

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.04.2017
DELIVERED ON : 14.06.2018

CORAM :

The Hon'ble Ms.INDIRA BANERJEE, CHIEF JUSTICE

AND

The Hon'ble Mr.JUSTICE M.SUNDAR

W.P.Nos.21149, 21150, 37166, 37756 and 38698 of 2016
and
W.M.P.Nos.10392 and 10527 of 2017

W.P.No.21149 of 2016:

M.Baskaran .. Petitioner

Vs.

- 1.The Election Commissioner of India,
Nirvachan Sadan,
Ashoka Road, New Delhi.
- 2.The Chief Electoral Officer,
Public (Elections) Department,
Government of Tamil Nadu,
Secretariat, Fort St. George,
Chennai-600 009.
- 3.The District Electoral Officer-cum-
District Collector,
Karur District, Karur.
- 4.The Returning Officer,
Aravakurichi Assembly Constituency,
Tahsildar Office,
Aravakurichi, Karur District.
- 5.K.C.Palanisamy
- 6.V.Senthilbalaji
- 7.V.Pukkarandi
- 8.G.Aravind
- 9.G.Kalaiyarasan
- 10.V.Subramani
- 11.R.Natarajan
- 12.C.S.Prabhu
- 13.M.Mariappan
- 14.R.Mohammed Mirza

15.P.Rajeshkumar
16.R.Kannan
17.M.Karthikeyan
18.S.Krishnamoorthy
19.M.Sasikumar
20.S.Sambath
21.M.Sundareswaran
22.N.Senthilkumar
23.T.M.Syed Abuthahir
24.A.Thamizhalagan
25.K.Dasaprakash
26.V.Thirukumar
27.Noiyal Ma.Ramasamy
28.K.Palanichamy
29.P.Palanchamy
30.K.Balasubramani
31.P.Baskar
32.T.Pitchaimuthu
33.T.Prabakaran
34.K.Magudeeswaran
35.R.Manivasagam
36.G.Muthukumar
37.C.P.Ravi
38.M.Vigneshwaran
39.T.Veeramani

... Respondents

W.P.No.21150 of 2016 :

G.Kunjithapatham

.. Petitioner

Vs.

- 1.The Election Commissioner of India,
Nirvachan Sadan,
Ashoka Road, New Delhi.
- 2.The Chief Electoral Officer,
Public (Elections) Department,
Government of Tamil Nadu,
Secretariat, Fort St. George,
Chennai-600 009.
- 3.The District Electoral Officer-cum-
District Collector,
Thanjavur District,
Thanjavur.
- 4.The Returning Officer,
174-Thanjavur Assembly Constituency,
Thasildar Office,
Thanjavur, Thanjavur District.
- 5.B.Anjugam
- 6.M.Sundara Rajan

7.M.S.Ramalingam
8.M.Rengasamy
9.V.Jayaprakash
10.A.Nalladurai
11.A.Rajeshkannan
12.M.Santhosh
13.S.Mariappan
14.S.Muthuvel
15.V.Jeganathan

.. Respondents

W.P.No.37166 of 2016 :

S.Rajendran

.. Petitioner

Vs.

- 1.The Election Commission of India,
rep by its Chief Election Commissioner,
Election Commission of India,
Nirvachan Sadan,
Ashoka Road, New Delhi-110 001.
- 2.The Election Commission of India,
rep by its Secretary,
Nirvachan Sadan, Ashoka Road,
New Delhi-110 001.
- 3.The Chief Electoral Officer &
Principal Secretary,
Public (Election) Department,
Secretariat,
Fort St. George,
Chennai-600 009.
- 4.The Returning Officer,
No.134 Aravakurichi Assembly Constituency,
Aravakurichi, Karur District.
- 5.All India Anna Dravida Munnetra Kazhagam,
rep by its General Secretary,
226, Avvai Shanmugam Salai,
Royapettah, Chennai-600 014.
- 6.Dravida Munnetra Kazhagam,
rep by its General Secretary,
367 & 369, Anna Arivalayam,
Anna Salai Road,
Teynampet, Chennai-600 018.
- 7.V.Senthil Balaji,
- 8.K.C.Palanisamy

.. Respondents

W.P.No.37756 of 2016 :

T.P.Balasubramaniam

.. Petitioner

Vs.

- 1.The Election Commission of India,
rep by its Chief Election Commissioner,
Election Commission of India,
Nirvachan Sadan,
Ashoka Road, New Delhi-110 001.
 - 2.The Election Commission of India,
rep by its Secretary,
Nirvachan Sadan, Ashoka Road,
New Delhi-110 001.
 - 3.The Chief Electoral Officer &
Principal Secretary,
Public (Election) Department,
Secretariat,
Fort St. George,
Chennai-600 009.
 - 4.The Returning Officer,
No.134 Aravakurichi Assembly Constituency,
Aravakurichi, Karur District.
 - 5.All India Anna Dravida Munnetra Kazhagam,
rep by its General Secretary,
226, Avvai Shanmugam Salai,
Royapettah, Chennai-600 014.
 - 6.Dravida Munnetra Kazhagam,
rep by its General Secretary,
367 & 369, Anna Arivalayam,
Anna Salai Road,
Teynampet, Chennai-600 018.
 - 7.V.Senthil Balaji,
 - 8.K.C.Palanisamy
 - 9.M.Rangamsamy
 - 10.Anjugam Boopathi
- सत्यमेव जयते .. Respondents

W.P.No.38698 of 2016 :

A.A.Sadik Ali

.. Petitioner

Vs.

- 1.The Election Commission of India,
rep by its Chief Election Commissioner,
Election Commission of India,
Nirvachan Sadan,
Ashoka Road, New Delhi-110 001.

- 2.The Election Commission of India,
rep by its Secretary,
Nirvachan Sadan, Ashoka Road,
New Delhi-110 001.
 - 3.The Chief Electoral Officer,
Public (Election) Department,
State of Tamil Nadu,
Secretariat,
Fort St. George,
Chennai-600 009.
 - 4.The Returning Officer,
134 Aravakurichi Assembly Constituency,
Tahsildar Office,
Aravakurichi, Karur District.
 - 5.The Returning Officer,
174 Thanjavur Assembly Constituency,
Tahsildar Office,
Thanjavur,
Thanjavur District.
 - 6.All India Anna Dravida Munnetra Kazhagam,
rep by its General Secretary,
226, Avvai Shanmugam Salai,
Royapettah, Chennai-600 014.
 - 7.Dravida Munnetra Kazhagam,
rep by its General Secretary,
367 & 369, Anna Arivalayam,
Anna Salai Road,
Teynampet, Chennai-600 018.
 - 8.V.Senthil Balaji,
 - 9.K.C.Palanisamy
 - 10.M.Rangasamy
- ... Respondents

W.P.No.21149 of 2016 filed under Article 226 of the Constitution of India praying for issue of Writ of Mandamus, directing the respondents 1 to 4 to appoint a statutory auditor to calculate the expenses incurred by the Election Commission to conduct the election to 134 Aravakurichi Assembly Constituency notified by the first respondent in its order dated 22.3.2016 and which was rescinded by the order of the first respondent in order No.464/TN-LA/2016 dated 27.5.2016 as well as that incurred by all the candidates including the petitioner and consequently to recover the same with interest and exemplary penalty from the 5th and 6th respondents whose indulgence in electoral offences of bribing the voters on massive scale resulted in the rescinding of the election by the first respondent herein.

W.P.No.21150 of 2016 filed under Article 226 of the Constitution of India praying for issue of Writ of Mandamus, directing the respondents 1 to 4 to appoint a statutory auditor to calculate

the expenses incurred by the Election Commission to conduct the election to 174 Thanjavur Assembly Constituency notified by the first respondent in its order dated 22.3.2016 and which was rescinded by the order of the first respondent in order No.464/TN-LA/2016 dated 27.5.2016 as well as that incurred by all the candidates including the petitioner and consequently to recover the same with interest and exemplary penalty from the 8th respondent whose indulgence in electoral offences of bribing the voters on massive scale resulted in the rescinding of the election by the first respondent herein.

W.P.Nos.37166 of 2016 filed under Article 226 of the Constitution of India praying for issue of Writ of Mandamus, directing the respondent 1 to 4 to forbear them from assigning any registered symbols based on Form B if any issued by the respondents 5 and 6 in terms of paragraphs 13(b), (c) and (e) and 13(A) of the Election Symbols (Reservation) and Allotment Order, 1968 to their respective official candidates / respondents 7 and 8 in the General Election for 134 Aravakurichi Assembly constituency which is scheduled to be held on 19.11.2016 in view of their proved corrupt practices as evident from the proceedings No.464/TN/LA/2016 dated 27.5.2016 issued by the first respondent, by considering the petitioner's representation dated 18.10.2016.

W.P.No.37756 of 2016 filed under Article 226 of the Constitution of India praying for issue of Writ of Mandamus, directing the first respondent to hold an enquiry under Section 10A of the Representation of People Act and pending such adjudication forbear the respondents 1 to 4 from assigning any registered symbols based on Form B if any issued by the respondents 5 and 6 in terms of paragraphs 13(b), (c) and (e) and 13(A) of the Election Symbols (Reservation) and Allotment Order, 1968 to their respective official candidates / respondents 7 to 10 in the General Election for 134 Aravakurichi Assembly constituency and 174 Tanjavur Assembly Constituency which is scheduled to be held on 19.11.2016 in view of their proved corrupt practices as evident from the proceedings No.464/TN/LA/2016 dated 27.5.2016 issued by the first respondent.

W.P.No.38698 of 2016 filed under Article 226 of the Constitution of India praying for issue of Writ of Mandamus, directing the respondent 1 to 5 to forbear the respondent No.6 from authorizing their candidates for 134-Aravakurichi and 174 Thanjavur Assembly Constituencies to contesting in their election symbol and forbear the respondent No.7 from authorizing their candidates for 134 Aravakurichi and consequently to declare the respondents 8 to 10 are unfit or disqualified candidates for contesting in the by-election for the above said two constituencies by considering the petitioner's representation dated 25.10.2016 and by performing their duty

under Article 324(1) of the Constitution of India and Order 16 (A) of the Election Symbols (Reservation and Allotment) order 1968.

For Petitioners: Mr.M.Purushothaman
in W.P.Nos.21149 and 21150 of 2016

Mr.N.Jothi
assisted by Mr.N.Manokaran
in W.P.No.37166 of 2016

No appearance
in W.P.Nos.37756 and 38698 of 2016

For Respondents: Mr.Niranjan Rajagopal for RR1 to 4
in W.P.Nos.21149, 21150, 37166 of 2016
and for RR1 and 2 in W.P.Nos.37756/ 2016
and for R-1 in W.P.No.38698 of 2016

Mr.B.Kumar, Senior Counsel
for Mr.J.Karuppiah
for R-6 in W.P.No.21149 of 2016,
for R-8 in W.P.No.21150 of 2016
for RR5 and 7 in W.P.No.37166 of 2016
for RR5,7 and 9 in in W.P.No.37756 of
2016

Mr.R.Shanmughasundaram, Senior Counsel
for Mr.S.Manuraj
for R-5 in W.P.Nos.21149 and 21150/2016
for R-8 in W.P.No.37166 of 2016
for RR8 and 10 in W.P.No.37756 of 2016
for R-9 in W.P.No.38698 of 2016
for Mr.A.Gopinath
for R-6 in W.P.Nos.37166 and 37756/2016
for R-7 in W.P.No.38698 of 2016

COMMON ORDER

Ms.Indira Banerjee, Chief Justice

In the writ petitions, being W.P.Nos.21149 and 21150 of 2016, the writ petitioners have sought orders for appointment of a Statutory Auditor to calculate the expenses caused to the exchequer by reason of announcement of elections to 134-Aravakurichi and 174-Thanjavur Assembly Constituencies, postponement of dates and ultimate cancellation thereof and to recover the same from the concerned contesting candidates, who had, as per the order of the first respondent, being the Election Commission of India, indulged in corrupt practices.

2. On 22.4.2016, the Election Commission passed an order announcing elections to the Legislative Assembly, inter alia, from 134-Aravakurichi Assembly Constituency and 174-Thanjavur Assembly Constituency. The scheduled dates for election to the two constituencies were postponed and ultimately, the elections were cancelled by order No.464/TN-LA/2016, dated 27.5.2016 of the first respondent.

3. By notification dated 22.4.2016 issued under Section 15 of the Representation of the People Act, 1951 (hereinafter referred to as "the 1951 Act"), the Governor of Tamil Nadu announced general elections to the Tamil Nadu Legislative Assembly. On the same date, i.e., on 22.4.2016, the Election Commission also issued notifications under Sections 30 and 56 of the 1951 Act fixing the schedule of poll for Assembly Constituencies, including 134-Aravakurichi Assembly Constituency and 174-Thanjavur Assembly Constituency.

4. As per the aforesaid notification, nominations were to be filed within 29.4.2016; nominations were to be scrutinized on 30.4.2016; 2.5.2016 was fixed as the last date for withdrawal of nominations; the polls were to be held on 16.5.2016 and completed within 21.5.2016.

5. However, after the elections were announced, the Election Commission received reports of corrupt practices on the part of certain contesting candidates, including distribution of cash and other material articles to allure and/or purchase voters. By an order dated 14.5.2016, the Election Commission deferred the polls scheduled to be held at 134-Aravakurichi Assembly Constituency to 23.5.2016. Likewise, by an order dated 15.5.2016, the polls scheduled to be held at 174-Thanjavur Assembly Constituency was deferred to be held on 23.5.2016. The orders were notified in the Official Gazette on 15.5.2016. Ultimately, by an order dated 27.5.2016, the polls in both the constituencies were cancelled, allegedly by reason of corrupt practices on the part of the contesting candidates fielded by the two major political parties AIADMK and DMK.

6. Thereafter, by letters dated 1.6.2016 addressed, inter alia, to the Election Commission of India, the petitioners sought recovery of the expenses incurred by the Election Commission from the errant contesting candidates, alleged to belong to the two major political parties, DMK (Dravida Munnetra Kazhagam) and AIADMK (All India Anna Dravida Munnetra Kazhagam). The elections to the constituencies have since been held and election results have also been announced.

7. The writ petitions, being W.P.Nos.37166, 37756 and 38698 of 2016, seeking directions restraining the respondents from

assigning registered symbols to certain contesting candidates of the aforesaid assembly constituencies and, inter alia, seeking their disqualification has become infructuous, since the elections have already been held and the election results have been announced. The remedy, if any, of the petitioners in respect of the aforesaid writ petitions lay by way of a election petition. The said writ petitions are dismissed. We are informed election petitions have been filed and are pending disposal.

8. It is not in dispute that there is no specific provision of law which enables the Election Commission to recover the expenditure incurred by the State and/or the Election Commission by reason of deferring or cancellation of elections from contesting candidates responsible for the same.

9. Article 324(1) of the Constitution of India provides:

"Article 324. Superintendence, direction and control of elections to be vested in an Election Commission.

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

10. Article 324(6) of the Constitution of India makes it obligatory for the President or the Governor of a State to make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by Clause (1).

11. The other relevant provisions of the Constitution of India relating to elections to, inter alia, the State Assembly are as follows:

"Article 325. No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex.—

There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them.

Article 326. Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage.—

The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than eighteen years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.

Article 327. Power of Parliament to make provision with respect to elections to Legislatures.—

Subject to the provisions of this Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

Article 328. Power of Legislature of a State to make provision with respect to elections to such Legislature.—

Subject to the provisions of this Constitution and in so far as provision in that behalf is not made by Parliament, the Legislature of a State may from time to time by law make provision with respect to all matters relating to, or in connection with, the elections to the House or either House of the Legislature of the State including the preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses."

12. In exercise of the powers conferred by Article 327 of the Constitution of India, the Parliament has enacted the Representation of the People Act, 1950 and the Representation of the People Act, 1951. Chapter VIII of the 1951 Act containing Sections 76, 77 and 78, which relate to election expenses of a contesting candidate, are set out herein below for convenience:

"Section 76. Application of Chapter.—

This CHAPTER shall apply only to the elections to the House of the People and to the Legislative

Assembly of a State.

Section 77. Account of election expenses and maximum thereof.—

(1) Every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorised by him or by his election agent between the date on which he has been nominated] and the date of declaration of the result thereof, both dates inclusive.

Explanation.—For the removal of doubts, it is hereby declared that—

(a) the expenditure incurred by leaders of a political party on account of travel by air or by any other means of transport for propagating programme of the political party shall not be deemed to be the expenditure in connection with the election incurred or authorised by a candidate of that political party or his election agent for the purposes of this sub-section;

(b) any expenditure incurred in respect of any arrangements made, facilities provided or any other act or thing done by any person in the services of the Government and belonging to any of the classes mentioned in clause (7) of Section 123 in the discharge or purported discharge of his official duty as mentioned in the proviso to that clause shall not be deemed to be expenditure in connection with the election incurred or authorised by a candidate or by his election agent for the purposes of this sub-section.

Explanation 2.—For the purposes of clause (a) of Explanation 1, the expression "leaders of a political party", in respect of any election, means,—

(i) where such political party is a recognised political party, such persons not exceeding forty in number, and

(ii) where such political party is other than a recognised political party, such persons not exceeding twenty in number,

whose names have been communicated to the Election Commission and the Chief Electoral Officers of the States by the political party to be leaders for the purposes of such election, within a period of seven

days from the date of the notification for such election published in the Gazette of India or Official Gazette of the State, as the case may be, under this Act:

Provided that a political party may, in the case where any of the persons referred to in clause (i) or, as the case may be, in clause (ii) dies or ceases to be a member of such political party, by further communication to the Election Commission and the Chief Electoral Officers of the State, substitute new name, during the period ending immediately before forty-eight hours ending with the hour fixed for the conclusion of the last poll for such election, for the name of such person died or ceased to be a member, for the purposes of designating the new leader in his place.

(2) The account shall contain such particulars, as may be prescribed.

(3) The total of the said expenditure shall not exceed such amount as may be prescribed.

Section 78. Lodging of account with the district election officer.—(1) Every contesting candidate at an election shall, within thirty days from the date of election of the returned candidate or, if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates, lodge with the district election officer an account of his election expenses which shall be a true copy of the account kept by him or by his election agent under Section 77."

13. Section 77(3) of the 1951 Act provides that the total expenditure shall not exceed such amount as may be prescribed. If a cap on expenditure is prescribed and the expenditure incurred by a candidate is found to exceed the prescribed limit, election of the candidate may be questioned by filing an election petition.

14. Section 100(1) of the 1951 Act sets forth the grounds for declaring an election to be void. If the result of an election has been materially affected by any corrupt practice, the High Court is to declare the election of the returned candidate void, in view of Section 100(1)(d)(ii) of the 1951 Act.

15. There is no specific provision in the Constitution or in the 1951 Act for recovery of expenses incurred by the Election Commission and/or by the State for preparation for elections

from a candidate whose alleged acts lead to deferment or cancellation of elections.

16. The provisions of Chapter IX-A of the Indian Penal Code in respect of offences relating to elections are set out herein below:

"Section 171A - "Candidate", "Electoral right" defined.-

For the purposes of this Chapter--

(a) "candidate" means a person who has been nominated as a candidate at any election;

(b) "electoral right" means the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at any election.

Section 171B - Bribery.-

(1) Whoever--

(i) gives a gratification to any person with the object of inducing him or any other person to exercise any electoral right or of rewarding any person for having exercised any such right; or

(ii) accepts either for himself or for any other person any gratification as a reward for exercising any such right or for inducing or attempting to induce any other person to exercise any such right,

commits the offence of bribery:

Provided that a declaration of public policy or a promise of public action shall not be an offence under this section.

(2) A person who offers, or agrees to give, or offers or attempts to procure, a gratification shall be deemed to give a gratification.

(3) A person who obtains or agrees to accept or attempts to obtain a gratification shall be deemed to accept a gratification, and a person who accepts a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, shall be deemed to have accepted the gratification as a reward.

Section 171C - Undue influence at elections.-

(1) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.

(2) Without prejudice to the generality of the provisions of sub-section (1), whoever-

(a) threatens any candidate or voter, or any person in whom a candidate or voter is interested, with injury of any kind, or

(b) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure,

shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section (1).

(3) A declaration of public policy or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this section.

Section 171D - Personation at elections.- Whoever at an election applied for a voting paper or votes in the name of any other person, whether living or dead, or in a fictitious name, or who having voted once at such election applies at the same election for a voting paper in his own name, and whoever abets, procures or attempts to procure the voting by any person in any such way, commits the offence or presentation at an election.

Provided that nothing in this section shall apply to a person who has been authorised to vote as proxy for an elector under any law for the time being in force in so far as he votes as a proxy for such elector.

Section 171E - Punishment for bribery.-

Whoever commits the offence of bribery shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both:

Provided that bribery by treating shall be punished with fine only.

Explanation.--"Treating" means that form of bribery where the gratification consists in food, drink, entertainment, or provision.

Section 171F - Punishment for undue influence or personation at an election.-

Whoever commits the offence of undue influence or personation at an election shall be punished with imprisonment of either description for a term which may extend to one year or with fine, or with both.

Section 171G - False statement in connection with an election.-

Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false and which he either knows or believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate shall be punished with fine.

Section 171H - Illegal payments in connection with an election.-

Whoever without the general or special authority in writing of a candidate incurs or authorises expenses on account of the holding of any public meeting, or upon any advertisement, circular or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with fine which may extend to five hundred rupees;

Provided that if any person having incurred any such expenses not exceeding the amount of ten rupees without authority obtains within ten days from the date on which such expenses were incurred the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidate.

Section 171I - Failure to keep election accounts.-

Whoever being required by any law for the time being in force or any rule having the force of law to keep accounts of expenses incurred at or in connection with an election fails to keep such

accounts shall be punished with fine which may extend to five hundred rupees."

17. The case of Rai Sahib Ram Jawaya Kapur and others Vs. State of Punjab, reported in AIR 1955 SC 549, is an authority for the proposition that the executive power of the Government of India to issue orders extend to the matters enumerated in List I and in the Concurrent List and the executive powers of the State extend to matters enumerated in List II of the Seventh Schedule and Concurrent List, subject to the limitations provided in the Constitution. Carrying out of any business would be within the executive power of the State, if it was not an act which had been assigned by the Constitution to other authorities or bodies and was not contrary to the provisions of any law or did not encroach upon any legal rights of any member of the public. The Supreme Court held:

" This power of contract is expressly vested in the Government under Article 298 of the Constitution. In these circumstances, we are unable to agree with Mr Pathak that the carrying on of the business of printing and publishing text books was beyond the competence of the executive Government without a specific legislation sanctioning such course."

18. In Vishaka and others v. State of Rajasthan and others, reported in (1997) 6 SCC 241, the Supreme Court held that incidents of sexual harassment result in violation of the fundamental right of gender equality and the right to life and liberty guaranteed under Articles 14, 15 and 21 of the Constitution of India. Harassment at workplace is also in violation of the victim's fundamental right under Article 19(1) (g) of the Constitution of India to practice any profession or to carry out any occupation, trade or business.

19. The Supreme Court held that in the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international conventions and norms were significant for the purpose of interpretation of the guarantee of gender equality and the right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution of India and the safeguards against sexual harassment implicit therein.

20. Taking note of the fact that there was no domestic law occupying the field, but that India had ratified the Convention on the Elimination of All Forms of Discrimination against Women, commonly referred to as the CEDAW, and further taking note of the fact that the civil and penal laws in existence in India did

not adequately provide for specific protection of women from sexual harassment, the Supreme Court formulated and directed that the guidelines be strictly observed in all workplaces for the preservation and enforcement of the right to gender equality of working women. The directions, which were prospective, were to be binding and enforceable in law until suitable legislation was enacted to occupy the field.

21. In the instant case, there are no international conventions with regard to realization of costs of postponement and/or cancellation of elections from the person responsible for postponement and/or cancellation. Non recovery from errant contesting candidates of the costs of postponement or cancellation of election, incurred by the State does not infringe any legal or fundamental right. The writ petitioners have not lodged any complaint against the contesting candidates under the Indian Penal Code. The Election Commission has also not lodged any complaint, nor disqualified the candidates from contesting.

22. In *State of Maharashtra v. Narayan Shamrao Puranik and others*, reported in (1982) 3 SCC 519, the Supreme Court held that the Chief Justice of the High Court had full power, authority and jurisdiction in the matter of allocation of business of the High Court which not only flowed from the States Reorganization Act, 1956, but inhered in him. The judgment has no manner of application in the context of the relief claimed by the writ petitioners of recovery of costs from the contesting candidates.

23. In *Union of India v. Association for Democratic Reforms and another*, reported in (2002) 5 SCC 294, the question involved was whether before casting votes, voters had a right to know relevant particulars of their candidates. The Supreme Court answered the aforesaid question in the affirmative.

24. There can be no doubt as held by the Supreme Court in *Union of India v. Association for Democratic Reforms and another*, supra, that the Election Commission has plenary powers and its powers include measures for smooth conduct of election. In the absence of specific law, Election Commission can exercise its residuary power to fill the vacuum in order to meet unforeseen contingencies. Hence, Supreme Court upheld the direction of the High Court, where, with a view to enable the voter to make a right choice, the High Court directed the Election Commission to secure to the voters information in respect of each of the candidates for Lok Sabha/State Legislature regarding pendency, if any, of criminal cases against the candidate, assets of the candidate or his/her spouse or dependent relations and other details.

25. Article 324 of the Constitution of India empowers the Election Commission to control the conduct of all elections to Parliament and to the Legislature of every State. The limitation on this plenary character is only when the Parliament or the State Legislature has made a valid law relating to or in connection with the elections. The Supreme Court found that to maintain the purity of elections and in particular to bring transparency in the process of election, the Commission could ask the candidates about the expenditure incurred by the political parties and this transparency in the process of election would include transparency of a candidate, who seeks election or re-election. In this context, it would be useful to refer to Section 77 of the 1951 Act, which specifically requires political parties to give account of election expenses. There is, however, no provision of law requiring the Election Commission and/or the State to maintain separate accounts of expenses of holding elections in different constituencies or recovery thereof from candidates contesting from those constituencies. Recovery of expenses incurred by the Election Commission and/or by the State has no direct bearing on free and fair conduct of election.

26. The Supreme Court held that Article 324 of the Constitution operated in areas left unoccupied by legislation and the words "superintendence, direction and control" as well as "conduct of all elections" were of the broadest terms. The conduct of elections, in our view, necessarily means free and fair elections, for which information with regard to contesting candidates is an important ingredient.

27. In *Kishansingh Tomar v. Municipal Corporation of the City of Ahmedabad and others*, reported in (2006) 8 SCC 352, a Constitution Bench of the Supreme Court held that timely holding of elections to municipalities and panchayats was a mandatory requirement of Article 243(U) of the Constitution. The judgment has no application to the issue of postponement of elections by the Election Commission to prevent unfair practices or to recovery of costs.

28. In *Brudaban Nayak v. Election Commission of India and another*, reported in AIR 1965 SC 1892, the Supreme Court held that under the scheme of Articles 191, 192(1) and (2) of the Constitution it was clear that decision on the question of disqualification raised under Article 192(1) had to be pronounced by the Governor, but that decision had to be in accordance with the opinion of the Election Commission. The elections have now been completed and results announced. The candidates have not been disqualified. This judgment has no application to the question of recovery of costs incurred by the Election Commission/State from the contesting candidate, for whose fault the election had to be cancelled.

29. In *K.Anbazhagan v. Superintendent of Police and others*, reported in (2004) 3 SCC 767, transfer of criminal cases pending in the Court of IX Additional Session Judge, Chennai, to a Court of equivalent competent jurisdiction in any other State under Section 406 of the Code of Criminal Procedure was allowed. The judgment has no relevance.

30. In *Shailly Construction Private Limited v. State of Gujarat*, reported in 2011 SCC Online Guj 4785, there was a one time settlement scheme of the State of Gujarat for cooperative banks in liquidation. For implementation of the Scheme, a High Level Committee was constituted. The Division Bench of the Gujarat High Court found that the High Level Committee had adopted a hyper-technical approach while dealing with the case and had ignored the basic principles/objectives of the Scheme, which intended to give benefit to the defaulters. The Court held that in exercise of jurisdiction under Article 226 of the Constitution of India, High Courts have the power to pass orders and give necessary directions where the Government or a public authority had failed to exercise the discretion conferred upon it by law or had exercised such discretion mala fide or on irrelevant considerations, ignoring relevant considerations.

31. There can be no doubt with the proposition in *Krishnadevi Malchand Kamathia v. Bombay Environmental Action Group and others*, reported in (2011) 3 SCC 363, that even a void order requires to be so declared by a competent forum and that a party aggrieved by an invalid order might approach the Court for relief under Article 226 of the Constitution of India.

32. The judgment in *Board of Trustees of Port of Kandla v. Hargovind Jasraj and another*, reported in (2013) 3 SCC 182, appears to have been cited for the proposition that a person affected by an invalid order ought to seek redress against the same in a Court of law. The judgment has no application in the facts and circumstances of this case.

33. The judgment of the Supreme Court in *Shri Kanwar Lal Gupta v. Amar Nath Chawla and others*, reported in (1975) 3 SCC 646 relates to expenses incurred by a candidate in excess of ceiling. It is not an authority for the proposition that costs may be realized from contesting candidates for the expenses incurred by the Election Commission or the State by reason of cancellation of the election.

34. In *Mohinder Singh Gill and another v. The Chief Election Commissioner and others*, reported in (1978) 1 SCC 405, the majority held that the Election Commission clothed with comprehensive functions under Article 324 of the Constitution of India had power to cancel the whole poll of a constituency after

it had been held, but before the formal declaration of results.

35. In *Ashok Shankarrao Chavan v. Dr. Madhavrao Kinhalkar and others*, reported in AIR 2014 SC 3102, the Supreme Court expressed its anguish over corrupt practices of expending money to buy votes and held that the Election Commission, which was the authority with ultimate control in the matter of holding elections, should be invested with the widest power of its kind specified in the Act. Therefore, when it comes to interpretation of such power to be exercised by the Election Commission, the Court should have a very liberal approach in interpreting the nature of the power. The Supreme Court upheld the power of the Election Commission to enquire into allegations relating to failure of a candidate to submit accounts of election expenses in the manner prescribed and as required by or under the Act.

36. In *Union of India v. Association of Democratic Reforms and another*, reported in (2002) 5 SCC 294, the Supreme Court highlighted the need for maintaining purity in the elections and held that for that purpose Article 324 had to be interpreted in a broad perspective, acknowledging the wide powers invested with the Election Commission. The Supreme Court further held that the phrase "conduct of elections" was of wide amplitude which would include power to make all necessary provisions for conducting free and fair elections. The power of the Commission was plenary in character. The Commission could cope with the situation in areas left unoccupied by legislation. The Supreme Court directed the Election Commission to exercise its plenary powers by calling upon each candidate to disclose information as specified in the said judgment.

37. In *People's Union for Civil Liberties (PUCL) and another v. Union of India and another*, reported in (2003) 4 SCC 399, the Supreme Court noted how, as a matter of fact, money power was playing a very detrimental role in the matter of elections which was required to be curbed.

38. In *Krishnamoorthy v. Sivakumar and others*, reported in (2015) 3 SCC 467, the Supreme Court reiterated the plenary nature of the powers of the Election Commission which extended to directing candidates to furnish information and held that non-disclosure of criminal antecedents in entirety would amount to corrupt practice that rendered the election of the concerned candidate null and void, and the Court would be obliged to allow an election petition setting aside the election of the candidate found guilty of corrupt practice.

39. In *Jay Shankar Pathak v. Election Commission of India and others*, reported in AIR 2012 Jharkhand 58, a Division Bench of Jharkhand High Court re-affirmed the wide powers of the

Election Commission to ensure free and fair elections and to stop corrupt practices including horse trading and bribery by stopping counting and recommending cancellation of election notification.

40. There can be no dispute with the proposition of law laid down by the Supreme Court in Election Commission of India v. Ashok Kumar and others, reported in (2000) 8 SCC 216, elaborating the wide powers of the Election Commission for fair and effective completion of elections and cautioning the writ Court to be circumspect while entertaining an election dispute even though it may not be hit by the bar of Article 329 of the Constitution of India.

41. In All India Anna Dravida Munnetra Kazhagam v. The State Election Commissioner and four others, reported in 2007-2 L.W. 1, there was a reference to Third Judge on difference of opinion between Two Judges of the Division Bench namely, S.J.Mukhopadhaya and F.M.Ibrahim Kalifulla, JJ. with regard to the maintainability of writ petitions after elections had been conducted. The Third Judge P.K.Misra, J. agreed with F.M.Ibrahim Kalifulla, J. and held that under special circumstances a writ would be maintainable in matters relating to elections before or after completion of election process. This Court re-affirmed the onerous duty cast on the Election Commission to hold a free and fair election.

42. In re Destruction of Public and Private Properties v. State of Andhra Pradesh, reported in (2009) 5 SCC 212, destruction of public properties in the name of hartals, bandhs, agitations, etc, was brought to the notice of the Supreme Court. In this case, the need to formulate certain guidelines to deal with such destructions owing to absence of specific legislative provision was highlighted. The Hon'ble Supreme Court agreed and appointed two different committees and on the basis of their recommendations, formulated guidelines to deal with such cases of destruction of public and private properties in the name of agitations, bundhs, hartals and like. The Supreme Court, in this case, observed that there are several cases where guidelines had become necessary in the absence of statutory framework. Vishaka, supra, and Vineet Narain v. Union of India, reported in (1998) 1 SCC 226 were referred to and guidelines were framed. The relevant paragraphs of the judgment read as follows :

"15. In the absence of legislation the following guidelines are to be adopted to assess damages:

(I) Wherever a mass destruction to property takes place due to protests or thereof, the High Court may issue suo motu action and set up a machinery to investigate the damage caused and to award compensation related thereto.

(II) Where there is more than one State involved, such action may be taken by the Supreme Court.

(III) In each case, the High Court or the Supreme Court, as the case may be, appoint a sitting or retired High Court Judge or a sitting or retired District Judge as a Claims Commissioner to estimate the damages and investigate liability.

(IV) An assessor may be appointed to assist the Claims Commissioner.

(V) The Claims Commissioner and the assessor may seek instructions from the High Court or the Supreme Court as the case may be, to summon the existing video or other recordings from private and public sources to pinpoint the damage and establish nexus with the perpetrators of the damage.

(VI) The principles of absolute liability shall apply once the nexus with the event that precipitated the damage is established.

(VII) The liability will be borne by the actual perpetrators of the crime as well as the organisers of the event giving rise to the liability to be shared, as finally determined by the High Court or the Supreme Court as the case may be.

(VIII) Exemplary damages may be awarded to an extent not greater than twice the amount of the damages liable to be paid.

(IX) Damages shall be assessed for:

(a) damages to public property;

(b) damages to private property;

(c) damages causing injury or death to a person or persons; and

(d) cost of the actions by the authorities and police to take preventive and other actions.

(X) The Claims Commissioner will make a report to the High Court or the Supreme Court which will determine the liability after hearing the parties.

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17. The power of this Court also extends to laying down guidelines. In *Union of India v. Assn. for Democratic Reforms* [(2002) 5 SCC 294] this Court

observed: (SCC p. 309, paras 19-20)

"19. ... it is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules.

20. However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted."

18. This Court has issued directions in a large number of cases to meet urgent situations e.g.

- Lakshmi Kant Pandey v. Union of India [(1984) 2 SCC 244]
- Vishaka v. State of Rajasthan [(1997) 6 SCC 241 : 1997 SCC (Cri) 932]
- Vineet Narain v. Union of India [(1998) 1 SCC 226 : 1998 SCC (Cri) 307]
- State of W.B. v. Sampat Lal [(1985) 1 SCC 317 : 1985 SCC (Cri) 62]
- K. Veeraswami [K. Veeraswami v. Union of India, (1991) 3 SCC 655 : 1991 SCC (Cri) 734]
- Union Carbide Corpn. v. Union of India [(1991) 4 SCC 584]
- Delhi Judicial Service Assn. v. State of Gujarat [(1991) 4 SCC 406]
- DDA v. Skipper Construction Co. (P) Ltd. [(1996) 4 SCC 622]
- Dinesh Trivedi v. Union of India [(1997) 4 SCC 306] , Common Cause v. Union of India [(1996) 1 SCC 753 : AIR 1996 SC 929]
- Supreme Court Advocates-on-Record Assn. v. Union of India [(1993) 4 SCC 441]

19. The situations in which a positive mandamus (sic may be issued) to do a particular act in a particular way, may be broadly classified in the following manner. First are the broad mandamus cases where this Court has held that the Court may

issue a positive mandamus to enforce the law. Thus in Vineet Narain case [(1998) 1 SCC 226 : 1998 SCC (Cri) 307] detailed orders were passed for the investigation of the Hawala transaction cases. It is laid down that positive directions can be issued where there is a power coupled with a duty. The situations under which this can happen are numerous.

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28. The present case is one in which guidelines are necessary:

- (i) to the police to enforce statutory duties, and
- (ii) to create a special purpose vehicle in respect of damages for riot cases.

This issue was examined by the Nariman Committee which considered:

"... where (in such cases) there is destruction/damage to properties and loss of lives or injuries to persons-

- (i) the true measures of such damages,
- (ii) the modalities for imposition of such damages, and..." (p. 2 of the Report)."

43. There can be no doubt in law that the cost of destruction of property can be recovered from persons who indulge in the acts of vandalism and cause damage to property. The Court only framed guidelines and issued directions for quick recovery and penalization of the anti-social elements. It was not a case of imposition of penalty without authority of law.

44. Neither the Constitution nor the statutory enactments enable the Election Commission to recover costs of preparations for conducting elections from contesting candidates responsible for the cancellation of elections.

45. However, it is doubtful whether this Court can pass orders as prayed for by the writ petitioners for appointment of Statutory Auditor to calculate the expenses caused to the exchequer by reason of announcement of elections, postponement of dates and ultimate cancellation thereof and recover the same from the errant contesting candidates in the absence of any provision of law which enables such recovery, for this would amount to imposition of penalty with retrospective effect without authority of law.

46. A writ petition, being W.P.No.18284 of 2016, was filed by Mr.M.Baskaran praying, inter alia, for the following reliefs:

"to direct respondents 1 to 4 to conduct a thorough enquiry by giving an opportunity of hearing to all the candidates, including this petitioner and the voters of the 134-Aravakurichi Assembly Constituency, about the serious allegations of bribe given to voters; in pursuance to the observations made by the first respondent itself in its proceedings No.464/TNLA/2016 dated 14.05.2016 and consequently to conduct a fresh election in the 134-Aravakurichi Assembly Constituency barring the disqualified candidates if they are proven to have indulged in giving bribe to voters."

47. The writ petition was disposed of by a Division Bench of this Court by an order dated 1.6.2016, inter alia, holding that there is no legislation in this regard.

48. Public interest litigation is a relatively recent genre of litigation which has emerged to enhance access to justice. Any public spirited citizen can access the Courts to secure the rights of a marginalized class deprived of their rights or to ensure redressal of illegality. Good governance is ensured through such litigation.

49. Public interest litigation is, however, not a measure for the Courts to take over governance. Nor is it a process for supervising or monitoring every step, direction or measure involved in governance. Where fundamental or other rights are infringed or the State is demonstrated to be in abuse of power or acting mala fide, the Courts may consider the necessity of continuous supervision towards eliminating mal-governance. Such continuous supervision might be limited strictly to ensure that the State and the agencies of the State act in accordance with law and not in usurpation of the law.

50. It is true that unscrupulous candidates contesting elections should not be allowed to go scot-free when they disrupt elections and thereby cause huge wasteful expenditure to the State exchequer. However, this public interest litigation cannot be stretched to take over all acts of governance. In a country governed by a Constitution, of which separation of powers between the Legislature, the Executive and the Judiciary is a basic feature, this Court cannot take over legislative or executive functions. It is for the legislature to enact a law to provide for recovery of waste of public money caused by wrongful acts of contesting candidates. May be the Election Commission with its wide powers to ensure free and fair elections might make a recommendation for suitable enactment

and/or amendment of law. However, until such law is passed, this Court cannot pass orders as prayed for in W.P.Nos.21149 and 21150 of 2016. These writ petitions are dismissed.

In the result, all the writ petitions are dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

bbr/sasi

To

- 1.The Chief Election Commissioner,
The Election Commission of India,
Election Commission of India,
Nirvachan Sadan,
Ashoka Road, New Delhi-110 001.
- 2.The Secretary,
The Election Commission of India,
Nirvachan Sadan, Ashoka Road,
New Delhi-110 001.
- 3.The Chief Electoral Officer,
Public (Elections) Department,
Government of Tamil Nadu,
Secretariat, Fort St. George,
Chennai-600 009.
- 4.The District Electoral Officer-cum-
District Collector,
Karur District, Karur.
- 5.The Returning Officer,
Aravakurichi Assembly Constituency,
Tahsildar Office,
Aravakurichi, Karur District.
- 6.The District Electoral Officer-cum-
District Collector,
Thanjavur District,
Thanjavur.

7.The Returning Officer,
174-Thanjavur Assembly Constituency,
Thasildar Office,
Thanjavur, Thanjavur District.

8.The Returning Officer,
No.134, Aravakurichi Assembly Constituency,
Arvarkurichi, Karur District.

+4cc to Mr.M.Purushothaman, Advocate Sr.No.37429

+1cc to Mr.E.Murugan, Advocate Sr.No.37327

+5cc to M/s.G.R.Associates, SR.no.37569, 37568, 37572, 37571 and
37570

+1cc to Mr.N.Manokaran, Advocate Sr.No.37719

+1cc to Government Pleader SR.No.37668

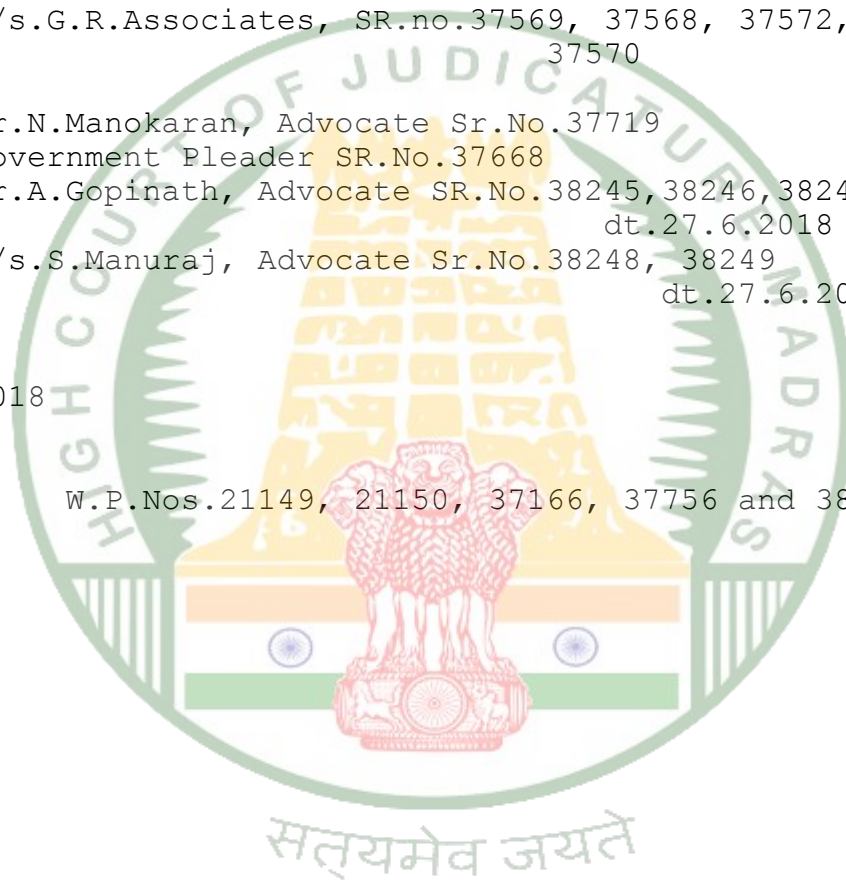
+3cc to Mr.A.Gopinath, Advocate SR.No.38245,38246,38247
dt.27.6.2018

+2cc to M/s.S.Manuraj, Advocate Sr.No.38248, 38249
dt.27.6.2018

NMI (CO)

sm:21.6.2018

W.P.Nos.21149, 21150, 37166, 37756 and 38698 of 2016



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