

(2005) 10 GUJ CK 0016

In the Gujarat High Court

Case No : Special Civil Application No. 20859 of 2005

Thakore Shanabhai Gedalbhai

APPELLANT

Vs

State Election Commission and Others

RESPONDENT

Date of Decision : 18-10-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 226, 243C, 243K, 243O, 243O(b)
Gujarat Municipalities Act, 1963 — Section 14, 14(5), 14(5)(iii), 2(7A)
Representation of the People Act, 1951 — Section 100, 15, 30, 80, 81

Citation : (2005) 25 GLH 687

Hon'ble Judges : P.B. Majmudar, J;G.S. Singhvi, J

Bench : Division Bench

Advocate : Ashim Pandya, Y.N. Oza, assisted by Mr. Hriday Buch, for the Appellant; S.N. Shelat assisted by Shri N.V. Anjaria, Advocate for State Election Commission (respondent No. 1) Shri S.P. Hasurkar, Assistant Government Pleader for Returning Officer and Taluka Development Officer, Virpur (respondent No. 2) and Shri Vijay Patel, Advocate for newly added, for the Respondent

Final Decision : Dismissed

Judgement

G.S. Singhvi, J.—Election is the essence of political democracy. It gives the people right to choose their representatives after a specified interval. Therefore, expeditious holding of elections is absolutely imperative. In order to ensure that the process of election is not impeded by interlocutory judicial interventions, the founding fathers of the Constitution incorporated Art. 329 in Part XV of the Constitution and enacted bar to interference by Courts in electoral matters. That article reads as under: "329. Bar to interference by courts in electoral matters. --

Notwithstanding anything contained in this Constitution -

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

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

When part IX and IX-A were inserted in the Constitution by the Constitution (73rd Amendment) Act, 1992 and the Constitution (74th Amendment) Act, 1992 and the Panchayats and municipalities were declared as institutions of self-government, similar bar was enacted in the form of Articles 243-O and 243-ZG. These two Articles also read as under: "243-O. Bar to interference by courts in electoral matters. -

Notwithstanding anything in this Constitution --

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies made or purporting to be made under Article 243K, shall not be called in question in any court;

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

"243 ZG. Bar to interference by courts in electoral matters. --

Notwithstanding anything in this Constitution --

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243ZF shall not be called in question in any court;

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

2. The ambit and scope of the bar contained in Art. 329 was considered by a Constitution Bench of Supreme Court in *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others*, . In that case, the appellant was one of the persons, who had filed nomination paper for election to Madras Legislative Assembly from Namakkal Constituency of Salem District. The Returning Officer rejected his nomination paper. The appellant moved the High Court under Article 226 of the Constitution of India for quashing the order of the Returning Officer and for issuance of mandamus for inclusion of his name in the list of valid nominations. The High Court dismissed the writ petition on the ground that it did not have the jurisdiction to interfere with the order of the Returning Officer. In appeal, the Supreme Court interpreted the word "election" appearing in Part XV of the Constitution and held : "the word "election" has been used in Part XV of the Constitution in the right sense, that is to say, to connote the entire procedure to be gone through to return the candidate to the legislature. The use of the expression "conduct of elections" in Article 324 specifically points to the wide

meaning and that meaning can also be read consistently into the other provisions which occur in Part XV including Article 329 (b). The term "election" may be taken to embrace the whole procedure whereby an elected member is returned, whether or not it be found necessary to take a poll. It" is not used in narrow sense."

3. The Supreme Court then considered whether intermediary intervention in the process of election is permissible. Their Lordships referred to the judgements of the Madras High Court in *Kulandaivelu Pillai Vs. Venkatarayar and Another*, and of Lahore High Court in *Sat Narain Gurwala vs. Hanuman Parshad and Another* and approved the views taken in those cases and laid down the following propositions.

"The law of election in India does not contemplate that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Art. 226 of the Constitution (the ordinary jurisdiction of the Courts having been expressly excluded), and another after they have been completed by means of an election petition. Any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any Court. Under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. Article 329 (b) was apparently enacted to prescribe the manner in which and the stage at which this ground, and other grounds which may raised under the law to call the election in question could be urged. It follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other Court. If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any, are rectified, there will be no meaning in enacting a provision like Art.329 (b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by the High Court at the pre-polling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought up before it.

The Representation of the People Act is a self-contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the rules made thereunder. Section 80, which is drafted in almost the same language as Article 329 (b), provides that "no election shall be called in question except by an election petition presented in accordance with the provisions of this Part". Section 80, along with Ss.100, 105 and 170 are the main provisions regarding election matters being judicially dealt with, and there is no provision anywhere to the effect that anything connected with elections can be

questioned at an intermediate stage."

4. In *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, . another Constitution Bench again considered the scope of the bar contained in Article 329 (b) and laid down the following propositions.

"(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matter 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."

5. In *Election Commission of India Through Secretary Vs. Ashok Kumar and Others*, , a three Judges Bench of the Supreme Court considered whether in exercise of power under Article 226 of the Constitution of India the High Court was justified in staying the notification issued by the Election Commission containing directions as to the manner of counting votes. The Supreme Court noticed several judicial precedents including the Constitution Bench judgements in *N. Ponnuswamy's case* (supra) and *Mohinder Singh Gill's case* (supra) and observed as under :

"20. Vide para 29 in *Mohinder Singh Gill 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 Gill case* points out that there may be a few controversies which may not attract the wrath of Article 329 (b). To wit:

(i) Powers 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 reasonable, 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 subserves the progress of the election and facilitates the completion of the election. The Election Commission may pass an order which far from accomplishing and contemplating 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 Sing Gill case this Court gives an example (vide para 34). Say after the President notifies the nation on the holding of elections u/s 15 and the Commissioner publishes the calendar for the poll u/s 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 Court's intervention in such a case will facilitate the flow and not stop the election stream.

21. A third category is not far to visualise. u/s 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 of 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 need 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 Court's 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.

28. Election disputes are not just private civil disputes between two parties. Though there is an individual or a few individuals arrayed as parties before the court but the stakes of the constituencies as a whole are on trial. Whichever way the lis terminates it affects the fate of the constituency and the citizens generally. A conscientious approach with overriding consideration for welfare of the constituency and strengthening the democracy is called for. Neither turning a blind eye to the controversies which have arisen nor assuming a role of overenthusiastic activists would do. The two extremes have to be avoided in dealing with election disputed.

29. Section 100 of the Representation of the People Act, 1951 need to be read with Article 329 (b), the former being a product of the latter. The sweep of Section 100 spelling out the legislative intent would assist us in determining the span of Article 329 (b) though the fact remains that any legislative enactment cannot curtail or override the operation of a provision contained in the Constitution. Section 100 is the only provision within the scope of which an attack on the validity of the election must fall so as to be a ground available for avoiding an election and depriving the successful candidate of his victory at the polls. The Constitution Bench in Mohinder Singh Gill case (vide SCC p.429, para 33) asks us to read Section 100 widely as "covering the whole basket of grievances of the candidates". Sub-clause (iv) of clause (d) of sub-section (1) of Section 100 is a "residual catch-all clause". Whenever there has been non-compliance with the provisions of the Constitution or of the Representation of the People Act, 1951 or of any Rules or Orders made thereunder if not specifically covered by any other preceding clause or sub-clause of the section it shall be covered by sub-clause (iv). The result of the election insofar as it concerns a returned candidate shall be set aside for any such non-compliance as the abovesaid subject to such non-compliance, also satisfying the requirement of the result of the election having been shown to have been materially affected insofar as a returned candidate is concerned. The conclusions which inevitably follow are : in the field of election jurisprudence, ignore such things as do not materially affect the result of the election unless the requirement of satisfying the test of material effect has been dispensed with by the law; even if the law has been breached and such breach satisfies the test of material effect on the result of the election of the returned candidate yet postpone the adjudication of such dispute till the election proceedings are over so as to achieve, in larger public interest. The goal of constituting a democratic body without interruption or delay on account of any controversy confined to an individual or group of individuals or single constituency having arisen and demanding judicial determination.

30. To what extent Article 329 (h) 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 Gill case). 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."

In paragraph 32 of the judgement, the Supreme Court culled out the following conclusions.

"(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 court's 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."

In paragraph 33 their Lordships clarified that aforestated conclusions should not be construed as summary of the judgement but should be read along with earlier part of the judgement containing reasons on which the aforementioned conclusions are based.

6. We have prefaced the disposal of the abovenoted petition and Special Civil Application Nos. 20860 of 2005 to 20872 of 2005 filed by the petitioners for quashing the orders of the Returning Officer vide which he rejected their nomination papers on the ground of non-submission of mandate of the political party along with the nomination papers because at the threshold of hearing an objection has been taken to the jurisdiction of this Court to exercise powers under Article 226 of the Constitution of India in view of the bar contained in Article 243-O.

7. The petitioners have challenged the orders of the Returning Officer mainly on the ground that the reasons assigned by him for rejecting their nomination papers, i.e., non-filing of the mandate of the political party along with nomination paper is extraneous to the provisions contained in Gujarat Panchayats Act, 1993 (for short, "the Panchayats Act") and Gujarat Panchayat Election Rules, 1994 (for short, "the Rules"). According to the petitioners, the scheme of rules contained in Part IV of the Rules neither provides for filing of mandate of the political party along with the nomination paper nor it is one of the grounds specified in Rule 15 (2) of the Rules for rejection of the nomination paper and, therefore, the Returning Officer committed a grave illegality by rejecting their nomination papers. It is also the pleaded case of the petitioners that the impugned orders have been passed by the Returning Officer with a view to ensure virtually uncontested election of the candidates of the party, which is in power in the State.

8. In the counter-affidavits filed by and on behalf of the respondents, it has been pleaded that in the face of bar contained in Article 243-O of the Constitution, the High Court cannot entertain a writ petition and issue directions for entertaining nomination of the petitioner because that would amount to interference with the process of election. According to the respondents, the process of election commenced with the issuance of notification by the State Election Commission in compliance of direction given by the High Court in Special Civil Application No. 10602 of 2005 and connected matters and, therefore, the rejection of the nomination papers of the petitioners, which is a part of the process of election cannot be called in question by filing a writ petition under Article 226 of the Constitution. The respondents have also defended the rejection of nomination papers of the petitioners by asserting that they had failed to file the mandate of the political party as per the requirement of order dated 17-4-1995 issued by the State Election Commission in exercise of its powers under Article 243K of the Constitution read with Rule 11 of the Rules. It is the case of the respondents that in terms of Clause 4 (2) of the order dated 17-4-1995, as amended with effect from 14-8-2000, the written intimation regarding the candidate of a political party is required to be given to the Election Officer and Secretary, State Election Commission upto 3 p.m. on the last day of submission of nomination papers, which the petitioners had failed to do and, therefore, the Returning Officer was justified in rejecting their nomination papers. It is also the case of the respondents that the order issued by the State Election Commission is in

consonance with the Election Symbols (Preservation and Allotment) Order, 1968 issued by the Election Commission of India and the provisions contained therein are statutory in nature.

9. In the rejoinder-affidavit filed in Special Civil Application No. 20859 of 2005, the petitioner has pleaded that the bar contained in Article 243-O of the Constitution is not attracted in his case because none of the reliefs prayed for by him interrupts, protracts or obstructs the election process. He has reiterated that the rejection of his nomination paper is *ex facie* illegal and this Court can exercise the power of judicial review in such matter so that his right to contest the election is not jeopardized. Another plea taken by the petitioner is that rejection of nomination paper cannot be made a ground for challenging the election u/s 31 of the Panchayats Act and if at this stage the Court does not interfere with the arbitrary, illegal and malicious order passed by the Returning Officer, then his right will be totally stultified.

10. Shri Y.N. Oza, learned Senior Advocate appearing for the petitioners referred to the provisions contained in Part IV of the Rules and argued that rejection of the nomination papers of the petitioners only on the ground of non-submission of the mandate of the political party along with nomination papers should be declared *ultra vires* to Rule 15 of the Rules because this is not one of the grounds on which the Returning Officer can reject the nomination paper. Shri Oza submitted that Rule 12 and Form 4 appended to the Rules do not provide for filing of the mandate of the political party along with the nomination paper and, therefore, rejection of nomination paper of the petitioner should be declared as nullity. He laid considerable emphasis on sub-rule 4 of Rule 15 and explanation appearing below that sub-rule and argued that non-filing of the mandate of the political party along with nomination paper can, at the best, be treated as technical defect and such defect cannot justify outright rejection of the nomination paper. Shri Oza pointed out that the petitioners had submitted the required mandate of the political party on 11-10-2005, i.e., before the scrutiny of nomination papers, which was to take place on 13-10-2005 and, therefore, the Returning Officer was not justified in rejecting the nomination papers. Shri Oza then argued that the petitioners should not be denied constitutional remedy under Article 226 of the Constitution of India because illegal rejection of nomination papers is not one of the grounds on which a petition can be filed u/s 31 of the Panchayats Act. He submitted that the word "election" used in that section takes its colour from the definition of that term contained in Rule 2 (f) of the Rules and the same cannot be given wider meaning so as to include improper rejection of nomination paper. To buttress his argument, Shri Oza referred to the definition of term "election" contained in Section 2 (7-A) of Gujarat Municipalities Act, 1963 and Section 14 (5) of the said Act, which contemplates improper rejection of the nomination paper as one of the grounds on which the election can be challenged by filing petition u/s 14 and argued that absence of similar definition in the Panchayats Act is clearly indicative of the Legislature's intention not to make illegal or improper rejection or acceptance of nomination as one of

the grounds for challenging the result of election u/s 31 of the Panchayats Act. Shri Oza strongly relied on conclusion No. 3 of Ashok Kumar's case (supra) and argued that acceptance of the petitioners' prayer for quashing orders passed by the Returning Officer would not in any manner interrupt, obstruct or delay the progress of election. He submitted that sufficient time is available for completing the process of election by including the name of the petitioners in the list to be prepared in terms of Rule 18 of the Rules and the concerned authority will face no difficulty in taking steps for completing the election as per prescribed schedule.

11. Shri Harin P. Raval and Shri P.S. Champaneri, learned advocates appearing for the petitioners in other cases which have been listed today, adopted the arguments of Shri Oza and submitted that the Court should intervene at this stage to ensure that elections are held in a democratic manner and all parties get due opportunity to contest the election. Shri Harin Raval laid considerable emphasis on the fact that most of the petitioners to whom he is representing had filed the mandate of the political party along with nomination paper and argued that rejection of their nomination papers has no legal sanctity whatsoever.

12. Shri S.N. Shelat, learned Senior Advocate appearing for the State Election Commission, argued that term "election" appearing in Article 243-O and Section 31 of the Act is of wide import and includes the entire process of election commencing from the date of notification by the State Election Commission and culminating in the declaration of result. Shri Shelat emphasized that all intermediary steps like preparation of electoral rolls, filing of nomination papers, scrutiny and withdrawal thereof, the casting of votes and counting thereof, form part of the process of election and, therefore, any action taken or order passed in the process of election can be made subject matter of a petition u/s 31 of the Panchayats Act, which can be filed after declaration of the result of election. He then argued that in view of the expressed bar contained in Article 243-O, this Court cannot entertain a petition filed under Article 226 of the Constitution of India questioning the rejection of the nomination paper because that would tantamount to interfering with the process of election. Shri Shelat further submitted that a direction by the Court to prepare list of contesting candidates by including the names of the petitioners and allotting them a particular symbol would constitute an interference with the process of election and, therefore, the writ petitions should be dismissed as not maintainable. In support of this argument, Shri Shelat relied on the following judgements.

i) Kanchanbhai v. Maneklal 1965 (6) GLR 200 (D.B.)

ii) Election Officer v. Dharamsinhbhai Muljibhai, 1995 GLH 242

iii) Vinodbhai Bikhabhai Harijan Vs. Election Officer and Additional Taluka Dev. Officer,

iv) N.P. Ponnuswamy v. Returning Officer, Namakkal Constituency (supra),

v) Mohinder Sing Gill v. Chief Election Officer (supra)

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

vii) Boddula Krishnaiah and another Vs. State Election Commissioner, A.P. and others, .

13. Shri Shelat then argued that the instructions issued by the State Election Commission vide order dated 17-4-1995 are statutory in character and noncompliance thereof constituted a valid ground for rejection of nomination papers of the petitioners.

14. Shri Ashim Pandya, learned counsel for the intervener argued that in terms of the instructions issued by the State Election Commission under Article 243 K, the petitioners were duty bound to file the mandate of the political party along with the nomination papers and non-compliance of that requirement rightly resulted in rejection of their nomination papers. He then relied on proviso to Rule 12 (2), which was inserted by amending Act No. 5 of 2003 and argued that if the petitioners do not claim themselves as candidates of recognized political party, their nomination papers would have been rejected on the ground that the same had not been subscribed by nine seconders. Shri Vijay Patel, advocate for the added respondent adopted the argument of Shri S.N. Shelat.

15. We have thoughtfully considered the respective, arguments. A reading of Article 243-O shows that the language used therein is identical to the language of Article 329. Like Article 329, Article 243-O contains a non obstante clause and lays down that, "notwithstanding anything in this Constitution, the validity of any law relating to the delimitation of the constituencies or the allotment of seats to such constituencies made or purporting to be made under Article 243 K shall not be called in question in any Court, and no election to any panchayat shall be called in question except by a Election Petition and in such a manner as provided for by or under any law made by the state legislature of a State". Since the language of the two articles is identical, the wider interpretation given to the term "election" appearing in Article 329 (b) has to be adopted for construing the said term appearing in Article 243-O. While interpreting Article 329 (b) in N.P. Ponnuswamy's case (supra), Mohinder Sing Gill's case (supra) and Ashok Kumar's case (supra), the Supreme Court has repeatedly held that judicial intervention with the process of election is not permissible and the only remedy available to a person aggrieved by any illegality or irregularity committed during the course of election is to file Election Petition under the relevant law enacted by the appropriate Legislature. In Mohinder Sing Gill's case and Ashok Kumar's case (supra), the Supreme Court did indicate that in special cases, the Court may exercise its extraordinary power under Article 226 for expediting or smoothening the process of election. Therefore, it must be held that election to a panchayat cannot be questioned except by an Election Petition which may be filed in accordance with the provisions contained in any law enacted by the State Legislature. The use of expression "notwithstanding anything contained in this

Constitution" is indicative of the intention of the Parliament to temporarily push out Article 226 where any election is called in question. To put it differently the High Court cannot entertain a petition under Article 226 of the Constitution if the dispute/issue raised therein can be subject matter of Election Petition. In such case, the High Court will have to stay its hands and refrain from interfering with the process of election till the dispute is adjudicated by an appropriate forum created under the law enacted by the State Legislature.

16. In *State of U.P. v. Pradhan, Sangh Kshetra Samiti*, 1995 Suppl (2) SCC 305, the Supreme Court considered the scope of bar contained in Article 243-O and held as under:

"What is more objectionable in the approach of the High Court is that although Clause (a) of Article 243(o) of the Constitution enacts a bar on the interference by the Court in electoral matters including that questioning of the validity of any law relating to the delimitation of the constituencies or the allotment of seats to such constituencies made or purported to be made under Article 243 K and the election to any Panchayat, the High Court has gone into the question of validity of the delimitation of the constituencies and also the allotment of seats to them. We may, in this connection, refer to a decision of this Court in *Meghraj Kothari Vs. Delimitation Commission and Others*, . In that case, a notification of the Delimitation Commission whereby a city which had been a general constituency was notified as reserved for the Schedule Castes. This Court held that the impugned notification was a law relating to the delimitation of the constituencies or the allotment of seats to such constituencies or the allotment of seats to such constituencies made under Article 327 of the Constitution, and that an examination of Section 8 and 9 of the Delimitation Commission Act showed that the matters therein dealt with were not subject to the scrutiny of any Court of law. There was a very good reason for such a provision because if the orders made under Sections 8 and 9 were not to be treated as final, the results would be that any voter, if he so wished, could hold up an election indefinitely by questioning the delimitation of the constituencies from Court to Court. Although an order u/s 8 or 9 of the Delimitation Commission Act and published u/s 10 (4) of that Act puts such an order in the same position as a law made by Parliament itself which could be made by it under Article 327. If we read Articles 243-C, 243-K and 243-O in place of Article 327 and Sections 2 (kk), 11-F and 12-BB of the Act in place of Sections 8 and 9 of the Delimitation Act, 1950, it will be obvious that neither the delimitation of the Panchayat area nor of the constituencies in the said areas and the allotments of seats to the constituencies could have been challenged nor the Court could have entertained such challenge except on the ground that before the delimitation, no objections were invited and no hearing was given. Even this challenge could not have been entertained after the notification for holding the elections was issued. The High Court not only entertained the challenge but has also gone into the merits of the alleged grievances although the challenge was made after the notification for the election was issued on 31-9-1994. "

17. In *Anugrah Narayan Sing and another v. State of U.P. and others* (supra) the Supreme Court considered the scope of bar contained in Article 243 ZG which is para materia to Article 243-O and held as under:

"In terms of Article 243ZG of the Constitution there is complete and absolute bar in considering any matter relating to municipal election on any ground whatsoever after the publication of the notification for holding municipal election. The bar imposed by Article 243-ZG is twofold. Validity of laws relating to delimitation and allotment of seats made under Article 243-O cannot be questioned in any court. No election to a municipality can be questioned except by an election petition. Moreover, it is well settled by now that if the election is imminent or well under way, the court should not intervene to stop the election process. If this is allowed to be done, no election will ever take place because someone or the other will always find some excuse to move the court and stall the elections."

18. In *Manda Jaganath Vs. K.S. Rathnam and Others*, , the Supreme Court considered the question whether an order passed by the Returning Officer rejecting Form-B filled by the candidate and refusing to allot party symbol to him could be interfered in a writ petition and answered the same in negative. Propositions of law laid down in that judgement read as under :

"(i) Under Art. 329(b) of the Constitution of India there is a specific prohibition against any challenge to an election either to the Houses of Parliament or to the Houses of Legislature of the State except by an election petition presented to such authority and in such manner as may be provided for in a law made by the appropriate legislature. The Parliament has by enacting the Representation of the People Act, 1951 provided for such a forum for questioning such election hence, under Art. 329 (b) no forum other than such forum constituted under the R.P. Act can entertain a complaint against any election.

(ii) Where the returning officer while scrutinising the nomination paper of the petitioner found that Form B which is required to be filled by the candidate for claiming party symbol was incompletely filled and vital clauses in the Form B were left blank and therefore rejected Form 13 of the petitioner and refused to allot him party symbol, the order could not be interfered with by High Court in exercise of writ jurisdiction.

(iii) "There are special situations wherein writ jurisdiction can be exercised but special situation means errors having the effect of interfering in the free flow of the scheduled election or hinder the progress of the election which is the paramount consideration. If by an erroneous order conduct of the election is not hindered then the courts under Art. 226 of the Constitution should not interfere with the orders of the Returning Officers remedy for which lies in an election petition only. IN the present case by not allotting a symbol claimed by petitioner the Returning Officer has not stalled or stopped the progress of the election. The petitioner has been treated as an independent candidate and he is permitted to

contest with a symbol assigned to him as an independent candidate, and consequently there is no question of stalling the election. His grievance as to such non-allotment of the symbol will have to be agitated in an election petition."

19. In view of these pronouncements, it must be held that the bar contained in Article 243-O is absolute and the High Court cannot entertain a writ petition filed under Article 226 of the Constitution of India questioning an election to any panchayat and the only remedy available to the aggrieved person to file Election Petition under the law enacted by the State Legislature.

20. The argument of Shri Y.N. Oza that challenge to the illegal, arbitrary and malicious rejection of nomination papers of the petitioners would fall within the ambit of conclusion No. 3 of Ashokkumar's case (supra), because an order by the Court to the Returning Officer to include the names of persons like the petitioners in the list of contesting candidates, which is required to be prepared under Rule 18 of the Rules, would not impede, obstruct, interrupt or delay the progress of election is without substance. In our view a direction by the Court to Returning Officer to entertain the candidature of the petitioners by ignoring the orders passed by him rejecting their nomination papers would necessarily result in effecting a change in the list of contesting candidates. The Returning Officer will also be required to issue party symbols to the petitioners in violation of the directives issued by the State Election Commission under Article 243 K of the Constitution. This exercise would certainly amount to an interruption in the progress of election and consequential delay in completion of the election in accordance with the schedule fixed under Rule-9 of the Rules. Therefore, the petitioners cannot take advantage of conclusion No. 3 recorded in paragraph 32 of Ashok Kumar's judgement (supra). At this stage, it is impossible for the Court to fathom the reasons which may prompt others to file similar petitions and claim similar directions. Interdiction by the Court at this interlocutory stage would stultify the process of election and make it impossible for the State Election Commission and officers subordinate to him to complete the process of election within the specified time schedule. In our view, this course is impermissible in view of the law laid down in N.P. Ponnuswamy's case (supra), Mohinder Singh Gill's case (supra), State of U.P. v. Pradhan, Sangh Kshetra Samiti (supra), Anugrah Nayarsig's case (supra) and even the law laid down in Ashok Kumar's case (paragraphs 29 and 30).

21. We shall now deal with the arguments of Shri Y.N. Oza that illegal or improper acceptance or rejection of nomination papers is not a ground for challenging election by filing a petition u/s 31 of the Panchayats Act and, therefore, the petitioners should not be denied relief under Article 226 of the Constitution. The emphasis of the learned counsel is that the legislature has not incorporated a provision like the one contained in Section 14 (5) (iii) read with Section 2 (7-A) of the Gujarat Municipalities Act and, therefore, an Election Petition cannot be filed u/s 31 of the Act questioning the election on the ground of improper, illegal or arbitrary rejection of the nomination paper. This argument

of the learned counsel sounds appealing in the first blush but on a deeper examination we are convinced that the same lacks merit. A careful analysis of the provisions of the Panchayats Act and the Rules in the light of the judicial precedents noted herein above and to which reference will be made hereafter, shows that term "election" appearing in Section 31 deserves to be construed in the same manner as the said term has been interpreted in the context of Articles 329 (b) and 243O of the Constitution and if so interpreted, there can be no doubt that a petition questioning the validity of an election on the ground of improper, illegal or wrongful rejection of the nomination paper would be maintainable under Section 31 of the Act.

22. In Kanchanbhai's case (supra), a Division Bench of this Court interpreted Section 24 of Gujarat Panchayats Act, 1962 and Rules 14 (2) and 14 (8) of the Gujarat District Panchayats Election Rules, 1962, which are para-materia to Section 31 of the Panchayats Act and Rule 12 of the Rules. The Division Bench first formulated the question in the following words:

"Now what are the questions which can be raised by an aggrieved person in an application u/s 24? The section empowers an aggrieved person and any person qualified to vote at an election would be an aggrieved person to bring the validity of the election into question before the Civil Judge, Junior Division, or the Civil Judge, Senior Divisions, as the case may be, by making an application within fifteen days from the date of declaration of the result of the election. What questions can be raised in such an application must, therefore, depend on what is comprehended within the expression "bringing the validity of the election into question". When an aggrieved person questions the decision of the Returning Officer rejecting a nomination paper, can it be said that he is questioning the validity of the election or bringing the validity of the election in question? That raises the question what is the true meaning to be given to the word "election" in section 24."

23. The Division Bench then referred to the wider interpretation placed on the term "election" in N.P. Ponnuswamy v. Returning Officer, Namakkal Constituency and observed :

"The context of section 24 also supports the view that the word "election" has been used in the section in a wide sense and not in a narrow sense. Section 24 occurs in Chapter III which contains a fasciculus of sections commencing from section 18 and ending with section 26 dealing, as the heading of the Chapter shows, with "Election, Appointment or Co-option of Members of Panchayats, Election Disputes Etc.". We have already pointed out that section 18 provides that election shall be conducted in the manner prescribed by the Rules. Section 19 deals with the circumstances in which members may be appointed in lieu of elected members. The division of the electorate into electoral divisions is provided in section 20 while section 21 provides for the preparation of the list of voters. Who shall be the person qualified to vote and be elected is dealt with in section 22 and section 22A imposes restrictions on simultaneous or double

membership of Panchayats. Section 23 lays down the disqualifications which disentitle a person to be a member of the Panchayat or to continue as such member. Then comes section 24 which provides for the determination of validity of elections. Apart from there being nothing in the language of section 24 which would indicate that the word "election" has been used in a narrow sense, there is positive evidence in the section itself which shows that the word "election" as used in it has a wide meaning and questioning the validity of the election within the meaning of the section includes questioning of the decision of the Returning Officer as regards rejection of a nomination paper. Sub-section (2A) is a provisions which throws considerable light on this question. It clearly shows that the validity of an election can be questioned u/s 24 on the ground of any breach of or any omission to carry out or any noncompliance with the provisions of the Act or the rules whereby the result of the election has been materially affected. Unless such a ground is a valid ground available to an aggrieved person for questioning the validity of the election under the section, it is difficult to see why the legislature should have thought it necessary to introduce sub-section (2A) and particularly the Explanation to it. The Legislature was obviously anxious to provide that a mere error by the officer charged with carrying out the rules or a mere irregularity or informality not corruptly caused should not be a ground for questioning the validity of an election but it made it clear by enacting the Explanation that if there is any breach of or, any omission to carry out or any noncompliance with the provisions of the Act or the rules by reasons of which the result of the election has been materially affected, the election may be set aside by the Civil Judge u/s 24. Now sub-rule (2) of Rule 14 lays down the grounds on which a nomination paper may be rejected by the Returning Officer. If the Retiming Officer has rejected a nomination paper otherwise than in accordance with these grounds, the rejection of the nomination paper would clearly amount to a breach of or noncompliance with sub-rule (2) of Rule 14 and if in consequence of that, the result of the election has been materially affected - which it undoubtedly would be - the election can be set aside by the Civil Judge. The validity of the election can, therefore, be questioned by an aggrieved person u/s 24 on the ground that a nomination paper was improperly rejected by the Returning Officer. This much is clear on a construction of section 24."

24. In *Election Officer v. Dharamsinhbhai Muljibhai* (supra), a learned Single Judge of this Court interpreted Section 31 of the Panchayat Act. The facts of the case show that Civil Judge (S.D.), Bhavnagar entertained the suit filed by the respondent and granted an injunction against the rejection of his nomination paper. The appeal filed against the order of temporary injunction was dismissed by Joint District Judge, Bhavnagar. Those orders were challenged by the Elections Officer in Civil Revision filed number Section 115 of the Code of Civil Procedure. The learned Single Judge referred to Section 31 of the Act, Article 243-O of the Constitution, various judgement of the Supreme Court and then held :

"From the above discussion, it is evident that election process having been already commenced, such process cannot be called in question, except by an

election petition u/s 31 of the Act, and that too in the manner and in the grounds provided therein. In that context and set of expression "no election" appearing in Article 243-O(b), the law made by the State Legislature will be the only source of calling in question an election of a member to any panchayat. As the election is not over, the question whether nomination papers presented by respondents were validly rejected or not, should not have been gone into by Civil Court at all in view of the provisions of Section 3 of the Act read with Article 243-O of the Constitution. The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it. It is now well recognised that where a right is created by a statute which gives a special remedy for enforcing it, the remedy provided in that statute only must be availed of. There are three classes of cases in which a right and/or liability may be established founded upon the statute. One is, where there was a right existing at common law and that right is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there unless the statute contains words which expressly or by necessary implication excludes the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives at common law. But, there is a third class, viz. where the right not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the Statute must be followed and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to. The law of election in this country does not contemplate that there should be two attacks one before the election and another after election on matters connected with election proceedings. In my view, to affirm such a position would be contrary to the scheme of the Gujarat Panchayats Act, 1993 and Gujarat Panchayats Election Rules, 1994. Any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought at an intermediate stage before any Court. Therefore, the Civil Court had no jurisdiction at all to examine the validity of the order passed by the returning officer rejecting nomination papers of the respondents. The only remedy available to the respondents was to file election petition u/s 31 of the Act after the election was over."

25. In *V.B. Harijan v. Election Officer and Additional Taluka Development Officer* (supra), another learned Single Judge considered the question whether a petition filed under Article 226 of the Constitution for quashing the rejection of nomination paper is maintainable. The learned Single Judge referred to the judgements of the Supreme Court in *N.P. Ponnuswamy v. The Returning Officer, Namakkal Constituency* (supra), *Nanhoo Mal and Others Vs. Hira Mal and Others*, and of this Court in *Ravjibhai Bhikhabhai Patel v. Chief Officer, Billimora Nagar Palika and others*, 1982 XXIII GLR 611 (D.B.), *Patel Kanchanbhai Mangalbhai v. Maneklal Maganlal Gandhi* (supra) and held as under

"The word "election" in Art.243-O is used in a comprehensive sense as including the entire process of election commencing with the issue of a notification and terminating with the declaration of election of a candidate. An application under Art.226 challenging the validity of any of the acts forming part of that process will be barred. These are instances of original proceedings calling in question an election and will be within the prohibition enacted in Art. 243-O. Therefore, election to the office of a member of the panchayat can be challenged only according to the procedure prescribed by the Act and that is by means of an election petition presented in accordance with the provisions of the Act and in no other way. The Act provides only for one remedy, that remedy being an election petition to be presented after election is over and there is no remedy provided at any intermediate stage. As an alternative effective remedy is available to the petitioner, the petition is liable to be rejected."

26. In our opinion the proposition laid down in Kanchanbhai's case (supra), Dharamsinhbhai's case (supra) and V.B. Harijan's case (supra), represents correct position of law and there is no reason for us to take a different view.

27. We may also profitably refer to the judgement of the Supreme Court in S.T. Muthusami Vs. K. Natarajan and Others, and of this Court in Ambabhai Popatbhai v. B.A. Pandey and others, 1989 (2) GLR 1385. Although in those cases the Supreme Court and this Court did not consider the effect of bar contained in Article 243-O or 243 ZG, but the proposition laid down therein shows that interlocutory judicial intervention with the process of election is not warranted.

28. In S.T. Muthusami's case (supra), the Supreme Court reversed the order passed by Madras High Court interfering with the allotment of symbol by the Returning Officer and observed :

"It is not appropriate for the High Court to interfere with an election process at an intermediate stage after the commencement of the election process and before the declaration of the result of the election held for the purpose of filling a vacancy in the office of the Chairman of a Panchayat Union under the provisions of the Tamil Nadu Panchayats Act, 1958 on the ground that there was an error in the matter of allotment of symbols to the candidates contesting at such election. The parties who are aggrieved by the result of the election can question the validity of election by an election petition which is an effective alternative

29. In Ambabhai Popatbhai v. B.A. Pandey's case (supra), a Division Bench of this Court considered whether improper rejection of nomination paper could be made subject matter of challenge in a petition filed under Article 226 of the Constitution of India. The Division Bench approved the view expressed by the learned Single Judge against the maintainability of the writ petition and observed :

"Both our High Court and the Supreme Court have in many decisions, deprecated the interference in the process of election by Courts after election process has started. It has also been held that the only remedy available to an aggrieved

candidate in such cases is by way of an election petition, after the election is over, and not to stall the election in the middle. It is unnecessary for us to quote the various decisions in this field since it is a settled principle that when there is an efficacious alternative remedy available for the appellant, he cannot be permitted to come by way of a writ petition under Art. 226 of the Constitution of India. The learned single Judge has correctly appraised all these facts of the case and has dismissed the Special Civil Application. We are in complete agreement with the reasoning of the learned single Judge and accordingly, this Letters Patent Appeal is dismissed."

30. On the basis of above discussion, we hold that :

(I) The bar contained in Article 243-O of the Constitution against the court's interference in the electoral matters is absolute and a petition filed under Article 226 of the Constitution questioning the election to a Panchayat cannot be entertained except after determination of the dispute in an Election Petition filed in accordance with the provisions of the law enacted by the State Legislature.

(II) A petition filed under Article 226 of the Constitution challenging the illegal or improper rejection or acceptance of nomination paper for an election to the Panchayat cannot be entertained by invoking conclusion No. 3 of paragraph 32 of Supreme Court's Judgement in Ashok Kumar's case (supra) because any direction by the High Court in such matters would impede the election process and delay finalization of the election.

(III) A petition filed under Article 226 of the Constitution involving challenge to the orders passed or action taken after the commencement of election process cannot be entertained except where direction is sought for expediting the process of election.

(IV) An illegal or improper rejection of nomination for election to the Panchayat can be challenged by filing an Election Petition u/s 31 of the Panchayats Act.

31. In view of the abovementioned conclusions, we do not consider it necessary to deal on merits of the petitioners' challenge to the orders passed by the Returning Officer rejecting their nomination paper on the ground of non-filing of the mandate of the recognized political party along with the nomination paper and make it clear that this ground shall be available to the petitioners if they challenge the result of election by filing petition u/s 31 of the Panchayats Act.

32. In the result, the writ petitions are dismissed. The interim order dated 14.10.2005 is vacated. The Returning Officer shall now hold election strictly in accordance with the schedule fixed by the State Election Commission. Needless to say that the petitioners shall be entitled to challenge the result of election by filing petitions u/s 31 of the Gujarat Panchayats Act on any legally permissible ground including the one relating to wrongful rejection of their nomination papers and none of the observations made in this order shall influence adjudication of such petitions.