

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE SMT. JUSTICE P.V.ASHA

MONDAY, THE 12TH DAY OF APRIL 2021 / 22ND CHAITHRA, 1943

WP(C).No.8089 OF 2021(I)

PETITIONER/S:

THE SECRETARY  
KERALA LEGISLATIVE ASSEMBLY, LEGISLATIVE COMPLEX,  
VIKAS BHAVAN P.O, THIRUVANANTHAPURAM - 695033.

BY SRI.V.MANU, SENIOR GOVT. PLEADER

RESPONDENT/S:

THE ELECTION COMMISSION OF INDIA  
REPRESENTED BY ITS SECRETARY GENERAL NIRAVACHAN  
SADAN, ASOKA ROAD, NEW DELHI - 110001.

BY ADV. SHRI.DEEPULAL MOHAN, SC, ELECTION  
COMMISSION OF INDIA

OTHER PRESENT:

SRI DEEPU LAL MOHAN SC ELECTION COMMISSION , SRI P  
VIJAYAKUMAR ASG

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON  
09.04.2021, ALONG WITH WP(C).8092/2021(J), THE COURT ON THE SAME  
DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE SMT. JUSTICE P.V.ASHA

MONDAY, THE 12TH DAY OF APRIL 2021 / 22ND CHAITHRA, 1943

WP(C).No.8092 OF 2021(J)

PETITIONER/S:

S. SHARMA  
AGED 66 YEARS  
S/O SEKHARAN, MEMBER OF LEGISLATIVE  
ASSEMBLY, MANNAPASSERY HOUSE, PERUMPADANNA, NORTH  
PARAVUR,  
ERNAKULAM DISTRICT.

BY ADVS.  
SRI.N.N.SUGUNAPALAN (SR.)  
SRI.P.K.BABU  
SRI.S.SUJIN

RESPONDENT/S:

- 1 THE CHIEF ELECTION COMMISSION OF INDIA  
NIRVACHAN, SASADAN, ASOK ROAD,  
NEW DELHI-110001.
- 2 THE CHIEF ELECTORAL OFFICER,  
ELECTION DEPARTMENT, KERALA LEGISLATIVE COMPLEX,  
VIKAS BHAVAN.P.O, THIRUVANANTHAPURAM-695033.
- 3 THE RETURNING OFFICER FOR ELECTION TO THE COUNCIL OF  
STATE, RAJYASABHA FROM KERALA, KERALA LEGISLATIVE  
COMPLEX, VIKAS BHAVAN.P.O, THIRUVANANTHAPURAM-  
695033.
- 4 UNION OF INDIA MINISTRY OF LAW AND JUSTICE,  
SASTRI BHAVAN, NEW DELHI-110001,  
REPRESENTED BY ITS SECRETARY.

R1-2 BY ADV. SHRI.DEEPULAL MOHAN, SC, ELECTION  
COMMISSION OF INDIA

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON  
09.04.2021, ALONG WITH WP(C).8089/2021(I), THE COURT ON THE SAME  
DAY DELIVERED THE FOLLOWING:

**P.V.ASHA, J.**

-----  
**W.P.(C) No.8089 & 8092 of 2021**  
-----

**Dated this the 12<sup>h</sup> day of April, 2021**

**JUDGMENT**

These two writ petitions are filed consequent to deferment of election to the 3 seats becoming vacant in the Council of States. W.P.(C) No. No.8089 of 2021 is filed by the Secretary of the Kerala Legislative Assembly and W.P.(C) No. No.802 of 2021 is filed by a sitting member of the Kerala Legislative Assembly (hereinafter referred to as "Assembly" for short). As the issue raised in both these writ petitions are identical, both the cases are disposed of by this common judgment. The parties and documents referred to in this judgment would be as described in the W.P.(C) No. No.8089 of 2021, unless specified otherwise.

2. Out of the nine members in the Council of States from the State of Kerala, three members -M/s Vayalar Ravi, K.K. Ragesh and Abdul Vahab are retiring on 21.04.2021 on completion of their 6 years' term. On 17.03.2021, the Election Commission of India issued Ext P1 press release announcing the schedule of election for filling up the three seats fixing the date for issuing notification as 24.03.2021; last date for making nomination: 31<sup>st</sup> March 2021; date for scrutiny of notification:

03.04.2021; date for withdrawal of candidature : 05.04.2021 and date before which election to be completed : 12.04.2021. In W.P.(C) No. 8092 of 2021 the petitioner has stated that pursuant to the press release, the Returning Officer had, as per Ext P2 proceedings dated 24.03.2021, produced in it, fixed Room No.740 of the 3<sup>rd</sup> floor of the Kerala Legislative Assembly Building as the place of poll with the previous approval of the Election Commission. On the very same day I.e 24.03.2021, the Election Commission issued another press note, stating the following:

*"The Commission vide Press Note No. ECI/PN/29/2021 DATED 17.03.2021 had announced the schedule of election for 03 seats to Council of States from Kerala as mentioned therein, with the notification scheduled to be issued on 24.03.2021.*

*In the meanwhile a reference has been received from the Ministry of Law & Justice. Pending examination of the reference, the Commission has decided to keep the aforementioned proposed notification and schedule in abeyance till further orders.*

3. The petitioners state that the 14<sup>th</sup> Kerala Legislative Assembly was constituted on 20. 05.2016, based on election held on 16.05.2016 and the first session of the same commenced on 02.06.2016 and as its five year term is not over as per Article 172 of the Constitution of India, the electoral college to the Council of States continues and therefore there is no justifiable reason for keeping in abeyance the proceedings for election to seats becoming vacant on 21.04.2021 and that the

schedule of dates were notified by the Commission after it issued notification for election to the State Assembly. The petitioners state that the Commission is bound to conduct the election before the expiration of the term of the three outgoing members of the Council of States; or else there would be a shortage of three representatives for the State in the Council of States and it should be during the currency of the 14<sup>th</sup> legislative assembly. The further contention of the petitioners is that as Section 12 of the Representation of People Act, 1951 ('RP Act' for short) provides for filling up of the seats of the 'retiring' members, on expiration of their term, the said section envisages completion of entire process of election before the actual retirement so as to fill up the seats as soon as the seats become vacant, especially when the Council of States is a continuing body, in accordance with Article 83 of the Constitution of India. In W.P.(C) No.8092/2021, the contention of the petitioner is that it is the constitutional right of the members of the legislative assembly including him to use their franchise to elect a member of their choice to the council of State and the postponement would affect their right as the term of the present assembly would expire in May 2021 and apart from that he would also lose his statutory right to exercise his vote to a person of his choice. The petitioner in W.P.(C) 8089/2012 seeks for a direction to the Commission to conduct the election to the three vacancies at the earliest

during the currency of 14<sup>th</sup> legislative assembly. In the other writ petition, petitioner has challenged the postponement of election by the press note dated 24.03.2021 of the Commission and has sought for a direction to the Commission to conduct the election in accordance with the schedule announced on 17.03.2021.

4. When the matter came up for consideration on 26.03.2021, the learned Standing Counsel for the Commission sought time to get instructions. On 30.03.2021, the learned Standing Counsel filed a statement on behalf of the Commission, stating that writ petition is premature and stating as follows in para 10:

*" 10.It is submitted that as per Press Note dated 24.03.2021, the Election Commission has only decided to keep in abeyance, the proposed notification and schedule till a revised date of issuance of notification and schedule is announced by the Commission. Further, on 26.03.2021the Election Commission has already issued a communication stating that the decision for conducting elections to the Rajya Sabha seats from Kerala will be taken shortly and within the existing legislative frame work as provided in Section 12 and 30 of the Act."*

5. On 07.04.2021, the learned Standing Counsel submitted that the notification for election would be issued before 21.04.2021. On direction by this court to disclose the reason behind the decision for postponement, the learned Standing Counsel filed an additional statement on behalf of the Commission on 09.04.2021. It is stated that the Commission had announced the schedule of biennial election on 17.03.2021 in

accordance with Section 12 of the RP Act to fill the seats of the three members retiring on 21.04.2021 and sent its recommendation for appointment of dates as per Section 39 of the Act to the President of India for publication of notification in the official gazette of India, with a copy to the Ministry of Law and Justice. On 23.03.2021 the Ministry wrote to the Commission:

*" If the election to elect the members to the Council of States are held on 12<sup>th</sup> April 2021 as suggested, the popular will, which is already recorded in the ballot box consequent to the Assembly Elections already held on 6<sup>th</sup> April 2021, it may not reflect the will of the people.*

*In view of the above, the Commission may kindly revisit the issue."*

6. It is stated that the Commission thereupon kept the publication in abeyance since an issue of propriety was raised by the Ministry and it sought for a legal opinion from a Senior Advocate who is an expert on Constitutional and Electoral laws who opined that it would be constitutionally just and proper that the new assembly whose elections are being held and polling would conclude on 06.04.2021, which is before the expiry of the term of the three members of Rajya Sabha from the State of Kerala should constitute the electoral College for filling up the three vacancies. It was opined that an extra-ordinary situation arose in the case as the election to the Legislative Assembly was announced on 26.02.2021; notified on 12.03.2021; polling completed on 06.04.2021; all before the expiry of the term of members on 21.04.2021 and counting would be taken within

a fortnight thereafter and therefore it was constitutional to announce the election after the new Legislative Assembly is constituted as those three members to be elected would represent the new legislative assembly for the major portion of their 6 years' term; it would not be constitutionally fair or consistent with the basic democratic principles if the election is held with the existing assembly which is in the terminal state. It is further stated that after consideration of the legal opinion as well the constitutional as well as other legal provisions Commission has decided to announce and notify the schedule of biennial election to the Council of States from Kerala to fill the seats of three members retiring on 21.04.2021 before the expiry of the term of the retiring members. The Commission has stated that it is not concerned with which assembly votes for the election as its constitutional duty is to conduct the elections at the earliest and that the date of expiration of the current assembly though may be a relevant factor it cannot be the sole basis for determining the schedule of which ultimately affect the functioning of the Upper House. It has also relied on the judgment in Special reference In Re (Gujarat Assembly Election matter) : (2002) 8 SCC 237 where it was held that the mandate under Article 234 is to conduct free and fair elections at the earliest.

7. According to the Government of India, as argued by Sri.P.Vijayakumar, the learned ASGI, the Election Commission had



forwarded a copy of the recommendation for conducting Election placed before the President, to the Ministry of Law and Justice also and it had rightly pointed out the factual circumstances arising in the matter when election was notified and a new set of members were being elected. It was pointed out that such an intimation was not for influencing the Election Commission and that the Election Commission is not supposed to act under any influence.

8. The learned Senior Counsel for the petitioners argued that, if the notification of election is delayed till 21.04.2021, the result would be that the persons nominated by the existing electoral college would be elected by the incoming electoral college, as the counting of votes for election to the legislative assembly is scheduled to be held on 02.05.2021 and such a contingency arose only because of the postponement of election and that the Election Commission did not act as envisaged under Article 324 of the Constitution of India. It was also pointed out that even after taking a decision, as stated in the additional statement, the Commission has not so far announced the revised schedule or taken steps for notification.

9. Heard M/s.C.S.Vidyanathan and N.N.Sugunapalan, the respective Senior Counsel in the respective Writ Petitions duly assisted by Sri.V.Manu, the learned Senior Government Pleader and Advocate Sri.P.K.Babu, respectively; Sri.Deepu Lal Mohan, the learned Counsel for the Election Commission, common

respondent in both the cases and P. Vijayakumar, the learned ASGI, appearing for the Union of India in W.P. © No. 8092 of 2021. Relying on the judgments in **N.P. Ponnuswami v. Returning Officer, Namakkal Constituency**:: AIR 1952 SC 64, **Mohinder Singh Gill v. Chief Election Commr.**: (1978) 1 SCC 405: AIR 1978 SC 851, **Election Commission of India v. Ashok Kumar**: (2000) 8 SCC 216, **Manda Jaganath v. K.S. Rathnam**: (2004) 7 SCC 492, **Special Reference No. 1 of 2002, In re (Gujarat Assembly Election matter)**: (2002) 8 SCC 237, **Election Commission of India v. State of Haryana**: 1984 Supp SCC 104, **Bhim Singh v. Election Commissioner of India** : (1996) 4 SCC 188, **DMDK v. Election Commission of India**: (2012) 7 SCC 340, **Indira Nehru Gandhi v. Raj Narain**: 1975 Supp SCC 1, **DMDK v. Election Commission of India**: (2012) 7 SCC 340, the learned Senior Counsel in both writ petitions argued that the reliefs sought by the petitioners to accelerate the process of election is not hit by the embargo in Article 329(b); the Commission is duty bound to carry out its duties as envisaged in Article 324 of the Constitution of India and steps shall be taken for conducting the election before the expiration of the term of retiring members; right to vote is a constitutional right; there cannot be a deferment of election in the absence of justifiable reasons, etc. Some of the judgments like In Re Gujarat Assembly election were relied on by both sides. Relying on the judgment of the Madras High Court in **G.Vasantha Pai V Election Commission of India** in\_W.P.1020 of

1976, the learned Counsel for the Commission argued that it is not necessary to conduct the election before the expiry of the term of the retiring members and that there is no provision which mandates completion of election to the council of states within a specific period. In order to examine the contentions, it is appropriate to have a look at the relevant provisions in the Constitution of India relating to the election as well as those in RP Act.

10. Under Article 324 of the Constitution of India the Superintendence, direction and control of the preparation of electoral rolls and the conduct of all elections to Parliament and to the Legislature of every State and elections to the offices of the President and Vice President held under the Constitution are vested in the Election Commission. Article 80 provides that the Council of States shall consist of 12 members to be nominated by the President and not more than 238 representatives of the States and of Union Territories. As per Article 80(4), the representatives of each state in the Council of States shall be elected by the elected members of the Legislative Assembly of the States in accordance with the proportional representation by means of the single transferable vote. As per Article 172((1) every Legislative Assembly of every State shall, unless sooner dissolved, continue for 5 years from the date appointed for its first meeting and no longer and the expiration of five years shall operate as a dissolution of

the assembly. Section 12 in Part III of the Representation of People Act, 1951 which provides for notification of biennial election to the Council of States reads as follows:

**12. Notification for biennial election to the Council of States.**—For the purpose of filling the seats of members of the Council of States retiring on the expiration of their term of office the President shall by one or more notifications published in the Gazette of India on such date or dates as may be recommended by the Election Commission, call upon the elected members of the Legislative Assembly or, as the case may be, the members of the electoral college, of each State concerned to elect members in accordance with the provisions of this Act and of the rules and orders made thereunder:

Provided that no notification under this section shall be issued more than three months prior to the date on which the term of office of the retiring members is due to expire.

(emphasis supplied )

11. Much emphasis was made to the expression "retiring" by the learned Senior Counsel appearing for the petitioners, referring to the proviso to Section 12, which prohibits any notification prior to the expiration of the term of office of the retiring members arguing that the proceedings shall commence and complete before the actual retirement of the members and that there shall not be any vacuum. I am also of the view that what is envisaged under Section 12 is to fill up the vacancies as soon as the incumbents retire and for that purpose election has to be completed by the date of retirement.

12. Nomination of candidates is dealt with in Chapter I of Conduct of Elections, which is in Part V of the Act. Section 30 of the Act which provides for appointment of dates of nomination, reads as follows:

**30. Appointment of dates for nominations, etc.**—As soon as the notification calling upon a constituency to elect a

*member or members is issued, the Election Commission shall, by notification in the Official Gazette, appoint-*

*(a) the last date for making nominations, which shall be the seventh day after the date of publication of the first-mentioned notification or, if that day is a public holiday, the next succeeding day which is not a public holiday;*

*(b) the date for the scrutiny of nominations, which shall be the day immediately following the last date for making nominations or, if that day is a public holiday, the next succeeding day which is not a public holiday;*

*(c) the last date for the withdrawal of candidatures, which shall be the second day after the date for the scrutiny of nominations or, if that day is a public holiday, the next succeeding day which is not a public holiday;*

*(d) the date or dates on which a poll shall, if necessary, be taken, which or the first of which shall be a date not earlier than the fourteenth day after the last date for the withdrawal of candidatures; and*

*(e) the date before which the election shall be completed.*

13. Section 39 of the Act which provides for the schedule of each steps of election where the elected members of the legislative assembly are to elect, reads as follows:

**39. Nomination of candidates at other elections.**—(1) *As soon as the notification calling upon the elected members or the members of the Legislative Assembly of a State or the members of the electoral college of a Union Territory to elect a member or members is issued, the Election Commission shall, by notification in the Official Gazette, appoint-*

*(a) the last date for making nominations, which shall be the seventh day after the date of publication of the first-mentioned notification or, if that day is a public holiday, the next succeeding day which is not a public holiday;*

*(b) the date for the scrutiny of nominations, which shall be the day immediately following the last date for making nominations or, if that day is a public holiday, the next succeeding day which is not a public holiday;*

*(c) the last date for the withdrawal of candidatures, which shall be the second day after the date for the scrutiny of nominations or, if that day is a public holiday, the next succeeding day which is not a public holiday;*

*(d) the date or dates on which a poll shall, if necessary, be taken, which or the first of which shall be a date not earlier than the seventh day after the last date for the withdrawal of candidatures; and*

(e) the date before which the election shall be completed.

(2) The provisions of Sections 31 to 38, excluding sub-sections (2) and (5) of Section 33 and clause (a) of sub-section (1) of Section 34, shall apply in relation to any such election as they apply in relation to an election in any constituency:

Provided that—

(a) any references in the said provisions to the electoral roll of the constituency shall, unless the context otherwise requires, be construed, in the case of an election by the members or the elected members of the Legislative Assembly of the State, as references to the list of members or elected members, as the case may be, of that Assembly maintained under sub-section (1) of Section 152, and in the case of an election by the members of the electoral college of a Union Territory, as references to the list of members of such electoral college maintained under sub-section (2) of that section;

xxxx

14. Thus Section 39 which stipulates the interval between each of the steps in the process of election starting from the notification till completion, would show that a minimum of 17 (7+1+2+7) days would be required for completing the election after the issuance of notification, where as 24 days are required for elections to the constituency. Relevant portion of Section 152, which provides for the electoral college, reads as follows:

**152. List of members of the State Legislative Assemblies and electoral colleges to be maintained by the returning officers concerned.**—(1) The returning officer for an election by the elected members of the Legislative Assembly of a State to fill a seat or seats in the Council of States or for an election, by the members of the Legislative Assembly of a State to fill a seat or seats in the Legislative Council of the State shall, for the purposes of such election maintain in his office in the prescribed manner and form a list of elected members or a list of members, as the case may be, of that Legislative Assembly.

15. Apart from that the time for completion can be extended on sufficient reasons as provided in Section 153 as follows:

**153. Extension of time for completion of election.**—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 (1) of Section 39.*

It would be necessary to consider the provisions contained in Section 66 as well as Section 67A also.

**66. Declaration of results.**—*When the counting of the votes has been completed, the returning officer shall, in the absence of any direction by the Election Commission to the contrary, forthwith declare the result of the election in the manner provided by this Act or the rules made thereunder.*

**67-A. Date of election of candidate.**—*For the purposes of this Act, the date on which a candidate is declared by the returning officer under the provisions of Section 53 or Section 66, to be elected to a House of Parliament or of the Legislature of a State shall be the date of election of that candidate.*

Therefore once the counting is over and on declaration of the returning officer, there would be another electorate.

16. In this context it is also necessary to examine certain other provisions in the RP Act pointed out by Sri. Deepu Lal Mohan, the learned Counsel for the Commission, in answer to the contentions raised with respect to the mandate for completing the election before the actual retirement of the members.

**151-A. Time limit for filling vacancies referred to in Sections 147, 149, 150 and 151.**—*Notwithstanding anything contained in Section 147, Section 149, Section 150 and Section 151, a bye-election for filling any vacancy referred to in any of the said sections shall be held within a period of six months from the date of the occurrence of the vacancy:*

*Provided that nothing contained in this section shall apply if—*

(a) the remainder of the term of a member in relation to a vacancy is less than one year; or

(b) the election Commission in consultation with the Central Government certifies that it is difficult to hold the bye-election within the said period.  
(emphasis supplied)

17. Section 147, 149, 150 and 151 relate to filling up of casual vacancies. Section 154 deals with the term of office of the members of the Council of States. In the case of election of the President and Vice President, it is mandatory to complete the election before expiration of the term of the incumbents in office as provided under Articles 62 and 68 of the Constitution of India, relevant portion of which read as follows:

**62. Time of holding election to fill vacancy in the office of President and the term of office of person elected to fill casual vacancy.**-(1) An election to fill a vacancy caused by the expiration of the term of office of President shall be completed before the expiration of the term.

xx

**68. Time of holding election to fill vacancy in the office of Vice-President and the term of office of person elected to fill casual vacancy.**-(1) An election to fill a vacancy caused by the expiration of the term of office of Vice-President shall be completed before the expiration of the term.

xx

18. In the case of election to the parliament or to legislative assemblies no such provision is seen available in the Constitution of India. Article 80 which deals with the composition of the Council of States provides for the maximum number of members in it and also for the election to it in accordance with proportional representation only. Section 154 of RP Act 1951 which fixes the term of office of its members at



6 years and provides that one third of the members holding seats shall retire every 2<sup>nd</sup> year, as follows:

**154. Term of office of members of the Council of States.—**

(1) Subject to the provisions of sub-sections (2) and (2-A), the term of office of a member of the Council of States, other than a member chosen to fill a casual vacancy, shall be six years.

(2) Upon the first constitution of the Council of States the President shall, after consultation with the Election Commission, make by order such provision as he thinks fit for curtailing the term of office of some of the members then chosen in order that, as nearly as may be, one-third of the members holding seats of each class shall retire in every second year thereafter.

(2-A) In order that, as nearly as may be, one-third of the members may retire on the second day of April, 1958, and on the expiration of every second year thereafter, the President shall, as soon as may be after the commencement of the Constitution (Seventh Amendment) Act, 1956, after consultation with the Election Commission, make by order such provisions as he thinks fit in regard to the terms of office of the members elected under sub-section (2) of Section 147.

(3) A member chosen to fill a casual vacancy shall be chosen to serve for the remainder of his predecessor's term of office.

19. It is seen that the RP Act provides for a specific time limit of six months for conducting the election to casual vacancies under Section 151A. However, it would be necessary to examine whether the Election Commission can postpone the election to the upper house, even when no time limit is fixed for filling up the vacant seats in council of States with reference to the judgments cited by both sides, keeping in mind the fact that the Commission had already announced that notification for election would be issued on 24.03.2021 to conduct the election before 21.04.2021 and based on that the returning officer had made arrangements for conducting the poll as per the schedule announced by the Election Commission; it is

whileso the Election Commission deferred the election and such deferment was based on an intimation received from the Ministry of Law and Justice.

20. **In Ponnuswami 's case** (supra) , a Constitution Bench was considering a case where the writ petition challenging the rejection of nomination to the legislative assembly of Tamil Nadu, was dismissed by the Madras High Court, in view of the bar under Article 329(b) of the Constitution of India. Article 329(b) reads as follows;

*"329. Notwithstanding anything in this Constitution—*

*(a) xx*

*(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."*

The Apex Court held that the word election would embrace the entire procedure whereby an elected member is returned. The said dictum was reiterated in the judgment in **Mohinder Singh Gill's** case stating that "election", commences from the initial notification and culminates in the declaration of the return of a candidate. While recognising the requirement for concluding the elections at the earliest in accordance with the schedule, it was held as follows in para 16 in **Ponnuswami 's** case:

*16(1) The conclusions which I have arrived at may be summed up briefly as follows:*

*(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as*

possible according to time schedule and all controversial 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 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.

21. In the judgment in **Mohinder Singh Gill v. Chief Election Commr.:** (1978) 1 SCC 405: AIR 1978 SC 851 the power of the Commission to cancel the poll and direction to conduct re-poll was the question which arose for consideration. The Apex Court considered the scope of judicial review under Article 226 vis a vis the ban under Article 329(b). The following issues were considered:

"(1) Is Article 329(b) a blanket ban on all manner of questions which may have impact on the ultimate result of the election, arising between two temporal termini viz. the notification by the President calling for the election and the declaration of the result by the returning officer? Is Article 226 also covered by this embargo and, if so, is Section 100 broad enough to accommodate every kind of objection, constitutional, legal or factual, which may have the result of invalidation of an election and the declaration of the petitioner as the returned candidate and direct the organisation of any steps necessary to give full relief?

(2) Can the Election Commission, clothed with the comprehensive functions under Article 324 of the Constitution, cancel the whole poll of a constituency after it has been held, but before the formal declaration

*of the result has been made, and direct a fresh poll without reference to the guidelines under Sections 58 and 64(A) of the Act, or other legal prescription or legislative backing? If such plenary power exists, is it exercisable on the basis of his inscrutable "subjective satisfaction" or only on a reviewable objective assessment reached on the basis of circumstances vitiating a free and fair election and warranting the stoppage of declaration of the result and directions of a fresh poll not merely of particular polling stations but of the total constituency?*

*(3) Assuming a constitutionally vested capacity under Article 324 to direct re-poll, is it exercisable only in conformity with natural justice and geared to the sole goal of a free, popular verdict if frustrated on the first occasion? Or, is the Election Commission immune to the observance of the doctrine of natural justice on account of any recognised exceptions to the application of the said principle and unaccountable for his action even before the Election Court?"*

22. It was held that any decision sought and rendered will not amount to "calling in question" an election in case it subserves the progress of the election and facilitates the completion of the election. If anything is done in furtherance of completion of election that cannot be described as questioning the election and that a single step taken in furtherance of election cannot be treated as equivalent to election which attracts the ban. It was held that the ban under Article 329(b) would attract only the challenges which would interfere with the progress of the election and those which accelerates the completion of the election and acts in furtherance of an election would not attract the ban. It was found that the cancellation of the poll and the ordering of fresh poll is part of election and challenging the same amounted to "calling it in question" which attracts the constitutional bar. In para 30 of the judgment it was held as follows:

30. 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.  
Xxxxx

In para 34 it was further explained as follows:

34. xxxBut what is banned is not anything whatsoever done or directed by the Commissioner but everything he does or directs in furtherance of the election, not contrarywise. For example, after the President notifies the nation on the holding of elections under Section 15 and the Commissioner publishes the calendar for the poll under Section 30, if the latter orders Returning Officers to accept only one nomination or only those which come from one party as distinguished from other parties or independents, is that order immune from immediate attack. We think not. Because the Commissioner is preventing an election, not promoting it and the Court's review of that order will facilitate the flow, not stop the stream. Election, wide or narrow be its connotation, means choice from a possible plurality, monolithic politics not being our genius or reality, and if that concept is crippled by the Commissioner's act, he holds no election at all.

23. It was held that the correctness, legality or otherwise of the direction for cancellation of poll integrated with re-poll is a step in election which is barred under Article 329(b) of the Constitution and hence not liable to be called in question under Article 226. It was found that that re-poll in one or more polling stations would be lawful, for good reasons. At the same time it was also found that if no re-poll had been directed and there was mere cancellation it would have then thwarted the course of the election and then the legal perspective would have been different. It was further held that immunity under Article 329(b) is conferred only if the act impeached is done for the apparent object of furthering a free

and fair election and the protective armour drops down if the act challenged is either unrelated to or thwarts or taints the course of the election.

24. In ***Election Commission of India v. Ashok Kumar: (2000)*** 8 SCC 216 it was held that the bar under Article 329(b) would attract only if the election is called in question. Analysing the 2 Constitution Bench Judgments in ***N.P. Ponnuswami's*** case and in ***Mohinder Singh Gill's*** case a three Judge Bench found that there may be cases where relief sought may not interfere with the process of election but where relief is sought for correcting the process of election taking care of such aberrations which can be corrected only at that particular moment failing which the stream of the process may break its bounds and a relief is sought for proceeding with the process of election in accordance with rules when circumstances are such that the wrong done shall not be undone after the election is over. In such cases also the intervention of the court shall not interrupt the ongoing process of election. In paragraph 32, it was concluded as follows:

**32.** *For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:*

*(1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.*

*(2) Any decision sought and rendered will not amount to "calling in question an election" if it subserves the progress of the election*

and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

(3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

(4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the court.

(5) The court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the court would act with reluctance and shall not act, except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material. (emphasis supplied)

25. In the judgment in **Manda Jaganath v. K.S. Rathnam:**

(2004) 7 SCC 492, a two Judge Bench of the Apex Court interfered with the judgment of the High Court of Andhra Pradesh which directed acceptance of the nomination of a candidate which the returning officer had rejected. The embargo under Article 329(b) was found to have attracted in that case. While following the dictum laid down in **Mohinder Gill's** case on the circumstances where intervention is required, the Apex court held as follows in para 18:

18. Of Course what is stated by this Court hereinabove is not exhaustive of a Returning Officer's possible erroneous actions which are amenable to correction in the writ jurisdiction of the courts. But the fact remains that such errors should have the effect of interfering in the free flow of the scheduled election or hinder the progress of the election which is the

*paramount consideration. If by an erroneous order conduct of the election is not hindered then the courts under Article 226 of the Constitution should not interfere with the orders of the Returning Officers, remedy for which lies in an election petition only.*

26. In view of the dictum laid down in the aforesaid judgments it can be safely concluded that these writ petitions which seek directions to expedite the elections do not attract the embargo under Article 329(b) of the Constitution of India. It is also pertinent to note that no such contention is raised by the Commission in these cases. The next question to be considered is on the extent of the power conferred on the Commission under Article 324.

27. Regarding the powers, superintendence, etc vested in the Election Commission under Article 324 it was held as follows in the judgment in **Mohinder Gill's** case:

*38. No one is an imperium in imperio in our constitutional order. It is reasonable to hold that the Commissioner cannot defy the law armed by Article 324. Likewise, his functions are subject to the norms of fairness and he cannot act arbitrarily. Unchecked power is alien to our system.*

*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, not 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". Myriad maybes, too mystic to be precisely presaged, may call for prompt action to reach the goal of free and fair election. XXXXXXXX*

*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(Virendra v. State of Punjab: AIR 1957 SC 896) and*



*Harishankar(Harishankar Bagla v. State of M.P: AIR 1954 SC 465 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. xx*

28. In the judgment in ***Election Commission of India v. State of Haryana***: 1984 Supp SCC 104 the Election Commission proceeded with its decision to conduct a bye election along with election in other States, as scheduled despite request from the Chief Secretary to defer the same pointing out law and order situation. It was interdicted by the High Court. While allowing the appeal, the Apex Court held as follows in para 8:

*"8. xxxxxxIt is not suggested that the Election Commission can exercise its discretion in an arbitrary or mala fide manner. Arbitrariness and mala fides 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."*

29. The judgment in ***Election Commission of India v. Union of India***: 1995 Supp (3) SCC 643, which is also relied on by the learned Senior Counsel for petitioners as well as the learned Counsel for the Election Commission, was in a petition filed by the Election Commission of India, when it found it impossible to discharge its constitutional obligations in view of a deadlock created by the Government of India and therefore had passed orders postponing all the elections, which were announced/notified/in progress, until further orders. The Apex court held as follows in para 8:

*8. While we reiterate the judicial perception as to the constitutional position and the plenitude of the powers of the Election Commission as a high and exclusive body charged with*

*the duty, at once sensitive and difficult, of overseeing free and fair elections in the country and that its perceptions of the imperatives for a free and fair elections are not to be interfered with by the courts, we must also indicate that there are no unreviewable discretions under the constitutional dispensation. The overall constitutional function to ensure that constitutional authorities function within the sphere of their respective constitutional authority is that of the courts. Whether the blanket suspension of the electoral process purported in the order dated 2-8-1993 is justifiable on that principle of judicial review is eminently arguable. But one thing seems clear : the jurisdiction of courts would not extend to issuing directions to the Election Commission for the conduct of particular polls on particular dates independently of the perception by the Commission as to their feasibility and practicability consistent with what may be needed to ensure the purity of the electoral process.*  
XXXXXXXXXX

30. Regarding the right to vote , in **Ponnuswami's** case it was held that the right to vote or to stand as a candidate is not a civil right but one created under statute and it must be subject to the limitations imposed in it. But in **Mohinder Singh Gill's** case in para 66 it was concluded that every Indian has a right to elect and be elected and it is a constitutional as distinguished from a common law right and is entitled to cognizance by courts, subject to statutory regulation. In **People's Union for Civil Liberties v. Union of India: (2003) 4 SCC 399**, it was held that the right to vote, is a constitutional right, and that in accordance with the constitutional mandate contained in Article 326, the right has been shaped by the RP Act and that it is not very accurate to describe it as a statutory right, pure and simple. Following the aforesaid proposition in the dissenting judgment in **DMDK v. Election Commission of India: (2012) 7 SCC 340**, it was held that every citizen of this country has a constitutional right both to

elect and also be elected to any one of the legislative bodies created by the Constitution which can be curtailed only by a law made by the appropriate legislation, that too only on grounds specified under Article 326.

31. The next question to be considered is in respect of the requirement of conducting election before expiration of the term of the retiring members; the power of the election Commission to defer the elections, etc. In **Indira Nehru Gandhi v. Raj Narain**: 1975 Supp SCC 1, Hon'ble Khanna J, in the separate judgment, while considering the constitutional validity of Article 329A(4), reiterated that democracy is part of the basic structure of the constitution and emphasized the requirement of periodical election in para 198, as follows:

*Democracy postulates that there should be periodical elections, so that people may be in a position either to re-elect the old representatives or, if they so choose, to change the representatives and elect in their place other representatives. Democracy further contemplates that the elections should be free and fair, so that the voters may be in a position to vote for candidates of their choice. Democracy can indeed function only upon the faith that elections are free and fair and not rigged and manipulated, that they are effective instruments of ascertaining popular will both in reality and form and are not mere rituals calculated to generate illusion of defence to mass opinion.*

32. A 5 Judge Bench of the Apex Court was answering a reference under Article 143 of the Constitution of India in **Special Reference No. 1 of 2002, In re (Gujarat Assembly Election matter)**: (2002) 8 SCC 237, (which was relied on by all the Counsel including the learned ASGI, There the Governor dissolved the assembly on 1.07.2002 whereas the normal completion of its term was till 18.03.2003. Though the Election

Commission took steps for conducting election immediately thereafter, it found that it was not possible to hold election enabling the convening of the next session of the assembly within six months of the date of last session of the legislative assembly, which was to fall on 03.10.2002, as required under Article 174. It was of the view that the President would have to step in, in such a situation. The President of India made the reference in that context seeking opinion on the aspects: (i) whether Article 174 is subject to Article 324 as to the schedule of election; (ii) can the Election Commission frame a schedule for election to the assembly on the premise that any infraction under Article 174 would be remedied by resorting to Article 356 and (iii) is the Election Commission under duty to carry out the mandate under Article 174 by drawing upon all the requisite resources of the Union and State to ensure free and fair election. Hon'ble Justice K.G. Balakrishnan, concurring with the majority, in his separate judgment, while dealing with the apprehension as to a contingency of the Election Commission indefinitely delaying the election, held in para 105 that the Election Commission which is vested with the power to decide the election schedule can act only in accordance with the constitutional provisions. It further held that when an assembly is dissolved it is the duty of the Election Commission to conduct fresh election and see that a democratically elected Government is installed at the earliest. It was also held that

any decision by the Election Commission, which is intended to defeat this very avowed object of forming an elected Government can be challenged before the Court if the decision taken by the Election Commission is perverse, unreasonable or for extraneous reasons and in case the decision of the Election Commission is vitiated by any of these grounds the Court can give appropriate direction for the conduct of the election.

33. Another question which was considered in the Special reference in Gujarat Assembly was about the limitation, if any, on the powers of the Election Commission to frame schedule for the purpose of holding election for constituting Legislative Assembly. In para. 80 it was held as follows:

*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 Parliament. 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 cannot be taken away by law framed by Parliament. If Parliament makes any such law, it would be repugnant to Article 324. Holding periodic, free and fair elections by the Election Commission are part of the basic structure and the same was reiterated in Indira Nehru Gandhi v. Raj Narain.*

34. The interpretation of the word "expiration" occurring in Section 14 of the RP Act also came up for consideration in that judgment ***In re (Gujarat Assembly Election matter)*** in para 79 of the judgment it was found as follows:

*79. However, we are of the view that the employment of the words "on an expiration" occurring in Sections 14 and 15 of the Representation of the People Act, 1951 respectively show that the Election Commission is required to take steps for holding election immediately on expiration of*

*the term of the Assembly or its dissolution, although no period has been provided for. Yet, there is another indication in Sections 14 and 15 of the Representation of the People Act that the election process can be set in motion by issuing of notification prior to the expiry of six months of the normal term of the House of the People or Legislative Assembly. Clause (1) of Article 172 provides that while promulgation of emergency is in operation, Parliament by law can extend the duration of the Legislative Assembly not exceeding one year at a time and this period shall not, in any case, extend beyond a period of six months after promulgation has ceased to operate. Further, under Articles 123 and 213, the life of an ordinance promulgated either by the President or by the Governor, as the case may be, is six months and repeated promulgation of ordinance after six months has not been welcomed by this Court. Again, under Articles 109, 110, and 111 and analogous articles for the State Assembly, Money Bill has to be passed by the House of the People or by the Legislative Assembly. The aforesaid provisions do indicate that on the premature dissolution of the Legislative Assembly, the Election Commission is required to initiate immediate steps for holding election for constituting Legislative Assembly on the first occasion and in any case within six months from the date of premature dissolution of the Legislative Assembly.*

35. In **Bhim Singh v. Election Commissioner of India : (1996) 4 SCC 188** , while considering the constitutionality of Section 30(d) of the RP Act, in not providing maximum time limit for holding election, it was emphasized that functionaries in any manner concerned with directing the conduct, supervision and control of free, fair and peaceful elections to the House of the People and the Legislative Assemblies of the States need to adopt a realistic, pragmatic and flexible approach to ensure that the country shall be governed in its true, secular, socialist, democratic perspective. All these judgments would show that process of election has to be accelerated and that Constitution does not envisage a situation of keeping the seats unfilled.

36. In the judgment dated 15.04.1976 in **G.Vasantha Pai V Election Commission of India** in W.P.1020 of 1976, relied on by Sri.Deepu Lal, the learned Counsel for the Election Commission, the Madras High Court considered a case more or less similar to the present one where the petitioner sought directions to the Election Commission to conduct election to fill up the seats in the Tamil Nadu Legislative Council as 21 out of 63 members from different categories, were retiring on 20.04.1976, for which the State Government sent proposal to the Election Commission on 30.01.1976. 7 were to be filled up from the Tamil Nadu Legislative Assembly, As the President of India proclaimed emergency on 31.01.1976 and the legislative assembly stood dissolved, the Election Commission took steps for conducting election from other constituencies for filling up the other vacancies and issued a press release on 03.03.1976 announcing the schedule of biennial election. However on receipt of a message from the Chief Secretary to Government as to the law and order situation on account of the President's proclamation, the Commission decided to withdraw its proceedings for notification and informed the same on 05.03.1976. The petitioner sought a direction to conduct the election as per the schedule announced on 03.03.1976 and before the expiration of the term of the existing members stating that the same was mandatory under the RP Act or otherwise it will result in dissolution of the Council, for which the Commission has no power. The

Commission's contention was that the Council itself was under suspended animation because of the proclamation under Article 356 and that the postponement was on sufficient reason. The High Court held that the absence of full strength in the Council at a particular time will not result in its dissolution. The contention of the petitioner relying on Section 16 of the RP Act that there should be an outer limit for issuing the notification, was rejected stating that Section 16 does not provide for any outer limit and that it cannot be held that it is mandatory to conduct the election before the retirement of the existing members. The Court found that the Commission postponed the election because of the law and order situation. It was further held that there was only a press release and that when no notification was issued under Section 16, 30 or 31, the election process cannot be said to have commenced and there was no question of adding or amending any notification. It was held the power of superintendence, direction and control over the conduct of election vested in the Election Commission under Article 324 would include the power to postpone the election if the circumstances are not conducive for the fair and proper conduct of the election at any point of time. It was further held that there is no constitutional mandate to hold the election before the expiration of the term as contained in Article 62, though normally the biennial election is to be completed before the expiration of the term. It is pertinent



to note that the Commission postponed the election as it was convinced of the situation consequent to the proclamation of emergency.

37. The circumstances arising in the present case are not similar to those in **Vasantha Pai's** case where valid reasons were available. In the present case there is no law and order situation as was in the case of **Vasantha Pai**. Therefore, the said judgment would not apply to the present case, where the proceedings were kept in abeyance on receipt of the reference from the Central Government. On an overall reading of the provisions contained in Rule 14, 30, 39, etc of the RP Act read with the provisions contained in Article 80(4) of the Constitution of India it can only be concluded that the intention is not to keep the seats unfilled but to complete the process of election before the retirement of the members, so as to have the full strength of members in the Upper House to represent the State. A different view is warranted only when there is any law and order situation or any practical impossibility. The power to amend or extend the schedule are not to be invoked normally. Such circumstances are not available in the present case. It is true that it is completely within the purview of the Commission to fix the schedule; but the postponement of election is not envisaged either in the Constitution or in the rules, in the absence of good and sufficient reasons.

38. As pointed out by the learned ASGI, it cannot be said that the Government of India wanted to influence the Commission. As argued by all the learned Senior Counsel including the Counsel for the Commission and the learned ASGI, Election Commission of India which is conferred with wide powers and entrusted with onerous duties enjoined under Article 324 is not expected to be influenced on the basis of a reference. Commission which itself had announced and notified the election to the legislative assembly was very aware of the situation when it issued the press release with the schedule of election to the Council of States proposing completion by 16.04.2021. Once the counting is over and on declaration by the returning officer, there would be another electorate. It could have been avoided in the event of conduct of election as scheduled and also if it is conducted expeditiously before the date of counting scheduled on 2<sup>nd</sup> May 2021. The fact that it is upto the Commission to fix the schedule of election would not mean that the Commission can fix any date. As held in the judgment in **Mohinder Gill's** case (supra) when a high functionary like. The Commissioner is vested with wide powers it is incumbent on the Commissioner to act fairly and legally as Article 324 is geared to the accomplishment of free and fair elections expeditiously. The Commission, which is fully aware of its duty conferred under Article 324 of the Constitution of India in its true spirit, has therefore to expedite the proceedings so as to see that the

representation in the upper House from the State of Kerala is always in full swing and to avoid situations as pointed out by the learned Senior Counsel for the petitioners, where the nomination is made by the existing assembly and voting by another assembly. It is seen that at least after it arrived at the decision that it is its duty to see that the vacancies are filled up at the earliest, the Commission is yet to take any steps for the same.

When the Commission itself has admitted that it is duty bound to conduct the election and complete the process at the earliest, it is only appropriate that it takes expeditious steps without further delay to complete the election before another electorate comes into existence on 02.05.2021. Ordered accordingly.

**sd/-**

**P.V.ASHA**

**JUDGE**

rkc

**APPENDIX OF WP (C) 8089/2021**

**PETITIONER'S/S EXHIBITS:**

- EXHIBIT P1**                      A TRUE PHOTOCOPY OF THE PRESS NOTE NO. ECI/PN/29/2021 DATED 17TH MARCH, 2021 ISSUED BY THE FIRST RESPONDENT ELECTION COMMISSION OF INDIA.
- EXHIBIT P2**                      A TRUE PHOTOCOPY OF THE PRESS NOTE NO. ECI/PN/36/2021 DATED 24TH MARCH 2021 ISSUED BY THE RESPONDENT ELECTION COMMISSION OF INDIA.
- EXHIBIT P3**                      A TRUE PHOTOCOPY OF THE RELEVANT PAGES OF THE RESUME OF BUSINESS TRANSACTED DURING THE FIRST SESSION OF THE FOURTEENTH KERALA LEGISLATIVE ASSEMBLY.

**APPENDIX OF WP(C) 8092/2021**

**PETITIONER'S/S EXHIBITS:**

- EXHIBIT P1** TRUE COPY OF THE NOTIFICATION ISSUED BY THE RETURNING OFFICER FIXING THE DATE TO THE ELECTION OF THE MEMBERS TO THE RAJYASABHA DATED 24.3.2021
- EXHIBIT P2** TRUE COPY OF THE NOTIFICATIONM DATED 24.3.2021 ISSUED BY THE ELECTION COMMISSION APPOINTING THE RETURNING OFFICER
- EXHIBIT P3** TRUE COPY OF THE PRESS NOTE ISSUED FROM THE MINISTRY OF LAW
- EXHIBIT P4** TRUE COPY OF THE LETTER NO.318/CS/KL/2021/B DATED 24-3-2021 ISSUED BY THE ELECTION COMMISSION OF INDIA TO THE CHIEF ELECTORAL OFFICER, KERALA.