IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE THE CHIEF JUSTICE MR.S.MANIKUMAR

&

THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

THURSDAY, THE 05TH DAY OF NOVEMBER 2020 / 14TH KARTHIKA, 1942

WP(C).No.23341 OF 2020(S)

PETITIONER:

P.C. GEORGE MLA,
POONJAR ASSEMBLY CONSTITUENCY,
POONJAR, KOTTAYAM DISTRICT,
RESIDING AT PLATHOTTAM, ERATTUPETTA,
KOTTAYAM DISTRICT.

BY ADVS. SRI. GEORGE POONTHOTTAM (SR.)
SRI. JOY GEORGE
SMT. PRAICY JOSEPH

RESPONDENTS:

1 STATE OF KERALA,
REPRESENTED BY THE CHIEF SECRETARY,
GOVERNEMNT SECRETARIAT,
THIRUVANANTHAPURAM-695 001.

2 KERALA STATE ELECTION COMMISSION
KERALA 'JANAHITHAM' TC-27/6(2)
VIKAS BHAVAN P.O., THIRUVANANTHAPURAM-695 033,
REPRESENTED BY THE STATE ELECTION COMMISSIONER.

R1 BY ADDITIONAL ADVOCATE GENERAL
SRI.RANJITH THAMPAN,
BY SRI.V.MANU, SENIOR GOVT. PLEADER
R2 BY SRI. MURALI PURUSHOTHAMAN, SC, K.S.E.COMM.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 05-11-2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J U D G M E N T

S. Manikumar, CJ

Instant public interest writ petition is filed challenging the decision of the Kerala State Election Commission, Thiruvananthapuram, respondent No.2, to conduct elections to Local Bodies in Kerala, for the year 2020, in the midst of COVID-19 pandemic, and to the Legislative Assembly scheduled to be conducted within four months thereafter. The reliefs sought for by the petitioner are as under:

(a) "Issue a writ of mandamus directing the State Election Commission, respondent No.2, to take a decision with regard to the deferring of elections to the local bodies, in the light of COVID-19 situation in Kerala;

(b) Issue a writ, order or direction, declaring that the conduct of local body elections in the State of Kerala, in the present health scenario will be violative of citizen's fundamental right guaranteed under Article 21 of the Constitution of India.

(c) Issue a writ, order or direction, during the State Election Commission, to hold a meeting with all the registered political parties, experts in the health sector, including representatives of the Union Health Ministry and ICMR, and take a decision on the conduct of local body election.

(d) Issue a writ, order or direction, directing the Kerala State Election Commission, to consider and pass orders on Exhibit-P18 representation filed by the petitioner."

2. Facts leading to the filing of instant writ petition are that, petitioner claims to be a six-time member of Kerala Legislative Assembly. He was elected from Poonjar assembly constituency. He was also the founder of a political party named "Kerala Janapaksham", which is not a part of any electoral coalition. He is aggrieved by the decision of the State Government and the State Election Commission to conduct the local body elections facilitating the spread of COVID-19 pandemic at a time when the test positivity rate in Kerala, is the highest in the country.

3. Petitioner has stated that the State of Kerala is fighting its grimmest battle against the COVID-19 pandemic with highest fresh cases of COVID in the country, highest positivity rates and ever-increasing fatality rates. Based on a combined reading of the reports of experts on COVID spread during the months of November and December, and the ever-rising new cases, death and positivity rates, petitioner has contended that it is clear that a local body election, if conducted in the present scenario, would push the State, which is at an edge of cliff, into oblivion.

4. Petitioner has further stated that with the highest percentage of senior citizens, among the highest density in population, among the highest voting rates, and the highest number of new COVID cases, conduct of local body elections would be the last straw on the camel's back, crushing the backbone of the State's health policy and administrative infrastructure.

According to him, with the elections to the Legislative Assembly scheduled to be conducted within three months, the State Exchequer would incur expenses running into thousands of crores, which would be diverted from the fight against COVID. According to the petitioner, the demoralized, underpaid, and overworked police, health workers, and other Governmental staff would be forced to do slave labour, in conducting two back to back elections and will not be in a position to take efforts to contain the spread of COVID during the election process.

5. Petitioner has further stated that the State Election Commission and the State Government are duty bound to uphold the fundamental right to life guaranteed to the citizens over and above electoral politics. The Constitutional mandate of the Election Commission under Articles 324 and 243 of the Constitution of India does not entail mechanical conduct of election. The time limit prescribed under the Constitution for conduct of elections include six months from the expiry of the terms of the bodies. Therefore, in the light of the raging COVID-19 pandemic, the State Election Commission ought to be directed to take a decision with regard to the conduct of elections only after discussing with all the stakeholders, expert bodies like, ICMR, Union Health Ministry and IMA, and should not conduct elections. Hence, the writ petition.

6. In the above circumstances, petitioner has filed the instant writ petition, on the following grounds:

A. Referring to Articles 243E(3) and 243U(3) of the Constitution of India, petitioner has contended that the constitutional mandate is to conduct elections to local bodies either at the end of their term at five years or on expiration of 6 months after the date of their dissolution. As per Section 153 of the Representation of the People Act, 1951, it shall be competent for the Election Commission for reasons which it considers sufficient, to extend the time for the completion of any election by making necessary amendments in the notification issued by it under section 30 or sub-section. The constitutional duty of the State Election Commission under Articles 243-E, 243-K, 243-ZA, 243-U and 324 of the Constitution of India, are not functions to be exercised mechanically. Though the electoral process cannot be permitted to be delayed due to laches and failure on the part of the Commission with regard to preparedness, the Commission is duty bound to consider if the ground reality permits a healthy electoral process.

B. Democracy ought to be for the people and not at the expense of the health and well-being of the people as is attempted now. Any constitutional mandate will not be greater than the fundamental right of a citizen under Article 21 of the Constitution of India. The State and the State Election Commission ought to realise their larger Constitutional and statutory mandate by adjourning the local body elections to a date where the COVID situation permits conduct of election. Therefore, in the light of the high increase in new COVID cases, deaths, when the State administration is grappling to control fatalities, a massive exercise of human participation like a local body election penetrating every nook and corner of the country is a recipe for disaster. The Government Doctors, health experts all over the world and even the Union Home

Ministry, along with socio political organizations have come together warning that the administration of the State will crumble and the health situation will become even more dire if elections are conducted now. The date of expiry of term of the local bodies is only on 11th of November, therefore, even if elections are deferred, it can be conducted after 6 months from November 11th as per Article 243E and Article 243U. Therefore, the State Election Commission ought to be directed to exercise their Constitutional mandate in true spirit in a manner that upholds the fundamental right of citizens under Article 21 of the Constitution and adjourn the local body elections to a more conducive date.

C. The decision to conduct local body elections in the month of December or earlier, will trigger a collapse of the health sector of the State. As on 28.10.2020, the State of Kerala has among the highest number of newly confirmed COVID-19 cases and highest positivity rate in the country, in spite of having the lowest test rate. Currently, 78% of India's active cases are reported from 10 States, including Kerala. Maharashtra (21.52 percent), Kerala (15 percent), Karnataka (12.05 percent) top this list. As per data sourced from the website of Kerala Government, https://dashboard.kerala.gov.in/, Kerala as on 28.10.2020 has reported 4,11,464 cases of COVID-19, with 93,265 active cases and 1,403 deaths. On 28.10.2020, three districts reported above 1000 positive cases with a total of 8,790 cases with a highest per day death count of 27. While the country has an average recovery rate of 90.62%, Kerala's recovery rate is 76.74%. Kerala has an active case ratio of 22.89% while the average active case ratio is 7.88% in India. In the case of monthly mortality (moving growth rate, the State has reached 130% in October, and the national average is hardly 40%.

According to epidemiologists and public health professionals, the estimated sufficient reproduction number for COVID-19 (a way of measuring the pandemic's transmission potential) in the State is 1.21. While experts suggest increased testing to reduce test positivity rate, almost all of the district administrations are not very keen on increasing the testing numbers. Under instructions from the Government, the health department is attempting to bring down the test positivity rate and thus keep the number of cases low by increasing testing in places where COVID-19 cases are comparatively low. Therefore, the numbers reported now, are much lesser than the true figures. If the numbers given by the Government for public consumption itself has skyrocketed the State to having the worst COVID figures, then the real situation is even more grim. Therefore, on the basis of a combined reading of the expert reports on COVID spread during the months of November and December and the ever-rising new cases, death and positivity rates, it is clear that a local body election if conducted in the present scenario will push the State which is at an edge of cliff into oblivion. With the highest percentage of senior citizens, among the highest density in population, among the highest voting rates, and the highest number of new COVID cases, conduct of local body elections will be the last straw on the camel's back, crushing the backbone of the State's health, policing and administrative infrastructure. Therefore, directions ought to be issued to the State Election Commission to consider the above factual realities and postpone the elections to the local bodies in the State.

D. With about one lakh candidates likely to be in the fray 15,962 wards in 941 Grama Panchayats, 2,080 wards in 152 Block Panchayats, 331 wards in14 District Panchayats, 3,078 wards in 86

Municipalities and 414 wards in the six Municipal Corporations, it is not humanly possible to keep social distancing and the candidates, who are locally known to each household can themselves be COVID carriers in the State. With almost 7 candidates per ward in over 21, 000 wards, with each candidate being allowed 5 volunteers for political campaign, the total number of persons directly involved in campaigning even as per election commission's guidelines will run into more than 7.35 lakhs. Even though as per the guidelines issued by the Commission, it is mandated that a candidate if diagnosed with COVID, he is more likely to hide the fact as it would affect his chance of winning. The health workers in overcrowded hospitals, the Policemen and other front-line workers are already beset with overwhelming load which will worsen during election. Therefore, it will be impossible to control or even trace the number of COVID patients brought about by the local body polls which is sure to destroy the existence of the State.

E. Employees of Local Self-Government Departments are not at all prepared for the elections as they were shouldering the responsibilities of fighting COVID. Several States such as Karnataka, Maharashtra and Andhra Pradesh have already postponed local body elections in order to focus their resources in fighting the pandemic. In Kerala, there is a case of high positivity among health workers and Police as they were in the forefront of the fight against COVID. With the declaration of elections, their involvement will rise manifold. When the elections were postponed in September the COVID numbers were only 3, 000 which has now climbed to more than double. The health workers and policemen who are the front-line warriors in the struggle against COVID are exhausted from almost an year of rest less fighting against the pandemic. Among

the newly infected, rising numbers are from health workers, policemen and Government servants. Government doctors have gone on a strike citing heavy load and Government apathy. The officials of local bodies were the ones who were managing the COVID crisis and making facilities at the grass root level. These officers have been overworked to total exhaustion. If elections to local bodies are immediately commenced when the State is fighting the grimmest battle against COVID, nothing short of a disaster culminating in mass deaths will happen.

F. It is to be noted that the decision to notify elections is at a stage where the situation is so serious as caseload is spiraling at a rapid pace. It is when the State's priority should be to ensure quality and timely medical attention to the critically ill that the State has decided to devote its resources to conduct of elections. Pursuant to notification of elections, a Model Code of Conduct will be put in place virtually freezing the State apparatus and turning all its resources to the conduct of the elections. The Police personnel which have been given the duty to ensure that COVID protocol is strictly adhered to, will be pulled back to undertake election duties. Unlike polls to Assembly constituencies, local body polls trigger a massive outreach to all nooks and corners of the State. Each political volunteer at the grass root level will be mobilized and put to work. Those areas and sections of populations which were never cared for and absolutely ignored like remote Tribal communities and slum dwellers will be reached out. An election especially in a State like Kerala which has high density of population combined with among the highest voter turnout will be a catalyst for disaster in the times of the COVID pandemic. The number of fresh COVID cases have hit the highest in the country leading to more than 20 per day

deaths. The situation is so dire that the Government has now shifted focus from preliminary treatment and containment to prevention of deaths. The share of cases from Kerala in India's overall load jumped from 2.9% until September 15 to 6.4% in the second half of the month to about 13% in the month of October. Kerala also didn't increase testing to keep up with the population surge and also slackened on its contact tracing efforts that had helped it to contain significant spread until May. This was severely deprecated by the Union Health Ministry as well. The IMA which is the largest organisation of doctors in Kerala has also sought for deferment of local body elections, along with major socio cultural organisations like NSS. It has to be noted that the State Election Commission on the unanimous opinion of political parties, had effectively adjourned the conduct of elections in the month of September. When the situation was less dire with less than 3, 000 per day cases, it has now reached a peak of 9, 000 cases making it even more important to adjourn the elections. Hence, the deferment of local body elections ought to be directed upholding the fundamental right to life under Article 21 of the Constitution.

G. The term of the 14th Kerala Legislative Assembly ends in May 2021. The general elections will take place in April. Model Code of Conduct is likely to come into force by March 10, 2021. With the notification of the local body elections, a code of conduct will be in force for the same which will be for a span of at least a month and will be in force till declaration of results. Therefore, conduct of two general elections is slated to happen one after another within 4 months. The combined period of almost two months of model of conduct and the pressure and work associated with two consecutive elections will paralyze the functioning of the Government offices and

police putting general administration and COVID control in disarray. This is in addition to the huge expenditure required for conduct of the two elections on separate dates which will run into thousands of crores of public money. The human resource and finances that are urgently required in the health sector will be diverted to conduct elections if elections are conducted now when the COVID figures have hit a peak. Therefore, the conduct of local body elections will break the back of the State exchequer when the economy is already crumbling and divert precious funds which can be used to save lives during the COVID pandemic. The duty of the State to safeguard the fundamental rights of its citizens is the basic structure of the Constitution and trumps any other Constitutional or statutory obligation. Hence, the State Election Commission ought to be directed to consider the possibility of conducting the assembly and local body elections/ together.

H. If the State Election Commission goes forward with the notification of local body polls in the following days, it would occur in the month of December. However, according to health experts, the onset of winter from the month of December will worsen the situation in the country and the cold climate will create a most fertile ground for transmission of a super flu like COVID-19. According to the modeling done by the Academy of Medical Sciences, UK, a wave of hospital admissions and peak in death will occur in the month of December. The Union Health Minister, Dr. Harsh Vardhan, in his statement to the media has stated that the COVID numbers are likely to see a spike during winter. The Director of AIIMS Delhi has stated that the Winter season would lead to an increase in COVID cases as in the case of all respiratory virus infections. Therefore, if the local body elections are to be conducted

in the winter season, it will worsen the condition in the State and lead to an unprecedented number of deaths.

I. On an evaluation of the present COVID-19 figures in Kerala, combined with the social and geological specialities of the State, any mass gathering, any large-scale movement of persons like local body elections would culminate in an ultimate disaster. This is especially true when Kerala has the highest percentage of senior citizens in India, who are most vulnerable to COVID-19. Akin to the situation in Western countries, where hospitals were sunk by the flood of patients, Kerala faces an eminent collapse of the health infrastructure. The availability of beds and ventilator facilities in hospitals have already become insufficient leading to the Government directing that patients be treated at home. The State Election Commission ought to consider the said aspects before deciding on conduct of the local body elections.

J. On the basis of a combined reading of the expert reports on COVID spread during the months of November and December and the ever-rising new cases, death and positivity rates, it is clear that a local body election if conducted in the present scenario will push the State which is at an edge of cliff into oblivion. With the highest percentage of senior citizens, among the highest density in population, among the highest voting rates, and the highest number of new COVID cases, conduct of local body elections will be the last straw on the camel's back, crushing the backbone of the State's health, policing and administrative infrastructure.

7. Advancing the arguments on the basis of the pleadings, material on record, and in the light of the judgment in W.P.(C) No.16487 of 2020 dated

13.08.2020 (Exhibit-P8), Mr. George Poonthottam, learned Senior Counsel appearing for the petitioner, submitted that the petitioner is conscious of the fact of the jurisdictional limitations on the prayers sought for. However, he submitted that in a democratic set up, where weightage has to be given to the rights guaranteed under Article 21 of the Constitution of India than the political Will, to have the local body or the assembly elections, this Court has to consider whether, the decision of the State Election Commission, to conduct elections to the local bodies or the Legislative Assembly, in the midst of COVID-19 pandemic, is necessitated or not, as the case may be.

8. Referring to the data available in the website, learned Senior Counsel appearing for the petitioner further submitted that the number of COVID-19 cases, in the State of Kerala, upto 30.09.2020 was 4,11,464 with 93,265 active cases and 1,403 deaths, and, in the month of October, 2020 alone, three districts have reported above 1000 positive cases with a total of 8,790 cases with a highest per day death count of 27. According to him, as on today, the number of hot spots in the State of Kerala is 1000 and having regard to the rapid increase, it would be more in future.

9. Learned Senior Counsel further submitted that there is no indication as to when the number of cases would be reduced or the end of pandemic. Referring to the number of cases, the time when the all party meeting was convened, the decision taken, and the current/subsequent increase in COVID-

19 cases, he submitted that the scenario at present is different, and, further submitted that the ground reality should not be ignored, while taking a decision to conduct elections to the local bodies and Legislative Assembly, as the case may be.

10. Learned Senior Counsel appearing for the petitioner further submitted that in view of the Constitutional mandate, the petitioner is not asking for an indefinite postponement of the elections, but state that the decision of the State Election Commission to complete the election process before December, 2020, is not correct and it would affect the lives of several persons. Thus, on the pleadings and the material on record, petitioner has prayed to grant the reliefs sought for.

11. Referring to the stand of the State Election Commission, respondent No.2, in the earlier writ petition viz., W.P.(C) No.16487 of 2020, incorporated in paragraph 9 of the statement filed in the instant writ petition, Mr. Murali Purushothaman, learned standing counsel for the Election Commission, submitted that the Commission is conscious of the mandate of the Constitution of India and COVID-19 pandemic situation.

12. Learned standing counsel for the 2nd respondent further submitted that State Election Commission is constituted under Articles 243/243ZA of the Constitution of India for the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of all elections to the

Panchayats/Municipalities. He further submitted that Articles 243E and 243U of the Constitution of India mandate that the election to constitute a Panchayat/Municipality shall be completed before the expiry of its duration. As per the above Constitutional provisions, the term of the present Panchayats at all level and Municipalities (except Mattannur Municipality), and Municipal Corporations would expire on 11.11.2020 and the General Election to constitute Panchayats and Municipalities are to be held before 11.11.2020, so that the new members shall be in office on 12.11.2020. He also submitted that in view of the Constitutional mandate, instant writ petition is not maintainable.

13. Learned standing counsel for the Election Commission further submitted that after Exhibit-P8 judgment dated 13.08.2020 in W.P.(C) No.16487 of 2020, the Commission had meeting with the Director of Health Services of the State regarding the practicability of conducting election during the pandemic and the Director of Health Services informed the Commission that elections can be conducted following the Covid protocol. He also pointed out in the said meeting conducted on 17.08.2020, besides doctors, many others participated. He further submitted that as agreed by the Director of Health Services, State of Kerala, in the said meeting on 17.08.2020, a draft advisory on infection control for Local Self Government Institutions was submitted to the Election Commission through the Principal Secretary to the Government, Local Self Government Department.

14. Learned standing counsel for the Election Commission further submitted an all party meeting was convened by the Election Commission on 11.09.2020, wherein majority of the political parties requested the Election Commission to postpone the elections by sometime, in view of COVID-19 pandemic situation in Kerala, and at the same time, expressed their concern on indefinite postponement of the elections and resort to appointment of an administrative committee in the place of elected representatives.

15. Learned standing counsel for the Election Commission further submitted that after considering the views and suggestions received from the above deliberations, inputs, the advisory issued for control of COVID-19, by the Director of Health Services, Election Commission issued Annexure-R2(c) broad guidelines with regard to the key activities, in the matter of conducting elections to Local Self Government Institutions during COVID-19 pandemic.

16. Learned standing counsel for the Election Commission further submitted that the Commission has also gathered suggestions and recommendations from various other stakeholders, including State, regarding the conduct of General Election to the Local Self Government Institutions.

17. In the letter dated 11.09.2020 [Annexure-R2(d)], addressed to the State Election Commission, by the Chief Secretary of the State, pursuant to an all party meeting convened by Government on 11.09.2020 regarding holding of the election to the Local Self Government Institution, Government of Kerala

have requested for slight postponement of the elections to LSGI in Kerala, in view of COVID-19 pandemic.

18. According to the learned standing counsel, after considering all the relevant inputs, the Commission, in exercise of its power under Article 243K of the Constitution of India, and all other enabling provisions in that regard, and on a detailed consideration of the factual situation as on date and for the most efficacious manner of conducting election, in substantial compliance with the Constitutional mandate under Articles 243E and 243U, issued proceeding No. B1-33870-2020-SEC dated 28.10.2020 [Annexure-R2(e)], deciding to defer the appointment of dates for nominations etc., to a date after 11.11.2020 and to hold elections to all the Municipal Corporations, Municipalities and Panchayats, at all levels in the State, in a manner to complete the entire election process to all constituencies at the earliest, at any rate, before 31.12.2020.

19. Referring to the decisions of the Hon'ble Supreme Court in **Election Commission of India v. State of Haryana** [(1984) Supp. 1 SCC 104], **Special Ref. By President (Gujarat Assembly)** [(2002) 8 SCC 237], and of this Court in **Centre for Consumer Education v. Kerala State Election Commission and Others** (Exhibit-P8 judgment), the learned standing counsel for the 2nd respondent submitted that fixing the date for the elections is the domain of the Election Commission and the petitioner cannot seek for a writ of mandamus. Learned standing counsel for the Election Commission

further submitted a schedule for conducting elections for the LSGI has been prepared and yet to be published.

20. Placing reliance on a decision in **Badri Narayan Singh v. The Ministry of Home Affairs & Ors.** [judgment dated 7.9.2020 in CWJC No. 7206 of 2020] along with its analogous case being CWJC No. 7294 of 2020 dated 07.09.2020 titled as **Jai Vardhan Narayan v. The Election Commission of India & Ors.**, decided by a Hon'ble Division Bench of the Patna High Court, Mr. Tek Chand, learned Senior Government Pleader, submitted that the writ petitions filed for postponement of Assembly elections, have been rejected. Learned standing counsel for the Election Commission further added that the Special Leave Petition filed against the said judgment has been withdrawn.

21. By way of reply, Mr. George Poonthottam, learned Senior Counsel for the petitioner, submitted that the phenomenal increase in COVID-19 cases, after the meeting was conducted, in particular, between 01.10.2020 and 30.10.2020 be taken note of by this Court for passing appropriate orders.

22. Heard the learned Senior Counsel Mr. George Poonthottam for the petitioner, Mr. Murali Purushothaman, learned standing counsel for the Election Commission, respondent No.2, and Sri. Tek Chand, learned Senior Government Pleader for the State, respondent No.1, and perused the materials available on record.

23. Exhibit-P1 is the graph based cumulative summary of COVID cases in Kerala starting from 30.01.2020 till 25.10.2020. Exhibit-P2 is the date-wise quarantine statistics for the State of Kerala from 30.01.2020 till 27.10.2020 and Exhibit-P3 is the district-wise active COVID cases statistics as on 27.10.2020. Exhibits-P4 and P5 are the date wise admitted patient figures as on 28.10.2020 and reporting of new cases till 26.10.2020. Exhibit-P6 is the COVID statistics for the month of October, 2020. Exhibit-P11 is the press release dated 23.10.2020 by the State Election Commission and it reads thus:

> "LOCAL ELECTIONS — Opportunity to re-register those who are not included in the voter list from 27th
>
> The State Election Commission V. Bhaskaran informed that those who are not included in the final voters list which was published on 1st October will have the opportunity to include their names from 27th to 31st of October.
>
> The State Election Commissioner V. Bhaskaran further informed that the final voter list for 11 Gram Panchayats, 16 Municipalities and 6 Corporations was published on 15th of October. Applications for delisting of names and correction of entries can also be submitted from 27 onwards.
>
> Online applications for adding, editing and transferring names should be submitted online at "lsgelection.kerala.gov.in" Objections to the exclusion of deceased and non-resident persons from the list can be submitted to the Electoral Registration Office in Form 5 — and Form 8 either directly or by post.
>
> The Commission has directed the Electoral Registration Officers to publish the supplementary lists by November 10 after examining the applications and objections received till October 31. The final voter list, published on 1st of October, includes 2,71,20,823 voters, including 1,29,25,766 men, 1,41,94,775 women and 282 transgender people.
>
> S.E.C. 38/2020"

24. Exhibit-P12 is the press release dated 28.10.2020 by the Kerala State Election Commission and it reads thus:

> 28th October, 2020
>
> State Election Commissioner V. Bhaskaran has issued guidelines for the installation and removal of banners, banners, hoardings, etc. for campaigning by candidates, political parties and others in the forthcoming local body elections. Materials such as plastic and PVC should not be used for election campaigns. Only eco-friendly materials that are soluble in soil and compostable can be used.
>
> The revised guidelines were issued in the light of the orders issued by the Kerala High Court and the State Government and also considering the ongoing COVID-19 pandemic.
>
> S.E.C. 39/2020"

25. Annexure-R2(a) is the minutes of the meeting convened by the State Election Commissioner with the Director of Health Services on 17.08.2020, wherein, the Commission has directed the Director of Health Department to make available the earliest guidelines regarding the conduct of elections as per the Covid protocol. Further, the Commission has also stated that full cooperation of the Health Department is necessary for election activities. The Commission has finally stated that in connection with the issue, further meetings would have to be convened.

26. Annexure-R2(b) is the minutes of the meeting convened by the State Election Commissioner with the representatives of political parties on

18.09.2020, wherein it was observed that full cooperation of all the political parties and politicians are required for the smooth conduct of general elections.

27. Annexure-R2(c) is the proceedings of the 2nd respondent-State Election Commission dated 16.10.2020 along with the guidelines for the conduct of General Elections to Panchayat, Municipality etc., with COVID-19 Regulations. Proceedings of the 2nd respondent reads thus:

"**PROCEEDINGS OF THE SECRETARY, STATE ELECTION COMMISSION**

(Present: A Santhosh)

Subject: Kerala State Election Commission – Order passed – issuing Guidelines for Conduct of General Elections to Local Self Government Institutions, 2020 by containing the spread of COVID-19

Reference:- The Decision taken at the meeting of the representatives of various political parties which was convened by the State Election Commission.

No.B1-33894-2020-SEC Date- 16.10.2020

ORDER

The pre-election works, in connection with the general elections to the 941 Grama Panchayats, 152 Block Panchayats and 14 District Panchayat, 86 Municipalities except Mattannoor, and 6 Municipal Corporations, are in progress. Considering the spread of COVID-19 in the State, based on the above referred meeting, Guidelines for conduct of General Elections by following COVID-19 Regulations is issued.

A. Santhosh
Secretary"

28. Annexure-R2(d) is the D.O. Letter dated 11.09.2020 of the Chief Secretary of the State of Kerala, respondent No.1, addressed to the State Election Commission and it reads thus:

"D.O. No.612/CS/2020/CSO 11th September, 2020

Dear Shri Bhaskaran,

The five+ year term of the Local Self Governments (LSGs) in Kerala is expiring and the new LSGs are to take office by the middle of November 2020. The State is witnessing an increasing incidence of Covid-19 cases. The average number of new cases has risen from 618 to 1671 and to 2388 in July, August and till September 10 respectively. The State machinery is fully focusing on containing Covid-19 Pandemic.

The all party meeting held today, September 11, 2020, considered the issue of holding elections to the LSGs. Based on the discussions, it is conveyed that slight postponement can be considered in view of increasing incidence of COVID 19 pandemic. But the elections to LSGs cannot be postponed indefinitely, as there has to be compliance to Articles 243E and 243U of the Constitution which stipulate that elections to LSGs are to be held every five years.

The above is for your information and appropriate action.

Yours sincerely

Dr. Vishwas Mehta"

29. Annexure-R2(e) is the proceedings dated 28.10.2020 issued by the 2nd respondent, which reads thus:

"PROCEEDINGS OF THE COMMISSIONER, STATE ELECTION COMMISSION) KERALA, THIRUVANANTHAPURAM

(PRESENT: V. BHASKARAN)

Sub: State Election Commission - Conduct of General Election to Local Self Government Institutions, 2020 — Orders issued.

No. B1 - 33870 -2020-SEC Date: 28.10.2020

O R D E R

The State Election Commission is constituted under Articles 243K / 243ZA of the Constitution of India for the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats/Municipalities.

2. Articles 243E and 243U of the Constitution of India mandates that the election to constitute a Panchayat/Municipality shall be completed before the expiry of its duration. As per the above Constitutional provisions, the term of the present Panchayats at all level and Municipalities (except Mattannur Municipality) and Municipal Corporations would expire on 11-11-2020 and the General Election to constitute Panchayats and Municipalities will have to be held before 11-11-2020 so that the new members shall be in office on 12-11-2020.

3. In Kishansing Tomar v. Municipal Corporation of the city of Ahmedabad and others ((2006) 8 SCC 352) the Constitution Bench of the Hon'ble Supreme Court held that Article 243-U of the Constitution of India (which corresponds to Article 243-E in the cases of Panchayats) is a mandatory requirement and it is incumbent upon the State Election Commission to carry out the mandate of the Constitution and to see that the elections to Municipalities are conducted before the expiry of its duration of five years as mandatorily specified in Article 243U the Constitution.

4. The State Election Commission is conscious of the mandate of the Constitution that it is incumbent on the part of the Commission to conduct election to Local Self Government Institutions before the expiry of the duration of the present bodies. Accordingly, the preparations for holding elections are in full swing though the election process has not commended and no date has been fixed for the poll. The election machinery of the State is _alerted so as to be in a state of

readiness for timely holding of election.

5. The State Election Commission is also aware and conscious of Covid-19 Pandemic and the advisories of the Government to contain the spread of the virus. The Commission is tracking the Covid-19 situation in the State. The Commission has accordingly held a meeting with the Director of Health Services of the State on 17.08.2020 regarding the conduct of election during the pandemic.

6. In the all party meeting convened on 18.09.2020 the majority of the Political Parties have requested the Commission for postponement of the election a little in view of the Covid-19 pandemic situation in the State.

7. The Commission has considered all the inputs so received. In *Kishansing Tomar's* case (supra), the Hon'ble Supreme Court observed.

> "21) It is true that there may be certain man-made calamities, such as rioting or breakdown of law and order, or natural calamities which could distract the authorities from holding elections to the Municipality, but they are exceptional circumstances and under no circumstance the Election Commission would be justified in delaying the process of election after consulting the State Govt. and other authorities. But that should be an exceptional circumstance and shall not be a regular feature to extend the duration of the Municipality. Going by the provisions contained in Article 243-U, it is clear that the period of five years fixed thereunder to constitute the Municipality is mandatory in nature and has to be followed in all respects."

8. The Commission has already taken all preparations for the timely completion of election before the expiration of the duration of five years' period stipulated in the Constitution. At the same time taking note of the extraordinary situation and exceptional circumstances that exist in the State due to Covid-19 pandemic the Commission hereby decides to defer the appointment of dates for nominations, etc. to a date after 11.11.2020.

9. Therefore, the State Election Commission in exercise of its powers under Article 243K of the Constitution of India and all other enabling provisions in this regard and on detailed consideration of the factual situation as on date and for the most efficacious manner of conducting election in substantial compliance with the Constitutional mandate under Articles 243E and 243U, hereby decides to hold elections to all Municipal Corporations, Municipalities and Panchayats at all levels in the State of Kerala in a manner to complete the entire election process to all these constituencies at the earliest, at any rate, before 31.12.2020. Detailed election schedule will be published at the time of announcement of election.

V. Bhaskaran
State Election Commissioner."

30. Part IX of the Constitution of India deals with Panchayats. Article 243-E deals with duration of Panchayats etc., and the same reads thus:

"**243-E. Duration of Panchayats, etc. -**(1) Every Panchayat, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer.

(2) No amendment of any law for the time being in force shall have the effect of causing dissolution of a Panchayat at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in clause (1).

(3) An election to constitute a Panchayat shall be completed-

(a) before the expiry of its duration specified in clause (1);

(b) before the expiration of a period of six months from the date of its dissolution:

PROVIDED that where the remainder of the period for which the dissolved Panchayat would have continued is less than six

months, it shall not be necessary to hold any election under this clause for constituting the Panchayat for such period.

(4) A Panchayat constituted upon the dissolution of a Panchayat before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Panchayat would have continued under clause (1) had it not been so dissolved. ”

31. Article 243-K of the Constitution of India speaks about election to the Panchayats and it reads thus:

“**243-K Election to the Panchayats**.- (1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor.

(2) Subject to the provisions of any law made by the Legislature of a State, the conditions of service and tenure of office of the State Election Commissioner shall be such as the Governor may by rule determine:

PROVIDED that the State Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of a High Court and the conditions of service of the State Election Commissioner shall not be varied to his disadvantage after his appointment.

(3) The Governor of a State shall, when so requested by the State Election Commission, make available to the State Election Commission such staff as may be necessary for the discharge of the functions conferred on the State Election Commission by clause (1).

(4) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with, elections to the Panchayats."

32. Article 243-U of the Constitution of India speaks about duration of Municipalities and it reads thus:

"243-U. Duration of Municipalities etc.- (1) Every Municipality, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer:

Provided that a Municipality shall be given a reasonable opportunity of being heard before its dissolution.

(2) No amendment of any law for the time being in force shall have the effect of causing dissolution of a Municipality at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in clause (1).

(3) An election to constitute a Municipality shall be completed,—

(a) before the expiry of its duration specified in clause (1);

(b) before the expiration of a period of six months from the date of its dissolution:

Provided that where the remainder of the period for which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Municipality for such period.

(4) A Municipality constituted upon the dissolution of a Municipality before the expiration of its duration shall continue only for the remainder of the period for which the dissolved

> Municipality would have continued under clause (1) had it not been so dissolved."

33. Article 243-ZA of the Constitution of India speaks about elections to the Municipalities and it reads thus:

> "**243-ZA. Elections to the Municipalities**.- (1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Municipalities shall be vested in the State Election Commission referred to in article 243K.
>
> (2) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with, elections to the Municipalities."

34. On an earlier occasion, more or less on the same grounds, when Centre for Consumer Education filed W.P.(C) No.16487 of 2020, for a writ of mandamus directing the Kerala State Election Commission, respondent No.1 therein, not to conduct election to the Local Self Government Bodies in Kerala, till COVID-19 pandemic is completely under control, and also sought for a declaration that initiation of election process by the Election Commission to the Local Self Government bodies, during the COVID-19 pandemic period, is legally incorrect and unsustainable, in paragraphs 10 and 11 of the Exhibit-P8 judgment dated 13.08.2020, we observed thus:

> "10. True that the country is facing a difficult situation, where activities in many fields have become standstill or restricted due to COVID-19 pandemic. In the present pandemic situation in Kerala,

when will the COVID-19 would be under complete control is unable to be predicted, and for that matter, whether this Court, under Article 226 of the Constitution of India, can direct the State Election Commission, respondent No.1, not to conduct elections to the Local Self Government Bodies, is the issue to be answered.

11. Kerala State Election Commission has to discharge its obligations, as well as statutory functions and duties in accordance with the mandates and diktats contained under the Constitution of India. In the above said backdrop, can the initiation of the process by the State Election Commission, respondent No.1, for conducting the election to the Local Self Government Institutions, during COVID-19 pandemic be declared as legally incorrect and unsustainable, in exercise of powers under Article 226 of the Constitution of India is the issue to be decided in this writ petition."

35. After considering the Constitutional provisions and the decision of the Hon'ble Supreme Court in **Kishansing Tomas v. Municipal Corporation of the City of Ahmedabad and Others** [(2006) 8 SCC 352], at paragraphs, 17 to 21, we ordered thus:

"17. Conduct of elections to the Local Self Government institutions depends upon the decision of the Kerala State Election Commission. Ultimately, after a comprehensive assessment, if the Kerala State Election Commission decides to conduct the elections for the Local Self Government institutions and issues any notification, a cause may arise to challenge, but not at this stage, when the decision to conduct election is yet to be taken.

18. The second prayer in the writ petition is to declare the initiation of the election process by the Kerala State Election

Commission, to the Local Self Government Institutions, during the COVID-19 pandemic period, as legally incorrect and sustainable.

19. Article 243 (K) of the Constitution of India reads thus:

> "(1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor.
>
> (2) Subject to the provisions of any law made by the Legislature of a State, the conditions of service and tenure of office of the State Election Commissioner shall be such as the Governor may by rule determine:
>
> PROVIDED that the State Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of a High Court and the conditions of service of the State Election Commissioner shall not be varied to his disadvantage after his appointment.
>
> (3) The Governor of a State shall, when so requested by the State Election Commission, make available to the State Election Commission such staff as may be necessary for the discharge of the functions conferred on the State Election Commission by clause (1).
>
> (4) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with, elections to the Panchayats."

20. Initiation of the process, publication of notification, conduct of elections and publication of results are, *inter alia*, various stages in exercise of powers under Article 243K of the Constitution of India. But, in the wake of COVID-19 epidemic and the consequential circumstances, setting out the reasons, as to how deployment of staff and others engaged in prevention and spread of the disease, the petitioner has sought for:

> (ii) Declare that the initiation of the election process by the 1st respondent to the Local Self Government bodies, during the Covid-19 Pandemic period, is legally incorrect and unsustainable.

> 21. It is trite law that mandamus cannot be issued, restraining the statutory authorities from discharging their duties. Mandamus, if any, would amount to issuing directions to disobey the law. However, in the current scenario and on the facts and circumstances of this case, as per the statement dated 13.08.2020 by respondent No.1, the preparations for holding elections are in full swing, though the election process has not commenced. Placing on record the said statement, the second prayer sought for by the petitioner also cannot be granted."

36. At the time when this Court passed Exhibit-P8 judgment in W.P.(C) No.16487 of 2020 dated 13.08.2020, Election Commission did not take any decision to conduct the local body elections. Now, a decision has been taken. Further, the relief sought in W.P.(C) No.16487 of 2020 for a declaration that initiation of the election process by the Election Commission to the Local Self Government Institutions, during COVID-19 pandemic period, as legally incorrect and unsustainable, has been rejected, holding that a writ of mandamus cannot be issued restraining the statutory authorities from discharging their duties and that mandamus, if any, issued would amount to issuing directions to disobey the law.

37. While extracting the details of the events, pursuant to the judgment in W.P.(C) No.16487 of 2020 dated 13.08.2020 (Exhibit-P8), the Election Commission has taken note of the fact as to how the Director of Health Services, State of Kerala, has opined and suggested, what the representatives

of the political parties have opined, as to how the elections to the LSGIs to be conducted. The question is whether the decision taken by the Election Commission can be interfered with under judicial review.

38. *Dehors* the above, in the light of the mandate and limitations on the Courts, to issue appropriate writ under Article 226 of the Constitution of India, firstly we deem it fit to consider the decisions of the constitutional Courts.

39. In **Election Commission of India v. State of Haryana** [(1984) Supp. 1 SCC 104], the Hon'ble Supreme Court held that 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.

40. In **Special Ref. By President (Gujarat Assembly)** reported in (2002) 8 SCC 237, the Constitution Bench of the Hon'ble Supreme Court held that fixing the schedule of the election is within the exclusive domain of the Election Commission.

41. In **Centre for Education v. Kerala State Election Commission and Others** (judgment dated 13.08.2020 in W.P.(C) No.16487/2020), this Court observed that Mandamus, if any, restraining the Statutory authorities from discharging their Statutory duties would amount to issuing directions to disobey the law.

42. In **Jai Vardhan Narayan v. The Election Commission of India & Ors.** [CWJC No.7294 of 2020 dated 07.09.2020], the petitioner therein

approached the High Court of Patna, by way of a writ petition, seeking direction to the Election Commission to postpone/defer the 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 orders. Prayers sought for were due to the prevailing pandemic situation in the State of Bihar. Contentions supporting the prayers were that as on the date of filing of the writ petition, there were 11,460 positive cases of the virus with as many as 1015 deaths in the State. Cases of corona-virus are only increasing every day and any conduct of elections during 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 therein has contended that during the conduct of elections, due to campaigning, gathering etc., the cases and spread of virus would increase, and deaths due to this would increase as well and lots of lives would be in danger, and that all \developmental activities would stop with the announcement of the election. The scare of the virus would frighten the voters from going into the voting booths to cast their votes. Therefore, the Government may be formed with less than 50% of votes, making a mockery of democracy.

43. In CJWPC No.7206 of 2020 [**Badri Narayan Singh v. The Ministry of Home Affairs**, **Government of India and Ors.**], the petitioner therein has contended that, 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 would affect the right and opportunity to carry out a free and fair election campaign. Therefore, the petitioner therein has sought for intervention of the court in ascertaining that the fundamental rights of the voters are protected, in the alternate, elections to the State Assembly be deferred, till such time, the fundamental rights of the voters are possible to be achieved.

44. Let us consider how the High Court of Patna has addressed the above contentions in the aforesaid judgment.

> "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 a 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 met that we synopsize 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 fulfillment 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 be 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. [Notwithstanding anything in this Constitution--
>
> [...] (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* Constituency:
>
> > 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 to 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] 1 SCR 308 and Harishankar 1954 CriLJ 1322, 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."
> >
> > (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., 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 Pillai. 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.

xx xxx xxxx

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."

45. Giving due consideration to the law decided by the Hon'ble Supreme Court, on jurisdiction as to the maintainability of a writ petition seeking for postponement of election, the Hon'ble Division Bench of the Patna High Court in the aforesaid judgment, held thus:

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.

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

46. Though the decision of the Patna High Court in **Badri Narayan Singh** (cited supra) has only persuasive value, going through the same, we are of the view that the said decision can be made applicable to the case on hand. In the light of the Constitutional provisions, extracted above, as regards maintainability of a writ petition against the decision of the Election Commission, decisions cited supra by the learned standing counsel for the Election Commission squarely apply to the case on hand.

47. The State Election Commission, respondent No.2, has taken note of COVID-19 pandemic situation in Kerala, views expressed by the Director of Health Services, Government of Kerala, the political parties, mandate of the Constitution of India contained in Article 243-U, and Annexure-R2(e) dated 28.10.2020 proceedings, which speaks for itself. On the aspect as to whether, the said proceedings of the Election Commission requires interference, in exercise of the powers under Article 226 of the Constitution of India, under judicial review, let us consider a few decisions:

> "(i) The principle of "Wednesbury unreasonableness" or irrationality, classified by Lord Diplock as one of the grounds for intervention in judicial review, was lucidly summarised by Lord Greene M.R. in **Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.,** reported in (1948) 1 KB 223 = (1947) 2 All ER 680 as follows:
>
> > "…the court is entitled to investigate the action of the local authority with a view of seeing whether it has taken into account matters which it ought not to take into account, or conversely, has refused to take into account or neglected to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority, nevertheless, have come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere."
>
> (ii) In **Council of Civil Service Unions v. Minister for the Civil Service,** reported in (1984) 3 All ER 935, Lord Diplock enunciated three grounds upon which an administrative action is subject to control by judicial review, viz. (i) illegality (ii) irrationality and (iii) procedural impropriety, as follows:
>
> > "By "illegality" he means that the decision-maker must understand correctly the law that regulates his decision-

making power and must give effect to it, and whether he has or has not, is a justiciable question; by “irrationality” he means “Wednesbury unreasonableness”. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided, could have arrived at it; and by “procedural impropriety” he means not only failure to observe the basic rules of natural justice or failure to act with procedural fairness, but also failure to observe procedural rules that are expressly laid down in the legislative instrument by which the tribunal's jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”

(iii) In **Shri Sitaram Sugar Co. Ltd. and Ors. v. Union of India (UOI) and Ors.** [(1990) 3 SCC 223], the Hon'ble Apex Court held thus:

“56. The Court has neither the means nor the knowledge to re-evaluate the factual basis of the impugned orders. The Court, in exercise of judicial review, is not concerned with the correctness of the findings of fact on the basis of which the orders are made so long as those findings are reasonably supported by evidence. In the words of Justice Frankfurter of the U.S. Supreme Court in Railroad Commission of Texas v. Rowan & Nichols Oil Company, 311 US 570, 85 L. ed. 358:

> “Nothing in the Constitution warrants a rejection of these expert conclusions. Nor, on the basis of intrinsic skills and equipment, are the federal courts qualified to set their independent judgment on such matters against that of the chosen state authorities.... When we consider the limiting conditions of litigation the adaptability of the judicial process only to issues definitely circumscribed and susceptible of being judged by the techniques and criteria within the special competence of lawyers it is clear that the Due Process Clause does not require the feel of the expert to be supplanted by an independent view of judges on the conflicting testimony and prophecies and impressions of expert witnesses.”

This observation is of even greater significance in the absence of a Due Process Clause.

57. Judicial review is not concerned with matters of economic policy. The Court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. The Court does not supplant the "feel of the expert"

by its own views. When the legislature acts within the sphere of its authority and delegates power to an agent, it may empower the agent to make findings of fact which are conclusive provided such findings satisfy the test of reasonableness. In all such cases, judicial inquiry is confined to the question whether the findings of fact are reasonably based on evidence and whether such findings are consistent with the laws of the land. As stated by Jagannatha Shetty, J. in M/s. Gupta Sugar Works, (supra):

> ".....the court does not act like a chartered accountant nor acts like an income tax officer. The court is not concerned with any individual case or any particular problem. The court only examines whether the price determined was with due regard to considerations provided by the statute. And whether extraneous matters have been excluded from determination."

(iv) In the State **of U.P. v. Johri Mal**, reported in (2004) 4 SCC 714, the Hon'ble Supreme Court observed thus:

> "The scope and extent of power of the judicial review of the High Court contained in Article 226 of the Constitution of India would vary from case to case, the nature of the order, the relevant statute as also the other relevant factors including the nature of power exercised by the public authorities, namely, whether the power is statutory, quasi-judicial or administrative. The power of judicial review is not intended to assume a supervisory role or don the robes of the omnipresent. The power is not intended either to review governance under the rule of law or do the courts step into the areas exclusively reserved by the suprema lex to the other organs of the State. Decisions and actions which do not have adjudicative disposition may not strictly fall for consideration before a judicial review court."

(v) In **Rameshwar Prasad v. Union of India**, reported in (2006) 2 SCC 1, the Hon'ble Supreme Court held thus:

> "A person entrusted with discretion must, so to speak, direct himself properly in law. He must call his attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules he may truly be said to be acting unreasonably. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.

> It is an unwritten rule of law, constitutional and administrative, that whenever a decision-making function is entrusted to be subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote."

(vi) In **Jayrajbhai Jayantibhai Patel v. Anilbhai Jayanitbhai Patel,** [(2006) 8 SCC 200], the Hon'ble Apex Court held thus:—

> "18. Having regard to it all, it is manifest that the power of judicial review may not be exercised unless the administrative decision is illogical or suffers from procedural impropriety or it shocks the conscience of the court in the sense that it is in defiance of logic or moral standards but no standardised formula, universally applicable to all cases, can be evolved. Each case has to be considered on its own facts, depending upon the authority that exercises the power, the source, the nature or scope of power and the indelible effects it generates in the operation of law or affects the individual or society. Though judicial restraint, albeit self-recognised, is the order of the day, yet an administrative decision or action which is based on wholly irrelevant considerations or material; or excludes from consideration the relevant material; or it is so absurd that no reasonable person could have arrived at it on the given material, may be struck down. In other words, when a Court is satisfied that there is an abuse or misuse of power, and its jurisdiction is invoked, it is incumbent on the Court to intervene. It is nevertheless, trite that the scope of judicial review is limited to the deficiency in the decision-making process and not the decision."

The following passage from Professor Bernard Schwartz's book Administrative Law (Third Edition) aptly echo's our thoughts on the scope of judicial review:

> "Reviewing courts, the cases are now insisting, may not simply renounce their responsibility by mumbling an indiscriminate litany of deference to expertise. Due deference to the agency does not mean abdication of the duty of judicial review and rubber-stamping of agency action: [W]e must accord the agency considerable, but not too much deference; it is entitled to exercise its discretion, but only so far and no further."

Quoting Judge Leventhal from Greater Boston Television Corp. v. FCC, 444 F. 2d 841 (D.C. Cir. 1970), he further says:

> "…the reviewing court must intervene if it "becomes aware…that the agency has not really taken a 'hard look'

> at the salient problems, and has not genuinely engaged in reasoned decision-making…"

(vii) In **Ganesh Bank of Kurundwad Ltd. v. Union of India,** reported in (2006) 10 SCC 645, the Hon'ble Supreme Court, held as under:—

> "15. The court will be slow to interfere in such matters relating to administrative functions unless decision is tainted by any vulnerability enumerated above; like illegality, irrationality and procedural impropriety. Whether action falls within any of the categories has to be established. Mere assertion in that regard would not be sufficient.
>
> 50. There should be judicial restraint while making judicial review in administrative matters. Where irrelevant aspects have been eschewed from consideration and no relevant aspect has been ignored and the administrative decisions have nexus with the facts on record, there is no scope for interference. The duty of the court is (a) to confine itself to the question of legality; (b) to decide whether the decision making authority exceeded its powers (c) committed an error of law (d) committed breach of the rules of natural justice and (e) reached a decision which no reasonable Tribunal would have reached or (f) abused its powers. Administrative action is subject to control by judicial review in the following manner:
>
> (i) Illegality.- This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.
>
> (ii) Irrationality, namely, Wednesbury unreasonableness.
>
> (iii) Procedural impropriety.
>
> 51. …...Professor De Smith in his classical work "Judicial Review of Administrative Action" 4th Edition at pages 285-287 states the legal position in his own terse language that the relevant principles formulated by the Courts may be broadly summarized as follows. The authority in which discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good

> faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped in two main categories: (I) failure to exercise discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts ultra vires."

(viii) In **Bank of India v. T. Jogram** reported in (2007) 7 SCC 236, the Hon'ble Supreme Court has held that it is well settled principle of law that judicial review is not against the decision, but is against the decision making process.

(ix) In **Jagdish Mandal v. State of Orissa and Ors.** [(2007) 14 SCC 517], the Hon'ble Supreme Court held thus:

> "22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafide. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out.
>
> The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.
>
> The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some

> technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold....."

(x) In **State of Maharashtra v. Prakash Prahland Patil** reported in (2009) 12 SCC 159, the Hon'ble Apex Court, at paragraphs 5 and 6, held as follows:

> "5. The scope for judicial review has been examined by this court in several cases. It has been consistently held that the power of judicial review is not intended to assume a supervisory role or don the robes of omnipresent. The power is not intended either to review governance under the rule of law nor do the courts step into the areas exclusively reserved by the supreme lex to other organs of the State. A mere wrong decision, without anything more, in most of the cases will not be sufficient to attract the power of judicial review. The supervisory jurisdiction conferred upon a court is limited to see that the authority concerned functions within its limits of its authority and that its decisions do not occasion miscarriage of justice.
>
> 6. The courts cannot be called upon to undertake governmental duties and functions. Courts should not ordinarily interfere with a policy decision of the State. While exercising power of judicial review the court is more concerned with the decision making process than the merit of the decision itself."

(xi) In **All India Railway Recruitment Board v. K. Shyam Kumar** [(2010) 6 SCC 614], the Hon'ble Supreme Court, held as follows:

> "22. Judicial review conventionally is concerned with the question of jurisdiction and natural justice and the Court is not much concerned with the merits of the decision but how the decision was reached. In Council of Civil Service Unions v. Minister of State for Civil Service, (1984) 3 All ER 935 the (GCHQ Case) the House of Lords rationalized the grounds of judicial review and ruled that the basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision

making powers and must give effect to it. Grounds such as acting ultra vires, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading "illegality". Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural justice, such as *audi alteram partem*, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc.

23. Ground of irrationality takes in Wednesbury unreasonableness propounded in Associated Provincial Picture Houses Limited v. Wednesbury Corporation, (1947) 2 All ER 680, Lord Greene MR alluded to the grounds of attack which could be made against the decision, citing unreasonableness as an 'umbrella concept' which covers the major heads of review and pointed out that the court can interfere with a decision if it is so absurd that no reasonable decision maker would in law come to it. In GCHQ Case (supra) Lord Diplock fashioned the principle of unreasonableness and preferred to use the term irrationality as follows:

> "By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury's unreasonableness", ……. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

24. In **R. v. Secretary of State for the Home Department ex parte Brind**, (1991) 1 All ER 720, the House of Lords re-examined the reasonableness of the exercise of the Home Secretary's discretion to issue a notice banning the transmission of speech by representatives of the Irish Republican Army and its political party, Sinn Fein. Court ruled that the exercise of the Home Secretary's power did not amount to an unreasonable exercise of discretion despite the issue involving a denial of freedom of expression. House of Lords however, stressed that in all cases raising a human rights issue proportionality is the appropriate standard of review.

25. The House of Lords in **R (Daly) v. Secretary of State for the Home Department**, (2001) 2 AC 532 demonstrated how the traditional test of Wednesbury unreasonableness has moved towards the doctrine of necessity and proportionality. Lord Steyn noted that the criteria of proportionality are more

precise and more sophisticated than traditional grounds of review and went on to outline three concrete differences between the two:

(1) Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions.

(2) Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations.

(3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.

Lord Steyn also felt most cases would be decided in the same way whatever approach is adopted, though conceded for human right cases proportionality is the appropriate test.

26. The question arose as to whether doctrine of proportionality applies only where fundamental human rights are in issue or whether it will come to provide all aspects of judicial review. Lord Steyn in **R. (Alconbury Development Limited) v. Secretary of State for the Environment, Transport and the Regions**, (2001) 2 All ER 929 stated as follows:—

> "I consider that even without reference to the Human Rights Act, 1998 the time has come to recognize that this principle (proportionality) is part of English administrative law not only when Judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the Wednesbury principle and proportionality in separate compartments seems to me to be unnecessary and confusing".

Lord Steyn was of the opinion that the difference between both the principles was in practice much less than it was sometimes suggested and whatever principle was applied the result in the case was the same.

27. Whether the proportionality will ultimately supersede the concept of reasonableness or rationality was also considered by Dyson Lord Justice in **R. (Association of British Civilian Internees: Far East Region) v. Secretary of State for Defence**, [2003] QB 1397 and stated as follows:—

> "We have difficulty in seeing what justification there now is for retaining Wednesbury test ….. but we consider that it is not for this Court to perform burial rights. The continuing existence of the Wednesbury test has been acknowledged by the House of Lords on more than one occasion. A survey of the various judgments of House of Lords, Court of Appeals, etc. would reveal for the time being both the tests continued to co-exist."

28. Position in English Administrative Law is that both the tests that is. Wednesbury and proportionality continue to co-exist and the proportionality test is more and more applied, when there is violation of human rights, and fundamental freedom and the Wednesbury finds its presence more on the domestic law when there is violations of citizens ordinary rights. Proportionality principle has not so far replaced the Wednesbury principle and the time has not reached to say goodbye to Wednesbury much less its burial.

29. In Huang case, (2007) 4 All ER 15 (HL), the House of Lords was concerned with the question whether denial of asylum infringes Article 8 (Right to Respect Family Life) of the Human Rights Act, 1998. House of Lords ruled that it was the duty of the authorities when faced with individuals who did not qualify under the rules to consider whether the refusal of asylum status was unlawful on the ground that it violated the individual's right to family life. A structured proportionality test has emerged from that decision in the context of the violation of human rights. In R (Daly) (supra) the House of Lords considered both common law and Article 8 of the convention and ruled that the policy of excluding prisoners from their cells while prison officers conducted searches, which included scrutinizing privileged legal correspondence, was unlawful.

30. Both the above-mentioned cases, mainly concerned with the violation of human rights under the Human Rights Act, 1998 but demonstrated the movement away from the traditional test of Wednesbury unreasonableness towards the test of proportionality. But it is not safe to conclude that the principle of Wednesbury unreasonableness has been replaced by the doctrine of proportionality.

31. Justice S.B. Sinha, as His Lordship then was, speaking for the Bench in *State of U.P. v. Sheo Shanker Lal Srivastava*, (2006) 3 SCC 276 after referring to the judgment of the Court of appeal in *Huang v. Secretary of State for the Home Department*, (2005) 3 All ER 435, *R. v. Secretary of State of*

the Home Department, ex parte Daly, (2001) 3 All ER 433 (HL) opined that Wednesbury principle may not now be held to be applicable in view of the development in constitutional law and held as follows:—

> "24. While saying so, we are not oblivious of the fact that the doctrine of unreasonableness is giving way to the doctrine of proportionality.
>
> 25. It is interesting to note that the Wednesbury principles may not now be held to be applicable in view of the development in constitutional law on this behalf. See, for example, Huang v. Secy. of State for the Home Deptt. wherein referring to R. v. Secretary of State of the Home Department, ex parte Daly, it was held that in certain cases, the adjudicator may require to conduct a judicial exercise which is not merely more intrusive than Wednesbury, but involves a full-blown merit judgment, which is yet more than ex p. Daly, requires a judicial review where the court has to decide a proportionality issue."

32. Sheo Shanker Lal Srivastava case was later followed in *Indian Airlines Ltd. v. Prabha D. Kanan*, (2006) 11 SCC 67. Following the above mentioned two judgments in *Jitendra Kumar v. State of Haryana*, (2008) 2 SCC 161, the Bench has referred to a passage in HWR Wade and CF Forsyth on Administrative Law, 9th Edition. (2004), pages 371-372 with the caption "Goodbye to Wednesbury" and quoted from the book which reads as follows:—

> "The Wednesbury doctrine is now in terminal decline but the coup de grace has not yet fallen, despite calls for it from very high authorities" and opined that in some jurisdictions the doctrine of unreasonableness is giving way to doctrine of proportionality."

33. Indian Airlines Ltd.'s case and Sheo Shanker Lal Srivastava's case (supra) were again followed in *State of Madhya Pradesh v. Hazarilal*, (2008) 3 SCC 273 and the Bench opined as follows:—

> "Furthermore the legal parameters of judicial review have undergone a change. Wednesbury principle of unreasonableness has been replaced by the doctrine of proportionality.".

34. With due respect, we are unable to subscribe to that view, which is an overstatement of the English Administrative Law.

35. Wednesbury principle of unreasonableness as such has not been replaced by the doctrine of proportionality though

that test is being applied more and more when violation of human rights is alleged. H.W.R. Wade & C.F. Forsyth in the 10th Edition of Administrative Law (2009), has omitted the passage quoted by this court in Jitender Kumar case and stated as follows:

> "Notwithstanding the apparent persuasiveness of these views the coup de grace has not yet fallen on Wednesbury unreasonableness. Where a matter falls outside the ambit of 1998 Act, the doctrine is regularly relied upon by the courts. Reports of its imminent demise are perhaps exaggerated." (emphasis applied).

36. Wednesbury and Proportionality - Wednesbury applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. Proportionality as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to 'assess the balance or equation' struck by the decision maker. Proportionality test in some jurisdictions is also described as the "least injurious means" or "minimal impairment" test so as to safeguard fundamental rights of citizens and to ensure a fair balance between individual rights and public interest. Suffice to say that there has been an overlapping of all these tests in its content and structure, it is difficult to compartmentalize or lay down a straight jacket formula and to say that Wednesbury has met with its death knell is too tall a statement. Let us, however, recognize the fact that the current trend seems to favour proportionality test but Wednesbury has not met with its judicial burial and a state burial, with full honours is surely not to happen in the near future.

37. Proportionality requires the Court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. Courts entrusted with the task of judicial review has to examine whether decision taken by the authority is proportionate, i.e. well balanced and harmonious, to this extent court may indulge in a merit review and if the court finds that the decision is proportionate, it seldom interferes

with the decision taken and if it finds that the decision is disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere.

38. Leyland and Anthony on Textbook on Administrative Law (5th edn. OUP, 2005) at p.331 has amply put as follows:

> "Proportionality works on the assumption that administrative action ought not to go beyond what is necessary to achieve its desired results (in everyday terms, that you should not use a sledgehammer to crack a nut) and in contrast to irrationality is often understood to bring the courts much closer to reviewing the merits of a decision".

39. Courts have to develop an indefeasible and principled approach to proportionality till that is done there will always be an overlapping between the traditional grounds of review and the principle of proportionality and the cases would continue to be decided in the same manner whichever principle is adopted. Proportionality as the word indicates has reference to variables or comparison, it enables the Court to apply the principle with various degrees of intensity and offers a potentially deeper inquiry into the reasons, projected by the decision maker."

(xii) In **Union of India v. Rajasthan High Court** reported in (2017) 2 SCC 599, the Hon'ble Supreme Court, at paragraph 13, while discussing the scope of judicial review, held as follows:

> "13. ……..The powers under Article 226 are wide - wide enough to reach out to injustice wherever it may originate. These powers have been construed liberally and have been applied expansively where human rights have been violated. But, the notion of injustice is relatable to justice under the law. Justice should not be made to depend upon the individual perception of a decision maker on where a balance or solution should lie. Judges are expected to apply standards which are objective and well defined by law and founded upon constitutional principle. When they do so, judges walk the path on a road well-travelled. When judicial creativity leads judges to roads less travelled, in search of justice, they have yet to remain firmly rooted in law and the Constitution. The distinction between what lies within and what lies outside the power of judicial review is necessary to preserve the sanctity of judicial power. Judicial power is respected and

> adhered to in a system based on the rule of law precisely for its nuanced and restrained exercise. If these restraints are not maintained the court as an institution would invite a justifiable criticism of encroaching upon a terrain on which it singularly lacks expertise and which is entrusted for governance to the legislative and executive arms of government. Judgments are enforced, above all, because of the belief which society and arms of governance of a democratic society hold in the sanctity of the judicial process. This sanctity is based on institutional prestige. Institutional authority is established over long years, by a steadfast commitment to a calibrated exercise of judicial power. Fear of consequences is one reason why citizens obey the law as well as judicial decisions. But there are far stronger reasons why they do so and the foundation for that must be carefully preserved. That is the rationale for the principle that judicial review is confined to cases where there is a breach of law or of the Constitution."

(xiii) In **Royal Medical Trust v. Union of India** reported in (2017) 16 SCC 605, the Hon'ble Supreme Court, on the scope of judicial review, held as follows:

> "The principle of judicial review by the constitutional courts have been lucidly stated in many authorities of this Court. In ***Tata Cellular v. Union of India***, dealing with the concept of Judicial Review, the Court held:—
>
> "Lord Scarman in Nottinghamshire County Council v. Secretary of State for the Environment proclaimed:
>
> 'Judicial review' is a great weapon in the hands of the judges; but the judges must observe the constitutional limits set by our parliamentary system upon the exercise of this beneficial power." Commenting upon this Michael Supperstone and James Goudie in their work Judicial Review (1992 Edn.) at p. 16 say:
>
> "If anyone were prompted to dismiss this sage warning as a mere obiter dictum from the most radical member of the higher judiciary of recent times, and therefore to be treated as an idiosyncratic aberration, it has received the endorsement of the Law Lords generally. The words of Lord Scarman were echoed by Lord Bridge of Harwich, speaking on behalf of the Board when reversing an interventionist decision of the *New Zealand Court of Appeal in Butcher v.*

> *Petrocorp Exploration Ltd*. 18-3-1991." Observance of judicial restraint is currently the mood in England. The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action."

(xiv) In **Kerala State Beverages (M and M) Corporation Limited and Ors. v. P.P. Suresh and Ors.** [(2019) 9 SCC 710], the Hon'ble Supreme Court held thus;

> "26. The challenge to the order dated 07.08.2004 by which the Respondents were deprived of an opportunity of being considered for employment is on the ground of violation of Articles 14, 19 and 21 of the Constitution of India. Lord Diplock in Council of Civil Service Unions and Ors. v. Minister for the Civil Services4, held that the interference with an administrative action could be on the grounds of 'illegality', 'irrationality' and 'procedural impropriety'. He was of the opinion that 'proportionality' could be an additional ground of review in the future. Interference with an administrative decision by applying the Wednesbury's principles is restricted only to decisions which are outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it."

28. In **Om Kumar v. Union of India** [AIR 2000 SC 3689], this Court held as follows:

> "By 'proportionality', we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the legislature and the administrative authority 'maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve'. The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not, is for the Court. That is what is meant by proportionality."

In this case, M. Jagannadha Rao, J. examined the development of principles of proportionality for review of administrative decisions in England and in India. After referring to several judgments, it was held that the proportionality test is applied by the Court as a primary reviewing authority in cases where there is a violation of Articles 19 and 21. The proportionality test can also be applied by the Court in reviewing a decision where the challenge to administrative action is on the ground that it was discriminatory and therefore violative of Article 14. It was clarified that the principles of Wednesbury have to be followed when an administrative action is challenged as being arbitrary and therefore violative of Article 14 of the Constitution of India. In such a case, the Court would be doing a secondary review.

29.While exercising primary review, the Court is entitled to ask the State to justify the policy and whether there was an imminent need for restricting the fundamental rights of the claimants. In secondary review, the Court shows deference to the decision of the executive.

30. Proportionality involves 'balancing test' and 'necessity test'.[*Coimbatore District Central Co-operative Bank v. Coimbatore District Central Cooperative Bank Employees Association and Anr.*(2007) 4 SCC 669] Whereas the balancing test permits scrutiny of excessive and onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the necessity test requires infringement of human rights to be through the least restrictive alternatives.[Judicial Review of Administrative Action (1955) and Wade & Forsyth: Administrative Law (2005) (2007) 4 SCC 669]

31. An administrative decision can be said to be proportionate if:

(a) The objective with which a decision is made to curtail fundamental rights is important;

(b) The measures taken to achieve the objective have a rational connection with the objective; and

(c) The means that impair the rights of individuals are no more than necessary.

(xv) In **Municipal Council, Neemuch v. Mahadeo Real Estate and Ors.** [(2019) 10 SCC 738], the Hon'ble Supreme Court observed thus:

"13. In the present case, the learned Judges of the Division Bench have arrived at a finding that such a sanction was, in fact, granted. We will examine the correctness of the said finding of fact at a subsequent stage. However, before doing that, we propose to examine the scope of the powers of the High Court of judicial review of an administrative action. Though, there are a catena of judgments of this Court on the said issue, the law laid down by this Court in the case of **Tata Cellular v. Union of India** reported in (1994) 6 SCC 651 lays down the basic principles which still hold the field. Paragraph 77 of the said judgment reads thus:

> "77. The duty of the court is to confine itself to the question of legality. Its concern should be:
>
> 1. Whether a decision-making authority exceeded its powers?
>
> 2. Committed an error of law?
>
> 3. Committed a breach of the Rules of natural justice?
>
> 4. Reached a decision which no reasonable tribunal would have reached or,
>
> 5. Abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

> (i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.
>
> (ii) Irrationality, namely, Wednesbury unreasonableness.
>
> (iii) Procedural impropriety.

The above are only the broad grounds but it does not Rule out addition of further grounds in course of time. As a matter of fact, in **R. v. Secretary of State for the Home Department, ex Brind**, (1991) 1 AC 696, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these

cases the test to be adopted is that the court should, 'consider whether something has gone wrong of a nature and degree which requires its intervention'.

14. It could thus be seen that the scope of judicial review of an administrative action is very limited. Unless the Court comes to a conclusion, that the decision maker has not understood the law correctly that regulates his decision-making power or when it is found that the decision of the decision maker is vitiated by irrationality and that too on the principle of "Wednesbury Unreasonableness" or unless it is found that there has been a procedural impropriety in the decision-making process, it would not be permissible for the High Court to interfere in the decision making process. It is also equally well settled, that it is not permissible for the Court to examine the validity of the decision but this Court can examine only the correctness of the decision-making process.

23. …….....As discussed herein above, the High Court, while exercising its powers of judicial review of administrative action, could not have interfered with the decision unless the decision suffers from the vice of illegality, irrationality or procedural impropriety.

15. This Court recently in **West Bengal Central School Service Commission v. Abdul Halim** reported in [AIR 2019 SC 4504] had again an occasion to consider the scope of interference Under Article 226 in an administrative action.

> “31. In exercise of its power of judicial review, the Court is to see whether the decision impugned is vitiated by an apparent error of law. The test to determine whether a decision is vitiated by error apparent on the face of the record is whether the error is self-evident on the face of the record or whether the error requires examination or argument to establish it. If an error has to be established by a process of reasoning, on points where there may reasonably be two opinions, it cannot be said to be an error on the face of the record, as held by this Court in **Satyanarayan v. Mallikarjuna** reported in AIR 1960 SC 137. If the provision of a statutory Rule is reasonably capable of two or more constructions and one construction has been adopted, the decision would not be open to interference by the writ Court. It is only an obvious misinterpretation of a relevant statutory provision, or ignorance or disregard thereof, or a decision founded on reasons which are clearly wrong in law, which can be

> corrected by the writ Court by issuance of writ of Certiorari.
>
> 32. The sweep of power Under Article 226 may be wide enough to quash unreasonable orders. If a decision is so arbitrary and capricious that no reasonable person could have ever arrived at it, the same is liable to be struck down by a writ Court. If the decision cannot rationally be supported by the materials on record, the same may be regarded as perverse.
>
> 33. However, the power of the Court to examine the reasonableness of an order of the authorities does not enable the Court to look into the sufficiency of the grounds in support of a decision to examine the merits of the decision, sitting as if in appeal over the decision. The test is not what the Court considers reasonable or unreasonable but a decision which the Court thinks that no reasonable person could have taken, which has led to manifest injustice. The writ Court does not interfere, because a decision is not perfect."

48. Keeping in mind the above principles of law, while testing the decision of the State Election Commission, we are of the view that Annexure-R2(e) proceedings dated 28.10.2020 issued by the 2nd respondent cannot be held to be arbitrary, warranting interference

49. Petitioner has solely contended on the basis of the subsequent increase in COVID-19 cases, reported in Kerala. At the risk of repetition, let us consider, as to what the State Election Commission, respondent No.2, has considered:

> "A. As agreed by the Director of Health Services in the meeting convened on 17.08.2020 by the State Election Commissioner as evident from Annexure-R2(a) minutes, a draft advisory on infection control measures for Local Self Government Institutions elections, in view of COVID-19

outbreak, was submitted to the 2nd respondent by the Director of Health Services through the Principal Secretary to Government, Local Self Government Department. Later, on 18.09.2020, a party meeting was also convened by the Commission, wherein, majority of the political parties requested for postponement of the election by sometime in view of the COVID-19 pandemic situation in Kerala, and, at the same time, expressed their concern on indefinite postponement of election and resort to appointment of administrative committee in the place of elected representatives, as evident from Annexure-R2(b) minutes dated 18.09.2020. In the said meeting, a representative of the political party of the petitioner also participated.

B. Based on the inputs, views and suggestions received from the above deliberations, the advisory on infection control measures for Local Self Government Institutions Elections, in view of COVID-19 outbreak, submitted by the Director of Health Services, the 2nd respondent has issued broad guidelines with respect to the key activities of the conduct of elections to Local Self Government Institutions in Kerala during COVID-19 pandemic.

C. Further, the Commission has gathered suggestions and recommendations from various other stakeholders, including State, regarding the conduct of General Election to the Local Self Government Institutions. In the letter dated 11-09-2020 [Annexure-R2(d)], addressed to the 2nd respondent by the Chief Secretary of the State, pursuant to an all party meeting convened by Government on 11-09-2020 regarding holding of the election to the Local Self Government

> Institution, Government of Kerala requested for slight postponement of the elections to LSGI in Kerala, in view of COVID-19 pandemic.
>
> D. Thus, after considering all the relevant inputs, the Commission, in exercise of its power under Article 243K of the Constitution of India, and all other enabling provisions in that regard, and on a detailed consideration of the factual situation, as on date and for the most efficacious manner of conducting election in substantial compliance with the Constitutional mandate under Articles 243E and 243U, has issued proceeding No. B1-33870-2020-SEC dated 28.10.2020, Annexure-R2(e), deciding to defer the appointment of dates for nominations etc., to a date after 11.11.2020, and to hold elections to all the Municipal Corporations, Municipalities and Panchayats, at all levels in the State, in a manner to complete the entire selection process to all constituencies at the earliest, at any rate, before 31.12.2020.

50. Merely because there is a rise in the number of cases reported for COVID-19 subsequently, in particular, between 01.10.2020 to 31.10.2020, it cannot be contended that the State Election Commission has not considered the gravity and impact of COVID-19 cases. True that there is no indication by any of the authorities, including the Central Government or the authorities under the Disaster Management Act, 2005, as to when there would be an end to COVID-19 pandemic. But, that alone cannot be a ground, either to declare

that the decision of the State Election Commission, respondent No.2, to hold the elections, mandated as per the Constitutional provisions, as invalid or to issue any direction to the 2nd respondent to postpone the elections.

51. When the Constitution of India mandates the State Election Commission to conduct elections, in terms of Articles 243E(3) and 243U(3) to the local bodies, Courts, which are enjoined with a duty to abide by the Constitution and the laws, are bound to adhere to the Constitution of India.

52. Giving due consideration to the decisions extracted above, we are of the view that the Constitution of India is Supreme, and every decision of an authority under any Act, in the case on hand, the State Election Commission, should be, in accordance with the Constitutional mandate. In such a view of the matter, on the facts and circumstances of the case, we are of the view that the decision of the 2nd respondent, in issuing Annexure-R2(e) proceedings dated 28.10.2020, cannot be said to be erroneous.

In the result, this Writ Petition is dismissed.

Sd/-
S. MANIKUMAR
CHIEF JUSTICE

Sd/-
SHAJI P. CHALY
JUDGE

krj

APPENDIX

PETITIONER'S/S EXHIBITS:

EXHIBIT P1	COPY OF THE GRAPH BASED CUMULATIVE SUMMARY OF COVID CASES IN KERALA STARTING FROM 30.1.2019 TILL 25.10.2020 AS EXTRACTED FROM KERALA GOVERNMENT WEBSITE.
EXHIBIT P2	COPY OF THE DATE WISE QUARANTINE STATISTICS FOR THE STATE OF KERALA, FROM 30.01.2020 TILL 27.10.2020 AS EXTRACTED FROM KERALA GOVERNMENT WEBSITE.
EXHIBIT P3	COPY OF THE DISTRICT WISE ACTIVE COVID CASES STATISTICS FOR THE STATE OF KERALA, AS ON 27.10.2020, AS EXTRACTED FROM KERALA GOVERNMENT WEBSITE.
EXHIBIT P4	COPY OF THE DISTRICT WISE ADMITTED PATIENT FIGURES AS ON 28.10.2020.
EXHIBIT P5	COPY OF THE DATE WISE REPORTING OF NEW CASES TILL 26.10.2020.
EXHIBIT P6	COPY OF THE COVID STATISTICS FOR THE MONTH OF OCTOBER, 2020, AS EXTRACTED FROM KERALA GOVERNMENT WEBSITE.
EXHIBIT P7	COPY OF THE STATEMENT OF THE CHIEF MINISTER OF KERALA ACCUSING OPPOSITION PARTIES OF PUSHING THE STATE TO COMMUNITY SPREAD BY BECOMING SUPER SPREADERS PUBLISHED IN THE ONLINE VERSION OF THE HINDU NEWSPAPER DATED 11.7.2020.
EXHIBIT P8	COPY OF THE JUDGMENT OF THIS HON'BLE COURT IN WPC NO.16487/2020 DATED 13.8.2020.
EXHIBIT P9	COPY OF THE PRESS REPORT IN THE HINDU NEWS ONLINE PORTAL REGARDING IMA'S REQUEST TO DEFER POLLS DATED 24.8.2020.
EXHIBIT P10	COPY OF THE PRESS REPORT ON STATEMENT OF THE CHIEF MINISTER DATED 22.10.2020 PUBLISHED IN KERALA KAUMUDI ONLINE.

EXHIBIT P11 COPY OF THE PRESS RELEASE OF THE KERALA STATE ELECTION COMMISSION NORIFYING 31.10.2020 AS THE LAST DATE FOR ADDING NEW VOTERS, DATED 23.10.2020, WITH ENGLISH TRANSLATION.

EXHIBIT P12 COPY OF THE PRESS RELEASE FOR CONDUCT OF LOCAL BODY ELECTIONS, PUBLISHED BY THE STATE ELECTION COMMISSION, DATED 28.10.2020 WITH ENGLISH TRANSLATION.

EXHIBIT P13 COPY OF THE PRESS REPORT ON THE STATEMENT OF NAIR SERVICE SOCIETY (NNS) TO POSTPONE LOCAL BODY POLLS DATED 13.08.2020.

EXHIBIT P14 COPY OF THE PRESS REPORTING OF ICMR STUDY PUBLISHED IN THE HINDU DATED 14.06.2020.

EXHIBIT P15 COPY OF THE STATEMENT OF DR.HARSH VARDHAN, UNION HEALTH MINISTER, REPORTED IN THE HINDUSTAN TIMES DATED 10.11.2020.

EXHIBIT P16 COPY OF THE STATEMENT OF THE DIRECTOR AIIMS DELHI REPORTED IN NDTV DATED 13.10.2020.

EXHIBIT P17 COPY OF THE REPORT OF MATHRUBHUMI ON THE STRIKE OF KGMOA DATED 14.10.2020.

EXHIBIT P18 COPY OF THE LETTER SENT BY THE PETITIONER TO THE STATE ELECTION COMMISSIONER DATED 22.10.2020.

EXHIBIT P19 COPY OF THE LETTER SENT BY THE PETITIONER TO THE CHIEF ELECTION OFFICER DATED 22.10.2020.

EXHIBIT P20 COPY OF THE ORDER OF THE SUPREME COURT IN WPC NO.437/2020 DATED 18.3.2020.

RESPONDENTS' EXHIBITS:

ANNEXURE-R2(A): PHOTOCOPY OF THE MINUTES OF THE MEETING CONVENED BY THE STATE ELECTION COMMISSIONER WITH THE DIRECTOR OF HEALTH SERVICES ON 17-08-2020, WITH ENGLISH TRANSLATION.

ANNEXURE-R2(B): PHOTOCOPY OF THE MINUTES OF THE MEETING CONVENED BY THE STATE ELECTION COMMISSIONER WITH THE REPRESENTATIVES OF THE POLITICAL

PARTIES ON 18-09-2020, WITH ENGLISH TRANSLATION.

ANNEXURE-R2(D): PHOTOCOPY OF THE LETTER D.O. NO.612/CS/2020/CSO DATED 11-09-2020 OF THE CHIEF SECRETARY OF 1ST RESPONDENT ADDRESSED TO THE STATE ELECTION COMMISSIONER.

ANNEXURE-R2(E): PHOTOCOPY OF PROCEEDING NO.B1-33870-2020-SEC DATED 28-10-2020 ISSUED BY THE 2ND RESPONDENT.

//TRUE COPY//

P.A. TO C.J.