

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

WRIT PETITION NO. 3010 OF 2015

Prashant s/o Subhash Desarda
age 38 years, occ. Business
r/o 77, Surananagar,
Aurangabad,
Dist. Aurangabad.

.. PETITIONER

VERSUS

1. The State of Maharashtra
Through Department of Urban Development
Mantralaya,
Mumbai 400 032.
2. The State Election Commission of Maharashtra
Through its Chief Election Commissioner,
Mumbai.
3. The Aurangabad Municipal Corporation
Through its Municipal Commissioner,
Aurangabad.
4. The Commissioner
Aurangabad Municipal Corporation,
Aurangabad.

.. RESPONDENTS

Mr. P.M. Shah, Senior Counsel instructed by Mr. D.P. Palodkar, advocate for petitioner.

Mr. V.D. Salunke, special counsel with Mrs. A.V. Gondhalekar, AGP for the State.

Mr. S.T. Shelke, advocate for respondent no. 2.

Mr. A.M. Karad and Mr. G.N. Kulkarni, advocates for respondent no. 3.

WITH

WRIT PETITION NO.3193 OF 2015

Anil s/o Shrikishan Makriye
age 47 years, occ. Social work and
Corporator, Aurangabad-Paithan Gate
Ward no. 37, Municipal Corporation
Aurangabad
Tq. & Dist. Aurangabad.

.. PETITIONER

VERSUS

1. The State of Maharashtra
Through Department of Urban Development
Mantralaya,
Mumbai 400 032.
2. The State Election Commission of Maharashtra
Through its Chief Election Commissioner,
Mumbai.
3. Municipal Corporation, Aurangabad
Through its Municipal Commissioner

.. **RESPONDENTS**

Mr. S.S. Thombre, advocate for petitioner.

Mr. V.D. Salunke, special counsel with Mrs. A.V. Gondhalekar, AGP for the State.

Mr. S.T. Shelke, advocate for respondent no. 2.

Mr. A.M. Karad with Mr. G.N. Kulkarni, advocates for respondent no. 3.

**WITH
WRIT PETITION NO. 3194 OF 2015**

Samir s/o Subhash Rajurkar
age 38 years, occ. Agriculture,
business and social work
r/o Plot No. 13, Shriram Colony
Samarth nagar, Aurangabad
Tq. & Dist. Aurangabad.

.. **PETITIONER**

VERSUS

1. The State of Maharashtra
Through the Principal Secretary (2)
Department of Urban Development
M.S. Mantralaya,
Mumbai 400 032.
2. The Director of Municipal Administration
M.S. Mumbai.
3. The State Election Commission of Maharashtra
Through its Chief Election Commissioner,
Mumbai.
4. The Aurangabad Municipal Corporation
Aurangabad
through its Municipal Commissioner

.. **RESPONDENTS**

Mr. R.S. Deshmukh, advocate for petitioner.
 Mr. V.D. Salunke, special counsel with Mrs. A.V. Gondhalekar, AGP for the State.
 Mr. S.T. Shelke, advocate for respondent no. 3.
 Mr. A.M. Karad with Mr. G.N. Kulkarni, advocates for respondent no. 4.

**WITH
 WRIT PETITION NO. 3242 OF 2015**

Shrinivas s/o Shripad Kulkarni
 age 29 years, occ. Business
 r/o Plot No. 184, Sector B
 N-1, CIDCO, Aurangabad.

.. PETITIONER

VERSUS

1. The State of Maharashtra
 Through its Secretary
 Urban Development Department,
 Mantralaya,
 Mumbai 400 032.
2. The State Election Commission of Maharashtra
 Through its Chief Election Commissioner,
 Mumbai.
3. The Aurangabad Municipal Corporation
 Through its Municipal Commissioner,
 Aurangabad, Dist. Aurangabad.
4. The Commissioner,
 Aurangabad Municipal Corporation,
 Aurangabad.

.. RESPONDENTS

Mr. L.M. Kulkarni, advocate for petitioner.
 Mr. V.D. Salunke, special counsel with Mrs. A.V. Gondhalekar, AGP for the State.
 Mr. S.T. Shelke, advocate for respondent no. 2.
 Mr. A.M. Karad with Mr. G.N. Kulkarni, advocates for respondent no. 3.

**WITH
 WRIT PETITION NO. 3247 OF 2015**

Mir Wajed Ali s/o Mir Hamed Ali
 age 40 years, occ. Business
 r/o 5-6-15, Mil Corner
 Kotwalpura, Aurangabad
 Dist. Aurangabad.

.. PETITIONER

VERSUS

1. The State of Maharashtra
Through Department of Urban Development
Mantralaya,
Mumbai 400 032.
2. The State Election Commission of Maharashtra
Through its Chief Election Commissioner,
Mumbai.
3. The Aurangabad Municipal Corporation
Through its Municipal Commissioner,
Aurangabad.
4. The Commissioner,
Aurangabad Municipal Corporation,
Aurangabad.

.. RESPONDENTS

Mr. P.M. Shah, senior counsel instructed by Mr. D.P. Palodkar, advocate for petitioner.

Mr. V.D. Salunke, special counsel with Mrs. A.V. Gondhalekar, AGP for the State.

Mr. S.T. Shelke, advocate for respondent no. 2.

Mr. A.M. Karad with Mr. G.N. Kulkarni, advocates for respondent no. 3.

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CORAM : R.M. BORDE &

V. K. JADHAV JJ.

DATE : 23rd MARCH, 2015.

ORAL JUDGMENT : (PER R. M. BORDE, J.)

1. Heard.
2. Rule. Rule made returnable forthwith. With the consent of the parties, all the petitions are taken up for final disposal at admission stage.
3. In this group of petitions challenge is raised to the final notification issued by the State Election Commission prescribing delimitation,

reservation and rotation of the seats for the purpose of holding elections to Aurangabad Municipal Corporation. Elections to the Aurangabad Municipal Corporation were held in the year 2010. Since the term of the Councillors who were elected in the year 2010 has come to an end on 11.02.2015, preliminary notification came to be published by the State Election Commission. Objections were expected to be lodged upto 20.02.2015. The date of hearing before the authorised officer was prescribed as 03.03.2015 and the date for decision on objections and suggestions and final publication of notification was prescribed as 12.03.2015. The draw of lots for the purpose of reservation was conducted on 07.02.2015 and 10.02.2015 and, after considering the objections lodged by different individuals, final notification came to be issued on 12.03.2015.

4. Population of Aurangabad Municipal Corporation area in the year 2010 as per 2001 census report was stated to be 880340 and, taking into consideration population figures, the strength of Councillors was prescribed at 99. In the year 2015, the population of Aurangabad Municipal Corporation area is taken to be 1175160 in accordance with 2011 census figures and as such, the number of Councillors to be elected is increased to 113. As a result of increase in number of wards and change in population figures, exercise in respect of delimitation of wards and prescribing reservation and rotation of seats was required to be conducted in accordance with the provisions of law, rules, orders issued by the State Election Commission and in observance of the constitutional mandate. In the year 2011, the State Government has taken a decision to prescribe multi

member wards by incorporating amendment in section 5(3) of the Maharashtra Municipal Corporation Act. The system of multi member ward adopted in the year 2011 with effect from 26.05.2011 was given go bye by the State in view of Ordinance issued on 31.12.2014 thereby reverting to its earlier decision of having single member ward/constituency. It is worthy to note that after enforcement of amendment i.e. Maharashtra Act No. 26 of 2011 on 26.05.2011, the State Government prescribed rules namely Bombay Provincial Municipal Corporations (Manner of Allotment and Rotation of Reservation of Seats in Wards) Rules, 2011 (hereinafter referred to as the Rules of 2011). The rules framed post amendment to section 5(3) of the Act take care of constitution of multi member ward. However, after promulgation of Ordinance thereby reverting to the original position on 31.12.2014, there is no corresponding amendment effected to the Rules of 2011.

5. Section 5(2) of the Act of 1949 prescribes number of Councillors to be elected corresponding to the population figures in the Corporation. Sub-section 3 of section 5 reads thus :-

5. Constitution of Corporation

(2) Each Corporation shall consist of -

(a) such number of councillors, elected directly at ward elections, as is specified in the table below :-

	Population	Number of Councillors
(i)	Above 3 lakhs and upto 6 lakhs	The minimum number of elected councillors shall be 65. For every additional population of 15,000 above 3 lakhs, one additional councillor shall be provided, so

		however that the maximum number of elected councillors shall not exceed 85.
(ii)	Above 6 lakhs and upto 12 lakhs	The minimum number of elected councillors shall be 85. For every additional population of 20,000 above 6 lakhs, one additional councillor shall be provided, so however, that the maximum number of elected councillors shall not exceed 115.
(iii)	Above 12 lakhs and upto 24 lakhs	The minimum number of elected councillors shall be 115. For every additional population of 40,000 above 12 lakhs, one additional councillor shall be provided, so however that the maximum, number of elected councillors shall not exceed 145.
(iv)	Above 24 lakhs	The minimum number of elected councillors shall be 145. For every additional population of 1 lakh, one additional councillor shall be provided so that the maximum number of elected councillors shall be 221.

(b) such number of nominated councillors not exceed five, having special knowledge or experience in Municipal Administration to be nominated by the Corporation in such manner as may be prescribed.

The State Election Commission shall from time to time by notification in the Official Gazette specify for each city the number and the boundaries of the wards into which such city shall be divided for the purpose of ward election of the Councillors [so that, as far as practicable, all wards shall be compact areas and the number of persons in such wards according to the

latest census figures shall approximately be the same. Each ward shall elect as far as possible only one Councillor. Sub-section 3 prior to its amendment by virtue of the Ordinance dated 31.12.2014 reads thus :-

(3) The [State Election Commissioner] shall, from time to time, by notification in the Official Gazette, specify for each City the number and boundaries of the wards into which such City shall be divided for the purpose of the ward election of councilors [so that, as far as practicable, all wards shall be compact areas and the number of persons in each ward according to the latest census figures shall approximately be the same. Each of the ward shall [elect as far as possible two Councillors but not less than two and not more than three Councillors, and each voter shall, notwithstanding anything contained in this Act, be entitled to cast the same number of votes, as the number of Councillors to be elected in his ward].

[Provided that, no notification issued under sub-section (3), whether before or after the commencement of the Maharashtra Municipal corporations, Municipal Councils, Nagar Panchayats and Industrial Townships (Third Amendment) Act, 1995, shall have effect except for the general election held next after the date thereof and for subsequent elections.]

[Provided also that, before any notification is issued under sub-section (3), a draft thereof shall be published in the Official Gazette, and in such other manner as in the opinion of the [State Election Commissioner] is best calculated to bring the information to the notice of all persons likely to be affected thereof, together, with a notice specifying the date on or before which any objections or suggestions will be received, and the date after which the draft will be taken into consideration.]

[Explanation – For the purposes of this Act, the expression “latest census figures” obtaining in sub-section (3) shall mean -

(a) the figures of the latest census finally published and pending publication of final figures of the latest census shall mean the provisional figures published of such census; and

(b) where the relevant final or provisional figures of the latest census are not available, the final relevant

figures of the census immediately preceding the latest census.]

[Explanation II – In this sub-section and sub-section (4), “Scheduled Tribes” means such tribes or tribal communities or parts of, or groups within, such tribes or tribal communities as are deemed to be Scheduled Tribes in relation to the State of Maharashtra under Article 342 of the Constitution of India.]

Thus, there is reversion back to the original position of one member one ward system by virtue of Ordinance dated 31.12.2014. Section 5A of the Act of 1949 prescribes reservation of seats which reads thus :-

5A Reservation of seats :

(1) (a) In the seats to be filled in by election in a Corporation, there shall be seats reserved for persons belonging to the Scheduled Castes, Scheduled Tribes, Backward Class of citizens and women, as may be determined by the State Election Commissioner, in the prescribed manner;

(b) the seats to be reserved for the persons belonging to the Scheduled Castes and the Scheduled Tribes in a Corporation shall bear, as nearly as may be, the same proportion to the total number of seats to be filled in by direct election in the Corporation as the population of the Scheduled Castes or, as the case may be, the Scheduled Tribes in that Corporation area bears to the total population of that area and such seats shall be allotted by rotation to different electoral wards in a Corporation:

Provided that, [one-half] of the total number of seats so reserved shall be reserved for women belonging to the Scheduled Castes, or as the case may be, the Scheduled Tribes:

Provided further that, where only one seat is reserved for the Scheduled Castes, or as the case may be, the Scheduled Tribes, then no seat shall be reserved for women belonging to the Scheduled Castes, or as the

case may be, the Scheduled Tribes and [* * *]

(c) the number of seats to be reserved for persons belonging to the category of Backward Class of citizens shall be twenty-seven per cent of the total number of seats to be filled in by election in a Corporation and such seats shall be allotted by rotation to different electoral wards in a Corporation :

Provided that, [one-half] of the total number of seats so reserved shall be reserved for women belonging to the category of Backward Class of citizens:

(d) [one-half] (including the number of seats reserved for women belonging to the Scheduled Castes, Scheduled Tribes and the category of Backward Class of citizens) of the total number of seats to be filled in by direct election in a corporation shall be reserved for women and such seats shall be allotted by rotation to different electoral wards in a Corporation.

(e) Notwithstanding anything contained in clauses (a) to (d), the State Election Commissioner may, by an order, issue instructions for rotation of wards reserved for the Scheduled Castes, Scheduled Tribes, Backward Class of Citizens and Women in Corporations where the number of wards have changed after the general elections for whatever reasons.]

(2) The reservation of seats (other than the reservation for women) under clause (b) of sub-section (1), shall cease to have effect on the expiration of the period specified in article 334 of the Constitution of India.]

The elections of Councillors is prescribed under section 14 of the Act and the responsibility of conducting election is cast on the State Election Commission. Section 14 of the Act reads thus :

14. State Election Commission

(1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Corporations shall vest in the State Election Commissioner.

(2) The State Election Commissioner may, by order, delegate any of his power and functions to any officer of the State Election Commission or any officer of the State Government not below the rank of Deputy Collector or to any officer of the Corporation not below the rank of the Assistant Municipal Commissioner.

(3) All officers and members of the staff appointed or deployed for preparation of electoral rolls and conduct of election of the Corporations under this Act or the rules shall function under the superintendence, direction and control of the State Election Commission.

(4) Notwithstanding anything contained in this Act and the rules, the State Election Commissioner may issue such special or general orders or directions which may not be inconsistent with the provisions of the Act and the rules for fair and free elections.

Section 456 of the Act provides for powers of the State Government to make rules and sub-section (1) thereof provides that the State Government may at any time require the Corporation to make rules under section 454 in respect of any purpose or matter specified in section 457. Sub-section (2) provides that if the Corporation fails to comply with such requisition within such reasonable time as may be fixed by the State Government, the State Government may after previous publication make such rules and the rules so made shall, on final publication in the Official Gazette have effect as if enacted under this Act. Section 457(1) provides for matters in respect of which rules may be framed. Sub-section (1) refers to ward election and various stages therefor. It would be appropriate at this stage to refer to the constitutional provisions relating to conduct of election referable to reservation of seats. Article 243T reads thus :

243T Reservation of seats – (1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes in every Municipality and the number of seats so reserved shall bear, as nearly as may be, the same proportion to

the total number of seats to be filled by direct election in that Municipality as the population of the Scheduled Castes in the Municipal area or of the Scheduled Tribes in the Municipal area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Municipality.

(2) Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality.

(4) The offices of Chairpersons in the Municipalities shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide.

(5) The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in article 334.

(6) Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Municipality or offices of Chairpersons in the Municipalities in favour of backward class of citizens.

Article 243(z)(a) provides that the superintendence, direction and control of the preparation electoral roll for, and the conduct of, all the elections to the municipalities shall be vested in the State Election Commission referred to under Article 243K. Sub-Article (2) provides that subject to provisions of this Constitution, the Legislature of the State may by law make provision with respect of all matters relating to or in connection

with the elections to the municipalities. Article 243K though makes a reference to election to the Panchayats, it provides for the State Election Commission consisting of State Election Commissioner to be appointed by the Government.

6. The main objection raised by petitioners in all these petitions is that the State Election Commission has committed a serious illegality in its failure to observe the procedure prescribed for delimitation and reservation of wards as provided under Rules of 2011. It is the contention of petitioners that it was obligatory on the part of the State Election Commission, when the field is covered and regulated by the rules, to observe the procedure so prescribed and any deviation therefrom is impermissible. Our attention is invited to provisions of section 5(a) of the Act of 1949, more particularly, sub-section (1)(a) which lays down that in the seats to be filled in by election in the Corporation, there shall be seats reserved for persons belonging to the Scheduled Castes, Scheduled Tribes, Backward Class of citizens and women, as may be determined by the State Election Commissioner, in the prescribed manner. Section 2(46A) defines the term “prescribed” as prescribed by rules. It is thus contended that it was mandatory on the part of the State Election Commission to observe the procedure prescribed by rules while making provision for reservation of seats and rotation thereof for the purpose of election to the Corporation. It is further argued that the failure on the part of the State Election Commission in observing the rules is illegal and resultantly the whole process of delimitation, reservation and rotation of seats is vitiated. It is pointed out that the State Election

Commission inspite of noticing that the field is governed by the rules framed by the State Government, has taken recourse to the orders issued by the State Election Commission on 03.05.2005, 10.07.2009 and 02.02.2015 which is a serious incurable illegality. Petitioners have placed strong reliance on the judgments delivered by Division Bench of this Court in the matter of Uday Pawar Vs. The State Election Commission in Writ Petition No. 5386/2006 decided on 03.10.2006 and subsequent judgment in the matter of Prashant Bamb and others Vs. The State of Maharashtra reported in **2007(2) BCR 604**. Placing reliance on the aforesaid judgments it is strenuously urged that it was impermissible for the State Election Commission to refuse to observe the procedure prescribed in the rules and take recourse to the directions issued by the Commission in the year 2005 and onwards. It is contended that as a result of failure of the State Election Commission to adhere to the mandate of rules, a serious prejudice is caused to the petitioners. Referring to the Rules of 2011, more particularly, explanation to rule 7(5), it is contended that general elections proposed to be held after commencement of the Rules of 2011 shall have to be considered as the first election and that rotation of reservation is not permissible. Learned counsel for petitioners contended that the rules must be observed by the State Election Commission in its letter and spirit and any deviation therefrom would be contrary to the law laid down by this Court in the matters referred to above.

7. The State Election Commission has presented affidavit-in-reply and controverted all the contentions raised by petitioners in the petition. It is recorded in affidavit-in-reply presented on behalf of the State Election

Commission that ward formation has been done as per order dated 03.05.2005 issued by the State Election Commission. It is further stated that the population ratio for the ensuing election of 113 Councillors is 10399 per Councillor whereas in 2010 elections, the population ratio for 99 Councillors was 8815 per Councillor. In order to maintain the population ratio, the limits/boundaries of the wards have also been changed as compared to 2010 elections. It is the contention of State Election Commission that the preamble of the Rules of 2011 records that those have been framed in consonance with the amendment Act of 2011. It is contended that rules were applicable to the election of multi member as per amended provisions of section 5(3) of the Act of 1949. Since the Government has again amended section 5(3) of the Act by ordinance dated 31.12.2014, it rendered impermissible for the State Election Commission to adhere to the rules. The State Election Commission contends that reliance placed by petitioners on Rules of 2011 is misplaced and since the rules are framed taking into consideration constitution of multi member ward, those cannot be applied for a single member ward. It is further recorded that reservations of 2005 and 2010 elections have been considered for the purpose of rotation and reservation of seats for the ensuing elections of 2015 keeping in mind the directives issued by this Court in Writ Petition No. 5386/2006. It is also urged by the learned counsel for the State Election Commission that the directives/orders issued by the State Election Commission in the year 2005, 2010 are in conformity with the spirit of rules of 2011 and that the mandate of the rules is followed in its spirit.

8. Mr. Shah, learned Senior Counsel appearing for petitioners, referring to the judgment of Division Bench of this Court in the matter of Uday Pawar (supra) contended that this Court had directed the State Election Commission to observe the mandate of rules in its letter and spirit and as such, it is impermissible for the State Election Commission to contend that the rules cannot be made applicable to the present situation. Said petition was presented by the petitioner seeking quashment of the delimitation of electoral division for the purpose of holding elections to the Zilla Parishad and sought further directions to the State Election Commission to observe rotation policy as laid down by the Maharashtra Zilla Parishads and Panchayat Samitis (Manner and Rotation of Reservation of Seats) Rules 1996. The Stand of the Election Commission in the said matter was that since there is increase in the population there was increase in the number of seats and therefore, reservation was required to be adjusted and that rotation policy would be observed in the next election. The Division Bench of this Court refused to accept the defence of the Election Commission and issued directions for keeping adherence to the rules while conducting elections. In the matter of Prashant Bamb Vs. State of Maharashtra, similar prayer was made by petitioner therein seeking directions to the respondents i.e. State Election Commission to follow rotation policy for general elections to the Panchayats in the State of Maharashtra which were held in the year 2007 in compliance with Maharashtra Zilla Parishads and Panchayat Samitis (Manner and Rotation of Reservation of Seats) Rules, 1996. It was urged that the mandate of law ought to be followed by the Commission in implementing rules of 1996 while providing rotation. It was contended

on behalf of the State Election Commission that the rules are not harmoniously drafted and there are impediments in their implementation, more particularly, in delimitation of seats based on census figures of 2011. It was contended that the boundaries of the wards have undergone change due to fluctuation of policy and as such, it was not possible to maintain reservation of electoral division in descending order. Zilla Parishad elections were held in adherence to the rules of 1996 and seats were reserved for Scheduled Castes and Scheduled Tribes. The Election Commission contended that rotation system will be adhered to during the subsequent elections. The stand of the Election Commission was disapproved by this Court for more than one reasons including the ground of defiance of the earlier order passed by this Court in the matter of Uday Pawar (supra). Learned senior counsel for petitioners contends that the Rules of 2011 framed by the State Government must be followed in its letter and spirit including explanation to sub-rule 5 of rule 7 whereunder it is provided that the general elections held after commencement of the rules shall be considered to be the first election. It is contended that after framing of Rules of 2011, the proposed elections to Aurangabad Municipal Corporation are the first elections and as such, rotation of seats is not permissible. It is contended that by making appropriate deviation, the mandate of rules 3, 4 and 6 and 7 needs to be adhered to. It is also contended that even on consideration of the directives/orders issued by the State Election Commission on 03.05.2005, more particularly, paragraphs 21 and 22, the election based on census figures of 2011 shall be the first election and in view of paragraph no. 22, rotation of seats shall have to be provided in the

subsequent election/second election after publication of census figures. Learned senior counsel thus contends that the procedure adopted by the Election Commission in prescribing rotation of seats is even not in consonance with the directives/orders issued by the Election Commission itself on 03.05.2005.

9. It has been contended on behalf of the State Election Commission that ensuing 2015 elections cannot be considered as the first elections as has been laid down under the Rules of 2011. It is pointed out that during the elections of 2005 and 2010, while prescribing reservation the Commission has undertaken a detailed exercise. Aurangabad city consists of 2178 enumeration blocks as per 2011 census. These enumeration blocks were divided into census wards. These census wards are identical to election wards of 2010 elections. In order to ascertain reservation of 2005 elections and 2010 elections, enumeration blocks of the concerned election wards are taken into consideration which form the concerned election wards. This exercise has been undertaken in respect of 113 election wards for ensuing elections. It is pointed out that the wards were arranged in descending order for the purpose of rotating Scheduled Caste and Scheduled Tribe reservation. For the purpose of ascertaining reservation of newly created election wards, reservation of enumeration block of 2005 elections and 2010 elections has been taken into consideration. It is contended that for the purpose of rotation of reservation, reservation of the concerned wards in the years 2005 and 2010 has been considered and care and caution has been taken to ensure that reservation is not repeated in the

concerned ward. It is also pointed out that during the general elections of 1995, 2000 and 2005 of Aurangabad Municipal Corporation, reservations were not rotated erroneously. Reservation came to be rotated in the year 2010 after judgment of this Court in Writ Petition No. 5386/2006 and connected writ petitions. In this view of the matter, reservations for the year 2005 and 2010 have been considered for the purpose of rotation of reservation for ensuing elections of 2015.

10. In our view, the procedure adopted by the State Election Commission is in consonance with section 5A(1)(b) and (e) of the Act of 1949 as well as Article 243T of the Constitution of India. The State Election Commission in exercise of powers conferred on it under the Constitution can issue directives for conduct of elections. The directives issued by the State Election Commission on 03.05.2005 prescribe procedure for formation of wards although paragraphs 21 and 22 prescribe making provision for reservation of seats in descending order at the first election after declaration of census figures and, rotation of reservation at the second elections after publication of census figures. Said directives are not in conformity with the judgment of the Division Bench of this Court in the matter of Uday Pawar Writ Petition no. 6389/2006 and Prashant Bamb Writ Petition No. 5386/2006. The State Election Commission as such, after the decision in the aforesaid writ petitions proceeded to issue fresh directives on 10.07.2009 whereunder the procedure in respect of rotation of reservation has been prescribed. It is recorded in the order dated 10.07.2009 that since the earlier order dated 03.05.2005 does not prescribe for rotation of reservation,

the said order dated 10.07.2009 is being issued. The procedure prescribed for rotation of reservation and prescription of reserved seats in the order dated 10.07.2009 is generally similar to the rules framed by the State Government in the year 2011. The State Election Commission contends that the directives issued on 10.07.2009 have been observed while prescribing rotation of reservation which are broadly in conformity with the Rules of 2011. Objection raised by petitioners that explanation to rule 7(5) which provides that the general elections after commencement of Rules of 2011 shall be construed as the first elections, cannot be invoked in the instant matter for several reasons. While framing rules in the year 2011, in the preamble it is recorded that in view of amendment provisions prescribing multi member wards and in order to give effect to the said provisions, the rules regarding manner and allotment of rotation of reservation of seats of councillors in the wards of Corporation for women and candidates belonging to Scheduled Caste, Scheduled Tribe and backward class of citizens are being framed. As has been recorded above, the State has reverted back to its original practice of prescribing single member ward by issuing Ordinance in the month of December 2014. In view of the Ordinance issued by the State prescribing single member ward, no effect can be given to the provisions of rules 3(2), 4(2) and 6 of the Rules of 2011. Rule 3 of the Rules of 2011 prescribe for manner of allotment of seats reserved for Scheduled Caste which reads thus :

6. Manner of allotment for the Backward Class of Citizens -

(1) The seats of Councillors to be reserved for the candidates belonging to the Backward Class of Citizens shall be allotted to the wards in the following manner,

namely :-

(a) Where the number of seats of Councillors to be reserved for the candidates belonging to the Backward Class of Citizens is less than the number of wards remaining after excluding the wards having seats reserved for the Scheduled Castes and Scheduled Tribes, then -

(i) Firstly if there is a ward with three seats and at the most one seat is reserved for the Scheduled Castes or the Scheduled Tribes, one seat for the Backward Class of Citizens shall be allotted directly to that ward;

(ii) thereafter one seat shall be allotted to the Backward Class of Citizens in every ward selected by draw of lots from amongst the remaining wards having two seats excluding the wards having seats reserved for the Scheduled Castes and the Scheduled Tribes.

(b) Where the number of seats to be reserved for the candidates belonging to the Backward Class of Citizens is more than the number of wards remaining, after excluding the wards having seats reserved for the Scheduled Castes and Scheduled Tribes, then -

(i) firstly, one seat in each ward excluding the wards having seats reserved for the Scheduled Castes and Scheduled Tribes shall be allotted for the Backward Class of Citizens;

(ii) secondly, where there is a ward of three seats and where in all one seat is reserved for the Scheduled Castes or the Scheduled Tribes or the Backward Class of Citizens, then one seat in such ward shall be directly allotted to the Backward Class of Citizens.

(iii) thereafter, the remaining seats, if any, to be reserved for the Backward Class of Citizens shall be allotted by drawing of lots from amongst the wards having two seats where one seat is reserved for the Scheduled Castes or the Scheduled Tribes;

(iv) if even after allocation of seats for the Backward Class of Citizens as per clauses (i), (ii) and (iii), some seats still remain to be reserved for the Backward Class of Citizens, then the same shall be allotted by draw of lots from amongst all such wards where at least one seat is not reserved for any category.

(2) The seats so reserved for the Backward Class of Citizens shall be rotated, as far as possible, in the subsequent elections to the Corporation to such wards in which no seat had been reserved in the previous elections for the Backward Class of Citizens until such reservation is given by rotation in each of the wards in the Corporation.

It is provided under rule 6 that in case where there are three seats prescribed in a ward, one seat shall be allotted directly to Backward Class of Citizens and if there are still more seats to be allotted, those should be by draw of lots. So far as instant elections are concerned, since there is no prescription for multi member wards, the procedure as prescribed under rule 6 of Rules of 2011 cannot be invoked. Explanation to rule 7(5) provides that for the purpose of rotation under the said rule and under rules 3, 4 and 6, general elections held after commencement of the rules shall be considered as the first elections. As has been recorded above, sub-rule (2) of rule 4 and rule 6 as well as rule 7 which provide for reservation of women have been rendered incapable of implementation in view of reverting back to the old system of providing for a single member ward. Thus, oral submission of the State Election Commission that the spirit of the Rules of 2011 which is in conformity with the directives issued by the State Election Commission in the year 2009 in substance is observed, deserves acceptance.

11. There cannot be any dual opinion in respect of the preposition that the mandate of rules as far as possible must be observed in view of the judgment of the Division Bench of this Court in the matter of Prashant Bamb as well as in the matter of Uday Pawar to which reference is made

earlier. It is to be noted that the broad principles underlying the rules need to be followed for the reason that in view of subsequent Ordinance issued by the State Government dispensing with the system of multi member ward which is the foundation of Rules of 2011, the rules are not capable of implementation in its entirety. Thus, as has been laid down in the matter of Prashant Bamb, while enforcing rules the authorities must apply their mind and ensure that the rules regarding rotation of reservation are followed. The power of the Commission is plenary in character. Every contingency cannot be foreseen while drafting statutory provision. The jurisdiction of the Election Commission is wide enough to include all powers necessary for smooth conduct of elections and the word election is used in a wide sense to include entire process of election which consists of several stages and includes many steps. In the instant matter, the peculiar situation which has occurred as a result of amendment enforced in the year 2014 prescribing for single member ward which is not within the contemplation of Rules of 2011, has been met by the Election Commission by resorting to the earlier directives issued in the year 2009 and by making appropriate steps which are not on contradiction of the spirit of Rules of 2011.

12. So far as contention as regards adherence to explanation is concerned, it is to be borne in mind that the explanation is appended to the section to explain the meaning of words contained therein and it becomes part and parcel of the enactment. In the matter of S. Sundaram Pillai Vs. V.R. Pattabiraman reported in **AIR 1985 Supreme Court 582**, the objects of explanation to a statutory provision have been serialised as below :

- (a) to explain the meaning and intendment of the Act itself.
- (b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve.
- (c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful.
- (d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and
- (e) it cannot, however, take away a statutory right with which any person under the statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.

Since the provisions contained in rules 3, 4, 6 and 7 in respect of manner of allotment and rotation of seats to a large extent has become incapable of implementation in view of Ordinance issued by the State prescribing single member ward, the explanation to rule 7(5) has lost its efficacy. The instant election as such cannot be considered as the first election after commencement of Rules of 2011. Even otherwise, the explanation being contrary to the spirit of section 5A and the constitutional provisions, the explanation to rule 7(5) needs to be read down. Where a ambiguity arises as to supposed intention of the legislature, one of the statutory constructions, the court propounded is the doctrine of reading down. Lord Reid in *Federal Steam Navigation C. Vs. Department of Trade and Industry* has stated thus :

“the judge may read in words which he considers to be necessarily implied by words which are already in the statute and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute.

It is convenient to mention here the meaning and scope of the word 'reading down' and Severance' dealt with on page 7, para B in Australian Federal Constitutional Law by Colin Howard which reads as follows :

“The High Court presumes the validity of legislation to the extent that it will not of its own motion raise questions of constitutionality. Legislation is treated as valid unless the parties to litigation challenge it on constitutional grounds. The techniques of construction known as reading down and severance are corollaries of this presumption. Reading down puts into operation the principle that so far as it is reasonably possible to do so, legislation should be construed as being within power. It has the practical effect that where an Act is expressed in language of a generality which makes it capable, if read literally, of applying to matters beyond the relevant legislative power, the court will construe it in a more limited sense so as to keep it within power.”

In view of above, the contention of petitioners that instant elections being conducted for the first time after enforcement of the Rules of 2011 shall be construed as the first election in view of the explanation to rule 7(5) does not deserve acceptance. Resultantly, it needs to be recorded that the State Election Commission is justified in directing rotation of seats for reserved category. It is also contended that earlier prescription of reservation for women category was 33% which has been increased to 50% and as such, instant elections after the change in percentage of reservation

for women category shall be construed as the first election and rotation of seats shall not be allowed, also does not deserve acceptance. Merely because the percentage of seats for women category is increased does not give any justification for stalling the rotation of reservation which is meant for benefiting the reserved category namely Scheduled Caste, Scheduled Tribe and Other Backward Class and women. Reservation provided in favour of women is inclusive of the reservation amongst the other reserved categories i.e. constitutional reservation for Scheduled Caste, Scheduled Tribe and Other Backward Class.

13. Petitioners in the instant petitions are coming up with the contention which is exactly the stand taken up by the Election Commission in the matter of Prashant Bamb which was not accepted by the Division Bench of this Court. In the matter of Prashant Bamb, in paragraph no. 17, the legal and constitutional position as regards conduct of elections is laid down as follows :

(a) when there is no Parliamentary legislation or rule made under the said legislation, the Commission is free to pass any orders in respect of the conduct of elections.

(b) where there is an Act and express Rules made thereunder, it is not open to the Commission to override the Act or the Rules and pass orders in direct disobedience to the mandate contained in the Act or the Rules. In other words, the powers of the Commission are meant to supplement rather than supplant the law (both statute and Rules) in the matter of superintendence, direction and control as provided by Article 324.

(c) where the Act or the Rules are silent, the Commission has no doubt plenary powers under Article 324 to give any direction in respect of the

conduct of election.

In the instant matter, as has been recorded earlier, since the Rules of 2011 are framed taking into consideration multi member wards, said rules are not capable of being implemented in its letter and spirit. However, the broad principles and directives contained under rules which are in consonance with the directives issued by the State Election Commission must be implemented and according to us, have been implemented in substance.

14. The powers to issue directions vest in the Commission. The Apex Court in the matter of Mohinder singh Gill Vs. Chief Election Commissioner reported in **(1978) 1 SCC 405** has observed thus :

“It is true that Article 324 has to be read in the light of the constitutional scheme and the Representation of the People Acts of 1950 and 1951. The Article, however, operates in areas left unoccupied by legislation and the words superintendence, direction and control as well as conduct of all elections are in the broadest terms. Article 324 on the face of it, vests vast functions which may be powers or duties essentially administrative and marginally even adjudicative or legislative.

Provisions of Article 243K are pari materia to those of Article 324 of the Constitution of India. Article 243-K operates in areas left unoccupied by the legislation. The words superintendence, direction and control are indicative of the broad sweep of the constitutional provisions.

Thus, whatever is necessary for conduct of election comes within the sweep of the term superintendence, direction and control and the Election Commission is capable of doing such acts and issue necessary directions for

smooth functioning of elections. We, therefore, are of the view that the State Election Commission is justified in adopting suitable measures in the instant matter for giving effect to the constitutional provisions as well as statutory provisions relating to the rotation policy. Non-observance of the rules of rotation of seats would be violative of the legislative mandate and would be contrary to Article 243T of the Constitution of India. It thus becomes obligatory on the part of the State Election Commission under its powers to devise suitable methodology to hold elections by rotating the seats. The action of the State Election Commission in the instant matter, according to us, is in consonance with the statutory provisions as well as constitutional provisions and in conformity with the directives issued by this Court in Writ Petition No. 5385/2011 and other companion petitions.

15. The State of Maharashtra in the instant petitions has presented affidavit sworn by the Deputy Secretary, Urban Development department. The matter was argued before us on 19.03.2015 and the State Government was represented by the Additional Government Pleader Mrs. Gondhalekar. However, on 20.03.2015, in the midst of hearing, appointment of Special Advocate for the State of Maharashtra was made and we permitted the Special counsel appointed by the State to argue the matter. The State Government, unmindful of the statutory changes brought about by virtue of Ordinance issued in December 2014, emphasised the need of adhering to 2011 rules in letter and spirit including explanation to rule 7(5) which surprises us. The rules have been framed in view of amendment to section 5 enforced in the year 2011 providing for multi member wards and it is

evident on the face of the rules that in view of reverting back to the old system of single member ward, those rules are not capable of implementation in its entirety. Still the insistence of the State Government to adhere to the rules in its letter and spirit, more particularly, rule 7(5) explanation which bars rotation of seats during the instant elections is surprising. What is more surprising is the State Government expects the Election Commission to approach it for securing clarification of the rules. The State Election Commission is a constitutional functionary and derives powers from Article 243K of the Constitution of India. The expectation of the State Government that the State Election Commission must approach it for clarification in the matter of implementation of rules, is in ignorance of the constitutional provisions. The State Election Commission which is a constitutional authority is empowered to issue directives for smooth functioning of the election as has been recorded in the matter of Mohinder Singh Gill (supra). The phrase superintendence, direction and control of the conduct of election is of a wide amplitude which include power to make all necessary provisions for conducting free and fair election. It is averred in the affidavit-in-reply by the State Government thus :

I say and submit that the rules framed vide notification dated 5.7.2011 are in force and are binding on all the respondents. The said Rules are required to be observed in its true letter and spirit while conducting the election process. It is brought to the notice of this Hon'ble Court that these Rules are framed with due consultation with the Election Commission. Hence, it is humbly submitted that if the officers of the State Election Commission had faced any difficulty in application / interpretation of these Rules, then they should have approached for further clarification. However, none of the officer has approached State Government for the said clarification of the notification.

Above stand taken by the State Government in its affidavit-in-reply is in ignorance of the change in the statutory provisions by virtue of Ordinance issued in December 2014 thereby amending provisions of section 5A as well as in ignorance of the constitutional provisions and law laid down by the Supreme Court referred to above. In our view, the stand taken by the State Government appears to be more of convenience than being in adherence to the legal and constitutional provisions.

16. Learned special counsel appearing for the State Government has contended that it was incumbent upon the State Election Commission to adhere to the Rules of 2011 framed by the State Government including explanation to rule 7(5) which provides that the instant election shall be treated as first one after framing of 2011 rules and no rotation of reservation is permissible. It is contended that the action of the State Election commission of reverting back to its own directions while prescribing rotation of reservation is against legitimate expectation of the citizens. We are surprised as to how principle of legitimate expectation is attracted in the instant case. As has been observed in the matter of Sethi Auto Service Station and another Vs. Delhi Development Authority and others reported in **2009 AIR SC 904** thus :

“An examination of the afore-noted few decisions shows that the golden thread running through all these decisions is that a case for applicability of the doctrine of legitimate expectation, now accepted in the subjective sense as part of our legal jurisprudence, arises when an administrative body by reason of a representation or by past practice or conduct aroused an

expectation which it would be within its powers to fulfill unless some overriding public interest comes in the way. Where a person who bases his claim on the doctrine of legitimate expectation, in the first instance, has to satisfy that he has relied on the said representation and the denial of that expectation has worked to his detriment..... It is well settled that the concept of legitimate expectation has no role to play where the State action is as a public policy or in the public interest unless the action taken amounts to an abuse of power. “

Thus the arguments advanced by learned special counsel for the State invoking principles of legitimate expectation is unacceptable.

17. While insisting upon adherence to Rules of 2011 and for treating the instant elections as the first elections, the learned special counsel for the State Government has contended that on the basis of 2011 rules the elections of more than 20 Corporations were already conducted and it is therefore incumbent upon the State Election Commission to strictly adhere to the Rules of 2011. It must be noted that the elections as contended by the special counsel for the State Government admittedly were conducted prior to the issuance of Ordinance in the month of December 2014 prescribing single member ward system. The rules, even otherwise, were relevant then, since those are brought in existence taking into consideration multi member ward system. Necessary amendment to the methodology and policy deserves to be made and has been made by adhering to the spirit of the rules which, according to us, is justifiable. The instant elections are the first elections after promulgation of Ordinance reverting back to the original system of single member ward.

18. In Writ Petition No. 3194/2015 and other writ petitions, objection is raised to the manner of rotation of reservation. It is contended that the principle of rotation of reservation in descending order has not been adhered to. It is pointed out that during 2010 elections, the reservation prescribed for Scheduled Caste category so far as Nyaynagar ward is concerned, consists of 17.19% Scheduled Caste population. According to petitioners, during 2015 elections, while rotating reservation the wards having less than 17.19% Scheduled Caste population shall be prescribed for Scheduled Caste category. However, the prescription of reservation during 2015 elections disclose that MIDC Chikalthana ward bears 46.47% Scheduled Caste population. According to petitioner, adoption of such methodology is violative of mandate of rotation of reservation in descending manner. The objection raised is without any substance for the reason that as a result of increase in population, there is increase in number of wards. During the ensuing elections, as has been pointed out by the Election Commission, census figures of 2011 have been taken into consideration and number of wards have been increased from 99 to 113. The prescription of reservation shall have to be as has been directed by the Election Commission. In case of newly created election wards, the census figures of particular caste shall have to be taken into consideration. The wards are required to be arranged in descending order for the purpose of rotating Scheduled Caste and Scheduled Tribe reservation. The Election Commission has taken into consideration the reservation of enumeration blocks of 2005 and 2010 while ascertaining reservation which we deem is in

consonance with the policy of reservation and rotation of seats. The newly created wards on the basis of enumeration blocks shall have to be reserved considering the reservation of enumeration blocks of 2005 and 2010. The reservation for newly created wards shall be on the basis of the population figures. Policy of reservation and rotation of seats shall have to be observed harmoniously and the preposition put forth by petitioners in respect of rotation of reservation only by observing ascending order and overlooking new creation of wards and change in population figures is devoid of substance and does not deserve acceptance. Similar are the petitions presented by other petitioners. It shall have to be taken note that the State Election Commission is expected to observe the principles governing the rules and its own orders in its substance and a single error here and there may not vitiate the whole process of election or would not render the whole process of delimitation of wards and prescription of reservation and rotation bad and illegal.

19. For the reasons recorded above, we are of the considered view that the petitions are devoid of substance and do not deserve consideration. All the petitions are dismissed. Rule discharged. In the facts and circumstances of the case, there shall be no order as to costs.

(V.K. JADHAV)
JUDGE

(R. M. BORDE)
JUDGE