

(2008) 10 BOM CK 0054

In the Bombay High Court

Case No : Writ Petition No. 4860 of 2008

Vikramsing Walvi and Uttam Deshmukh

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 31-10-2008

Acts Referred:

Constitution of India, 1950 — Article 226, 243, 243B, 243D, 243D(1)
Maharashtra Zilla Parishad and Panchayat Samitis Act, 1961 — Section 12, 12(2), 2(26A), 2(3), 4
Maharashtra Zilla Parishads and Panchayat Samitis (Manner and rotation of Reservation of Seats) Rules, 1996 — Rule 14(2), 3, 4, 4(2), 7
Panchayats (Extension to Scheduled Areas) Act, 1996 — Section 3, 4

Citation : (2008) 6 ALLMR 497 : (2009) 2 BomCR 330

Hon'ble Judges : N.V. Dabholkar, J;N.D. Deshpande, J

Bench : Division Bench

Advocate : P.M. Shah, instructed by P.D. Bachate, for the Appellant; Umakant Patil, A.G.P. for Respondent No. 1, S.T. Shelke, for Respondent No. 2, N.S. Chaudhary, for Respondent Nos. 3 to 5, V.D. Hon, for Respondent Nos. 6 and 7 and P.S. Patil, for the Respondent

Final Decision : Allowed

Judgement

N.V. Dabholkar, J.

1. As described in petition paragraph 2 and prayer Clause (B), the Petitioners have approached this court for a relief of writ of mandamus or any other appropriate writ, order or direction in the like nature, directing Respondents-authorities and more particularly Respondent No. 2-State Election Commission to give effect to and strictly comply with The Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 (henceforth referred to as "PESA" for the sake of brevity), during ensuing elections of Zilla Parishads and Panchayat Samitis, pertaining to Dhule and Nandurbar Districts.

2. PESA, an Act of Parliament, received assent of the President, on 24th December 1996 and the objects and reasons for enacting the same can be read

in the preamble which runs thus;

An Act to provide for the extension of the provisions of Part IX of the Constitution relating to Panchayats to the Scheduled Areas.

Part IX was inserted in the Constitution, by the Constitution (Seventy Third amendment) Act, 1992, which came into force with effect from 24th April 1993 vide Notification No. S.O. 267(E).

Observing that the Panchayati Raj Institutions had not been able to acquire status and dignity of viable and responsive people's bodies due to a number of reasons, although Article 40 of the Constitution enshrined one of the Directive Principles that the State shall take steps to organize the village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self government, it was considered to be imperative need to enshrine in the Constitution certain basic and essential features of Panchayati Raj Institutions to impart certainty, continuity and strength to them, the Seventy Third amendment was inserted to achieve following objectives.

Accordingly, it was proposed to add a new part, relating to Panchayats in the Constitution, to provide for among other things, Gram Sabha in a village or group of villages, constitution of Panchayats at village and other level or levels; direct elections to all seats in Panchayats at the village and intermediate level, if any, and to the offices of Chairpersons of Panchayats at such levels; reservation of seats for the Scheduled Castes and Scheduled Tribes in proportion to their population for membership of Panchayats and office of Chairpersons in Panchayats at each level, reservation of not less than one-third of the seats for women; fixing tenure of 5 years for Panchayats and holding elections within a period of 6 months in the event of supersession of any Panchayat, disqualifications for membership of Panchayats; devolution by the State Legislature of powers and responsibilities upon the Panchayats with respect to the preparation of plans for economic development and social justice and for the implementation of development schemes; sound finance of the panchayats by securing from the Consolidated Fund of the State, as also assignment to, or appropriation by, the Panchayats of the revenues of designated taxes, duties, tolls and fees; setting up of a Finance Commission within one year of the proposed amendment and thereafter every 5 years to review the financial position of Panchayats, auditing of accounts of the Panchayats, powers of State Legislature to make provisions with respect to the elections to Panchayat under the superintendence, direction and control of the chief electoral officer of the State; application of the provisions of the said Part to Union territories; excluding certain States and areas from the application of the provisions of the said Part; continuance of existing laws and Panchayats until one year from the commencement of the proposed amendment and barring interference by courts in electoral matters relating to Panchayats.

We have underlined some portion above, for the purpose of emphasis, since we

believe that the dispute raised in the writ petition revolves around the issue of reservation of seats for the Scheduled Caste and Scheduled Tribes.

Article 243(d) of the Constitution, which is interpretation Clause in Part IX, defines "Panchayat" as to mean an institution (by whatever name called) of self government constituted under Article 243B for the rural areas. Article 243B contemplates constitution of Panchayats at the village, intermediate and district levels, in accordance with the provisions of this part. The Gram Panchayat, Panchayat Samiti and Zilla Parishads are thus "Panchayats" constituted at village, intermediate and district level, in the State.

We may usefully reproduce part of Article 243M and 244, which are required to be considered for the purpose of resolution of dispute raised by the writ petitioners.

243-M: Part not to apply to certain areas.

(1) Nothing in this part shall apply to the Scheduled Areas referred to in Clause (1) and the tribal areas referred to in Clause (2) of Article 244.

(2) Nothing in this part shall apply to:

xx

(3) xxx

(3A) xxx

(4). Notwithstanding anything in this Constitution:

(a) xxx

(b) Parliament may, by law, extend the provisions of this part to the Scheduled Areas and the Tribal Areas referred to in Clause (1), subject to such exceptions and modifications as may be specified in such law, and no such law shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

Thus, it is evident that applicability of part IX is prohibited to the Scheduled Areas and Tribal Areas referred to in Clauses (1) and (2) respectively of Article 244. But, by virtue of Clause (4)(b), the Parliament is empowered, by law, to extend the provisions of this part to the Scheduled Areas and the Tribal Areas, subject to such exceptions and modifications as may be specified in such law. As can be seen from preamble of PESA quoted hereinabove, the said Act is enacted to extend the provisions of part IX of the Constitution, relating to Panchayats, to the Scheduled Areas.

Article 244 is contained in part X of the Constitution titled as "The Scheduled And Tribal Areas." and the same reads as under;

244. Administration of Scheduled Areas and Tribal Areas: (1) The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled

Areas and Scheduled Tribes in any State, other than the States of Asam, Meghalaya, Tripura and Mizoram.

Thus, the Scheduled Areas and Tribals in the Maharashtra State, by virtue of Article 244(1) of the Constitution, shall be administered and controlled in accordance with the provisions of the Fifth Schedule of the Constitution.

In exercise of powers conferred by sub para (2) of paragraph 6 of the Fifth Schedule to the Constitution of India, the President, in consonance with the Governor of the State, has declared Scheduled Areas in the State of Maharashtra, by the Scheduled Areas (Maharashtra) Order 1985 (copy of which is at Exhibit B to the Petition). Dhule and Nandurbar Districts (In fact, existing Nandurbar District is originally a part of Dhule District), are at Entry No. 3. Entire Tahsils of Navapur, Taloda, Akkalkuva and Akrani (which are now part and parcel of Nandurbar District) are declared Scheduled Area. Similarly, 80 villages out of 221, from Sakri Tahsil (still part of Dhule District), 82 villages in Nandurbar Tahsil and town Nandurbar (now part of Nandurbar District), 141 villages in Shahada Tahsil (now part of Nandurbar district) and 62 villages in Shirpur Tahsil out of 150 (now part of Dhule Tahsil) are declared to be the Scheduled Area. There is no dispute that parts of Dhule and Nandurbar Districts are declared as Scheduled Area and not entire Dhule or entire Nandurbar District. Thus, Dhule and Nandurbar are the two Zilla Parishads, part of each having been declared as Scheduled Areas, by the President of India in exercise of powers conferred upon His Excellency, by paragraph 6 of the Fifth Schedule of the Constitution.

3. Both the Petitioners claimed to be residents of declared Scheduled Areas. Petitioner No. 1 was elected as a member of Panchayat Samiti from Dhanora constituency and consequently, he was also elected as Chairman of Panchayat Samiti, Nandurbar. Both these seats were reserved for Scheduled Tribe category in the last election. Petitioner No. 2 is Sarpanch of village Mohagaon, a seat reserved for Scheduled Tribe category. Petitioners are desirous of contesting forthcoming elections of Zilla Parishad and Panchayat Samiti, from the respective constituencies. (They are residents of village Dhanora and Mohagaon). According to Petitioners, Article 243D prescribes reservation of seats for S.C. and S.T. in every Panchayat and the number of seats so reserved, are required to bear as nearly as may be, the same proportion to the total of seats to be filled in, by direct election in that Panchayat, as the population of Scheduled Caste/Schedule Tribe in the Panchayat Area bears to total population of that area. (To describe in brief, reservation according to population ratio). One-third of the seats so reserved, are further required to be reserved for women belonging to the respective categories.

According to Petitioners, Union of India has enacted PESA and thus extended the provisions of Part IX of the Constitution relating to Panchayats to the Scheduled Areas, subject to such exceptions or modifications as provided in Section 4 of the said Act. The Petitioners have reproduced Section 4(g) of PESA for ready reference, which runs thus;

4. Notwithstanding anything contained under Part IX of the Constitution, the Legislature of a State shall not make any law under that Part which is inconsistent with any of the following features, namely,:

(a) to (f) xxx

(g). the reservation of seats in the Scheduled Areas at every Panchayat shall be in proportion to the population of the communities in that Panchayat for whom reservation is sought to be given under Part IX of the Constitution.

Provided that the reservation for the Scheduled tribes shall not be less than a One-third of the total number of seats;

Provided further that all seats of Chairpersons of Panchayats at all levels shall be reserved for the Scheduled Tribes.

According to the Petitioners, once part area is declared as Scheduled Area, as referred to in Clause (1) of Article 244 of the Constitution, there cannot be rotation of seats in the Scheduled Area (as contemplated by Article 243D(1)), as PESA clearly indicates reservation for Scheduled Tribes in the Scheduled Area. On 2.12.1985, Presidential Order about the Scheduled Areas (Maharashtra) is published, declaring certain areas of Dhule and Nandurbar Districts to be Scheduled Areas under paragraph 6 of the Fifth Schedule of the Constitution. The State Election Commission and other authorities of the State are, therefore, required to reserve seats in the Scheduled Area for the forthcoming elections for Zilla Parishad and Panchayat Samitis in accordance with provisions of PESA. The Petitioners, by representations to the Honourable the Chief Minister, as also the State Election Commission, requested to implement the provisions of PESA (reservation in accordance with provisions of PESA), at the ensuing Zilla Parishad and Panchayat Samiti Elections. (As informed by Advocate Shri S.T. Shelke for the State Election Commission, the election programme is likely to be declared on 10.11.2008, polling is proposed to be scheduled on 30.11.2008 is because, the term of existing Zilla Parishad and Panchayat Samiti ends sometime between 20th and 30th December 2008.) According to the Petitioners, PESA is enacted with the aim and object that the administration and control of Scheduled Areas shall be in the hands of Scheduled Tribes.

The State of Maharashtra has effected amendments to the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 (henceforth referred to as "ZPPS Act"), as a result of amendments to Sections 12(2)(b) and 58(1-B)(b), which are not in consonance with and in fact, contrary to Parts IX and X of the Constitution, i.e. Articles 243, 243D, 244 and Schedule Fifth of the Constitution of India, read with PESA, a central legislation. The Petitioners believe that during the discussion in the meetings, the Respondents-authorities and the State Election Commission overlooked the provisions of PESA.

Local Member of Parliament, Shri B.H. Chaure, had moved the Hon^{ble} Chief Minister, as well as Election Commissioner, for declaring above referred

provisions of ZPPS Act, as null and void, since those are in conflict with Articles 244(1), Fifth Schedule of the Constitution and Section 4(g) of PESA. He also had moved, Director, National Commission for Scheduled Tribe, Bhopal, to look into the matter (Exh. C colly.). It appears that, the Chairperson of National Commission for Scheduled Tribes, had moved the Hon'ble Chief Minister requesting to initiate immediate action to amend through Ordinance, ZPPS Act, for supersession of earlier amendment and bringing the same in harmony with Section 4(g) of PESA (Exh. D). (Exhibits C and D are the communications dated May/July, 2008).

Petitioners have prepared at Exhibit E, a table of reservation proposed by the State Election Commission for Zilla Parishads and Panchayat Samitis, at the ensuing elections, as gathered by them during the meetings held on 27.5.2008, 13.6.2008 and 1.7.2008. According to Petitioners, Respondents-authorities are neglecting the provisions of PESA and amended provisions of ZPPS Act, are likely to create chaos due to conflict between Central legislation (PESA) and State legislation (ZPPS Act). According to the petitioners, PESA is a legislation with superior efficacy and it must prevail over ZPPS Act, to the extent provisions of the said State Act are not in harmony with PESA. For the purpose of pleading that so far as governance of Scheduled Area through Panchayats is concerned, no other enactment, much less a State legislation will be applicable, reliance is placed upon the speech of the Hon'ble Minister of Rural Areas and Employment (Shri Yerran Naidu), at the time of introduction of the bill to provide for extension of provisions of Part IX to the Scheduled Areas (PESA). (Exh. F).

After the enactment of the Constitution 73rd Amendment Act, these State Governments having Scheduled Areas, enacted the State Panchayat laws which did not exclude the Scheduled Area. This action on their part tantamount to extension of legislation on Panchayati Raj to the Scheduled Areas. The extension of Part IX of the Constitution by the States of Andhra Pradesh and Bihar to Scheduled Areas was challenged in their respective High Courts. The Courts have held the extension of State Panchayats Acts to the Scheduled Areas as ultra vires of the Constitution and viewed that Part IX can be extended to these Scheduled Areas only through an Act on the Parliament, as provided in Article 243M(4)(b) of the Constitution. That is why I am introducing the present Amendment which would apply to the Scheduled Areas in eight States.

4. In case of all the parties, submissions are just elaborations of the pleadings and, therefore, it would be desirable and useful to sum up the submissions advanced on behalf of the Petitioners, by Shri P.M. Shah, learned Senior Counsel. Learned Senior Counsel Shri Shah desired us to take into consideration certain specific dates and the dates to which he drew our attention can be enlisted as follows;

24.04.1993. Part IX of the Constitution of India came into force.

30.10.1996. Maharashtra Zilla Parishads and Panchayat Samitis (Manner and

rotation of Reservation of Seats) Rules, 1996.

24.12.1996. PESA came into force.

03.01.1997. Amendment to ZPPS Act (Sections 12(2)(b) and 58(1-B)(b) came into force, initially by way of Ordinance I of 1997 and then by amendment to the Act.

It was submitted that in view of Article 243M read with Article 244(1) and Fifth Schedule, Part IX of the Constitution would not apply to the Areas declared as Scheduled Area, by Presidential order of 1985 (Exh.B). The Central legislation (PESA) is the only legislation that can govern the Scheduled Area for the purpose of Panchayati Raj and reservation ought to be in accordance with Section 4(g) of PESA. The Election Commission, according to learned Senior Counsel Shri Shah, seems to plead that it follows 1996 Rules, due to judgment in Writ Petition No. 5386 of 2006, delivered by this Court on 3.10.2006. But, Rule 4(2) of the Maharashtra Z.P. and P.S. (Manner and rotation of reservation of seats) Rules 1996 (henceforth referred to as "the 1996 Rules" for brevity's sake), is in conflict with Section 4(g) of PESA, since the said rule restricts only one reservation per block, by rotation, whereas PESA neither recommends rotation nor reservation of only one seat per block, which may cause at times, only 50 per cent seats for S.T., although population of ST is more than 50 per cent as compared to total population of the block.

Section 2(26-A) of ZPPS Act defines "Scheduled Areas" to mean it the Scheduled Areas referred to in Clause (1) of Article 244 of the Constitution of India. Section 12(2)(b), as applicable to Zilla Parishads and Section 58(1-B)(b) Panchayat Samitis, are identically worded and these are the provisions prescribing reservations at Zilla Parishads and Panchayat Samitis. elections respectively. We were specifically taken to first two provisos, out of the three provisos, below Sections 12(2)(b) and 58(1-B)(b). We reproduce those, as below.

Provided that in a Zilla Parishad (Panchayat Samiti) comprising entirely the Scheduled Areas, the seats to be reserved for the Scheduled Tribes shall not be less than one half of the total number of seats in the Zilla Parishad. (Panchayat Samiti)

Provided further that, the reservation for the Scheduled Tribes in a Zilla Parishad (Panchayat Samiti) falling only partially in the Scheduled Areas shall be in accordance with the provisions of Clause (b).

We may state here itself that concluding Clauses of Section 12(2)(b) and Section 58(1-B)(b) identically read:

...and such seats shall be allotted by rotation to different electoral divisions/ colleges in a Zilla Parishad/Panchayat Samiti.

According to learned Senior Counsel Shri P.M. Shah, the PESA does not recommend rotation, which would be applicable even to the Scheduled Area, by

virtue of first proviso, because reservations for Zilla Parishads or Panchayat Samitis comprising entirely the Scheduled Areas, are to be governed by Clause (b) of the respective sections. (terminal Clause of which, prescribing rotation, is reproduced hereinabove).

It was submitted that second proviso practically derecognises the Scheduled Area as such, when it is only a part of Zilla Parishad/Panchayat Samiti Area, because in such areas, reservations are to be governed only by Clause (b) and first proviso, pertaining to Zilla Parishad/Panchayat Samiti comprising entirely the Scheduled Area, will not come into play and thereby, there shall not be a mandate for reservation at least One-half of the total number of seats for the Scheduled Tribe. The second proviso thus conflicts with first proviso to Section 4(g) of PESA.

Shri Shah, learned Senior Counsel, has also placed reliance upon paragraph 7 of the affidavit in reply filed by Smt. Susan George, Director, in the Ministry of Panchayati Raj, New Delhi, on behalf of Respondent Nos. 3 to 5, with emphasis on observations of the Committee under the chairmanship of Shri Dilip Singh Bhuria, Member of Parliament, in its report dated 17.1.1995, reproduced within paragraph 7 of the reply itself.

Learned Senior Counsel also did not fail to draw our attention to paragraphs 3, 5 and 6 of the reply filed by Shri Rajiv Pandey, Under Secretary, State Election Commission, on behalf of Respondent No. 2. It was pointed out that in the judgment in Writ Petition No. 5386 of 2008, which the Election Commission referred in its reply, the court was not considering either Article 243M or provisions of PESA.

Lastly, learned Senior Counsel urged to consider that once the Scheduled Area is declared by the President, which is part of Zilla Parishad or Panchayat Samiti, for the purpose of working out elections, practically the court may examine desirability of treating such area as one Division governed by PESA and another Division governed by ZPPS Act.

5. While advancing submissions on behalf of the State Election Commission, Advocate Shri S.T. Shelke submitted that the State Election Commission neither opposes nor supports the Petition and it will follow the verdict that will be delivered by the court. He has given us tentative election programme and has urged that delivery of judgment even during vacation, if possible, will leave time margin for State Election Commission, if it is required to do exercise of readjustment of reservations, in the light of verdict of the Court. He has supported the argument of learned Senior Counsel Shri Shah for the Petitioners that while delivering judgment in Writ Petition No. 5386 of 2006 on 3.10.2006, this court was not considering provisions of PESA, although rigour of that judgment is subsequently diluted by judgment of another Division Bench of this High Court in Writ Petition No. 6389 of 2006 rendered on 9.2.2007 reported at Prashant Bansilal Bamb and Others Vs. The State of Maharashtra and Others,

According to Advocate Shri Shelke, delimitation and reservation for ensuing elections is done by the State Election Commission, by following directions in the said two judgments. He also urged the court to examine, if amendments to Sections 12 and 58 of the ZPPS Act, are within legislative competence of the Governor of the State, by para 5 of the Fifth Schedule of the Constitution.

In the reply on behalf of the State Election Commission, filed by Shri Rajiv Pandey, it is contended that the State Election Commission is not responsible for implementing the provisions of PESA. The responsibility of putting forth a proposal before the Maharashtra State Legislature for implementation of the said Act, is with the Rural Development Department of the State Government. The Election Commission has implemented the order passed by Aurangabad Bench of Bombay High Court in Writ Petition No. 5386 of 2006, wherein this Court had directed that the policy of rotation in reservation of seats has to be followed. By decision in Writ Petition No. 6389 of 2006 and five other writ petitions, this court has also directed the Election Commission to devise suitable modalities under its powers to give true effect and meaning to the rotation policy as envisaged in the constitutional scheme and the 1996 Rules. Elections of 27 Zilla Parishads in the State are completed in the year 2007. The State Election Commission has sent several letters to the Government of Maharashtra to delete proviso to Rule 4(2) of the 1996 Rules. However, no action is taken by the State Government to that end. The said proviso insists that, reservation of Zilla Parishad seats for SC and ST should be limited only to one seat per Panchayat Samiti, which is not feasible in several districts where seats for SC and ST exceed the number of Panchayat Samitis. Dhule Zilla Parishad consists of four Panchayat Samitis. On the basis of Scheduled Tribe population, 18 seats have been reserved for ST in the said Zilla Parishad and 40 seats are reserved in Nandurbar Zilla Parishad, in six Panchayat Samitis. In both these Zilla Parishads, every Panchayat Samiti has more than one seat reserved for ST. As the seats for ST are to be reserved on the basis of population ratio of that category, the State Election Commission has not been able to give effect to Rule 4(2) of the 1996 Rules.

The submission on behalf of the State Election Commission that it would be unfair to rotate seats earmarked for Scheduled Tribe, particularly in the Scheduled Area, because seats earmarked for the Scheduled Tribes would move out of the Scheduled Area, was not accepted by this court in Writ Petition No. 5386 of 2006. The term of Zilla Parishads of Dhule and Nandurbar expires on 27.12.2008 and the elections to the same are required to be completed before that date. It is urged that changes, if any, which are required to be carried out in the reservation at this stage, would affect entire electoral process in these districts and it may not be possible to complete the election process before expiry of the terms.

6. While opposing the petition, it was contended by Shri Umakant Patil, learned A.G.P. that Article 243D provides rotation which is not provided by PESA. PESA is silent on the aspect and, therefore, Sections 12(2)(b) and 58 (1-B)(b) of the

ZPPS Act to the extent those provisions prescribe rotation, do not conflict either with the Constitution or PESA. According to learned A.G.P., the amendments to those Sections are, therefore, in harmony with Article 243D and PESA. It was impliedly submitted that, if the second proviso to Sections 12(2)(b) and 58(1-B)(b), which are taken exception to by the learned Senior Counsel for the Petitioners, are to be ignored, then it will be treating the entire Zilla Parishad or Panchayat Samiti as the Scheduled Area, as soon as the President declares some portions as Scheduled Area.

An affidavit in reply is filed by Shri Paras Bothra, Deputy Commissioner, (Establishment), in the office of Divisional Commissioner, Aurangabad, on behalf of the State. It is contended that considering the essence of Article 243D and the provisions of PESA, necessary amendments are made in ZPPS Act, by Maharashtra Acts 20 and 40 of 1997. By these amendments, principle of proportionate representation to the Scheduled Tribe and reservation of One-half of total number of seats to the Scheduled Tribes in the Scheduled Area, has been observed. It is contended that the provisions pertaining to reservation of all seats in the Scheduled Area of Chairpersons of Panchayat at all three levels of Panchayat to STs also exists in the said amendment. (Such amendment, finds place in Sections 42 and 67 respectively, as applicable to Zilla Parishads and Panchayat Samitis respectively, provided entire area of the same is Scheduled Area). It is contended that the amendments are in harmony with Article 243D and, therefore, it cannot be said that the provision of rotation for Scheduled Area is not in line with constitutional provisions.

In regard to representations of Petitioners, it is submitted that the Govt. had invited all concerned, including the representatives of the petitioners for meetings, the issue was discussed and it was decided that the department should scrutinise the proposal as per the provisions of ZPPS Act, constitutional provisions and PESA and submit a proposal to the Cabinet for necessary decision. Representatives from Dhule District have submitted a counter representation on 24.6.2008, pleading for maintaining rotation system. Opinion was obtained from Law and Judiciary Department and it has clearly opined that the provisions in ZPPS Act, and more particularly Sections 12(2)(b) and 58(1-B)(b) are consistent with the constitutional provisions and there is no need to amend those.

7. Shri N.S. Choudhari, standing Counsel for Union of India, has drawn our attention to Article 244. According to him, in view of Article 243M(4)(b), it is the Parliament which is competent to extend the provisions of Part IX to the Scheduled Areas and the Tribal Areas and, therefore, reference to either union list or concurrent list or State list is not necessary. According to Advocate Shri Choudhari, in view of Article 254(1), law made by the Parliament shall prevail and the law made by Legislature of State shall, to the extent of repugnancy, be void. Learned Counsel for the Central Government has indirectly supported the writ petition.

Reply filed on behalf of Respondent Nos. 3 to 5, mainly relies upon

recommendations in paragraphs 17 and 30 of the Committee headed by Shri Dilip Singh Bhuria, reproduced in para.7 of the reply, which read;

17. Since the Scheduled Areas and Tribal Areas are expected to have majority of tribal population, the different tier Panchayats therein should have majority of Scheduled Tribe Members. Further, both the Chairman and Vice Chairman should also belong to STs.

30. The Group was further of the view that notwithstanding the fact that the areas under consideration i.e. Scheduled Areas are expected to have majority of tribal population, it is necessary to stipulate that the Panchayats therein will have a majority of Scheduled Tribe members. The reason is that, the Scheduled Areas were notified as such, on account of majority of Scheduled Tribe population, contiguity etc. In course of time, on account of influx of non-ST population, in a few Scheduled Areas, the status of the ST population might have been reduced to minority. That should not be regarded to have altered over-all the character of Scheduled Areas. The chairman and vice chairman should belong to the Scheduled Tribe. One-third of the seats should be reserved for women.

However, paragraph 8 of the reply is concluded by saying that, there is no explicit mention that once a particular area is declared as Scheduled Area, there cannot be a rotation of seats in the Scheduled Area.

8. The three intervenors are resisting the petition and Advocate Shri V.D. Hon for intervenors - Respondent Nos. 6 and 7 submitted that PESA is being followed and implemented through amendments to ZPPS Act. According to him, the petitioners have not challenged the validity of amendments to Section 12 and Section 58 of ZPPS Act and, therefore, no such declaration now can be issued. In view of absence of prayer for such a declaration, the petition deserves to be dismissed. It was submitted that PESA was enacted for the purpose of development of Scheduled Area and some provisions regarding elections are also part of it. Entire Zilla Parishad, Dhule is not declared as Scheduled Area by the President and hence, according to Shri Hon, PESA will not come in action for entire Zilla Parishad, Dhule. According to Advocate Shri Hon, Article 243O would now operate as a bar to grant any relief.

Advocate Shri P.S. Patil for Respondent No. 8, apart from adopting the arguments advanced by Shri Hon, has placed reliance upon couple of reported judgments. He has also urged that it is too late to issue directions to correct any irregularity/ illegality and, therefore, if at all this Court is inclined to issue any directions, those may be directed to be implemented at the time of next elections and not the present elections.

9. To describe in brief, the petitioners, Union Government on one side have come with a case that the provisions of PESA are not being implemented, sofar as elections of Zilla Parishads and Panchayat Samitis in revenue districts of Dhule and Nandurbar are concerned, in spite of the fact that, a considerable part of both Zilla Parishads is declared to be Scheduled Area, by the President of India,

by the Scheduled Area (Maharashtra) Order, 1985. Although Election Commission has taken a role of an observer, by conceding that it shall implement the directions those may be issued by this Court, State and intervenors have opposed the Petition, by contending that the provisions of PESA are being given effect within the State and more particularly, for the purpose of elections to Zilla Parishads and Panchayat Samitis in revenue districts of Dhule and Nandurbar, where there exists Scheduled Area in the territorial limits of each Zilla Parishad. Naturally, the first task before us is to find out whether provisions of PESA are being given effect to, at the elections of the Panchayats within the State of Maharashtra and the area declared as Scheduled Area by the President, may be by amendment to ZPPS Act and, therefore, it is necessary to compare the relevant provisions from the two legislations, as also 1996 Rules enacted by the State, also for the same purpose.

In fact, the reservation of seats for SC/ST/women at the elections of Panchayats, is provided by Article 243D, as contained in Part IX of the Constitution and without reproduction of entire Article 243D (inserted with effect from 24.3.1993), the scheme of the reservations provided by the said Article can be summed up as under;

(i). Specific reservation of seats for Scheduled Castes and Scheduled Tribes.

(ii). Reservation of seats as per population ratio of the communities. Rotation of seats is permissible-

Such seats may be allotted by rotation to different constituencies.

(iii). Not less than One-third seats amongst those reserved for SC/ST, to be further reserved for women of the same category.

(iv). Not less than one-third of the total seats to be reserved for women (by taking into account the seats already reserved for SC/ST women). Rotation of seats reserved for women is permissible.

(v). Reservations of Offices of the Chairpersons as per State legislation, but according to population ratio, and One-third for women. (Reservations for women permissible by rotation).

(vi). Reservation for OBC by State legislation.

We have already reproduced Section 4(g) of PESA and the scheme of reservations, under the said Central Legislation (came into force on 24.12.1996) can be summed up as under;

(i). Reservations for SC/ST as per population ratio.

(ii). Not less than 50 per cent seats of the total number of seats to be reserved for ST.

(iii). All seats of Chairpersons of Panchayats at all levels to be reserved for ST.

The provisions regarding reservations by State legislation, are contained in Sections 12(2)(b) and 58(1-B)(b) of ZPPS Act (as amended with effect from 3.1.1997). Both the Sections are identically worded, the first one being applicable, so far as elections to Zilla Parishads are concerned, and the later one for the elections to Panchayat Samitis. In addition, there is a set of rules- Maharashtra Zilla Parishads and Panchayat Samitis (manner and rotation of reservations of seats) Rules 1996, which came into force on 30.10.1996.

Under the provisions of ZPPS Act, the scheme of reservation can be summed up as under.

- (i). Provision of reservation for SC/ST/OBC and Women.
- (ii). Reservation for SC/ST as per population ratio and by rotation, "such seats shall be allotted by rotation to different electoral divisions/colleges."
- (iii). Not less than 50 per cent seats to be reserved for ST, if "entire area" is declared as Scheduled Area.
- (iv). Reservation for ST as per Clause (b) i.e. population ratio, if only part of area is declared as Scheduled Area.
- (v). Only one-third seats from amongst seats reserved for SC/ST, to be reserved for women of such category, by rotation.

When we refer to 1996 Rules, the implementation of reservations is prescribed as follows;-

- (i). As per Rule 3, reservation for SC/ST as per Section 12(2) of ZPPS Act, i.e. population ratio.
- (ii). Reservation of seats by rotation, beginning with the constituency having highest population of the reserved category and rotating to the constituencies in descending order of population.
- (iii). Rotation of SC/ST seats to electoral divisions, where there was no such reservation in earlier election.
- (iv). Not more than 1 seat (to be reserved) in any one Block (Note: on reading Sections 2(3), 5 and 56 of ZPPS Act, together one Block becomes equivalent to one Panchayat Samiti).

By virtue of Clause (4)(b) of Article 243M, the Parliament is empowered to enact a legislation to extend the provisions of Part IX of the Constitution to the Scheduled Area, and PESA is that legislation. The Parliament is also empowered to extend such application of Part IX, subject to exceptions and modifications as may be prescribed in such law. Section 3 of PESA reads;

3. The provisions of Part IX of the Constitution, relating to Panchayats are hereby extended to the Scheduled Areas, subject to such exceptions and modifications as provided in Section 4.

We have already reproduced Section 4(g) of PESA in the earlier part of this judgment and in the process, have also reproduced opening part of Section 4, which we reproduce at the cost of repetition;

4. Notwithstanding anything contained under Part IX of the Constitution, the legislature of a State shall not make any law under that part, which is inconsistent with any of the following features, namely;

....

....

On comparison of Article 243D with Section 4(g) of PESA, following features of distinction can be noticed.

Article 243D contemplates allotment of reserved seats by rotation to different constituencies. It also contemplates that not less than One-third of the total number of seats reserved shall be reserved for women belonging to respective reserved categories. It also makes provision for not less than One-third seats of the total number of seats in every Panchayat, to be reserved for women and to be allotted to different constituencies by rotation. It must be said that Clause (g) of Section 4 of PESA, which introduced exceptions/modifications to the application of Part IX of the Constitution to the Scheduled Area, is silent on all above aspects.

It can be said that the two provisos to main Clause (g) of Section 4 of PESA clearly provide modifications to the provision regarding reservation as contained in Part IX of the Constitution, in the form of Article 243D. The first proviso prescribes that reservation for the Scheduled Tribes shall not be less than a one-half of the total number of seats. The second proviso requires all seats of Chairpersons of Panchayats at all levels to be reserved for Scheduled Tribes. What is prescribed by these two provisos to Clause (g) of Section 4 of PESA, does not find place in Article 243D. On the contrary, Clause (4) of Article 243D empowers the State Government to make a law for providing reservation for Scheduled Castes, Scheduled Tribes and women to the offices of Chairpersons in the Panchayats at any level and proviso to Clause (4) of Article 243D prescribes that the reservation to the offices of Chairpersons shall also bear the same proportion to total number of offices of Chairpersons as per the population ratio. First proviso to Section 4(g) may appear to be in conflict with Article 243D, because in a given case the reservation for Scheduled Tribe may be 50 per cent, although population of the Scheduled Tribe may not be fifty percent. The Second proviso is clearly in conflict with Clause (4) of Article 243D. However, since Article 243M(4) begins with non-obstante clause, "Notwithstanding anything in this Constitution" and Sub-clause (b) of said Clause (4) empowers the Parliament to make a law subject to exceptions and modifications without such law being deemed amendment of the Constitution, it may not be possible to express that the modifications as contained in the two provisos are unconstitutional. Liberty to modify Part IX as applicable to the Scheduled Area with exceptions and

modifications, is granted by Article 243M(4)(b) itself.

As regards rotation of reserved seats and reservation for women provided in Article 243D, PESA is silent. It does not specifically prohibit "rotation" as well as "one-third reservation for women" either within the reserved seats, or within total number of seats of Panchayat. By Section 3, Part IX of the Constitution is extended in its application to Scheduled Areas subject to the exceptions/modifications as in Section 4 of PESA. The modifications, indicated hereinabove; are contained in two provisos. However, it may not be possible to say that "rotation" and "one-third reservation for women" are deleted as ?exceptions?. If the Parliament intended that "rotation" and ?one-third reservation for women? amongst reserved seats or amongst total number of seats should not apply, it could have expressly said so in Clause (g) of Section 4 of PESA. We are of a considered view that silence in Section 4(g) of PESA, regarding ?rotation? and ?reservation for women? does not amount to ?exception? to the applicability of those, as prescribed by Article 243D, also to the Scheduled Areas, once Part IX is extended to the Scheduled Areas, by PESA.

The applicability of Part IX to the Scheduled Areas in the modified form, seems to have been felt necessary, because the areas declared as Scheduled Areas, are the areas having majority of tribal population and, therefore, the reservation applicable at the election for Panchayats in Scheduled Area, should be such that majority members to be elected would be of Scheduled Tribes. It is also desired that all Chairpersons of the Panchayats at all levels should belong to Scheduled Tribe, because the Scheduled Area is so declared by the President, after taking into consideration that the majority population of the area is tribal population.

Now we are required to consider and compare the provisions of PESA on one hand and the provisions of ZPPS Act and 1996 Rules on the other hand. Provisions of ZPPS Act (Sections 12(2)(b) and 58(1-B)(b) provide reservation for Scheduled Castes, Scheduled Tribes as per population ratio and reserved seats are to be allotted to different constituencies by rotation. By virtue of first proviso to said Sections of ZPPS Act, where entire area of a Panchayat is scheduled area, there is provision for reservation of not less than one half of the total number of seats in favour of Scheduled Tribes. For the reasons discussed hereinabove, we have already held that silence of Section 4(g) of PESA regarding rotation policy and one third reservation for women does not amount an exception. In other words, we are unwilling to accept the silence as amounting to elimination of applicability of those requirements as contained in Article 243D. The requirement of rotation of reserved seats of Sections 12(2) and 58(1-B)(b) cannot be said to be conflicting with provisions of PESA.

However, State Government by two proviso, has categorised the Panchayats into two categories (1) where entire Panchayat area is scheduled area and (2) where Panchayat area is only partially scheduled area. The second proviso was under strong exception by the petitioners as also the Union. It lays down that where entire area of the Panchayat is not a declared Scheduled area, or where only part

of the territory of Panchayat is Scheduled area, reservation of seats shall be as per Clause (b) i.e. as per population ratio and Clause (b) does not make any provision for "not less than one half of the total number of seats as reservation for Scheduled Tribes". The second proviso, therefore, must be said to be in conflict with first proviso to Section 4(g) of PESA. State legislation has created similar distinction as regards reservation of offices of the Chairpersons for the purpose of Panchayats having entire area declared as scheduled area and Panchayats wherein only part of the area is declared scheduled area. On reference to Sections 42 and 67 of the ZPPS Act, as modified by amendment dated 3.1.1997, proviso to Section 42(4)(a) relating to President and Vice President of Zilla Parishad and proviso to Section 67(5)(a) relating to Chairman of Panchayat Samiti are also identically worded and those can be reproduced hereinbelow in a combined form;

Provided that the office of the President of Zilla Parishad (the Chairperson of a Panchayat Samiti) comprising entirely the Scheduled Areas shall be reserved only for the persons belonging to the Scheduled Tribes.

Provided further that the office of the President of Zilla Parishad (of the Chairperson of a Panchayat Samiti) falling only partially in the Scheduled Areas shall be reserved for the persons belonging to the Scheduled Tribes in accordance with the provisions of Clause (a).

and Clauses (a) of both Sections prescribe reservation of the offices of Presidents/ Chairpersons in accordance with population ratio.

It needs no elaborate discussion that second proviso quoted hereinabove as applicable to the reservation to the offices of Chairpersons of the Panchayat containing only part area as Scheduled Area is in conflict with second proviso to Section 4(g).

Coming to 1996 Rules, Rules 3 and 7 enable State Election Commission to determine the number of seats to be reserved for Scheduled Castes/Scheduled Tribes/Other Backward Classes and women at Zilla Parishads and Panchayat Samitis elections but as provided in Sections 12(2) and 58(1-B) respectively. Rules 4 and 8 are relating to manner of allotment and rotation of seats reserved for Scheduled Castes and Scheduled Tribes at Zilla Parishads and Panchayat Samitis elections respectively and these rules prescribe that seats reserved for Scheduled Castes and Scheduled Tribes shall be allotted to electoral divisions/ colleges in the descending order beginning with division/college where population of such Scheduled Castes/Scheduled Tribes is highest. Sub-rule (2) requires that seats reserved for Scheduled Castes and Scheduled Tribes to be rotated in the subsequent general elections to electoral divisions/colleges in which no seats were reserved in the previous general elections. We are unable to see any conflict of these two rules with the provisions of PESA, especially so when we have already observed that PESA has not excepted "rotation" of reserves seats.

Proviso to Sub-rule (2) of Rule 14 reads thus :

Provided that, with a view to securing representation to the members of such castes or tribes, in as many blocks as possible in the districts, the seats may be rotated to electoral divisions so however that not more than one seat is reserved in any one block.

And it is monopoly of Rule 4, there is no such provision to Sub-rule (2) of Rule 8 for obvious reasons that on collective reading of Sections 2(3), 5 and 56 of ZPPS Act, one Panchayat Samiti is one block). By virtue of this proviso, at the Zilla Parishad election, there can be reservation of only one seat for Scheduled Castes/Scheduled Tribes per block/Panchayat Samiti. The proviso conflicts with the requirement of first proviso to Section 4(g) of PESA. Not less than one half (50%) seats are required to be reserved for Scheduled Tribes category, as per PESA and if only one seat is allowed to be reserved per Panchayat Samiti at Zilla Parishad elections for Scheduled Castes/Scheduled Tribes, even if there are only two seats per Panchayat Samiti, reservation for Scheduled Tribe is bound to fall below 50%.

To sum up, the provisions of ZPPS Act and 1996 Rules are in conflict with Section 4(g) of PESA on following points:

- (i) To the extent second proviso to Sections 12(2)(b) and 58(1-B)(b) do not provide reservation for Scheduled Tribes of not less than one half of the total number of seats in the Panchayat. (Where entire area of the Panchayat is not declared a scheduled area),
- (ii) to the extent second proviso to Sections 42(4)(a) and 67(5)(a) do not provide reservation of all the offices of Chairpersons only for Scheduled Tribes (where entire area of Panchayat is not declared scheduled area) and (iii) proviso to Rule 4(2) of 1996 Rules conflicts with the requirement of "reservation of not less than one half of the total number of seats for Scheduled Tribes".

10. In order to find out the reasons for conflict or legal battle, we may hypothetically consider three types of Panchayats;

- (i). Where entire area of Panchayat is free from Presidential Declaration (No part of Panchayat Area is declared as Scheduled Area).
- (ii). Where entire Panchayat Area is declared Scheduled Area.
- (iii). Where Panchayat Area is partially declared as Scheduled Area.

In case of first type of Panchayat, Part IX of the Constitution applies by itself and PESA would not be in the picture. In case of second type of Panchayat, where entire area of Panchayat is declared as Scheduled Area, only PESA would operate and provisions of State legislation (ZPPS Act), if in conflict with PESA, would be inapplicable. However, in the discussion hereinabove, we have arrived at a conclusion that the provisions of ZPPS Act, as applicable to Panchayat where entire area is declared as Scheduled Area, do not conflict with PESA.

The problem arises when the authorities are required to conduct the elections of

the Panchayats wherein part area is declared as Scheduled Area and part area is not so declared. Admittedly, Dhule Zilla Parishad and Nandurbar Zilla Parishad, which are the Panchayats of the highest level, are such Panchayats wherein entire area is not declared to be Scheduled area. In other words, only part area of these highest Panchayats is declared Scheduled Area. In fact, on reference to Scheduled Areas (Maharashtra) Order, 1985, following position emerges, so far as Panchayats at district levels (Zilla Parishad) and Panchayats at Taluka level (Panchayat Samiti) are concerned.

Dhule Zilla Parishad - Part area-Scheduled Area.

Dhule Panchayat Samiti. - No Scheduled Area

Sindhkheda - No Scheduled Area

Sakri - Partly Scheduled Area

Shirpur - Partly Scheduled Area

Nandurbar Zilla Parishad - Part area Scheduled Area.

Nandurbar Panchayt Samiti - Partly Scheduled Area.

Shahada - Partly Scheduled Area.

Nawapur - Entire Scheduled Area.

Taloda - Entire Scheduled Area.

Akkalkuwa - Entire Scheduled Area.

Akrani - Entire Scheduled Area.

While amending Sections 12 and 58, as also 42 and 67 of ZPPS Act with effect from 3.1.1997, the State of Maharashtra seems to have taken a note of the fact that as a result of declaration of Scheduled area, there are Panchayats in the State, wherein there is a Scheduled Area as their parts, although entire Panchayat area is not declared as Scheduled Area. On reference to Section 4(g) of PESA, which is the only part of the Act as applicable to elections of Panchayats and reservations at such elections, it is evident that there is no express indication of cognizance of such eventuality i.e. existence of Panchayats, area of which is partly Scheduled Area and partly not so declared. However, opening part of Clause (g) "...in the Scheduled Areas at every panchayat...." has some indication of Scheduled Area being only part of the Panchayat and for which, the modifications to Part IX of the Constitution in its application to the Scheduled Area, are being adopted by Section 4(g) of PESA and more particularly by two

provisos to the said Clause (g) of Section 4. If this is taken into account, there is reason to feel that while adopting part IX in its application to the Scheduled Area in the modified form, the Central legislation, to some extent; controls reservation of seats as well as offices of Chairpersons which may not be strictly within Scheduled Area, e.g. in Panchayat where population of Scheduled Tribe is 30 per cent, by requiring not less than one-half of the total number of seats for Scheduled Tribes, 20 per cent seats would be required to be reserved in an area not so declared. "All the seats of chairpersons of Panchayats" referred to in second proviso to Section 4(g) would not fall in Scheduled Area, if Scheduled Area is only part/small part of entire area of Panchayat. Thus, the way the second proviso to Section 12(2)(b) and Section 58(1-B)(b), as also 42(4)(a) and 67(5) (a) of ZPPS Act, seem to treat part of the area of a Panchayat declared as Scheduled Area, at par with area not so declared, the Central legislation also seems to be invading in the area not declared as Scheduled Area while extending applicability of part IX of the Constitution to Scheduled Area, in its modified form by Section 4(g) of PESA.

11. Naturally, the question that is required to be considered would be, what happens when PESA and ZPPS Act read with 1996 rules conflict. Upon reading Article 243D(4)(b), it is evident that only the Parliament has legislative competence to provide application of part IX with exceptions and modifications as may be specified in the law providing application of part IX to the Scheduled Areas. It must be said that Clause (4) of Article 243M is very strongly worded, since it opens with non-obstante Clause "Notwithstanding in this Constitution." and Sub-clause (b) ends with "...and no such law shall be deemed to be amendment of this Constitution for the purpose of Article 368...." It is felt that the manner in which Clause (4) of Article 243M is worded, it empowers the Parliament to make a law which may even be in conflict with provisions of part IX, while extending applicability of IX part to the Scheduled Area and yet such provisions are not to be deemed an amendment of the Constitution for the purpose of Article 368. The State legislature lacks legislative competence, so far as extension of IX part to Scheduled area is concerned and, therefore, the provisions of State legislation, which conflict with PESA, would be inapplicable.

Advocate Shri S.T. Shelke for the State Election Commission referred to paragraph 5 of Fifth Schedule and desired us to examine whether the amendments to the provisions of ZPPS Act can be said to have been effected in exercise of powers conferred by said paragraph 5 of Fifth Schedule. The said provision reads thus;

Law applicable to Scheduled Areas:

(1). Notwithstanding any thing in this Constitution, the Governor may "by public notification? direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any

direction given under this sub-paragraph may be given so as to have retrospective effect.

Governors of State thus seem to have been empowered to obstruct or resume the application of any Act of Parliament, or that of the State legislature to a Scheduled Area or any part thereof in the State and subject to such exceptions or modifications as he may specify. Governor is required to do so "by a public notification? and not with the aid of State legislation. Therefore, it may not be correct to say that amendments to ZPPS Act are effected by Governor of the State in exercise of his powers conferred by paragraph 5 of Fifth Schedule, regarding "administration and control of Scheduled Areas and Scheduled Tribes."

It was not submitted on behalf of the State that the amendments to Sections 12/58 and 42/67 of ZPPS Act were in exercise of powers conferred upon Governor by paragraph 5 of the Fifth Schedule of the Constitution, nor it was submitted that any such "public notification" is issued by the Governor of the Maharashtra. In this context, the statement of objects and reasons in promulgating Maharashtra Zilla Parishad and Panchayat Samiti (Extension to the Scheduled Areas and Amendment) Ordinance, 1997 (No. I of 1997) and more particularly contents in paragraphs 2 and 3, can usefully be referred to.

2. In exercise of the powers conferred by the Article 243M(4)(b) of the Constitution, Parliament has passed, the provisions of the Panchayats (Extension to the Scheduled Areas) Act 1996 (Act No. 40 of 1996), providing for extension of the provisions of the said Part IX to the Scheduled Areas, subject to the exceptions and modifications as provided in Section 4 of the said Act. Section 4 of the said Act, inter alia, provides for the reservation of seats in the Scheduled Areas in any Panchayat in proportion to the population of the communities in that Panchayat for whom reservation is sought to be given under the said Part IX, provided that, the reservation for the Scheduled Tribes shall not be less than one half of the total number of seats, and also that, all seats of chairpersons of Panchayats at all levels shall be reserved for the Scheduled Tribes.

3. The general elections to the Zilla Parishads and Panchayat Samitis are scheduled to be held sometime in the month of February or March 1997. It is, therefore, necessary to carry out suitable amendments, with immediate effect in the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, so as to give effect to the said provisions of Section 4 of the said Act made by Parliament.

Thus, Ordinance and subsequent amendments to ZPPS Act were aimed at implementing PESA and not prohibiting its applicability.

Learned standing Counsel for Union referred to Article 254(1) of the Constitution, for propounding that PESA being legislation of the Parliament, would prevail over provisions of ZPPS Act and 1996 Rules and to the extent the provisions of State Act and Rules are repugnant to the provisions of PESA, shall be void. With due respect, reference to Article 254(1) is not necessary. The said Article deals with the legislation enacted by the Parliament and the State legislature in their

legislative competence, flowing from the lists as contained in the Seventh Schedule (Union list, Concurrent list and State list). Part IX of the Constitution having come into force only in the year 1993, is not included in either of the three lists. The legislative competence in favour of the Parliament arises by virtue of Article 243M(4)(b), which indicates that only Parliament can legislate for extending the provisions of Part IX of the Constitution, with exceptions and modifications, to the Scheduled Area. Naturally, the provisions of State legislation and Rules controlling allotment of seats and reservations, as also reservations for offices of chairpersons, so far as Scheduled Area is concerned, will have to be deemed to be void, in the light of existence of Central legislation-PESA in the field. Although we felt that there may be occasions when compliance of first proviso to Section 4(g) may be invading upon the area not declared as Scheduled Area, by reservation of seats for Scheduled Tribes in that area. Similarly, reservation of all offices of the chairpersons of the Panchayats at all level for Scheduled Tribes as prescribed by second proviso to Section 4(g) also invades in the area not declared as Scheduled Area. However, since, so far, no such legal challenge is successfully set up against those two provisos to Section 4(g) of PESA, those will have to be implemented. Moreover, legislations providing reservation for SC/ST, which are Constitutional reservations, need to be interpreted in favour of the reservation and not against the reservations.

12. The contention of the State that it has fully implemented the provisions of PESA by suitable amendments to ZPPS Act, is not sustainable in view of the conclusions regarding provisions of ZPPS Act being in conflict with Section 4(g) of PESA. If the second proviso referred from 4 Sections of ZPPS Act as applicable to the Panchayats, wherein part area is scheduled area are to be ignored being repugnant to PESA. The first proviso to the extent they refer to Panchayats where entire area is declared as scheduled area, the propriety of existence of word "entire" is required to be re-examined, in view of the fact that PESA does not specifically refer by distinction amongst the Panchayats where entire area is declared as Scheduled Area and Panchayats where only part of area is declared as Scheduled Area.

It, therefore, appears desirable that there is dialogue between State and the Union to resolve this discrepancy. After all the Courts cannot direct either Government to legislate in a particular manner.

In para 3 of reply filed by Shri Rajiv Pande on behalf of State Election Commission, it is contended that State Election Commission is not responsible for implementing provisions of PESA. We are afraid once Part IX is made applicable also to the Scheduled Areas, with exceptions and modifications, by PESA, such an approach is not permissible to the State Election Commission in view of Article 243K(1), which vests the superintendence, direction and control of the preparation of electoral roll for, and on the conduct of all elections to the Panchayats in State Election Commission. The provision of PESA to the extent applicable to the elections of Panchayats are required to be implemented by the

Election Commission in the field.

Senior Counsel Shri P.M. Shah submitted that in order to resolve the dispute, the possibility may be examined if Panchayats wherein part area is declared Scheduled Area can be considered for elections as two zones, Scheduled Area being governed by PESA and the remaining area by State Legislation. In the discussion hereinabove, we have taken a note that PESA though does not expressly distinguish between Panchayats having entire area as scheduled area and Panchayats having part area as Scheduled Area, opening part of Clause (g) indicates awareness about existence of Panchayats wherein only part area is Scheduled Area. Yet it prescribes reservation of more than 50% seats of the total number of seats in the Panchayat area for Scheduled Tribes, as also reservation of all offices of Chairpersons for Scheduled Tribes. The invasion that may occur in the area not declared Scheduled area, to some extent while implementing Section 4(g) of PESA may not permit us to accede to the proposition of learned Senior Counsel. Moreover, Sections 6 and 56 of ZPPS Act require establishment of a Zilla Parishad for every district and Panchayat Samiti for every block. Constitution of districts and blocks is the function of the State Government by virtue of Sections 4 and 5 of ZPPS Act. The Court, therefore, cannot consider issuance of direction to treat Scheduled Area and other areas as separate zones thereby practically creating two Zilla Parishads or two Panchayat Samitis in the same district/block.

13. Realising that if this Court upholds the contentions of the petitioners, it may issue directions requiring the State Election Commission to bring the reservations at the ensuing elections in harmony with provisions of PESA, both Counsel for intervenors have relied upon Article 243O of the Constitution of India and claimed that it is too late to correct the irregularity/illegality. They have, therefore, prayed that the directions that may be issued by this Court may be ordered to be implemented at the next election. Article 243O reads thus:

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.

The discussion of reasons hereinabove, clearly indicates that although petitioners have come with a prayer for directions to implement PESA, for the purpose they have challenged applicability of certain provisions of ZPPS Act, relating to allotment of seats (reservation). Impliedly, they have also challenged allotment of seats, although the grievance can be said to be of less number of seats being awarded to Scheduled Tribe category, than required under PESA.

Advocate Shri Shelke for the Election Commission has submitted that the State Election Commission is likely to declare election programme on 10.11.2008. We, therefore, can infer that exercise of delimitation of the constituencies and

allotment of seats is already in progress, nearing completion or may be even completed.

Although both the learned Counsel for intervenors-respondents have challenged maintainability of the writ petition, such challenge is mainly set up, by relying upon Clause (b) of Article 243O and not by relying upon the nature of challenge described by us hereinabove. It was contended by both of them that it is too late for this court to interfere and, therefore, directions, if any, may be ordered to be complied with, only for the next election. Interference of the court in the election process was thus opposed.

Advocate Shri Patil for Respondent No. 8 has placed reliance upon judgment of the Hon'ble the Supreme Court in the matter of Boddula Krishnaiah and another Vs. State Election Commissioner, A.P. and others, . Ratio laid down by the judgment is summed up in the head note titled as "important point".

Once an election process has been set in motion, though the High Court may entertain or may have already entertained a writ petition, it would not be justified in interfering with election process giving direction to state (stay) the proceedings or to conduct the election process a fresh, in particular when election had already been held, in which voters were allegedly prevented to exercise their franchise and remedy could be prosecuted under the Acts and Rules.

In the reported matter, the election was held on 27.6.1995 and although High Court, by interim order dated 26.6.1995, directed to allow 94 persons to participate in the election, on the date of poll they could not exercise their franchise. By interim order dated 6.7.1995, direction was issued by High Court not to declare result of election of Gram Panchayat, in a writ petition by some of them, seeking directions to permit them to exercise their franchise.

The other reported judgment Election Commission of India Through Secretary Vs. Ashok Kumar and Others, relied upon by learned Advocate Shri P.S. Patil, has considered the leading cases on the subject, regarding interference by the High Courts in electoral matters, beginning from N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, to C. Subrahmanyam Vs. K. Ramanjaneyullu and Others, . We intend to reproduce certain observations from this reported judgment in the matter of Election Commission of India Through Secretary Vs. Ashok Kumar and Others, . In this matter, interim order passed by the High Court in exercise of its writ jurisdiction under Article 226 of the Constitution, whereby it had stayed the notification by the Election Commission of India, containing directions as to the manner of counting votes and making further directions of its own on the subject, was stayed by the Supreme Court. By the time the matter came up for final hearing before the Supreme Court, the counting had taken place in accordance with the notification dated 28.9.1999 that was challenged before the High Court and the appeals had become infructuous. However, at the insistence of the learned Counsel for appellants,

who submitted that the issue arising for decision in the appeals was of wide significance, inasmuch as several writ petitions are filed before the High Court, seeking interim directions interfering with the election proceeds and, therefore, it would be in public interest, if the court may pronounce upon the merits of the issue arising for decision in the appeals; the Hon^{ble} the Supreme Court proceeded to hear and decide the appeals on merits. Naturally, the Hon^{ble} Apex Court was considering the issue regarding jurisdiction of the High Court to entertain petitions under Article 226 of the Constitution and to issue interim directions after commencement of the electoral process.

No doubt, it was a matter wherein objections to passing of orders by the High Court was raised by relying upon Article 329 of the Constitution. However, Article 243O is *pari-materia* with Article 329 and, therefore, law laid down by the Hon^{ble} Apex Court in the matter relied upon by learned Counsel for the intervenors-respondents, would be squarely applicable to the matter at hands.

The observations in the matters of N.P. Ponnuswami and Mohinder Singh Gill, are considered and dealt with in paras 18 to 21 of the reported judgment. Both earlier decisions rendered were the decisions by the Constitution Bench.

The plenary power of Article 329 has been stated by the Constitution Bench to be founded on two principles; (1) the peremptory urgency of prompt engineering of the whole election process without intermediate interruptions by way of legal proceedings challenging the steps and stages in between the commencement and the conclusions; (2) the provision of a special jurisdiction which can be invoked by an aggrieved party at the end of the election excludes other form, the right and remedy being creatures of statutes and controlled by the Constitution.

Following observations from Mohinder Singh Gill's case are reproduced.

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

(2). In conformity with this principle, the scheme of the election law in this country, as well as in England, is that no significance should be attached to anything which does not affect the election and if any irregularities are committed while it is in progress and they belong to the category or class which under the law by which the 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 to a dispute before any court while the election is in progress.

Following are the observations in paragraph 20;

A Reading of Mohinder Singh Gill's 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 subserves the progress of the election and facilitates the completion of election.

In paragraph 21 of the judgment, the court has observed third category of cases, which may call the court to interfere in the electoral process and we quote;

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 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 court has summed up its conclusions in paragraph 32 of the judgment and it is evident from the conclusions that interference by the court should be an exception, rule being invoking of judicial remedy to be postponed till after the completion of the proceedings in election. The term "election" is required to be widely interpreted so as to include all steps and entire proceedings from the date of notification of election till declaration of result. However, we may reproduce conclusions 2 to 4 verbatim.

(2). Any decision sought and rendered will not amount to "calling in question an election" if it subserves the process 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 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 decision of statutory bodies, such as, on a case of mala fide or arbitrary exercise of powers being made out or the statutory body being shown to have acted in breach of law.

(4). Without interrupting, obstructing and 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 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.

In the matter at hands, as can be seen from the discussion of facts and law hereinabove, the petitioners are aggrieved by non implementation of provisions of PESA, which give distinct advantage to the Scheduled Tribes, when Panchayat is one consisting of Scheduled Area. We have already observed earlier that, implementation of Section 4(g) of PESA would require reservation of not less than one-half of total number of seats in the Panchayat and also of all the offices of Chairpersons of the Panchayats for Scheduled Tribe. If the election goes ahead without ensuring such reservation, entire election proceedings will be illegal, viewed in the light of provisions of PESA, which is a special legislation enacted by the Parliament, extending provisions of Part IX of the Constitution with modifications, to the Scheduled Area. The seats, which ought to be reserved for Scheduled Tribes, if not reserved and election proceedings are allowed to be concluded, the situation may be irreversible, except by fresh election. The submission of learned Counsel for the State Election Commission, confirms that the actual election programme has not rolled in motion, which is likely to be declared on 10.11.2008. It is also clear that polling is tentatively scheduled for 30.11.2008 and the term of existing Zilla Parishads and Panchayat Samitis ends sometime in the last week of December 2008. We, therefore, feel that there is time margin available for rectifying the legal lacuna. There are at least ten more days from the date of delivery of this judgment, during which the State Election Commission can act to remove the defect and there also appears some time margin (between 30.11.2008 to 27.12.2008) to postpone the election programme, by few days and yet complete it before expiry of tenure of present Panchayats. We, therefore, feel justified in entertaining the writ petition (which was filed on 21.7.2008) and issue directions, in view of conclusion 4 reproduced hereinabove, from the case relied upon by learned Counsel for intervenors-Respondents.

We have gone through the judgment rendered by earlier Division Benches in Writ Petition Nos. 5386 of 2006 and group of Writ Petitions, including Writ Petition No. 6389 of 2006. We do not think that we are recording anything in conflict with those judgments. In fact, in both those judgments, election for Zilla Parishad, Aurangabad, was the subject-matter. The court thus, was not required to consider the provisions of PESA and rotation policy, which was sought to be implemented by the directions of the court, is upheld by us, as available to be implemented by the State Election Commission, in view of silence of PESA on that aspect.

14. Our conclusions based on the reasons discussed hereinabove, can be summarised as follows;

- (1). Second proviso to each of Sections 12(2)(b) and 58(1-B)(b) of ZPPS Act are in conflict with first proviso to Section 4(g) of PESA.
- (2). Second proviso to each of Sections 42(4)(a) and 67(5)(a) of ZPPS Act are in

conflict with the second proviso to Section 4(g) of PESA.

(3). Proviso to Rule 4(2) of 1996 Rules is also in conflict with first proviso to Section 4(g) of PESA.

(4). It is desirable for Law Departments of State and Union to have a dialogue to remove the discrepancy.

(5). Till the time discrepancy is removed, provisions of ZPPS Act/1996 Rules to the extent of repugnancy with PESA, as indicated hereinabove, will have to be ignored for practical application.

(6). It is not possible to treat Scheduled Area and other part from the same Panchayat, as separate zones, controlled by PESA and ZPPS Act, for the purpose of elections to Panchayats.

(7). State Election Commission cannot deny responsibility of implementation of PESA in the field.

In view of conclusions hereinabove, the writ petition will have to be and is accordingly allowed.

Rule, which was made returnable forthwith by consent of the parties at the commencement of the arguments, is made absolute, by directing Respondent Nos. 1 and 2 to implement the provisions of PESA for the elections of Panchayats at all levels in the districts of Dhule and Nandurbar.