litigation (PIL) No. 54008 of 2015 (Rishipal Singh v. State of U.P. and others) to the effect that though reservation of seats for the elections is under challenge but once the notification for election of Zila Panchayat has been issued, it would not be appropriate or proper for the Court to entertain the petition once the electoral process has been initiated, in view of the constitutional bar contained in Article 243-O of the Constitution of India.

20. In our opinion, if the very process of holding election or implementation of reservation under the Rules, in respect of the various constituencies of Zila Panchayat has to be challenged, then the only remedy available to a person, not belonging to the reserved category in question for which the seat has been

reserved, is to file petition under Article 226 of the Constitution of India. He has no remedy elsewhere. His challenge to the process of reservation may ultimately succeed or may not succeed, is a different issue, but it cannot be said that the writ petition is not maintainable. The writ petition raising such issue, in our opinion, have to be entertained, notwithstanding the bar contained in Article 243-O of the Constitution of India.

21. Following questions, in this regard, therefore are referred for examination by the Larger Bench:

"(a) Whether, constitutional remedy of judicial review under Article 226 of the Constitution of India, which has been recognised as a basic feature of constitution in *L. Chandra Kumar Vs. Union of India* and others, , could be curtailed in view of the bar created under Article 243-O of the Constitution of India?

(b) Whether, a writ petition under Article 226 of the Constitution of India can be refused to be entertained for the reason that a notification for holding the Panchayat elections has been issued by the State in view of Article 243-O of the Constitution of India, even where:

(i) vires of election laws is questioned,

(ii) Government Orders issued for effecting the election are stated to be in breach of election laws/arbitrary,

(iii) actual implementation by the State of election laws/Government Orders is stated to be in breach of the provisions,

(iv) any other similar issue?

(c) Whether, the High Court in exercise of power under Article 226 of the Constitution of India can interfere in the election process, if the elections are not being held in accordance with the Constitution of India or there is inherent defects or breaches of the election law making the entire election a mockery or a farce?

(d) Whether, this Court would permit ongoing process of election, in the facts of the present case, or not?

(e) Whether, the vires of the election laws as well as reservation of seats can be subjected to challenge only in a petition under Article 226 of the Constitution of India or else the aggrieved person is rendered remedy less?

(f) Whether, the judgment of the Division Bench in the case of *Rishipal Singh v. State of U.P. and others* (supra) has laid down the correct law?

22. Since the elections are in progress and various important issues including that of reservation of the various constituencies has been seriously canvassed before us, we request the Hon''ble the Chief Justice to constitute a Larger Bench for answering the aforesaid question, if possible, in the next week.

23. Sri T.P. Singh, learned Senior Advocate, appearing on behalf of the State Election Commission submitted that the State may be given an opportunity to correct the error in the matter of reservation. We need not express our opinion on this issue as it is always open for the State to correct its own mistake. Original records are returned to the standing counsel.