

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.7206 of 2020

Badri Narayan Singh S/o Late Kishun Singh, Mohalla-Yogiyatoli (Yarpur),
Police Station-Gardanibagh, District-Patna (Bihar) 800001.

... .. Petitioner/s

Versus

1. The Ministry of Home Affairs (MHA) Government of India, through the Home Secretary North Block, New Delhi-110001 (India).
2. The State of Bihar through The Chief Secretary, Main Secretariat, Patna, Bihar-800 015.
3. The Chief Election Commissioner, the Office Address Nirvachan Sadan, Ashoka Road, New Delhi 110001.
4. The Chief Election Officer, State Election Commission, Bihar Sone Bhawan, 3rd Floor, Beerchand Patel Marg, Patna-800 001 (Bihar).

... .. Respondent/s

with

Civil Writ Jurisdiction Case No. 7294 of 2020

Jai Vardhan Narayan, Advocate, Patna High Court, Advocate on Record No. 07196, Enrolment No. 2202 dated 19.07.2011 of the Bihar State Bar Council, Patna, aged about 33 years, Gender-Male, Son of Sarvendra Kumar Verma, Advocate, Patna High Court, resident of Deans' Tank Road, Tari Mohalla, Ara, Bhojpur, Presently residing at Jagat Narayan Road, Kadam Kuan, P.O. and P.S. Kadam Kuan, District Patna- 800003.

... .. Petitioner/s

Versus

1. The Election Commission of India Through the Chief Election Commissioner of India, Nirvachan Sadan, Ashoka Road, New Delhi 110001.
2. The Chief Electoral Officer Bihar, 7, Sardar Patel Marg, (Mangles Road), Patna- 800015.
3. The Union of India Through the Principal Secretary, Department of Home, Government of India.
4. The Chief Secretary Government of Bihar, Old Secretariat Building, Patna.

... .. Respondent/s



Appearance :

(In Civil Writ Jurisdiction Case No. 7206 of 2020)

For the Petitioner/s : None
For the Union of India : Dr. K.N. Singh, ASG
Mrs. Nivedita Nirvikar, CGC
For the State : Mr. Lalit Kishore, Advocate General
Mr. Prabhat Kumar Verma, AAG-3
Ms. Divya Verma, A.C. to AAG-3
For the Election Commission: Mr. Sidhartha Prasad, Advocate
(In Civil Writ Jurisdiction Case No. 7294 of 2020)
For the Petitioner/s : Mr. Jai Vardhan Narayan (In Person)
For the Union of India : Dr. K.N. Singh, A.S.G.
Mr. Rajesh Kumar Verma, CGC
For the Election Commission: Mr. Siddharth Prasad, Advocate
For the State : Mr. Lalit Kishore, Advocate General
Mr. Pawan Kumar, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE S. KUMAR

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 07-09-2020

The petitioners have approached this Court under writ jurisdiction, seeking direction to the Election Commission to postpone/ defer the upcoming assembly elections to be held in the State of Bihar in 2020 and/or restrain the Election Commission from notifying date for assembly election till further order of this Court. This is because of the prevailing Pandemic Covic-19, corona-virus disease in the State of Bihar.

The date of expiration of legislative Assembly of Bihar is 29.11.2020. For this reason, the election commission has decided to go ahead with assembly elections in October



2020. The election date and schedule of elections are yet to be notified by the Commission. In light of Covid-19, the Election Commission of India has on 21st August vide document no. 324.6.EPS.OT.001.2020 issued guidelines/SOPs for the conduct of elections during Covid-19.

CWJC 7206/2020

By way of his petition, Shri Badri Narayan Singh brings to the record the prevailing position of Coronavirus disease in the State of Bihar. He states as on 05.07.2020 there were 11,460 positive cases of the virus with as many as 1015 deaths in the State. He further states that the cases of coronavirus are only increasing every day and any conduct of elections in this period would only increase the spread of the disease, which neither the government nor the Election Commission is ready to take responsibility for. The petitioner assesses that during the conduct of elections, due to campaigning, gathering etc., the cases and spread of the virus would increase, and deaths due to this would increase as well and lots of lives would be in danger, and that all development activities would stop with the announcement of the election. The petitioner also claims that the scare of the virus would frighten the voters from going into the voting booths to cast



their votes. Therefore the government would be formed with less than 50% of votes, making a mockery of democracy. The petitioner has also provided his calculations on the number of persons who would be able to vote with social distancing measures in place and contends that with the given number of polling booths not more than 30% of the total voters would get a chance at polling.

Significantly, no mala fides stand alleged.

We find that the contentions of the petitioner are completely unsubstantiated. We see that the increase in the number of cases may be attributed to the increase in testing in the State. There is nothing to show that the Election Commission is refusing to take stock of the coronavirus situation in the State. In the counter-affidavit on behalf of the State Election Commission, they have categorically assured to the Court that the guidelines/SOPs formulated for the conduct of elections are done keeping in view the prevailing Covid-19 pandemic and that every possible decision being explored is taken into account only after analyzing all factors relating to conduct of elections. There is nothing to show that the Election Commission is failing to take responsibility/ the possibility of spread of the disease.



The petitioner's assessment of the increase in the spread of the disease and increased loss of lives is completely unsubstantiated. There is nothing to show that development schemes would cease on the announcement of elections. There is nothing on record to substantiate the claim that 'less than 50%' of persons would come out for voting or that 'no more than 30%' would be allowed to vote while following social distancing guidelines. The assertion that elections during the prevailing disease would be a mockery of democracy is utterly and completely unsubstantiated. Also, no mala fides stand alleged.

CWJC 7294/2020

The second petition, brought about by Shri Vardhan Narayan, brings to the Court's attention, the fundamental right of every voter under Article 19(1)(a), to know the antecedents including criminal past of the candidate standing for the assembly election. Further on account of Covid-19 as well as flooding in multiple parts of the State, it would not be possible to make available this information and bio-data of the candidates to the voters that campaign contains the ideas that a candidate wishes to share with the people. The campaign agendas, talking points and policy issues of the candidates need



to reach the people. However, since a large proportion of the population of Bihar is rural and illiterate, digital means of campaigning to disperse these messages would not work that smaller and independent candidates will neither have resources nor technology to reach out to voters through digital means. Digital campaigning would therefore be violative of Article 14 of the Constitution, as it will affect the right and opportunity to carry out a free and fair election campaign. The petitioner seeks this Court's intervention in ascertaining that the fundamental rights of the voters are protected, in the alternate the elections to the State Assembly Elections be deferred till such time that the fundamental rights of the voters are possible to be achieved.

It is brought to our notice that Hon'ble the Apex Court and even this Court, very same Bench, has dismissed similar petitions. Twice, none has entered appearance in the first matter and in the second matter, learned counsel who is the petitioner himself seriously does not press the present petition. However, to put finality to the issue, we pass a detailed order.

Undisputedly, free and fair elections are a fundamental right of every citizen of this country. In the case of **Indira Nehru Gandhi v. Raj Narayan (1975) Supp SCC 1**, the Constitution Bench of Hon'ble the Apex Court held that free



and fair elections form is an essential feature of any democracy and therefore forms part of the basic structure of the Constitution.

Further voters have a fundamental right to know and have information on the antecedents of the candidates, as pointed, the Hon'ble the Apex Court in the case of **Union of India v. Association for Democratic Reforms and Anr (2002) 5 SCC 294** has held so as under:

"38. If right to telecast and right to view to sport games and right to impart such information is considered to be part and parcel of Article 19(1)(a), we fail to understand why the right of a citizen/voter -- a little man - to know about the antecedents of his candidate cannot be held to be a fundamental right under Article 19(1)(a)? In our view democracy cannot survive without free and fair election, without free and fairly informed voters. Votes cast by uninformed voters in favour of X or Y candidate would be meaningless. As stated in the aforesaid passage, one-sided information, disinformation, misinformation and non-information all equally create an uninformed citizenry which makes democracy a farce. Therefore, casting of a vote by misinformed and non-informed voter or a voter having one-sided information only is bound to affect the democracy seriously. Freedom of speech and expression includes right to impart and receive



information which includes freedom to hold opinions. Entertainment is implied in freedom of 'speech and expression' and there is no reason to hold that freedom of speech and expression would not cover right to get material information with regard to a candidate who is contesting election for a post which is of utmost importance in the democracy."

The ratio also stood reiterated in **People's Union for Civil Liberties (PUCL) v. Union of India (2003) 4 SCC 399.**

However, there is nothing on the record to show that the Election Commission is/ would be unable to ascertain these fundamental rights to the voters. Be that as it may, further issues which arise for consideration are as follows:

- (i) Whether this Court under its writ jurisdiction has authority to issue directions to the Election Commission, fixing dates for conducting elections to the Legislative Assembly;
- (ii) what is the scope of interference of a Court under Article 226 of the Constitution of India, in relation to the decisions of the Election Commission with respect to election matters.

The issues stand answered by culling out different



propositions hereinafter.

I. Conduct of Elections is in the Exclusive Jurisdiction of the Commission

Article 324 of the Constitution vests the exclusive superintendence, direction and control of elections in the Election Commission:

"**324.** (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution 1 *** shall be vested in a Commission (referred to in this Constitution as the Election Commission). ..."

It is a settled position of law that the Election Commission has exclusive authority with respect to framing laws regarding the conduct of elections and where there is no law to cope with some situation within the enacted rules, the Commission has plenary powers to exercise their discretion.

Although earlier cases referred to the authority of the Commission under Article 324, the case of **Mohinder Singh Gill v. The Chief Election Commissioner (1978) 1 SCC 405**, was one of the first cases to flesh out that the



'conduct' of elections and the 'superintendence, direction and control' of elections under Article 324 meant that Commission had extensive plenary powers to take decisions that were not covered under the statute. In this case, due to disruptions during the counting of votes for a constituency in Punjab, the Commission ordered the cancellation of the whole poll and directed to hold a fresh poll for the constituency. The petitioner argued that the Commissioner had no power to cancel the election to a whole constituency. Therefore, the impugned order is beyond his authority and in excess of his functions under Article 324. Moreover, even if such power exists, it has been exercised illegally, arbitrarily and in violation of the implied obligation of *Audi Alteram Partem*. He argued that the Commissioner acted beyond its boundaries and in breach of its content and oblivious of its underlying duties. The Constitution Bench of the Hon'ble Apex Court answered as follows:

"92. Diffusion, even more elaborate discussion, tends to blur the precision of the conclusion in a judgment and so it is meet that we synopsise the formulations. Of course, the condensed statement we make is for convenience, not for exclusion of the relevance or attenuation of the binding impact of the detailed argumentation. For this limited purpose, we set down our holdings:



1(a) Article 329(b) is a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of the result.

(b) Election, in this context, has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate.

2(a) The Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. This, responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances.

(b) Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission shall act in conformity with, not in violation of such provisions but where such law is silent Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice in so far as conformance to such canons can reasonably and realistically be



required of it as fairplay-in- action in a most important area of the constitutional order, viz., elections. Fairness does import an obligation to see that no wrong-doer candidate benefits by his own wrong. To put the matter beyond doubt natural justice enlivens and applies to the specific case of order for total repoll although not in full panoply but inflexible practicability. Whether it has been complied with is left open for the Tribunal adjudication.

(3) The conspectus of provisions bearing on the subject of elections clearly expresses the rule that there is a remedy for every wrong done during the election in progress although it is postponed to the post election stage and procedure as predicated in Article 329(b) and the Act. The Election Tribunal has, under the various provisions large enough powers to give-relief to an injured candidates if he makes out a case and such processual amplitude of power extends to directions to the Election Commission or other appropriate agency to hold a poll, to-bring up the ballots do other-thing necessary for fulfilment of the jurisdiction to undo illegality and injustice and do complete justice within the parameters set by the existing law."

In the case of **Election Commission of India v. State of Haryana 1984 (Supp) SCC 104**, the Hon'ble Court was faced with a situation similar to that in the instant petition.



Owing to serious law and order problems in the State of Punjab and territorial disputes with the State of Haryana, questions on the possibility of holding by-elections in light of the looming threat of "terrorist activities, were brought before the Courts. The High Court granted interim relief to the petitioners by way of stay on the election operation. The Hon'ble Supreme Court held that although it is not suggested that the Election Commission can exercise its discretion in an arbitrary or mala fide manner, the ultimate decision as to whether it is possible and expedient to hold the elections at any given point of time must rest with the Election Commission. The Court further held that it could not be assumed that the Commission is so naive as to be unaware of the prevailing situation:

"8.....We see no doubt that the Election Commission came to its decision after bearing in mind the pros and cons of the whole situation. It had the data before it. It cannot be assumed that it turned a blind eye to it. In these circumstances, it was not in the power of the High Court to decide whether the law and order situation in the State of Punjab and Haryana is such as not to warrant or permit the holding of the by-election."

(Emphasis supplied)

In 2002, **Special Ref. by President (Gujarat Assembly) (2002) 8 SCC 237**, another constitution bench of



the Hon'ble the Apex Court clarified that fixing the schedule of the election was within the exclusive domain of the Hon'ble Commission.

"80. So far as the framing of the schedule or calendar for election of the Legislative Assembly is concerned, the same is in the exclusive domain of the Election Commission, which is not subject to any law framed by the Parliament. The Parliament is empowered to frame law as regards conduct of elections but conducting elections is the sole responsibility of the Election Commission. As a matter of law, the plenary powers of the Election Commission can not be taken away by law framed by Parliament. If Parliament makes any such law, it would repugnant to Article 324."

It is, therefore trite law that only the Hon'ble Election Commission and not this Court who has the authority to decide upon the date and schedule for the State Assembly Elections.

II. Scope of Interference of High Court in Electoral Matters

The petitioner has laid great emphasis on the fact that the fundamental rights of the voters under Article 19(1)(a), as well as independent candidates under Article 14, are under threat, warranting the interference of this Court seeking a



mandamus for delaying the elections to the Legislative Assembly of Bihar. This brings about the issue of the scope of writ jurisdiction in election matters.

Article 329 of the Constitution provides a bar to the interference by Courts in electoral matters:

"**329.** 1 [Notwithstanding anything in this Constitution 2 ***—

[...] (b) no election to either House of Parliament or to the House or either 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."

II(a). What are 'election' matters?

The case of **N.P. Ponnuswami and Ors v. Returning Officer, Namakkal Constituency [1952] SCR 218** was one of the first cases where the question of interpretation of Article 329 came before the Hon'ble Apex Court. In this case, the Commission had rejected the petitioner's nomination papers, and therefore he approached the Court seeking a writ of certiorari to quash the decision of this Commission. The Hon'ble High Court rejected his plea by reason of Article 329(b), which bars the interference of Courts in electoral



matters. A six-judge bench of the Hon'ble, the Apex Court adjudicated of the scope of Article 329 and interpreted the meaning of 'election' under Article 329, holding that "the word "election" could be and had been properly used with respect to the entire process which consisted of several stages and embraced many steps some of which might have an important bearing on the result of the process" and, therefore, held that in view of the provisions of Art. 329 (b) of the Constitution and s. 80 of the Representation of the People Act, 1951, the High Court had no jurisdiction to interfere with the order of the Returning Officer under Art. 226. The only way such an order could be called in question was as laid down in Art. 329 (b) of the Constitution and s. 80 of the Representation of the People Act, 1951, and this could be done only by an election petition presented before the Election Tribunal after the entire process of election culminating in a candidate being declared elected had been gone through.

This proposition was accepted and further fleshed out by the constitution-bench of the Hon'ble Court in **Mohinder Singh Gill (supra)** upholding that "election" included the "rainbow of operations" commencing from the initial notification and culminates in the declaration of the



return of a candidate. The Hon'ble Court further upheld that any decision that interferes with the progress of election would be said to "call in question an election" and therefore be hit by Article 329:

"29. Thus, there are two types of decisions, two types of challenges. The first relates to proceedings which interfere with the progress of the election. The second accelerates the completion of the election and acts in furtherance of an election. So, the short question before us, in the light of the illumination derived from Ponnuswami, is as to whether the order for re-poll of the Chief Election Commissioner is "anything done towards the completion of the election proceeding" and whether the proceedings before the High Court facilitated the election process or halted its progress. The question immediately arises as to whether the relief sought in the writ petition by the present appellant amounted to calling in question the election...

The plenary bar of Article 329(b) rests on two principles: (1) The peremptory urgency of prompt engineering of the whole election process without intermediate interruptions by way of legal proceedings challenging the steps and stages in between the commencement and the conclusion. (2) The provision of a special jurisdiction which can be invoked by an aggrieved party at the end of the election excludes other form, the right and remedy



being creatures of statutes and controlled by the Constitution."

II(b). Interference of the High Court before schedule/ date of elections notified

In the case of **A.K.M. Hassan Uzzaman v. Union of India (1982) 2 SCC 218**, where the petitioner had approached the High Court under Article 226 for interim orders because the electoral rolls had not been revised and therefore any election would be in contravention of the RP Act. This was before the issuance of notification under Section 15(2) of the RP Act [notification of date for election]. The Hon'ble Apex Court holding that despite the fact that the High Court did not lack jurisdiction to pass orders, it must be reluctant to do anything that would result in a postponement of elections irrespective of whether preparation and publication of rolls fell within 'elections' under Article 329:

"1.(i) Though the High Court did not lack the jurisdiction to entertain the Writ Petition and to issue appropriate directions therein, no High Court in the exercise of its powers under Article 226 of the Constitution should pass any orders, interim or otherwise, which has the tendency or effect of postponing an election, which is reasonably imminent, and in relation to which its writ jurisdiction is invoked. The imminence of the



electoral process is a factor which, must guide and govern the passing of orders in the exercise of the High Court's writ jurisdiction. The more imminent such process, the greater ought to be the reluctance of the High Court to do anything, or direct anything to be done, which will postpone that process indefinitely by creating a situation in which, the Government of a State cannot be carried on in accordance with the provisions of the Constitution. ... The High Courts must observe a self-imposed limitation on their power to act under Article 226, by refusing to pass orders or give directions which will inevitably result in an indefinite postponement of elections to legislative bodies, which are the very essence of the democratic foundation and functioning of our Constitution. That limitation ought to be observed irrespective of the fact whether the preparation and publication of electoral rolls are a part of the process of 'election' within the meaning of Article 329(b) of the Constitution."

The Hon'ble Court further held that it was the duty of Courts to protect and preserve the integrity of all constitutional institutions, therefore when the method of their functioning is questioned, courts must examine the allegations with more than ordinary care. However, that being said, the presumption of the courts would always be the existence of



bona fides in the discharge of constitutional and statutory functions and until that presumption is displaced, it is not just or proper for the Courts to act on preconceived notions and to prevent public authorities from discharging functions which are clothed upon them.

Subsequently, in the case of **Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman (1985) 4 SCC 689**, a constitution bench of the Hon'ble Court decided the merits of the Hassan case, where the Court reiterated that:

"26.Even assuming, therefore, that the preparation and publication of electoral rolls are not a part of the process of 'election' within the meaning of Article 329(b), we must reiterate our view that the High Court ought not to have passed the impugned interim orders, whereby it not only assumed control over the election process but, as a result of which, the election to the Legislative Assembly stood the risk of being postponed indefinitely. The order dated March 30, 1982 which we will presently reproduce, contains our reasons in support of this conclusion. Very often, the exercise of jurisdiction, especially the writ jurisdiction, involves questions of propriety rather than of power. The fact that the Court has the power to do a certain thing does not mean that it must exercise that power regardless of the consequences. As observed by a Constitution Bench of this Court in *N.P. Ponnuswami V. Returning*



Officer, Namakkal Constituency¹:

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.” (Emphasis supplied)

In the case of **Election Commission of India v. State of Haryana** (supra), another constitution bench of the Hon'ble Apex Court decided on the High Court's interference in the decision of the Commission. Here, the Commission had decided to notify a certain programme for holding the by-election to the Taoru Constituency on 18 April 1984. The state government filed a writ petition to the High Court of Punjab and Haryana and obtained an ex-parte interim order for the stay on the notification on 17th April 1984 (before the elections were notified and therefore Article 329 was not attracted). The Hon'ble Supreme Court vacated this interim order on 18th April under SLP filed by the Commission. In its full decision, the



Hon'ble Court held that the High Court should've restrained itself from granting any order [irrespective of the bar on interference] by reason that:

"8. The difference between the Government of Haryana and the Chief Election commission centers round the question as to whether the position of law and order in the State of Haryana is such as to make it inexpedient or undesirable to hold the proposed by-election at this point of time. The Government of Haryana is undoubtedly in the best position to assess the situation of law and order in areas within its jurisdiction and under its control. But the ultimate decision as to whether it is possible and expedient to hold the elections at any given point of time must rest with the Election Commission, It is not suggested that the Election Commission can exercise its discretion in an arbitrary or mala fide manner. Arbitrariness and mala fide destroy the validity and efficacy of all orders passed by public authorities. It is therefore necessary that on an issue like the present, which concerns a situation of law and order, the Election Commission must consider the views of the State Government and all other concerned bodies or authorities before coming to the conclusion that there is no objection to the holding of the elections at this point of time. On this aspect of the matter, the correspondence between the Chief Secretary of Haryana and the Chief Election Commissioner



shows that the latter had taken all the relevant facts and circumstances into account while taking the decision to hold the by-election to the Taoru Constituency in accordance with the proposed programme.In these circumstances, it was not in the power of the High Court to decide whether the law and order situation in the State of Punjab and Haryana is such as not to warrant or permit the holding of the by-election. It is precisely in a situation like this that the ratio of the West Bengal Poll case would apply in its full rigor”.

10. The circumstance that the High Court has knowledge of a fact will not justify the substitution by it of its own opinion for that of an authority duly appointed for a specific purpose by the law and the Constitution. Different people hold different views on public issues, which are often widely divergent. Even the judges. A Judge is entitled to his views on public issues but the question is whether he can project his personal views on the decision of a question like the situation of law and order in a particular area at a particular period of time hold that the Election Commission is in error in its appraisal of that situation. We suppose not.”

It is trite law that Article 329 bars interference of Courts in 'elections' starting from the notification of elections till their conclusion. However, along with that multiple



constitution benches of the Hon'ble Apex Court have also categorically held that the High Courts in the exercise of its powers under Article 226 of the Constitution should not pass any orders which have the tendency or effect of postponing an election, even where they may not be expressly barred from doing so under Article 329 of the Constitution. [**A.K.M. Hassan Uzzaman v. Union of India (supra), Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman (supra), Election Commission of India v. State of Haryana (supra)**]

II(c) It is in the general interest that election be conducted as early as possible

Right from **N.P. Ponnuswami (supra); Mohinder Singh Gill (supra);, etc**, The Hon' Apex Court in the case of **Election Commission of India through Secretary v. Ashok Kumar (2000) 8 SCC 216** maintained that the general idea is that all election disputes must be postponed till after the election process is over, at which point an election petition to the Commission would be the appropriate remedy for the aggrieved. Here, the petitioners had questioned the notification relating to the manner of counting votes by the Commission. The Court reiterated that:

"18 (1) Having regard to the important functions which the legislatures have to perform in democratic



countries, it has always been recognised to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

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

(Emphasis supplied)

The importance of concluding elections and postponement of all disputes till after the elections have also been echoed in multiple decisions other decisions (than the ones already cited above) of the Hon'ble Court including **Boddula Krishnaiah v. State Election Commissioner, A.P. (1996) 3 SCC 416, West Bengal State Election Commission**



v. Communist Party of India (Marxist) (2018) 18 SCC 141
and others.

II(d) The Exception of malafides/ arbitrary decision by the Commission

As aforementioned, Article 329 bars interference of Courts in electoral matters. However, the Election Commission must not be allowed to act mindlessly, malafide or arbitrarily. To this extent, the Hon'ble Supreme Court in **Mohinder Singh Gill (supra)** held that:

"39. Even so, situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it is that the Constitution has made comprehensive provision in Article 324 to take care of surprise situations. That power itself has to be exercised, not mindlessly nor mala fide, nor arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation. More is not necessary to specify; less is insufficient to leave unsaid. Article 324, in our view, operates in areas left unoccupied by legislation and the words 'superintendence, direction and control' as well as 'conduct of all elections' are the broadest terms. ... It has been argued that this will create a constitutional despot beyond the pale of accountability; a Frankenstein's monster who may manipulate the system into



elected despotism- instances of such phenomena are the tears of history. To that the retort may be that the judicial branch, at the appropriate stage, with the potency of its benignant power and within the leading strings of legal guidelines, can call the bluff, quash the action and bring order into the process. Whether we make a triumph or travesty of democracy depends on the man as much as on the Great National Parchment. Secondly, when a high functionary like the Commissioner is vested with wide powers the law expects him to act fairly and legally. Article 324 is geared to the accomplishment of free and fair elections expeditiously. Moreover, as held in *Virendra* [1958]1SCR308 and *Harishankar* 1954CriLJ1322, discretion vested in a high functionary may be reasonably trusted to be used properly, not perversely. If it is misused, certainly the Court has power to strike down the act. This is well established and does not need further case law confirmation. Moreover, it is useful to remember the warning of Chandrachud,J.:

But the electorate lives in the hope that a sacred power will not so flagrantly be abused and the moving finger of history warns of the consequences that inevitably flow when absolute power has corrupted absolutely. The fear of perversion is no test of power.^{13a} (Emphasis supplied)

In the case of **Election Commission of India v.**



State of Haryana (supra), the Hon'ble Supreme Court held that it was not suggested that the Election Commission could exercise its discretion in an arbitrary or mala fide manner; arbitrariness and mala fide destroy the validity and efficacy of all orders passed by public authorities however that it could also not be assumed that the Commission has turned a blind eye on the prevailing situation in taking its decision. The presumption of the courts would always be the existence of bona fides in the discharge of constitutional and statutory functions and until that presumption is displaced.

This was further reiterated in **Election Commission of India through Secretary v. Ashok Kumar (supra)** that malafides in the decision of the Commission could be a ground for judicial review; however the assertions of malafide must not be merely bald assertions without substantiation. The Hon'ble Apex Court observed that:

"34. On 28.9.1999 a notification under Rule 59A came to be issued. It is not disputed that the Commission does have power to issue such notification. What is alleged is that the exercise of power was mala fide as the ruling party was responsible for large scale booth capturing and it was likely to lose the success of its candidates secured by committing an election offence if



material piece of evidence was collected and preserved by holding polling station wise counting and such date being then made available to the Election Tribunal. Such a dispute could have been raised before and decided by the High Court if the dual test was satisfied:

(1) the order sought from the Court did not have the effect of retarding, interrupting, protracting or stalling the counting of votes and the declaration of the results as only that much part of the election proceedings had remained to be completed at that stage,

(ii) a clear case of mala fides on the part of Election Commission inviting intervention of the Court was made out, that being the only ground taken in the petition. A perusal of the order of the High Court shows that one of the main factors which prevailed with the High Court for passing the impugned order was that the learned Government Advocate who appeared before the High Court on a short notice, and without notice to the parties individually, was unable to tell the High Court if the notification was published in the Government Gazette. The power vested in the Election Commission under Rule 59A can be exercised only by means of issuing notification in the official gazette. However, the factum of such notification having been published was brought to the notice of this Court by producing a copy of the notification. Main pillar of the foundation of the High Court's order thus collapsed.



In the petitions filed before the High Court there is a bald assertion of mala fides. The averments made in the petition do not travel beyond a mere ipse dixit of the two petitioners that the Election Commission was motivated to oblige the ruling party in the State. From such bald assertion an inference as to mala fides could not have been drawn even prima facie. On the pleadings and material made available to the High Court at the hearing held on a short notice we have no reason to doubt the statement made by the Election Commission and contained in its impugned notification that the Election Commission had carefully considered the matter and then decided that in the light of the prevailing situation in the State and in the interests of free and fair election and also for safety and security of electors and with a view to preventing intimidation and victimisation of electors in the State, a case for direction attracting applicability of Rule 59A for counting of votes in the constituencies of the State, excepting the two constituencies where electronic voting machines were employed, was made out. Thus, we find that the two petitioners before the High Court had failed to make out a case for intervention by the High Court amidst the progress of election proceedings and hence the High Court ought not to have made the interim order under appeal though the impugned order did not have the effect of retarding, protracting, delaying or stalling the counting of votes or the progress of the election



proceedings." (Emphasis supplied)

In **2002 Special Ref. by President (Gujarat Assembly) (supra)**, a Constitution Bench of the Hon'ble Court observed that:

"77. We find that the Representation of the People Act, 1951 also has not provided any period of limitation for holding election for constituting fresh Assembly election in the event of premature dissolution of the former Assembly. In this context, concerns were expressed by learned counsel for one of the national political parties and one of the States that in the absence of any period provided either in the Constitution or in the Representation of the People Act, the Election Commission may not hold election at all and in that event it would be the end of democracy. It is no doubt true that democracy is a part of the basic structure of the Constitution and periodical, free and fair election is the substratum of democracy. If there is no free and fair periodic election, it is the end of democracy and the same was recognized in *M.S. Gill v. Chief Election Commr.*³⁰ thus: (SCC p. 419, para 12)

"12. A free and fair election based on universal adult franchise is the basic, the regulatory procedures vis-à-vis the repositories of functions and the distribution of legislative, executive and judicative roles in the total



scheme, directed towards the holding of free elections, are the specifics. The super authority is the Election Commission, the kingpin is the Returning Officer, the minions are the presiding officers in the polling stations and the electoral engineering is in conformity with the elaborate legislative provisions.”

78. Similar concern was raised in the case of A.C. Jose v. Sivan Pillai³¹. In that case, it was argued that if the Commission is armed with unlimited arbitrary powers and if it happens that the persons manning the Commission shares or is wedded to a particular ideology, he could be giving odd directions cause a political havoc or bring about a Constitutional crisis, setting at naught the integrity and independence of the electoral process, so important and indispensable to the democratic system. Similar apprehension was also voiced in M.S. Gill v. Chief Election Commissioner (supra). The aforesaid concern was met by this Court by observing that in case such a situation ever arises, the Judiciary which is a watchdog to see that Constitutional provisions are upheld would step in and that is enough safeguard for preserving democracy in the country."

(Emphasis supplied)

Therefore, it is clear that although the commission has exclusive supervision of the conduct of elections and that there is a bar on the courts in interference in election matters-



which even otherwise the courts must refrain themselves from interference that would have the effect of postponing elections, the Courts are still adequately armed with the power of review in cases where the decisions of the tribunal are malafide, arbitrary or capricious or mindless.

However, these assertions must be shown by the persons arguing so, as the general assumption would be towards the existence of bona fides in the discharge of constitutional duty by a constitutional functionary.

There is no assertion of either malafide or arbitrary/mindless actions on the part of the Election Commission. Even if they are made, there is nothing on the record to show that the Commission is acting as such. From the counter affidavit of the Commission, they have given assurance that they are constantly monitoring the Covid-19 situation on the ground. Further, guidelines/SOPs have been released by the CEC, especially for the conduct of elections during the pandemic. We do not see any reason to question the bonafides of the actions of the Commission at this stage.

III Right to Dispute Elections is a Statutory rather than Constitutional Right

In the case of **Jyoti Basu and Ors v. Debi Ghosal**



and Ors (1982) 1 SCC 691, the Hon'ble the Apex Court clarified that the right to elect and question and dispute elections is a statutory right and therefore only amenable to the special jurisdiction of the Election Commission under the scheme of the Act:

"9. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation.

An Election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket.



Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self contained code within which must be found any rights claimed in relation to an election or an election dispute." (Emphasis supplied)

IV Hon'ble Supreme Court on Postponement of Elections owing to Covid-19

In March 2020, the Hon'ble the Apex Court in **State of Andhra Pradesh v. the Andhra Pradesh State Election Commission W.P. (Civil) No. 437/2020** declined to interfere in the decision of the Election Commission in postponing the elections due to Covid-19.

On 28 August 2020, a three-judge bench of Hon'ble the Apex Court in Writ Petition(s) (Civil) No. 875/2020, titled



as Avinash Thakur Vs. Chief Election Commissioner & Ors. refused to grant relief on writ petition before it seeking to defer the Bihar assembly elections.

Similarly, this Court in CWJC No. 7308 of 2020, titled as Vijay Kumar Singh Vs. The Election Commission of India & Ors, dismissed the petition by observing as under:

“From the averments made, we find the petition to be wholly misconceived and not maintainable. The basis for postponement of the election to the Legislative Assembly, Bihar is sought on the ground-(a) cancellation of world famous Baba Dham Yatra from Sultanganj, Bihar to Deoghar, Jharkhand; (b) voters above the age of 65 years may not be able to cast their vote.

The present petition filed in public interest on behalf of a practicing advocate is shorn of particulars and facts, apart from there being no basis supporting the submissions which in any case based on mere presumptions and suppositions. Also, no judicial precedent cited in support of the petition.

The reasons assigned seeking a postponement, to our mind, do not warrant interference, particularly when the record is conspicuously silent indicating non-application of mind by the appropriate authorities. Further, there is nothing on record indicating that the relevant authorities are not likely to account for all factors in determining the feasibility of conducting the



elections to the Legislative Assembly of the State of Bihar.”

V. Writ petition challenging the decision of the Commission under election petition

Once the elections are concluded, and results declared, the election can be challenged before the Commission by way of Election Petition under the RP Act. In the case of **Durga Shankar Mehta v Raghuraj Singh AIR 1954 SC 520** the Hon'ble Apex Court confirmed the jurisdiction of the Court to interfere under special leave in matters that come on appeal from the decisions of the Election Tribunal on election petitions:

"4.The jurisdiction with which the Election Tribunal is endowed is undoubtedly a special jurisdiction; but once it is held that it is a judicial Tribunal empowered and obliged to deal judicially with disputes arising out of or in connection with election, the overriding power of this Court to grant special leave, in proper cases, would certainly be attracted and this power cannot be excluded by any Parliamentary legislation.

The non obstante clause with which article 329 of the Constitution begins and upon with which the respondent's counsel lays so much stress debars us, as it debars any other Court in the land, to



entertain a suit or a proceeding calling in question any election to the Parliament or the State Legislature. It is the Election Tribunal alone that can decide such disputes, and the proceedings has to be initiated by an election petition and in such manner as may be provided by a statute. But once that Tribunal has made any determination or adjudication on the matter, the powers of this Court to interfere by way of special leave can always be exercised."

In **Hari Vishnu Kamath v. Sayed Ahmad Ishaque AIR 1955 SC 233**, the Hon'ble Court confirmed that this jurisdiction would also extend to the High Courts under writ authority of Article 226:

"6.Thereafter when the election petition is in due course heard by a Tribunal and decided, whether its decision is open to attack, and if so, where and to what extent, must be determined by the general law applicable to decisions of Tribunals. There being no dispute that they are subject to the supervisory jurisdiction of the High Courts under article 226, a writ of certiorari under that article will be competent against decisions of the Election Tribunals also."

8. By parity of reasoning [from the case of **Durga Shankar**] it must be held that the power of the High Court under article 226 to issue writ of



certiorari against decisions of Election Tribunals remains equally unaffected by article 329(b)"

Summary of the Law

1) The Election Commission is the sole authority responsible for the conduct of elections, including the decision on the schedule of the election. The ultimate decision on when to hold elections lies with the Commission. It cannot be assumed that the Election Commission has taken/ or would take its decision without considering the prevailing situation. The Commission cannot be directed to act in any-what-way by any authority.

2) 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. However, anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.



3) The High Court must be reluctant in interfering in the elections especially where it would result in a postponement of elections even where it is not expressly barred under Article 329 of the Constitution.

4) Subject to the above, the action taken, or orders issued by the Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of bodies in an established case of mala fides; gross arbitrary/ abuse or exercise of power; or the body shown to have acted in breach of fundamental principles of law.

For the aforesaid reasons, the writ petitions stand dismissed/disposed of.

(Sanjay Karol, CJ)

(S. Kumar, J)

pallavi/-

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CAV DATE	
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