

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPLICATION NO.7 OF 2021
IN
ELECTION PETITION NO.1 OF 2019**

Dr. Rajendra Babanrao Bhosale	]	
The Returning Officer	]	
42 (SC) - Solapur Parliamentary	]	
Constituency, Solapur.	]	Applicant

IN THE MATTER BETWEEN:

Kirtikumar Dattatray Shivsharan	]	
R/o.41/187, New Budhwar Peth,	]	
Solapur.	]	Petitioner
Versus		

- | | | |
|--------------------------------------|---|--------------------|
| 1. The Election Commission of India |] | |
| Its office at Nirvachan Bhawan, |] | |
| Ashoka Bhawan, New Delhi. |] | |
| | | |
| 2. Dr. Rajendra Babanrao Bhosale |] | |
| The Returning Officer, 42 (SC) - |] | |
| Solapur Parliamentary |] | |
| Constituency, Solapur. |] | |
| | | |
| 3. Shri Sha. Bra. Dr. Jai Sidheshwar |] | |
| Shivachary Mahaswamiji, |] | |
| R/o. Gaudgaon, Taluka Akkalkot, |] | |
| District Solapur. |] | Respondents |

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Ms. Drishti Shah i/b Ms. Rekha Rajgopal, for Applicant-Original Respondents No.1 and 2.

Mr. Prakash Ambedkar a/w Mr. Sandeep Rankhambe, for Petitioner.

Mr. Abhijit Patil, for Respondent No.3.

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(corrected vide order dated 31.03.2023)

CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON : 17th MARCH, 2023.
PRONOUNCED ON : 29th March, 2023.

ORDER:

1. By this application, the applicant-respondent No.2 in Election Petition No.1 of 2019 has prayed for deleting his name from the array of the respondents in the cause title of the election petition in view of the provisions of section 82 r/w section 86 (4) of the Representation of the People Act, 1951.

2. A few facts necessary for disposal of this application can be summarized as follows.

3. Petitioner - Kirtikumar Dattatray Shivsharan has filed an election petition on various grounds, *inter alia*, seeking a declaration that election of respondent No.3 - Shri. Sha. Bra. Dr. Jai Sidheshwar Shivachary Mahaswamiji from 42- (SC) Solapur as null and void. It is, *inter alia*, prayed for declaring the certificate issued in favour of respondent No.3 - Shri. Sha. Bra. Dr. Jai Sidheshwar Shivachary Mahaswamiji from the said constituency as null and void.

4. I heard Ms. Drishti Shah, learned Counsel for the applicant. She, *inter alia*, submits to delete the name of the respondent No.1- The Election Commission of India from the array of the respondent as, her arguments would be common in respect of both the respondents.

5. Ms. Shah invited my attention to sections 82 and 86 of the Representation of the People Act, 1951 which read thus;

"82. Parties to the petition.- A petitioner shall join as respondents to his petition-

(a)where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and

(b)any other candidate against whom allegations of any corrupt practice are made in the petition.

"86. Trial of election petitions.- (1) The High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section 117.

(2).....

(3).....

(4) Any candidate not already a respondent shall, upon application made by him to the High Court within fourteen days from the date of commencement of the trial and subject to any order as to security for costs which may be made by the High Court, be entitled to be joined as a respondent".

6. It is apparent from the aforesaid provisions that the parties to the petition can only be contesting candidates against whom relief has been sought for declaration that the election of and/or any of the candidates is void.

7. Learned Counsel has, therefore, placed reliance on following decisions;

(a) Jyoti Basu and others Vs. Debi Ghosal and others, AIR 1982 Supreme Court 983,

(b) B. Sundara Rami Reddy Vs. Election Commission of India and others, 1991 Supp (2) Supreme Court Cases, 624;

(c) Michael B. Fernandes V. C.K. Jaffar Sharief and others, AIR 2002 Supreme Court 1041;

8. Learned Counsel for the applicant would argue that the applicant who was a Returning Officer can, at the most, be summoned as a witness. Thus, according to the learned Counsel for the applicant, the applicant is neither a necessary nor a proper party to the election petition. She further submits that even otherwise there are no allegations against the officers of the election commission.

9. The respondent - Kirtikumar Dattatray Shivsharan in his reply states that the applicant has not complied with the provisions of the Act and Rules as well as the directions given by the respondent No.1 from time to time. It is stated in the reply that the applicant has committed corrupt practices by helping the returned candidate respondent No.3, inasmuch as, affidavit of the applicant reflects that he had acted *mala fide* at the time of counting of votes which amounts to corrupt practice. The reply further states that the applicant in his affidavit has unequivocally admitted about differences of six votes due to technical mistakes as well as 141 votes between the polled votes and counted votes. It is further stated that the applicant has failed to perform his duty as per sub clause 15.30 of the hand book.

10. I heard Mr. Ambedkar, learned Counsel for the petitioner extensively. Mr. Ambedkar has invited my attention to section 24 of the Representation of the People Act, which speaks about general duty of the Returning Officer as well as other orders to be made by this Court in view of section 99 of the said Act. Section 98 and section 99 (ii) (b) (a) read thus;

"98.Decision of [the High Court].-At the conclusion of the trial of an election petition [the High Court] shall make an order-

(a)dismissing the election petition; or
(b)declaring the election of [all or any of the returned candidates] to be void; or

(c)declaring the election of [all or any of the returned candidates] to be void and the petitioner or any other candidate to have been duly elected.

(d)....

99. Other orders to be made by [the High Court].-(1).....

(a).....

(i).....

(ii)the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice; and]

(b)fixing the total amount of cost payable, and specifying the persons by and to whom costs shall be paid:

Provided that [a person who is not a party to the petition shall not be named] in the order under sub-clause (ii) of clause (a) unless

(a) he has been given notice to appear before [the High Court] and to show cause why he should not be so named;

11. Mr. Ambedkar vehemently argued that the applicant ought to have referred the matter to the election commission. He has placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Mohinder Singh Gill and another Vs. The Chief Election Commissioner, New Delhi and others, AIR 1978 Supreme Court 851**. The learned Counsel has also placed reliance on the judgment of the Hon'ble Supreme Court in the case of **A.C. Jose Vs. Sivan Pillai and others, (1984) 2 Supreme Court Cases 656** by contending that for the first time the legitimacy of user of electronic voting machine in an election came in question. The Counsel would argue that the Hon'ble Supreme Court held that in the existing structure of the Act and Rules, there is no provision for using electronic voting machine without necessary amendment and such user was

held to be bad in law. The learned Counsel has tried to distinguish the ratio laid down in the case of **Jyoti Basu** (supra) by emphasizing on the words "as far as may be" as stated therein, which are contrary to section 87 of the Representation of the People Act which states "as nearly as may be". Section 87 reads thus;

87. Procedure before the High Court.- (1)

Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (5 of 1908) to the trial of suits:

Provided that the High Court shall have the discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings.

(2) The provisions of the Indian Evidence Act, 1872 (1 of 1972), shall, subject to the provisions of this Act, be deemed to apply in all respects to the trial of an election petition.

12. While buttressing his point in respect of the election Commission of India and Returning Officer making necessary parties to the election petition, the Counsel has invited my attention to paragraphs 52, 55, 83 and 85 of the judgment in case of **Mohinder Singh** (supra), which read thus;

"52. Ridge v. Baldwin(1964) AC 40: is a leading case which restored light to an area 'benighted by the narrow conceptualism of the previous decade', to borrow Professor Clark's expression. (Natural Justice Substance and Shadow-'Public Law' Journal- Spring 1975). Good administration demands fairplay in action and this simple desideratum is the fount of natural justice. We have already said that the classification of functions as 'judicial' or 'administrative' is a stultifying shibboleth, discarded in India as in England. Today, in our jurisprudence, the advances made by natural justice far exceed old frontiers and if judicial creativity belights penumbral areas it is only for improving the quality of government by injecting fairplay into its wheels.

55. Normally, natural justice involves the irritating inconvenience for men in authority, of having to hear both sides since notice and opportunity are its very marrow. And this principle is so integral to good government, the onus is on him who urges exclusion to make out why. Lord Denning expressed the paramount policy consideration behind this rule of public law (while dealing with the nemo iudex aspect) with expressiveness.

"Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking 'the judge was biased'."

We may adapt it to the *audi alteram* situation by the altered statement:

"Justice must be felt to be just by the community if democratic legality is to animate the rule of law. And if the invisible audience sees a man's case disposed of unheard, a chorus of 'no-confidence' will be heard to say, 'that man had no chance to defend his stance'."

That is why Tuckor LJ in *Russell v. Duke of Norfolk* (1949) 1 All E.R. 109 (at 118 E) emphasised that 'whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case'. What is reasonable in given circumstances is 'in the domain of practicability; not formalised rigidity. Lord Upjohn in *Fernando* ((1967) 2 AC 337) observed that: 'while great urgency may rightly limit such opportunity timeously, perhaps severely, there can never be a denial of that opportunity if the principles of natural justice are applicable'. It is untenable heresy, in our view, to lockjaw the victim or act behind his back by tempting invocation of urgency, unless the clearest case of public injury flowing from the least delay is self-evident. Even in such cases a remedial hearing as soon as urgent action has been taken is the next best. Our

objection is not to circumscription dictated by circumstances, but to annihilation as an easy escape from a benignant, albeit inconvenient obligation. The procedural pre-condition of fair hearing, however minimal, even post-decisional, has relevance to administrative and judicial gentlemanliness. The Election Commission is an institution of central importance and enjoys far-reaching powers and the greater the power to affect others' right or liabilities the more necessary the need to hear.

83. We derive support for this approach from *Durga Mehta* (AIR 1954 SC 520). The Court there considered the same words, in the same sections, in the same Statue. Section 100 (2) (c) interpreted in that case re-incarnates as S. 100 (1) (d) (iv) later. Everything is identical. And Mukherjea, J. explained (at p. 524 of AIR)

"It is argued on behalf of the respondent that the expression 'non-compliance' as used in sub-section. (2)(c) would suggest the idea of not acting according to any rule or command and that the expression is not quite appropriate in describing a mere lack of qualification. This, we think, would be a narrow way of looking at the thing. When a person is incapable of being chosen as a member of a State Assembly under the provisions of the Constitution itself but has nevertheless been returned as such at an election, it can be said without impropriety that there has been non-compliance with the provisions of the Constitution materially affecting the result of the election. There is no material difference between 'non-compliance' and 'non-observance' or

"breach" and this item in clause (c) of sub-section. (2) may be taken as a residuary provision contemplating cases where there has been infraction of the provisions of the Constitution or of the Act but which have not been specifically enumerated in the other portions of the clause."

Lexical significations are not the last work in statutory construction. We hold that it is perfectly permissible for the Election Court to decide the question as one falling under Section 100 (1) (d) (iv). A presumatic view of the Act and Art. 324 helps discern 'an organic synthesis. Law sustains, not fails.

85. Section 98, which we have read earlier, contemplates three possibilities when an election petition is tried. Part VI of the Act deals with the complex of provisions calculated to resolve election disputes. A match past this Part discloses the need to file an election petition (S. 80) the jurisdiction to try which is vested in the High Court (80A). Regulatory of the further processes on presentation of a petition are Secs. 81 to 96. If a candidate whose return is challenged has a case invalidating the challenger's election he may set it up subject to the provision in Sec. 97. Then comes the finale in Sec. 98. The High Court has three options by way of conclusive determinations. It may (a) dismiss the petition (b) declare the election void; and (c) go further to declare the petitioner duly elected. Side-stepping certain species of orders that may be passed under S. 99 we have to explore the gamut of implied powers when the grant of power is wide and needs incidental exercises to execute the substantive power.

(Emphasis supplied)

13. Mr. Ambedkar would argue that in order to save election process as well as democracy, Courts are bound to ensure that Election Commission and Returning Officer are impleaded as parties to the petition. He further argued that it is only the Election Commission who can answer whether Government of India has sanctioned micro processor /micro controller/memory/encrypted code in the EVM machines. The Counsel would argue that the judgment in the case of **Jyoti Basu** (supra) is against the wishes of founding fathers of the Constitution. Election Commission wrongly declared the result of the election in view of the admission made in the affidavit by the applicant.

14. In rejoinder, Ms. Shah contends that the judgments cited on behalf of the petitioner are under writ jurisdiction and, therefore, cannot be made applicable to the election petition. In the case of **Jyoti Basu** (supra), **B. Sundara Rami Reddy** and **Michael B. Fernandes** (supra), the Hon'ble Supreme Court has unequivocally observed that right to elect or to be elected or disputes regarding election are neither fundamental rights nor common law rights but are confined to the provisions of the Act. The rules made therein and consequently, the rights and remedies are limited to

those provided by the statutory provisions. While dealing with questions of joinder of the parties referred to in Sections 82 and 86 (4) of the Act, it has been held that the contest of the Election Petition is designed to be confined to the candidates at the Election and all others are excluded. Thus, only those can be joined as respondents to Election Petition who are mentioned in Sections 82 and 86 (4) and none others.

15. The Hon'ble Supreme Court in case of **Jyoti Basu and others Vs. Debi Ghosal and others, AIR 1982 Supreme Court 983**, has elaborately discussed the scope of section 82 and 86 (4) of the Act which even has considered the provisions of Article 324 of the Constitution.

16. My attention is also drawn to paragraphs 11, 12 and 13 of the decision in the case of ***Jyoti Basu*** (supra) which read thus;

“11. The matter may be looked at from another angle. The Parliament has expressly provided that an opportunity should be given to a person who is not a candidate to show cause against being 'named' as one guilty of a corrupt practice. Parliament, however, has not thought fit to expressly provide for his being joined as a party to the election petition either by the election-petitioner or at the

instance of the very person against whom the allegations of a corrupt practice are made. The right given to the latter is limited to show cause against being 'named' and that right opens up for exercise when, at the end of the trial of the election petition notice is given to him to show cause why he should not be 'named'. The right does not extend to participation at all stages and in all matters, a right which he would have if he is joined as a party at the commencement. Conversely the election petitioner cannot by joining as a respondent a person who is not a candidate at the election subject him to a prolonged trial of an election petition with all its intricacies and ramifications. One may well imagine how mischievous minded persons may harass public personages like the Prime Minister of the country, the Chief Minister of a State or a political leader of a national dimension by impleading him as a party to election petitions, all the country over. All that would be necessary is a seemingly plausible allegation, casually or spitefully made, with but a facade of truth. Everyone is familiar with such allegations. To permit such a public personage to be impleaded as a party to an election petition on the basis of a mere allegation, without even prime facie proof, an allegation which may ultimately be found to be unfounded, can cause needless vexation to such personage and prevent him from the effective discharge of his public duties. It would be against the public interest to do so. The ultimate award of costs would be no panacea in such cases, since the public mischief cannot be repaired. That is why public Policy and legislative wisdom both seem to point to an interpretation of the provisions of the Representation of the People Act which does not permit the joining, as parties, of persons other

than those mentioned in Sections 82 and 86 (4). It is not as if a person guilty of a corrupt practice can get away with it. Where at the concluding stage of the trial of an election petition, after evidence has been given, the Court finds that there is sufficient material to hold a person guilty of a corrupt practice, the Court may then issue a notice to him to show cause under Section 99 and proceed with further action. In our view the legislative provision contained in Section 99 which enables the Court, towards the end of the trial of an election petition, to issue a notice to a person not a party to the proceeding to show cause why he should not be 'named' is sufficient clarification of the legislative intent that such person may not be permitted to be joined as a party to the election petition.

12. There is yet another viewpoint. When in an election petition in addition to the declaration that the election of the returned candidate is void a further declaration is sought that any candidate other than the returned candidate has been duly elected, Section 97 enables the returned candidate or any other party to 'recriminate' i.e. to give evidence to prove that the election of such candidate would have been void if he had been a returned candidate and a petition had been presented to question his election. If a person who is not a candidate but against whom allegations of any corrupt practice are made is joined as a party to the petition then, by virtue of his position as a party, he would also be entitled to 'recriminate' under sec. 97. Surely such a construction of the statute would throw the doors of an election petition wide open and convert the petition into a 'free for all' fight. A necessary consequence would be an unending,

disorderly election dispute with no hope of achieving the goal contemplated by Sec. 86(6) of the Act that the trial of the election petition should be concluded in six months. It is just as well to remember that 'corrupt practice' as at present defined by Sec. 123 of the Act is not confined to the giving of a bribe but extends to the taking of a bribe too and, therefore, the number of persons who may be alleged to be guilty of a corrupt practice may indeed be very large, with the consequence that all of them may possibly be joined as respondents.

13. In view of the foregoing discussion we are of the opinion that no one may be joined as a party to an election petition otherwise than as provided by Sections 82 and 86(4) of the Act. It follows that a person who is not a candidate may not be joined as a respondent to the election petition. The appeal is therefore, allowed with costs and the names of the appellants and the seventh respondent in the appeal are directed to be struck out from the array of parties in the election petition. We may mention that in arriving at our conclusion we have also considered the following decisions cited before us: S.B. Adityan & Anr. v. S. Kandaswami & Ors., AIR 1958 Mad 171; Dwijendra Lal Sen Gupta v. Harekrishna Konar, AIR 1963 Cal 218; H.R. Gokhale v. Bharucha Noshir C.AIR 1969 Bom. 177 and S. Iqbal Singh v. S. Gurdas Singh Badal AIR 1973 Punj & Har 163 (FB)".

(Emphasis Supplied)

17. My attention is also drawn to the decision in the case of **B. Sundara Rami Reddy** (supra), relevant paragraphs of which read as under:

“3. After hearing learned counsel for the petitioner we do not find any merit in the petition. Section 82 of the Representation of the People Act, 1951 specifies the persons who are required to be joined as respondents to an election petition. Under this provision the returned candidate is a necessary party as a respondent and where relief for a declaration is claimed that the election petitioner, or any other candidate be duly elected, all the contesting candidates are necessary to be impleaded as respondents to the petition. No other person or authority except as aforesaid is required to be impleaded as a respondent to an election petition under the Act. The Election Commission of India is therefore not a necessary party to an election petition.

4. Learned Counsel for the petitioner urged that even if the Election Commission may not be a necessary party, it was a proper party since its orders have been challenged in the election petition. He further urged that since Civil Procedure Code, 1908 is applicable to trial of an election petition the concept of proper party is applicable to the trial of election petition. We find no merit in the contention. Section 87 of the Act lays down that subject to the provisions of the Act and any rules made thereunder; every election petition shall be tried by the High Court, as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure, 1908 to the trial of suits. Provisions of the Civil Procedure Code have thus been made applicable to the trial of an election petition to a limited extent as would appear from the expression “subject to the provisions of this Act”. Since Section 82 designates the persons who are to be joined as respondents to the petition, provisions of the Civil Procedure

Code, 1908 relating to the joinder of parties stands excluded. Under the Code even if a party is not necessary party, he is required to be joined as a party to a suit or proceedings if such person is a proper party, but the Representation of the People Act, 1951 does not provide for joinder of a proper party to an election petition. The concept of joining a proper party to an election petition is ruled out by the provisions of the Act. The concept of joinder of a proper party to a suit or proceeding underlying Order 1 of the Civil Procedure Code cannot be imported to the trial of election petition, in view of the express provisions of Sections 82 and 87 of the Act. The Act is a self-contained Code which does not contemplates joinder of a person or authority to an election petition on the ground of proper party. In *K. Venkateswara Rao v. Bekkam Narasinha Reddi*, AIR 1969 Supreme Court 872 this Court while discussing the application of Order 1 Rule 10 of the Civil Procedure Code to an election petition held that there could not be any addition of parties in the case of an election petition except under the provisions of sub-section (4) of Section 86 of the Act. Again in *Jyoti Basu V. Debi Ghosal*, (1982) 1 SCC 691 this Court held that the concept of 'proper party' is an must remain alien to an election dispute under the Representation of the People Act, 1951. Only those may be joined as respondents to an election petition who are mentioned in Section 82 and Section 86 (4) and no others. However, desirable and expedient it may appear to be, none else shall be joined as respondents".

18. The judgment in the case of Mohinder Singh **Mohinder Singh Gill and another Vs. The Chief Election Commissioner, New Delhi and others, AIR 1978 Supreme Court 851** is altogether on different aspect and the said ratio cannot be made applicable in the present set of facts since it was not a ruling under the Election Petition. Relevant paragraphs read thus;

“14. The wide canvas so spread need not engage us sensitively, since such diffusion may weaken concentration on the few essential points concerned in this case. One such aspect relates to repoll. Adjournment of the poll at any polling station in certain emergencies is sanctioned by section 57 and fresh poll in specified vitiating contingencies is authorised by section 58. The rules run into more particulars. After the votes are cast comes their counting. Since the simple plurality of votes clinches the verdict, as the critical moment approaches, the situation is apt to hot up, disturbances erupt and destruction of ballots disrupt. If disturbance or destruction demolishes the prospect of counting the total votes, the number secured by each candidate and the ascertainment of the will of the majority, a re-poll confined to disrupted polling stations is provided for. Section 64A chalks out the conditions for and course of such repoll, spells out the power, and repository thereof and provides for kindred matters. At this stage we may make a closer study of the provisions regarding repoll systematically and stagewise arranged in the Act. It is not the case of either side that a total repoll of an entire constituency is specified in the sections or the rules. Reliance is placed

for this wider power upon Article 324 of the Constitution by the Commission in its order, by the first respondent in his affidavit, by the learned Additional Solicitor General in his argument and by the third respondent through his counsel. We may therefore have to study the scheme of Article 324 and the provisions of the Act together since they are integral to each other. Indeed, if we may mix metaphors for emphasis, the legislation made pursuant to Article 327 and that part of the Constitution specially devoted to elections must be viewed as one whole picture, must be heard as an orchestrated piece and must be interpreted as one package of provisions regulating perhaps the most stressful and strategic aspect of democracy-in-action so dear to the nation and so essential for its survival.

The lis and the issues

15. Two prefatory points need to be mentioned as some reference was made to them at the bar. Firstly, an election dispute is not like an ordinary lis between private parties. The entire electorate is vicariously, not inertly, before the court. MANU/SC/0097/1958: 1959 SCR 611. We may, perhaps, call this species of cases collective litigation where judicial activism assures justice to the constituency, guardians the purity of the system and decides the rights of the candidates. In this class of cases, where the common law tradition is partly departed from, the danger that the active judge may become, to some extent, the prisoner of his own prejudices exists; and so, notwithstanding his powers of initiative, the parties' role in the formulation of the issues and in the presentation of evidence and argument should be substantially maintained and care has to be taken that the circle does

not become a vicious *one, as pointed out by* J.A. Jolowicz in. 'Public Interest Parties and the Active Role of the Judge in Civil Litigation' (ss. p. 276). Therefore, it is essential that courts, adjudicating upon election controversies, must play a verily active role, conscious all the time that every decision rendered by the Judge transcends private rights and defends the constituency and the democracy of the country.

20. Right at the forefront stands in the way of the appellant's progress the broad-spectrum ban of Article 329(b) which, it is claimed for the respondents, is imperative and goal-oriented. Is this Great Wall of China, set up as a preliminary bar, so impregnable that it cannot be by passed even by Art. 226 ? That, in a sense, is the key question that governs the fate of this appeal. Shri P. P. Rao for the appellant contended that, however, wide Art. 329(b) may be, it does not debar proceedings challenging, not the steps promoting election but dismantling it, taken by the Commission without the backing of legality. He also urged that his client, who had been nearly successful in the poll and had been deprived of it by an illegal cancellation by the Commission, would be left in the cold without any remedy since the challenge to cancellation of the completed poll in the entire constituency was not covered by S.100 of the Act. Many subsidiary pleas also were put forward but we will focus on the two inter-related submissions bearing on Article 329(b) and S.100 and search for a solution. The problem may seem prickly but an imaginative application of principles and liberal interpretation of the constitution and the Act will avoid anomalies and assure justice. If we may anticipate our view which will presently be explained, section 100(1) (d) (iv)

of the Act will take care of the, situation present here, being broad enough, as a residual provision, to accommodate, in expression 'non-compliance', every excess, transgression, breach or omission. And the span of the, ban under Article 329(b) is measured by the sweep of S. 100 of the Act.

34. This dilemma does not arise in the wider view we take of s. 100(1) (d) (iv) of the Act. Sri Rao's attack on the order impugned is in substance based on alleged non-compliance with a provision of the Constitution viz., Article 324 but is neatly covered by the widely-worded, residual catch-all clause of section 100 knowing the supreme significance of speedy elections in our system the framers of the Constitution have, by implication, postponed all election disputes to election petitions and tribunals. In harmony with this scheme section 100 of the Act has been designedly drafted to embrace all conceivable infirmities which may be urged. To make the project fool-proof Section 100(1)(d) (iv) has been added to absolve everything left over. The Court has in earlier rulings pointed out that Section 100 is exhaustive of all grievances regarding an election but what is banned is not anything whatsoever done or directed by the Commissioner but everything he does or directs in furtherance of the election, not contrary wise. For example, after the President notifies the nation on the holding of elections under S. 15 and the Commissioner publishes the calendar for the poll under Section 30, if the latter orders returning officers to accept only one nomination or only those which come from one party as distinguished from other parties or independents, is that order immune from immediate attack. We think not. Because the Commissioner is preventing an

election, not promoting it and the courts review of that order will facilitate the flow, not stop the stream. Election, wide or narrow be its connotation, means choice from a possible plurality monolithic politics not being our genius or reality, and if that concept is crippled by the Commissioner's act, he holds no election at all.

35. A poll is part-a vital part-of the election but with the end of the poll the whole election is not over. Ballots have to be assembled, scrutinised, counted, recount claims considered and result declared. The declaration determines the election. The conduct of the election thus ripens into the elector's choice only when processed, screened and sanctified, every escalatory step upto the formalised finish being unified in purpose, forward in movement, fair and free in its temper. Article 329(b) halts judicial intervention during this period, provided the act possesses the pre-requisites of 'election' in its semantic sweep. That is to say, immunity is conferred only if the act impeached is done for the apparent object of furthering a free and fair election and the protective armour drops down if the act challenged is either unrelated to. or thwarts or taints the course of the election.

55. Normally, natural justice involves the irritating inconvenience for men in authority, of having to hear both sides since notice and opportunity are its very marrow. And this principle is so integral to good government, the onus is on him who urges exclusion to make out why. Lord Denning expressed the paramount policy consideration behind this rule of public law (while dealing with the *nemo iudex* aspect) with expressiveness. "Justice must be rooted in confidence: and

confidence is destroyed when right-minded people go away thinking 'the judge was biased'." We may adapt it to the *audi alteram* situation by the altered statement : "Justice must be felt to be just by the community if democratic legality is to animate the rule of law. And if the invisible audience sees a man's case disposed of unheard, a chorus of 'no-confidence' will be heard to say, 'that man had no chance to defend his stance'." That is why Tuckor LJ in *Russol v. Duke of Norfolk*(1) (1) (1949) 1 All E.R. 109 (at 118E) emphasised that 'whatever standard of natural justice is adopted, one A, essential is that the person concerned should have a reasonable opportunity of presenting his case'. What is reasonable in given circumstances is 'in the domain of practicability; not formalised rigidity. Lord Upjohn in *Fernando*[1967] 2 A.C 337 observed that 'while great urgency may rightly limit such opportunity timeously : perhaps severely there can never be a denial of that opportunity if the principles of natural justice are applicable'. It is untenable heresy, in our view, to look jaw the victim or act behind his back by tempting invocation of urgency, unless the clearest case of public injury flowing from the least delay is self evident. Even in such cases a remedial hearing as soon as urgent action has been taken is the next best. Our objection is not to circumscription dictated by circumstances, but to annihilation as an easy escape from a benignant, albeit inconvenient obligation. The procedural precondition of fair hearing, however minimal, even post- decisional, has relevance to administrative and judicial gentlemanliness. The Election Commission is an institution of central importance and enjoys far-reaching powers and the greater the power to affect others' right or liabilities the more necessary

the need to hear.

76. We have been told that wherever the Parliament has intended a hearing it has said so in the Act and the rules and inferentially where it has not specified it is otiose. There is no such sequitur. The silence of a statute has no exclusionary effect except where it flows from necessary implication. Article 324 vests a wide power and where some direct consequence on candidates emanates from its exercise, we must read this functional obligation.

84. A kindred matter viz., the scope of section 100 and section 90 has to be examined, parties having expressed anxious difference on the implied powers of the Election Court. Indeed, it is a necessary part of our decision but we may deal with it even here. Sri Rao's consternation is that, if his writ petition is dismissed as not maintainable and his election petition is dismissed on the ground that the Election Court had no power to examine the cancellation of poll, now that a fresh poll has taken place, he will be in the unhappy position of having to forfeit a near-victory because a gross illegality triumphs irremediably. If this were true the hopes of the rule of law turn into dupes of the people. We have given careful thought to this tragic possibility and are convinced indeed, the learned Solicitor General has argued for upholding, not subverting the rule of law and agrees that the Election Court has all the powers necessary to grant all or any of the reliefs set out in section 98 and to direct the Commissioner to take such ancillary steps as will render complete justice to the appellant”.

19. In so far as ratio in **Mohinder Singh Gill's** (supra) case is concerned, an order of Election Commission was challenged through a Writ Petition and it was not an Election Petition under the provisions of the Representation of People Act. There is no dispute with the proposition that a free and fair electoral process is the foundation of our democracy, but the question for consideration is, whether by indicating in the Act as to who shall be arrayed as party, the Court would be justified in allowing some others as parties to an election petition.

20. In case of **Michael B. Fernandes Vs. C.K. Jaffer Sharief and others, (2002) 3 Supreme Court Cases 521**, the Hon'ble Supreme Court has observed thus:

“We are not in a position to accept the submission of Mr. Venkataramani inasmuch as in Gill's case, an order of the Election Commissioner was under challenge by filing a writ petition and it was not an election petition under the provisions of the Representation of the People Act. There is no dispute with the proposition that a free and fair electoral process is the foundation of our democracy, but the question for consideration is, whether by indicating in the Act as to who shall be arrayed as party, the Court would be justified in allowing some others as parties to an election petition. For the aforesaid proposition, Gill's case is no authority. Mr. Venkataramani then relied upon the decision

of Calcutta High Court in *Dwijendra Lal Sen Gupta vs. Hare Krishna Konar*, A.I.R. 1963 Calcutta 218, where the question came up for consideration directly and the Calcutta High Court did observe that the Returning Officer may nevertheless in an appropriate case be a "proper party" who may be added as party to the election petition and undoubtedly, the aforesaid observation supports the contention of Mr. Venkararamani. Following the aforesaid decision, a learned Single Judge of the Bombay High Court in the case of *H.R. Gokhale vs. Bharucha Noshir C. and Others.*, A.I.R. 1969 Bombay 177, had also observed that the observations of Shah, J in *Ram Sewak Yadav's* case, AIR 1964 SC 1249 in paragraph (6) is not intended to lay down that the Returning Officer can in no event be a proper party to an election petition. But both these aforesaid decisions of the Calcutta High Court and Bombay High Court had been considered by this Court in *Jyoti Basu* case and the Court took the view that the public policy and legislative wisdom both seem to point to an interpretation of the provisions of the Representation of the People Act which does not permit the joining, as parties, of persons other than those mentioned in Sections 82 and 86(4). The Court also in paragraph (12) considered the consequences if persons other than those mentioned in Section 82 are permitted to be added as parties and held that the necessary consequences would be an unending, disorderly election dispute with no hope of achieving the goal contemplated by Section 86(6) of the Act. In the aforesaid premises, we reiterate the views taken by this Court in *Jyoti Basu's* case and reaffirmed in the latter case in *B. Sundara Rami Reddy* and we see no infirmity with the impugned judgment, requiring our interference under Article 136 of

the Constitution. This appeal accordingly fails and is dismissed”.

21. In **Jyoti Basu’s case**, the Hon’ble Supreme Court took a view that Public Policy and legislative wisdom both point to an interpretation that the provisions of the Representation of the People Act 1951 does not permit the joining, as parties of persons other than those mentioned in sections 82 and 86 (4). The view taken by the Hon’ble Supreme Court in case of **Jyoti Basu** (supra) has been reiterated and re-affirmed in case of **Michael Fernandes** (supra) as well as in case of **Sundara Rami Reddy** (supra). Thus, the ratio in **Mohinder Singh Gill’s** case can be distinguished accordingly.

22. A consistent view has been taken by this Court (Coram: R.I. Chagla, J.) in the case of **Aslam Badshahji Sayyed Vs. The Election Commission of India and others**, in Election Petition No.16 of 2019 with Application (L) No.6 of 2019 in Election Petition No.16 of 2019. The same view has also been taken by another Single Bench (Coram: G.S. Kulkarni, J.) in the case of **The Election Commission of India and another** in the matter between **Rahul Raghunath Ovhal Vs. The Election Commission of India** in Application (L) NO.3 of 2019 in Election Petition No.9 of 2019 .

23. Having considered the judgments hereinabove, the legal position as enumerated in all the decisions, more particularly in the case of **Jyoti Basu** (supra) which has further been considered in case of **Sundara Rami Reddy** (supra) and **Michael Fernandes** (supra), neither Election Commission of India nor Chief Electoral Officer or Returning Officer can be necessary parties to the Election Petition. Thus, prayer of the applicant/original respondent No. 2 needs to be granted.

24. In the light of the observations made hereinabove, following order is expedient;

: ORDER :

1. The petitioner is directed to effect necessary amendment in the Petition, thereby, deleting the names of respondent No.1 -The Election Commission of India and respondent No.2 - Dr. Rajendra B. Bhosale - Returning Officer from the array of the parties with consequential amendments in the body and prayer of the Petition.

2. The amendment shall be carried out within a period of six weeks from the date of passing of this order.

3. In the circumstances, there is no order as to costs.

4. Application stands disposed of.

[PRITHVIRAJ K. CHAVAN, J.]