

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 16.03.2021

Delivered on : 17.03.2021

CORAM :

THE HON'BLE MR.SANJIB BANERJEE, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE SETHILKUMAR RAMAMOORTHY

W.P.No.20027 of 2020

Dravida Munnetara Kazhagam
rep. by its Organising Secretary
R.S.Bharathi
"Anna Arivalayam", No.367 and 369
Anna Salai, Chennai - 600 018.

... Petitioner

Vs

- 1 The Union of India
rep. by its Secretary to Government
Ministry of Law and Justice
4th Floor, A-Wing, Shastri Bhawan
New Delhi - 110 001.
- 2 The Election Commission of India
rep. by its Chief Election Commissioner
Office of the Election Commission of India
Nirvachan Sadan, Ashoka Road
New Delhi - 110 001.
- 3 The Chief Electoral Officer, Tamil Nadu
Secretariat, Fort St. George
Chennai - 600 009.

.. Respondents

Prayer: Petition under Article 226 of the Constitution of India seeking issuance of a writ of declaration, declaring Section 60 (c) of the Representation of the People Act, 1951 and the Rules made thereunder, viz., Rules 27(A) to (L) of the Conduct of Election Rules, 1961, The Conduct of Elections (Amendment) Rules, 2019 issued vide Notification SO 3786(E) dated 22.10.2019 and the Conduct of Elections (Amendment) Rules, 2020 issued vide Notification SO 1964 (E) dated 19.6.2020 by the first respondent and the consequential two notifications No.52/2020/SDR/Vol I

dated 17.9.2020 and published in TN Govt Gazette dated 22.9.2020, notification dated 28.9.2020 and impugned instructions dated 3.10.2020 under reference 52/2020/SDR/Vol I and impugned Revised Guidelines bearing No.52/2021/SDR/Vol-I dated 02.02.2021 and impugned Notification bearing No.52/2021/SDR/Vol-I, dated 27.02.2021 issued by the second respondent as unconstitutional, illegal and void ab initio. (Prayer amended vide order dated 2.3.2021 made in W.M.P.No.6111 of 2021) in WP.No.20027/2020

For Petitioner : Mr.P.Wilson
Senior Counsel
for M/s.P.Wilson Associates

For Respondents : Mr.R.Sankaranarayanan
Additional Solicitor-General
assisted by
Mr.K.Srinivasamurthy
Senior Panel Counsel
for Central Government
for 1st respondent

Mr.G.Rajagopalan
Senior Counsel
for Mr.Niranjan Rajagopal
for M/s.G.R.Associates
for respondents 2 and 3

ORDER

THE HON'BLE CHIEF JUSTICE

The propriety of an amendment effected in 2003 to the Representation of the People Act, 1951 has been called into question by one of the leading political parties in the State along with myriad other grievances in respect of the guidelines issued by the Election Commission of India and the classification of persons who may exercise their franchise otherwise than by presenting themselves at a polling booth in the forthcoming assembly elections.

2. According to the petitioning political party, the introduction of clause (c) in Section 60 of the Act of 1951 amounts to excessive delegation as it is perceived to confer virtual legislative authority to the Election Commission. While the petitioner agrees that the Election Commission has the primacy in conducting assembly elections, it suggests that matters such as the classes of persons who may vote otherwise than by attending the election booth must be completely

indicated in any rules that may be framed by the Central Government and the Election Commission must not be left with any authority to pick and choose from such classes of persons. The lesser argument by the petitioner in such regard is that, at any rate, Section 60(c) of the Act of 1951 does not permit the Election Commission to indicate any classes of persons to permit them to vote otherwise than by attending the election booth and the entire authority in such regard has to be exercised by the Central Government upon drafting appropriate rules.

3. In such light, the 2019 and 2020 amendments to the Conduct of Election Rules, 1961 have also been challenged in the present proceedings together with the guidelines issued by the Election Commission on September 17, 2020, February 2, 2021 and February 27, 2021. The amendments to the Rules of 1961 have been questioned on the ground of excessive delegation and the three sets of guidelines have been assailed as being in excess of authority or at variance with the Rules of 1961.

4. By a notification published on October 22, 2019, the Central Government incorporated several changes to the said Rules of 1961, inter alia, by introducing a sub-clause in Rule 18(a) thereof to allow absentee voters to participate in an election. The definition of an "absentee voter" was introduced as additional clause (aa) in Rule 27-A of the said Rules of 1961 along with the definition of a "nodal officer" in additional clause (ab) of Rule 27-A thereof. Certain other changes were also brought in by including a class of persons described as "person with disability", another class as "senior citizen" and a further class of those "employed in essential services". The modalities for the absentee voter voting were also incorporated by the amendment of 2019. The petitioner claims that even if all the amendments were to be accepted at face value, it would be evident that the 2019 Amendment to the said Rules of 1961 permitted an absentee voter as defined therein to exercise the right to participate in the democratic process only by postal ballot.

5. By a further notification published on June 19, 2020, the Central Government introduced another class of persons who could exercise their franchise without physically coming to cast the usual ballot at the election booth. Room was made for Covid-19 suspects or affected persons, whether such persons had been tested positive or were under quarantine as a result of the pandemic. The other substantial change that was incorporated by the latest amendment to the said Rules of 1961 was the lowering of the age of senior citizens from 80 years to 65 years.

6. Both the amendments of 2019 and 2020 were carried out by the Central Government in exercise of the powers conferred by

Section 60(c) of the Act of 1951. Such provision, which is squarely challenged by the petitioner as being ultra vires the Constitution on the grounds of excessive delegation and arbitrariness, needs to be seen:

"60. Special procedure for voting by certain classes of person.- Without prejudice to the generality of the provisions contained in section 59, provision may be made, by rules made under this Act, for enabling-

...

...

(c) any person belonging to a class of persons notified by the Election Commission in consultation with the Government to give his vote by postal ballot and not in any other manner, at an election in a constituency where a poll is taken subject to the fulfilment of such requirements as may be specified in those rules;

..."

7. The petitioner insists that the opening words of the Section mandate that a provision may be made for the purpose indicated in clause (c), but such provision may only be made by rules being framed for such purpose. Again, the petitioner asserts that the special requirements for such classes of persons exercising their franchise need to be specified in the same set of rules as clearly indicated in clause (c). Thus, it is the contention of the petitioner that the classes of persons who are to be conferred the benefit of voting by postal ballot must be clearly indicated in a set of rules to be formulated by the Central Government and the mode and manner of voting by such class of persons need also be stipulated by rules; the only power of the Election Commission in such regard being to notify such persons as belonging to a class to enjoy the benefit. The petitioner maintains that even such notification by the Election Commission has to be in consultation with the Government. Most importantly, according to the petitioner, the notification must necessarily mean publication in the Official Gazette.

8. At one level, it appears to be the broad assertion of the petitioning political party that certain classes of persons would be enumerated by rules framed in such regard by the Central Government, whereupon the Election Commission may notify some of such persons and extend to such notified persons the courtesy of voting by postal ballot after consulting the Central Government before publishing the relevant notification. The petitioner says that it is not for the Election Commission to choose who may be allowed to vote by postal ballot; the Election Commission may only choose some persons from a bank of persons enumerated by the Central Government by framing appropriate

rules.

9. There are several grounds which have been taken by the petitioner, inter alia, to assail the measures set afoot by the Election Commission to allow persons suffering from Covid-19 or quarantined in such connection to exercise their right to vote. These grounds do not pertain, in principle, to the authority of the Election Commission to extend the benefit of the postal ballot to such persons, but the petitioner questions the manner in which the Election Commission has notified that voting would be exercised by such class of persons. The petitioner also questions the Election Commission having restricted senior citizens to be given the option of postal voting to those above the age of 80, though the 2020 Amendment to the Rules has lowered the age of senior citizens from 80 to 65. The petitioner claims that since the word "Government" as used in Section 60(c) of the Act of 1951 is not defined in such Act or in the Representation of the People Act, 1950, the word must be understood as indicated in the General Clauses Act, 1897 to imply both the Central Government and the State Government. The petitioner maintains that in the case of Assembly elections, the relevant State Government must be consulted as mandated in Section 60(c) of the Act of 1951, before the class is notified in the Official Gazette of such State as per Section 2(3) of the Act of 1951.

10. The petitioner is emboldened to make the last limb of the argument that the consultation must be even with the State Government in terms of Section 60(c) of the Act of 1951 since persons from completely different walks of life have been regarded to belong to essential services in one State and a completely different set of persons in another State, without there being any uniformity. The petitioner suggests that apart from persons engaged in essential services being too wide and vague a class of persons to be indicated in the rules, if the Election Commission perceives some persons in a particular State to belong to essential services and other persons in another State as belonging to essential services, it is the State Governments of the concerned States that ought to be consulted before notifying the specific persons to be included as persons connected with essential services in that State.

11. As to the mode and manner of voting, as appears to have been permitted to absentee voters by the guidelines issued by the Election Commission, the petitioner questions the very basis thereof on the fundamental premise that the expression "postal ballot" means and implies something and the modalities worked out by the Election Commission are a complete departure therefrom. According to the petitioner, postal ballot implies that a set of papers would be forwarded through the Department

of Posts by the Election Commission for a voter to receive the same, exercise his choice on the ballot paper and return the same by post to the appropriate polling officer or other official as indicated by the Election Commission. The petitioner complains that postal ballot or voting by post as contemplated in the Rules formulated under the Act of 1951 does not conceive of a situation where the ballot paper would be physically taken by a messenger for the voter to cast his vote and return the papers, whether immediately or within a stipulated period of time.

12. In short, the apprehension expressed by the petitioner is that the sanctity of the right to vote, which is the most fundamental right enjoyed by a citizen in a democracy, is desecrated by the mode and manner of voting as stipulated for a class of persons by the Election Commission. The petitioner laments that the secrecy in casting a vote, which is the fulfillment of the right to choose by an ordinary citizen, is seriously compromised in the voting process designed by the Election Commission for absentee voters. The petitioner submits that the Election Commission has virtually cut off the role of political parties in the process. The petitioner says that in the usual polling at an election booth, the election agents of all political parties would be present and there would be a secluded place where a citizen would cast her vote in complete peace and privacy and not be required to indicate the choice she made to any other. This fundamental premise will be lost in the methodology devised by the Election Commission, according to the petitioner.

13. Several propositions have been raised by the petitioner, whether they may be relevant in the present context or not. The petitioner claims that the classification of the electorate on the basis of age, health, disability and employment amounts to violating the principle of equality and goes against the basic feature of the Constitution. The petitioner submits that the differential treatment under Part III-A of the said Rules of 1961, particularly, the amendments of 2019 and 2020 thereto, are violative of Articles 15(1) and 325 of the Constitution. The petitioner says that Section 60(c) of the Act of 1951 compromises on the secrecy in voting which is the sine qua non of any free and fair election. The petitioner says that Section 60(c) of the Act of 1951 is also violative of Article 19(1)(a) of the Constitution and is otherwise unreasonable, vague and discriminatory. To the extent the political parties are excluded from monitoring and overseeing the voting by the absentee voter, the petitioner protests the same. The petitioner says Section 60(c) of the Act of 1951 amounts to excessive delegation and uncanalised and unbridled power to the Election Commission. The further challenge to clause (c) of

Section 60 of the Act of 1951 is that it is in complete disharmony with the other clauses of the provision. Rules 27-A to 27-L of the said Rules of 1961 are questioned on the ground of excessive delegation. Similarly, the terms "absentee voter" and "notified elector" as defined in the Rules of 1961 are said to be instances of unreasonable classification.

14. The impugned guidelines of September 17, 2020, February 2, 2021 and February 27, 2021 are said to be without jurisdiction altogether as they are not authorised by Section 30 of the Act of 1951. The expressions "person with disability" and "essential services" as used in the said Rules of 1961 are questioned as being completely vague and being prone to abuse and systemic discrimination. The petitioner says that the separate form of counting the votes cast by the absentee voters amounts to a kind of discrimination and also compromises both the secrecy and the right of choice of such persons. The petitioner is equally dissatisfied with the definitions of the persons suffering from Covid-19 and the persons in quarantine and says that the expressions have been left open-ended without any specificity. Form 12D introduced in the Rules of 1961 by the 2019 Amendment is also questioned as unworkable and obtuse. Finally, it is suggested that though the Election Commission enjoys primacy in the matter of conducting elections, it only has executive authority for conducting elections and for implementing the law without having any power or jurisdiction to make any prescription on the substantive matters as to classes of voters or manner of voting, as these aspects fall within the exclusive domain of the Parliament.

15. The petitioner harps on the virtues of the traditional mode of voting at an election booth as prescribed under Section 59 of the Act of 1951. The petitioner insists that such manner of voting ensures transparency since the voter is alone while actually exercising her franchise; the political parties are represented by agents in the polling booth to check the identity of the voter; the name of the voter is verified from the electoral rolls; and, there cannot be any pressure on the voter to cast her vote one way or the other. The petitioner says that just as every citizen is equal, when any voter is exercising the most fundamental right in a democracy, it is done in a uniform manner and only certain classes of voters may be conferred the privilege of voting otherwise than by presenting themselves at a specified polling booth within the constituency where the voter is ordinarily a resident.

16. The petitioner says that the 2003 amendment to the Act of 1951 was pursuant to a Bill that was introduced in the Parliament in 1999 and was referred to a Standing Committee. The petitioner refers to extracts from the meetings of the

relevant Standing Committee and the Statement of Objects and Reasons that accompanied the original Bill to indicate the limited purpose of the amendment. The petitioner submits that the avowed purpose of the amendment was not what the amended provision is now sought to be interpreted to imply. The petitioner says that the amendment to the Act of 1951 sought to be incorporated in 1999 pertained to persons who had moved from one State to another and were no longer ordinary residents of the State of origin.

17. The petitioner relies on the statement tendered on October 28, 1999 on behalf of the Law Minister in Parliament in course of the discussion thereon to bring out the limited purpose for which the amendment was introduced. The petitioner suggests that the scope of the amendment ought to be confined to the purpose for which it was introduced. Discussions evident from the relevant report of the Standing Committee are sought to be placed to suggest the limited ambit of the amendments proposed in the Bill of 1999. The petitioner's contention is that the words and meaning of the amended provision are now being twisted out of the context in which the amendment was introduced to bring about a virtual parallel form of voting that was not contemplated by the legislature when it passed the amendment.

18. The petitioner refers to Section 3(23) of the General Clauses Act, 1897 to submit that the expression "in consultation with the Government" in Section 60(c) of the Act of 1951 must, in the context of any Assembly elections, be consultation with the concerned State Government. The petitioner says that since the word "Government" is not defined in the Act of 1951 or in the Act of 1950, it must take colour both from the Act of 1897 and from Section 2(3) of the Act of 1951. The petitioner points out that where the Act intended the Government to be the Central Government, it specifically referred to the Central Government, including at Section 78-A(2), Section 151-A and Section 169 of the Act of 1951. Similarly, the petitioner shows that when it expressly referred to the State Government, the Act of 1951 specified so at Section 78-B(2) thereof. The petitioner contends that since Section 60(c) of the Act of 1951 would govern both Parliamentary and Assembly elections, the word "Government" has been deliberately used without specifying either the Centre or the State.

19. As to the process of consultation, the petitioner refers to the specific authorities being indicated in Sections 154(2) and 156(1) of the Act of 1951 referring to the President and the Governor, respectively. The petitioner refers to the definition of "appropriate authority" in Section 2(1)(b) of the Act of 1951 and rests with how a notification has to be published under

Section 2(3) of the Act of 1951.

20. The petitioner has also relied on the judgment reported at AIR 1951 SC 332 (In re Delhi Laws Act v. Part 'C' States (Laws) Act, 1950) and a judgment reported at (1989) 4 SCC 683 (A.N.Parasuraman v. State of Tamil Nadu) on excessive delegation. The petitioner has also brought a judgment reported at (1984) 2 SCC 656 (A.C.Jose v. Sivan Pillai) to assert that even under Articles 324 to 329 of the Constitution the legislative powers in respect of matters relating to the Parliament or the State Legislatures vest in the Parliament and not in the Election Commission. A further judgment reported at (1980) Supp SCC 53 (S.Raghubir Singh Gill v. S.Gurucharan Singh Tohra) has been cited to emphasise on the importance of secrecy while exercising the right to vote.

21. In Delhi Laws Act, the general authority of the legislature to delegate fell for consideration and the Supreme Court concluded the discussion on such aspect by observing that the legislature must normally discharge its primary legislative function itself and not through others. It was also held that certain duties could be entrusted to an outside agency, but the relevant agency had to act as a subordinate authority and not as a parallel legislature. The Court observed that delegation should not cross the line beyond which it would amount to "abdication and self-effacement."

22. In A.N.Parasuraman, the Supreme Court held that it was permissible to leave to the delegated authority only the task of implementing the object of a statute upon adequate guidelines being laid down for the exercise of the power.

23. In A.C.Jose, the Supreme Court noticed the special powers conferred by the Constitution to the Election Commission under Article 324 thereof. The Court laid down four rules in the context of the special authority conferred on the Election Commission, such Commission's primacy in conducting elections and the supreme authority of the Parliament to make laws. Paragraph 25 of the report captures the legal position:

"25. To sum up, therefore, the legal and constitutional position is 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, and

(d) where a particular direction by the Commission is submitted to the Government for approval, as required by the Rules, it is not open to the Commission to go ahead with implementation of it at its own sweet will even if the approval of the Government is not given."

24. In *S.Raghubir Singh Gill*, the Supreme Court held that "secrecy of ballot is a keystone in the arch of constitutional democracy" and "Free and fair elections are the mainspring of a healthy democratic life ...". The Court went on to say that "If free and fair election is the life-blood of constitutional democracy and if secrecy of ballot was ensured to achieve the larger public purpose ... both must be complementary to each other and co-exist or one must yield to the other to serve the larger public interest."

25. The Election Commission refers to the primacy of its position qua elections as recognised in Article 324 of the Constitution. The Commission acknowledges the supremacy of the Parliament in making laws as recognised in Article 327 of the Constitution, but asserts that such laws have to be subject to the authority conferred to the Election Commission under Article 324 of the Constitution. According to the Election Commission, when laws are made by the Parliament and rules are framed thereunder, the provisions of the statute and the rules govern the matters they cover; but on aspects not covered by any act of the Parliament or any rules framed under any statute, it is completely within the authority of the Election Commission to decide on the procedure and the course of action to ensure free and fair elections and facilitating every citizen to vote.

26. The Election Commission refers to the celebrated judgment reported at (1978) 1 SCC 405 (*Mohinder Singh Gill v. The Chief Election Commissioner*). The Constitution Bench noticed that there could be areas not covered by express legislation, where the Commission would have free rein, but

subject to the norms of fairness and lack of arbitrariness, since "Unchecked power is alien to our system." Paragraph 39 of the report encapsulates the essence of the discussion on such aspect:

"39. Even so, situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it is that the Constitution has made comprehensive provision in Article 324 to take care of surprise situations. That power itself has to be exercised, not mindlessly nor mala fide, not arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation. More is not necessary to specify; less is insufficient to leave unsaid. Article 324, in our view, operates in areas left unoccupied by legislation and the words "superintendence, direction and control, as well as 'conduct of all elections', are the broadest terms". Myriad maybes, too mystic to be precisely presaged, may call for prompt action to reach the goal of free and fair election. It has been argued that this will create a constitutional despot beyond the pale of accountability; a Frankenstein's monster who may manipulate the system into elected despotism – instances of such phenomena are the tears of history. To that the retort may be that the judicial branch, at the appropriate stage, with the potency of its benignant power and within the leading strings of legal guidelines, can call the bluff, quash the action and bring order into the process. Whether we make a triumph or travesty of democracy depends on the man as much as on the Great National Parchment. Secondly, when a high functionary like the Commissioner is vested with wide powers the law expects him to act fairly and legally. Article 324 is geared to the accomplishment of free and fair elections expeditiously. Moreover, as held in *Virendra v. State of Punjab*, AIR 1957 SC 896, and *Harishankar Bagla v. State of M.P.*, AIR 1954 SC 465, discretion vested in a high functionary may be reasonably trusted to be used properly, not perversely. If it is misused, certainly the Court has power to strike down the act. This is well established and does not need further case law confirmation. Moreover, it is useful to remember the warning of Chandrachud, J.:

"But the electorate lives in the hope that a sacred power will not so flagrantly be

abused and the moving finger of history warns of the consequences that inevitably flow when absolute power has corrupted absolutely. The fear of perversion is no test of power."

27. The Election Commission refers, first, to Part III of the 1961 Rules and the persons entitled to vote by post indicated in Rule 18(a)(v) that incorporated the corresponding amendment that was incorporated in 2019 to include a reference to Section 60(c) of the Act of 1951 and the absentee voters provided for therein. The Commission places almost the entirety of Part III-A of the 1961 Rules introduced in 1999 and substantially amended in 2019 and 2020. The Commission says that Rule 27-C provides the manner in which a notified elector who wishes to vote by post shall apply therefor, Rule 27-D indicates the form of the ballot paper for postal ballot, Rule 27-E specifies the manner of issuance of the ballot paper, Rule 27-F indicates the recording of the vote by postal ballot and Rule 27-I provides for the return of the ballot paper. The Commission says that the other provisions in Part III-A of the 1961 Rules pertain to assistance to illiterate or infirm electors and incidental matters. The Commission reasons that if the most rudimentary right in a democratic system is the right to elect the government at the immediate local level, at the State level and at the national level, the mandate of the Election Commission is to ensure maximum participation in the process of election and the conduct of the elections in a free and fair manner. In respect of direct elections, the Election Commission conducts the Assembly and Parliamentary elections and the entire activity of such Commission is geared to deliver the primary object of the right to vote as recognised in Section 62 of the Act of 1951 to every citizen entitled thereto.

28. As to the function of the Election Commission under Section 60(c) of the Act of 1951, it is submitted that the Election Commission has only the authority to choose a smaller section from a larger class indicated in the rules framed by the Central Government and this has to be done in consultation only with the Central Government, since Article 327 of the Constitution subjects the Election Commission to the authority of the Parliament.

29. The Commission says that its guidelines pertaining to voting by those affected by Covid-19, citizens above the age of 80 years, persons with disability and personnel engaged in essential services are all in conformity with the rules laid down in Part III-A of the 1961 Rules. The Commission also indicates that even though it was under no obligation to consult

the State Government as to which of the personnel should be regarded as belonging to essential services for the purpose of the ensuing Assembly elections, the Commission did seek the State Government's opinion and the State Government declined to express any views, whereupon the Commission was constrained to exercise its discretion to include personnel belonging to a host of services ranging from railwaymen to media persons authorised by the Commission as personnel rendering essential services.

30. The Commission refers to Section 60(c) of the Act of 1951 and maintains that it is only an enabling provision that permits the Commission to choose a coherent group from a larger class, where the larger class has been specified in the rules formulated by the Central Government. On the issue of perceived arbitrariness on its part to choose certain classes of persons from a larger body of persons classified by the Central Government, the Commission submits that the discretion is conferred under the statute and such discretion must be seen in the context of the primacy that the Commission enjoys in the conduct of elections. The Commission refers to Section 13-CC of the Act of 1950 that recognises Central and State Government officials to be deputed to the Commission and such officials being regarded as officials of the Commission. The corresponding provision in Section 28-A of the Act of 1951 is also placed.

31. The Commission says that its guidelines pertaining to the classes of voters complained of by the petitioner include the provision for video-graphing the filling up of the postal ballot, the presence of representatives of political parties and the presence of election personnel to ensure the free exercise of franchise. The Commission refers to the bar under Article 329 of the Constitution and submits that the fact that it may be possible to misuse or abuse the process of voting by postal ballot may not be good ground to challenge the procedure, though the specific acts of abuse or misuse may be cited as grounds under Section 100 of the Act of 1951 to challenge the election of a particular candidate.

32. In the context of voting by machines as recognised in Section 61-A of the Act of 1951, the Commission refers to a Division Bench judgment of this Court reported at 2001 Writ L.R. 758 (AIADMK v. The Chief Election Commissioner) and submits that the observations therein would hold good in the present case. Paragraphs 40 and 41 of the report have been relied upon to demonstrate that the expressions "in such manner as may be prescribed" and "such constituency or constituencies" in Section 61-A of the Act of 1951 were not seen to amount to arbitrary or unbridled power being conferred on the Election Commission in the use of voting machines.

33. The Commission refers to Article 73 of the Constitution read with Article 327 thereof to suggest that the word "Government" in Section 60(c) of the Act of 1951 must only imply the Central Government and no other.

34. The Union seeks to put in perspective the role of the Election Commission as envisaged in Part XV of the Constitution covering Articles 324 to 329. The Act of 1950 being primarily for the preparation of electoral rolls and the Act of 1951 being for the conduct of the elections by the Commission, the Union maintains that the constitutional provisions read with the two applicable statutes provide a complete code in respect of the relevant elections and the Union does not perceive the Commission having transgressed the bounds of its authority.

35. The Union refers to the circumstances that led to the 1999 amendment to the Act of 1951 being introduced. The Statement of Objects and Reasons accompanying the Bill introduced in the Parliament in 1999 is placed to point out that the acts of terrorism in the then State of Jammu and Kashmir had resulted in a large number of persons originating from that State moving out therefrom and not being able to exercise their right to vote. The Union says that the Bill provided not only for persons from such northern-most State who had left the place of their origin, but also covered other migrant citizens.

36. The Union points out that Section 60 of the Act of 1951, in its original form, pertained only to, loosely speaking, members of the armed forces and those suffering from preventive detention; the other classes were included pursuant to the amendment effected in 2003 on the basis of the Bill introduced in the Parliament in 1999. The Union submits that through the amendment of the 1961 Rules in 1999 and 2000, other classes of persons have been brought within the fold of Section 60 of the Act of 1951, primarily to ensure that no person entitled to vote lost such basic right in participating in the democratic system. Towards such end, the Union submits, persons who may not be within their constituencies on the date of voting, whether by reason of their service or vocation or because of their inability, were afforded a chance to participate in the democratic exercise.

37. The Union has placed copiously from the amended provisions of the 1951 statute, the 1961 Rules and the provisions that existed prior to 2003 to submit that the changes were necessary in larger public interest and, considering the exalted position of the Election Commission, a degree of autonomy had to be conferred on the Commission within the legal parameters delineated by the Parliament.

38. The Union maintains that in view of Entry 72 of List I of the Seventh Schedule to the Constitution including Election Commission, the word "Government" in Section 60(c) of the Act of 1951 has to be seen to only be the Central Government. On behalf of the Union Entry 37 in List II of the same Schedule is read to indicate that even pertaining to elections to legislatures of the State, the State's authority to enact laws is subject to the provisions of any law made by the Parliament. As such, the Union claims that unless the Act of 1951 specifies the State Government wherever the relevant provision intends it to be such government, all other references to government in such enactment must imply the Central Government.

39. The Union contends that in the light of the wide authority conferred on the Election Commission by Article 324 of the Constitution, the extent of delegation envisaged by Section 60(c) of the Act of 1951 cannot be perceived to be excessive. In such context, the Union has referred to a judgment reported at 1952 SCR 218 (N.P.Ponnuswami v. Returning Officer). At paragraph 10 of the report, the Supreme Court examined the scheme of Part XV of the Constitution and the Act of 1951 and recognised that Part XV of the Constitution was a code in itself:

"10. I think that a brief examination of the scheme of Part XV of the Constitution and the Representation of the People Act, 1951, will show that the construction I have suggested is the correct one. Broadly speaking, before an election machinery can be brought into operation, there are three requisites which require to be attended to, namely, (1) there should be a set of laws and rules making provisions with respect to all matters relating to, or in connection with, elections, and it should be decided as to how these laws and rules are to be made; (2) there should be an executive charged with the duty of securing the due conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections. Articles 327 and 328 deal with the first of these requisites, Article 324 with the second and Article 329 with the third requisite. The other two articles in Part XV, viz, Articles 325 and 326 deal with two matters of principle to which the Constitution-framers have attached much importance. They are: (1) prohibition against discrimination in the preparation of, or eligibility for inclusion in, the electoral rolls, on grounds of religion, race, caste, sex or any of them; and (2) adult suffrage. Part XV of the Constitution is really a code in itself providing

the entire ground-work for enacting appropriate laws and setting up suitable machinery for the conduct of elections."

40. The Union has also referred to the judgment in A.C. Jose (supra), relied upon earlier by the petitioner, to indicate the powers of the Election Commission as noticed therein.

41. Another judgment, reported at (2011) 9 SCC 1 (K.T. Plantation Private Limited v. State of Karnataka), has been brought by the Union for the proposition that whether any particular legislation suffered from excessive delegation must be determined by the Court "having regard to the subject-matter, the scheme, the provisions of the statute including its Preamble and the facts and circumstances and the background on which the statute is enacted." (Para 60)

42. On the issue of excessive delegation in matters pertaining to elections, the Union has referred to a judgment reported at (1970) 2 SCC 567 (Shri Shiv Kirpal Singh v. Shri V.V. Giri). At paragraph 222 of the report, the Supreme Court observed that a provision requiring Rules pertaining to elections to be made after consulting the Election Commission would not amount to excessive delegation as long as the Rules are needed for carrying out the purposes of the Act. The Court went on to add that the Parliament has the power of altering the Rules by amending the Act itself in case it disapproves of any of the Rules and any Rule which is shown to have been made in contravention of the provisions of the Act or for any reason other than to give effect to the purposes of the Act would be declared void by the Court.

43. The Union refers to the discussion in Parliament before the 2003 amendment was incorporated. Ironically, according to the Union, the same political party which is the petitioner here vociferously supported the incorporation of the amendment. The Union also refers copiously to Part III-A of the 1961 Rules, particularly the amendments brought about in 2019 and 2020, including Forms 12-C and 12-D introduced thereby.

44. The Union places the principal impugned notification of February 2, 2021 issued by the Election Commission. According to the Union, each of the guidelines and the subject-matter thereof correspond to the various provisions in Part III-A of the 1961 Rules, particularly Rules 27-C, 27-D and 27-E thereof, including the provisos thereto.

45. Finally, the Union says that postal ballot or voting by post has to be seen in the larger sense and the contemporaneous

modes of communication. The Union submits that postal ballot can no longer be regarded as that ballot which would be entrusted by the Election Commission to the Department of Posts to be delivered to a voter, for such voter to indicate his choice of candidate therein and return the postal ballot in identical mode to the Election Commission via the Department of Posts. The Union says that there is no harm in a postal ballot being physically delivered by personnel engaged by the Election Commission and the postal ballot being collected in similar manner as long as the fairness of the system is ensured.

46. The Union concedes that there may be problems, particularly in the context of where and in what conditions the voter resides to follow the procedure that has been determined by the Election Commission, but such procedure cannot be seen to be arbitrary or objectionable. At any rate, the designing of such procedure by the Election Commission cannot be seen to be without jurisdiction or the permissibility thereof evidencing excessive delegation of authority, according to the Union.

47. Though the challenge to the vires of Section 60(c) of the Act of 1951 does not appear to be on firm grounds, the overall challenge in the petition cannot be brushed aside, since it has been brought by a party that has played a considerable role in nurturing and guiding this preeminent State. The petitioning party must be seen to be aware of the psyche of the voter, the difficulties that the Election Commission may face in implementing the manner of voting through postal ballot, as indicated in the impugned guidelines, and the endeavour here has to be respected as an attempt to ensure a free and fair election, where the secrecy of exercising the right of franchise is not compromised by the complications in the manner of exercise of such right by postal ballot. The petitioner appears to be concerned that the implementation of the new sets of guidelines may not be in tune with the geography of the State or its climate. The petitioner must be seen to be sufficiently aware of the local logistics for its concerns to be addressed with the degree of seriousness that they deserve.

48. That said, it must be confessed that even the nature of the petitioner's attack on the validity of Section 60(c) of the Act of 1951 falls way short of the exalted tests that a person questioning the propriety of a statutory provision must meet. Apart from a ground of excessive delegation urged in course of such challenge, there is no credible suggestion that Section 60 (c) of the Act of 1951 is in derogation of any constitutional provision or principle or even against the grain of the statute which has made room for it. There is no credible suggestion that the impugned provision falls foul of Article 14 of the Constitution in any manner or form.

49. As to excessive delegation, the delegation in the present case is not as is usually found in a statute where the legislature empowers the executive or a branch of the executive to devise measures to implement the purpose of the statute. The discussion here pertains to a high constitutional authority as the Election Commission and the venerable position conferred to such Commission by the constitutional provisions in Part XV of the *suprema lex*. The expressions "superintendence, direction and control" as used in Article 324 of the Constitution are of the widest amplitude and the fullest latitude has to be seen to be granted thereby to the Commission in the matter of conducting such of the elections as have been entrusted to it. The authority has to be seen to be plenary, in the sense that within its domain the Election Commission has primacy and the Parliament can only enact such laws as would aid in its functioning as envisaged in the Constitution. There is no doubt that the Election Commission has to abide by the laws made by the Parliament; but the laws made by the Parliament can only be such as may facilitate the conduct of the elections by the Election Commission in the milieu of the expansive domain carved out for the Commission in the wide words of Article 324 of the Constitution.

50. Excessive delegation would imply a situation where the authority of the legislature or the delegating authority is passed on to some other body to a certain extent. The issue of excessive delegation in respect of Section 60(c) of the Act of 1951 is confined to the choice by the Election Commission of some persons out of a class of persons indicated by the Central Government by formulating rules in such regard. The other aspect of excessive delegation may be the enabling power which has been given, so that the Election Commission may choose to the fullest of the limit as indicated in the rules or any part thereof.

51. The choice of senior citizens aged over 80 years may be seen in such context. The argument of the petitioner is that when the lower age limit of a senior citizen has been reduced from the erstwhile 80 years to 65 years by the Central Government amending the 1961 Rules, the Election Commission has no business to go by the class of senior citizens in the pre-amended provision and extend only to them the choice of voting by postal ballot. The fallacy in the argument is that the clear words of Section 60(c) of the Act of 1951 permit any person to be chosen by the Election Commission from a class of persons indicated in the Rules to be conferred the privilege of voting by postal ballot as long as the choice is preceded by a consultation with the Central Government and followed by a notification in such regard being published. If the statute

confers the right to indicate classes of persons to the executive and the executive allows the Election Commission to choose sub-classes in consultation with the executive, no case of excessive delegation is made out. At any rate, such a choice cannot be seen to be arbitrary as the logistics may not permit the full complement of the class to be immediately accommodated.

52. Though the ground of excessive delegation is also urged by the petitioner in the matter pertaining to the guidelines issued by the Election Commission, the challenge on such count appears to be one of illegality or impropriety, rather than of excessive delegation. Even then, when the functioning of the Election Commission is assailed on the lesser grounds of illegality or impropriety, it is incumbent on the petitioner to demonstrate that the impugned guidelines are at variance with the statutory rules that govern the field or in excess of the general authority enjoyed by the Election Commission in the matter of conducting elections. The only matters of substance that the petitioner has been able to urge pertain to the word "notified" used in Section 60(c) of the Act of 1951 and the perceived failure of the Election Commission in such regard together with the use of the word "postal" implying that the postal ballots would necessarily have to be sent by post and received back by post and in no other manner. On both counts, covering the challenge founded on the perceived failure of the Election Commission to notify the persons selected for special treatment and the apparent departure by the Election Commission from the mode of posting the postal ballot as envisaged in the Rules, the petitioner relies on the old adage: that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all.

53. Notwithstanding the indistinct murmurs to the contrary attempted by the Union, the word "notified" in Section 60(c) of the Act of 1951 must be seen to have been used in the context of what the word "notify" connotes in Indian jurisprudence. Whenever a statute commands a certain thing to be notified, it usually implies that it would be notified by publication and that such publication would be made in the Official Gazette. One of the initial planks of the petitioner's argument was that the impugned guidelines which have been issued by the Election Commission are without basis, since the classes of persons from among the larger sets may not have been notified in the first place, if at all there was any consultation with the Central Government in such regard, as there was no consultation with the State Government as the petitioner wishes the provision to imply. On facts, it must be recorded straightaway that the four classes of persons included as absentee voters and entitled to choose to exercise their franchise by postal ballot - senior citizens above 80 years, persons with disabilities, Covid-

affected persons and personnel engaged in specific essential services - have been duly notified upon the notifications being completed by corresponding publications being made in the Official Gazette of the State. The matter pertaining to electors above the age of 80 years and electors with physical disability was published in the Tamil Nadu Government Gazette on February 27, 2021. The matter covering Covid-19 suspects or affected persons has been published in the same Gazette on the same day and the matter pertaining to personnel from certain essential services has been published in the same Gazette on February 28, 2021. Copies of all four publications have been presented in Court.

54. There can also be no doubt that the smaller classes of persons chosen from the larger classes in some cases was upon consultation with the Central Government, as the Central Government has not only not expressed any reservation on such count, but has also insisted that it was the appropriate government to be consulted in such regard. Even then, it is evident that while deciding which of the essential services should be included for the privileged treatment, the Election Commission sought the views of the State, but the State refrained from giving any.

55. A strange argument has been made by the petitioner to suggest that the words used in Section 60(c) of the Act of 1951 have now been twisted out of context to imply much more than what the amendment introduced in 1999 intended the provision to mean. It is an elementary rule in statutory interpretation: that where the plain words of a provision, when read in their ordinary and natural sense, admit of a particular interpretation, that is the end of the matter. Standing in the year 2021, it matters little as to what may have impelled the 1999 Bill that was introduced to amend the Act of 1951 as long as the ordinary meaning of the words permit the measures now taken. The historical basis for the introduction of a statutory provision has no impact in its subsequent implementation and interpretation as long as the subsequent interpretation does not militate with the language of the provision, the purpose of the statute and the object that the impugned measures seek to achieve. It may also be observed that clause (c) is eminently compatible with the company that it keeps in Section 60 of the Act of 1951 without betraying any sign of incongruity.

56. It must be acknowledged that all that the Election Commission has done here is to be inclusive and allow certain classes of persons who would have been excluded from exercising their franchise the right to use the postal ballot and participate in the celebration of the festival of democracy. Wiser minds have seen the secrecy of the ballot and the conduct

of fair elections to be complementary in the judgment in S.Raghubir Singh Gill. One may add, with humility, that if the process is made inclusive without compromising on either the secrecy of the ballot or the fairness in the conduct of elections, it would be a greater cause to celebrate and compliment the conducting body.

57. Rule 27-A, introduced in 1999 as the definitions provision in the new Part III-A of the 1961 Rules, as now modified, defines "absentee voter" as follows:

"27-A. Definitions.- In this Part, unless the context otherwise requires, -

...

(aa) "absentee voter" means a person belonging to such class of persons as may be notified, under clause (c) of Section 60 of the Act, and who is employed in essential services as mentioned in the said notification, and includes an elector belonging to the class of senior citizen or persons with disability or the COVID 19 suspect or affected persons;"

58. The four larger sets of persons, two of which have been completely chosen by the Election Commission and the two others in part, are clearly indicated in the Rules brought about by the Central Government under the authority conferred on it by Section 169 of the Act of 1951. It may also be noticed that unlike the everyday rule-making provision in a statute that gives authority to an appropriate government to make the rules, Section 169 of the Act of 1951 ordains that the Central Government make the rules "after consulting the Election Commission ...".

59. In a sense, the simultaneous argument on behalf of the petitioner that there has been excessive delegation by the Central Government in favour of the Election Commission qua the Rules of 1961 and that the Election Commission has acted in excess of its authority under the said Rules, appears to be self-defeating. If there is excessive delegation in favour of the Election Commission, then there may be little room to question the Commission's authority. On the other hand, if the Election Commission is seen to be acting in excess of its brief qua the said Rules, no case of excessive delegation would be made out. In any event, in the backdrop of the rule-making provision in Section 169 of the Act of 1951 mandating consultation with the Election Commission, the Rules of 1961, particularly the amendments brought about in 2019 and 2020, do not amount to excessive delegation. Also, as noticed above, the impugned guidelines appear to be in consonance with the Rules of 1961.

60. Equally, there does not seem to be any arbitrariness in the classification of the persons permitted by the Rules of 1961 to cast their vote by postal ballot. The consideration appears to have been as to who may not be able to physically attend a polling booth to cast her vote. If such is the consideration, there is no arbitrariness in the classes of persons enumerated by the amendments of 2019 and 2020, particularly, as the object appears to be to afford such classes of persons their basic right to participate in the democratic process.

61. As regards the contention that the words "postal ballot" imply that the postal paper should be served only through the Department of Posts, we find that the expression "postal ballot" is not defined either in the Act of 1951 or the 1961 Rules. In the absence of a statutory definition that limits the ambit of the expression to service through the Department of Posts, we are inclined to accept the contention of the Union that it should be construed expansively so as to include personal service of the postal ballot paper.

62. Finally, the petitioner's contention that the Election Commission has no jurisdiction to issue guidelines has to be discarded in the light of the plenary authority that may be seen to have been conferred on such Commission by Article 324 of the Constitution. Further, in A.C. Jose, the Supreme Court recognised the authority of the Election Commission to pass any orders in respect of the conduct of elections when there is no parliamentary legislation or rule made under the said legislation. Such authority was also seen when there was no express provision made in the rules for the Commission "to supplement ... the law ... in the matter of superintendence, direction and control as provided by Article 324 ...". In addition, the judgment recognised the plenary powers of the Commission "to give any direction in respect of the conduct of election ...".

63. The only area which is of some concern is the manner in which some personnel from certain areas have been notified as belonging to the essential services without several others being included. To be fair to the Commission, it could not elicit any views from the State Government despite invitation. The submission of the Commission in such regard is that it considered all those who applied to it to be regarded as part of the essential services.

64. If there is any criticism which the Commission deserves in the present context, it may be in its constricted approach in covering the entire gamut of essential services. There are many who go about their normal duties, whether on an election day or

a holiday, so that the rest of the population can exercise their rights or enjoy their freedom. Such people also serve who only stand and wait, and it may do well for the Election Commission to include the larger section of personnel involved in essential services to allow them the right to vote when they are away from their constituencies in discharge of their duties as part of the essential services.

65. There is no merit to the petitioner's challenge, whether to the validity of Section 60(c) of the Act of 1951 or to the impugned guidelines issued by the Election Commission or, generally, to how the Commission has gone about in its endeavour to conduct the ensuing assembly elections in this State. That is not to suggest that the challenge here was completely without basis, since the experience of the procedure introduced by the Election Commission will reveal how such process may be more refined and attuned to the geography and the climate of the place.

66. W.P.No.20027 of 2020 is dismissed. Consequently, W.M.P.Nos.24702, 24704 and 24706 of 2020 are closed. There will be no order as to costs.

67. The Court expresses its gratitude to the erudite assistance all round and the impeccable dignity maintained in course of a difficult hearing on the hybrid mode on matters involving some complexity pertaining to the most basic right exercised in a democracy.

Sd/-

Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

sasi

To:

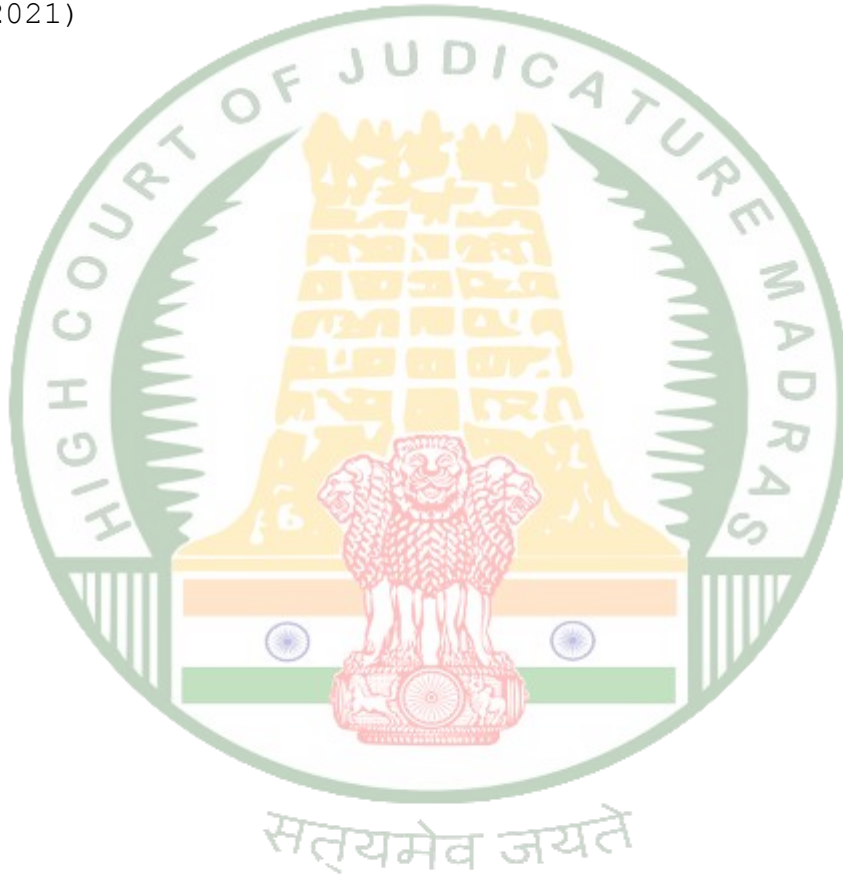
- 1 The Secretary to Government
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Ministry of Law and Justice
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- 2 The Chief Election Commissioner
Election Commission of India
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W.P.No.20027 of 2020

GJ(CO)
CB(01/06/2021)



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