BEFORE THE NATIONAL GREEN TRIBUNAL

(SOUTHERN ZONE)

Appeal No. 5 (SZ) of 2020

Between

M/s Yashaswi Fish Meal and Oil Company ...Appellant

Vs

Union of India and others ...Respondent

TYPED SET OF CITATIONS FILED ON BEHALF OF THE APPELLANT

S. No	Case Particulars	Important Paragraphs	Page Number
1.	**Ashish Rajanbhai Shah v. Union of India and Ors [2013 SCC OnLine NGT 75]** – *The Order passed by the authority should give reasons for its consequences and must show proper application of mind.*	29 to 32	10
2.	**M/s Sesa Goa Limited v. State of Goa and Ors [Application No. 49 of 2012] Order dated 11.04.2013, Principal Bench, National Green Tribunal** – Providing of reasons in orders is of essence in judicial proceedings	18, 25	10
3.	**Ravi Yashwant Bhoi v. District Collector [(2012) 4 SCC 407]** - One of the salutary requirements of natural justice is spelling out the reasons for the order made.	Internal Page Nos. ~~413~~ 429 and ~~414~~ 431 Para 38 – 46	62
4.	**M/s Champ Energy Ventures Pvt Ltd v. Ministry of Environment and Forests and Ors [2014 SCC OnLine NGT 175]** – It is well settled that fair play and principles of natural justice require the	7	94

	authority to follow the principles of audialterem partem.		
5.	**Mohinder Singh Gill and Anr v. The Chief Election Commissioner, New Delhi and Ors (1978) 1 SCC 405** – (i) When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. (Para 8) (ii) The audialterem partem rule has a few facets two of which are (a) notice of the case to be met; and (b) opportunity to explain.	8 and 52 to 60	97
6.	**S. N. Mukherjee v. Union of India and Ors (1990 4 SCC 594** – failure to give reason amounts to denial of justice	35,36, 39 and 40	159

Dated at Chennai on this the 18th day of February 2022

Counsel for Appellant

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2013 SCC OnLine NGT 75

National Green Tribunal Principal Bench New Delhi

(BEFORE SWATANTER KUMAR, CHAIRPERSON AND U.D. SALVI, J.M. AND D.K. AGRAWAL, E.M., G.K. PANDEY, E.M. AND A.R. YOUSUF, E.M.)

1. Ashish Rajanbhai Shah, Resident of 154, Pritam Society Bharuch, Gujarat. ... Appellant;

Versus

1. Union of India through its Secretary Ministry of Environment and Forests Paryavaran Bhawan, CGO Complex Lodhi Road, New Delhi-110003
2. State of Gujarat through its Secretary Department of Environment Govt. of Gujarat Blok No. 14/8 New Sachivalaya Gandhinaga
3. Mr. B.J. Soni Deputy Collector Jambusar Gujarat ... Respondents.

Appeal No. 30 of 2013
Decided on July 11, 2013

Counsel for Appellant:

Mr. A.K. Prasad Advocate and Mr. Harshvardhan Jha, Advocate.

Counsel for Respondents:

Ms. Neelam Rathore, Advocate with Ms. Syed Amber, Advocate, Mr. S. Panda for H. Wahi, Advocate for Respondent No. 1

ORDER

SWATANTER KUMAR, CHAIRPERSON:— The National Green Tribunal Act, 2010 (for short "the NGT Act") came into force on 18th October, 2010. As per the Act, under Section 16(g) any direction issued on or after commencement of the Act under Section 5 of the Environment (Protection) Act, 1986 (for short "the Act") is appealable before this Tribunal. The appeal can be filed by any person aggrieved from issuance of such direction. The present appellant being aggrieved from the direction issued by the Collector, Bharuch, Gujarat dated, 26th February, 2013 has preferred the present appeal. The said order reads as under:

"No. Bhumi/S.I./Vashi/1555
Collector Office, Chitnis Branch
Bharuch
Dated 26-2-2013.
To.

1. Rajendra K. Goyal, residing at 8, Mohan Krupa Society, Opp. Jain Temple, Manjalpur, Vadodara,
2. Ashish Rajanbhai Shah, residing at 154, Pritam Society-1, Bharuch.
3. Amishaben Thakorbhai Patel, residing of Gajera, Taluka Jambusar.

Sub:— Regarding damage to Mangrove trees in the land allotted for Salt Industry in C.R.Z. Area.

"It is hereby being informed to you that you have been allotted on Rental Lease Agreement basis, the unnumbered land, out of the lands of Block Nos. 1639 and 1640 Paiki, situated in Mauje village Nada, Taluka Jambusar, District Bharuch. Because of Construction of Obstructing mud-walls in the Sea Belt, the natural flow

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of sea water has stopped and hence, damage is being caused to the Mangrove Trees. Hence, it is hereby informed to you immediately make open the natural Sea Belt for the natural flow of the sea water, with a view to see that the sea waters can naturally flow to the Mangrove Trees and thereby, the damage being caused to the Mangrove Trees is stopped.

Kindly implement the above instruction immediately and thereafter, intimate to this office.

Sd/- Illegible
Collector
Bharuch"

2. The above order *interalia* but primarily is challenged on the following grounds:—

(i) The impugned order suffers from the infirmity of non-application of mind. The authority has acted contrary to the principles of natural justice and has not felt the need to dwell upon the various contentions that have been raised by the appellant in its reply dated, 4.2.2012 and 10.2.2012 respectively.

(ii) The Collector on the one hand has failed to deal with the contentions of the reply filed on behalf of the appellant, while on the other hand has also failed to record any reason for passing the impugned order.

(iii) The land and the activity of the appellant fell in CRZ (I) and not CRZ (III) for which the appellant had produced records but they have been completely ignored by the Collector while passing the impugned order in the present appeal.

3. Now, we may refer to the basic facts giving rise to the present appeal. Vide order no. Bhumi/S.I./Vashi/227 dated, 27th January, 2011, the Collector had allotted 300 acres of land to the appellant for the purpose of establishing the salt industry. According to the appellant, prior to the passing of the order, the Collector, Bharuch had called for the necessary opinion from various relevant departments and it was subsequently recommended to allot the said land to the appellant for the said purpose. Actual measurement on the site of the plan had been carried out to demarcate the said land. This land was given on lease and the appellant had deposited the ground rent of Rs. 39,600/- by a challan dated, 03.06.2011 and also deposited Rs. 2000/-, the amount of the deposit on 7th April, 2009. The appellant also claims to have deposited the local fund amount of Rs. 99,000 payable upon the rent amount and education cess of Rs. 9,900 with the Talati cum Mantri, before actual possession of the land was handed over to the appellant. The lease in favour of the appellant was granted with certain Terms and Conditions and it was stated in the order of the Collector, which contained 47 Terms and Conditions, that if the appellant fails to follows any condition therein or any condition that is added by the Government later, then the lease contract would automatically terminate without any intimation to the appellant and the compensation as well as the deposit amount would be retained by the Government as well. Prior to this, the Additional Industrial Commissioner, District Gandhinagar vide its order dated 8 February, 2008, had informed the District Collector Bharuch as follows:—

"This is to inform you that there is no need for the Salt producing unit in the District to obtain any C.R.Z. Certificate from the Forests and Environment Department. Hence, the information related to the Revenue villages as well as showing their limits, may kindly be sent directly to the Deputy Salt Commissioner.

4. The appellant in order to carry out its activity of salt industry had made the bunds around the land so as to collect brine water in the crystallizers for solar evaporation, till salt deposition took place. Thereafter, the deposited salt is scrapped from the crystallizer and collected at the platform before the salinity increases beyond 280 Be. The entire process takes 45 days' time and it is a continuous seasonal process. Salt is manufactured from sea brine or subsoil brine, of the salinity ranging

from 20 to 80 Be.

5. Gujarat Ecological Commissioner, vide letter dated 28th August, 2012, had written to the Principal Secretary, Forest and Environment Department, Government of Gujarat, Gandhinagar and stated that upon conducting the spot verification in salt leases, some of the mangrove trees 'seem' to have been damaged during the bund work. It was also mentioned therein that as per the provisions contained in the CRZ Notification, setting up of new industries and expansion of existing industries is prohibited. The Member Secretary of the said Commission stated that upon spot verification, the salt manufacturing activity was being carried out and bunds had been constructed by removing of soil and some of the mangrove trees seemed to have been damaged during the digging of bunds.

(emphasis supplied by us)

6. Further it also referred to the fact that about 8 creeks of smaller and bigger sizes are blocked due to construction of the bund and an apprehension was expressed that mangrove trees are likely to be destroyed in future as well. In the provisions and conditions of CRZ Notification Para 7(i), it was stated that part of area falls under the category of CRZ (I).

7. The Collector issued a Notice dated 4th December, 2012, directing the appellant to stop all the activities which were allegedly resulting in the damage to mangrove trees. This notice had made a reference to the letter of the Gujarat Ecology Commission dated 28.08.2012. However from the language and contents of this letter it appears that the copy of the said notice was annexed with the said notice. Notice dated 4.12.2012 reads as under:

"No. Bhumi/S.I/Vashi/63
Collector Office, Chitnis
Branch, Bharuch
Dated 4-12-2012.
To
Shri B.J. Soni
Deputy Collector
Jambusar.

Sub:— Regarding damage to Mangrove Trees in the land allotted for salt Industry

Ref:— Letter No. GEC/T/-14/2384-88 dt. 28-8-2012 of the Member Secretary, Gujarat Ecology Commission, Gandhi Nagar.

In context to the above cited subject, vide the letter referred to hereinabove, a representation is made before this office regarding the damage to the Mangrove Trees because of digging of the mud for using it for the purpose of construction obstruction mud walls in salt pans in the unnumbered saline waste land allotted, adjacent of Revenue Survey No. 1639/1640 for salt Industry at Mauje Village Nada, Taluka Jambusar. In the said letter, instructions have been given to stop all the activities damage the mangrove trees by the lease holder in the said Rental lease land allotted for salt Industry.

Hence, as per the below mentioned details, instructions are hereby being given to initiate all the necessary steps for immediately upon receipt of this letter, for stopping all the activities damaging the Mangroves trees by the lease holder in the said Rental lease land allotted for Salt Industry. Since the Report containing all the steps initiated by you is to be produced before the Government, you are informed to immediately send your Report for the Steps initiated by you.

SN	Name and Address	Village/Taluka	Revenue Survey No./Measurement	Order No. and Date

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1.	Rajendra K. Goyal, residing at 8, Mohamkrupa Society, Opp. Jain Temple, Manjalpur, Vadodara	Nada, Tal. Jambusar	350 Acres out of the unnumbered relevant of 1639	Bhumi/S.I./J.F./Vashi/9935 dt. 11-11-2011
2.	Ashish Rajanbhai Shah, residing at 154, Pritam Society-1, Bharuch	Nada, Tal. Jambusar	300 Acres of the unnumbered relevant of 1640	Bhumi/S.I./J.F./Vashi/227 dt. 21-1-2011
3.	Amishaben Thakorbhai Patel, residing of Gajera, Taluka Jambusar	Nada. Tal. Jambusar	300 Acres out of the unnumbered relevant of 1639	Bhumi/S.I./J.F./Vashi/3754 dt. 7-6-2011

Further in respect of all other leases of this village:—

1. To stop immediately all the activities damaging the Mangrove trees in and around the tidal land region, to see that the sea passage and passage of natural tidal flows are not stopped and if any such activities are done without the permission of the Competent officers, then it shall be considered as the violation the Notification of C.R.Z. and hence, all such activities should be stopped.
2. Further, if any activities of construction of any types of obstructing walls are going on in the C.R.Z. areas, then it hereby informed stop the same.

Sd/- Illegible
Deputy collector, Jambusar.
No. Bhumi/Vashi/2221
Mamlatdar Officer,
Jambusar"

8. According to the appellant, though this was said to be a notice but in fact it was only a direction to stop all activities. The letter had called for the reports from the Collector and copy thereof was also addressed to three other parties all of whom have also preferred an appeal before the Tribunal.

9. A detailed written reply was made by the appellant to the District Collector and he took various pleas in the said reply. While denying that the applicant had violated the notification and damaged the environment or any mangrove trees, a specific plea was taken that the mangrove trees provided a benefit to the salt industries and thus, the appellant could never damage such trees. It was for the reason that these mangrove trees also protected the mud walls which were erected by the salt industry. However, when there is a high tide which is forceful, then it uproots these mangrove trees. Hence, no damage or destruction of mangrove trees is caused by the appellant. The Sarpanch of the village, after inspection of the site had also issued a certificate dated, 8.9.2012 stating that there was no damage done to the mangrove trees by the salt industry of the appellant, while referring to erection of mud bunds it was said that they were erected strictly in consonance with the terms and conditions laid down in the lease order. Also it was stated that the mud bunds were erected at a distance of 700 meters from the sea and did not cause any damage to the natural sea water. As far as violation of Condition No. 42 was concerned, it was stated in the reply that no permission was required to be obtained from the CRZ Authority in view of the letter of

the Additional Industrial Commissioner as aforestated. This was a detailed reply and it also stated that the direction to stop all activity was issued to the appellant without affording any opportunity. Thus, on the interim prayer made by the appellant for stay of the operation of notice-cum-direction dated 4th December, 2012, the Additional Secretary had granted the order of stay on 21st December, 2012.

10. Again on 28st January, 2013, a notice was issued to all the three parties to remain present on the date of hearing on 31st January, 2013 at 12.00 p.m. and respond to the allegations made therein. This notice also referred to the letter dated 4th December, 2012, as a show cause notice. The parties in response to the said notice appeared and filed another reply dated 4th February, 2013, wherein such allegations were denied.

11. Thereafter, the Collector passed the order dated, 26th February, 2013, as afore referred, compelling the appellant to file the present appeal on the grounds stated supra.

12. We think it will be appropriate for us to discuss all the three grounds raised by the appellant together as they are inter-connected and would require common discussion.

13. At the very outset, we may notice that as far as the plea that the impugned order having been passed without affording an opportunity to show cause against the proposed order is concerned, the same deserves to be rejected. From the pleadings of the in the plea as well as in the documents annexed thereto, it is clear that the notice-cum-direction dated 4th December, 2012 was served upon the appellant before the notice dated 28th January, 2013, had been served and duly received by the appellant. The appellant had not only received the said notice but has also filed a detailed reply/representation against such notices. The appellant thereafter, filed a representation before the Authority which then passed the order dated 26.2.2013. In view of this matter, appellant has been served with a show cause notice and an opportunity of hearing was provided to him before the impugned order was passed. Thus, this contention of the appellant deserves to be rejected.

14. The next contention that we have to consider on behalf of the appellant is that there is non-application of mind and non-recording of reasons by the authority while passing the impugned order. Further, it is also contended that there is no consideration of relevant evidence, relevant materials and documents placed on record have not been considered by the authority.

15. We may now refer to certain judgments on the point that an administrative authority is also required to record reasons as to show proper application of mind and the orders being in conformity with the basic rule of law. In the case of *State of West Bengal* v. *Alpana Roy*, (2005) 8 SCC 296 while dealing with the order of the High Court which had not provided for reasons in support of its order, the Supreme Court held that High Court was in error in not recording reasons as it denied an opportunity to the affected parties before the Appellate Court and also referred to the necessity of providing reasons by the authority. The Apex Court held under:—

> "7. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind, all the more when its order is amenable to further avenue of challenge. The absence of reasons has rendered the High Court's judgment not sustainable.
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> 8. Even in respect of administrative orders Lord Denning M.R. in *Breen* v. *Amalgamated Engineering Union*, (1971) (1) All E.R. 1148 observed "The giving of reasons is one of the fundamentals of good administration". In *Alexander Machinery (Dudley) Ltd.* v. *Crabtree*, 1974 LCR 120 it was observed: "Failure to give reasons amounts to denial of justice". Reasons are live links between the mind of the

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decision taker to the controversy in question and the decision or conclusion arrived at". Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review, in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out. The "inscrutable face of a sphinx"." is ordinarily incongruous with a judicial or quasi-judicial performance

16. In the case of *Anil Kumar* v. *Presiding Officer*, (1985) 3 SCC 378 the Court stated that it is a well settled norm that a disciplinary enquiry or a quasi-judicial enquiry has to be conducted in accordance with the principles of natural justice. An enquiry report in a quasi-judicial enquiry must show the reasons for arriving at a particular conclusion.

17. The Apex Court describing 'reasons' as the hallmark of exercise of judicial power, further elucidated upon the same to be described as an essential requisite of principles of natural justice in the case of *Secretary and Curator, Victoria Memorial Hall* v. *Howrah Ganatantrik Nagrik Samity*, (2010) 3 SCC 732

"40. The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind". Vide State of Orissa *v.* Dhaniram Luhar, *(2004) 5 SCC 568 : AIR 2004 SC 1794; and* State of Rajasthan *v.* Sohan Lal, (2004) 5 SCC 573.

42. Reason is the heart beat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Vide *Raj Kishore Jha* v. *State of Bihar*, (2003) 11 SCC 519 : AIR 2003 SC 4664; *Vishnu Dev Sharma* v. *State of Uttar Pradesh*: (2008) 3 SCC 172; *Steel Authority of India Ltd.* v. *Sales Tax Officer, Rourkela I Circle*: (2008) 9 SCC 407; *State of Uttaranchal* v. *Sunil Kumar Singh Negi*, (2008) 11 SCC 205 : AIR 2008 SC 2026; *U.P.S.R.T.C.* v. *Jagdish Prasad Gupta*, (2009) 12 SCC 609 : AIR 2009 SC 2328; *Ram Phal* v. *State of Haryana*: (2009) 3 SCC 258; *Mohammed Yusuf* v. *Faij Mohammad*: (2009) 3 SCC 513; and *State of Himachal Pradesh* v. *Sada Ram*: (2009) 4 SCC 422.

43. Thus, it is evident that the recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected may know, as why his application has been rejected."

18. We may also refer to a recent Judgment of this Tribunal in Application No. 49 of 2012 *Sesa Goa Ltd.* v. *State of Goa* decided on 11th April, 2013 wherein the Tribunal while considering similar issue stated the necessity for recording of such reasons on the one hand and its consequences thereof on the other.

19. Of course, reasons recorded by such authorities may not be like judgments of courts, but they should precisely state the reasons for rejecting or accepting a claim which would reflect due application of mind. The Bombay High Court in the case of *Pipe Arts India Pvt. Ltd.* v. *Gangadhar Nathuji Golmare*, 2008 (6) MLJ 280 held:—

"Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before Court.

Announcing reasons can also provide public understanding of how the numerous decisions of the system are integrated. In a busy Court, the reasons are an essential demonstration that the Court did in fact fix its mind on the case at hand. An unreasoned decision has very little claim to acceptance by the defeated party and is difficult or impossible to accept as an act reflecting systematic application of legal principles."

20. In a Constitutional Bench of Supreme Court, in the Case of *S.N. Mukherjee* v. *Union of Inida*, (1990) 4 SCC 594 the Supreme Court stated that A party appearing before the Tribunal is entitled to know, either expressly or inferentially the reasons stated by the Tribunal and what it is to which the Tribunal is addressing its mind.

21. The recording of reasons is also an assurance that the authority concerned consciously applied its mind to the facts on record. It also aids the appellate or revisional authority or the supervisory jurisdiction of the High Court under Article 226 or the appellate jurisdiction of this Court under Article 136 to see whether the authority concerned acted fairly and justly to mete out justice to the aggrieved person.

22. Another very important aspect of recording of reasons by administrative or quasi-judicial authority is that the reasons so recorded must have a nexus and should deal with the grounds which have been raised by the affected party for consideration by such authority. Recording reasons without dealing with such contentions would tantamount to non-recording of reasons. The authority concerned is expected to apply its mind to all aspects of a case but most importantly to the contentions raised by the affected party in relation to the grounds or supporting arguments without which no adverse order could be passed against such party. If such grounds are not dealt with in the order passed by the authority, neither the party nor the appellate authority would be able to comprehend as to why their contentions have been rejected, as the reasons are harbinger between the mind of the maker of the order, to the controversy in question and the decision or conclusion arrived at. This is the acid test for examining fair opportunity and proper application of mind by the authority concerned.

23. In the present case, as it appears from the record before this Tribunal, there were three main allegations against the appellant.

A. The mud bunds constructed by the appellant were illegal and likely to cause damage to the mangrove trees.

B. Appellant had violated 'Condition 42' of the Terms and Conditions of the lease and had not obtained the permission of CRZ or from the Concerned Environmental Department.

C. The appellant was carrying out a prohibitory activity in terms of Notification dated 6th January, 2011 and was causing damage to the Environment.

24. Firstly, we must notice that there is nothing on record to show that the copy of the letter of the Gujarat Ecological Commission dated 21st August, 2010, was furnished to the appellant to enable him to offer his comments to the contentions, thereof. Furthermore, the notice dated 4th December, 2012 contained no grounds. It merely directed to close the bund work. However, the communication dated 28th February, 2013, contains certain allegations though none of them were required to be answered by the appellant. The appellant had submitted a detailed reply and documents in support thereof. The contention of the appellant is that in terms of 'condition 20' of the Terms and Conditions of his lease, it was mandatory for him to build structures for the protection of the salt bunds. It was in furtherance, to such conditions of the lease that the appellant built the mud bund. How the fault was attributable to the case of *Anil Kumar* v. *Presiding Officer*, (1985) 3 SCC 378 is therefore, not clear and in any case, there is no discussion or reasoning in the impugned order on that behalf. In relation to violation of 'Condition 42' which reads as under:

"(42) Should take prior permission regarding Costal Regulation Zone (C.R.Z.) and environment from the concern Department of Government."

25. The appellant therefore, require to take permission regarding CRZ from the concerned department. According to the appellant, it is contended that the area in question falls under CRZ (III) and the activity of salt industries was not required to take any permission from the CRZ authority. In this regard the appellant had relied upon the letter of the Additional Industry Commissioner, State of Gujarat, dated 8.2.2008, authored by the Additional Industrial Commissioner, Gandhi Nagar, stating that there was no need to obtain any CRZ certificate from the Forest and Environment Department. The documents and the averments made by the appellant clearly show that the appellant had violated the 'Condition 42' of the Terms and Conditions of the lease. It was expected of the authority to record reasons in that regard to refer the matter that led to unjust view taken by the Collector. In fact, the impugned order is totally silent even in this regard. Lastly the allegation related to causing immense pollution and damage to mangrove trees. In this regard, the appellant had rendered detailed reply on record for the consideration of the Collector. None of the points pleaded by the appellant, in his reply has been dealt with by the Collector in the impugned order. According to the appellant the mud bunds in fact would help in maintaining the mangrove trees as they are likely to be eradicated because of high tide. It was also their case that the sea water was not obstructed entirely to reach the mangrove trees, thus, neither there was threat to Mangrove trees nor there was threat to environment by the activities carried out by the appellant. According to them they were interested to protect the mangrove trees along with carrying on of their activities.

26. In addition to this, it was also the case put forward by the consideration of the Collector that to some extent they were also pumping water and using the same for the manufacture of salt.

27. Unfortunately even this issue finds no deliberation in the order impugned.

28. The Department of Environment and Forests has issued a CRZ Notification dated 6.1.2011. It defines the prohibited activities within CRZ as well as the activities which could be carried out in the said zone. 'Clause 7' of the said Notification makes the classification of CRZ into CRZ (I), CRZ (II), CRZ (III) and CRZ (IV). Even under CRZ (I) under clause ii (d) salt harvesting by solar evaporation of sea water is a permissible activity. The CRZ (III) declares an area of up to 200 meters of high tide line to be no development zone. However, certain exceptions have been carved thereto, including that under clause (iii)(d) salt manufacturing from the sea water is permissible in the no development zone. The Authority has accepted to deliberate the plan upon these technical issues with some elucidation. The impugned order dated 28th March, 2013, is patently unsupported by reasons and demonstrated non-application of mind. The order itself does not discuss any of the grounds except vaguely mentioning that there is likelihood of damage to the mangrove trees. Even the letter of the Gujarat Ecological Commission dated 28.8.2012, had noticed that some of the mangrove trees seem to have been damaged. In other word even if the impugned order is taken on its face value even then it was clearly based upon an apprehension and not on any definite finding which could form basis for passing of such a prohibitory order like the impugned order.

29. An administrative authority and Tribunal are obliged to give reasons and absence whereof could render the order liable to judicial chastise. The order passed by the authority should give reasons for its consequences and must show proper application of mind. Violation of either of them could in the given facts and circumstances of the case vitiate the order itself. An order of an administrative authority may not provide reasons like a judgment but the order must be supported by the reasons of rationality. The distinction between an order passed by

administrative authority or a quasi-judicial authority has practically extinguished and both are required to pass well reasoned orders. (Reference: *Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota* v. *Shukla and Brothers Court*, (2010) 4 SCC 785.

30. While exercising such powers the concerned authority is expected to record satisfaction objectively. Thus, such satisfaction could only be expressed by recording of reasons. It will be appropriate to take action on an order which records no reasons and consequently no satisfaction thereof. If fact even in case requiring recording of subjective satisfaction, recording of reasons would be imperative, the content thereof however, may differ. It is not sufficient to record as to which condition had been violated. It must state as to how the condition had been violated and what is the effect of the explanation rendered by the affected parties and how the same was unsatisfactory. Then alone the authority would determine as to what should be the consequential order and what is required to be done by the authority and the same however has not been complied with in the present case.

31. Recording of reasons even help in balancing the question of onus. If the order records reasons which reflect satisfaction, then the onus is on the person challenging it to show that such reasons are unsuitable and improper. But in absence of such reasons the applicant discharges primary onus only by raising a challenge against such an order and such challenge could include non-recording of reasons, non-application of mind and patent arbitrariness. Then it is for the authority concerned to meet such challenge and to show that there were valid grounds in passing the impugned order. In the present case, the order does not contain any reasons, furthermore nothing has been reflected by the respondent on the file of the Tribunal to show that there were any plausible reasons to the explanation rendered by the appellant.

32. For the reasons aforestated, we see no reason to sustain the order dated 26.2.2013. We thereby allow the appeal and quash the impugned order. We further direct the Collector, Bharuch, Gujarat to provide a hearing to the appellant, considering all relevant documents produced by them and pass an order afresh in accordance with law expeditiously and in any case not later than 3 months from the date of passing of this order. In the fact and circumstance of the case we leave the parties to bear their own costs.

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BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

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APPLICATION NO. 49 OF 2012

In the matter of :

1. M/s. Sesa Goa Limited
   Sesa Ghor,
   20 EDC Complex , Patto
   Panaji Goa- 40300, through
   Its AVP-iron ore, Goa
   Mr. Sauvick Mazumdar

2. Mr. Raghav J. Parrikar,
   Shareholder of
   M/s Sesa Goa Limited
   Residing at House No. 602
   Sails Wado, Parra'
   Bardez, Goa

.....Appellants

Versus

1. State of Goa,
   Through the Chief Secretary
   Government of Goa, Secretariat
   Porvorim, Bardex, Goa.
2. The Goa Costal Zone
   Management Authority,
   Through its Member Secretary,

C/o Department of Science,
Technology and Environment,
Government of Goa,
Opp. Saligao Seminary, P.O.
Saligoa, Bardez, Goa-40351.

3. Khemlo Sawant,
Resident of Betalwada,
Amona, Bicholim, Goa.

.....Respondents

Counsel for Appellants :
Mr. Mukul Rohatgi, Sr, Advocate and Ms. Kiran Suri Advocate, Mr. Ninad Laud, Advocate, Mr. S.J. Amith, Advocate.

Counsel for Respondents :
Mr. Manish Salkar, Government Advocate, for Respondent No.1 & 2.
Mr. Raj Panjwani, Sr. Advocate with Mr. Rahul Choudary, Advocate, for Respondent No. 3.

ORDER/JUDGMENT

PRESENT :
Hon'ble Mr. Justice Swatanter Kumar (Chairperson)
Hon'ble Mr. Justice P. Jyothimani (Judicial Member)
Hon'ble Dr.G.K. Pandey (Expert Member)
Hon'ble Prof. A.R. Yousuf (Expert Member)
Hon'ble Dr. R.C.Trivedi (Expert Member)

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JUSTICE SWATANTER KUMAR, (CHAIRPERSON)

Challenge

1. The Goa Coastal Zone Management Authority (for short 'Authority') vide its order dated, 4th March, 2011, took the decision and issued the following directions:

> 14. **Decision of GCZMA**:- GCZMA members deliberated on the points of reference made in the complaint made by Khemlo Sawant. From the documentation it is seen that, the jetties existed prior to 1991 and the activity of loading is an ongoing process at Amona. Proceeding's to the hearing were referred to. It is observed that, M/s Sesa Goa has proceeded to rapidly expand their jetties without obtaining any prior approval from this Authority and other local Authority. At present the factual position appears that the jetties are more than double in area and this expansion is unauthorized. GCZMA Members also observed that the conveyor system is not authorized at site though there are NOC's or approvals from CoP or GSPCB. It is seen that M/s Sesa Goa has sought to submit a plan with its earlier reply dated 01/12/2009 ; which appears to be fraudulently generated and hence this document cannot be relied upon. Further the enquiries by Deputy Collector and SDO (Bicholim) has no finding in its report and the same cannot be relied upon.
> 15. GCZMA Members after perusing all documents provided, the contents of the complaint, replies to show cause notice issued, replies submitted, documentary evidence produced before the Authority in its hearing and other facts of the case concluded that;

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i. The activity of loading iron ore is going on prior to 1991
ii. The jetties in question, exist prior to 1991;
iii. The jetties in question, have been expanded unauthorisedly over double the area of operation over the area beyond 65 sq. mts is illegal and needs to be stopped. Further the unauthorized portion needs to be surveyed and removed forthwith.

16. **Directions**: Therefore, in exercise of the powers conferred under section 5 of the Environment (Protection) Act, 1986; the GCZMA directs:-

i. M/s Sesa Goa to forthwith stop the activity over the illegal portion of the jetties in question and take action to remove the extended unauthorised portion within 15 (fifteen) days from the date of receipt of these Order failing which the Addl. Collector (North) shall take action to remove the same without any further reference to M/s Sesa Goa and the cost of removal shall be recovered from M/s Sesa Goa.
ii. The Additional Collector (North) to undertake the survey of the jetties in question, mark the area over and above 65 sq. mts and take action to stop the activity over the extended unauthorised portion of the jetties in question.

2. The legality and correctness of the above decision and directions are questioned by the applicants, M/s Sesa Goa & Ors. *inter-alia* but primarily on the following grounds:

1. The impugned order is violative of principles of natural justice.

2. The impugned order has been passed upon allegations and considerations which did not form part of the show cause notice issued to the applicants.
3. The Authority in its order has relied upon certain reports and documents which were never furnished to the applicants. Consideration of such reports and documents has caused serious prejudice to the rights of the applicants.
4. Undisputedly and in fact admittedly, the jetties were in existence prior to 1991 and therefore, the conclusions arrived at by the Authority are contrary to record.
5. The Costal Regulation Zone Notification (for short the 'Notification') itself was issued in the year 1991 and cannot, both in fact and in law, have any application to the existing jetties.
6. In fact, the Notification itself does not contemplate such retrospective application.

Facts

3. The necessary facts giving rise to the above challenge can in short be noticed at this stage itself. Applicant No. 1 is a company

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registered under the provisions of the Companies Act, 1956 and is engaged in the business of extraction, sale and export of mineral ore. For the purpose of this business, the applicants used barges for carrying mineral ore from the loading point to the port. These loading points were in the nature of jetties which the applicants use for loading iron ore to the barges. According to the applicants they had constructed 'jetties' in the year 1969 and the plans for the same were approved by the Captain of Ports in the year 1969. Some modifications/repairs were carried out to the jetties and they were extended in the year 1987.

4. According to the applicants, Mr. Khemlo Sawant, Respondent No. 3, is an ex-employee of the company, whose services were terminated on the grounds of misconduct that he committed from time to time during his tenure with the company. Respondent No. 3 is nothing but a disgruntled person who had filed a complaint to the Authority with a malafide intention to settle his personal score. On the basis of this complaint the Authority, served a show cause notice, dated 16th November, 2009, upon the applicants. In this show cause notice, it was alleged that there is an illegal

construction of the Hopper and Belt System for loading iron ore close to jetty no. 2. 16

5. This show cause notice was replied to by the applicants vide its communication dated 1st December, 2009. In the reply, applicants stated that, the said system was legally installed and also annexed documents to support such contentions. The applicant company, without prejudice to its contention and as an abundant caution vide letter dated 10th February, 2010, also requested for regularization of the improvised loading facility in the form of the conveyor belting system. Even after submitting all these documents nothing was heard from the Authority which clearly gave an impression to the applicants that the proceedings therefrom had been dropped.

6. However, the Authority again served a show cause notice dated 1st January, 2010, upon the applicants, stating therein, that there has been illegal construction and operation of jetties without Coastal Regulation Zone (for short 'CRZ') and other statutory approvals. In this show cause notice no reference was made to the first show cause notice dated 16th November, 2009. The Applicant submitted a reply to the said show cause notice as well, stating

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therein, that the jetties in question were legal structures as they were constructed in 1969 and had been operational since then. The Applicants had obtained certain documents including the 'No Objection Certificate' (NOC) on 27th February, 1969 issued by the Captain of Ports, the letter including the payments made to the Captain of Ports towards Port dues, the House Tax Receipt issued by the village Panchayat of Amona and also the 'Consent to Operate' under the Air (Prevention and Control) Act, 1981 and Water (Prevention and Control) Act, 1974, respectively.

7. This matter was pending before the Authority when the applicants received 'stop work' notice on 11th October, 2010 from the office of the Deputy Collector and Sub Divisional Officer. It was only later that the applicants came to know that another notice has also been issued in furtherance to the first notice already issued by the said Authority. In that letter to the Deputy Collector, the Authority, stated that illegal construction of jetty 1 and 2 is being carried out in alleged violation of Notification and, therefore, the same should be stopped. In pursuance of the said notice, the officials from the office of the Mamlatdar, Bicholim and the Authority visited the site for an inspection. Since, there was no

renovation of jetties, nothing adverse was noticed by the visiting team and there was complete silence on part of the office of the Deputy Collector. Vide letter dated 29th October, 2010, the Authority referred the matter to Deputy Collector and SDO and directed them to conduct a summary inquiry with further directions to provide the company with an opportunity of a personal hearing. The Deputy Collector granted a personal hearing to the applicant company and asked the applicants to produce relevant documents. The applicants filed its reply on 16th November, 2010, and the additional report was also filed on 18th November, 2010. The officers of the Deputy Collector neither dealt with applicants nor did the applicants receive any order or report in conclusion of the proceedings conducted by the Deputy Collector. At that point of time the copy of the report of Deputy Collector was not even furnished to the applicants. However, from the impugned order dated 4th March, 2011, the applicants came to know that some report has been submitted by the Deputy Collector and that report has been made the basis for passing the impugned order vide communication dated 2nd December, 2010. The Authority called upon the applicants to appear for a personal hearing on 16th

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December, 2010 at 4.00 p.m. This notice referred to the show cause notice dated 1st January, 2010, where it had been alleged that there was an illegal construction and operation of jetties. In this notice of hearing there was no reference to the show cause notice, dated 16th November, 2009. The applicants also filed additional reply on 15th December, 2010, where they claim to have relied on certain documents that amply demonstrated that jetties in question were legal and constructed in the year 1969, and thereafter modified/repaired in the year 1987. The matter was again called for hearing on 12th January, 2011 and on the date of hearing specific emphasis was laid by the applicants on their part that the show cause notice dated 16th November, 2009, was not the subject matter of the hearing and that the various arguments that were raised on behalf of the applicants were not even considered by the Authority concerned. Thereafter, the applicants received the order dated 4th March, 2011, on 9th March, 2011, which is subject matter of the challenge in the present application. The contentions raised by the applicants were, that despite the fact that in the para 15 of the impugned order, the Authority came to the conclusion that loading of iron ore has been going on prior to the year 1991,

and the jetties in question were in existence prior to 1991, still the Authority has erroneously arrived at the conclusion that jetties have been unauthorisedly extended to an area above 65 sq.m, which is illegal. The jetties were constructed in the year 1969 while the Notification came into force in the year 1991 and, thus, has no application. The documents that were filed, including the plan, clearly showed that the jetties had been constructed in the year 1969 after obtaining NOC from Captain of Ports and later obtained consent from the Goa Pollution Control Board when it came into existence. The village panchyats in its Resolution dated 12th August, 2010, have accepted the fact that the jetties were used for loading of iron ore and had been in existence since 1969.

8. It was also the contention of the applicants that the Hopper and Belt system were in question and permission for the same had been obtained from the Captain of Ports and Goa State Pollution Control Board. The applicants in the alternative submitted that even if it is assumed, that too without admitting, that the conveyor belting system was installed in the year 1992, still the CRZ Regulations would be inapplicable inasmuch as the Notification would only be applicable from the date the Coastal Zone

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Management Plan was finalized, which was in the year 1996 and, thus, the same would have no application in relation to years 1991 and 1992. The documents relied upon, particularly the report of the Collector and the documents annexed to the reply filed by the complainant, Mr. Khemlo Sawant, as mentioned in the order dated 4th March, 2011 had not been furnished to the applicant. All these aspects clearly showed that the impugned order is violative of the principles of natural justice and suffers from the infirmity of non-application of mind.

On behalf of the Authority it was contended that the Notification does not provide for any specific procedure that ought to be adopted by the Authority. The Authority, in fact, in the present case has acted in consonance with the principles of natural justice. It was competent to adopt the procedure that it considered to be proper. The second show cause notice was issued and then, after granting a personal hearing to the applicants, the order dated 4th March, 2011 was passed. During the hearing, or otherwise, no document was asked for and, in fact, some documents which have been relied upon by the Authority while passing the impugned order were the documents filed by the applicants itself.

9. The learned Counsel appearing for the Authority, during the course of argument, fairly stated that the copy of the report submitted by the Collector and some other documents, including the one stated in para 12 of the impugned order, were not furnished to the applicants. He also stated that the Authority or any of its authorized officers have not conducted any inspection of the jetties in question. Even if any benefit is given to the applicants on the basis of documents relied upon, at best, the jetties could be extended to area of 65 sq.m, while at the site they were found to be more than 270 sq.m and thus, as these jetties are illegal they cannot be used for transport of mineral ore.

10. We may also notice that the impugned order was challenged by the applicants before the High Court of Bombay, Goa Bench in W.P. 169 of 2011 and vide order dated 14th September, 2012, the High Court of Bombay transferred this matter to this Tribunal.

Legal Analysis

11. From the grounds of challenge as well as the contentions raised, it clearly emerges that the main plank of submission on

behalf of the applicants revolves around the non-compliance of the principles of natural justice.

12. The Notification dated 19th February, 1991, was superseded by the Notification dated 15th September, 2010/6th January, 2011, issued by Department of Environment and Forest and Wildlife, Government of India. This Notification deals with 'high tide line' on the landward side along the sea front as well as restriction on the setting up and expansion of industries, operations or processes and the like, in the CRZ (Coastal Regulation Zone). It also declares certain activities as 'prohibited activities' within the CRZ.

13. A plain reading of this Notification clearly shows that it does not by specific language provide for any procedure for taking action against the violators of the restrictions or even the manner in which the Authority will proceed if it finds that any activity, or act or omission has been done in violation to the said Notification. It is a settled cannon of administrative law that if a specific procedure has not been provided for and the authority empowered to perform such functions passes orders which particularly may have severe consequences affecting the rights of others, then it can only do so in compliance with the principles of natural justice and the absence of

the same would invite judicial review and would render such action invalid in law. Thus, first and foremost it must be understood as to what is Law of Natural Justice.

14. A Constitution Bench of the Supreme Court in the case of *Swadeshi Cotton Mills vs. Union of India* (1981) 1 SCC 664 stated that

> "The phrase is not capable of a static and precise definition. It cannot be imprisoned in the straight-jacket of a cast-iron formula. Historically, "natural justice" has been used in a way "which implies the existence of moral principles of self-evident and unarguable truth". In course of time, Judges nurtured in the traditions of British jurisprudence, often invoked it in conjunction with a reference to "equity and good conscience". Legal experts of earlier generations did not draw any distinction between "natural justice" and "natural law". "Natural justice" was considered as "that part of natural law which relates to the administration of justice". Rules of natural justice are not embodied rules. Being means to an end and not an end in themselves, it is not possible to make an exhaustive catalogue of such rules. But two fundamental maxims of natural justice have now become deeply and indelibly ingrained in the common consciousness of mankind, as pre-eminently necessary to ensure that the law is applied impartially, objectively and fairly. Described in the form of Latin tags these twin principles are: (*i*) *audi alteram partem* and (*ii*) *nemo judex in re sua*"

15. The above two *maxims* have attained a definite meaning, connotation in law and their contents as well as implications are

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well- established and firmly understood. These, nevertheless are not statutory rules. Each one of these rules leads to charges with exigencies of different situations. They do not apply in the same manner to situations which are not alike. They are not immutable but flexible. These rules can be adapted and modified by statutes, statutory rules and also by constitution of a Tribunal which is to decide a particular matter and the rules by which such Tribunal is governed. In England the law in this regard is not different from the law in India. In *Norwest Holst Ltd. vs. Secretary of State* for Trade*(1978)* 3 All England Reports 280, Ormond LJ observed: "the House of Lords and this Court have repeatedly emphasized that the ordinary principles of natural justice must be kept flexible and must be adapted to the circumstances prevailing in any particular case."

16. In the case of *Union of India v. Tulsiram Patel* (1985) 3 SCC 398, another Constitution Bench of the Supreme Court stated: "that the question whether requirements of natural justice have been met by the procedure adopted in a given case must depend to a great extent on the facts and circumstances of the case in point,

the constitution of the Tribunal and the rules under which it functions."

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17. It must be noticed that the aim of rules of natural justice is to secure justice, or to put it negatively, to prevent miscarriage of justice. Despite the fact that such rules do not have any statutory character, their adherence is even more important for the compliance of the statutory rules. The violation of the principles of natural justice has the effect of vitiating the action, be it administrative or quasi-judicial, in so far as it affects the rights of a third party. Flexibility in the process of natural justice is an inbuilt feature of this doctrine. Absolute rigidity may not further the cause of justice and therefore adoption of flexibility is important for applying these principles.

18. A Court or a Tribunal has to examine whether the principles of natural justice have been violated or not as a primary consideration, whenever and wherever such an argument is raised. Test of prejudice is an additional aspect. Normally, violation of principles of natural justice, like non-grant of hearing, would vitiate the action unless the theory of 'useless formality' is pressed into service and is shown to have a complete applicability to the facts of

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the case. We may notice that this theory, though has been accepted by the Courts, but is rarely applied.

19. In the case of *Canara Bank v. A.K. Awasthi* (2005) 6 SCC 321, the Supreme Court compared natural justice to common sense justice. It emphasized on the compliance with the principles of natural justice when a quasi-judicial body embarks upon determination of disputes between the parties or when an administrative action involving civil consequences is in issue. The Court held:

> "**9.** The expressions "natural justice" and "legal justice" do not present a watertight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigant's defence.
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> **10.** The adherence to principles of natural justice as recognised by all civilised States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this

principle. It must be precise and unambiguous. It should apprise the party determinatively of the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory recognition of this principle found its way into the "Magna Carta". The classic exposition of Sir Edward Coke of natural justice requires to "vocate, interrogate and adjudicate". In the celebrated case of *Cooper* v. *Wandsworth Board of Works* the principle was thus stated: (ER p. 420)

> "Even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam' (says God), 'where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?' "
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> Since then the principle has been chiselled, honed and refined, enriching its content. Judicial treatment has added light and luminosity to the concept, like polishing of a diamond.

11. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.

12. What is meant by the term "principles of natural justice" is not easy to determine. Lord Summer (then

> Hamilton, L.J.) in *R.* v. *Local Govt. Board*[3] (KB at p. 199) described the phrase as sadly lacking in precision. In *General Council of Medical Education & Registration of U.K.* v. *Spackman* Lord Wright observed that it was not desirable to attempt "to force it into any Procrustean bed" and mentioned that one essential requirement was that the Tribunal should be impartial and have no personal interest in the controversy, and further that it should give "a full and fair opportunity" to every party of being heard."

20. The above findings of the Court puts one matter beyond ambiguity, i.e., the affected party is entitled to a full and fair opportunity, and such an opportunity, shall, both in fact and in substance, be granted to ensure that justice is not only done but also seems to have been done.

21. In the present case we are concerned with the application and the various facets of the maxim *audi alteram partem.* The Courts have consistently emphasized that this is a highly effective rule devised by the Courts to ensure that a statutory authority arrives at a just decision and it is calculated to act as a healthy check on the abuse or misuse of power.

22. The doctrine of *audi alteram partem* has three basic essentials. Firstly, a person against whom an order is required to be passed or whose rights are likely to be affected adversely must be granted an

opportunity of being heard. Secondly, the authority concerned should provide a fair and transparent procedure and lastly, the authority concerned must apply its mind and dispose of the matter by a reasoned or speaking order. While referring to this principle in the case of *Assistant Commissioner, Commercial Tax Department, works contract and leasing, Kota vs. Shukla & Bros* (2010) 4 SCC 785, the Supreme Court of India stressed upon the need for recording reasons and for the authority to act fairly. The court held as under:

> "**11.** The Supreme Court in *S.N. Mukherjee* v. *Union of India* while referring to the practice adopted and insistence placed by the courts in United States, emphasized the importance of recording of reasons for decisions by the administrative authorities and tribunals. It said "administrative process will best be vindicated by clarity in its exercise". To enable the courts to exercise the power of review in consonance with settled principles, the authorities are advised of the considerations underlining the action under review. This Court with approval stated:
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> > "*11.* ... 'the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained'."
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> **12.** In exercise of the power of judicial review, the concept of reasoned orders/actions has been enforced equally by the foreign courts as by the courts in India. The administrative authority and tribunals are obliged to give reasons, absence whereof could render the order liable to judicial chastisement. Thus, it will not be far from an absolute principle of law that the courts should record

reasons for their conclusions to enable the appellate or higher courts to exercise their jurisdiction appropriately and in accordance with law. It is the reasoning alone, that can enable a higher or an appellate court to appreciate the controversy in issue in its correct perspective and to hold whether the reasoning recorded by the court whose order is impugned, is sustainable in law and whether it has adopted the correct legal approach. To sub serve the purpose of justice delivery system, therefore, it is essential that the courts should record reasons for their conclusions, whether disposing of the case at admission stage or after regular hearing.

13. At the cost of repetition, we may notice, that this Court has consistently taken the view that recording of reasons is an essential feature of dispensation of justice. A litigant who approaches the court with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements. A judgment without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher court in the event of challenge to that judgment. Now, we may refer to certain judgments of this Court as well as of the High Courts which have taken this view."

24. The recording of reasons by the administrative and quasi-judicial authorities is a well-accepted norm and its compliance has

been stated to be mandatory. Of course, reasons recorded by such authorities may not be like judgments of courts, but they should precisely state the reasons for rejecting or accepting a claim which would reflect due application of mind. The Bombay High Court in the case of *Pipe Arts India Pvt. Ltd v. Gangadhar Nathuji Golmare*, 2008 (6) MLJ 280 held:

> "8. The Supreme Court and different High Courts have taken the view that it is always desirable to record reasons in support of the Government actions whether administrative or quasi-judicial. Even if the statutory rules do not impose an obligation upon the authorities still it is expected of the authorities concerned to act fairly and in consonance with basic rule of law. These concepts would require that any order, particularly, the order which can be subject matter of judicial review, is reasoned one. Even in the case of Chabungbambohal Singh v.Union of India and Ors: 1995(1) SCALE 857 , the Court held as under:
> His assessment was, however, recorded as "very good" whereas qua the appellant it had been stated unfit. As the appellant was being superseded by one of his juniors, we do not think if it was enough on the part of the Selection Committee to have merely stated unfit, and then to recommend the name of one of his juniors. No reason for unfitness, is reflected in the proceedings, as against what earlier Selection Committees had done to which reference has already been made.
> 9. The requirement of recording reasons is applicable with greater rigour to judicial proceedings. Judicial order determining the rights of the parties essentially should be an order supported by reasoning. The order must reflect what weighed with the Court in granting or declining the relief claimed by the applicants.

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10. In the case of Jawahar Lal Singh v. Naresh Singh and Ors: 1987CriLJ698 , accepting the plea that absence of examination of reasons by the High Court on the basis of which the trial Court discarded prosecution evidence and recorded the finding of an acquittal in favour of all the accused was not appropriate, the Supreme Court held that the order should record reasons. Recording of proper reasons would be essential, so that the Appellate Court would have advantage of considering the considered opinion of the High Court on the reasons which had weighed with the trial Court.

11. May be, while entertaining the interim applications, the orders are not expected to be like detailed judgments in final disposal of the matter, but they must contain some reasons which would provide adequate opportunity and ground to the aggrieved party to assail that order in appeal effectively.

12. In the case of State of Punjab and Ors. v. Surinder Kumar and Ors. : [1992]194ITR434(SC) , while noticing the jurisdictional distinction between Article 142 and Article 226 of the Constitution of India, the Supreme Court stated that powers of the Supreme Court under Article 142 are much wider and the Supreme Court would pass orders to do complete justice. The Supreme Court further reiterated the principle with approval that the High Court has the jurisdiction to dismiss petitions or criminal revisions in limini or grant leave asked for by the petitioner but for adequate reasons which should be recorded in the order. The High Court may not pass cryptic order in relation to regularisation of service of the respondents in view of certain directions passed by the Supreme Court under Article 142 of the Constitution of India. Absence of reasoning did not find favour with the Supreme Court. The Supreme Court also stated the principle that powers of the High Court were circumscribed by limitations discussed and declared by judicial decision and it cannot transgress the limits on the basis of whims or subjective opinion varying from Judge to Judge.

13. In the case of Hindustan Times Ltd. v. Union of India and Ors. : [1998]1SCR4 , the Supreme Court while dealing with the cases under the Labour Laws and Employees' Provident Funds and Miscellaneous Provisions Act, 1952 observed that even when the petition under Article 226 is dismissed in limini, it is expected of the High Court to pass a speaking order, may be briefly.

14. Consistent with the view expressed by the Supreme Court in the afore-referred cases, in the case of State of U.P. v. Battan and Ors. (2001)10SCC607 , the Supreme Court held as under:

The High Court has not given any reasons for refusing to grant leave to file appeal against acquittal. The manner in which appeal against acquittal has been dealt with by the High Court leaves much to be desired. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order. The absence of reasons has rendered the High Court order not sustainable.

15. Similar view was also taken by the Supreme Court in the case of Raj Kishore Jha v. State of Bihar and Ors. JT 2003 (Supp.2) SC 354.

16. In a very recent judgment, the Supreme Court in the case of State of Orissa v. Dhaniram Luhar 2004CriLJ1385 while dealing with the criminal appeal, insisted that the reasons in support of the decision was a cardinal principle and the High Court should record its reasons while disposing of the matter. The Court held as under:

8. Even in respect of administrative orders Lord Denning, M.R. In Breen v. Amalgamated Engg. Union observed:

The giving of reasons is one of the fundamentals of good administration." In Alexander Machinery (Dudley) Ltd. v. Crabtree it was observed: "Failure to give reasons amounts to denial of justice." "Reasons are live links between the mind of the decision-taker to the

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controversy in question and the decision or conclusion arrived at." Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made; in other words, a speaking-out. The "inscrutable face of the sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance.

17. Following this very view, the Supreme Court in another very recent judgment delivered on February, 22, 2008, in the case of State of Rajasthan v. Rajendra Prasad Jain Criminal Appeal No. 360/2008 (Arising out of SLP (Cri.) No. 904/2007) stated that "reason is the heartbeat of every conclusion, and without the same it becomes lifeless."

18. Providing of reasons in orders is of essence in judicial proceedings. Every litigant who approaches the Court with a prayer is entitled to know the reasons for acceptance or rejection of such request. Either of the parties to the Us has a right of appeal and, therefore, it is essential for them to know the considered; opinion of the Court to make the remedy of appeal meaningful. It is the reasoning which ultimately culminates into final decision which may be subject to examination of the appellate or other higher Courts. It is not only desirable; but, in view of the consistent position of law, mandatory for the Court to pass orders while recording reasons in support thereof, however, brief they may be. Brevity in reasoning cannot be understood in legal parlance as absence of; reasons. While no reasoning in support of

judicial orders is impermissible, the brief reasoning would suffice to meet the ends of justice at least at the interlocutory stages and would render the remedy of appeal purposeful and meaningful. It is a settled cannon of legal jurisprudence that the Courts are vested with discretionary powers but such powers are to be exercised judiciously, equitably and in consonance with the settled principles of law. Whether or not, such judicial discretion has been exercised in accordance with the accepted norms, can only be reflected by the reasons recorded in the order impugned before the higher Court. Often it is said that absence of reasoning may ipso facto indicate whimsical exercise of judicial discretion. Patricia Wald, Chief Justice of the D.C. Circuit Court of Appeals in the Article, Black robed Bureaucracy or Collegiality under Challenge, (42 MD.L. REV. 766, 782 (1983), observed as under:

My own guiding principle is that virtually every appellate decision requires some statement of reasons. The discipline of writing even a few sentences or paragraphs explaining the basis for the judgment insures a level of thought and scrutiny by the Court that a bare signal of affirmance, dismissal, or reversal does not.

19. The Court cannot lose sight of the fact that a losing litigant has a cause to plead and a right to challenge the order if it is adverse to him. Opinion of the Court alone can explain the cause which led to passing of the final order. Whether an argument was rejected validly or otherwise, reasoning of the order alone can show. To evaluate the submissions is obligation of the Court and to know the reasons for rejection of its contention is a legitimate expectation on the part of the litigant. Another facet of providing reasoning is to give it a value of precedent which can help in reduction of frivolous litigation. Paul D. Carrington, Daniel J Meador and Maurice Rosenburg, Justice on Appeal 10 (West 1976), observed as under:

When reasons are announced and can be weighed, the public can have assurance that the correcting process is

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working. Announcing reasons can also provide public understanding of how the numerous decisions of the system are integrated. In a busy Court, the reasons are an essential demonstration that the Court did in fact fix its mind on the case at hand. An unreasoned decision has very little claim to acceptance by the defeated party, and is difficult or impossible to accept as an act reflecting systematic application of legal principles. Moreover, the necessity of stating reasons not infrequently changes the results by forcing the judges to come to grips with nettlesome facts or issues which their normal instincts would otherwise cause them to avoid.

20. The reasoning in the opinion of the Court, thus, can effectively be analysed or scrutinized by the Appellate Court. The reasons indicated by the Court could be accepted by the Appellate Court without presuming what weighed with the Court while coming to the impugned decision. The cause of expeditious and effective disposal would be furthered by such an approach. A right of appeal could be created by a special statute or under the provisions of the Code governing the procedure. In either of them, absence of reasoning may have the effect of negating the purpose or right of appeal and, thus, may not achieve the ends of justice.

21. It will be useful to refer words of Justice Roslyn Atkinson, Supreme Court of Queensland, at AIJA Conference at Brisbane on September 13, 2002 in relation to Judgment Writing. Describing that some judgment could be complex, in distinction to routine judgments, where one requires deeper thoughts, and the other could be disposed of easily but in either cases, reasons they must have. While speaking about purpose of the judgment, he said,

The first matter to consider is the purpose of the judgment. To my mind there are four purposes for any judgment that is written:

(1) to clarify your own thoughts;

(2) to explain your decision to the parties;

(3) to communicate the reasons for the decision to the public; and
(4) to provide reasons for an appeal Court to consider.

22. Clarity of thought leads to proper reasoning and proper reasoning is the foundation of a just and fair decision. In Alexander Machinery (Dudley) Ltd. v. Crabtree 1974 ICR 120, the Court went to the extent of observing that "Failure to give reasons amounts to denial of justice". Reasons are really linchpin to administration of justice. They are link between the mind of the decision taker and the controversy in question. To justify our conclusion, reasons are essential. Absence of reasoning would render the judicial order liable to interference by the higher Court. Reasons is the soul of the decision and its absence would render the order open to judicial chastism."

25. Another Constitution Bench of the Supreme Court, in the case of *S.N. Mukherjee vs. Union of India* (1990) 4 SCC 594, while referring to the English law as well as the judgments of the Supreme Court, stated that the failure to give reasons amounts to denial of justice. A party appearing before the Tribunal is entitled to know, either expressly or inferentially the reasons stated by the Tribunal, and what it is to which the Tribunal is addressing its mind. The decision should be in the form of a reasoned document available to the parties affected and thus, the party should be informed of the reasons. The Apex Court in the case of *Ravi*

Yashwant Bhoir v. Collector (2012) 4 SCC 407, reiterated that it is a settled preposition of law that even in administrative matters, the reasons should be recorded as it is incumbent upon authorities to pass a speaking and reasoned order. The Court noticed that the expanding horizon of the principles of natural justice provides for the requirement to record reasons unless recording of such reasons is specifically excluded by a Statute.

26. Such a view has been expressed by the Supreme Court consistently in the past. In the case of *Maharashtra State Board of Secondary and Higher Secondary Education vs. K.S. Gandhi* (1991) 2 SCC 716, the Supreme Court had emphasized that it is implicit that principles of natural justice or fair play do require recording of reasons as a part of fair procedure. In an administrative decision, its order/decision itself may not contain reasons. Even if it is not the requirement of rules, but at least, the record should disclose reasons. It also held that recording of reasons excludes chances of arbitrariness and ensures a degree of fairness in the process of decision making. The Court also noticed that omission to record reasons may vitiate the order. The Court while noticing that omnipresence and omniscience of the principles of natural justice

act as deterrence to arrive at arbitrary decisions in flagrant 40 infraction of fair play, held as under:

> "21. Thus it is settled law that the reasons are harbinger between the minds of the maker of the order to the controversy in question and the decision or conclusion arrived at. It also excludes the chances to reach arbitrary, whimsical or capricious decision or conclusion. The reasons assure an inbuilt support to the conclusion/decision reached. The order when it affects the right of a citizen or a person, irrespective of the fact, whether it is quasi-judicial or administrative fair play requires recording of germane and relevant precise reasons. The recording of reasons is also an assurance that the authority concerned consciously applied its mind to the facts on record. It also aids the appellate or revisional authority or the supervisory jurisdiction of the High Court under Article 226 or the appellate jurisdiction of this Court under Article 136 to see whether the authority concerned acted fairly and justly to mete out justice to the aggrieved person."

27. The consistent view of the courts has been that recording of reasons is an essential feature of the principles of natural justice. Natural justice cannot be understood in isolation. It must be examined while keeping in mind the facts and circumstances of a given case. As already noticed, violation of principles of natural justice and its consequences in law would always be relatable to a situation in a given case. Providing of notice, giving a fair

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opportunity to put forward its case and to record reasons are the essential features of the doctrine of natural justice. It is neither permissible nor prudent to permit violation of these rules and prejudice, though is a relevant consideration, may not always be an indispensable aspect. The cases in which, *ex facie,* a serious violation of principles of natural justice is shown, the Court or the Tribunal may declare the action invalid and ineffective, even in absence of proven prejudice.

28. Another very important aspect of recording of reasons by administrative or quasi-judicial authority is that the reasons so recorded must have a nexus and should deal with the grounds which have been raised by the affected party for consideration by such authority. Recording reasons without dealing with such contentions would tantamount to non-recording of reasons. The authority concerned is expected to apply its mind to all aspects of a case but most importantly to the contentions raised by the affected party in relation to the grounds or supporting arguments without which no adverse order could be passed against such party. If such grounds are not dealt with in the order passed by the authority, neither the party nor the appellate authority would be able to

comprehend as to why their contentions have been rejected, as the reasons are harbinger between the mind of the maker of the order, to the controversy in question and the decision or conclusion arrived at. This is the acid test for examining fair opportunity and proper application of mind by the authority concerned.

29. The importance of the doctrine of natural justice is evident from the fact that with the development of law it has been treated as an ingredient of Article 14 of the Constitution of India. 'Natural Justice' means a fair process. A fair process essentially must exclude arbitrariness and exclusion of arbitrariness would ensure equality and equal treatment before law. This new dimension of *audi alteram partem* as a facet of natural justice has been noticed by D.D. Basu, Shorter Constitution, 44th Edition 2012:

> "Once it is acknowledged that non-arbitrariness is an ingredient of Art. 14 pervading the entire realm of State action governed by Art. 14, it has come to be established, as a further corollary , that the *audi alteram partem* facet of natural justice is also requirement of Art. 14, for, natural justice is the antithesis of arbitrariness. The right of *audi alteram partem* is a valuable right recognized under the Constitution of India wherein it is held that, the principle of the maxim which mandates that no one should be condemned unheard, is a part of the rules of natural justice. Such right of hearing conferred by a statute cannot be taken away even by Courts."

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30. Reference could also be made to the judgments in the case of *DTC Mazdoor Union v. DTC,* AIR 1991 SC 101 and *Basudeo Tiwari v. Sido Kanhu University,* (1998) 8 SCC 194.

31. Now, we may examine whether there has been a violation of principles of natural justice, its extent and consequences. The first and the foremost contention in this regard raised on behalf of the applicants is that the report of the Deputy Collector which was part of the record and which has also been referred to in the impugned order was never furnished to the applicants, though, the applicants had submitted the documents when the enquiry was conducted by the Deputy Collector. According to the applicants, it has caused serious prejudice to them. In the impugned order, it has been, noticed "further, the enquiries by the Deputy Collector and SDO (Bicholim) has no finding in its report and the same cannot be relied upon."

32. As already noticed, no dispute has been raised before us by the learned counsel appearing for the Respondent No.3 that the copy of the report of the Deputy Collector and that of the SDO had not been furnished to the applicants. However, the contention is that in the facts and circumstances of the case it was not necessary

to furnish these documents to the applicants. They had no significance as they were not relied upon by the Authority. This contention does not have any merit. It is clear that the Deputy Collector had acted in furtherance to the letter of the Authority dated 23rd September, 2010. In furtherance to it he had issued the stop work order dated 11th October, 2010 as well as submitted the report. 94

33. On the one hand, remarks have been recorded to say that reports cannot be relied upon but on the other in paragraph 6 of the order, it has been specifically stated, "the Deputy Collector (Bicholim) conducted a hearing and has submitted a report that the jetties were in existence before 1991. He has not stopped loading/unloading operation at the site. He indicates them to be legal in nature. From the record available in the file, the jetties appear not to be totally legally constructed and the Village Panchayat had ordered for its demolition. Other facts of the case reveal that the claim of jetties existing in 1969 appear to be untrue and the Land Record Survey plans of 1976 do not have the same indicated on their plans."

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34. Both the above comments cannot co-exist. Either the report has not been considered and relied upon in its entirety or it has been relied upon partially or otherwise. From the order it is clear that the said reports have been relied upon.

35. The Deputy Collector (Bicholim) had also been asked to conduct an enquiry vide letter of Authority dated 29th October, 2010. The enquiry was conducted by the Deputy Collector in which the applicants had participated and he had submitted his report without furnishing a copy thereof to the applicants. Once the report was called by the Authorities and it formed part of the record, it was expected of the Authorities to furnish a copy of the report to the applicants as well. Furthermore, what remarks have been recorded supra would be of no consequence as the record being part of a quasi-judicial functioning, could not be brushed aside in that fashion. If it recorded findings which were favorable to the applicants, they should have been taken into consideration and judged appropriately. If the remarks were against the petitioner, similar process should have been followed in the event.

36. It is also contended that a number of other documents which had been filed by the complainant along with his reply or were

otherwise collected by the Authorities had not been furnished to the applicants. There is also no dispute to the fact that the documents which had been furnished to the Authorities by the complainant had not been furnished to the applicants on the pretext that they were the documents of the applicants themselves. This argument of Respondent No.3 cannot advance their case any further. Once the documents were relied upon by the Authority in recording its conclusions, then such documents ought to have been furnished to the applicants. These documents included, reply of the claimant dated 21st December, 2009 and a copy of the Plan dated 29th September, 2005. According to the applicants, the non-furnishing of the report and other documents, as afore-indicated, has caused serious prejudice to their right of defense as they did not know what case is being put up by the Authorities for the purposes of deciding the show cause notice in question.

37. It is also the contention of the applicants before us that the order suffers from non-application of mind as the various documents which had been produced by the applicants have not been considered by the authorities. These included:

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a. Application dated 22/1/1969 made by SGL to the Captain of Ports;

b. Permission/NOC from the Captain of Ports dated 27/2/1969;

c. Resolution of the Panchayat dated 12/8/2010 confirming that the Panchayat records indicate existence of Jetties from 1969;

d. Notice/Resolution from the Communidade of Navelim dated 12/9/1968;

e. Affidavits of 11 local and prominent villagers from Amona;

f. Outward Registers of the Panchayat of Amona in relation to the permission for repairs of the jetty granted in the year 1987;

g. Internal communications of SGL dated 9/7/1987; 6/10/1987; 16/10/1987; 3/8/1987; 25/8/1987; and 2/9/1987;

h. Daily Ore Stock Movement Reports dated 7/5/1987 and 8/5/1987 in relation to the two jetties:

i. Topo sheet of the area prepared in the year1991.

38. Non-consideration of these documents by the authorities again has prejudicial effect on the case of the applicants. Still another contention is that the impugned order suffers from non-application of mind as the various contentions raised by the applicants have not been considered, much less in their correct perspective. *Inter alia*, it is contended that the documents relating to payment of riverine dues could not form the basis for the true and correct determination of the area of the jetties which were in existence prior to 1991. In fact, the area of 65 sq. mt5s. referred to in the document dated 24th October, 1996 relates merely to a 'portion of one of the jetties protruding in the river.'

39. The area of the jetties was in serious dispute as the Captain of Ports had alleged that even the area of the ship which was being used for loading/unloading was part of the area which was chargeable to riverine dues. That dispute itself was pending and as such no reliance could be placed upon such a contention. The impugned order does not consider the contention at all that conveyor belting system was operating only after obtaining the permission from the Captain of Ports and Goa State Pollution Control Board. Furthermore, even if as an argument it is assumed

that the conveyor belting system was installed in the year 1992, then it was clear that the CRZ Regulations came into force only upon finalization of the Coastal Zone Management Plan, which in relation to the area in question, was done in the year 1996. This contention has not been dealt with by the Authorities. The hearing had been conducted by the Authority but the impugned order has been passed by the Member Secretary, which is not permissible in law. Also, the Authority ceased to exist in February, 2009 as its term came to an end and unless a fresh Authority was constituted, no order could be passed in the eyes of law. Non-consideration of these submissions, according to the applicants, has denied him a fair trial and has prejudiced its interest. Non-consideration of the submissions and non-furnishing of these documents clearly violates the doctrine of *audi alteram partem* and would vitiate the impugned order. It is contended that it is not even the case of Respondent No.3 that this violation at the first stage had ever been corrected at a subsequent hearing or stage. A defect of natural justice in trial body can be cured by the presence of natural justice in the appellate body. This would result in depriving the litigant of his right to appeal from the initial body. To buttress the contention,

reliance has been placed upon *Institute of Chartered Accountants v. L. K. Ratna* (1986) 4 SCC 533. 50

39. We may notice that this contention of the applicants has merit, primarily for the reason that there was a clear admission made before us that the report and some other documents had not been furnished to the applicants by the Authority. In fact, during the course of hearing, the matter was also adjourned to find out if the documents have been supplied and the answer to the same was found to be in negative at a subsequent hearing in other words, no attempt has been made to correct the violation of principles of natural justice at the initial stage. Lastly, it is also contended on behalf of the applicants that the impugned order and the directions contained in the order are beyond the purview and scope of the show cause notice. The show cause notice dated 16th November, 2009 was never part of the proceedings that culminated into passing of the impugned order dated 4th March, 2011. The show cause notice dated 1st January, 2010, in fact, was projected as the sole show cause notice for taking action against the applicants. Furthermore, the grounds taken in the show cause notice are different than the ones on the basis of which the impugned order

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has been passed. In other words, the impugned order is beyond the ambit and scope of the show cause notices issued to the applicants. To that extent the applicants have been taken by surprise and such proceedings are again violative of the principles of natural justice. Reliance in this regard has been placed upon the judgments of the Supreme Court in the case of *Godrej Industries Ltd. V. Commissioner of Central Excise* (2008) 17 SCC 417 and *Trilochan Dev Sharma v. State of Punjab* (2001) 6 SCC 260.

40. It is true that in the above cases the Supreme Court has clearly stated that an order passed on grounds not taken in the show cause notice is not sustainable. Furthermore, in paragraph 12 of the judgment in the case of *Trilochan Dev Sharma* (supra), the Supreme Court observed: "It follows as a necessary corollary that what has not been provided as a ground providing reasons for proposed removal cannot be relied upon as furnishing basis for the order of removal." The authorities exercising its power of passing orders of civil consequences against parties are expected to apply their minds to all facets. All such factors must be put to the applicant and the applicant have a right to put forward his case on each of such issues. In the present case, even if we assume that

both the show cause notices are the foundation, as was recorded in the impugned order, even then, in none of these notices has it been recorded anywhere that the jetties were in excess of 65 sq. meters (area over and above), were unauthorized, illegal and work in that behalf should be stopped. This is a very material allegation which ought to have been made in the show cause notice itself. On the contrary in the show cause notice it has been stated that there was illegal construction/operation of jetties, loading/unloading without approval and the absence of such other statutory approvals. The show cause notice talked of the purpose of reconstruction, construction, development, repair, renovation between 200 meters to 500 meters of the high tide line. These allegations have not been discussed in the impugned order. In fact, the notice clearly stated that the alleged illegal construction was highly detrimental to the coastal ecosystem, riverine ecosystem due to destruction of sand dunes, coastal vegetation etc. None of these grounds have been dealt with in the impugned order.

41. Still another contention raised before the Tribunal is that there was no illegal construction/loading/unloading activities at the jetties. The applicants, vide their letter dated 10th February, 2010,

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without prejudice to their rights, had requested the office of the Authority to regularize the improvised loading facility in the form of conveyer belting system in Survey No. 32 of village Amona. This application has not been reacted to by the Authority finally, may be in view of the proceedings pending before it in furtherance to the show cause notice. Reliance has been placed upon the provisions of the Notification of 2011 in this regard. The activities which are directly related to the water front or directly need offshore facilities have been made an exception to the prohibited activities within the CRZ. Furthermore Clause 4 of the Notification states about regulation on permissible activities in CRZ area except those prohibited in Para 3 of the Notification, Clause 4(f) reads under:

> "(f) construction and operation for ports and harbors, jetties, wharves, quays, slipways, ship construction yards, breakwaters, groynes, erosion control measures;"

42. The said Notification while dealing specifically with the CRZ of Goa declares construction of jetties as permissible by the Gram Panchayats. In other words, the claim of regularization needs examination by the competent authority. Certainly, we are not even

remotely indicating or should be understood to have indicated whether regularization should or should not be permitted. It is for the concerned authorities to examine the said request of the applicants, in accordance with law and with strict adherence to the prescribed procedure.

43. To put it simply, the impugned order on the one hand dealt with the issues which were not the allegations made in the show cause notice while on the other it does not discuss or appreciate any evidence in regard to the allegations that were made in the show cause notice. This leads clearly to one conclusion, that the Authority has failed to apply its mind to the facts of the case and has not even considered various legal and other submissions that had been raised by the applicants.

44. Another relevant factor is with regard to the inspection of jetties by the competent authority. As is evident from the above factual matrix, the dispute relates to illegal construction/renovation of the jetties and its extent. The extent could have been best determined by conducting an inspection. It is not in dispute before us that the Authority did not conduct any inspection of the site in question. The Deputy Collector had conducted an instant enquiry,

the report of which has been mentioned in the impugned order, but at the same time it is stated that it returns no findings. The SDO and some officials had visited the site but no report thereof has been referred to in the proceedings and particularly in the impugned order. The Authority, thus, has ignored certain important aspects on the one hand and on the other, has decided the matter with reference to the events which were not part of the show cause notice.

45. Abuse of power and arbitrariness are two sides of the same coin. One triggers the other. The non-supplying of report, certain documents, non-application of mind, the content of the impugned order being beyond the scope of the show cause notice and non-communication of material relied upon, seen in the light of the background that no inspection was conducted by the Authority concerned, leads us to come to the insuppressible conclusion that there has been denial of fair opportunity to the applicants. The principles of natural justice have been violated. Non-recording of reasons in regard to the grounds and material submissions regarding the same by the Authority further substantiates the view that the impugned order is unsustainable in law. We are unable to

hold that the procedure adopted by the Authorities completely eliminates the element of arbitrariness or that of a capricious decision. Adherence to the principles of natural justice, as an indefeasible part of rule of law is of supreme importance, particularly when an Authority like Respondent No. 2 embarks upon determining the disputes between the parties or passes any administrative order/action involving civil consequences. We have no hesitation in coming to the conclusion that after the service of show cause notices, the proceedings and the impugned order are vitiated for the reasons afore-recorded.

46. Now, we must deal with the contention advanced on behalf of Respondent No.3 that the Notification of 2011 and for that matter even of 1991 did not provide for any specific procedure to be adopted by the authority while initiating such proceedings under the scheme of the Notification. Thus, the procedure adopted by the Respondent No.3 while passing the impugned order dated 4th March, 2011 does not call for any interference. The submission is that the Authority was competent to adopt a procedure that it may have deemed fit and proper.

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47. The proposition of law advanced on behalf of the Respondent No.3 to a limited extent, may not be questionable. It is a settled canon of law that wherever the rules do not provide any specific procedure to be followed by the authority concerned while dealing with disputes and passing orders having civil consequences, it can adopt its own procedure. But equally true is that such procedure has to be in consonance with the principles of natural justice and the basic rule of law. The application of any procedure, in absence of specific provision of law, which infringes the principles of natural justice, cannot be sustained in law. Such procedure and the order passed upon such basis shall stand vitiated. As far as the merits of the present case are concerned, we have already returned a definite finding that there has been a serious violation of the principles of natural justice and the impugned order cannot stand the scrutiny of judicial review. The necessary corollary to the above discussion would be as to what will be the procedure that should be followed by the authorities in consonance with the principles of natural justice in absence of the prescription of any procedure in the Notification. Putting the allegations to the applicants by means of a notice, granting an opportunity to the affected party of being heard

and recording of reasons while passing the orders are the fundamental essentials of the doctrine of *audi alteram partem.* So the authority must follow the procedure which would satisfy these basic ingredients before it can pass an order having civil consequences. Thus, we direct the authority to follow the following procedure while exercising its power in terms of the Notifications of 1991 and/or 2011:

(1) It must serve a notice to show cause, containing comprehensively all the acts/omissions/commissions which the affected party has committed, rendering it liable for any action in terms of the Notification.

(2) The affected party should submit its reply with complete documents to support the contents thereof, within the time prescribed in the show cause notice.

(3) The authority must furnish to the applicants, complaints, documents and/or any other material that it proposes to rely upon for the purposes of determining the controversy in issue.

(4) Wherever the records are voluminous and it may not be practical to furnish the copies of all such records, in that

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event the authority must provide an inspection of documents to the applicants and supply copies of such documents as the applicants may ask for, at his cost. Wherever the facts of the case require and the authority is of the view that the controversy can better be resolved by physical inspection of the site, then it must by itself or through such other appropriate high officer get the site in question inspected and furnish the inspection report to the affected party.

(5) The affected party should be provided a fair opportunity to put forward its case before the authority.

(6) After hearing the parties, the authority should pass a reasoned order. The order should deal, preferably with the grounds which have been raised by the affected party, as precisely as possible.

48. The above directions should be followed by the authority in all cases and with immediate effect.

49. Reverting to the case at hand, while we set aside the order dated 4th March, 2011, we grant liberty to the Authority to commence its proceedings from the stage of show cause notice/notices and proceed in accordance with the directions afore-

contained from that stage. It is a settled principle of law that wherever the Courts or Tribunals set aside an order, it could always grant liberty and normally should grant liberty to the authority to commence its proceedings from the stage the defect had occurred in the proceedings. This principle has been well-settled by the Hon'ble Supreme Court in the case of *Managing Director, ECIL, Hyderabad v. Karunakaran*(1993) 4 SCC 727and *Shyam Sunder v. State of Haryana* (2001) 3 Recent Service Judgements 371. Applying this principle to the facts of the present case, the Authority shall commence its proceedings from the stage of service of the show cause notices. The show cause notice dated 16th November, 2009 and 1st January, 2010 shall be the basis for proceeding further with the enquiry, however with specific liberty to the authority to make any additional or fresh grounds that it may deem fit, within two weeks from the date of pronouncement of this order. To these show cause notices, the applicants shall submit its additional reply, if any, within two weeks thereafter. The Authority shall then proceed with the matter in light of the above directions and pass the final order within four months from the date of pronouncement of this order.

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50. We allow the application and set aside the order dated 4th March, 2011, with the above directions and liberties as granted. However, we leave the parties to bear their own costs.

Justice Swatanter Kumar
Chairperson

Justice P. Jyothimani
Judicial Member

Dr. G.K. Pandey
Expert Member

Prof. A.R. Yousuf
Expert Member

Dr. R.C. Trivedi
Expert Member

New Delhi
April 11, 2013

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(2012) 4 Supreme Court Cases 407

(BEFORE DR B.S. CHAUHAN AND J.S. KHEHAR, JJ.)

RAVI YASHWANT BHOIR .. Appellant;

Versus

DISTRICT COLLECTOR, RAIGAD AND OTHERS .. Respondents.

Civil Appeal No. 2085 of 2012†, decided on March 2, 2012

A. **Constitutional Law — Democracy — Elected office-bearers — Removal from office — Misconduct — Meaning — Should be construed with reference to subject-matter, context, scope and object of statute — What amounts to misconduct — Court should examine whether misconduct has been detrimental to public interest — Mere error of judgment resulting in doing of negligent act does not amount to misconduct — Failure on the part of appellant President of Municipal Council to call general body meeting inadvertently, unintentionally and in ignorance of statutory requirement, without any corresponding loss to Municipal Council, held, would not amount to misconduct — Appellant restored to office — Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (40 of 1965) — Ss. 55-A and 55-B — Constitution of India, Preamble and Arts. 243-S and 243-V**

B. **Constitutional Law — Democracy — Elected office-bearers — Removal from office — Misconduct — Disgraceful conduct — Meaning — It need not necessarily be connected with discharge of official duty — Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (40 of 1965) — Ss. 55-A and 55-B — Service Law — Misconduct — Words and Phrases — "Disgraceful conduct" — Constitution of India, Preamble and Arts. 243-S and 243-V**

C. **Fraud/Forgery/Mala Fides — Mala fides — Malice in law — Meaning — Malice attributed to State is never personal malice but is malice in law — Deliberate wrongful or injurious act done with oblique or indirect motive in violation of law to the prejudice of others without reasonable or probable cause constitutes malice in law — Removal of duly elected President of Municipal Council (appellant) by competent authority (being Chief Minister of the State holding portfolio of Department concerned) unceremoniously in a casual manner without strictly adhering to safeguards provided under statute, held on facts, vitiated by malice in law — Appellant restored to office — Administrative Law — Mala fides — Constitution of India, Arts. 243-S and 243-V**

D. **Constitutional Law — Basic features or structure of the Constitution — Violation of, by exercise of executive power — Scope of judicial review — Democratic set-up of the country is a basic feature of the Constitution — "Basic" and "democracy" — Meaning — Municipal bodies, having been**

† From the Judgment and Order dated 18-6-2009 of the High Court of Judicature of Bombay in WP No. 4665 of 2009

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conferred constitutional status by Constitution (74th Amendment) Act, 1992, are constitutional institutions and basic democratic units — Exercise of executive power affecting efficacy of such institutions would destroy a basic feature of the Constitution — Removal of duly elected President of Municipal Council (appellant) by competent authority (being Chief Minister of the State holding portfolio of Department concerned) in a casual manner without following procedure prescribed by law, held, dangerous to democratic set-up of the country — Hence, Supreme Court would interfere in such a situation by striking down illegal and unconstitutional order of removal — Hence, appellant restored to office — Constitution of India — Arts. 14, 21, Preamble, 368, 243-S, 243-V, 162, 73, 32, 226 and 136 — Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (40 of 1965) — Ss. 55-A, 55-B and 81 — Rule of Law — Words and Phrases — "Basic", "democracy" and "democratic"

E. Municipalities — Officers and Members of Municipal Corporation/ Council — Removal of elected member (President) for misconduct — Involves quasi-judicial proceedings — Elected officials stand on a higher pedestal than government servants — Their removal has serious repercussions as it casts stigma and takes away their valuable rights as well as rights of people of their respective constituencies to be represented by them — Hence, they can be removed only in exceptional circumstances, by following stringent procedure and standard of proof — Holding of full-fledged inquiry and strict compliance with statutory provisions and principles of natural justice necessary — Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (40 of 1965) — Ss. 55-A, 55-B and 81 — Constitution of India, Preamble and Arts. 243-S, 243-V and 311

F. Municipalities — Officers and Members of Municipal Corporation/ Council — Removal of elected member — Recording of reasons — Order of removal must assign reasons for removal — Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (40 of 1965) — Ss. 55-A and 55-B — Constitution of India, Arts. 243-S and 243-V

G. Administrative Law — Natural Justice — Duty to Give Reasons/ Recording of Reasons/Speaking Order — One of the principles of natural justice — Rationale behind requirement of recording reasons in order — Right to reasons is an indispensable part of sound judicial system

H. Constitution of India — Art. 226 — Necessary party — Complainant filing complaint against abuse of public office having only a remote interest cannot seek to be a party on ground of public interest — *Damnum sine injuria* — On basis of some loss or harm suffered by complainant which may not be wrongful in the eye of the law, in absence of any injury to his legal right or legally protected interest, complainant cannot claim status of a party to adversarial litigation — Complaint filed by ex-President of Municipal Council against appellant, currently elected President, a political

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rival — Complaint leading to removal of appellant from his office — Writ petition filed before High Court by appellant against order of removal — Held, complainant cannot claim to be a party to writ proceedings — In garb of being a necessary party, complainant cannot be permitted to make a case as that of general public interest — Maxims — *Damnum sine injuria* — Civil Procedure Code, 1908 — Or. 1 R. 9 — Practice and Procedure — Parties

I. **Evidence Act, 1872 — S. 114 Ill. (g) — Removal proceedings conducted against elected office-bearer i.e. appellant President of Municipal Council for misconduct — Original record not produced before Supreme Court, though directed — Adverse inference drawn — Chief Secretary of State directed to conduct enquiry into non-compliance and send personal affidavit in respect thereto to Supreme Court within four weeks**

J. **Constitution of India — Arts. 129 and 136 — Non-compliance with order of Supreme Court to supply original record of quasi-judicial proceedings — Enquiry directed against officials concerned — Contempt of Courts Act, 1971, S. 2(c)**

One of the charges relating to alleged misconduct was that the appellant President of the Municipal Council did not call for a general body meeting for a period of three months as required under Section 81(1) of the 1965 Act. The other two charges were regarding the acceptance of fresh tenders at high rates for incomplete work of laying down pipeline for water supply. It was alleged that tender of lower estimated cost was not accepted, rather there was a difference of more than 10% in tender amount.

The appellant submitted his explanation in writing. In respect of the charge regarding not holding the meeting, it was explained by the appellant that the officer concerned of the Municipal Council did not inform him, nor did the members ask to hold such meeting and as such it was merely an inadvertent act and not intentional and therefore, the question of committing misconduct could not arise. As regards the other two charges, it was explained that the Chief Officer, the Junior Engineer had considered the technical aspect and then the recommendation was forwarded under the signatures of President, Chief Officer and Junior Engineer and after considering all factors, the Municipal Council passed a resolution accepting the tenders. It was stated that as the Council itself had accepted the tenders by its resolution, there was neither breach of any statutory provision, nor could the appellant exclusively be held responsible for acceptance of the tenders. After considering the explanation the appellant was issued a notice of hearing. The appellant along with his advocate remained present on the date of hearing before the competent authority i.e. the Chief Minister holding the portfolio of the Department concerned. As at the time of hearing the complainant, Respondent 5, an ex-President and then a sitting Councillor of the Municipal Council of which the appellant was the President wanted to rely upon some new grounds, the appellant raised objection. The Chief Minister directed the Secretary to fix up a date of hearing, but no date was fixed. However, without affording any opportunity of hearing to the appellant, the Chief Minister then passed a cryptic order stating: "... lowest tender is accepted as per Clause 171 of the Maharashtra Municipal Council Accounts Code, 1971. However, the tenders were invited as per the DSR rates for the year 2005-2006. The lowest tender received at that time and was more than 10% of the rates of

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the estimate (approximately 31% and 37%). Despite this, the said tender was accepted." It was declared that the conduct of the appellant was unbecoming of the President of Uran Municipal Council and that the appellant was declared to be disqualified for the remaining tenure of municipal councillorship under Section 55-B of the Act and further disqualified for a period of six years from the date of the order. In the order, no reference was made to the pleadings taken by the appellant either in his reply to show cause or during the course of hearing, nor any reason was given for reaching this conclusion. The appellant filed a writ petition before the High Court challenging the said order but the same was dismissed.

Allowing the appeal, setting aside all disqualifications imposed on the appellant and restoring him to office, the Supreme Court

Held :

Misconduct and disgraceful conduct

The expression "misconduct" has to be understood as a transgression of some established and definite rule of action, a forbidden act, unlawful behaviour, wilful in character. It may be synonymous as misdemeanour in propriety and mismanagement. Further, the expression "misconduct" has to be construed and understood in reference to the subject-matter and context wherein the term occurs taking into consideration the scope and object of the statute which is being construed. Misconduct is to be measured in the terms of the nature of misconduct and it should be viewed with the consequences of misconduct as to whether it has been detrimental to the public interest. An action which is detrimental to the prestige of the institution may also amount to misconduct. Acting beyond authority may be a misconduct. When the office-bearer is expected to act with absolute integrity and honesty in handling the work, any misappropriation, even temporary, of the funds, etc. constitutes a serious misconduct, inviting severe punishment. However, conclusions about the absence or lack of personal qualities in the incumbent do not amount to misconduct holding the person concerned liable for punishment. Mere error of judgment resulting in doing of negligent act does not amount to misconduct. But, in exceptional circumstances, not working diligently may be a misconduct. In a particular case, negligence or carelessness may also be a misconduct.

(Paras 18, 19, 13 and 16)

State of Punjab v. *Ram Singh*, (1992) 4 SCC 54 : 1992 SCC (L&S) 793 : (1992) 21 ATC 435; *Disciplinary Authority-cum-Regl. Manager* v. *Nikunja Bihari Patnaik*, (1996) 9 SCC 69 : 1996 SCC (L&S) 1194; *Govt. of T.N.* v. *K.N. Ramamurthy*, (1997) 7 SCC 101 : 1997 SCC (L&S) 1749; *Inspector Prem Chand* v. *Govt. of NCT of Delhi*, (2007) 4 SCC 566 : (2007) 2 SCC (L&S) 58; *SBI* v. *S.N. Goyal*, (2008) 8 SCC 92 : (2008) 2 SCC (L&S) 678; *Govt. of A.P.* v. *P. Posetty*, (2000) 2 SCC 220 : 2000 SCC (L&S) 254; *M.M. Malhotra* v. *Union of India*, (2005) 8 SCC 351 : 2005 SCC (L&S) 1139; *Baldev Singh Gandhi* v. *State of Punjab*, (2002) 3 SCC 667; *Union of India* v. *J. Ahmed*, (1979) 2 SCC 286 : 1979 SCC (L&S) 157; *Bank of India* v. *Mohd. Nizamuddin*, (2006) 7 SCC 410 : 2006 SCC (L&S) 1663, *relied on*

Black's Law Dictionary, 6th Edn.; P. Ramanatha Aiyar's *Law Lexicon*, Reprint Edn. 1987, p. 821, *relied on*

The expression "disgraceful conduct" is not defined in the statute. Therefore, the same has to be understood in given dictionary meaning. The term "disgrace" signifies loss of honour, respect, or reputation, shame or bring disfavour or discredit. "Disgraceful" means giving offence to moral sensibilities and injurious to reputation or conduct or character deserving or bringing disgrace or shame.

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Disgraceful conduct is also to be examined from the context in which the term has been employed under the statute. Disgraceful conduct need not necessarily be connected with the official duties of the office-bearer. Therefore, it may be outside the ambit of discharge of his official duty. (Para 20)

It is clear from the relevant provisions of the 1965 Act that in case the President of the Municipal Council fails to call the meeting, there are other modes of calling the meeting. Not calling the meeting of the general body of the House may be merely a technical misconduct committed inadvertently in ignorance of statutory requirements. It is nobody's case that the appellant President of the Municipal Council had done it intentionally/purposely in order to avoid some unpleasant resolution/demand of the Council. No finding of fact has been recorded either by the competent authority or by the High Court that some urgent/important work could not be carried out for want of a general body meeting of the Council. Merely not to conduct oneself according to the procedure prescribed or omission to conduct a meeting without any corresponding loss to the corporate body, would not be an automatic misconduct by inference, unless some positive intentional misconduct is shown. In the absence of any imputation of motive, not calling the meeting by the appellant could not in itself be enough to prove the charge. Thus, the first charge proved against the appellant for not calling the meeting of the Municipal Council, did not warrant the order of removal and the explanation furnished by the appellant could have been accepted. (Paras 61 to 68)

The other charges could not be proved against the appellant in view of the fact that the tenders at a higher rate were accepted by the Council itself and the appellant could not be held exclusively responsible for it. It had been a collective consensus decision of the Council to accept the tender at higher rate and the appellant could not have been held guilty of the said charges. (Paras 68 and 69)

Malice in law

The duly elected member/Chairman of the Council could not have been removed in such a casual and cavalier manner without strict adherence to the safeguards provided under the statute which had to be scrupulously followed. Thus, the instant case is a crystal clear-cut case of legal malice and therefore, the impugned orders are liable to be quashed. (Para 70)

The State is under an obligation to act fairly without ill will or malice in fact or in law. Where malice is attributed to the State, it can never be a case of personal ill will or spite on the part of the State. "Legal malice" or "malice in law" means something done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. Passing an order for unauthorised purpose constitutes malice in law. Mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for "purposes foreign to those for which it is in law intended". It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. (Paras 47 and 48)

ADM, Jabalpur v. *Shivakant Shukla*, (1976) 2 SCC 521; *Union of India* v. *V. Ramakrishnan*, (2005) 8 SCC 394 : 2005 SCC (L&S) 1150; *Kalabharati Advertising* v. *Hemant Vimalnath Narichania*, (2010) 9 SCC 437 : (2010) 3 SCC (Civ) 808, *relied on*

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Removal of elected office-bearers

(i) Municipalities — Constitutional institution — Basic feature of the Constitution

An elected official cannot be permitted to be removed unceremoniously without following the procedure prescribed by law, in violation of the provisions of Article 21 [Article 14] of the Constitution, by the State by adopting a casual approach and resorting to manipulations to achieve ulterior purpose. The Court being the custodian of law cannot tolerate any attempt to thwart the institution. (Para 22)

People's Union for Civil Liberties v. *Union of India*, (2003) 4 SCC 399; *State of Punjab* v. *Baldev Singh*, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080; *G. Sadanandan* v. *State of Kerala*, AIR 1966 SC 1925 : 1966 Cri LJ 1533, *relied on*

Mohinder Kumar v. *State*, (1998) 8 SCC 655 : 1999 SCC (Cri) 79; *Ali Mustaffa Abdul Rahman Moosa* v. *State of Kerala*, (1994) 6 SCC 569 : 1995 SCC (Cri) 32, *referred to*

Lily Thomas v. *Speaker, Lok Sabha*, (1993) 4 SCC 234, *cited*

The municipalities have been conferred constitutional status by amending the Constitution vide the 74th Amendment Act, 1992 w.e.f. 1-6-1993. The municipalities have also been conferred various powers under Article 243-B of the Constitution. Amendment in the Constitution by adding Parts IX and IX-A confers upon the local self-government a complete autonomy on the basic democratic unit unshackled from official control. Thus, exercise of any power having effect of destroying the Constitutional institution besides being outrageous is dangerous to the democratic set-up of this country. (Paras 21 and 22)

The democratic set-up of the country has always been recognised as a basic feature of the Constitution, like other features e.g. supremacy of the Constitution, rule of law, principle of separation of powers, power of judicial review under Articles 32, 226 and 227 of the Constitution, etc. "Basic" means the basis of a thing on which it stands, and on the failure of which it falls. In democracy all citizens have equal political rights. Democracy means actual, active and effective exercise of power by the people in this regard. It means political participation of the people in running the administration of the Government. It conveys the state of affairs in which each citizen is assured of the right of equal participation in the polity. (Paras 23 and 26)

Kesavananda Bharati v. *State of Kerala*, (1973) 4 SCC 225; *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625; *Union of India* v. *Assn. for Democratic Reforms*, (2002) 5 SCC 294; *Special Reference No. 1 of 2002, In re (Gujarat Assembly Election Matter)*, (2002) 8 SCC 237; *Kuldip Nayar* v. *Union of India*, (2006) 7 SCC 1; *R.C. Poudyal* v. *Union of India*, 1994 Supp (1) SCC 324, *relied on*

It is not permissible to destroy any of the basic features of the Constitution even by any form of amendment, and therefore, it is beyond imagination that it can be eroded by the executive on its whims without any reason. The Constitution accords full faith and credit to the act done by the executive in exercise of its statutory powers, but they have a primary responsibility to serve the nation and enlighten the citizens to further strengthen a democratic State. (Para 24)

Public administration is responsible for the effective implication of the rule of law and constitutional commands which effectuate fairly the objective standard set for adjudicating good administrative decisions. However, wherever

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the executive fails, the Courts come forward to strike down an order passed by them passionately and to remove arbitrariness and unreasonableness, for the reason that the State by its illegal action becomes liable for forfeiting the full faith and credit trusted with it. (Para 25)

Scheduled Castes and Scheduled Tribes Officers' Welfare Council v. *State of U.P.*, (1997) 1 SCC 701 : 1997 SCC (L&S) 194; *State of Punjab* v. *G.S. Gill*, (1997) 6 SCC 129 : 1997 SCC (L&S) 1475, *relied on*

(ii) Compliance with procedure prescribed by law and principles of natural justice

A duly elected person is entitled to hold office for the term for which he has been elected and he can be removed only on a proved misconduct or any other procedure established under law like "no confidence motion", etc. The elected official is accountable to its electorate as he has been elected by a large number of voters and it would have serious repercussions when he is removed from the office and further declared disqualified to contest the election for a further stipulated period which also takes away the rights of the people of his constituency to be represented by him. (Paras 37 and 35)

An elected official in local-self government has to be put on a higher pedestal as against a government servant and for his removal, a more stringent procedure and standard of proof is required. He can be removed strictly in accordance with the provisions provided by the legislature for his removal. Further, removal of a duly elected member on the basis of proved misconduct is a quasi-judicial proceeding in nature. Therefore, the principles of natural justice are required to be given full play and strict compliance should be ensured, even in the absence of any provision providing for the same. Principles of natural justice require a fair opportunity of defence to such an elected office-bearer. The decision must show that the authority has applied its mind to the allegations made and the explanation furnished by the elected office-bearer sought to be removed. (Paras 31, 30, 34 and 35)

Indian National Congress (I) v. *Institute of Social Welfare*, (2002) 5 SCC 685; *Bachhitar Singh* v. *State of Punjab*, AIR 1963 SC 395; *Union of India* v. *H.C. Goel*, AIR 1964 SC 364; *Jyoti Basu* v. *Debi Ghosal*, (1982) 1 SCC 691; *Mohan Lal Tripathi* v. *District Magistrate, Rae Bareily*, (1992) 4 SCC 80; *Ram Beti* v. *District Panchayat Raj Adhikari*, (1998) 1 SCC 680; *Tarlochan Dev Sharma* v. *State of Punjab*, (2001) 6 SCC 260, *relied on*

Thus an elected member can be removed in exceptional circumstances upon strict adherence to the statutory provisions and holding a full-fledged enquiry, meeting the requirement of principles of natural justice and giving an incumbent an opportunity to defend himself, for the reason that removal of an elected person casts stigma upon him and takes away his valuable statutory right. Not only the elected office-bearer but his constituency/electoral college is also deprived of representation by the person of their choice. (Para 36)

Recording of Reasons

Further, the expanding horizon of the principles of natural justice provides for requirement to record reasons as it is now regarded as one of the principles of natural justice. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to

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indicate an application of mind of the authority before the court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out the reasons for the order made, in other words, a speaking out. The inscrutable face of the sphinx is ordinarily incongruous with a judicial or quasi-judicial performance. (Paras 42 and 46)

Shrilekha Vidyarthi v. *State of U.P.*, (1991) 1 SCC 212 : 1991 SCC (L&S) 742; *LIC* v. *Consumer Education and Research Centre*, (1995) 5 SCC 482; *Union of India* v. *Mohan Lal Capoor*, (1973) 2 SCC 836 : 1974 SCC (L&S) 5; *Mahesh Chandra* v. *U.P. Financial Corpn.*, (1993) 2 SCC 279; *State of W.B.* v. *Atul Krishna Shaw*, 1991 Supp (1) SCC 414; *S.N. Mukherjee* v. *Union of India*, (1990) 4 SCC 594 : 1990 SCC (Cri) 669; *Krishna Swami* v. *Union of India*, (1992) 4 SCC 605; *Sant Lal Gupta* v. *Modern Coop. Group Housing Society Ltd.*, (2010) 13 SCC 336 : (2010) 4 SCC (Civ) 904; *Institute of Chartered Accountants of India* v. *L.K. Ratna*, (1986) 4 SCC 537 : (1986) 1 ATC 714, *relied on*

In this case, the explanation given by the appellant in response to the charge-sheet/show-cause notice was not considered at all. No reasoning had been given by the statutory authority for reaching the conclusion. It is not understandable as to on what basis such a cryptic order imposing such a severe punishment can be sustained in the eye of the law. (Para 56)

The High Court has also erred in not dealing with any of the issues raised by the appellant while furnishing his explanation and not giving any reasoning to uphold the findings recorded by the statutory authority imposing such a severe punishment. (Para 57)

Complainant as a party

Moreover Respondent 5, the ex-President who was the complainant, cannot be the party to the lis. At the most, he could lead evidence as a witness. The complaint filed by Respondent 5 against the appellant could at the most be pressed into service as a material exhibit in order to collect the evidence to find out the truth. He could not claim the status of an adversarial litigant. A legal right is an averment of entitlement arising out of law. In fact, it is a benefit conferred upon a person by the rule of law. Thus, only a person who suffers from legal injury can challenge the act or omission. There may be some harm or loss that may not be wrongful in the eye of the law because it may not result in injury to a legal right or legally protected interest of the complainant but juridically harm of this description is called *damnum sine injuria*. (Paras 58 and 61)

The complainant has to establish that he has been deprived of or denied of a legal right and he has sustained injury to any legally protected interest. In case he has no legal peg for a justiciable claim to hang on, he cannot be heard as a party in a lis. A fanciful or sentimental grievance may not be sufficient to confer a locus standi to sue upon the individual. There must be injuria or a legal grievance which can be appreciated and not a *stat pro ratione voluntas reasons* i.e. a claim devoid of reasons. (Para 59)

Under the garb of being a necessary party, a person cannot be permitted to make a case as that of general public interest. A person having a remote interest cannot be permitted to become a party in the lis, as the person who wants to become a party in a case, has to establish that he has a proprietary right which has been or is threatened to be violated, for the reason that a legal injury creates a remedial right in the injured person. A person cannot be heard as a party unless

he answers the description of aggrieved party. The High Court failed to appreciate that it was a case of political rivalry. The case of the appellant has not been considered in the correct perspective at all. (Para 60)

Adi Pherozshah Gandhi v. *Advocate General of Maharashtra*, (1970) 2 SCC 484; *Jasbhai Motibhai Desai* v. *Roshan Kumar*, (1976) 1 SCC 671; *Maharaj Singh* v. *State of U.P.*, (1977) 1 SCC 155; *Ghulam Qadir* v. *Special Tribunal*, (2002) 1 SCC 33; *Kabushiki Kaisha Toshiba* v. *Tosiba Appliances Co.*, (2008) 10 SCC 766, *relied on*

Adverse inference against State Government

The appellant has raised a question of fact before the High Court as well as before the Supreme Court submitting that at the time of hearing before the Hon'ble Chief Minister, Respondent 5 had raised new grounds and the appellant raised serious objections as he had no opportunity to meet the same. To ascertain as to whether in order to give an opportunity to the appellant to meet the alleged new grounds, the competent authority had adjourned the case. The Supreme Court while reserving the judgment vide order dated 13-2-2012 asked the Standing Counsel for the State to produce the original record before the Supreme Court within a period of two weeks. But neither the record has been produced nor has any application been filed to extend the time to produce the same. Thus the Supreme Court has been deprived of seeing the original record and to examine the grievance of the appellant. It is a matter of grave concern and shock the way the State Authorities have treated the highest court of the land. In such a fact situation, the Court has no option except to draw an adverse inference against the State. A copy of the order be sent directly to the Chief Secretary, State of Maharashtra, Bombay, who may conduct an enquiry and send his personal affidavit as to under what circumstances the State Authorities could decide not to ensure compliance with the order of the Supreme Court dated 13-2-2012, within a period of four weeks from the date of receipt of this order, to the Registrar General of the Supreme Court who may place it along with the file before the Bench. (Paras 71 to 73 and 76)

Ravi Yashwant Bhoir v. *Collector*, (2012) 4 SCC 440, *referred to*

In view of the above, the judgment and order of the High Court as well as the order passed by the Chief Minister are hereby set aside. The Supreme Court while entertaining the petition had granted interim protection to the appellant vide order dated 17-7-2009, which was extended till further orders vide order dated 13-8-2009 and, thus, the impugned orders remained inoperative. Therefore, it will be deemed as if no order had ever been passed against the appellant. (Para 74)

Ravi Yashwant Bhoir v. *Chief Minister*, WP (C) No. 4665 of 2009, order dated 18-6-2009 (Bom), *reversed*

Ravi Yashwant Bhoir v. *Chief Minister*, (2012) 4 SCC 438; *Ravi Yashwant Bhoir* v. *Chief Minister*, (2012) 4 SCC 439; *Chintaman Raghunath Gharat* v. *State of Maharashtra*, WP (C) No. 2309 of 2008, order dated 3-4-2008 (Bom) [connected case of WP (C) No. 2289 of 2008], *referred to*

R-D/49561/C

Advocates who appeared in this case :

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Sudhanshu S. Choudhari, Mike Prakash Desai, Sanjay V. Kharde and Ms Asha Gopalan Nair, Advocates, for the Respondents.

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45. (1979) 2 SCC 286 : 1979 SCC (L&S) 157, *Union of India* v. *J. Ahmed* 424*c-d*
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The Judgment of the Court was delivered by

DR B.S. CHAUHAN, J.— This appeal has been preferred against the impugned judgment and order dated 18-6-2009 passed by the High Court of Bombay in *Ravi Yashwant Bhoir* v. *Chief Minister*[1] by which the High Court has affirmed and upheld the judgment of the Hon'ble Chief Minister of Maharashtra declaring that the conduct of the appellant was unbecoming of the President of Uran Municipal Council and declared him to be disqualified for the remaining tenure of municipal councillorship under Section 55-B of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (hereinafter called as "the 1965 Act") and further declared him disqualified for a period of six years from the date of the order i.e. 21-3-2009.

2. The facts and circumstances giving rise to this appeal are: that the appellant was elected as member of Uran Municipal Council and, subsequently, elected as a President of the Municipal Council. The appellant was served with a show-cause notice dated 3-12-2008 by the State of Maharashtra calling upon him to explain why action under Section 55-B of the 1965 Act be not taken against him.

1 WP (C) No. 4665 of 2009, order dated 18-6-2009 (Bom)

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3. The charge-sheet contained the following six charges:

Charge 1

Uran Charitable Medical Trust has built up unauthorised construction on Survey Nos. 8, 9, 10 and 11 situated at Mouje Mhatawali to the extent of 1140 sq m for their hospital and you are the Trustee of the said Trust. The Municipal Council had issued notice dated 17-10-2006 for demolishing the said unauthorised construction on its own. Shri Dosu Ardesar Bhiwandiwala had filed Regular Civil Suit No. 95 of 2007 against the said notice in the Court of the Civil Judge, Junior Division, Uran and the same was decided on 19-12-2007 in which the plaintiff's application was rejected.

Junior Engineer of Uran Municipal Council lodged a complaint with Uran Police Station under Sections 53 and 54 of the Maharashtra Regional and Town Planning Act, 1966 against the said unauthorised construction on 24-7-2007. Shri Jayant Gosal and three others filed Public Interest Litigation No. 57 of 2008 concerning the said unauthorised construction of the said Trust in the Bombay High Court and the same is presently sub judice.

You are the Trustee of the said Trust and as President of the Municipal Council, you are duty-bound to oppose the unauthorised construction. However, you did not take any action to oppose the same and it appears that you have supported the unauthorised construction. You have, therefore, violated Sections 44, 45, 52 and 53 of the Maharashtra Regional and Town Planning Act, 1966.

Charge 2

The Municipal Council had called the general body meeting on 22-3-2007 by way of Resolution No. 2, Survey Nos. 8, 9, 10 and 11 at Mouje Mhatawali area admeasuring about 4000 sq m was proposed for reservation of garden. However, instead of that, the resolution was passed for reserving the same for hospital, nursing home and medical college. At that time, you were presiding over the meeting. By this illegal act, you have violated Sections 44(1)(*e*) and 42(1), (2) and (3) of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Township Act, 1965.

Charge 3

After you were elected as the President on 20-12-2006, a general body meeting was held on 9-1-2007. Although it is required under Section 80(1) of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Township Act, 1965 to hold the general body meeting once in two months, no such meeting was held for a period of three months between 28-2-2007 and 28-5-2007. By the said act, you have violated Section 81(1) of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Township Act, 1965.

Charge 4

In the meeting held on 9-1-2007, the suggestion to Agenda 4 made by members, Shri Chintaman Gharat and Shri Shekhar Mhatre that a rented car be provided for the use of the President was rejected by you. Similarly, the members, Shri Chintaman Gharat and Shri Shekhar Mhatre had made suggestion to Agenda 2 of the same meeting that new nalla be constructed near Ughadi at Bhavara Phanaswadi. The said suggestion was rejected after being read over.

Similarly, members, Shri Chintaman Gharat and Shri Shekhar Mhatre had made suggestion to Agenda 20 in the same meeting that new nalla be constructed in front of the house of Shri Kailash Patail at Bhavara Phanaswadi. The said suggestion was rejected.

Similarly, suggestion was made by Shri Chintaman Gharat and Shri Shekhar Mhatre to Agenda 23 that the Standing Committee be authorised to open the tender/approvals and give sanctions for diverse works of the Municipal Council. The said suggestion was rejected. Similarly, suggestion was made by Shri Chintaman Gharat and Shri Shekhar Mhatre to Agenda 27 of the same meeting regarding allotment of contract for spraying insecticides in Ward Nos. 1 to 17 of the Municipal Council. It appears from the minutes of the meeting dated 9-1-2007 that even the said suggestion was rejected.

You have, therefore, violated Rules 30, 32(1) and (2) of the Maharashtra Municipal Councils (Conduct of Business) Rules, 1966 by frequently rejecting the suggestions of the members of the Municipal Council.

Charge 5

Tenders were invited on 5-10-2006 for installing CI pipeline of 300 mm diameter for outlet and inlet of GSR tank at Sarvodayawadi within Uran Municipal Council by the Construction Department of Maharashtra Jeevan Pradhikaran, Panvel by its Outward No. MJPBV/MC/MS/Uran/311/3/06 dated 7-12-2006 at the Town Hall of the Uran Municipal Council. Pursuant to the same three tenders were invited, details whereof are as follows:

	Name & address of the contractor	*Tender amount*
1.	M/s Shailesh Construction, Ulhasnagar	Rs 9,11,351.50
2.	M/s Padmavati Enterprise, Ambernath	Rs 8,92,375.00
3.	M/s Kiran B. Jadhav, Ulhasnagar	Rs 8,47,462.98

Out of the aforesaid three tenders, the lowest tender of M/s Kiran B. Jadhav, Ulhasnagar was accepted as per Clause 171 of the Maharashtra Accounts Code, 1971. However, the estimate was prepared as per the DSR of 2005-2006. As a result when the tenders were invited, there was a difference of more than 10% in the tender amount. Therefore, by citing

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Item 44 of Standing Order 36 of the Commissioner and Director, Directorate of Municipal Administration, the Municipal Council called for the current market rates from the commercial dealers concerned, M/s Nazmi Electrical & Hardware Limited, Kalyan and M/s Sanjay Steel Tube Corporation Limited on 5-1-2007 to compare the difference in the rates of the tenderers/contractors and the market rates and decided that the rates of the tenderers were less than the market rates on the basis of the comparison and sanctioned the tenders and the bills of the tenderers were paid thereby you have violated Paras 44 to 47 of Standing Order 36 regarding inviting tenders and approvals dated 29-12-2005 bearing No. NPS/Inviting Tenders/2005/Case No. 151/05 and Clause 171 of the Maharashtra Accounts Code, 1971.

Charge 6

Tenders were invited on 5-10-2006 for installing CI pipeline of 300 mm diameter for outlet and inlet of GSR tank at Sarvodayawadi within Uran Municipal Council by the Construction Department of Maharashtra Jeevan Pradhikaran, Panvel by its Outward No. MJPBV/MC/MS/Uran/311/3/06 dated 7-12-2006 at the Town Hall of the Uran Municipal Council. Pursuant to the same three tenders were invited, details whereof are as follows:

	Name & address of the contractor	*Tender amount*
1.	M/s Shailesh Construction, Ulhasnagar	Rs 4,21,165.00
2.	M/s Padmavati Enterprise, Ambernath	Rs 4,18,889.28
3.	M/s Kiran B. Jadhav, Ulhasnagar	Rs 3,78,507.78

Out of the aforesaid three tenders, the lowest tender of M/s Kiran B. Jadhav, Ulhasnagar was accepted as per Clause 171 of the Maharashtra Accounts Code, 1971. However, the estimate was prepared as per the DSR of 2005-2006. As a result when the tenders were invited, there was a difference of more than 10% in the tender amount. Therefore, by citing Item 44 of Standing Order 36 of the Commissioner and Director, Directorate of Municipal Administration, the Municipal Council called for the current market rates from the commercial dealers concerned, M/s Nazmi Electrical & Hardware Limited, Kalyan and M/s Sanjay Steel Tube Corporation Limited on 5-1-2007 to compare the difference in the rates of the tenderers/contractors and the market rates and decided that the rates of the tenderers were less than the market rates on the basis of the comparison and sanctioned the tenders and the bills of the tenderers were paid thereby you have violated Paras 44 to 47 of Standing Order 36 regarding inviting tenders and approvals dated 29-12-2005 bearing No. NPS/Inviting Tenders/2005/Case No. 151/05 and Clause 171 of the Maharashtra Accounts Code, 1971.

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4. The appellant submitted his explanation dated 18-12-2008 in writing. After considering the same, the appellant was issued a notice for hearing on 23-1-2009. The appellant remained present along with his advocate before the competent authority i.e. the Hon'ble Chief Minister holding the portfolio of the Urban Development Department. However, vide impugned order dated 21-3-2009, the appellant was declared disqualified for his remaining tenure and further declaring him disqualified for a period of six years even as member of the Council. Being aggrieved, the appellant filed the writ petition challenging the order dated 21-3-2009. The writ petition stood dismissed vide impugned judgment and order dated 18-6-2009[1]. Hence, this appeal.

5. Shri Vinay Navare, learned counsel appearing for the appellant, has submitted that only three charges i.e. Charges 3, 5 and 6 have been held proved against the appellant. One charge is that the appellant did not call for a meeting for a period of three months i.e. from 28-2-2007 to 28-5-2007 as required under Section 81(1) of the 1965 Act, for which the appellant had furnished explanation which was worth acceptance. The officer concerned of the Municipal Council did not inform the appellant, nor the members asked to hold such meeting as required under Section 81(1) of the 1965 Act, so it was merely an inadvertent act and could not be intentional. Therefore, the question of committing any misconduct could not arise.

6. Other charges which stood proved are regarding the acceptance of fresh tenders at high rates for incomplete work of laying down 300 mm CI pipeline for water supply. The tender for lower estimated cost was not accepted rather there was a difference of more than 10 per cent in tender amount. The explanation was furnished by the appellant that there was a resolution by the Council itself accepting the said tenders and, therefore, the appellant exclusively could not be held responsible for the acceptance of tenders on the high rate of CI pipes. Even the rate of CI pipe purchased by Maharashtra Jivan Pradhikaran were also considered and after considering all these factors, the lowest bid was accepted by the Uran Municipal Council. The Chief Officer, the Junior Engineer has also considered the technical aspect, and, then the recommendation was forwarded under the signature of President, Chief Officer and Junior Engineer and thereafter, the Municipal Council passed the resolution and accepted the said tender. Therefore, it cannot be said that by doing this the appellant has breached any of the statutory provisions.

7. It is further submitted that at the time of hearing on 21-3-2009, the complainant wanted to rely upon some new grounds, and, therefore, the appellant raised the objection. The Hon'ble Chief Minister directed the Secretary to fix up a date of hearing, however, no date of hearing was fixed and the impugned order dated 21-3-2009 had been passed without affording any opportunity of hearing to the appellant. Therefore, the said order was

1 *Ravi Yashwant Bhoir* v. *Chief Minister*, WP (C) No. 4665 of 2009, order dated 18-6-2009 (Bom)

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passed in utter disregard of the principles of natural justice and cannot be sustained in the eye of the law.

8. The competent/statutory authority has not recorded reasons for the conclusions arrived at, by which, at least the three charges stood proved against the appellant. The expression "misconduct" has not been understood in correct perspective. Even if the three charges stood proved, the punishment imposed is totally disproportionate, more so, was not warranted in the facts and circumstances of the case. The High Court erred in not appreciating the facts in correct perspective, therefore, the impugned judgment and order is liable to be set aside.

9. Shri Mike Prakash Desai and Shri Sudhansu Choudhary, learned counsel appearing on behalf of the respondents, have vehemently opposed the appeal contending that the charges proved against the appellant constituted grave misconduct on his part and was liable to be removed and has rightly been declared disqualified for further period of six years. The appellant had been given full opportunity to defend himself. The period of disqualification has lapsed, thus this Court is dealing with an academic issue. The impugned order does not warrant any interference in the facts and circumstances of the case. The appeal lacks merit and, accordingly, is liable to be dismissed.

10. We have considered the rival submissions made by the learned counsel for the parties and perused the record. Before considering the case on merits, it is pertinent to deal with certain legal issues.

Misconduct

11. "Misconduct" has been defined in *Black's Law Dictionary*, 6th Edn. as:

> "A transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, unlawful behavior, wilful in character, improper or wrong behavior, its synonyms are misdemeanor, misdeed, misbehavior, delinquency, impropriety, mismanagement offence, but not negligence or carelessness."

"Misconduct in office" has been defined as:

> "Any unlawful behavior by a public officer in relation to the duties of his office, wilful in character. Term embraces acts which the office-holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act."

12. P. Ramanatha Aiyar's *Law Lexicon*, Reprint Edn. 1987 at p. 821 defines "misconduct" thus:

> "The term 'misconduct' implies a *wrongful intention*, and *not a mere error of judgment*. Misconduct is not necessarily the same thing as conduct involving moral turpitude. *The word 'misconduct' is a relative term, and has to be construed with reference to the subject-matter and the context wherein the term occurs*, having regard to the scope of the Act or statute which is being construed. Misconduct literally means wrong

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conduct or improper conduct. In usual parlance, misconduct means a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand and carelessness, negligence and unskilfulness are transgressions of some established, but indefinite, rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law; carelessness or abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite. Misconduct in office may be defined as unlawful behaviour or neglect by a public officer, by which the rights of a party have been affected.

Thus it could be seen that the word 'misconduct' though not capable of precise definition, on reflection receives its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, wilful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject-matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve...." (emphasis supplied)

(See also *State of Punjab* v. *Ram Singh*[2].)

13. Mere error of judgment resulting in doing of negligent act does not amount to misconduct. However, in exceptional circumstances, not working diligently may be a misconduct. An action which is detrimental to the prestige of the institution may also amount to misconduct. Acting beyond authority may be a misconduct. When the office-bearer is expected to act with absolute integrity and honesty in handling the work, any misappropriation, even temporary, of the funds, etc. constitutes a serious misconduct, inviting severe punishment. (Vide *Disciplinary Authority-cum-Regl. Manager* v. *Nikunja Bihari Patnaik*[3], *Govt. of T.N.* v. *K.N. Ramamurthy*[4], *Inspector Prem Chand* v. *Govt. of NCT of Delhi*[5] and *SBI* v. *S.N. Goyal*[6].)

14. In *Govt. of A.P.* v. *P. Posetty*[7], this Court held that since acting in derogation to the prestige of the institution/body and placing his present position in any kind of embarrassment may amount to misconduct, for the reason, that such conduct may ultimately lead that the delinquent had behaved in a manner which is unbecoming of an incumbent of the post.

2 (1992) 4 SCC 54 : 1992 SCC (L&S) 793 : (1992) 21 ATC 435 : AIR 1992 SC 2188
3 (1996) 9 SCC 69 : 1996 SCC (L&S) 1194
4 (1997) 7 SCC 101 : 1997 SCC (L&S) 1749 : AIR 1997 SC 3571
5 (2007) 4 SCC 566 : (2007) 2 SCC (L&S) 58
6 (2008) 8 SCC 92 : (2008) 2 SCC (L&S) 678 : AIR 2008 SC 2594
7 (2000) 2 SCC 220 : 2000 SCC (L&S) 254

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15. In *M.M. Malhotra* v. *Union of India*[8], this Court explained as under: (SCC p. 362, para 17)

> "*17.* ... It has, therefore, to be noted that the word 'misconduct' is not capable of precise definition. But at the same time though incapable of precise definition, the word 'misconduct' on reflection receives its connotation from the context, the delinquency in performance and its effect on the discipline and the nature of the duty. The act complained of must bear a forbidden quality or character and its ambit has to be construed with reference to the subject-matter and the context wherein the term occurs, having regard to the scope of the statute and the public purpose it seeks to serve."

A similar view has been reiterated in *Baldev Singh Gandhi* v. *State of Punjab*[9].

16. Conclusions about the absence or lack of personal qualities in the incumbent do not amount to misconduct holding the person concerned liable for punishment. (See *Union of India* v. *J. Ahmed*[10].)

17. It is also a settled legal proposition that misconduct must necessarily be measured in terms of the nature of the misconduct and the court must examine as to whether misconduct has been detrimental to the public interest. (Vide *Bank of India* v. *Mohd. Nizamuddin*[11].)

18. The expression "misconduct" has to be understood as a transgression of some established and definite rule of action, a forbidden act, unlawful behaviour, wilful in character. It may be synonymous as misdemeanour in propriety and mismanagement. In a particular case, negligence or carelessness may also be a misconduct for example, when a watchman leaves his duty and goes to watch cinema, though there may be no theft or loss to the institution but leaving the place of duty itself amounts to misconduct. It may be more serious in case of disciplinary forces.

19. Further, the expression "misconduct" has to be construed and understood in reference to the subject-matter and context wherein the term occurs taking into consideration the scope and object of the statute which is being construed. Misconduct is to be measured in the terms of the nature of misconduct and it should be viewed with the consequences of misconduct as to whether it has been detrimental to the public interest.

Disgraceful conduct

20. The expression "disgraceful conduct" is not defined in the statute. Therefore, the same has to be understood in given dictionary meaning. The term "disgrace" signifies loss of honour, respect, or reputation, shame or bring disfavour or discredit. "Disgraceful" means giving offence to moral sensibilities and injurious to reputation or conduct or character deserving or

8 (2005) 8 SCC 351 : 2005 SCC (L&S) 1139 : AIR 2006 SC 80
9 (2002) 3 SCC 667 : AIR 2002 SC 1124
10 (1979) 2 SCC 286 : 1979 SCC (L&S) 157 : AIR 1979 SC 1022
11 (2006) 7 SCC 410 : 2006 SCC (L&S) 1663 : AIR 2006 SC 3290

bringing disgrace or shame. Disgraceful conduct is also to be examined from the context in which the term has been employed under the statute. Disgraceful conduct need not necessarily be connected with the official (*sic* duties) of the office-bearer. Therefore, it may be outside the ambit of discharge of his official duty.

Removal of an elected office-bearer

21. The municipalities have been conferred constitutional status by amending the Constitution vide the 74th Amendment Act, 1992 w.e.f. 1-6-1993. The municipalities have also been conferred various powers under Article 243-B of the Constitution.

22. Amendment in the Constitution by adding Parts IX and IX-A confers upon the local self-government a complete autonomy on the basic democratic unit unshackled from official control. Thus, exercise of any power having effect of destroying the Constitutional institution besides being outrageous is dangerous to the democratic set-up of this country. Therefore, an elected official cannot be permitted to be removed unceremoniously without following the procedure prescribed by law, in violation of the provisions of Article 21 of the Constitution, by the State by adopting a casual approach and resorting to manipulations to achieve ulterior purpose. The Court being the custodian of law cannot tolerate any attempt to thwart the institution.

23. The democratic set-up of the country has always been recognised as a basic feature of the Constitution, like other features e.g. supremacy of the Constitution, rule of law, principle of separation of powers, power of judicial review under Articles 32, 226 and 227 of the Constitution, etc. [Vide *Kesavananda Bharati* v. *State of Kerala*[12], *Minerva Mills Ltd.* v. *Union of India*[13], *Union of India* v. *Assn. for Democratic Reforms*[14], *Special Reference No. 1 of 2002, In re (Gujarat Assembly Election Matter)*[15] and *Kuldip Nayar* v. *Union of India*[16].]

24. It is not permissible to destroy any of the basic features of the Constitution even by any form of amendment, and therefore, it is beyond imagination that it can be eroded by the executive on its whims without any reason. The Constitution accords full faith and credit to the act done by the executive in exercise of its statutory powers, but they have a primary responsibility to serve the nation and enlighten the citizens to further strengthen a democratic State.

25. Public administration is responsible for the effective implication of the rule of law and constitutional commands which effectuate fairly the objective standard set for adjudicating good administrative decisions. However, wherever the executive fails, the Courts come forward to strike

12 (1973) 4 SCC 225 : AIR 1973 SC 1461
13 (1980) 3 SCC 625 : AIR 1980 SC 1789
14 (2002) 5 SCC 294 : AIR 2002 SC 2112
15 (2002) 8 SCC 237 : AIR 2003 SC 87
16 (2006) 7 SCC 1 : AIR 2006 SC 3127

down an order passed by them passionately and to remove arbitrariness and unreasonableness, for the reason that the State by its illegal action becomes liable for forfeiting the full faith and credit trusted with it. (Vide *Scheduled Castes and Scheduled Tribes Officers' Welfare Council* v. *State of U.P.*[17] and *State of Punjab* v. *G.S. Gill*[18].)

26. "Basic" means the basis of a thing on which it stands, and on the failure of which it falls. In democracy all citizens have equal political rights. Democracy means actual, active and effective exercise of power by the people in this regard. It means political participation of the people in running the administration of the Government. It conveys the state of affairs in which each citizen is assured of the right of equal participation in the polity. (See *R.C. Poudyal* v. *Union of India*[19].)

27. In *People's Union for Civil Liberties* v. *Union of India*[20], this Court held as under: (SCC pp. 457-58, para 94)

> "*94*. The trite saying that 'democracy is for the people, of the people and by the people' has to be remembered forever. In a democratic republic, it is the will of the people that is paramount and becomes the basis of the authority of the Government. The will is expressed in periodic elections based on universal adult suffrage held by means of secret ballot. It is through the ballot that the voter expresses his choice or preference for a candidate. 'Voting is formal expression of will or opinion by the person entitled to exercise the right on the subject or issue', as observed by [the] Court in *Lily Thomas* v. *Speaker, Lok Sabha*[21], (SCC pp. 236-37, para 2) quoting from *Black's Law Dictionary*. The citizens of the country are enabled to take part in the government through their chosen representatives. In a parliamentary democracy like ours, the Government of the day is responsible to the people through their elected representatives. The elected representative acts or is supposed to act as a live link between the people and the Government. The people's representatives fill the role of lawmakers and custodians of the Government. People look to them for ventilation and redressal of their grievances."

28. In *State of Punjab* v. *Baldev Singh*[22], this Court considered the issue of removal of an elected office-bearer and held that where the statutory provision has very serious repercussions, it implicitly makes it imperative and obligatory on the part of the authority to have strict adherence to the statutory provisions. All the safeguards and protections provided under the statute have to be kept in mind while exercising such a power. The Court

17 (1997) 1 SCC 701 : 1997 SCC (L&S) 194 : AIR 1997 SC 1451
18 (1997) 6 SCC 129 : 1997 SCC (L&S) 1475 : AIR 1997 SC 2324
19 1994 Supp (1) SCC 324 : AIR 1993 SC 1804
20 (2003) 4 SCC 399 : AIR 2003 SC 2363
21 (1993) 4 SCC 234
22 (1999) 6 SCC 172 : 1999 SCC (Cri) 1080 : AIR 1999 SC 2378

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considering its earlier judgments in *Mohinder Kumar* v. *State*[23] and *Ali Mustaffa Abdul Rahman Moosa* v. *State of Kerala*[24] held as under: (*Baldev Singh case*[22], SCC p. 199, para 28)

> "*28.* ... It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed."

29. The Constitution Bench of this Court in *G. Sadanandan* v. *State of Kerala*[25] held that if all the safeguards provided under the statute are not observed, an order having serious consequences is passed without proper application of mind, having a casual approach to the matter, the same can be characterised as having been passed mala fide, and thus, is liable to be quashed.

30. There can also be no quarrel with the settled legal proposition that removal of a duly elected member on the basis of proved misconduct is a quasi-judicial proceeding in nature. [Vide *Indian National Congress (I)* v. *Institute of Social Welfare*[26].] This view stands further fortified by the Constitution Bench judgments of this Court in *Bachhitar Singh* v. *State of Punjab*[27] and *Union of India* v. *H.C. Goel*[28]. Therefore, the principles of natural justice are required to be given full play and strict compliance should be ensured, even in the absence of any provision providing for the same. Principles of natural justice require a fair opportunity of defence to such an elected office-bearer.

31. Undoubtedly, any elected official in local self-government has to be put on a higher pedestal as against a government servant. If a temporary government employee cannot be removed on the ground of misconduct without holding a full-fledged inquiry, it is difficult to imagine how an elected office-bearer can be removed without holding a full-fledged inquiry.

32. In service jurisprudence, minor punishment is permissible to be imposed while holding the inquiry as per the procedure prescribed for it but for removal, termination or reduction in rank, a full-fledged inquiry is required otherwise it will be violative of the provisions of Article 311 of the Constitution of India. The case is to be understood in an entirely different context as compared to the government employees, for the reason, that for the removal of the elected officials, a more stringent procedure and standard of proof is required.

33. This Court examined the provisions of the Punjab Municipal Act, 1911, providing for the procedure of removal of the President of the

23 (1998) 8 SCC 655 : 1999 SCC (Cri) 79
24 (1994) 6 SCC 569 : 1995 SCC (Cri) 32 : AIR 1995 SC 244
22 *State of Punjab* v. *Baldev Singh*, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080
25 AIR 1966 SC 1925 : 1966 Cri LJ 1533
26 (2002) 5 SCC 685 : AIR 2002 SC 2158
27 AIR 1963 SC 395
28 AIR 1964 SC 364

Municipal Council on similar grounds in *Tarlochan Dev Sharma* v. *State of Punjab*[29] and observed that removal of an elected office-bearer is a serious matter. The elected office-bearer must not be removed unless a clear-cut case is made out, for the reason that holding and enjoying an office, discharging related duties is a valuable statutory right of not only the elected member but also of his constituency or electoral college. His removal may curtail the term of the office-bearer and also cast stigma upon him. Therefore, the procedure prescribed under a statute for removal must be strictly adhered to and unless a clear case is made out, there can be no justification for his removal. While taking the decision, the authority should not be guided by any other extraneous consideration or should not come under any political pressure.

34. In a democratic institution, like ours, the incumbent is entitled to hold the office for the term for which he has been elected unless his election is set aside by a prescribed procedure known to law or he is removed by the procedure established under law. The proceedings for removal must satisfy the requirement of natural justice and the decision must show that the authority has applied its mind to the allegations made and the explanation furnished by the elected office-bearer sought to be removed.

35. The elected official is accountable to its electorate because he is being elected by a large number of voters. His removal has serious repercussions as he is removed from the post and declared disqualified to contest the elections for a further stipulated period, but it also takes away the right of the people of his constituency to be represented by him. Undoubtedly, the right to hold such a post is statutory and no person can claim any absolute or vested right to the post, but he cannot be removed without strictly adhering to the provisions provided by the legislature for his removal (vide *Jyoti Basu* v. *Debi Ghosal*[30], *Mohan Lal Tripathi* v. *District Magistrate, Rae Bareily*[31] and *Ram Beti* v. *District Panchayat Raj Adhikari*[32]).

36. In view of the above, the law on the issue stands crystallised to the effect that an elected member can be removed in exceptional circumstances giving strict adherence to the statutory provisions and holding the enquiry, meeting the requirement of principles of natural justice and giving an incumbent an opportunity to defend himself, for the reason that removal of an elected person casts stigma upon him and takes away his valuable statutory right. Not only the elected office-bearer but his constituency/ electoral college is also deprived of representation by the person of their choice.

37. A duly elected person is entitled to hold office for the term for which he has been elected and he can be removed only on a proved misconduct or

29 (2001) 6 SCC 260 : AIR 2001 SC 2524
30 (1982) 1 SCC 691 : AIR 1982 SC 983
31 (1992) 4 SCC 80 : AIR 1993 SC 2042
32 (1998) 1 SCC 680 : AIR 1998 SC 1222

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any other procedure established under law like "no confidence motion", etc. The elected official is accountable to its electorate as he has been elected by a large number of voters and it would have serious repercussions when he is removed from the office and further declared disqualified to contest the election for a further stipulated period.

Recording of reasons

38. It is a settled proposition of law that even in administrative matters, the reasons should be recorded as it is incumbent upon the authorities to pass a speaking and reasoned order.

39. In *Shrilekha Vidyarthi* v. *State of U.P.*[33], this Court has observed as under: (SCC p. 243, para 36)

> "*36.* ... Every State action may be informed by reason and it follows that an act uninformed by reason, is arbitrary. The rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is the trite law that 'be you ever so high, the laws are above you'. This is what men in power must remember, always."

40. In *LIC* v. *Consumer Education and Research Centre*[34] this Court observed that the State or its instrumentality must not take any irrelevant or irrational factor into consideration or appear arbitrary in its decision. "Duty to act fairly" is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty must be received and guided by the public interest. A similar view has been reiterated by this Court in *Union of India* v. *Mohan Lal Capoor*[35] and *Mahesh Chandra* v. *U.P. Financial Corpn.*[36]

41. In *State of W.B.* v. *Atul Krishna Shaw*[37], this Court observed that: (SCC p. 421, para 7)

> "*7.* ... Giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review."

42. In *S.N. Mukherjee* v. *Union of India*[38], it has been held that the object underlying the rules of natural justice is to prevent miscarriage of justice and secure fair play in action. The expanding horizon of the principles of natural justice provides for requirement to record reasons as it is now regarded as one of the principles of natural justice, and it was held in the above case that except in cases where the requirement to record reasons is expressly or by necessary implication dispensed with, the authority must record reasons for its decision.

33 (1991) 1 SCC 212 : 1991 SCC (L&S) 742 : AIR 1991 SC 537
34 (1995) 5 SCC 482 : AIR 1995 SC 1811
35 (1973) 2 SCC 836 : 1974 SCC (L&S) 5 : AIR 1974 SC 87
36 (1993) 2 SCC 279 : AIR 1993 SC 935
37 1991 Supp (1) SCC 414 : AIR 1990 SC 2205
38 (1990) 4 SCC 594 : 1990 SCC (Cri) 669 : AIR 1990 SC 1984

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43. In *Krishna Swami* v. *Union of India*[39] this Court observed that the rule of law requires that any action or decision of a statutory or public authority must be founded on the reason stated in the order or borne out from the record. The Court further observed: (SCC p. 637, para 47)

> "*47.* ... Reasons are the links between the material, the foundation for their erection and the actual conclusions. They would also demonstrate how the mind of the maker was activated and actuated and their rational nexus and synthesis with the facts considered and the conclusions reached. Lest it would be arbitrary, unfair and unjust, violating Article 14 or unfair procedure offending Article 21."

44. This Court while deciding the issue in *Sant Lal Gupta* v. *Modern Coop. Group Housing Society Ltd.*[40], placing reliance on its various earlier judgments held as under: (SCC pp. 345-46, para 27)

> "*27.* It is a settled legal proposition that not only administrative but also judicial orders must be supported by reasons recorded in it. Thus, while deciding an issue, the court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice delivery system, to make it known that there had been proper and due application of mind to the issue before the court and also as an essential requisite of the principles of natural justice.
>
> > '*3.* ... The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the court concerned had really applied its mind.'*
>
> The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is the principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected."

45. In *Institute of Chartered Accountants of India* v. *L.K. Ratna*[41], this Court held that on charge of misconduct the authority holding the inquiry

39 (1992) 4 SCC 605 : AIR 1993 SC 1407

40 (2010) 13 SCC 336 : (2010) 4 SCC (Civ) 904

* **Ed.**: As observed in *State of Rajasthan* v. *Sohan Lal*, (2004) 5 SCC 573, p. 576, para 3.

41 (1986) 4 SCC 537 : (1986) 1 ATC 714 : AIR 1987 SC 71

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must record reasons for reaching its conclusion and record clear findings. The Court further held: (SCC p. 558, para 30)

> "*30.* ... In fairness and justice, the member is entitled to know why he has been found guilty. The case can be so serious that it can attract the harsh penalties provided by the Act. Moreover, the member has been given a right of appeal to the High Court under Section 22-A of the Act. To exercise his right of appeal effectively he must know the basis on which the Council has found him guilty. We have already pointed out that a finding by the Council is the first determinative finding on the guilt of the member. It is a finding by a Tribunal of first instance. The conclusion of the Disciplinary Committee does not enjoy the status of a 'finding'. Moreover, the reasons contained in the report by the Disciplinary Committee for its conclusion may or may not constitute the basis of the finding rendered by the Council. The Council must, therefore, state the reasons for its finding."

46. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind of the authority before the court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out the reasons for the order made, in other words, a speaking out. The inscrutable face of the sphinx is ordinarily incongruous with a judicial or quasi-judicial performance.

Malice in law

47. This Court has consistently held that the State is under an obligation to act fairly without ill will or malice in fact or in law. Where malice is attributed to the State, it can never be a case of personal ill will or spite on the part of the State. "Legal malice" or "malice in law" means something done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite.

48. Mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for "purposes foreign to those for which it is in law intended". It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorised purpose constitutes malice in law. (See *ADM, Jabalpur* v. *Shivakant Shukla*[42], *Union of India* v. *V. Ramakrishnan*[43] and *Kalabharati Advertising* v. *Hemant Vimalnath Narichania*[44].)

42 (1976) 2 SCC 521 : AIR 1976 SC 1207
43 (2005) 8 SCC 394 : 2005 SCC (L&S) 1150
44 (2010) 9 SCC 437 : (2010) 3 SCC (Civ) 808 : AIR 2010 SC 3745

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49. Section 55 of the 1965 Act provides for removal of the President of the Council by no confidence motion. Sections 55-A and 55-B provide a mode of removal of duly elected President on proved misconduct or negligence, etc. which read as under:

"**55-A.** ***Removal of President and Vice-President by Government.***— Without prejudice to the provisions of Sections 51-A and 55, a President or a Vice-President may be removed from office by the State Government for misconduct in the discharge of his duties, or for neglect of, or incapacity to perform his duties or for being guilty of any disgraceful conduct; and the President or Vice-President so removed shall not be eligible for re-election or reappointment as President or Vice-President as the case may be, during the remainder of the term of office of the Councillors:

Provided that, no such President or Vice-President shall be removed from office, unless he has been given a reasonable opportunity to furnish an explanation.

55-B. ***Disqualification for continuing as Councillor or becoming Councillor on removal as President or Vice-President.***—Notwithstanding anything contained in Section 55-A, if a Councillor or a person is found to be guilty of misconduct in the discharge of his official duties or being guilty of any disgraceful conduct while holding or while he was holding the office of the President or Vice-President, as the case may be, the State Government may—

(*a*) disqualify such Councillor to continue as a Councillor for the remainder of his term of office as a Councillor and also for being elected as a Councillor, till the period of six years has elapsed from the order of such disqualification;

(*b*) disqualify such person for being elected as a Councillor till the period of six years has elapsed from the order of such disqualification."

50. It is also pertinent to refer to the provisions of Section 81 of the 1965 Act which reads as under:

"**81.** ***Provisions in regard to meetings of Council.***—The following provisions shall be observed with respect to the meetings of a Council:

(1) For the disposal of general business, which shall be restricted to matters relating to the powers, duties and functions of the Council as specified in this Act or any other law for the time being in force, and any welcome address to a distinguished visitor, proposal for giving Manpatra to a distinguished person or resolution of condolence (where all or any of these are duly proposed), an ordinary meeting shall be held once in two months. The first such meeting, shall be held within two months from the date on which the meeting of the Council under Section 51 is held, and each succeeding ordinary meeting shall be held within two months from the date on which the last preceding ordinary meeting is held. The President may also call additional ordinary meetings as he deems necessary. It shall be the duty of the President to fix the dates for all ordinary meetings and to call such meetings in time.

(1-A) If the President fails to call an ordinary meeting within the period specified in clause (1), the Chief Officer shall forthwith report

such failure to the Collector. The Collector shall, within seven days from receipt of the Chief Officer's report or may, suo motu, call the ordinary meeting. The agenda for such meeting shall be drawn up by the Collector, in consultation with the Chief Officer:

* * *

(2) The President may, whenever he thinks fit, and shall upon the written request of not less than one-fourth of the total number of Councillors and on a date not later than fifteen days after the receipt of such request by the President, call a special meeting. The business to be transacted at any such meeting shall also be restricted to matters specified in clause (1).

(3) If the President fails to call a meeting within the period specified in clause (2), the Councillors who had made a request for the special meeting being called, may request the Collector to call a special meeting. On receipt of such request, the Collector, or any officer whom he may designate in this behalf, shall call the special meeting on a date within fifteen days from the date of receipt of such request by the Collector. Such meeting shall be presided over by the Collector or the Officer designated, but he shall have no right to vote."

51. The instant case requires to be examined in the light of aforesaid settled legal propositions and the statutory provisions.

52. The case has initially originated because of the complaint dated 3-5-2007 filed by Shri Chintaman Raghunath Gharat, ex-President and the then sitting Municipal Councillor, Uran Municipal Council (Respondent 5) regarding the misconduct of the appellant. The preliminary inquiry was conducted through the Collector, Raigad. The Collector, Raigad made an inquiry through the Deputy Collector and submitted the inquiry report dated 25-8-2008 and as no action was taken by the statutory authority against the appellant, Shri Gharat filed Writ Petition No. 2309 of 2008 before the High Court which was disposed of vide order dated 3-4-2008[45] directing Respondent 2 (Hon'ble Minister of State, Urban Development, the then Hon'ble Chief Minister) to take a decision on the application/complaint submitted by Shri Gharat within a period of 8 weeks. As the decision could not be taken within that stipulated time, Shri Gharat filed Contempt Petition No. 379 of 2008 which was disposed of by the High Court directing the statutory authority to take up the decision expeditiously.

53. It was, in fact, in view of the High Court's order, the charge-sheet/show-cause notice dated 3-12-2008 containing six charges was served upon the appellant. In response to the said charge-sheet dated 3-12-2008, the appellant furnished explanation dated 18-12-2008 denying all the charges framed against him and furnished a detailed explanation. In this respect, hearing was held on 23-1-2009 wherein the appellant as well as the complainant appeared along with their advocates and made their submissions

45 *Chintaman Raghunath Gharat* v. *State of Maharashtra*, WP (C) No. 2309 of 2008, order dated 3-4-2008 (Bom) [connected case of WP (C) No. 2289 of 2008]

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before the Hon'ble Minister. The impugned order was passed on 21-3-2009 holding the appellant guilty of three charges imposing the punishment as referred to hereinabove.

54. The impugned order dated 21-3-2009 runs from pp. 28 to 52 of the appeal paper book. The facts and the charges run from pp. 28 to 36. The explanation furnished by the appellant runs from pp. 36 to 47. The order of the Hon'ble Minister runs only to 5 pages.

55. It is evident from the said order that the Hon'ble Minister did not make any reference to the pleadings taken by the appellant either in his reply to show cause or during the course of hearing. The order simply reveals that the Hon'ble Minister noticed certain things. Two paragraphs at p. 48 are not relevant at all for our consideration. The admission of the appellant that meeting was not held for a period of 3 months between 28-2-2007 to 28-5-2007 has been relied upon. In other paragraphs reference has been made to Standing Order 36 issued by the Director and Commissioner, Directorate of Municipal Administration, providing for the procedure for inviting tenders and then straightaway without giving any reason, finding is recorded as under:

> "Out of the 3 tenders received for installation of 300 mm diameter pipeline for outlet and inlet of GSR tank at Sarvodayawadi and Town Hall of Uran Municipal Council, lowest tender is accepted as per Clause 171 of the Maharashtra Municipal Council Accounts Code, 1971. However, the tenders were invited as per the DSR rates for the year 2005-2006. The lowest tender received at that time and was more than 10% of the rates of the estimate (approximately 31% and 37%). Despite this, the said tender was accepted."

Then, a very cryptic order of punishment has been passed.

56. The explanation furnished by the appellant for not holding the meeting and acceptance of tender by the Council itself and not by the appellant, has not been considered at all. No reasoning has been given by the statutory authority for reaching the conclusions. We fail to understand as to on what basis such a cryptic order imposing such a severe punishment can be sustained in the eye of the law.

57. The High Court has also erred in not dealing with any of the issues raised by the appellant while furnishing his explanation; rather relied upon the findings recorded by the Hon'ble Minister. There is nothing in the judgment of the High Court wherein the grievance of the appellant has been considered or any reasoning has been given to uphold the findings recorded by the statutory authority imposing such a severe punishment.

58. Shri Chintaman Raghunath Gharat, ex-President was the complainant, thus, at the most, he could lead evidence as a witness. He could not claim the status of an adversarial litigant. The complainant cannot be the party to the lis. A legal right is an averment of entitlement arising out of law. In fact, it is a benefit conferred upon a person by the rule of law. Thus, a

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person who suffers from legal injury can only challenge the act or omission. There may be some harm or loss that may not be wrongful in the eye of the law because it may not result in injury to a legal right or legally protected interest of the complainant but juridically harm of this description is called *damnum sine injuria*.

59. The complainant has to establish that he has been deprived of or denied of a legal right and he has sustained injury to any legally protected interest. In case he has no legal peg for a justiciable claim to hang on, he cannot be heard as a party in a lis. A fanciful or sentimental grievance may not be sufficient to confer a locus standi to sue upon the individual. There must be injuria or a legal grievance which can be appreciated and not a *stat pro ratione voluntas reasons* i.e. a claim devoid of reasons.

60. Under the garb of being a necessary party, a person cannot be permitted to make a case as that of general public interest. A person having a remote interest cannot be permitted to become a party in the lis, as the person who wants to become a party in a case, has to establish that he has a proprietary right which has been or is threatened to be violated, for the reason that a legal injury creates a remedial right in the injured person. A person cannot be heard as a party unless he answers the description of aggrieved party. (Vide *Adi Pherozshah Gandhi* v. *Advocate General of Maharashtra*[46], *Jasbhai Motibhai Desai* v. *Roshan Kumar*[47], *Maharaj Singh* v. *State of U.P.*[48], *Ghulam Qadir* v. *Special Tribunal*[49] and *Kabushiki Kaisha Toshiba* v. *Tosiba Appliances Co.*[50]) The High Court failed to appreciate that it was a case of political rivalry. The case of the appellant has not been considered in the correct perspective at all.

61. In such a fact situation, the complaint filed by Respondent 5 could at the most be pressed into service as a material exhibit in order to collect the evidence to find out the truth. In the instant case, as all the charges proved against the appellant have been dealt with exclusively on the basis of documentary evidence, there is nothing on record by which the complainant could show that the general body meeting was not called, as statutorily required, by the appellant intentionally.

62. Not calling the meeting of the general body of the House may be merely a technical misconduct committed inadvertently in ignorance of statutory requirements. It is nobody's case that the appellant had done it intentionally/purposely in order to avoid some unpleasant resolution/demand of the Council. No finding of fact has been recorded either by the competent authority or by the High Court that some urgent/important work could not be carried out for want of general body meeting of the Council.

46 (1970) 2 SCC 484 : AIR 1971 SC 385
47 (1976) 1 SCC 671 : AIR 1976 SC 578
48 (1977) 1 SCC 155 : AIR 1976 SC 2602
49 (2002) 1 SCC 33
50 (2008) 10 SCC 766

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63. Merely not to conduct oneself according to the procedure prescribed or omission to conduct a meeting without any corresponding loss to the corporate body, would not be an automatic misconduct by inference, unless some positive intentional misconduct is shown. It was an admitted fact that the meeting had not been called. However, in the absence of any imputation of motive, not calling the meeting by the appellant could not in itself, be enough to prove the charge.

64. Section 81 of the 1965 Act requires that for the disposal of the general business, the President should call the meeting of the Council within a period of two months from the date on which the last preceding ordinary meeting was held. The statutory provisions further provided that in case the President fails to call the ordinary meeting within the said stipulated period, the Chief Officer may report such failure to the Collector and the Collector can call the ordinary meeting of the Council following the procedure prescribed therein. The President can also call the meeting on the request of the members not less than one-fourth of the total number of Councils.

65. Therefore, the cogent reading of all the provisions makes it clear that in case the President fails to call the meeting, there are other modes of calling the meeting and in such an eventuality where reasonable explanation has been furnished by the appellant to the show-cause notice on this count, the competent authority could not have passed such a harsh order.

66. So far as the other charges regarding laying down the pipelines at a much higher rate are concerned, it has been a positive case of the appellant that as the earlier contractor had abandoned the work in between and there was a scarcity of water in the city, the Chief Officer, the Junior Engineer considered the technical aspect and then recommendations were forwarded under the signatures of the appellant, the Chief Officer and Junior Engineer to the Council, which ultimately passed the resolution accepting the said tenders. In such a fact situation, it was a collective consensus decision of the House after due deliberations. Admittedly, it was not even the ratification of contract awarded by the appellant himself. Thus, even by any stretch of imagination it cannot be held to be an individual decision of the appellant and the competent authority failed to appreciate that the tenders were accepted by the Council itself and not by the appellant alone. Therefore, he could not be held responsible for acceptance of tenders.

67. We have gone through the counter-affidavit filed by Respondent 5, complainant before this Court and he has not stated anywhere that the tenders were not accepted by the Council, rather allegations have been made that the tenders had been accepted at a higher rate so that the contractor could get the financial gain. Similarly, technical issue has been raised for not calling the meeting, committing serious irregularities sufficiently warranting disqualification of the appellant on his omission to call the meeting, but it is not his case that he did it intentionally. The counter-affidavit filed by the State does not reveal anything in relation to the issues involved herein and it

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appears that the deponent/officer has merely completed the formalities without any purpose.

68. To conclude, we are of the considered opinion and that too after appreciation of the entire evidence on record that the first charge proved against the appellant for not calling the meeting of Council, did not warrant the order of removal and the explanation furnished by the appellant could have been accepted. Other charges could not be proved against the appellant in view of the fact that the tenders at a higher rate were accepted by the Council itself and the appellant could not be held exclusively responsible for it.

69. Respondent 5, being a political rival, could not have been entertained as a party to the lis. The charge of not calling the meeting of the Council had been admitted by the appellant himself, thus, no further evidence was required, for the reason, that the admission is the best evidence. The competent authority could have considered his explanation alone and proceeded to take a final decision. So far as the other charges are concerned, as has been observed hereinabove, it had been a collective consensus decision of the Council to accept the tender at higher rate and the appellant could not have been held guilty of the said charges.

70. Thus, the instant case has been a crystal clear-cut case of legal malice and therefore, the impugned orders are liable to be quashed. The duly elected member/Chairman of the Council could not have been removed in such a casual and cavalier manner without giving strict adherence to the safeguards provided under the statute which had to be scrupulously followed.

71. The appellant has raised a question of fact before the High Court as well as before this Court submitting that at the time of hearing before the Hon'ble Chief Minister, Respondent 5 has raised new grounds and the appellant raised serious objections as he had no opportunity to meet the same. Thus, in order to give the appellant an opportunity to rebut the same the competent authority had adjourned the case and directed the Secretary to fix a date so that the appellant may meet those new objections/grounds. However, the order impugned removing the appellant from the post and declaring him further disqualified for a period of six years had been passed. It is not evident from the order impugned as what could be those new grounds which had not been disclosed to the appellant.

72. Thus, to ascertain as to whether in order to give an opportunity to the appellant to meet the alleged new grounds, the competent authority had adjourned the case, this Court while reserving the judgment vide order dated 13-2-2012[51] asked the learned Standing Counsel for the State, Shri Mike Prakash Desai to produce the original record before this Court within a period of two weeks. For the reasons best known to the State Authorities

51 *Ravi Yashwant Bhoir* v. *Collector*, (2012) 4 SCC 440

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neither the record has been produced before us, nor has any application been filed to extend the time to produce the same.

73. In fact, this Court has been deprived of seeing the original record and to examine the grievance of the appellant. We express our grave concern and shock at the way the State Authorities have treated the highest court of the land. In such a fact situation, the Court has no option except to draw the adverse inference against the State.

74. In view of the above, the appeal succeeds and is allowed. The judgment and order of the High Court dated 18-6-2009[1] as well as the order passed by the Hon'ble Chief Minister dated 21-3-2009 are hereby set aside. This Court while entertaining the petition had granted interim protection to the appellant vide order dated 17-7-2009[52], which was extended till further orders vide order dated 13-8-2009[53] and, thus, the orders impugned remained inoperative. Thus, it will be deemed as if no order had ever been passed against the appellant.

75. In the facts and circumstances of the case, there will be no order as to costs.

76. A copy of the order be sent directly to the Chief Secretary, State of Maharashtra, Bombay, who may conduct an enquiry and send his personal affidavit as to under what circumstances the State Authorities could decide not to ensure compliance with the order of this Court dated 13-2-2012[51], within a period of four weeks from the date of receipt of this order, to the Registrar General of this Court who may place it along with the file before the Bench.

[CITED ORDER 1]

(2012) 4 Supreme Court Cases 438

(BEFORE K.G. BALAKRISHNAN, C.J. AND P. SATHASIVAM, J.)

RAVI YASHWANT BHOIR .. Petitioner;

Versus

CHIEF MINISTER AND OTHERS .. Respondents.

SLP (C) No. 16271 of 2009†, decided on July 17, 2009

Municipalities — Officers and Members of Municipal Corporation/ Council — Removal of — Removal of President (appellant) for misconduct — Writ petition filed by appellant challenging order of removal dismissed

1 *Ravi Yashwant Bhoir* v. *Chief Minister*, WP (C) No. 4665 of 2009, order dated 18-6-2009 (Bom)

52 *Ravi Yashwant Bhoir* v. *Chief Minister*, (2012) 4 SCC 438

53 *Ravi Yashwant Bhoir* v. *Chief Minister*, (2012) 4 SCC 439

51 *Ravi Yashwant Bhoir* v. *Collector*, (2012) 4 SCC 440

† From the Judgment and Order dated 18-6-2009 in WP No. 4665 of 2009 of the High Court of Bombay

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2014 SCC OnLine NGT 175

Before the National Green Tribunal (Western Zone) Bench, Pune

(BEFORE V.R. KINGAONKAR, J.M. AND AJAY A. DESHPANDE, E.M.)

Between:

M/s. Champ Energy Ventures Pvt. Ltd. Plot No. 7, Gat no. 399/1-2-3 B, Village Bhare, Tal-Mulshi, Pune-412106 ... Applicant;

Versus

1. Ministry of Environment and Forests Through its Principal Secretary, New Delhi, India, Paryavaran Bhavan, C.G.O. Complex, Lodhi Road, New Delhi-110003
2. Central Pollution Control Board, Parivesh Bhavan, East Arjun Nagar, Delhi-110032
3. State of Maharashtra, (Through the Ministry of Environment and Forest, Mantralaya, Mumbai-400032
4. Member Secretary, Maharashtra Pollution Control Board, Kalpataru Complex, Sion, Mumbai
5. Maharashtra Pollution Control Board, Through the Reginal Officer, Pune Office: Jog Centre, 3rd Floor, Mumbai-Pune Road, Wakadewadi, Pune-411003 ... Respondents.

Application No. 21/2014 (WZ) and M.A. No. 58/2014
Decided on May 1, 2014

Counsel for Applicant
Dr. Sadhana Mahashabde.

Counsel for Respondent(s):
Ms. Shweta Busar for Respondent No. 1.
D.M. Gupte/Supriya Danagare for Respondent Nos. 2, 3.

COMMON ORDER

1. By this common order, we propose to dispose of both these Applications together, inasmuch as they are interlinked. The Miscellaneous Application is filed by the original Applicant with a request to add Automotive Research Association of India (ARAI), as a party to the main Application. The Applicant has further sought directions against ARAI, to grant type approval/COP for six (6) models of bifuel gas Gensets, petrol start/petrol run models. The Applicant seeks further directions including direction to CPCB to the effect that no instructions shall be issued to ARAI to discontinue internal process of Type Approval/COP of six (6) petrol start/petrol run Gensets, manufactured by the Applicant.

2. The main Application of the Applicant reveals that the Applicant allegedly manufactures 22 models of petrol and LPG driven Gen sets. Out of them, six (6) are petrol driven Gen sets, 14 are petrol start LPG run Gen sets and two (2) are LPG start/LPG Run Gensets. According to the Applicant, standards have already been fixed for petrol start/petrol run and Petrol start/LPG run Gensets. However, the CPCB has not yet fixed the standards, nor notification has been issued by the MoEF in respect of LPG start/LPG run Gen sets. Obviously, ARAI has not tested the same for issuance of Type Approval. The Application for such approval is not entertained by ARAI, because no such standards have been fixed by the Authority by MPCB and CPCB.

3. The Applicant seeks directions that the CPCB shall give them personal hearing in

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respect of directions which have been issued under Section 5 of the Environment (Protection) Act, 1986, as regards to the unapproved Gensets for which standards are not notified. The Applicant further urges that MoEF be directed to set out standards for emissions and noise for petrol start/LPG run Gen sets and LPG/CNG/Natural Gas run Gensets. So also, certain other directions are sought against the ARAI.

4. The reply affidavit of Respondent No. 2, (CPCB) shows that only six (6) models of petrol start/petrol run type have been approved. It is stated that out of these six (6) models, only three (3) type Gensets, which are manufactured by the Applicant, have been granted approval for production, because they are manufactured at the site of industrial unit of the Applicant. Other three (3) approved models are being manufactured for the customer namely Bajaj Electrical Ltd., for which type approval has been issued. It is stated that any Genset compatible with petrol fuel must have valid Type Approval and unless such approval is granted production thereof cannot be undertaken. It is further stated that the Applicant is illegally manufacturing a large number of Gensets without obtaining Type Approval and unless such bulk of Gen sets are recalled, the request for personal hearing cannot be considered by the CPCB. It is further stated by CPCB that the Applicant has got valid type of approval for three (3) models and therefore, cannot manufacture any other models, as there is no approval. It is contended that the Type Approval for model of other three (3) Gensets sold to the customer i.e. Bajaj Electrical Ltd, is not permissible, to manufacture at the Applicant's industrial premises.

5. We have heard Mr. Yogeshkumar Upadhyay, appearing for ARAI, who has filed affidavit. He is working as Senior Manager. According to him, the ARAI has no role to play in the matter. His affidavit shows that the ARAI is only certifying agency. He would submit that only on fixation of standards by competent authority and after receiving of Application by the manufacturer, ARAI is required to consider the Application for the purpose of certification, if the compliance is found in accordance with the standards. Beyond that ARAI has no role to play. It is not business of ARAI to fix the standards, nor it is business of ARAI to grant any kind of approval for manufacturing of Gensets or any other engines run on fuel like petrol, diesel etc.

6. We have heard learned Counsel for the parties including Counsel for CPCB, Counsel for MoEF, MPCB and also Counsel for the Applicant.

7. Perusal of the record shows that the Applicant was not given opportunity of hearing before taking any decision by the CPCB to give directions under Section 5 of the Environment (Protection) Act, 1986. It is well settled that fair play and principles of natural justice require the authority to follow the principles of *audi alterm partem*. Obviously, it is necessary to hear the party, which is likely to be affected before passing of any adverse order. In other words, before directing the Applicant to recall the Gensets or stop manufacturing or close down the business, the CPCB is required to give Notice of hearing to the Applicant. The Applicant shall go before the CPCB and submit representation and thereafter, personal hearing shall be given by the CPCB to the Applicant before taking final decision in the matter that will be requirement of administrative decision making process.

8. It is stated by Kedarnath Das, Scientist-C, attached to CPCB that the standards of emissions and noise for LPG start/LPG run or petrol start/LPG driven Gen sets are likely to be fixed and notified by the MoEF within period of couple of months. We may note that CPCB is also empowered to take necessary decision for the purpose of fixing of standards of emissions. Although, approval for such purpose and work of notification may be referred to MoEF, if regulated.

9. We do not propose to set out any particular standard, nor do we propose to grant any permission to the Applicant for manufacturing of approved type of Gensets. For, it is not in the domain of NGT to issue directions to the authority to allow manufacturing

of Gensets of which there is no fixed standards as such. Under these circumstances, we propose to finally dispose of the main Application and Miscellaneous Application in the following manner.

(I) The approved three (3) Gen sets bearing Champ 3000 CPS petrol start/petrol run, Champ 5000 CPS petrol start/petrol run and Champ 2800 CPS petrol start/petrol run, shall be allowed and continued to be manufactured by the Applicant for period of four (4) months hereafter. The remaining three (3) models which are being sold to the customer Bajaj Electricals Ltd, may be allowed to be manufactured if they are manufactured at the site of Bajaj Electricals Ltd. and if they are not manufactured on that site, then after conducting inspection same may be disallowed by the CPCB.

(II) There is no need to join ARAI in the Application and ARAI, stands discharged.

(III) The CPCB shall reconsider the closure order or any prohibitory order passed against the Applicant and recall the same.

(IV) The CPCB shall hear the Applicant on 26th May, 2014, at the office of the Chairman/Member Secretary, New Delhi, between 11 a.m. to 1.00 p.m.

(V) The Applicant will be at liberty to submit written representation before the date of such hearing.

(VI) The Chairman, CPCB, should consider such representation before taking final decision in regard to the directions which are proposed to be given under Section 5 of the Environment (Protection) Act, 1986. Then only after hearing the Applicant, such decision shall be arrived at and be communicated to the Applicant.

(VII) The MoEF, in consultation with CPCB shall fix the standards for LPG start/LPG run as well as petrol start LPG run Gen Sets within period of four (4) months hereafter at the most.

(VIII) The directions shall be communicated by the Counsel to the Secretary of MoEF and concerned department and Mr. Kedarnath, Scientist-C, shall communicate this order to the Chairman/Member Secretary of CPCB as well as shall give a copy of the order to the concerned department of MoEF.

(IX) In case standards are so fixed, the Applicant is at liberty to apply to ARAI, as per the Notification and norms settled.

(X) Both the Applications are accordingly disposed of. No costs.

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(BEFORE M. H. BEG, C.J. AND P. N. BHAGWATI, V. R. KRISHNA IYER, P. K. GOSWAMI AND P. N. SHINGHAL, JJ.)

MOHINDER SINGH GILL AND ANOTHER .. Appellants;

Versus

THE CHIEF ELECTION COMMISSIONER, NEW DELHI AND OTHERS .. Respondents.

Civil Appeal No. 1297 of 1977†, decided on December 2, 1977

Constitution of India — Articles 329(b) & 226 — Scope and applicability — Held, Article 329(b) operates as a complete bar to challenges to steps in election including that by a writ petition under Article 226 — Covers only proceedings "calling in question" the election — Meaning of — Section 100, R. P. A., 1951, held, is otherwise broad enough to cover every kind of objection, constitutional, legal or factual and affords complete relief to the petitioner — Sections 98 & 100, R. P. A., 1951

Constitution of India — Article 324 — Scope of Election Commission's powers under — Held, to be construed widely and the power operates in areas left unoccupied by legislation — Limitations on the power pointed out — Election Commission, however, not only to act bona fide but subject to rules of natural justice — Hence rules of natural justice as far as practicable to be followed before cancelling a poll and ordering a re-poll — Sections 58 and 64A, R. P. A., 1951 do not then prevent a re-poll

Administrative Law — Natural justice — Expanding area of application indicated — Distinction between administrative and quasi-judicial functions, held, no longer relevant — English cases considered (Paras 43 to 63)

Administrative Law — Natural justice — Hearing — Flexibility in the requirements of in different fact situations — Hearing after the passing of the order may, on facts, satisfy the requirements of natural justice (Paras 62 and 63)

Administrative Law — Administrative action as much subject to natural justice as judicial and quasi-judicial ones — Natural justice — Applicability of (Paras 44, 51 and 53)

Administrative Law — Judicial review — Action to be judged by the reasons stated while making the order and supplementary reasons in the shape of affidavits to be excluded — AIR 1952 SC 16, relied on (Para 8)

Article 324(1) vests in the Election Commission the superintendence, direction and control of the preparation of the electoral rolls for. and the conduct of all elections to Parliament and to the Legislature of every State and the elections to the offices of the President and the Vice-President held under the Constitution. Article 329 (b) provides that notwithstanding anything in the Constitution, no election to either House of Parliament or to the House or either of the Houses of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate legislature. Section 100(1)(d)(iv) of

†Appeal by Special Leave from the Judgment and Order dated April 25, 1977 of the Delhi High Court in Civil Writ Petition 245 of 1977.

the Representation of the People Act, 1951, provides that subject to the provisions of sub-section (2) if the High Court is of opinion that the result of the election in so far as it concerns a returned candidate has been materially affected by any non-compliance with the provisions of the Constitution or of that Act or of any Rules or Orders made under it, the High Court shall declare the election of the returned candidate to be void. Section 98 of the same Act provides that, 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.

In the 1976 elections to Parliament held from the 13-Ferozepore constituency in Punjab which consisted of 9 assembly segments, the appellant and the third respondent were the principal contestants. According to the scheme for the conduct of elections the postal ballots are to arrive at the returning officer's head-quarters where they are to be counted. An official tally is made when the ballot boxes and the returns from the various segment headquarters duly reached the headquarters. Voting and counting in all the segments took place but the completion of the counting at the constituency headquarters was aborted by mob violence at the final hour when the postal ballots were being counted. Ballot boxes from one of the segments was also done away with **en route** and the returning officer had to postpone the declaration of the result. An observer who had been sent earlier by the Election Commission was present at the time of counting and he and the returning officer reported the happenings to the Election Commission. The appellant, who was having a substantial lead over the respondent before the disturbance took place met the Chief Election Commissioner on the next day, i.e. March 22 with a request that he should direct the returning officer to declare the result of the election but the Commission issued an order cancelling the whole poll, and a few days later, the Commission gave a direction to have a fresh poll for the whole constituency. The Commission declined to re-consider its decision and thereupon the appellant filed a Writ Petition under Article 226 in the High Court. The Election Commission filed a counter-affidavit wherein it stated that after taking into account the circumstances and the information including the oral representation of the appellant he passed the order cancelling the poll in the said Parliamentary constituency. Holding that it had no jurisdiction to entertain the Writ Petition, the High Court dismissed the petition but made observations on the merits. Meanwhile, pursuant to the Commission's direction a re-poll was held and the third respondent was declared elected and the appellant had filed an election petition before the High Court. In appeal to the Supreme Court against the decision of the High Court dismissing the Writ Petition, the following points were raised:

> (1) Is Article 329(b) a blanket ban on all manner of questions which may have impact on the ultimate result of the election, arising between two temporal termini viz., the notification by the President calling for the election and the declaration of the result by the returning officer? Is Article 226 also covered by this embargo and, if so, is Section 100, R. P. A., 1951, broad enough to accommodate every kind of objection. constitutional, legal or factual, which may have the result of invalidation of an election and the declaration of the petitioner as the returned candidate and direct the organisation of any steps necessary to give full relief?
>
> (2) Can the Election Commission, clothed with the comprehensive functions under Article 324 of the Constitution, cancel the whole poll of a constituency after it has been held, but before the formal declaration of the result has been made, and direct a fresh poll without reference to the guidelines under Sections 58 and 64(a) of the Act, or other legal prescription or legislative backing. If such plenary powers exist, is it exercisable on the basis of his inscrutable 'subjective satisfaction' or only on a reviewable objective assessment

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reached on the basis of circumstances vitiating a free and fair election and warranting the stoppage of declaration of the result and the direction of a fresh poll not merely of particular polling stations but of the total constituency ?

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

Dismissing the appeal the Supreme Court

Held :

Per Beg, C. J., Bhagwati and Krishna Iyer, JJ.

1. (a) Election has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect a candidate culminating in the final declaration of the returned candidate. (Para 92)

Every step from start to finish of the total process constitutes 'election' not merely the conclusion or culmination. The rainbow of operations covered by the compendious expression 'election' commences from the initial notification and culminates in the declaration of the returned candidate. (Paras 22 and 27)

Indira Nehru Gandhi v. *Raj Narain*, (1976) 2 SCR 347 : 1975 Supp SCC 1 ; *N. P. Ponnuswami* v. *Returning Officer*, (1952) SCR 218 : AIR 1952 SC 64 : 1 ELR 133 ; *Hari Vishnu Kamath* v. *Syed Ahmed Ishaque*, (1955) 1 SCR 1104 : AIR 1955 SC 233 : 10 ELR 216 and *Dr. N. B. Khare* v. *Election Commission of India*, AIR 1958 SC 139 : 1958 SCR 648 and *Durga Shankar Mehta* v. *Thakur Raghuraj Singh*, (1955) 1 SCR 267 : AIR 1954 SC 520 : 9 ELR 494, *followed*.

(b) Article 329(b) is a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of the result. The conspectus of provisions bearing on the subject of elections in the Constitution and the Representation of the People Act clearly expresses the rule that there is a remedy for every wrong done during the election in progress although it is postponed to the post-election stage and procedure as predicated in Article 329(b) and the 1951-Act. The Election Court has, under various provisions of the Act, large enough powers to give relief to the injured candidate if he makes out a case and such processual amplitude of power extends to directions to the Election Commission or other appropriate agency to hold a poll to bring up the ballots or do other things necessary for the fulfilment of the jurisdiction to undo illegality and injustice and do complete justice within the parameters set by the existing law. (Para 92)

Under Article 329(b) the sole remedy for an aggrieved party, if he wants to challenge any election, is an election petition and this exclusion of all other remedies includes constitutional remedies like Article 226 because of the non-obstante clause. If what is impugned is an election the ban operates provided the proceeding "calls it in question" or puts it in issue, not otherwise. The paramount policy of the Constitution-makers in declaring that no election shall be called in question except the way it is provided for in Article 329(b) and the Representation of the People Act, 1951, shows that the Constitution and the Act should be read as an integrated scheme. The reason for postponement of election litigation to the post-election stage is that elections shall not unduly be protracted or obstructed. The speed and promptitude in getting due representation for the electors in the legislative bodies is the real reason. It is not every decision sought and rendered that will amount to "calling in question" an election. There are two types of decisions and two types of challenges. The first relates to proceedings which

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interfere with the process of election and the second accelerates the completion of the election and acts in furtherance of an election. Anything done towards the completion of the election proceedings, such as a decision by a returning officer on objections made to any nomination, can by no stretch of reasoning be described as questioning the election. The plenary bar of Article 329(b) rests on two principles: (i) the peremptory urgency and prompt engineering of the whole election process without intermediate interruptions by way of legal proceedings challenging the steps and stages in between the commencement and the conclusion; and (ii) the provision of the special jurisdiction which can be invoked by an aggrieved party at the end of the election excludes the other forms, the right and remedy being creatures of the statute and controlled by the Constitution. The conclusion is, therefore, irresistible that jurisdiction under Article 226 cannot consider the correctness, legality or otherwise of the direction for cancellation integrated with the re-poll because the prima facie purpose of such a re-poll was to restore a detailed poll process and to complete it through the salvationary effect of a re-poll. Whether in fact or in law the order is validly made by the Election Commission or is violative can be examined later by the High Court as the Election Tribunal. If the regular poll, for some reason, has failed to reach the goal of choosing the returned candidate and to achieve this object a fresh poll (not a new election) is needed, it may still be a step in the election. Hence, the writ application, challenging the cancellation coupled with re-poll, amounts to calling in question a step in election and is, therefore, barred by Article 329(b). (If no re-poll had been ordered here the legal perspective would have been different.) (Paras 21, 26 to 32)

This conclusion is fortified by reading Section 100 of the 1951-Act so as to give a substantial assurance of justice and as covering the whole basket of grievances of candidates. Knowing the supreme significance of speedy elections, 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. The Section is exhaustive of all grievances regarding an election. An election ripens into the electors' choice only when processed, screened and sanctified, every 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 prerequisites of "election" in its semantic sweep. Under Section 98 of the Act, the High Court has three options by way of conclusive determinations. If the second poll here is set aside as invalid by the High Court in the election petition for any good reason then it falls and the third respondent too with it. The question of the soundness of cancellation of the entire poll is within the court's power under Section 98. Everything necessary to resurrect, reconstruct and lead on to a consummation of the original process and to give effective relief by way of completion of the proper election are within the court's power. (Paras 33 to 35, 86 and 88)

Mutajog Dubey v. *H. C. Bhari*, (1955) 2 SCR 925 : AIR 1956 SC 44 : (1955) 28 ITR 941 : 1956 Cri LJ 140 and *Commissioner of Commercial Taxes* v. *R. S. Jhaver*, (1968) 1 SCR 148 : AIR 1968 SC 59 : 20 STC 453 : 66 ITR 664, *referred to*.

2. The Constitution contemplates a free and fair election and vests comprehensive responsibility of superintendence, direction and control of the conduct of elections in the Election Commission. This responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances. It is true that Article 324 has to be read in the light of the Constitutional scheme and the Representation of the People Acts of 1950 and 1951. The Article, however, operates in areas left unoccupied by legislation and the words "superintendence, direction and control" as well as "conduct of all elections" are in the broadest terms. But the Commission cannot defy the law armed by Article 324 nor act arbitrarily. Its orders are subject to review. So ordering a re-poll for the whole constituency under compulsion of circumstances may be

a direction for the conduct of elections and can be saved by Article 324 provided it is bona fide necessary for the vindication of the free verdict of the electorate and the abandonment of the previous poll because it failed to achieve the goal. The Article is wide enough to supplement the powers under the Acts. It is true that there may be some guidelines in Sections 58 and 64A of the 1951-Act and they may be applicable to an order for constituency-wide re-poll. But though it may be wholesome to be guided it is not illegal not to do so provided homage to natural justice is otherwise paid. (Paras 96, 38 to 41 and 78)

3. Two limitations at least are laid on the plenary character of the power of the Election Commissioner in the exercise thereof. First, when Parliament or any State Legislature has made a valid law relating to or in connection with the elections, the Commission shall act in conformity with and not in violation of such provisions. But where such law is silent, Article 324 is a reservoir of power to act for the avowed purpose of not divorced from, pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, to act bona fide and be amenable to the norms of natural justice in so far as conformance to such canons can reasonably and realistically be required of it, as fairplay-in-action in a most important area of the constitutional order, namely, elections. Fairness does import an obligation to see that no wrong-doer candidate benefits by his own wrong. Natural justice enlivens and applies to the specific case of total re-poll although not in full panoply but in flexible practicability. Whether it has been complied with is left open for the Tribunal's adjudication. Article 324 is geared to the accomplishment of free and fair elections expeditiously. If it is misused certainly the Court has power to strike down the particular action. (Paras 92 and 39)

Vijayendra v. *State of Punjab*, 1958 SCR 308 : AIR 1957 SC 896 ; *Harishankar Bagla* v. *State of M. P.*, (1955) 1 SCR 380 : AIR 1954 SC 465 : 1954 Cri LJ 1322 ; *A. K. Kraipak* v. *Union of India*, (1970) 1 SCR 457 : (1969) 2 SCC 262, *followed.*

In re H. K. (an infant), (1967) 2QB 617 : (1967) 1 All ER 226 *applied.*

Ridge v. *Baldwin*, (1964) AC 40 : (1963) 2 All ER 66, *referred to.*

Article 324, on the face of it, vests vast functions which may be powers or duties essentially administrative and marginally even adjudicative or legislative. (Para 50)

All Party Hill Leaders' Conference v. *Capt. W. A. Sangma*, (1977) 4 SCC 161, *referred to.*

But assuming that the cancellation of the poll were only an administrative act, even then it does not repel the application of the natural justice principle. Good administration demands fairplay in action and this simple desideratum is the fount of natural justice. Classification of functions as "judicial" or "administrative" is a stultifying shibboleth discarded in India as well as in England. When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned therein and cannot be supplemented by fresh reasons in the shape of affidavits or otherwise. (Paras 51, 53 and 8)

Commissioner of Police v. *Gordhandas Bhanji*, AIR 1952 SC 16 : 1952 SCR 16 : 1951 SCJ 803, *followed.*

(a) The fact that the Election Commission is a high constitutional functionary charged with conducting elections with celerity to bring the new House into being, does not imply that the process of notice and hearing would thwart this imperative and delay the process. It is true that once the process of election has started it should not be interrupted since the temporary slow-down may halt the early constitution of an elected Parliament. Discretion is vested in the Election Commissioner and he will ordinarily use it wisely and not rashly. Yet wide discretion is fraught with tyrannical potential even in high personages. Natural justice is one kind of check on wide power. (Paras 58, 61 to 63)

Wiseman v. *Borneman*, (1967) 3 All ER 1945 ; *Howard* v. *Borneman*, (1974) 3 WLR 660 and *Selvarajan*, (1966) 1 All ER 12, *applied.*

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Russel v. *Duke of Norfolk*, (1949) 1 All ER 109 and *Durayappah* v. *Fernando*, (1967) 2 AC 337 : (1967) 2 All ER 152 (PC), *referred to*.

(b) Merely because there was no final determination to the prejudice of any party by directing a re-poll and since the High Court as Election Tribunal is the last word on every objectionable order, it does not mean that the Election Commission is not bound by rules of natural justice. The Election Court can exercise only a limited power of review and must give regard to the Commission's discretion. The trouble and cost of instituting such proceedings would deter all but the most determined of parties aggrieved and even the latter could derive no help from legal principles in predicting whether at the end of the day the Court would not condone their summary treatment on a subjective appraisal of the demerits of the case they had been denied the opportunity to present. The public interest would be ill-served by judicially fostered uncertainty as to the value to be set upon procedural fair-play as a canon of good administration. (Para 72)

Pearlberg v. *Varty*, (1971) 1 WLR 728 and *Malloch* v. *Aberdeen Corpn.*, (1971) 1 WLR 1578 : (1971) 2 All ER 1278, *applied*.

(c) It is not correct to say that no candidate could claim anything more than expectation and hence has no crystalised right till official declaration of the result and, therefore, he cannot complain of civil consequences. Every candidate has an interest or right to fair and free and legally run election. A vested interest in the prescribed process is a processual right actionable if breached, the Constitution permitting. The appellant has a right to have the election conducted not according to humour or hubris but according to law and justice. It is true the Election Commissioner in this case was met by the appellant but the hearing was a vacuous one where nothing was disclosed and the appellant was summarily told off. (Para 66)

Ram Gopal Chaturredi v. *State of M. P.* (1970) 1 SCR 472 : (1969) 2 SCC 240 and *Union of India* v. *Col. J. N. Sinha*, (1971) 1 SCR 791 : (1970) 2 SCC 458, *explained*.

State of Orissa v. *Dr. Binapani Dei*, (1967) 2 SCR 625 : AIR 1967 SC 1269 : (1967) 2 LLJ 266, *referred to*.

(d) The application of the rule of natural justice would not end in a far-flung futility on the ground that hearing will have to be given to every member of the constituency. The candidates have set themselves up as nominated candidates, organised the campaign and galvanised the electorate for the crowning event of polling and counting. Their interest and claim are not indifferent but immediate, not weak but vital. They are more than members of the public. In this sense they stand on a better footing and cannot be denied the right to be heard or noticed and it is not necessary that notice should be given to all the members of the public. In electoral situations if the Election Commission cancels a poll because it is satisfied that the procedure adopted has gone awry on a wholesale basis in such a case no doubt notice need not be given to any member of the constituency. It all depends on the circumstances and the matter is incapable of generalisations. In a situation like the present it is a far cry from natural justice to argue that the whole constituency may have to be given a hearing. It is sufficient if notice is given to the parties to the electoral dispute. (Para 70)

Board of High School & Intermediate Education, U. P., Allahabad v. *Ghanshyam Das Gupta*, (1962) Supp 3 SCR 36 : AIR 1962 SC 1110, *referred to*.

Bihar School Examination Board v. *Subhash Chander Sinha*, (1970) 3 SCR 963 : (1970) 1 SCC 648, *distinguished*.

It cannot be argued that since hearing is provided for in certain matters, that Parliament when it intended that hearing should be given said so in the Act and the Rules and inferentially where it has not so specified it is not necessary to give any hearing. 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 consequences on candidates emanate from its exercise, this functional obligation of following the rule of natural justice must be read into it. (Para 77)

[Any observations made by the Delhi High Court in dismissing the writ petition or by the Supreme Court in disposing of the present matter in appeal from that decision, on merits of the case, would not bind the High Court as an Election Tribunal in disposing of the election petition.] (Para 9)

Per Goswami and Shinghal, JJ. (concurring)

(1) Article 329(b) rules out the maintainability of the writ application. An election can be challenged only under the provisions of the Representation of the People Act, 1951. Indeed, Section 80 of that Act provides that no election shall be called in question except by an election petition presented in accordance with the provisions of Part IV of the Act. All the substantial reliefs which the appellant seeks in the writ application including the declaration of the election to be void and a declaration of appellant to be duly elected, can be claimed in the election petition. It will be within the power of the High Court as an election court to give all appropriate reliefs and to do complete justice between the parties. In doing so, it will be open to the High Court to pass any ancillary or consequential order to enable it to grant the necessary relief provided under the Act. One of the prayers of the appellant is for a declaration of the result on the basis of poll which has been cancelled. This is nothing short of seeking to establish the validity of a very important stage in the election process, namely, the poll which has taken place and which is countermanded by the impugned order. If the appellant succeeds the result may be declared if possible on the basis of that poll or some other suitable orders may be passed. If he fails, a fresh poll will take place and the election will be declared on the basis of the fresh poll. This is, in fact, a vital issue which relates to the questioning of the election since the election will be complete only after the fresh poll on the basis of which the declaration of the result will be made. That is, there are no two elections and there is only one continuous process of election. If, therefore, during the process of election at an intermediate or final stage, the entire poll has been wrongly cancelled and a fresh poll has been wrongly ordered, that is a matter which may be agitated after declaration of the result on the basis of the fresh poll, by questioning the election in the appropriate forum by means of an election petition in accordance with law. The appellant is thus not without a remedy to question every step in the electoral process and every order that has been passed in the process of the election including the countermanding of the earlier poll. The election court will be able to entertain his objection with regard to the order of the Election Commissioner countermanding the earlier poll and the whole matter will be at large. There is, therefore, no foundation for the grievance that the appellant will be without remedy if the writ application is dismissed. The High Court was, therefore, right in dismissing the writ petition. (Paras 126 and 123)

(2) Article 324(1) is couched in wide terms. When appropriate laws are made under Article 327 by Parliament or under Article 328 by State Legislatures the Election Commission has to act in conformity with those laws and the other legal provisions made thereunder. Even so, both the Articles — Articles 327 and 328 — are subject to the provisions of the Constitution which include Articles 324 and 329. The framers of the Constitution took care to leave scope for the exercise of the residuary power by the Commission in its own right as a creature of the Constitution in the infinite variety of situations that may emerge from time to time in our large democracy. The Commission may be required to cope with some situations which may not have been provided for in the enacted laws and rules The Election Commission is a high-powered and independent body and its objective cannot be achieved unless it has an amplitude of powers in the conduct of elections — of course in accordance with the existing laws. But where they are absent, and yet a situation has to be tackled, the Election Commissioner has the power to deal with the situation. The Election Commissioner must lawfully exercise his power independently in all matters relating to the conduct of elections

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and see that the election process is completed. The express statutory grant of power or the imposition of a definite duty carries with it by implication, in the absence of limitation, the authority to employ all the means that are usually employed and that are necessary to the exercise of the power or the performance of the duty. The Chief Election Commissioner has thus to pass appropriate orders on receipt of reports from the returning officer with regard to any situation arising in the course of an election, and power cannot be denied to him to pass such appropriate orders. Moreover, such power has to be exercised with promptitude. Whether an order passed is wrong, arbitrary or otherwise invalid, relates to the mode of exercising the power under Article 324. (Paras 113 and 114)

Sections 58 and 64(A) envisage the necessity for the cancellation of poll and ordering of re-poll in particular polling stations where the situation may warrant such a course. When provision is made in the Act it cannot be said that if a general situation arises whereby numerous polling stations may witness serious mal-practices the power should be denied to the Election Commission to take an appropriate decision. The fact that a particular Chief Election Commissioner may take certain decisions unlawfully or arbitrarily is not the test in such a case. Under both the sections poll that was taken at a particular situation can be voided and a fresh poll can be ordered by the Commission. These provisions cannot, therefore, be said to rule out the making of an order to deal with a similar situation in a substantially large area or the whole constituency. (Paras 117 and 118)

The contention that the President can revoke, alter or amend the notification under Section 14 of the Act or that he promulgates an Ordinance in an appropriate case does not touch the question of the power of the Election Commissioner. That question will have to be decided on the scope of Article 324(1). It is true that in exercising the powers under the article the Election Commission cannot do something impinging upon the power of the President; but after the notification has been issued by the President, the entire electoral process is in the charge of the Election Commission, and the Commission is exclusively responsible for the conduct of the election without reference to any outside agency. When a poll that has already taken place has been cancelled and a fresh poll has been ordered, the order with the amended date is passed as an integral part of the electoral process. It, therefore, necessarily follows that if there is any illegality in the exercise of the power under Article 324 or under any provisions of the Act, there is no reason why Section 100(1)(d)(iv) of the Act should not be attracted to it. (Paras 120, 122 and 125)

Durga Shanker Mehta v. *Thakur Raghuraj Singh*, (1955) 1 SCR 267 : AIR 1954 SC 520 : 9 ELR 444, *followed*.

(3) In view of the conclusion that the High Court had no jurisdiction to entertain the writ petition under Article 226 it would not be correct for the Supreme Court in an appeal against the order of the High Court to enter into any other controversy on the merits either on law or on facts and to pronounce finally on the same. Any view expressed by the High Court or the Supreme Court would not bind the High Court as an Election Tribunal in disposing of the election petition. Being not altogether certain of all the facts that may be made available in the appropriate forum it may be a premature exercise by the Supreme Court even to lay down guide lines when there is no hide-bound formula or rule of natural justice to operate in all cases and at all times when a decision has to be made. Justice and fair-play have often to be harmonised to the exigencies of the situation in the light of accumulated totality of circumstances in a given case having regard to the question of prejudice, not to the mere combatants in the electoral contest, but the real and larger issue of the completion of a free and fair election with rigorous promptitude. This Court will not, therefore, make the task of the election court difficult and embarrassing by suggesting guidelines in a rather twilight zone. (Paras 127 and 130)

S-M/3762/C

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The Judgment of the Court was delivered by

KRISHNA IYER, J. (*for himself, Beg, C.J. and Bhagwati, J.*)—What troubles us in this appeal, coming before a Bench of 5 Judges on a reference under Article 145(3) of the Constitution, is not the profusion of controversial facts nor the thorny bunch of lesser law, but the possible confusion about a few constitutional fundamentals, finer administrative normae and jurisdictional limitations bearing upon elections. What are those fundamentals and limitations ? We will state them, after mentioning briefly what the writ petition, from which this appeal, by special leave, has arisen, is about.

THE BASICS

2. Every significant case has an unwritten legend and indelible lesson. This appeal is no exception, whatever its formal result. The message, as we will see at the end of the decision, relates to the pervasive philosophy of democratic elections which Sir Winston Churchill vivified in matchless words :

> At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper — no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point.

If we may add, the little, large Indian shall not be hijacked from the course of free and fair elections by mob muscle methods, or subtle perversion of discretion by men 'dressed in little, brief authority'. For 'be you ever so high, the law is above you'.

3. The moral may be stated with telling terseness in the words of William Pitt : 'Where laws end, tyranny begins'. Embracing both these mandates and emphasizing their combined effect is the clemental law and politics of Power best expressed by Benjamin Disraeli[1] :

> I repeat . . . that all power is a trust — that we are accountable for its exercise — that, from the people and for the people, all springs, and all must exist.

Aside from these is yet another, bearing on the play of natural justice, its nuances, non-applications, contours, colour and content. Natural justice is no mystic testament of Judge-made juristics but the pragmatic, yet principled, requirement of fairplay in action as the norm of a civilised justice-system and minimum of good government — crystallised clearly in our jurisprudence by a catena of cases here and elsewhere.

THE CONSPECTUS OF FACTS

4. The historic elections to Parliament, recently held across the country, included a constituency in Punjab called 13-Ferozepore parliamentary constituency. It consisted of nine assembly segments and the polling took place on March 16, 1977. According to the calendar notified by the Election Commission, the counting took place in respect of five assembly segments on March 20, 1977 and the remaining four on the next day. The appellant and the third respondent were the principal contestants. It is stated by the appellant that when counting in all the assembly segments was completed at the respective segment headquarters, copies of the results

1. *Vivian Grey*, BK VI Ch 7

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were given to the candidates and the local tally telephonically communicated to the returning officer (respondent 2). According to the scheme the postal ballots are to arrive at the returning officer's headquarters at Ferozepore where they are to be counted. The final tally is made when the ballot boxes and the returns duly reach the Ferozepore headquarters from the various segment headquarters. The poll proceeded as ordained, almost to the very last stages, but the completion of the counting at the constituency headquarters in Ferozepore was aborted at the final hour as the postal ballots were being counted — thanks to mob violence allegedly mobilised at the instance of the third respondent. The appellant's version is that he had all but won on the total count by a margin of nearly 2000 votes when the panicked opposite party havoced and halted the consummation by muscle tactics. The postal ballot papers were destroyed. The ballot boxes from the Fazilka segment were also done away with en route, and the returning officer was terrified into postponing the declaration of the result. On account of an earlier complaint that the returning officer was a relation of the appellant, the Election Commission (hereinafter referred to as Commission) had deputed an officer of the Commission — Shri IKK Menon — as observer of the poll process in the constituency. He was present as the returning officer started the last stage operations on March 21, from 3 p.m. onwards. Thus the returning officer had the company of the observer with him during the crucial stages and controversial eruptions in the afternoon of March 21. Shortly after sunset, presumably, the returning officer who under compulsion had postponed the concluding part of the election, reported the happenings by wireless message to the Election Commission. The observer also reached Delhi and gave a written account and perhaps an oral narration of the untoward events which marred what would otherwise have been a smooth finish to the election.

5. Disturbed by the disruption of the declaratory part of the election, the appellant, along with a former Minister of the State, met the Chief Election Commissioner (i.e. the Commission) at about 10.30 a.m. on March 22, with the request that he should direct the returning officer to declare the result of the election. Later in the day, the Commission issued an order which has been characterised by the appellant as a lawless and precedentless cancellation of the whole poll acting by hasty hunch and without rational appraisal of facts. By March 22, when the Election Commission made the impugned order, the bulk of the electoral results in the country had beamed in The gravamen of the grievance of the appellant is that while he had, in all probability, won the poll, he had been deprived of this valuable and hard-won victory by the arbitrary action of the Commission going contrary to fairplay and in negation of the basic canons of natural justice. Of course, the Commission did not stop with the cancellation but followed it up a few days later with a direction to hold a fresh poll for the whole constituency, involving all the nine segments, although there were no complaints about the polling in any of the constituencies and the ballot papers of eight constituencies were available intact with the returning officer and only Fazilka segment ballot papers were destroyed or damaged on the way, (plus the postal ballots) It must

also be mentioned here that a demand was made, according to the version of the third respondent, for recount in one segment which was, unreasonably, turned down. The observer, in his report to the Election Commission, also mentioned that in two polling stations divergent practices were adopted in regard to testing valid and invalid votes. To be more precise, Shri IKK Menon mentioned in his report that at polling station 8, the presiding officer's seal on the tag as well as the paper seal of one box was broken. But the ballot papers contained in that box were below 300 and would not have affected the result in the normal course. In another case in Jalalabad assembly segment, the assistant returning officer had rejected a number of ballot papers of a polling station on the score that they were not signed by the presiding officer. In yet another case it was reported that the ballot papers were neither signed nor stamped but were accepted by the assistant returning officer as valid, although the factum was not verified by Shri Menon with the assistant returning officer. Shri Menon, in his report, seems to have broadly authenticated the story of the mob creating a tense situation leading to the military being summoned. According to him only the ballot papers of Fazilka assembly segment were destroyed, not of the other segments. Even regarding Fazilka, the result-sheet had arrived. So far as Zira assembly segment was concerned, some documents (not the ballot papers) had been snatched away by hooligans. The observer had asked the returning officer to send a detailed report over and above the wireless message. That report, dated March 21, reached the Commission on March 23, but, without waiting for the report — we need not probe the reasons for the hurry — the Commission issued the order cancelling the poll. The Chief Election Commissioner has filed a laconic affidavit leaving to the Secretary of the Commission to go into the details of the facts, although the Chief Election Commissioner must himself have had them within his personal ken. This aspect also need not be examined by us and indeed cannot be, for reasons which we will presently set out.

6. Be that as it may, the Chief Election Commissioner admitted in his affidavit that the appellant met him in his office on the morning of March 22, 1977 with the request that the returning officer be directed to declare the result. He agreed to consider and told him off, and eventually passed an order as mentioned above. The then Chief Election Commissioner has mentioned in his affidavit that the observer Shri Menon had apprised him of 'the various incidents and developments regarding the counting of votes in the constituency' and also had submitted a written report. He has also admitted the receipt of the wireless message of the returning officer. He concludes his affidavit: 'that after taking all these circumstances and information including the oral representation of the first petitioner into account on March 22, 1977 itself I passed the order cancelling the poll in the said parliamentary constituency. In my view this was the only proper course to adopt in the circumstances of the case and with a view to ensuring fair and free elections, particularly when even a recount had been rendered impossible by reason of the destruction of ballot papers'. The order of the Election Commission, resulting in the demolition of the poll already held, may be read at this

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stage :

ELECTION COMMISSION OF INDIA

New Delhi
Dated March 22, 1977
Chaitra 1, 1899 (Saka)

NOTIFICATION

S.O. Whereas the Election Commission has received reports from the Returning Officer of 13-Ferozepore parliamentary constituency that the counting on March 21, 1977 was seriously disturbed by violence; that the ballot papers of some of the assembly segments of the parliamentary constituency have been destroyed by violence; that as a consequence it is not possible to complete the counting of the votes in the constituency and the declaration of the result cannot be made with any degree of certainty;

And whereas the Commission is satisfied that taking all circumstances into account, the poll in the constituency has been vitiated to such an extent as to affect the result of the election;

Now, therefore, the Commission in exercise of the powers vested in it under Article 324 of the Constitution, Section 153 of the Representation of the People Act, 1951 and all other powers enabling it so to do, cancels the poll already taken in the constituency and extends the time for the completion of the election up to April 30, 1977 by amending its notification 464/77 dated February 25, 1977 in respect of the above election as follows:

In clause (d) of item (i) of the said notification relating to the completion of election—

(a) in the existing item (i), after the words "State of Jammu and Kashmir", the words "and 13-Ferozepore parliamentary constituency in the State of Punjab" shall be inserted; and

(b) the existing item (ii) shall be renumbered as item (iii), and before the item (iii) as so renumbered, the following item shall be inserted, namely:

(iii) April 30, 1977 (Saturday) as the date before which the election shall be completed in 13-Ferozepore parliamentary constituency in the State of Punjab. (464/77)

By order
Sd/- A. N. Sen,
Secretary.

The Commission declined to reconsider his decision when the appellant pleaded for it. Shocked by the liquidation of the entire poll, the latter moved the High Court under Article 226 and sought to void the order as without jurisdiction and otherwise arbitrary and violative of any vestige of fairness. He was met by the objection, successfully urged by the respondents 1 and 3, that the High Court had no jurisdiction in view of Article 329(b) of the Constitution and the Commission had acted within its wide power under Article 324 and fairly. Holding that it had no jurisdiction to entertain the writ petition, the High Court nevertheless proceeded to enter verdicts on the merits of all the issues virtually exercising even the entire jurisdiction which exclusively belonged to the Election Tribunal. The doubly damnified appellant has come up to this Court in appeal by special leave.

7. Meanwhile, pursuant to the Commission's direction, a re-poll was held. Although the appellant's name lingered on the ballot he did not participate in the re-poll and respondent 3 won by an easy plurality although numerically those who voted were less than half of the previous poll. Of course, if the Commission's order for re-poll fails in law, the second electoral exercise has to be dismissed as a stultifying futility. Two things fall to be mentioned at this stage, but, in passing, it may be stated that the third respondent had complained to the Chief Election Commissioner that the assistant returning officer Fazilka segment had declined the request for recount unreasonably and that an order for re-poll of the Fazilka assembly part should be made 'after giving personal hearing'. Meanwhile, runs the request of the third respondent: 'direct the returning officer to withhold declaration of result of 13-Ferozepore parliament constituency'. We do not stop to make inference from this document but refer to it as a material factor which may be considered by the tribunal which, eventually, has to decide the factual controversy.

8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in *Gordhandas Bhanji*[2]:

> Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older.

A CAVEAT

9. We must, in limine, state that — anticipating our decision on the blanket ban on litigative interference during the process of the election, clamped down by Article 329(b) of the Constitution — we do not propose to enquire into or pronounce upon the factual complex or the lesser legal tangles, but only narrate the necessary circumstances of the case to get a hang of the major issues which we intend adjudicating. Moreover, the scope of any factual investigation in the event of controversion in any petition under Article 226 is ordinarily limited and we have before us an appeal from the High Court dismissing a petition under Article 226 on the score that such a proceeding is constitutionally out of bounds for any Court, having regard to the mandatory embargo in Article 329(b). We should not, except in exceptional circumstances, breach the recognised, though not inflexible, boundaries of Article 226 sitting in appeal, even assuming the maintainability of such a petition. Indeed, we should have expected the High Court to have considered the basic jurisdictional issue

2 *Commr. of Police, Bombay* v. *Gordhandas Bhanji*, AIR 1952 SC 16

first, and not last as it did, and avoided sallying forth into a discussion and decision on the merits, self-contradicting its own holding that it had no jurisdiction even to entertain the petition. The learned Judges observed :

> It is true that the submission at serial 3 above in fact relates to the preliminary objection urged on behalf of respondents 1 and 3 and should normally have been dealt with first but since the contentions of the parties on submission 1 are intermixed with the interpretation of Article 329(b) of the Constitution, we thought it proper to deal with them in the order in which they have been made.

This is hardly convincing alibi for the extensive *per incuriam* examination of facts and law gratuitously made by the Division Bench of the High Court, thereby generating apprehensions in the appellant's mind that not only is his petition not maintainable but he has been damned by damaging findings on the merits. We make it unmistakably plain that the election Court hearing the dispute on the same subject under Section 98 of the R. P. Act, 1951 (for short, the Act) shall not be moved by expressions of opinion on the merits made by the Delhi High Court while dismissing the writ petition. An obiter binds none, not even the author, and obliteration of findings rendered in supererogation must allay the appellant's apprehensions. This Court is in a better position than the High Court, being competent, under certain circumstances, to declare the law by virtue of its position under Article 141. But, absent such authority or duty, the High Court should have abstained from its generosity. Lest there should be any confusion about possible slants inferred from our synoptic statements, we clarify that nothing projected in this judgment is intended to be an expression of our opinion, even indirectly. The facts have been set out only to serve as a peg to hang three primary constitutional issues which we will formulate a little later.

OPERATION ELECTION

10. Before we proceed further, we had better have a full glimpse of the constitutional scheme of elections in our system and the legislative follow-up regulating the process of election. Shri Justice Mathew in *Indira Nehru Gandhi*[3] summarised, skeletal fashion, this scheme following the pattern adopted by Fazl Ali, J. in *Ponnuswami*[4]. He explained: (SCC page 120, paras 268 & 269)

> The concept of democracy as visualized by the Constitution presupposes the representation of the people in Parliament and State Legislatures by the method of election. And, 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 (see **N. P. Ponnuswami** v. **Returning Officer, Namakkal Constituency**).

Article 329(b) envisages the challenge to an election by a petition to be presented to such authority as the Parliament may, by law, prescribe. A law

3. *Indira Nehru Gandhi* v. *Raj Narain*, (1976) 2 SCR 347, 504-505 : 1975 Supp SCC 1, 120

4. *N. P. Ponnuswami* v. *Returning Officer*, (1952) SCR 218 : AIR 1952 SC 64 : 1 ELR 133

relating to election should contain the requisite qualifications for candidates, the method of voting, definition of corrupt practices by the candidates and their election agents, the forum for adjudication of election disputes and other cognate matters. It is on the basis of this law that the question whether there has been a valid election has to be determined by the authority to which the petition is presented. And, when a dispute is raised as regards the validity of the election of a particular candidate, the authority entrusted with the task of resolving the dispute must necessarily exercise a judicial function, for, the process consists of ascertaining the facts relating to the election and applying the law to the facts so ascertained.

11. A short description of the legislative project in some more detail may be pertinent, especially touching on the polling process in the booths and the transmission of ballot boxes from the polling stations to the returning officer's ultimate counting station and the crucial prescriptions regarding announcements and recounts and declarations. We do not pronounce upon the issues regarding the stage for and right of recount, the validity of votes or other factual or legal disputes since they fall for decision by the Election Court where the appellant has filed an election petition by way of abundant caution.

12 A free and fair election based on universal adult franchise is the basic ; the regulatory procedures vis-a-vis the repositories of functions and the distribution of legislative, executive and judicative roles in the total scheme, directed towards the holding of free elections, are the specifics. Part XV of the Constitution plus the Representation of the People Act, 1950 (for short, the 1950 Act) and the Representation of the People Act, 1951 (for short, the Act), Rules framed thereunder, instructions issued and exercises prescribed, constitute the package of electoral law governing the parliamentary and assembly elections in the country. The super-authority is the Election Commission, the kingpin is the returning officer, the minions are the presiding officers in the polling stations and the electoral engineering is in conformity with the elaborate legislative provisions.

13 The scheme is this. The President of India (under Section 14) ignites the general elections across the nation by calling upon the people, divided into several constituencies and registered in the electoral rolls, to choose their representatives to the Lok Sabha. The constitutionally appointed authority, the Election Commission, takes over the whole conduct and supervision of the mammoth enterprise involving a plethora of details and variety of activities, and starts off with the notification of the time-table for the several stages of the election (Section 30). The assembly line operations then begin. An administrative machinery and technology to execute these enormous and diverse jobs is fabricated by the Act, creating officers, powers and duties, delegation of functions and location of polling stations. The precise exercises following upon the calendar for the poll, commencing from presentation of nomination papers, polling drill and felling of votes, culminating in the declaration and report of results are covered by specific prescriptions in the Act and the rules. The secrecy of the ballot, the authenticity of the voting paper and its later identifiability with reference to particular polling stations, have been thoughtfully provided for. Myriad other matters necessary for smooth elections have been taken care of by several provisions of the Act.

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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 re-poll. 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 statio..s is provided for. Section 64A chalks out the conditions for and course of such re-poll, 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 re-poll systematically and stagewise arranged in the Act. It is not the case of either side that a total re-poll of an *entire constituency* is specificated 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 Addl. 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. (See *Inamati Mallappa Basappa* v. *Desai Besavaraj. Ayyappa*[5]). 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*' (see p. 276). Therefore, it is essential that Courts, adjudicating upon election controversies, must play a warily active role, conscious all the time that every decision rendered

5. 1959 SCR 611, 616, 622 : AIR 1958 SC 698 : 14 ELR 296

by the Judge transcends private rights and defends the constituency and the democracy of the country.

16. Secondly, the pregnant problem of power and its responsible exercise is one of the perennial riddles of many a modern constitutional order. Similarly, the periodical process of free and fair elections, uninfluenced by the caprice, cowardice or partisanship of hierarchical authority holding it and unintimidated by the thrust, tantrum or vandalism of strong-arm tactics, exacts the embarrassing price of vigilant monitoring. Democracy digs its grave where passions, tensions and violence, on an overpowering spree, upset results of peaceful polls, and the law of elections is guilty of sharp practice if it hastens to legitimate the fruits of lawlessness. The judicial branch has a sensitive responsibility here to call to order lawless behaviour. Forensic non-action may boomerang, for the Court and the law are functionally the bodyguards of the People against bumptious power, official or other.

17. We now enter the constitutional zone relating to the controversy in this case. Although both sides have formulated the plural problems with some divergence, we may compress them into three cardinal questions :

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

(2) Can the Election Commission, clothed with the comprehensive functions under Article 324 of the Constitution, cancel the whole poll of a constituency after it has been held, but before the formal declaration of the result has been made, and direct a fresh poll without reference to the guidelines under Sections 58 and 64(a) of the Act, or other legal prescription or legislative backing ? If such plenary power exists, is it exercisable on the basis of his inscrutable 'subjective satisfaction' or only on a reviewable objective assessment reached on the basis of circumstances vitiating a free and fair election and warranting the stoppage of declaration of the result and directions of a fresh poll not merely of particular polling stations but of the total constituency ?

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

principle and unaccountable for his action even before the Election Court ?

18. The juridical aspect of these triple questions alone can attract judicial jurisdiction. However, even if we confine ourselves to legal problematics, eschewing the political overtones, the words of Justice Holmes will haunt the Court : "We are quiet here, but it is the quiet of a storm centre". The judicature must, however, be illumined in its approach by a legal — sociological guideline and a principled-pragmatic insight in resolving with jural tools and techniques, 'the various crises of human affairs' as they reach the forensic stage and seek dispute-resolution in terms of the rule of law. Justice Cardozo felicitously set the perspective :

> The great generalities of the Constitution have a content and significance that vary from age to age.

Chief Justice Hidayatullah perceptively articulated the insight :

> One must, of course, take note of the synthesized authoritative content or the moral meaning of the underlying principle of the prescriptions of law, but not ignore the historic evolution of the law itself or how it was connected in its changing moods with social requirements of a particular age.[6]

19 The old articles of the *suprema lex* meet new challenges of life, the old legal pillars suffer new stresses. So we have to adopt the law and develop its latent capabilities if novel situations, as here, are encountered. That is why in the reasoning we have adopted and the perspective we have projected, not literal nor lexical but liberal and visional is our interpretation of the articles of the Constitution and the provisions of the Act. Lord Denning's words are instructive :

> Law does not stand still. It moves continually. Once this is recognised, then the task of the Judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time. He must not be a mere mechanic a mere working mason, laying brick on brick, without thought to the overall design. He must be an architect — thinking of the structure as a whole building for society a system of law which is strong, durable and just. It is on his work that civilised society itself depends.

THE INVULNERABLE BARRIER OF ARTICLE 329(b)

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 bypassed even by Article 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 Article 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 Section 100 of the Act. Many subsidiary pleas also were put forward but we will

6. *Judicial Methods*, B. N. Rau Memorial Lecture

focus on the two inter-related submissions bearing on Article 329(b) and Section 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 the 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 Section 100 of the Act.

21. We have to proceed heuristically now. Article 329(b) reads :

> Notwithstanding anything in this Constitution—
>
> (b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

Let us break down the prohibitory provision into its components. The sole remedy for an aggrieved party, if he wants to challenge any election, is an election petition. And this exclusion of all other remedies includes constitutional remedies like Article 226 because of the non-obstante clause. If what is impugned is an election the ban operates provided the proceeding 'calls it in question' or puts it in issue ; not otherwise. What is the high policy animating this inhibition ? Is there any interpretative alternative which will obviate irreparable injury and permit legal contests in between ? How does Section 100(1)(d)(iv) of the Act integrate into the scheme ? Let us read Section 100 here :

> Subject to the provisions of sub-section (2) if (the High Court) is of opinion—
>
> * * * * *
>
> (d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—
>
> * * * * *
>
> (iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act.
>
> the High Court shall declare the election of the returned candidate to be void.

The companion provision, viz., Section 98 also may be extracted at this stage :

> 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.

Now arises the need to sketch the scheme of Section 100 in the setting of Article 329(b). The troublesome word 'non-compliance' holds in its fold a teleologic signification which resolves the riddle of this case in a way.

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So we will address ourselves to the meaning of meanings, the values within the words and the project unfolded. This will be taken up one after the other.

22. At the first blush we get the comprehensive impression that every calling in question of an election save, at the end, by an election petition, is forbidden. What, then, is an election? What is 'calling in question'? Every step from start to finish of the total process constitutes 'election', not merely the conclusion or culmination. Can the cancellation of the entire poll be called a step in the process and for the progress of an election, or is it a reverse step of undoing what has been done in the progress of the election, a non-step or anti-step setting at nought the process and, therefore, not a step towards the goal and hence liberated from the coils of Article 329(b)? And, if this act or step were to be shielded by the constitutional provision, what is an aggrieved party to do? This takes us to the enquiry about the ambit of Section 100 of the Act and the object of Article 329(b) read with Article 324. Such is the outline of the complex issue projected before us.

THE ELECTION PHILOSOPHY AND THE PRINCIPLE IN PONNUSWAMI

23. Democracy is government by the people. It is a continual participative operation, not a cataclysmic, periodic exercise. The little man, in his multitude, marking his vote at the poll does a social audit of his Parliament plus political choice of this proxy. Although the full flower of participative Government rarely blossoms, the minimum credential of popular government is appeal to the people after every term for a renewal of confidence. So we have adult franchise and general elections as constitutional compulsions. 'The right of election is the very essence of the constitution' (Junius). It needs little argument to hold that the heart of the Parliamentary system is free and fair elections periodically held, based on adult franchise, although social and economic democracy may demand much more.

24. *Ponnuswami* is a landmark case in election laws and deals with the scope, amplitude, rationale and limitations of Article 329(b). Its ratio has been consistently followed by this Court in several rulings through *Durga Shankar Mehta* v. *Thakur Raghuraj Singh*[7] and *Hari Vishnu Kamath*[8] and *Khare*[9] down to *Indira Gandhi*[10]. The factual setting in that case may throw some light on the decision itself. The appellant's nomination for election to the Madras Legislative Assembly was rejected by the Returning Officer and so he hurried to the High Court praying for a writ of certiorari to quash the order of rejection, without waiting for the entire elective process to run its full course and, at the end of it, when the results also were declared, to move the election tribunal for setting aside the result of the election conducted without his participation. He

7. (1955) 1 SCR 267 : AIR 1954 SC 520 : 9 ELR 494
8. *Hari Vishnu Kamath* v. *Syed Ahmed Ishaque*, (1955) 1 SCR 1104 : AIR 1955 SC 233 : 10 ELR 216
9. *Dr. N. B. Khare* v. *Election Commission of India*, AIR 1958 SC 139 : 1958 SCR 648
10. *Indira Nehru Gandhi* v. *Raj Narain*, (1976) 2 SCR 347 : 1975 Supp SCC 1

thought that if the election proceeded without him irreparable damage would have been caused and therefore sought to intercept the progress of the election by filing a writ petition. The High Court dismissed it as unsustainable, thanks to Article 329(b) and this Court in appeal, affirmed that holding. Fazl Ali, J. virtually spoke for the Court and explained the principle underlying Article 329(b). The ambit and spirit of the bar imposed by the article was elucidated with reference to the principle that 'it does not require much argument to show that in a country with a democratic Constitution in which the Legislatures have to play a very important role, it will lead to serious consequences if the elections are unduly protracted or obstructed'. In the view of the learned Judge, immediate individual relief at an intermediate stage when the process of election is under way has to be sacrificed for the paramount public good of promoting the completion of elections. Fazl Ali, J. ratiocinated on the ineptness of interlocutory legal hold-ups. He posed the issue and answered it thus :

> The question now arises whether the law of elections in this country contemplates that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution (the ordinary jurisdiction of the Courts having been expressly excluded), and another after they have been completed by means of an election petition. In my opinion, to affirm such a position would be contrary to the scheme of Part XV of the Constitution and the Representation of the People Act, which, as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any Court. It seems to me that under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. Article 329(b) was apparently enacted to describe the manner in which and the stage at which this ground, and other grounds which may be raised under the law to call the election in question, could be urged. I think it follows by necessary implication from the language of this provision that **those grounds cannot be urged in any other manner, at any other stage and before any other Court.** If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any are rectified, there will be no meaning in enacting a provision like Article 329(b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by the High Court at the pre-polling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought before it.

25. Having thus explaining the *raison d'etre* of the provision, the Court proceeded to interpret the concept of election in the scheme of Part XV of the Constitution and the Representation of the People Act, 1951. Articles 327 and 328 take care of the set of laws and rules making provisions with respect to all matters relating to or in connection with elections. Election disputes were also to be provided for by laws made under Article 327. The Court emphasised that Part XV of the Constitution was really a code in itself, providing the entire ground work for enacting the appropriate laws and setting up suitable machinery for the conduct of elections. The scheme of the Act enacted by Parliament was also set out by Fazl Ali, J. :

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Part VI deals with disputes regarding elections and provides for the manner of presentation of election petitions, the constitution of election tribunals and the trial of election petitions. Part VII outlines the various corrupt and illegal practices which may affect the elections, and electoral offences. Obviously, the Act is a self-contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the rules made thereunder. The provisions of the Act which are material to the present discussion are Sections 80, 100, 105 and 170, and the provisions of Chapter II of Part IV dealing with the form of election petitions, their contents and the reliefs which may be sought in them. Section 80 which is drafted in almost the same language as Article 329(b) provides that 'no election shall be called in question except by an election petition presented in accordance with the provisions of this Part'. Section 100, as we have already seen, provides for the grounds on which an election may be called in question, one of which is the improper rejection of a nomination paper. Section 105 says that 'every order of the Tribunal made under this Act shall be final and conclusive'. Section 170 provides that 'no civil court shall have jurisdiction to question the legality of any action taken or of any decision given by the Returning Officer or by any other person appointed under this Act in connection with an election'.

There have been amendments to these provisions but the profile remains substantially the same. After pointing out that the Act, in Section 80, and the Constitution, in Article 329(b), speak substantially the same language and inhibit other remedies for election grievances except through the election tribunal, the Court observed :

That being so, I think it will be a fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and **there is no remedy provided at any intermediate stage.**

There is a non-obstante clause in Article 329 and, therefore, Article 226 stands pushed out where the dispute takes the form of calling in question an election, except in special situations pointed at but left unexplored in *Ponnuswami.*

26. The heart of the matter is contained in the conclusions summarised by the Court thus:

(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance that **elections should be concluded as early as possible according to time schedule** and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, **so that the election proceedings may not be unduly retarded or protracted.**

(2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the "election" ; and, if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, **would have the effect of vitiating the "election" and enable the person affected to call it in question,** they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any Court **while the election is in progress.**

After elaborately setting out the history in England and in India of election legislation vis-a-vis dispute-resolution, Fazl Ali, J. stated :

If the language used in Article 329(b) is considered against this historical background, it should not be difficult to see why the framers of the Constitution framed that provision in its present form and chose the language which had been

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consistantly used in certain earlier legislative provisions and which had stood the test of time.

Likewise the Court discussed the connotation of the expression "election" in Article 329 and observed:

> That word has by long usage in connection with the process of selection or proper representatives in domestic institutions, acquired both a wide and a narrow meaning. In the narrow sense, it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling or a particular candidate being returned unopposed when there is no poll. In the wide sense, the word is used to connote **the entire process culminating in a candidate being declared elected** . . . . . it seems to me that the word "election" has been used in Part XV of the Constitution in the wide sense, that is to say, **to connote the entire procedure to be gone through to return a candidate to the legislature** . . . . . That the word "election" bears this wide meaning whenever we talk of elections in a democratic country, is borne out by the fact that in most of the books on the subject and in several cases dealing with the matter, one of the questions mooted is, when the election begins?

The rainbow of operations, covered by the compendious expression 'election', thus commences from the initial notification and culminates in the declaration of the return of a candidate. The paramount policy of the Constitution-framers in declaring that no election shall be called in question except the way it is provided for in Article 329(b) and the Representation of the People Act, 1951, compels us to read, as Fazl Ali, J. did in *Ponnuswami*, the Constitution and the Act together as an integral scheme. The reason for postponement of election litigation to the post-election stage is that elections shall not unduly be protracted or obstructed. The speed and promptitude in getting due representation for the electors in the legislative bodies is the real reason suggested in the course of judgment.

27. Thus far everything is clear. No litigative enterprise in the High Court or other Court should be allowed to hold up the on-going electoral process because the parliamentary representative for the constituency should be chosen promptly. Article 329 therefore covers "electoral matters". One interesting argument, urged without success in *Ponnuswami* elicited a reasoning from the Court which has some bearing on the question in the present appeal. That argument was that if nomination was part of election a dispute as to the validity of the nomination was a dispute relating to election and could be called in question, only after the whole election was over, before the election tribunal. This meant that the Returning Officer could have no jurisdiction to decide the validity of a nomination, although Section 36 of the Act conferred on him that jurisdiction. The learned Judge dismissed this argument as without merit, despite the great dialectical ingenuity in the submission. In this connection the learned Judge observed:

> Under Section 36 of the Representation of the People Act, 1951, it is the duty of the Returning Officer to scrutinize the nomination papers to ensure that they comply with the requirements of the Act and decide all objections which may be made to any nomination. It is clear that unless this duty is discharged properly, any number of candidates may stand for election without complying with the provisions of the Act and a great deal of confusion may ensue. In discharging the statutory duty imposed on him, the **Returning Officer does not call in question**

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any election. Scrutiny of nomination papers is only a stage, though an important stage, in the election process. **It is one of the essential duties to be performed before the election can be completed, and anything done towards the completion of the election proceeding can by no stretch of reasoning be described as questioning the election. The fallacy of the argument lies in treating a single step taken in furtherance of an election as equivalent to election.** The decision of this appeal however turns not on the construction of the single word 'election', but on the construction of the compendious expression — "no election shall be called in question" in its context and setting, with due regard to the scheme of Part XV of the Constitution and the Representation of the People Act, 1951. Evidently, the argument has no bearing on this method of approach to the question posed in this appeal, which appears to me to be the only correct method.

28. What emerges from this perspicacious reasoning, if we may say so with great respect, is that any decision sought and rendered will not amount to 'calling in question' an election if it subserves the progress of the election and facilitates the completion of the election. We should not slur over the quite essential observation "Anything done *towards the completion of the election proceeding* can by no stretch of reasoning be described as questioning the election". Likewise, it is fallacious to treat 'a single step taken in *furtherance* of an election' as equivalent to election.

29. Thus, there are two types of decisions, two types of challenges. The first relates to proceedings which interfere with the progress of the election. The second accelerates the completion of the election and acts in furtherance of an election. So, the short question before us, in the light of the illumination derived from *Ponnuswami*, is as to whether the order for re-poll of the Chief Election Commissioner is "anything done towards the completion of the election proceeding" and whether the proceedings before the High Court fecilitated the election process or halted its progress. The question immediately arises as to whether the relief sought in the writ petition by the present appellant amounted to calling in question the election. This, in turn, revolves round the point as to whether the cancellation of the poll and the reordering of fresh poll is 'part of election' and challenging it is 'calling it in question'.

30. The plenary bar of Article 329(b) rests on two principles : (1) The peremptory urgency of prompt engineering of the whole election process without intermediate interruptions by way of legal proceedings challenging the steps and stages in between the commencement and the conclusion. (2) The provision of a special jurisdiction which can be invoked by an aggrieved party at the end of the election excludes other form. the right and remedy being creatures of statutes and controlled by the Constitution. *Durga Shankar Mehta* (supra) has affirmed this position and supplemented it by holding that, once the Election Tribunal has decided, the prohibition is extinguished and the Supreme Court's overall power to interfere under Article 136 springs into action. In *Hari Vishnu* (supra) this Court upheld the rule in *Ponnuswami* excluding any proceeding, including one under Article 226, during the on-going process of election, understood in the comprehensive sense of notification down to declaration. Beyond the declaration comes the election petition, but beyond the decision of the Tribunal the ban of Article 329(b) does not bind.

31. If 'election' bears the larger connotation, if 'calling in question' possesses a semantic sweep in plain English, if policy and principle are tools for interpretation of statutes, language permitting, the conclusion is irresistible, even though the argument contra may have emotional impact and ingenious appeal, that the catch-all jurisdiction under Article 226 cannot consider the correctness, legality or otherwise of the direction for cancellation integrated with re-poll. For, the prima facie purpose of such a re-poll was to restore a detailed poll process and to complete it through the salvationary effort of a re-poll. Whether, in fact or law, the order is validly made within his powers or violative of natural justice can be examined later by the appointed instrumentality, viz., the Election Tribunal. That aspect will be explained presently. We proceed on the footing that re-poll in one polling station or in many polling stations, for good reasons, is lawful. This shows that re-poll in many or all segments, all-pervasive or isolated, can be lawful. We are not considering whether the act was bad for other reasons. We are concerned only to say that if the regular poll, for some reasons, has failed to reach the goal of choosing by plurality the returned candidate and to achieve this object a fresh poll (not a new election) is needed, it may still be a step in the election. The deliverance of Dunkirk is part of the strategy of counter-attack. Wise or valid, is another matter.

32. On the assumption, but *leaving the question of the validity of the direction for re-poll open* for determination by the Election Tribunal, we hold that a writ petition challenging the cancellation coupled with re-poll amounts to calling in question a step in 'election' and is therefore barred by Article 329(b). If no re-poll had been directed the legal perspective would have been very different. The mere cancellation would have then thwarted the course of the election and different considerations would have come into play. We need not chase a hypothetical case.

33. Our conclusion is not a matter of textual interpretation only but a substantial assurance of justice by reading Section 100 of the Act as covering the whole basket of grievances of the candidates. Sri P. P. Rao contended that the Court should not deny relief to a party in the area of elections which are the life-breaths of the democracy and people's power. We agree.

34. This dilemma does not arise in the wider view we take of Section 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

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

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 formalized 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.

36. Having held against the maintainability of the writ petition, we should have parted with the case finally. But Counsel for both the candidates and, more particularly, the learned Addl. Solicitor General, appearing for the Election Commission, submitted that the breadth, amplitude and implications, the direction and depth of Article 324 and, equally important, the question of natural justice raised under Article 324 are of such public importance and largely fallow field, going by prior pronouncements, and so strategic for our democracy and its power process that this Court must decide the issue here and now. Article 141 empowers and obligates this Court to declare the law for the country when the occasion asks for it. Counsel, otherwise opposing one another, insistently concurred in their request that, for the working of the electoral machinery and understanding of the powers and duties vested in the functionaries constituting the infrastructure, it is essential to sketch the ambit and import of Article 324. This point undoubtedly arises before us even in considering the prohibition under Article 329 and has been argued fully. In any view, the Election Tribunal will be faced with this issue and the law must be laid down so that there may be no future error while disposing of the election petition or when the Commission is called upon to act on later occasion. This is the particular reason for our proceeding to decide what the content and parameters of Article 324 are, contextually limited to situations analogous to the present.

37. We decide two questions under the relevant article, not *arguendo*,

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but as substantive pronouncements on the subject. They are :

(a) What, in its comprehensive connotation, does the 'conduct' of elections mean or, for that matter, the 'superintendence, direction and control' of elections?

(b) Since the text of the provision is silent about **hearing before acting**, is it permissible to import into Article 324(1) an obligation to act in accord with natural justice?

38. Article 324, which we have set out earlier, is a plenary provision vesting the whole responsibility for national and State elections and, therefore, the necessary powers to discharge that function. It is true that Article 324 has to be read in the light of the constitutional scheme and the 1950 Act and the 1951 Act. Sri Rao is right to the extent he insists that if competent legislation is enacted as visualised in Article 327 the Commission cannot shake itself free from the enacted prescriptions. After all, as Mathew, J. has observed in *Indira Gandhi* (supra) (p. 523) (SCC p. 136, paras 335-6) :

> In the opinion of some of the judges constituting the majority in **Bharati's case**[11], Rule of Law is a basic structure of the Constitution apart from democracy.
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> The rule of law postulates the pervasiveness of the spirit of law throughout the whole range of government in the sense of excluding arbitrary official action in any sphere.

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

39. Even so, situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it is that the Constitution has made comprehensive provision in Article 324 to take care of surprise situations. That power itself has to be exercised, not mindlessly nor mala fide, not arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation. More is not necessary to specify ; less is insufficient to leave unsaid. Article 324, in our view, operates in areas left unoccupied by legislation and the words 'superintendence, direction and control, as well as 'conduct of all elections', are the broadest terms. Myriad maybes, too mystic to be precisely presaged, may call for prompt action to reach the goal of free and fair election. 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

11 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

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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*[12] and *Harishankar*[13] 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.[13a]

40. The learned Addl. Solicitor General brought to our notice rulings of this Court and of the High Courts which have held that Article 324 was a plenary power which enabled the Commission to act even in the absence of specific legislation though not contrary to valid legislation. Ordering a re-poll for a whole constituency under compulsion of circumstances may be directed for the conduct of elections and can be saved by Article 324 — provided it is bona fide necessary for the vindication of the free verdict of the electorate and the abandonment of the previous poll was because it failed to achieve that goal. While we repel Sri Rao's broadside attack on Article 324 as confined to what the Act has conferred, we concede that even Article 324 does not exalt the Commission into a law unto itself. Broad authority does not bar scrutiny into specific validity of the particular order.

41. Our conclusion on this limb of the contention is that Article 324 is wide enough to supplement the powers under the Act, as here, but subject to the several conditions on its exercise we have set out.

42. Now we move on to a close-up of the last submission bearing on the Commission's duty to function within the leading strings of natural justice.

43. Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes it, applies when people are affected by acts of Authority. It is the hone of healthy government, recognised from earliest times and not a mystic testament of Judge-made law. Indeed, from the legendary days of Adam — and of Kautilya's Arthasastra — the rule of law has had this stamp of natural justice which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case-law or other extant principle, not the hoary chords

12. *Virendra* v. *State of Punjab*, 1958 SCR 308 : AIR 1957 SC 896
13 *Harishankar Bagla* v. *State of M. P.*, (1955) 1 SCR 380 : AIR 1954 SC 465 : 1954 Cri LJ 1322
13a. *Indira Nehru Gandhi* v. *Raj Narain*, (1976) 2 SCR 347, 657 : 1975 Supp SCC 1, 251 (para 661)

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of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system.

44. The dichotomy between administrative and quasi-judicial functions vis-a-vis the doctrine of natural justice is presumably obsolescent after *Kraipak*[14] in India and *Schmidt*[15] in England.

45. *Kraipak* marks the watershed, if we may say so, in the application of natural justice to administrative proceedings. Hegde, J., speaking for a Bench of five Judges observed, quoting for support Lord Parker in *In re* H. K. (*an infant*)[16]:

> It is not necessary to examine these decisions as there is a great deal of fresh thinking on the subject. The horizon of natural justice is constantly expanding. (p.467) (SCC p. 271, para 17)
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> The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. (p. 468) (SCC p. 272, para 20)
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> * * * *
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> The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative inquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in **Suresh Koshy George v. The University of Kerala**[17] the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a Court that some principle of natural justice had been contravened the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case. (p. 469) (SCC pp. 272-3, para 20)

46. It is an interesting sidelight that in America it has been held to be but fundamental fairness that the right to an administrative hearing is given.[18] Natural justice is being given access to the United Nations.[19] It is notable that Mathew, J. observed in *Indira Gandhi* (p. 513, SCC p. 128, para 303) :

> If the amending body really exercised judicial power, that power was exercised in violation of the principles of natural justice of **audi alteram partem.** Even if a power is given to a body without specifying that the rules of natural justice should be observed in exercising it, the nature of the power would call for its observance.

14. *A. K. Kraipak* v. *Union of India*, (1970) 1 SCR 457 : (1969) 2 SCC 262
15. *Schmidt* v. *Secretary of State for Home Affairs*, (1969) 2 Ch 149
16. (1967) 2 QB 617, 630: (1967) 1 All ER 226
17. (1969) 1 SCR 317 : AIR 1969 SC 198
18. *Boston University Law Review*, Vol. 53, p. 899
19. *American Journal of International Law*, Vol. 67, p. 479

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Lord Morris of Borth-y-Gest in his address before the Bentham club concluded[20]:

> We can, I think, take pride in what has been done in recent periods and particularly in the field of administrative law by invoking and by applying those principles which we broadly classify under the designation of natural justice. Many testing problems as to their application yet remain to be solved. But I affirm that the area of administrative action is but one area in which the principles are to be deployed. Nor are they to be invoked only when procedural failures are shown. Does natural justice qualify to be described as a "majestic" conception? I believe it does. Is it just a rhetorical but vague phrase which can be employed, when needed, to give a gloss of assurance? I believe that it is very much more If it can be summarised as being fairplay in action — who could wish that it would ever be out of action? It denotes that the law is not only to be guided by reason and by logic but that its purpose will not be fulfilled if it lacks more exalted inspiration.

47. It is fair to hold that subject to certain necessary limitations natural justice is now a brooding omnipresence although varying in its play.

48. Once we understand the soul of the rule as fairplay in action — and it is so — we must hold that it extends to both the fields. After all, administrative power in a democratic set-up is not allergic to fairness in action and discretionary executive justice cannot degenerate into unilateral injustice. Nor is there ground to be frightened of delay, inconvenience and expense, if natural justice gains access. For fairness itself is a flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a china shop, nor a bee in one's bonnet. Its essence is good conscience in a given situation: nothing more — but nothing less. The 'exceptions' to the rules of natural justice are a misnomer or rather are but a shorthand form of expressing the idea that in those exclusionary cases nothing unfair can be inferred by not affording an opportunity to present or meet a case. Text-book excerpts and ratios from rulings can be heaped, but they all converge to the same point that *audi alteram partem* is the justice of the law, without, of course, making law lifeless, absurd, stultifying, self-defeating or plainly contrary to the commonsense of the situation.

49. Let us look at the jurisprudential aspects of natural justice, limited to the needs of the present case as the doctrine has developed in the Indo-Anglican systems We may state that the question of nullity does not arise here because we are on the construction of a constitutional clause. Even otherwise, the rule of natural justice bears upon construction where a statute is silent save in that category where a legislation is charged with the vice of unreasonableness and consequential voidness.

50. Article 324, on the face of it, vests vast functions which may be powers or duties, essentially administrative and marginally even judicative or legislative (See *All Party Hill Leaders' Conference, Shillong* v. *Capt. W. A. Sangma*[21]) We are not fascinated by the logomachic exercise suggested by Sri P. P Rao, reading 'functions' in contra-

20. *Current Legal Problems*, 1973, Vol. 26, p. 16

21. (1977) 4 SCC 161

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distinction to 'powers' nor by the trichotomy of diversion of powers, fundamentally sound but flawsome in several situations if rigidly applied. These submissions merely serve to draw the red-herring across the trial. We will now zero-in on the crucial issue of natural justice vis-a-vis Article 324 where the function is so exercised that a candidate is substantially prejudiced even if he has not acquired a legal right nor suffered 'civil consequences', whatever that may mean.

51. We proceed on the assumption that even if the cancellation of the poll in this case were an administrative act, that per se does not repel the application of the natural justice principle. *Kraipak* (supra) nails the contrary argument. Nor did the learned Addl. Solicitor General contend that way, taking his stand all through, *not* on technicalities, easy victories or pleas for reconsiderations of the good and progressive rules gained through this Court's rulings in administrative law but on the foundational thesis that any construction that we may adopt must promote and be geared to the great goal of expeditious, unobstructed, despatch of free and fair elections and leaving grievances to be fully sorted out and solved later before the election tribunal set out by the Act. To use a telling word familiar in officialese : 'Election Immediate'.

52. So now we are face to face with the naked issue of natural justice and its pro tem exclusion on grounds of necessity and non-stultification of the on-going election. The Commission claims that a direction for re-poll is an 'emergency' exception. The rules of natural justice are rooted in all legal systems, not any 'new theology' and are manifested in the twin principles of *nemo judex in causa sua* and *audi alteram partem*. We are not concerned here with the former since no case of bias has been urged. The grievance ventilated is that of being condemned unheard. Sporadic applications or catalogue of instances cannot make for a scientific statement of the law and so we have to weave consistent criteria for application and principles for carving out exceptions. If the rule is sound and not negatived by statute, we should not devalue it nor hesitate to hold every functionary who affects others' right to it. The *audi alteram partem* rule has a few facets two of which are (a) notice of the case to be met ; and (b) opportunity to explain. Let us study how far the situation on hand can co-exist with canons of natural justice. While natural justice is universally respected, the standards vary with situations contracting into a brief, even post-decisional opportunity, or expanding into trial-type trappings.

53. *Ridge* v. *Baldwin*[22] 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.[23] 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

22. (1964) AC 40 : (1963) 2 All ER 66

23. *Natural Justice : Substance and Shadow* 'Public Law' Journal—Spring 1975

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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.

54. The learned Addl. Solicitor General welcomed the dramatic pace of enlargement in the application of natural justice But he argued for inhibiting its spread into forbidden spaces lest the basic values of Article 329 be nullified. In short, his point is that where utmost promptitude is needed — and that is the *raison d'etre* of exclusion of intermediate legal proceedings in election matters — natural justice may be impractical and may paralyze, thus balking the object of expeditious completion. He drew further inspiration from another factor to validate the exclusion of natural justice from the Commission's actions, except where specifically stipulated by statute. He pointed out what we have earlier mentioned — that an election litigation is one in which the whole constituency of several lakhs of people is involved and, if the Election Commission were under an obligation to hear affected parties it may, logically, have to give notice to lakhs of people and not merely to candidates. This will make an ass of the law and, therefore, that is not the law. This *reductio ad absurdum* also has to be examined.

55. Law cannot be divorced from life and so it is that the life of the law is not logic but experience. If, by the experiential test, importing the right to be heard will paralyze the process, law will exclude it. It has been said that no army can be commanded by a debating society, but it is also true that the House of Commons did debate, during the days of debacle and disaster, agony and crisis of the Second World War, the life-and-death aspects of the supreme command by the then British Prime Minister 'to the distress of all our friends and to the delight of all our foes' — too historic to be lost on jurisprudence. Law lives not in a world of abstractions but in a cosmos of concreteness and to give up something good must be limited to extreme cases. If to condemn unheard is wrong, it is wrong except where it is overborne by dire social necessity. Such is the sensible perspective we should adopt if ad hoc or haphazard solutions should be eschewed.

56. 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 judex* 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 Tucker LJ in *Russel* v. *Duke of Norfolk*[24] emphasised that 'whatever standard of

24. (1949) 1 All ER 109, 118: 65 ILR 225

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*[25] 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 lock-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 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 enjoy far-reaching powers and the greater the power to affect others' right or liabilities the more necessary the need to hear.

57. We may not be taken to say that situational modifications to notice and hearing are altogether impermissible. They are, as the learned Addl. Solicitor General rightly stressed. The glory of the law is not that sweeping rules are laid down but that it tailors principles to practical needs, doctors remedies to suit the patient, promotes, not freezes, life's processes, if we may mix metaphors. Tucker, LJ drove home this point when he observed in the *Duke of Norfolk case* (supra) :

> There are no words which are of universal application to every kind of inquiry . . . The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

This circumstantial flexibility of fair hearing has been underscored in *Wiseman* v. *Borneman*[26] by Lord Reid when he said he would be "sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules". Lord Denning, with lovey realism and principled pragmatism, set out the rule in *Selvarajan*[27] :

> The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigation body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report.

Courts must be tempered by the thought while compromise on principle is unprincipled, applied administrative law in modern complexities of

25. *Durayappah* v. *Fernando*, (1967) 2 AC 337 : (1967) 2 All ER 152 (PC)
26. 1971 AC 297 : (1969) 3 All ER 275
27. (1976) 1 All ER 12, 19

government must be realistic, not academic. The myriad maybes and the diverse urgencies are live factors. Natural justice should not destroy administrative order by insisting on the impossible.

58. This general discussion takes us to four specific submissions made by the learned Addl. Solicitor General. He argued that the Election Commission, a high constitutional functionary, was charged with conducting elections with celerity to bring the new House into being and the tardy process of notice and hearing would thwart this imperative. So no natural justice. Secondly, he submitted that there was no *final* determination to the prejudice of any party by directing a re-poll since the Election Court had the last word on every objectionable order and so the Commission's order was more or less provisional. So no natural justice. Thirdly, he took up the position that no candidate could claim anything more than an expectation or *spes* and no right having crystallised till official declaration of the result, there was no room for complaint of civil consequences. What was condemned was the poll, not any candidate. So no natural justice. Finally, he reminded us of the far-flung futility of giving a hearing to a numerous constituency which too was interested in proper elections like the candidates. So no natural justice.

59. De Smith was relied on and *Wiseman*[28] as well as *Pearlberg*[29] were cited in support of these propositions. We may add to these weighty rulings the decision of the House of Lords in *Pearlberg*. The decision of this Court in the ruling in *Bihar School Examination Board* v. *Subhas Chandra Sinha*[30] where a whole University examination was cancelled without hearing any of the candidates but was upheld against the alleged vice of non-hearing, was relied on.

60. We must admit that the law, in certain amber areas of natural justice, has been unclear. Vagueness haunts this zone but that is no argument to shut down. If it is twilit, we must delight. So we will lay down the guidelines but guard ourselves against any decision on the facts of this case. That is left for the Election Court in the light of the law applicable.

61. Nobody will deny that the Election Commissioner in our democratic scheme is a central figure and a high functionary. Discretion vested in him will ordinarily be used wisely, not rashly, although to echo Lord Camden, wide discretion is fraught with tyrannical potential even in high personages, absent legal norms and institutional checks, and relaxation of legal canalisation on generous 'VIP' assumptions may boomerang. Natural justice is one such check on exercise of power. But the chemistry of natural justice is confused in certain aspects, especially in relation to the fourfold exceptions put forward by the respondents.

62. So let us examine them each. Speed in action versus soundness of judgment is the first dilema. *Punnuswami* (supra) has emphasised what is implicit in Article 329(b) that once the process of elec-

28. (1967) 3 All ER 1945
29. *Pearlberg* v. *Varty*, (1971) 1 WLR 728
30. (1970) 3 SCR 963 : (1970) 1 SCC 648

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tion has started, it should not be interrupted since the tempo may slow down and the early constitution of an elected parliament may be halted. Therefore, think twice before obligating a hearing at a critical stage when a quick re-poll is the call. The point is well taken. A fair hearing with full notice to both or others may surely protract ; and notice does mean communication of materials since no one can meet an unknown ground. Otherwise hearing becomes hollow, the right becomes a ritual. Should the cardinal principle of 'hearing' as condition for decision-making be martyred for the cause of administrative immediacy? We think not. The full panoply may not be there but a manageable minimum may make-do.

63. In *Wiseman* v. *Borneman*[30a] there was a hint of the competitive claims of hurry and hearing. Lord Reid said : 'Even where the decision has to be reached by a body acting judicially, there must be ***a balance between the need for expedition and the need to give full opportunity*** to the defendant to see material against him' (emphasis added). We agree that the elaborate and sophisticated methodology of a formalised hearing may be injurious to promptitude so essential in an election under way. Even so, natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances. To burke it altogether may not be a stroke of fairness except in very exceptional circumstances. Even in *Wiseman* where all that was sought to be done was to see if there was a prima facie case to proceed with a tax case where, inevitably, a fuller hearing would be extended at a later stage of the proceedings, Lord Reid, Lord Morris of Borth-y-Gest and Lord Wilberforce suggested "that there might be exceptional cases where to decide upon it ex-parte would be unfair, and it would be the duty of the tribunal to take appropriate steps to eliminate unfairness" (Lord Denning, M.R., in *Howard* v. *Borneman*[31] summarised the observations of the Law Lords in this form). No doctrinaire approach is desirable but the Court must be anxious to salvage the cardinal rule to the extent permissible in a given case. After all, it is not obligatory that Counsel should be allowed to appear nor is it compulsory that oral evidence should be adduced. Indeed, it is not even imperative that written statements should be called for. Disclosure of the prominent circumstances and asking for an immediate explanation orally or otherwise may, in many cases, be sufficient compliance. It is even conceivable that an urgent meeting with the concerned parties summoned at an hour's notice, or in a crisis, even a telephone call, may suffice. If all that is not possible as in the case of a fleeing person whose passport has to be impounded lest he should evade the course of justice or a dangerous nuisance needs immediate abatement, the action may be taken followed immediately by a hearing for the purpose of sustaining or setting aside the action to the extent feasible. It is quite on the cards that the Election Commission if pressed by circumstances, may give a short hearing. In any view, it is not easy to appreciate whether before further steps got under way he could not have afforded an opportunity of hearing the parties, and revoke the earlier directions. We do not wish to disclose our mind on what, in the critical circumstances, should have been done for a fair play of fair hearing.

30a. (1967) 3 All LR 1945 31. (1974) 3 WLR 660

This is a matter pre-eminently for the Election Tribunal to judge, having before him the vivified totality of all the factors All that we need emphasize is that the content of natural justice is a dependent variable, not an easy casualty.

64. The learned Addl. Solicitor General urged that even assuming that under ordinary circumstances a hearing should be granted, in the scheme of Article 324 and in the situation of urgency confronting the Election Commission it was not necessary.

65. Here we must demur. Reasons follow.

66. It was argued, based on rulings relating to natural justice, that unless civil consequences ensued, hearing was not necessary. A civil right being adversely affected is a *sine qua non* for the invocation of the *audi alteram partem* rule. This submission was supported by observations in *Ram Gopal*[32], *Col. Sinha*[33]. Of course, we agree that if only spiritual censure is the penalty, temporal laws may not take cognizance of such consequences since human law operates in the material field although its vitality vicariously depends on its morality. But what is a civil consequence, let us ask ourselves, bypassing verbal booby-traps? 'Civil consequences' undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence. 'Civil' is defined by Black (*Law Dictionary*, Fourth Edn.) at p. 311 :

> Ordinarily, pertaining or appropriate to a member of a civitas of free political community; natural or proper to a citizen. Also, relating to the community, or to the policy and government of the citizens and subjects of a state.
>
> The word is derived from the Latin civilis, a citizen . . . . In law, it has various significations.
>
> * * * *
>
> 'Civil Rights' are such as belong to every citizen ot the State or country, or, in a wider sense, to all its inhabitants, and are not connected with the organisation or administration of government. They include the rights of property, marriage, protection by the laws, freedom of contract, trial by jury, etc. . . . Or, as otherwise defined, civil rights are rights appertaining to a person in virtue of his citizenship in a State or community. Rights capable of being enforced or redressed in a civil action. Also a term applied to certain rights secured to citizens of the United States by the thirteenth and fourteenth amendments to the Constitution, and by various acts of Congress made in pursuance thereof.
>
> **(p. 1487, Black's Legal Dictionary)**

The interest of a candidate at an election to Parliament regulated by the Constitution and the laws comes within this gravitational orbit. The most valuable right in a democratic polity is the "little man's" little pencil-marking, assenting or dissenting, called his vote. A democratic right, if denied, inflicts civil consequences. Likewise, the little man's right, in a representative system of government, to rise to Prime Ministership or Presidentship by use of the right to be candidate, cannot be wished away

32. *Ram Gopal Chaturvedi* v. *State of M. P.*, (1970) 1 SCR 472 : (1969) 2 SCC 240

33. *Union of India* v. *Col. J. N. Sinha*, (1971) 1 SCR 791 : (1970) 2 SCC 458

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by calling it of no civil moment. If civics mean anything to a self-governing citizenry, if participatory democracy is not to be scuttled by the law, we shall not be captivated by catchwords. The straight-forward conclusion is that every Indian has a right to elect and be elected and this is a constitutional as distinguished from a common law right and is entitled to cognizance by Courts subject to statutory regulation. We may also notice the further refinement urged that a right accrues to a candidate only when he is declared returned and until then it is incipient, inchoate and infangible for legal assertion — in the twilight zone of expectancy, as it were. This too, in our view, is legicidal sophistry. Our system of 'ordered' rights cannot disclaim cognizance of orderly processes as the right means to a right end. Our jurisprudence is not so jejune as to ignore the concern with means as with the end, with the journey as with the destination. Every candidate, to put it cryptically, has an interest or right to fair and free and legally run election. To draw lots and decide who wins, if announced as the electoral methodology, affects his right, apart from his luckless rejection at the end. A vested interest in the prescribed process is a processual right, actionable if breached, the Constitution premitting. What is inchoate, viewed from the end, may be complete, viewed midstream. It is a subtle fallacy to confuse between the two. Victory is still an expectation; *qua mado* is a right to the statutory procedure. The appellant has a right to have the election conducted not according to humour or hubris but according to law and justice. And so natural justice cannot be stumped out on this score. In the region of public law *locus standi* and person aggrieved, right and interest have a broader import. But, in the present case, the Election Commission contends that a hearing has been given although the appellant retorts that a vacuous meeting where nothing was disclosed and he was summarily told off would be strange electoral justice. We express no opinion on the factum or adequacy of the hearing but hold that where a candidate has reached the end of the battle and the whole poll is upset, he has a right to notice and to be heard, the quantum and quality being conditioned by the concatenation of circumstances.

67. The rulings cited, bearing on the touchstone of civil consequences, do not contradict the view we have propounded. *Col. Sinha* (supra) merely holds — and we respectfully agree — that the lowering of retirement age does not deprive a government servant's rights, it being clear that every servant has to quit on the prescribed age being attained. Even *Binapani* concedes that the State has the authority to retire a servant on superannuation. The situation here is different. We are not in the province of substantive rights but procedural rights statutorily regulated. Sometimes processual protections are too precious to be negotiable, temporised with or whittled down.

68. *Ram Gopal* (supra), for the same reason, is inapplicable. A temporary servant has only a temporary tenure terminable legally without injury. Even he, if punished, has procedural rights in the zone of natural justice, but not when the contract of employment is legally extinguished. Interest and right are generous conceptions in this jurisdiction, not narrow orthodoxies as in traditional systems.

69. We move on to a consideration of the argument prolix plurality making hearing impracticable and therefore expendable. Attractively ingenious and seemingly precedented, but, *argumentum ab inconvenienti* has its limitations and cannot override established procedure. May be, *argumentum ab impossibili* has greater force. But here neither applies for it is a misconception to equate candidates who fought to the bitter finish with the hundreds of thousands of voters who are interested in electoral proprieties. In law and life, degree of difference may, at a substantial stage, spell difference in kind or dimensions. Is there an impossible plurality which frustrates the feasibility of notice and hearing if candidates alone need be notified ?

70. In *Subhash Chandra Sinha* (supra), Hidayatullah, C.J. speaking for the Court repelled the plea of natural justice when a whole examination was cancelled by the concerned university authorities. The reasons given are instructive. The learned Judge said that "the mention of fairplay does not come very well from the respondents who were grossly guilty of breach of fairplay themselves at the examinations". The Court examined the grounds for cancellation of examinations and satisfied itself that there was undoubted abundance of evidence that students generally had outside assistance in answering questions. The learned Judge went on further to say :

> This is not a case of any particular individual who is being charged with adoption of unfair means but of the conduct of all the examinees or at least a vast majority of them at a particular centre. If it is not a question of charging anyone individually with unfair means but to condemn the examination as ineffective for the purpose it was held, must the Board give an opportunity to all the candidates to represent their cases ? We think not. It was not necessary for the Board to give an opportunity to the candidates if the examinations as a whole were being cancelled. The Board had not charged any one with unfair means so that he could claim to defend himself. The examination was vitiated by adoption of unfair means on a mass scale. In these circumstances it would be wrong to insist that the Board must hold a detailed inquiry into the matter and examine each individual case to satisfy itself which of the candidates had not adopted unfair means. The examination as a whole had to go.
>
> (pp. 967-968) (SCC p. 652, para 13)
>
> * * * *
>
> If at a centre the whole body of students receive assistance and manage to secure success in the neighbourhood of 100% when others at other centres are successful only at an average of 50%, it is obvious that the university or the Board must do something in the matter. It cannot hold a detailed quasi-judicial inquiry with a right to its alumni to plead and lead evidence etc. before the results are withheld or the examinations cancelled. If there is sufficient material on which it can be demonstrated that the university was right in its conclusion that the examinations ought to be cancelled then academic standards require that the university's appreciation of the problem must be respected. It would not do for the Court to say that he should have examined all the candidates or even their representatives with a view to ascertaining whether they had received assistance or not. To do this would encourage indiscipline if not also perjury.
>
> (pp. 968-969) (SCC pp. 652-3, para 14)

These propositions are relied on by the learned Addl. Solicitor General who seeks to approximate the present situation of cancellation of the poll to the cancellation of an examination. His argument is that one has to launch on

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a public enquiry allowing a large number of people to participate in the hearing if the cancellation of the poll itself is to be subjected to natural justice. He further said that no candidate was condemned but the poll process was condemned. He continued to find a parallel by stating that like the university being responsible for the good conduct of examinations, the Election Commission was responsible for the proper holding of the poll. We do not consider the ratio in *Subhash Chandra* (supra) as applicable. In fact, the candidates concerned stand on a different footing from the electorate in general. They have acquired a very vital stake in polling going on properly to a prompt conclusion. And when that is upset there may be a vicarious concern for the constituency, why, for that matter, for the entire country, since the success of democracy depends on country-wide elections being held periodically and properly. Such interest is too remote and recondite, too feeble and attenuated, to be taken note of in a cancellation proceeding. What really marks the difference is the diffusion and dilution. The candidates, on the other hand, are the spearheads, the combatants, the claimants to victory. They have set themselves up as nominated candidates, organised the campaign and galvanised the electorate[34] for the crowning event of polling and counting. Their interest and claim are not indifferent but immediate, not weak but vital. They are more than the members of the public. They are parties to the electoral dispute. In this sense, they stand on a better footing and cannot be denied the right to be heard or noticed. Even in the case of university examinations it is not a universal rule that notice need not be given. *Ghanshyam Das Gupta's case*[34] illustrates this aspect. Even there, when an examination result of three candidates was cancelled the Court imported natural justice. It was said that even if the enquiry involved a large number of persons, the committee should frame proper regulations for the conduct of such enquiries but not deny the opportunity. That case was distinguished in *Subhash Chandra* the differentia being that in one case the right exercised was of the examining body to cancel its own examinations since it was satisfied that the examination was not properly conducted. It may be a parallel in electoral situations if the Election Commission cancels a poll because it is satisfied that the procedure adopted has gone awry on a wholesale basis. Supposing wrong ballot papers in large numbers have been supplied or it has come to the notice of the Commission that in the constituency counterfeit ballots had been copiously current and used on a large scale, then without reference to who among the candidates was more prejudiced, the poll might have been set aside. It all depends on the circumstances and is incapable of generalisation. In a situation like the present it is a far cry from natural justice to argue that the whole constituency must be given a hearing. That is an ineffectual over-kill.

71. Lastly, it was contended by the learned Addl. Solicitor General, taking his cue from *Wiseman* that the Election Commission's direction for a re-poll has only a provisional consequence since the Election Court was the ultimate matter of the destiny of the poll, having power to review the decision of the Commission. It is true that *Wisemen* deals with the assess-

34. *Board of High School and Intermediate Education, U. P., Allahabad* v. *Ghanshyam Das Gupta*, 1962 Supp 3 SCR 36 : AIR 1962 SC 1110

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ment of the evidence at a preliminary stage merely to ascertain whether there is a prima facie case. The proceeding had still later stages where the affected party would enjoy a full opportunity. Lord Reid said plainly that there was a difference :

> It is very unusual for there to be a judicial determination of the question whether there is a prima facie case . . . there is nothing inherently unjust in reaching such a decision (i.e., a prima facie decision) in the absence of the other party.

Lord Wilberforce however took the view that there was 'a residual duty of fairness'. Lord Denning in *Pearlberg* v. *Varty*[35] added in parenthesis :

> Although the tribunal, in determining whether there is a prima facie case, is itself the custodian of fairness, nevertheless its discretion is open to review.

Buckley, J. made this point about natural justice and administrative action (p. 747)

> I do not forget the fact that it has been said that the rules of natural justice may apply to cases where the act in question is more properly described as administrative than judicial or quasi-judicial : See **Ridge** v. **Baldwin** (supra) and **Schmidt** v. **Secretary of State for Home Affairs**[35a].

72. The Indian parallel would be an argument for notice and hearing from a police officer when he investigated and proceeded to lay a chargesheet because he thought that a case to be tried by the Court had been made out. The present case stands on a totally different footing. What the Election Commission does is not to ascertain whether a prima facie case exists or an ex parte order. subject to modification by him is to be made. If that were so *Pearlberg* would have been an effective answer. For, Lord Denning luminously illustrates the effect :

> I would go so far with him as to say that in reaching a prima facie decision, there is a duty on any tribunal to act fairly ; but fairness depends on the task in hand. Take an application to a Court by statute, or by the rules, or, as a matter of practice, is made ex parte. The Court itself is a custodian of fairness. If the matter is so urgent that an order should be made forthwith, before hearing the other side, as in the case of an interim injunction or a stay of execution, the Court will make the order straightaway. We do it every day. We are always ready, of course, to hear the other side if they apply to discharge the order. But still the order is made ex parte without hearing them. It is a prima facie decision. I agree that before some other tribunal a prima facie decision may be a little different. The party affected by it may not be able to apply to set it aside. The case must go forward to a final decision. Here, again, I think the tribunal itself is under what Lord Wilberforce described as a residual duty of fairness.
> (1971 AC 297, 320)

When *Pearlberg* reached the House of Lords[35b], the Law Lords considered the question again. Lord Hailsham of St. Marylebone, L. C. observed:

> The third factor which affects mind is the consideration that the decision once made, does not make any final determination of the rights of the taxpayer. It simply enables the inspector to raise an assessment, by satisfying the commissioner that there are reasonable grounds for suspecting loss of tax resulting from neglect, fraud, or wilful default, that is that there is a prima facie probability that there has been neglect, etc., and that the Crown may have lost by it. When the assessment is made, the taxpayer can appeal against it, and, on the appeal, may raise

35. (1971) 1 WLR 728, 737-8
35a. (1969) 2 ch 149 : (1969) 1 All ER 904
35b. (1972) 1 WLR 534 (HL) : (1972) 2 All ER 6

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any, question (inter alia) which would have been relevant on the application for leave, except that the leave given should be discharged. (p. 539)

* * * *

The doctrine of natural justice has come in for increasing consideration in recent years, and the Courts generally, and your Lordships' House in particular, have, I think rightly, advanced its frontiers considerably. But at the same time they have taken an increasingly sophisticated view of what it requires in individual cases. (p. 540)

Viscount Dilhorne observed in that case :

I agree with Lord Donoven's view (**Wiseman** v. **Borneman**[36]) that **it cannot be said that the rules of natural justice do not apply to a judicial determination of the question whether there is a prima facie case,** but I do not think they apply with the same force or as much force as they do to decide decisions which determine the rights of persons. (p. 546)

Lord Pearson's comment ran thus :

A tribunal to whom judicial or quasi-judicial functions are entrusted is held to be required to apply those principles in performing those functions unless there is a provision to the contrary. But where some person or body is entrusted by Parliament with administrative or executive functions there is no presumption that compliance with the principles of natural justice is required, although, as 'Parliament' is not to be presumed to act unfairly, the Courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness. Fairness, however, does not necessarily require a plurality of hearings or representations and counter-representations. If there were too much elaboration of procedural safeguards, nothing could be done simply and quickly and cheaply. Administrative or executive efficiency and economy should not be too readily sacrificed. The disadvantage of a plurality of hearings even in the judicial sphere was cogently pointed out in the majority judgments in **Cozens** v. **North Devon Hospital Management Committee**[37]. (p. 547)

Lord Salmon put the matter pithily :

No one suggests that it is unfair to launch a criminal prosecution without first hearing the accused. (p 550)

Indeed, in *Mallock*[38], Lord Wilberforce observed[39] :

A limited right of appeal on the merits affords no argument against the existence of a right to a precedent hearing, and, if that is denied, to have the decision declared void.

After all, the Election Court can exercise only a limited power of review and must give regard to the Commission's discretion. And the trouble and cost of instituting such proceedings would deter all but the most determined of parties aggrieved, and even the latter could derive no help from legal principle in predicting whether at the end of the day the Court would not condone their summary treatment on a subjective appraisal of the demerits of the case they had been denied the opportunity to present. The public interest would be ill-served by judicially fostered uncertainty as to the value to be set upon procedural fairplay as a canon of good administration. And further the *Wiseman* Law Lords regarded the cutting out of 'hearing' as quite unpalatable but in the circumstances harmless since most of the assessees knew the grounds and their declaration was one mode of explanation.

36. 1971 AC 297, 316
37. (1966) 2 QB 330, 343, 346-7
38. *Mallock* v. *Aberdeen Corpn.*, (1971) 1 WLR 1578, 1598 : (1971) 2 All ER 1278
39. D. H. Clark : *Natural Justice : Substance and Shadow,* Public Law : Spring 1975, p. 50, f. n. 30

73. We consider it a valid point to insist on observance of natural justice in the area of administrative decision-making so as to avoid devaluation of this principle by 'administrators already alarmingly insensitive to the rationale of *audi alteram partem*' :

> In his lecture on 'The Mission of the Law' Professor H. W. R. Wade takes the principle that no man should suffer without being given a hearing as a cardinal example of a principle 'recognised as being indispensable to justice, but which (has) not yet won complete recognition in the world of administration . . . . The goal of administrative sporadic and **ex post facto** judicial review. The essential mission of the law in this field is to win acceptance by administrators of the principle that to hear a man before he is penalised is an integral part of the decision-making process. A measure of the importance of resisting the incipient abnegation by the Courts of the firm rule that breach of **audi alteram partem** invalidates, is that if it gains ground the mission of the law is doomed to fail to the detriment of all.[40]

74. Our constitutional order pays more than lip-service to the rule of reasonable administrative process. Our people are not yet conscious of their rights ; our administrative apparatus has a hard-of-hearing heritage. Therefore a creative play of fairplay, irksome to some but good in the long run, must be accepted as part of our administrative law. Lord Hailsham, L.C. in *Pearlberg* presaged[41] :

> The doctrine of natural justice has come in for increasing consideration in recent years, and the Courts generally, (and the House of Lords in particular), have . . . advanced its frontiers considerably. But at the same time they have taken an increasingly sophisticate view of what is required in individual cases.

And in India this case is neither the inaugural nor the valedictory of natural justice.

75. Moreover. Sri Rao's plea that when the Commission cancels, viz., declares the poll void it is performing more than an administrative function merits attention, although we do not pause to decide it. We consider that in the vital area of elections where the people's faith in the democratic process is hyper-sensitive it is republican realism to keep alive *audi alteram* even in emergencies, 'even amidst the clash of arms'. Its protean shades apart we recognise that 'hearing' need not be an elaborate ritual and may, in situations of quick despatch, be minimal, even formal, nevertheless real. In this light, the Election Court will approach the problem. To scuttle the ship is not to save the cargo ; to jettison may be.

76. Fair hearing is thus a postulate of decision-making cancelling a poll. although fair abridgement of that process is permissible. It can be fair without the rules of evidence or form of trial. It cannot be fair if apprising the affected and appraising the representations is absent. The philosophy behind natural justice is, in one sense, participatory justice in the process of democratic rule of law.

77. 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 specificated it is otiose. There is no such sequitur. The silence

40. *Id.* p. 60

41. *Id.* p. 63

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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.

78. There was much argument about the guidelines in Sections 58 and 64A being applicable to an order for constituency-wide re-poll. It may be wholesome to be guided ; but it is not illegal not to do so, provided homage to natural justice is otherwise paid. Likewise, Sri P. P. Rao pressed that the Chief Election Commissioner was arbitrary in ordering a re-poll beyond Fazilka segment or postal ballots. Even the third respondent had not asked for it ; nor was there any material to warrant it since all the ballots of all the other segments were still available to be sorted out and recounted. A whole re-poll is not a joke. It is almost an irreparable punishment to the constituency and the candidates. The sound and fury, the mammoth campaigns and rallies. the whistle-stop speeches and frenzy of slogans, the white-heat of tantrums, the expensiveness of the human resources and a hundred other traumatic consequences must be remembered before an easy re-poll is directed, urges Shri Rao. We note the point but leave its impact open for the Election Court to assess when judging whether the impugned order was scary. arbitrary, whimsical or arrived at by omitting material considerations. Independently of natural justice, judicial review extends to an examination of the order as to its being perverse. irrational. bereft of application of the mind or without any evidentiary backing. If two views are possible. the Court cannot interpose its view. If no view is possible the Court must strike down.

79. We have projected the panorama of administrative law at this length so that the area may not be befogged at the trial before the Election Court and for action in future by the Election Commission. We have held that Article 329(b) is a bar for intermediate legal proceedings calling in question the steps in the election outside the machinery for deciding election disputes. We have further held that Article 226 also suffers such eclipse. Before the notification under Section 14 and beyond the declaration under Rule 64 of Conduct of Election Rules, 1961. are not forbidden ground. In between *is*, provided. the step challenged is taken in furtherance of, not to halt or hamper the progress of the election.

80. We have clarified that what may seem to be counter to the march of the election process may in fact be one to clear the way to a free and fair verdict of the electorate. It depends. Taking the Election Commission at his word (the Election Court has the power to examine the validity of his word). we proceed on the prima facie view that writ petition is not sustainable. If it turned out that the Election Commission acted bizarre fashion or in indiscreet haste, it forebodes ill for the Republic. For if the salt lose their savour, wherewith shall they be salted? Alan Barth in his *'Prophets with Honor'*, quotes Justice Felix Frankfurter regarding the standard for a judicial decision thus[42] :

> Mr. Dooley's th' Supreme Court fellows th' iliction returns', expressed the wit of

42. Quotation from *American Federation of Labour* v. *American Suth and Door Co.*, 335 US 538 (1949)—p. 15 of Alan Barth's book published by Light & Life Publishers, New Delhi

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cynicism, not the demand of principle. A Court which yields to the popular will thereby licenses itself to practice despotism, for there can be no assurance that it will not on another occasion indulge its own will. Courts can fulfil their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable.

The above observation would equally apply to the Election Commission.

81. Many incidental points were debated but we have ignored those micro-questions and confined ourselves to macro-determinations. It is for the Election Court, not for us, to rule on those variegated matters. Certain obvious questions will claim the Election Court's attention. Did the Commission violate the election rules or canons of fairness? Was the play, in short, according to the script or did the *dramatis personae* act defiantly, contrary to the text? After-all, democratic elections may be likened to a drama, with a solemn script and responsible actors, officials and popular, each playing his part, with roles for heroes but not for villains, save where the text is travestied and unscheduled anti-heroes intervene turning the promising project for the smooth registration of the collective will of the people into a tragic plot against it. Every corrupt practice, partisan official action, basic breach of rules or deviance from the fundamental of electoral fairplay is a danger signal for the nation's democratic destiny. We view this case with the seriousness of John Adams' warning[43]:

> 'Remember', said John Adams, 'remember', democracy never lasts long. It soon wastes, exhausts and murders itself. There never was a democracy that did not commit suicide.

82. Only one issue remains. Is the provision in Section 100 read with Section 98 sufficient to afford full relief to the appellant if the finding is in violation or mal-exercise of powers under Article 324? Sri Rao says 'NO' while the opposition says 'YES'.

83. Let us follow the appellant's apprehension for a while to test its tenability. He says that the Commissioner has no power to cancel the election to a whole constituency. Therefore, the impugned order is beyond his authority and in excess of his functions under Article 324. Moreover, even if such power exists it has been exercised illegally, arbitrarily and in violation of the implied obligation of *audi alteram partem*. In substance, his complaint is that under guise of Article 324 the Commissioner has acted beyond its boundaries, in breach of its content and oblivious of its underlying duties. Such a mal-exercise clearly tantamounts to non-adherence to the norms and limitations of Article 324 and, if true, is a non-compliance with that provision of the Constitution. It falls within Section 100(1)(d)(iv). A generous, purpose-oriented, literally informed statutory interpretation spreads the wings of 'non-compliance' wide enough to bring in all contraventions, excesses, breaches and subversions.

84. We derive support for this approach from *Durga Mehta* (supra).

43. Quoted from M. Hidayatullah in "*Democracy in India and the Judicial Process*", Lajpat Rai Memorial Lecture, p. 16

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The Court there considered the same words, in the same sections, in the same statute. Section 100(2)(c) interpreted in that case re-incarnates as Section 100(1)(d)(iv) later. Everything is identical. And Mukherjea, J. explained :

> 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 beween "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 Article 324 helps discern 'an organic synthesis'. Law sustains, not fails.

85. A kindred matter viz., the scope of Section 100 and Section 98 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 Addl. 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.

86. 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 march past this Part discloses the need to file an election petition (Section 80) ; the jurisdiction to try which is vested in the High Court (Section 80A). Regulatory of the further processes on presentation of a petition are Sections 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 Section 97. Then comes the finale in Section 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

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of orders that may be passed under Section 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.

87. A few more sections exist which we may omit as being not germane to the present controversy.

88. What is that controversy? Let us project it with special reference to the present case. Here the poll proceeded peacefully, the counting was almost complete, the ballots of most stations are available and postal votes plus the votes of one or two polling stations may alone be missing. Sri P. P. Rao asks and whenever Counsel in Court or speaker on a podium asks rhetorical questions be sure he is ready with an answer in his favour: If the Court holds that the cancellation by the Commissioner of the whole poll is illegal what relief can it give me since a fresh election based on that demolition has been already held? If the Court holds that since most of the ballots are intact, re-poll at one or two places is enough how can even the Court hold such limited re-poll? If the Court wants to grant the appellant the relief that he is duly elected how can the intervening processes lying within the competence of the Commissioner be commandered by the Court? The solution to this disturbing string of interrogations is simple, given a creative reading of implied powers writ invisibly, yet viably, into the larger jurisdiction under Section 98. Law transcends legalism when life is baffled by surprise situations. In this larger view and in accordance with the well-established doctrine of implied powers we think the Court *can* — and if justified, *shall* — do, by its command, all that is necessary to repair the injury and make the remedy realisable. Courts are not luminous angels beating their golden wings in the void but operational authority sanctioning everything to fulfil the trust of the rule of law. That the less is the inarticulate part of the larger is the jurisprudence of power. Both Sri Sorabjee and Sri Phadke agree to this proposition and Sri Rao, in the light of the election petition filed and pending, cannot but assent to it. By way of abundant caution or otherwise, the appellant has challenged, in his election petition, the declaration of the third respondent as the returned candidate. He has also prayed for his being declared the duly elected candidate. There is no dispute — there cannot be — that the cornerstone of the second constituency-wide poll is the cancellation of the first. If that is set aside as invalid by the High Court for any good reason then the second poll falls and the third respondent too with it. This question of the soundness of the cancellation of the entire poll is within the Court's power under Section 98 of the Act. All are agreed on this. In that eventuality, what are the follow-up steps? Everything necessary to resurrect, reconstruct and lead on to a consummation of the original process. Maybe, to give effective relief by way of completion of the broken election the Commissioner may have to be directed to hold fresh poll and report back together with the ballots. A recount of all or some may perhaps be required. Other steps suggested by other developments may be desired. If anything intergrally linked up with and necessitated by the obligation to grant full relief has to be undertaken or ordered to be done by the election machinery, all that is within the orbit of the Election Court's power.

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89. *Black's Law Dictionary* explains the proposition thus[44] :

> **Implied powers** are such as are necessary to make available and carry into effect those powers which are expressly granted or conferred, and which must therefore be presumed to have been within the intention of the constitutional or legislative grant.

90. This understanding accords with justice and reason and has the support of Sutherland. The learned Addl. Solicitor General also cited the cases in *Matajog Dobey* v. *H. C. Bhari*[45] and *Commissioner of Commercial Taxes* v. *R. S. Jhaver*[46] to substantiate his thesis that the doctrine of implied powers clothes the Commissioner with vast incidental powers. He illustrated his point by quoting from Sutherland (Frank E. Horack Jr., Vol. 3) :

> **Necessary implications.**—Where a statute confers powers or duties in general terms, all powers and duties incidental and necessary to make such legislation effective are included by implication. Thus it has been stated, "An express statutory grant of power or the imposition of a definite duty carries with it by implication, in the absence of a limitation, authority to employ all the means that are usually employed and that are necessary to the exercise of the power or the performance of the duty . . . . That which is clearly implied is as much a part of a law as that which is expressed". The reason behind the rule is to be found in the fact that legislation is enacted to establish broad or general standards. Matters of minor detail are frequently omitted from legislative enactments, and 'if these could not be supplied by implication the drafting of legislation would be an interminable process and the true intent of the Legislature likely to be defeated".
>
> The rule whereby a statute, is by necessary implication extended has been most frequently applied in the construction of laws delegating powers to public officers and administrative agencies. The powers thus granted involve a multitude of functions that are discoverable only through practical experience.
>
> * * * * *
>
> A municipality, empowered, by statute to construct sewers for the preservation of the public health, interest and convenience, was permitted to construct a protecting wall and pumping plant which were necessary for the proper working of the sewer, but were essential to public health. A country school superintendent, who was by statute given general supervisory power over a special election, was permitted to issue absentee ballots. The power to arrest has been held to include the power to take finger prints, and take into custody non-residents who were exempted from the provisions of a licensing statute.

91. Having regard to statutory setting and comprehensive jurisdiction of the Election Court we are satisfied that it is within its powers to direct a re-poll of particular polling stations to be conducted by the specialised agency under the Election Commission and report the results and ballots to the Court. Even a re-poll of postal ballots, since those names are known, can be ordered taking care to preserve the secrecy of the vote. The Court may, if necessary, after setting aside the election of respondent 3 (if there are good grounds therefor) keep the case pending, issue directions for getting available votes, order recount and/or parital re-poll, keep the election petition pending and pass final orders holding the appellant elected if — only if — valid grounds are established. Such

44. *Black's Legal Dictionary*, Fourth Edn., p. 1334
45. (1955) 2 SCR 925, 937 : AIR 1956 SC 44 : (1955) 28 ITR 941 : 1956 Cri LJ 140
46. (1968) 1 SCR 148, 154-5 : AIR 1968 SC 59 : 20 STC 453 : 66 ITR 664

being the wide ranging scope of implied powers we are in agreement with the learned Addl. Solicitor General that all the reliefs the appellant claims are within the Court's power to grant and Sri Rao's alarm is unfounded.

92. Diffusion, even more elaborate discussion, tends to blur the precision of the conclusion in a judgment and so it is meet, that we synopsize the formulations. Of course, the condensed statement we make is for convenience, not for exclusion of the relevance or attenuation of the binding impact of the detailed argumentation. For this limited purpose, we set down our holdings :

(1)(a) Article 329(b) is a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of the result.

(b) Election, in this context, has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate.

(2)(a) The Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. This responsibility may cove powers, duties and functions of many sorts, administrative or other, depending on the circumstances.

(b) Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission, shall act in conformity with, not in violation of, such provisions but where such law is silent Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from, pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice in so far as conformance to such canons can reasonably and realistically be required of it as fairplay-in-action in a most important area of the constitutional order, viz., elections. Fairness does import an obligation to see that no wrong-doer candidate benefits by his own wrong. To put the matter beyond doubt, natural justice enlivens and applies to the specific case of order for total re-poll, although not in full panoply but in flexible practicability. Whether it has been complied with is left open for the Tribunal's adjudication.

(3) The conspectus of provisions bearing on the subject of elections clearly expresses the rule that there is a remedy for every wrong done during the election in progress

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> although it is postponed to the post-election stage and procedure as predicated in Article 329(b) and the 1951 Act. The Election Tribunal has, under the various provisions of the Act, large enough powers to give relief to an injured candidate if he makes out a case and such processual amplitude of power extends to directions to the Election Commission or other appropriate agency to hold a poll, to bring up the ballots or do other thing necessary for fulfilment of the jurisdiction to undo illegality and injustice and do complete justice within the parameters set by the existing law.

93. In sum, a pragmatic *modus vivendi* between the Commission's paramount constitutional responsibility vis-a-vis elections and the rule of law vibrant with fair acting by every authority and remedy for every right breached, is reached.

94. We conclude stating that the bar of Article 329(b) is as wide as the door of Section 100 read with Section 98. The writ petition is dismissible but every relief (given factual proof) now prayed for in the pending election petition is within reach. On this view of the law *ubi jus ibi remedium* is vindicated, election injustice is avoided, and the constituency is allowed to speak effectively. In the light of and conditioned by the law we have laid down, we dismiss the appeal. Where the dispute which spirals to this Court is calculated to get a clarification of the legal calculus in an area of national moment, the parties are the occasion but the people are the beneficiaries, and so costs must not be visited on a particular person. Each party will bear his own costs.

95. A word of meed for Counsel. Shri Soli Sorabjee did, with imaginative, yet emphatic, clarity and pragmatic, yet persuasive, advocacy, belight the twilit, yet sensitive, zones of the electoral law ; Shri P. P. Rao did, with feeling for justice and wrestling with law, drive home the calamities of our system if right did not speak to remedy ; and Shri Phadke did, without overlapping argument, but with unsparing vigour, bring out the legal dynamics of quick elections and comprehensive corrections. We record our appreciation to the bar whose help goes a long way for the Bench to do justice.

GOSWAMI, J. (*for himself and Shinghal, J.*) (*concurring*)—This appeal by special leave is directed against the judgment of the Delhi High Court dismissing the writ application of the appellant under Article 226 of the Constitution.

97. By a notification of February 10, 1977, made under Section 14 of the Representation of the People Act, 1951, (briefly the Act), the President called upon the Parliamentary Constituencies to elect members to the House of the People in accordance with the provisions of the Act and the rules and orders made thereunder. Simultaneously, a notification was issued by the Chief Election Commissioner with a calendar of dates for different Parliamentary Constituencies in the country. In this appeal

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we are concerned with 13-Ferozepore Parliamentary Constituency in the State of Punjab where the poll was scheduled to be held on March 15, 1977, and March 23 was fixed as the date before which the election shall be completed. Counting, according to the schedule, was to commence on March 20, 1977 and it actually continued on March 21, 1977. This Parliamentary Constituency consisted of nine Assembly Constituencies including the Fazilka and Zira Assembly segments.

98. We may now briefly state the appellants' case so far as it is material :

98A. The poll in the entire Parliamentary Constituency was peacefully over on March 16, 1977. Counting in five Assembly segments was completed on March 20, 1977, and in the remaining four it was completed on March 21. The Assistant Returning Officers made entries in the result sheets in Form 20 and announced the number of votes received by each candidate in the Assembly segments. No recounting was asked for by any candidate or his polling agent in any segment. Copies of the result sheets in Form 20 were handed over to the candidates or to their polling agents. The ballot papers and the result sheets of all the nine Assembly segments were transmitted by the Assistant Returning Officers concerned to the Returning Officer at the Headquarters. According to the result sheets the appellant, who was the Congress candidate, secured 1,96,016 votes, excluding postal ballots, as against his nearest rival candidate, respondent 3, belonging to the Akali Party, who secured 1,94,095 votes, excluding postal ballots. The margin of votes between the appellant and respondent 3 at that stage was 1921. There were 769 postal ballots. As per programme, counting of postal ballot papers was started by the Returning Officer (respondent 2) at 3.00 p.m. on March 21. 248 ballot papers out of 769 were rejected in the counting. At this stage, it is said, respondent 3 and his son incited an unruly mob of his supporters to raid the office of the Returning Officer as a result of which a grave situation was created in which many officers received injuries. The Returning Officer was abused and was threatened that his son and other members of his family would be murdered. All the postal ballot papers, except those which had been rejected, were destroyed by the mob. Some ballot papers of Fazilka Assembly segment are also said to have been destroyed by the mob in the course of their transit to the office of the Returning Officer. The Assistant Returning Officer of the Zira Assembly segment, on his way to the office of the Returning Officer, was attacked by the mob and some of the envelopes containing ballot papers, paper seal accounts and Presiding Officers' diaries were snatched away from him. However the result sheets in Form 20 of all the Assembly segments in which the counting had been completed by March 21, 1977, could be preserved and were deposited in Government Treasury, Ferozepore. In view of the violent situation created in the office of the Returning Officer, he was prevented from ascertaining the result of the postal ballot papers and declaring the result of the election. He was made to sign a written report about the happenings to the Chief Election Commissioner (respondent 1) The above, briefly, is the version of the appellant.

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99. Deputy Commissioners are usually appointed as Returning Officers and originally Shri G. B. S. Gosal, who was the Deputy Commissioner, was nominated as the Returning Officer of the aforesaid constituency, as per notification dated January 29, 1977. It appears on February 8, 1977, Shri Gosal was transferred and Shri Gurbachan Singh, a close relation of the appellant, was appointed as the Deputy Commissioner in place of Shri Gosal. Shri Gurbachan Singh (respondent 2) thus became the Returning Officer. There were complaints and allegations against him and after being apprised of the same the Chief Election Commissioner (respondent 1) appointed Shri I. K. K. Menon, Under Secretary, Election Commission, as an Observer to be present at Ferozepore from March 16 till March 21 on which date the result was expected to be declared.

100. On March 22, 1977, the Chief Election Commissioner received a wireless message from the Returning Officer which may be quoted :

> Mob about sixteen thousand by overpowering the police attacked the counting hall where postal ballot papers were being counted. Police could not control the mob being outnumbered. Part of postal ballot papers excepting partly rejected ballot papers and other election material destroyed by the mob. Lot of damage to property done. The undersigned was forced under duress to give in writing the following : 'The counting of 13 Parliamentary Ferozepore Constituency has been adjourned due to certain circumstances which have been mentioned in the application presented by Shri Mohinder Singh Sayanwala regarding re-poll of the constituency and on the polling station in which the ballot boxes have been reported to be tampered with. This will be finally decided on receipt of instructions from the Election Commission and the result will be announced thereafter'. Counting adjourned and result postponed till receipt of further instructions from Election Commission. Incident happened in the presence of Observer at Ferozepore. Mob also destroyed the ballot papers and other election material and steel trunks of Fazilka Assembly segment at Ferozepore after the counting part of election material of Zira Assembly segment was also snatched and destroyed by the mob at Ferozepore.

On the same day the Chief Election Commissioner received a written report from the Observer. The Observer also "orally apprised the Chief Election Commissioner of the various incidents at the time of poll and counting in various Assembly segments". No other report from the Returning Officer was, however, received on that day.

101. On the materials mentioned above which he could gather on March 22, 1977, the Chief Election Commissioner passed the impugned order on the same day. It may even be appropriate to quote the same :

> Election Commission of India
>
> New Delhi
> Dated March 22, 1977.
> Chaitra 1, 1899 (SAKA)
>
> NOTIFICATION
>
> **S. O.** Whereas the Election Commission has received reports from the Returning Officer of 13—Ferozepur Parliamentary Constituency that the counting on March 21, 1977 was seriously disturbed by violence; that the ballot papers of some of the assembly segments of the parliamentary constituency have been destroyed by violence; that as a consequence it is not possible to complete the

counting of the votes in the constituency and the declaration of the result cannot be made with any degree of certainty;

And whereas the Commission is satisfied that taking all circumstances into account, the poll in the constituency has been vitiated to such an extent as to affect the result of the election;

Now, therefore, the Commission, in exercise of the powers vested in it under Article 324 of the Constitution, Section 153 of the Representation of the People Act, 1951 and all other powers enabling it so to do, cancels the poll already taken in the constituency and extends the time for the completion of the election upto April 30, 1977 . . .

* * * *

102. The appellant approached the Chief Election Commissioner to revoke the impugned order and to declare the result of the election, but without success. That led to the writ application in the High Court with prayer to issue—

(1) a writ of certiorari calling forth the records for the purpose of quashing the impugned order; and

(2) a writ of mandamus directing the Chief Election Commissioner and the Returning Officer to declare the result of the election;

(3) alternatively, a writ of mandamus directing the Chief Election Commissioner to act strictly in accordance with the provisions of Section 64A(2) thus confining its directions in regard to postal ballot papers only.

103. The appellant made three contentions before the High Court. Firstly, that the Election Commission had no jurisdiction to order re-poll of the entire Parliamentary Constituency. Secondly, the impugned order was violative of the principles of natural justice as no opportunity of a hearing was afforded to the appellant before passing the order. Thirdly, that the High Court under Article 226 of the Constitution was competent to go into the matter notwithstanding the provisions of Article 329(b) of the Constitution.

104. The application was resisted by the Chief Election Commissioner (respondent 1) and respondent 3, the rival candidate.

105. A preliminary objection was raised by respondents 1 to 3 with regard to the maintainability of the writ application on the ground that Article 329(b) of the Constitution was a bar to the High Court's entertaining it. Another objection was taken that the writ petition was not maintainable in view of the amended provisions of Article 226 of the Constitution. The High Court dismissed the writ application. The High Court held that Article 324 confers "plenary executive powers" on the Election Commission and there were no limitations on the functions contemplated in Article 324. The High Court observed that the law framed under Article 327 or Article 328 was in aid of the plenary powers already conferred on the Election Commission under Article 324. and where the law so made under Article 327 or Article 328 omitted to provide for a contingency or a situation, the said plenary executive power relating to conduct of elections conferred upon the Election Commission by Article

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324(1) of the Constitution would become available to it and the Election Commission would be entitled to pass necessary orders in the interest of free and fair elections. The High Court also held that the Returning Officer could not deprive the candidates of the rights of recount available to them under Rule 63 of the Conduct of Election Rules, 1961, and after going into the facts observed that "it became impossible for the Returning Officer to comply with the provisions of Rule 63(2) to 63(6)". Repelling the contention of the appellant that the Commission could not travel beyond the Act and the rules by simply relying on its powers under the Constitution, the High Court observed "that calling upon of the parliamentary constituencies to elect members has to be in accordance with the provisions of the Act and the rules but it does not mean that the conduct of elections by the Commission has to be held only under the Act or the rules. The Election Commission who is vested with the power of conducting the elections has still to hold the elections in accordance with the Act and the rules as well as under the Constitution". The High Court further held that the principles of natural justice were not specifically provided for in Article 324 but were "totally excluded while passing the impugned order". The High Court further observed that even if the principles of natural justice were impliedly to be observed before passing the impugned order the appellant was "heard not only before the issue of the notification but in any case after the notification". The High Court also held that it had no jurisdiction to entertain the writ petition in view of the bar contained in Article 329(b) of the Constitution.

106. This appeal has come up for hearing before this Constitution Bench on a reference by a Two-Judge Bench as substantial questions of law have arisen as to the interpretation of the Constitution, in particular Article 324 and Article 329(b) of the Constitution. We should, therefore, immediately address ourselves to that aspect of the matter.

107. What is the scope and ambit of Article 324 of the Constitution? The Constitution of our country ushered in a Democratic Republic for the free people of India. The founders of the Constitution took solemn care to devote a special chapter to elections niched safely in Part XV of the Constitution. Originally there were only six articles in this Part opening with Article 324. The penultimate article in the chapter, as it stands, is Article 329 which puts a ban on interference by Courts in electoral matters. We are not concerned in this appeal with the newly added Article 329A which is the last Article to close the chapter.

108. Elections supply the visa viva to a democracy. It was, therefore, deliberately and advisedly thought to be of paramount importance that the high and independent office of the Election Commission should be created under the Constitution to be in complete charge of the entire electoral process commencing with the issue of the notification by the President to the final declaration of the result. We are not concerned with the other duties of the Election Commission in this appeal.

109. Article 324 came to the notice of this Court for the first time

in *N. P. Ponnuswami* v. *Returning Officer, Namakkal Constituency*[47]. This Court observed :

> 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.

Further below this Court observed as follows :

> Obviously, the Act is a self-contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the rules made thereunder.

Lower down this Court further observed :

> It is now well-recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of.
>
> * * * * *
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> . . . it will be a fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage.

110. *Ponnuswami's case* (supra) had to deal with a matter arising out of rejection of a nomination paper which was the subject-matter of a writ application under Article 226 of the Constitution which the High Court had dismissed.

111. With regard to the construction of Article 329(b) it was held that "the more reasonable view seems to be that Article 229 covers all 'electoral matters' ". This Court put forth its conclusions in that decision as follows :

> (1) Having regard to the important functions which the Legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.
>
> (2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the 'election' ; and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the 'election' and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any Court while the election is in progress.

This Court also explained the connotation of the word "election" in very wide terms as follows :

> It seems to me that the word 'election' has been used in Part XV of the

47. 1952 SCR 218 : AIR 1952 SC 64 : 1 ELR 133

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Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the Legislature. The use of the expression 'conduct of elections' in Article 324 specifically points to the wide meaning, and that meaning can also be read consistently into the other provisions which occur in Part XV including Article 329(b).

This Court further observed that —

. . it (is) clear that the word 'election' can be and has been appropriately used with reference to the entire process which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process.

* * * * *

If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any, are rectified, there will be no meaning in enacting a provision like Article 329(b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by the High Court at the pre-polling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought up before it.

The above decision is *locus-classicus* on the subject and the parties before us seek to derive support from it for their contentions.

112. The important question that arises for consideration is as to the amplitude of powers and the width of the functions which the Election Commission may exercise under Article 324 of the Constitution. According to Mr. Rao, appearing on behalf of the appellants, there is no question of exercising any powers under Article 324 of the Constitution which, in terms, refers to "functions" under sub-article (6). We are, however, unable to accept this submission since functions include powers as well as duties (see *Stroud's Judicial Dictionary*, p. 1196). It is incomprehensible that a person or body can discharge any functions without exercising powers. Powers and duties are integrated with function.

113. Article 324(1) vests in the Election Commission the superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of the President and Vice-President held under the Constitution. Article 324(1) is thus couched in wide terms. Power in any democratic set-up, as is the pattern of our polity, is to be exercised in accordance with law. That is why Articles 327 and 328 provide for making of provisions with respect to all matters relating to or in connection with elections for the Union Legislatures and for the State Legislatures respectively. When appropriate laws are made under Article 327 by Parliament as well as under Article 328 by the State Legislatures, the Commission has to act in conformity with those laws and the other legal provisions made thereunder. Even so, both Articles 327 and 328 are "subject to the provisions" of the Constitution which include Article 324 and Article 329. Since the conduct of all elections to the various legislative bodies and to the offices of the President and the Vice-President is vested under Article 324(1) in the Election Commission, the framers of the Constitution took care to leaving scope for exercise of residuary power by the Commission, in its own right, as a creature of the

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Constitution, in the infinite variety of situations that may emerge from time to time in such a large democracy as ours. Every contingency could not be foreseen, or anticipated with precision. That is why there is no hedging in Article 324. The Commission may be required to cope with some situation which may not be provided for in the enacted laws and the rules. That seems to be the *raison d'etre* for the opening clause in Articles 327 and 328 which leaves the exercise of powers under Article 324 operative and effective when it is reasonably called for in a vacuous area. There is, however, no doubt whatsoever that the Election Commission will have to conform to the existing laws and rules in exercising its powers and performing its manifold duties for the conduct of free and fair elections. The Election Commission is a high-powered and independent body which is irremovable from office except in accordance with the provisions of the Constitution relating to the removal of Judges of the Supreme Court and is intended by the framers of the Constitution to be kept completely free from any pulls and pressures that may be brought through political influence in a democracy run on party system. Once the appointment is made by the President, the Election Commission remains insulated from extraneous influences, and that cannot be achieved unless it has an amplitude of powers in the conduct of elections — of course in accordance with the existing laws. But where these are absent, and yet a situation has to be tackled, the Chief Election Commissioner has not to fold his hands and pray to God for divine inspiration to enable him to exercise his functions and to perform his duties or to look to any external authority for the grant of powers to deal with the situation. He must lawfully exercise his power independently, in all matters relating to the conduct of elections, and see that the election process is completed properly, in a free and fair manner. "An express statutory grant of power or the imposition of a definite duty carries with it by implication, in the absence of a limitation, authority to employ all the means that are usually employed and that are necessary to the exercise of the power or the performance of the duty . . . . That which is clearly implied is as much a part of a law as that which is expressed."[48]

114. The Chief Election Commissioner has thus to pass appropriate orders on receipt of reports from the returning officer with regard to any situation arising in the course of an election and power cannot be denied to him to pass appropriate orders. Moreover, the power has to be exercised with promptitude. Whether an order passed is wrong, arbitrary or is otherwise invalid, relates to the mode of exercising the power and does not touch upon the existence of the power in him if it is there either under the Act or the rules made in that behalf, or under Article 324(1).

115. Apart from the several functions envisaged by the two Acts and the rules made thereunder, where the Election Commission is required to make necessary orders or directions, are there any other functions of the Commission? Even if the answer to the question may be found elsewhere, reference may be made to Section 19A of the Act which, in terms,

48. *Sutherland Statutory Construction*, Third Edition, p. 20

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refers to functions not only under the Representation of the People Act, 1950 and the Representation of the People Act, 1951, or under the rules made thereunder, but also under the Constitution. The Commission is,, therefore, entitled to exercise certain powers under Article 324 itself, on its own right, in an area not covered by the Acts and the rules. Whether the power is exercised in an arbitrary or capricious manner is a completely different question.

116. Mr. Rao submits, referring to Sections 58 and 64A of the Act, that the Chief Election Commissioner has no power to cancel the poll in the entire constituency. He submits that this is a case of complete lack of power and not merely illegal or irregular exercise of power. He points out that there is a clear provision under Section 63 of the Act for reordering of poll at a polling station. Similarly under Section 64A there is provision for declaring the poll at a polling station void when the Election Commission is satisfied that there is destruction or loss etc. of ballot papers before counting. Counsel submits that while law has provided for situations specified in Section 58 with regard to loss or destruction of ballot boxes and under Section 64A with regard to loss and destruction of ballot papers before counting of votes, no provision has been made for such an unusual exercise of power as the cancellation of the poll in the entire constituency after it has already been completed peacefully. It is, therefore, argued that, this is a case of complete lack of power of the Commission to pass the impugned order.

117. It is clear even from Section 58 and Section 64A that the Legislature envisaged the necessity for the cancellation of poll and ordering of re-poll in particular polling stations where situation may warrant such a course. When provision is made in the Act to deal with situations arising in a particular polling station, it cannot be said that if a general situation arises whereby numerous polling stations may witness serious mal-practices affecting the purity of the electoral process, that power can be denied to the Election Commission to take an appropriate decision. The fact that a particular Chief Election Commissioner may take certain decisions unlawfully, arbitrarily or with ulterior motive or in mala fide exercise of power, is not the test in such a case. The question always relates to the existence of power and not the mode of exercise of power. Although Section 58 and Section 64A mention "a polling station" or "a place fixed for the poll" it may, where necessary, embrace multiple polling stations.

118. Both under Section 58 and under Section 64A the poll that was taken at a particular polling station can be voided and fresh poll can be ordered by the Commission. These two sections naturally envisage a particular situation in a polling station or a place fixed for the poll and cannot be said to be exhaustive. The provisions in Sections 58 and 64A cannot therefore be said to rule out the making of an order to deal with a similar situation if it arises in several polling stations or even sometimes as a general feature in a substantially large area. It is, therefore not possible to accept the contention that the Election Commission

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has no power to make the impugned order for a re-poll in the entire constituency.

119. Mr. Rao submits that once the Presidential notification has been made, it is left to the President alone to amend or alter the notification and power, in an appropriate case, may be exercised by the President in which case the action of the President will be on the advice of the Cabinet which will be responsible to the Legislature. He submits that it was not the intention of the Constitution-makers in the entire scheme of the electoral provisions to entrust such an extraordinary power to the Election Commission He further submits that in an appropriate case the President may also promulgate an ordinance under Article 123(1) of the Constitution cancelling the poll in the entire constituency.

120. The contention that the President can revoke, alter or amend the notification under Section 14 of the Act or that he can promulgate an ordinance in an appropriate case does not however answer the question. The question will have to be decided on the scope and ambit of power under Article 324(1) of the Constitution which vests the conduct of elections in the Election Commission. It is true that in exercise of powers under Article 324(1) the Election Commission cannot do something impinging upon the power of the President in making the notification under Section 14 of the Act. But after the notification has been issued by the President, the entire electoral process is in the charge of the Election Commission and the Commission is exclusively responsible for the conduct of the election without reference to any outside agency. We do not find any limitation in Article 324(1) from which it can be held that where the law made under Article 327 or the relevant rules made thereunder do not provide for the mechanism of dealing with a certain extraordinary situation, the hands of the Election Commission are tied and it cannot independently decide for itself what to do in a matter relating to an election. We are clearly of opinion that the Election Commission is competent in an appropriate case to order re-poll of an entire constituency where necessary. It will be an exercise of power within the ambit of its functions under Article 324. The submission that there is complete lack of power to make the impugned order under Article 324 is devoid of substance.

121. The ancillary question which arises for consideration is that when the Election Commission amended its notification and extended the time for completion of the election by ordering a fresh poll, is it an order during the course of the process of 'election' as that term is understood?

122. As already pointed out, it is well-settled that election covers the entire process from the issue of the notification under Section 14 to the declaration of the result under Section 66 of the Act. When a poll that has already taken place has been cancelled and a fresh poll has been ordered, the order therefor, with the amended date, is passed as an integral part of the electoral process. We are not concerned with the question whether the impugned order is right or wrong or invalid on any account. Even if it is a wrong order it does not cease to be an order passed by a

competent authority charged with the conduct of elections with the aim and object of completing the elections. Although that is not always decisive, the impugned order itself shows that it has been passed in the exercise of power under Article 324(1) and Section 153 of the Act. That is also the correct position. Such an order, relating, as it does, to election within the width of the expression as interpreted by this Court, cannot be questioned except by an election petition under the Act.

123. What do the appellants seek in the writ application ? One of their prayers is for declaration of the result on the basis of the poll which has been cancelled. This is nothing short of seeking to establish the validity of a very important stage in the election process, namely, the poll which has taken place and which was countermanded by the impugned order. If the appellants succeed, the result may, if possible, be declared on the basis of that poll, or some other suitable orders may be passed. If they fail, a fresh poll will take place and the election will be declared on the basis of the fresh poll. This is, in effect, a vital issue which relates to questioning of the election since the election will be complete only after the fresh poll on the basis of which the declaration of the result will be made. In other words, there are no two elections as there is only one continuing process of election. If, therefore, during the process of election, at an intermediate or final stage, the entire poll has been wrongly cancelled and a fresh poll has been wrongly ordered, that is a matter which may be agitated after declaration of the result on the basis of the fresh poll, by questioning the election in the appropriate forum by means of an election petition in accordance with law. The appellants, then, will not be without a remedy to question every step in the electoral process and every order that has been passed in the process of the election including the countermanding of the earlier poll. In other words, when the appellants question the election after declaration of the result on the basis of the fresh poll, the election Court will be able to entertain their objection with regard to the order of the Election Commission countermanding the earlier poll, and the whole matter will be at large. If, for example, the election Court comes to the conclusion that the earlier poll has been wrongly cancelled, or the impugned order of the Election Commission is otherwise invalid, it will be entitled to set aside the election on the basis of the fresh poll and will have power to breathe life into the countermanded poll and to make appropriate directions and orders in accordance with law. There is, therefore, no foundation for a grievance that the appellants will be without any remedy if their writ application is dismissed. It has in fact been fairly conceded by Counsel for the other side that the election Court will be able to grant all appropriate reliefs and that the dismissal of the writ petition will not prejudice the appellants.

124. Indeed it has been brought to our notice that an election petition has been filed by the appellants, *ex abundanti cautela*, in the High Court of Punjab and Haryana, challenging the election which has since been completed on the basis of a fresh poll ordered by the Election Commission. The High Court of Punjab and Haryana will therefore be free to decide that petition in accordance with law.

125. It is submitted by Mr. Rao that in *Ponnuswami* (supra) the question was of improper rejection of nomination paper which is clearly covered by Section 100(1)(c) of the Act. Counsel submits that the only ground which can be said to be raised in the election petition, in the present case, is Section 100(1)(d)(iv), namely, non-compliance with the provisions of the Constitution or of the Representation of the People Act, 1951, or of any rules or orders made under that Act. According to Counsel, there is no non-compliance with Article 324 of the Constitution as the Election Commission has no power whatsoever to pass the impugned order under Article 324 of the Constitution. That, according to him, is not "non-compliance with the provisions of the Constitution" within the meaning of Section 100(1)(d)(iv). We are unable to accept this submission for the reasons already given. The Election Commission has passed the order professedly under Article 324 and Section 153 of the Act. We have already held that the order is within the scope and ambit of Article 324 of the Constitution. It, therefore, necessarily follows that if there is any illegality in the exercise of the power under Article 324 or under any provision of the Act, there is no reason why Section 100(1)(d)(iv) should not be attracted to it. If exercise of a power is competent either under the provisions of the Constitution or under any other provision of law, any infirmity in the exercise of that power is, in truth and substance, on account of non-compliance with the provisions of law, since law demands of exercise of power by its repository, as in a faithful trust, in a proper, regular, fair and reasonable manner. (See also *Durga Shanker Mehta v. Thakur Raghuraj Singh*[49])

126. The above being the legal position, Article 329(b) rules out the maintainability of the writ application. Article 329(b) provides that "notwithstanding anything in this Constitution . . . no election to either House of Parliament . . . .shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature". It is undisputed that an election can be challenged only under the provisions of the Act. Indeed Section 80 of the Act provides that "no election shall be called in question except by an election petition presented in accordance with the provisions of" Part VI of the Act. We find that all the substantial reliefs which the appellants seek in the writ application, including the declaration of the election to be void and the declaration of appellant 1 to be duly elected, can be claimed in the election petition. It will be within the power of the High Court, as the election Court, to give all appropriate reliefs to do complete justice between the parties. In doing so it will be open to the High Court to pass any ancillary or consequential order to enable it to grant the necessary relief provided under the Act. The writ application is therefore barred under Article 329(b) of the Constitution and the High Court rightly dismissed it on that ground.

127. In view of our conclusion that the High Court had no jurisdiction to entertain the writ application under Article 226 of the Constitu-

49. (1955) 1 SCR 267 : AIR 1954 SC 520 : 9 ELR 494

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tion, it will not be correct for us, in an appeal against the order of the High Court in that proceeding, to enter into any other controversy, on the merits, either on law or on facts, and to pronounce finally on the same. The pre-eminent position conferred by the Constitution on this Court under Article 141 of the Constitution does not envisage that this Court should lay down the law, in an appeal like this, on any matter which is required to be decided by the election Court on a full trial of the election petition, without the benefit of the opinion of the Punjab and Haryana High Court which has the exclusive jurisdiction under Section 80A of the Act to try the election petition. Moreover, a statutory right to appeal to this Court has been provided under Section 116A, on any question, whether of law or fact, from every order made by the High Court in the dispute.

128. So, in view of the scheme of Part VI of the Act, the Delhi High Court could not have embarked upon an enquiry on any part of the merits of the dispute. Thus it could not have examined the question whether the impugned order was made by the Election Commission in breach of a rule of natural justice. That is a matter relating to the merits of the controversy and it is appropriately for the election Court to try and decide it after recording any evidence that may be led at the trial. It may be that if we pronounce on the question of the applicability of the rule of natural justice, the High Court will be relieved of its duty to that extent. But it has to be remembered that even for the purpose of deciding that question, the parties may choose to produce evidence, oral or documentary, in the trial Court. We therefore refrain from expressing any opinion in this appeal on the question of the violation of any rule of natural justice by the Election Commission in passing the impugned order.

129. At the same time we would like to make it quite clear that any observation, on a question of law or fact, made in the impugned judgment of the Delhi High Court, bearing on the trial of the election petition pending in the Punjab and Haryana High Court, will stand vacated and will not come in the way of that trial. That High Court will thus be free to decide the petition according to the law. We would also like to make it quite clear, with all respect to the learned Judges who have delivered a separate judgment, that we may not be taken to have agreed with the views expressed therein about the applicability of *audi alteram partem* or on the applicability of the guidelines in Sections 58 and 64A to the facts and circumstances of this case, or the desirability of ordering a re-poll in the whole constituency, or the ordering of a re-poll of postal ballots etc. Election is a long, elaborate and complicated process and, as far as we can see, the rule of *audi alteram partem*, which is in itself a fluid rule, cannot be placed in a strait-jacket for purposes of the instant case. It has also to be remembered that the impugned order of the Election Commission could not be said to be a final pronouncement on the rights of the parties as it was in the nature of an order covering an unforeseen eventuality which had arisen at one stage of the election. The aggrieved party had all along a statutory right to call the entire election in question, including the Commission's order, by an election

petition under Section 80 of the Act, for the trial of which an elaborate procedure has been laid down in the Act. Then, as has been stated, there is also a right of appeal under Section 116A. These and perhaps other relevant points may enter the scales in considering at the trial of the election petition whether there may not be sufficient justification to negative the existence of any implied duty on the part of the Commission, at that stage, to hear any party before taking its decision to order or not to order a re-poll. We do not therefore think it necessary or desirable to foreclose a controversy like this by any general observations and will leave any issue that may arise from it for trial and adjudication by the election Court.

130. Being not altogether certain of all the facts and circumstances that may be made available, in the appropriate forum, it may be a premature exercise by this Court even to lay down guidelines when there is no hide-bound formula of rules of natural justice to operate in all cases and at all times when a decision has to be made. Justice and fair play have often to be harmonised with exigencies of situations in the light of accumulated totality of circumstances in a given case having regard to the question of prejudice not to the mere combatants in an electoral contest but to the real and larger issue of completion of free and fair election with rigorous promptitude. Not being adequately informed of all the facts and circumstances, this Court will not make the task of the election Court difficult and embarrassing by suggesting guidelines in a rather twilight zone.

131. As we find no merit in this appeal, it is dismissed but, in the circumstances of the case, there will be no order as to the costs in this Court.

(1978) 1 Supreme Court Cases 466

(BEFORE S. MURTAZA FAZAL ALI AND P. N. SHINGHAL, JJ.)

ABDUL LATIF AND OTHERS .. Appellants ;

Versus

STATE OF UTTAR PRADESH .. Respondent.

Criminal Appeal No. 376 of 1977, decided on January 24, 1978

Criminal Procedure Code, 1898—Sections 540 & 428—Only such witnesses to be called by the High Court who are necessary for a just decision of the case—Rejection of oral request by accused for examination of two witnesses not bad where those witnesses had in their statements to the police supported the prosecution case and having turned hostile were unhelpful to the case—Cr. P. C. 1973, Sections 311 & 391 (Para 2)

M/3783/SR

The Judgment of the Court was delivered by

FAZAL ALI, J.—This is an appeal by special leave confined only to the question, whether Section 428 read with Section 540 of the old Cr. P. C. was applicable to the facts of this case. The appeal is directed against the judgment of the High Court of Allahabad by which the convictions of the appellant under various sections of the Penal Code have been upheld by the High Court.

32. The High Court in the instant case followed the decision in *Saraswatiben* v. *Thakorlal Himatlal*[6] holding that if at one stage on the evidence before him the Magistrate found that there was no prima facie case against the accused, subsequently on enquiry as a result of further evidence if he felt that there was prima facie case against the accused whom he had discharged under Section 251-A(2) CrPC, it was open to him to frame a charge against the accused and that it was not necessary to take cognizance again and the Magistrate did not become functus officio. The same view was taken in *Amarjit Singh @ Amba* v. *State of Punjab*[7].

33. The above views have to yield to what is laid down by this Court in the decisions above referred to. The provisions of Section 319 had to be read in consonance with the provisions of Section 398 of the Code. Once a person is found to have been the accused in the case he goes out of the reach of Section 319. Whether he can be dealt with under any other provisions of the Code is a different question. In the case of the accused who has been discharged under the relevant provisions of the Code, the nature of finality to such order and the resultant protection of the persons discharged subject to revision under Section 398 of the Code may not be lost sight of. This should be so because the complainant's desire for vengeance has to be tampered (*sic* tempered) with though it may be, as Sir James Stephen says: "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite." (*General View of the Criminal Law of England*, p. 99). The APP's application under Section 216, insofar as the appellants 1 to 3 were concerned, could be dealt with under Section 216. Appellants 4 and 5 could be dealt with neither under Section 216 nor under Section 319. In that view of the matter the impugned order of the Magistrate as well as that of the High Court insofar as the appellants 4 and 5, namely, Vijya Bai and Jiya Bai are concerned, have to be set aside which we hereby do. The appeals are allowed to that extent.

(1990) 4 Supreme Court Cases 594

(BEFORE SABYASACHI MUKHARJI, C.J. AND M.H. KANIA, K. JAGANNATHA SHETTY, K.N. SAIKIA AND S.C. AGRAWAL, JJ.)

S.N. MUKHERJEE .. Appellant;

Versus

UNION OF INDIA .. Respondent.

Civil Appeal No. 417 of 1984†, decided on August 28, 1990

6 AIR 1967 Guj 263 : 1967 Cri LJ 1632

7 (1983) 85 Punj LR 324

† From the Judgment and Order dated the August 12, 1981 of the Delhi High Court in C.W.P. No. 1835 of 1981

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Administrative Law — Natural justice — Recording of reasons — Authority exercising quasi-judicial function must record reasons for its decision irrespective of whether the decision is subject to appeal, revision or judicial review — Reasons should be clear and explicit though may not be elaborate — This is one of the embodied rules of natural justice — Requirement is greater at original stage but at appellate or revisional stage while affirming the original decision such authority need not give separate reasons if it agrees with the reasons in the impugned order — Rule inoperative where statute dispenses with the requirement expressly or by necessary implication

Administrative Law — Natural justice — Object and basic principles of — Applicability — Not being embodied rules the extent of their application, held , depends on the governing statutory framework — May be excluded expressly or by necessary implication

Army Act, 1950 — Sections 108, 129, 131, 153, 158, 160, 162 — Army Rules, 1954 — Rules 60, 61, 62, 65, 66, 67, 69, 70, 71, 105 — Held, no reasons are required to be recorded at the stage of recording of findings aud sentence by the court martial or on confirmatiou of the findings and sentence of the court martial by the confirming authority or dismissal of post confirmation petition by Central Government

Army Rules, 1954 — Rules 60 to 67 and 105 — Role of judge-advocate during course of trial at a general court martial

Constitution of India — Articles 32, 226, 136(2) and 227(4) — Decision of tribunal/court constituted under law relating to Armed Forces such as Army Act and Army Rules — Held, open to challenge under Article 32 or 226 but not under Article 136 or 227

Army Act, 1950 — Section 164 — Confers no right to make represeutation to confirming authority before confirmatiou of findings and sentence recorded by court martial — Only a post confirmation right is conferred under sub-section (2) of Section 164 — But if a representation is made at the pre-confirmation stage, confirming authority is expected to consider the same — Comparative scope of sub-sections (1) and (2) of Section 164

Army Act, 1950 — Sections 52(f), 63 — Alternative charges — First charge iu respect of offence under Section 52(f), second charge alternative to the first in respect of offence under Section 63 and the third charge also in respect of offence under Sectiou 63 — Appellant found guilty of the first and third charges — Second charge beiug alternative to the first, appellant could be held guilty of either of the first or the second charge and not of both the charges at the same time — Appellant haviug been found guilty of the first charge, he was rightly acquitted of the second charge — Hence acquittal of appellant in respect of the second charge will not entitle him to acquittal in respect of the first charge which was identical in nature — Service Law — Departmental enquiry — Charges (Para 55)

Held :

Except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions must record the reasons for its decision. Such a decision

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is subject to the appellate jurisdiction of the Supreme Court under Article 136 as well as the supervisory jurisdiction of the High Courts under Article 227 and the reasons, if recorded, would enable the Supreme Court or the High Courts to effectively exercise the appellate or supervisory power. But this is not the sole consideration. The other considerations are the requirement of recording reasons would (*i*) guarantee consideration by the authority; (*ii*) introduce clarity in the decisions; and (*iii*) minimise chances of arbitrariness in decision-making. As contrasted with the ordinary courts of law and tribunals and authorities exercising judicial functions where the Judge is trained to look at things objectively uninfluenced by considerations of policy or expediency, an executive officer generally looks at things from the standpoint of policy and expediency. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions irrespective of the fact whether the decision is subject to appeal, revision or judicial review. (Paras 40, 35 and 36)

However, it is not required that the reasons should be as elaborate as in the decision of a court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge. (Para 36)

The object underlying the rules of natural justice "is to prevent miscarriage of justice" and secure "fair play in action". The requirement about recording of reasons for its decision by an administrative authority exercising quasi-judicial functions achieves this object by excluding chances of arbitrariness and ensuring a degree of fairness in the process of decision-making. Keeping in view the expanding horizon of the principle of natural justice, therefore, it must be held that the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities. (Para 39)

The rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework whereunder jurisdiction has been conferred on the administrative authority. With regard to the exercise of a particular power by an administrative authority including exercise of judicial or quasi-judicial functions the legislature, while conferring the said power, may feel that it would not be in the larger public interest that the reasons for the order passed by the administrative authority be recorded in the order and be communicated to the aggrieved party and it may dispense with such a requirement. It may do so by making an express provision to that effect. Such an exclusion can also arise by necessary implication from the nature of the subject matter, the scheme and the provisions of the enactment. The public interest underlying such a provision would outweigh the salutary purpose served by the requirement to record the reasons. The said requirement cannot, therefore, be insisted upon in such a case. (Para 39)

Harinagar Sugar Mills Ltd. v. *Shyam Sundar Jhunjhunwala*, AIR 1961 SC 1669: (1962) 2 SCR 339: (1961) 31 Com Cas 387; *Madhya Pradesh Industries Ltd.* v. *Union of India*, AIR 1966 SC 671: (1966) 1 SCR 466; *Mahabir Prasad Santosh Kumar* v. *State of U.P.*, (1969) 3 SCC 868: (1970) 3 SCR 40; *Tara Chand Khatri* v. *Municipal Corporation of Delhi*, (1977) 1 SCC 472: 1977 SCC (L&S) 151: (1972) 2 SCR 198; *Raipur Development Authority* v. *Chokhamal Contractors*, (1989) 2 SCC 721; *A.K. Kraipak* v. *Union of India*, (1969) 2 SCC 262: (1970) 1 SCR 457, *relied on*

Bhagat Raja v. *Union of India*, AIR 1967 SC 1606: (1967) 3 SCR 302; *Mahabir Prasad Santosh Kumar* v. *State of U.P.*, (1970) 1 SCC 764: (1971) 1 SCR 201; *Woolcombers of India Ltd.* v. *Woolcombers Workers Union*, (1974) 3 SCC 318: 1974 SCC (L&S) 551: (1974) 1 SCR 504; *Siemens Engineering and Manufacturing Co. of India Ltd.* v. *Union of India*, (1976) 2 SCC 981: 1976 Supp SCR 489; *Phelps Dodge Corporation* v. *National Labour Relations Board*, (1940) 85 L ed 1271; *Securities and Exchange Commission* v. *Chenery Corporation*, (1942) 87 L ed 626; *John T. Dunlop* v. *Walter Bachowski*, (1975) 44 L ed 2d 377; *Regina* v. *Gaming Board For Great Britain, Ex parte Benaim and Khaida*, (1970) 2 QB 417: (1970) 2 All ER 528; *McInnes* v. *Onslow-Fane*, (1978) 1 WLR 1520: (1978) 3 All ER 211; *Breen* v. *Amalgamated Engineering Union*, (1971) 2 QB 175: (1971) 1 All ER 1148; *Alexander Machinery (Dudley) Ltd.* v. *Crabtree*, (1974) 1 CR 120; *Regina* v. *Immigration Appeal Tribunal Ex parte Khan (Mahmud)*, 1983 QB 790: (1983) 2 All ER 420; *Pure Spring Co. Ltd.* v. *Minister of National Revenue*, (1947) 1 DLR 501; *Re R.D.R. Construction Ltd. and Rent Review Commission*, (1983) 139 DLR (3d) 168; *Re Yarmouth Housing Ltd. and Rent Review Commission*, (1983) 139 DLR (3d) 544; *Osmond* v. *Public Service Board of New South Wales*, (1985) 3 NSWLR 447; *Public Service Board of New South Wales* v. *Osmond*, (1986) 63 ALR 559; *R.* v. *Deputy Industrial Injuries Commissioner ex p. Moore*, (1965) 1 QB 456: (1965) 1 All ER 81; *Mahon* v. *Air New Zealand Ltd.*, 1984 AC 648: (1984) 1 All ER 201, *referred to*

(2) It has therefore to be seen whether the Army Act, 1950 and the Army Rules, 1954 expressly or by necessary implication dispense with the requirement of recording reasons. In so doing consideration must be kept for the special provisions in the Constitution with regard to the Armed Forces, like Articles 33, 136(2) and 227(4).

(3) A perusal of the provisions of the Army Act and Rules show that at the stage of recording of findings and sentence the court martial is not required to record its reasons. The judge-advocate plays an important role during the course of trial at a general court martial and he is enjoined to maintain an impartial position. The court martial records its findings after the judge-advocate has summed up the evidence and has given his opinion upon the legal bearing of the case. The members of the court have to express their opinion as to the finding by word of mouth on each charge separately and the finding on each charge is to be recorded simply as a finding of "guilty" or of "not guilty". It is also required that the sentence should be announced forthwith in open court. Rule 66(1) however requires reasons to be recorded for its recommendation in cases where the court makes a recommendation to mercy. There is no such requirement in other provisions relating to recording of findings and sentence. (Para 44)

Reasons are also not required to be recorded for an order passed by the confirming authority confirming the findings and sentence recorded by the court martial. The confirmation of the findings and sentence is an integral part of the proceedings of a court martial and before the findings and sentence of a court martial are confirmed the same are examined by the deputy or assistant judge-advocate general of the command which is intended as a check on the

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legality and propriety of the proceedings as well as the findings and sentence of the court martial. Moreover, in Section 162 an express provision has been made for recording of reasons based on merits of the case in relation to the proceedings of the summary court martial in cases where the said proceedings are set aside or the sentence is reduced and no other requirement for recording of reasons is laid down either in the Act or in the Rules in respect of proceedings for confirmation. The only inference that can be drawn from Section 162 is that reasons have to be recorded only in cases where the proceedings of a summary court martial are set aside or the sentence is reduced and not when the findings and sentence are confirmed. (Paras 48 and 46)

So also reasons are not required to be recorded for the order passed by the Central Government dismissing the post-confirmation petition since the considerations which apply at the stage of recording of findings and sentence by the court martial and at the stage of confirmation of findings and sentence of the court martial by the confirming authority are equally applicable at this stage. As reasons are not required to be recorded at the first two stages referred to above, the said requirement cannot, be insisted upon at the stage of consideration of post-confirmation petition under Section 164(2) of the Act. (Paras 48 and 47)

Som Datt Datta v. *Union of India,* AIR 1969 SC 414: (1969) 2 SCR 177: 1969 Cri LJ 663, *affirmed*

(4) However, even though the appellate jurisdiction of the Supreme Court and power of superintendence of the High Court are excluded under Articles 136(2) and 227(4) respectively in respect of the Armed Forces, the Supreme Court under Article 32 and the High Courts under Article 226 have the power of judicial review in respect of proceedings of courts martial and the proceedings subsequent thereto and can grant appropriate relief if the said proceedings have resulted in denial of the fundamental rights guaranteed under Part III of the Constitution or if the said proceedings suffer from a jurisdictional error or any error of law apparent on the face of the record. (Para 42)

(5) A person aggrieved by the finding or sentence of a court martial has no right to make a representation before the confirmation of the same by the confirming authority. Insofar as the finding and sentence of the court martial is concerned the only remedy that is available to a person aggrieved by the same is under sub-section (2) and the said remedy can be invoked only after the finding or sentence has been confirmed by the confirming authority and not before the confirmation of the same. Rule 147 of the Army Rules also lends support to this view. Hence the appellant cannot make a grievance about non-supply of the copies of the proceedings of the court martial and consequent denial of his right to make a representation to the confirming authority against the findings and sentence of the court martial before the confirmation of the said finding and sentence. However, in case such a representation is made by a person aggrieved by the finding or sentence of a court martial it is expected that the confirming authority shall give due consideration to the same while confirming the finding and sentence of the court martial. (Para 53)

In the present case the representation submitted by the appellant to the confirming authority was not considered by the confirming authority when it passed the order of confirmation. It appears that due to some communication

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gap within the department the representation submitted by the appellant did not reach the confirming authority till the passing of the order of confirmation. Since the appellant had no legal right to make a representation at that stage the non-consideration of the same by the confirming authority before the passing of the order of confirmation would not vitiate the said order. (Para 54)

(6) In the present case out of the three charges levelled against the appellant, the second charge was by way of alternative to the first charge. The appellant could be held guilty of either of these charges and he could not be guilty of both the charges at the same time. Since the appellant had been found guilty of the first charge he was acquitted of the second charge. There is, therefore, no infirmity in the court martial having found the appellant guilty of the first charge while holding him not guilty of the second charge. (Para 55)

On the facts it cannot be said that the findings recorded by the court martial on the three charges against the appellant were based on no evidence and were perverse. (Paras 57 to 59)

Appeal dismissed R-M/10166/CRLA

Advocates who appeared in this case :

A.K. Ganguli, Senior Advocate (A. Sharan, Advocate, with him) for the Appellant;
Kapil Sibal, Additional Solicitor General (Raju Ramachandran, Rajeev Dhavan, C.V. Subba Rao and Ms Sushma Suri, Advocates, with him) for the Respondents.
T. Prasad, Advocate, for the Secretary, Ministry of Defence.

The Judgment of the Court was delivered by

S.C. AGRAWAL, J.— This appeal, by special leave, is directed against the order dated August 12, 1981, passed by the High Court of Delhi dismissing the writ petition filed by the appellant. In the writ petition the appellant had challenged the validity of the finding and the sentence recorded by the General Court Martial on November 29, 1978, the order dated May 11, 1979, passed by the Chief of Army Staff confirming the findings and the sentence recorded by the General Court Martial and the order dated May 6, 1980, passed by the Central Government dismissing the petition filed by the appellant under Section 164(2) of the Army Act, 1950 (hereinafter referred to as 'the Act').

2. The appellant held a permanent commission, as an officer, in the regular army and was holding the substantive rank of Captain. He was officiating as a Major. On December 27, 1974, the appellant took over as the Officer Commanding of 38 Coy ASC(Sup) Type 'A' attached to the Military Hospital, Jhansi. In August 1975, the appellant had gone to attend a training course and he returned in the first week of November 1975. In his absence Captain G.C. Chhabra was the officer commanding the unit of the appellant. During this period Captain Chhabra submitted a Contingent Bill dated September 25, 1975 for Rs 16,280 for winter liveries of the depot civilian chowkidars and sweepers. The said Contingent Bill was returned by the Controller of Defence Accounts (CDA) Meerut with certain objections. Thereupon the appellant submitted a

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fresh Contingent Bill dated December 25, 1975 for a sum of Rs 7029.57. In view of the difference in the amounts mentioned in the two Contingent Bills, the CDA reported the matter to the headquarters for investigation and a Court of Enquiry blamed the appellant for certain lapses.

3. The said report of the Court of Enquiry was considered by the General Officer Commanding, M.P., Bihar and Orissa Area, who, on January 7, 1977 recommended that 'severe displeasure' (to be recorded) of the General Officer Commanding-in-Chief of the Central Command be awarded to the appellant. The General Officer Commanding-in-Chief, Central Command did not agree with the said opinion and by order dated August 26, 1977, directed the disciplinary action be taken against the appellant for the lapses.

4. In view of the aforesaid order passed by the General Officer Commanding-in-Chief, Central Command, a charge-sheet dated July 20, 1978, containing three charges was served on the appellant and it was directed that he be tried by General Court Martial. The first charge was in respect of the offence under Section 52(*f*) of the Act, i.e. doing a thing with intent to defraud, the second charge was alternative to the first charge and was in respect of offence under Section 63 of the Act, i.e. committing an act prejudicial to good order and military discipline and the third charge was also in respect of offence under Section 63 of the Act.

5. The appellant pleaded not guilty to the charges. The prosecution examined 22 witnesses to prove the charges. The General Court Martial, on November 29, 1978, found the appellant not guilty of the second charge but found him guilty of the first and the third charge and awarded the sentence of dismissal from service. The appellant submitted a petition dated December 18, 1978, to the Chief of Army Staff wherein he prayed that the findings and the sentence of the General Court Martial be not confirmed. The findings and sentence of the General Court Martial were confirmed by the Chief of the Army Staff by his order dated May 11, 1979. The appellant, thereafter, submitted a post-confirmation petition under Section 164(2) of the Act. The said petition of the appellant was rejected by the Central Government by order dated May 6, 1980. The appellant thereupon filed the writ petition in the High Court of Delhi. The said writ petition was dismissed, in limine, by the High Court by order dated August 12, 1981. The appellant approached this Court for grant of special leave to appeal against the said order of the Delhi High Court. By order dated January 24, 1984, special leave to appeal was granted by this Court. By the said order it was directed that the appeal be listed for final hearing before the Constitution Bench. The

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said order does not indicate the reason why the appeal was directed to be heard by the Constitution Bench. The learned counsel for the appellant has stated that this direction has been given by this Court for the reason that the appeal involves the question as to whether it was incumbent for the Chief of the Army Staff, while confirming the findings and the sentence of the General Court Martial, and for the Central Government, while rejecting the post-confirmation petition of the appellant, to record their reasons for the orders passed by them. We propose to deal with this question first.

6. It may be mentioned that this question has been considered by this Court in *Som Datt Datta* v. *Union of India*[1]. In that case it was contended before this Court that the order of the Chief of Army Staff confirming the proceedings of the court martial under Section 164 of the Act was illegal since no reason had been given in support of the order by the Chief of the Army Staff and that the Central Government had also not given any reasons while dismissing the appeal of the petitioner in that case under Section 165 of the Act and that the order of the Central Government was also illegal. This contention was negatived. After referring to the provisions contained in Sections 164, 165 and 162 of the Act this Court pointed out that while Section 162 of the Act expressly provides that the Chief of Army Staff may "for reasons based on the merits of the case" set aside the proceedings or reduce the sentence to any other sentence which the court might have passed, there is no express obligation imposed by Sections 164 and 165 of the Act on the confirming authority or upon the Central Government to give reasons in support of its decision to confirm the proceedings of the court martial. This Court observed that no other section of the Act or any of the rules made therein had been brought to its notice from which necessary implication can be drawn that such a duty is cast upon the Central Government or upon the confirming authority. This Court did not accept the contention that apart from any requirement imposed by the statute or statutory rule either expressly or by necessary implication, there is a general principle or a rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision.

7. Shri A.K. Ganguli has urged that the decision of this Court in *Som Datt Datta case*[1] to the extent it holds that there is no general principle or rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision needs reconsideration inasmuch as it is not in consonance with the other decisions of this Court. In support of this submission Shri Ganguli has placed reliance on the decisions of this Court in *Bhagat Raja* v. *Union of India*[2], *Mahabir Prasad*

1 (1969) 2 SCR 177 : AIR 1969 SC 414 : 1969 Cri LJ 663
2 (1967) 3 SCR 302 : AIR 1967 SC 1606

Santosh Kumar v. *State of U.P.*[3], *Woolcombers of India Ltd.* v. *Woolcombers Workers Union*[4] and *Siemens Engineering & Manufacturing Co. of India Limited* v. *Union of India*[5].

8. The learned Additional Solicitor General has refuted the said submission of Shri Ganguli and has submitted that there is no requirement in law that reasons be given by the confirming authority while confirming the finding or sentence of the court martial or by the Central Government while dealing with the post-confirmation petition submitted under Section 164 of the Act and that the decision of this Court in *Som Datt Datta case*[1] in this regard does not call for reconsideration.

9. The question under consideration can be divided into two parts :

(*i*) Is there any general principle of law which requires an administrative authority to record the reasons for its decision ; and

(*ii*) If so, does the said principle apply to an order confirming the findings and sentence of a court martial and post-confirmation proceedings under the Act?

10. On the first part of the question there is divergence of opinion in the common law countries. The legal position in the United States is different from that in other common law countries.

11. In the United States the courts have insisted upon recording of reasons for its decision by an administrative authority on the premise that the authority should give clear indication that it has exercised the discretion with which it has been empowered because "administrative process will best be vindicated by clarity in its exercise". (*Phelps Dodge Corporation* v. *National Labour Relations Board*[6].) The said requirement of recording of reasons has also been justified on the basis that such a decision is subject to judicial review and "the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review" and that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained". (*Securities and Exchange Commission* v. *Chenery Corporation*[7].) In *John T. Dunlop* v. *Walter Bachowski*[8] it has been observed that a statement of reasons serves purposes other than judicial review inasmuch as the reasons promotes thought by the authority and compels it to cover the relevant points and eschew irrelevancies and assures careful administrative consideration. The Federal Administrative Procedure Act, 1946 which pres-

3 (1970) 1 SCC 764 : (1971) 1 SCR 201
4 (1974) 3 SCC 318 : 1974 SCC (L&S) 551 : (1974) 1 SCR 504
5 (1976) 2 SCC 981 : 1976 Supp SCR 489
6 (1940) 85 L ed 1271, 1284
7 (1942) 87 L ed 626, 636
8 (1975) 44 L ed 2d 377

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cribed the basic procedural principles which are to govern formal administrative procedures contained an express provision [Section 8(*b*)] to the effect that all decisions shall indicate a statement of findings and conclusions as well as reasons or basis therefor upon all the material issues of fact, law or discretion presented on the record. The said provision is now contained in Section 557(*c*) of Title 5 of the United States Code (1982 edition). Similar provision is contained in the State statutes.

12. In England the position at common law is that there is no requirement that reasons should be given for its decision by the administrative authority. (See : *Regina* v. *Gaming Board for Great Britain, Ex parte Benaim and Khaida*[9] and *McInnes* v. *Onslow-Fane*[10].) There are, however, observations in some judgments wherein the importance of reasons has been emphasised. In his dissenting judgment in *Breen* v. *Amalgamated Engineering Union*[11] Lord Denning M.R., has observed that "the giving of reasons is one of the fundamentals of good administration."

13. In *Alexander Machinery (Dudley) Ltd.* v. *Crabtree*[12] Sir John Donaldson, as President of the National Industrial Relations Court, has observed that "failure to give reasons amounts to a denial of justice".

14. In *Regina* v. *Immigration Appeal Tribunal Ex parte Khan (Mahmud)*[13] Lord Lane, C.J. while expressing his reservation on the proposition that any failure to give reasons means a denial of justice, has observed : (QB p. 794)

> "A party appearing before a tribunal is entitled to know, either expressly stated by the tribunal or inferentially stated, what it is to which the tribunal is addressing its mind."

15. The Committee on Ministers' Powers (Donoughmore Committee) in its report submitted in 1932, recommended that "any party affected by a decision should be informed of the reasons on which the decision is based" and that "such a decision should be in the form of a reasoned document available to the parties affected". (p. 100) The Committee on Administrative Tribunals and Enquiries (Franks Committee) in its report submitted in 1957 recommended that "decisions of tribunals should be reasoned and as full as possible". The said Committee has observed : (para 98)

> "Almost all witnesses have advocated the giving of reasoned decisions by tribunals. We are convinced that if tribunal proceedings are to be fair to the citizen reasons should be given to the fullest

9 (1970) 2 QB 417, 413 : (1970) 2 All ER 528
10 (1978) 1 WLR 1520, 1531 : (1978) 3 All ER 211
11 (1971) 2 QB 175, 191: (1971) 1 All ER 1148
12 1974 ICR 120
13 1983 QB 790 : (1983) 2 All ER 420

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practicable extent. A decision is apt to be better if the reasons for it have to be set out in writing because the reasons are then more likely to have been properly thought out. Further, a reasoned decision is essential in order that, where there is a right of appeal, the applicant can assess whether he has good grounds of appeal and know the case he will have to meet if he decides to appeal."

16. The recommendations of the Donoughmore Committee and the Franks Committee led to the enactment of the Tribunals and Enquiries Act, 1958 in United Kingdom. Section 12 of that Act prescribed that it shall be the duty of the tribunal or Minister to furnish a statement, either written or oral, of the reasons for the decision if requested, on or before the giving of notification of the decision to support the decision. The said Act has been replaced by the Tribunals and Enquiries Act, 1971 which contains a similar provision in Section 12. This requirement is, however, confined, in its applications to tribunals and statutory authorities specified in Schedule I to the said enactment. In respect of the tribunals and authorities which are not covered by the aforesaid enactment, the position, as prevails at common law, applies. The Committee of Justice in its Report, *Administration under Law*, submitted in 1971, has expressed the view :

> "No single factor has inhibited the development of English administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions."

17. The law in Canada appears to be the same as in England. In *Pure Spring Co. Ltd.* v. *Minister of National Revenue*[14] it was held that when a Minister makes a determination in his discretion he is not required by law to give any reasons for such a determination. In some recent decisions, however, the courts have recognised that in certain situations there would be an implied duty to state the reasons or grounds for a decision. (See : *Re R.D.R. Construction Ltd. and Rent Review Commission*[15] and *Re Yarmouth Housing Ltd. and Rent Review Commission*[16].) In the Province of Ontario the Statutory Powers Procedure Act, 1971 was enacted which provided that "a tribunal shall give its final decision, if any, in any proceedings in writing and shall give reasons in writing therefor if requested by a party". (Section 17) The said Act has now been replaced by the Statutory Powers and Procedure Act, 1980, which contains a similar provision.

18. The position at common law is no different in Australia. The Court of Appeal of the Supreme Court of New South Wales in *Osmond* v. *Public Service Board of New South Wales*[17] had held that the common

14 (1947) 1 DLR 501, 539
15 (1983) 139 DLR (3d) 168
16 (1983) 139 DLR (3d) 544
17 (1985) 3 NSW LR 447

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law requires those entrusted by statute with the discretionary power to make decisions which will affect other persons to act fairly in the performance of their statutory functions and normally this will require an obligation to state the reasons for their decisions. The said decision was overruled by the High Court of Australia in *Public Service Board of New South Wales* v. *Osmond*[18] and it has been held that there is no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion and which may adversely affect the interests or defeat the legitimate or reasonable expectations, of other persons. Gibbs, C.J. in his leading judgment, has expressed the view that "the rules of natural justice are designed to ensure fairness in the making of a decision and it is difficult to see how the fairness of an administrative decision can be affected by what is done after the decision has been made". The learned Chief Justice has, however, observed that "even assuming that in special circumstances natural justice may require reasons to be given, the present case is not such a case". (p. 568) Deane J., gave a concurring judgment, wherein after stating that "the exercise of a decision-making power in a way which adversely affects others is less likely to be, or appear to be, arbitrary if the decision maker formulates and provides reasons for his decision", the learned Judge has proceeded to hold that "the stage has not been reached in this country where it is a general prima facie requirement of the common law rules of natural justice or procedural fair play that the administrative decision maker, having extended to persons who might be adversely affected by a decision an adequate opportunity of being heard, is bound to furnish reasons for the exercise of a statutory decision-making power". (p. 572). The learned Judge has further observed that the common law rules of natural justice or procedural fair play are neither standardized nor immutable and that their content may vary with changes in contemporary practice and standards. In view of the statutory developments that have taken place in other countries to which reference was made by the Court of Appeal, Deane J. has observed that the said developments "are conducive to an environment within which the courts should be less reluctant than they would have been in times past to discern in statutory provisions a legislative intent that the particular decision maker should be under a duty to give reasons". (p. 573)

19. This position at common law has been altered by the Commonwealth Administrative Decisions (Judicial Review) Act, 1977. Section 13 of the said Act enables a person who is entitled to apply for review of the decision before the Federal Court to request the decision

18 (1986) 63 ALR 559

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maker to furnish him with a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision and on such a request being made the decision maker has to prepare the statement and furnish it to the persons who made the request as soon as practicable and in any event within 28 days. The provisions of this Act are not applicable to the classes of decisions mentioned in Schedule I to the Act. A similar duty to give reasons has also been imposed by Sections 28 and 37 of the Commonwealth Administrative Appeals Tribunal Act, 1975.

20. In India the matter was considered by the Law Commission in the Fourteenth Report relating to reform in Judicial Administration. The Law Commission recommended : (Vol. II, p. 694)

> "In the case of administrative decisions provision should be made that they should be accompanied by reasons. The reasons will make it possible to test the validity of these decisions by the machinery of appropriate writs."

21. No law has, however, been enacted in pursuance of these recommendations, imposing a general duty to record the reasons for its decision by an administrative authority though the requirement to give reasons is found in some statutes.

22. The question as to whether an administrative authority should record the reasons for its decision has come up for consideration before this Court in a number of cases.

23. In *Harinagar Sugar Mills Ltd.* v. *Shyam Sundar Jhunjhunwala*[19] a Constitution Bench of this Court, while dealing with an order passed by the Central Government in exercise of its appellate powers under Section 111(3) of the Companies Act, 1956 in the matter of refusal by a company to register the transfer of shares, has held that there was no proper trial of the appeals before the Central Government since no reasons had been given in support of the order passed by the Deputy Secretary who heard the appeals. In that case it has been observed : (SCR p. 357)

> "If the Central Government acts as a tribunal exercising judicial powers and the exercise of that power is subject to the jurisdiction of this Court under Article 136 of the Constitution, we fail to see how the power of this Court can be effectively exercised if reasons are not given by the Central Government in support of its order."

24. In *Madhya Pradesh Industries Ltd.* v. *Union of India*[20] the order passed by the Central Government dismissing the revision petition under

19 (1962) 2 SCR 339 : AIR 1961 SC 1669 : (1961) 31 Comp Cas 387
20 (1966) 1 SCR 466 : AIR 1966 SC 671

Rule 55 of the Mineral Concession Rules, 1960, was challenged before this Court on the ground that it did not contain reasons. Bachawat, J., speaking for himself and Mudholkar, J., rejected this contention on the view that the reason for rejecting the revision application appeared on the face of the order because the Central Government had agreed with the reasons given by the State Government in its order. The learned Judges did not agree with the submission that omission to give reasons for the decision is of itself a sufficient ground for quashing it and held that for the purpose of an appeal under Article 136 orders of courts and tribunals stand on the same footing. The learned Judges pointed out that an order of court dismissing a revision application often gives no reasons but this is not a sufficient ground for quashing it and likewise an order of an administrative tribunal rejecting a revision application cannot be pronounced to be invalid on the sole ground that it does not give reasons for the rejection. The decision in *Harinagar Sugar Mills case*[19] was distinguished on the ground that in that case the Central Government had reversed the decision appealed against without giving any reasons and the record did not disclose any apparent ground for the reversal. According to the learned Judges there is a vital difference between an order of reversal and an order of affirmance. Subba Rao, J., as he then was, did not concur with this view and found that the order of the Central Government was vitiated as it did not disclose any reasons for rejecting the revision application. The learned Judge has observed : (SCR pp. 472-73)

> "In the context of a welfare State, administrative tribunals have come to stay. Indeed, they are the necessary concomitants of a welfare State. But arbitrariness in their functioning destroys the concept of a welfare State itself. Self-discipline and supervision exclude or at any rate minimize arbitrariness. The least a tribunal can do is to disclose its mind. The compulsion of disclosure guarantees consideration. The condition to give reasons introduces clarity and excludes or at any rate minimizes arbitrariness; it gives satisfaction to the party against whom the order is made; and it also enables an appellate or supervisory court to keep the tribunals within bounds. A reasoned order is a desirable condition of judicial disposal."
>
> "...If tribunals can make orders without giving reasons, the said power in the hands of unscrupulous or dishonest officers may turn out to be a potent weapon for abuses of power. But, if reasons for an order are given, it will be an effective restraint on such abuse, as the order, if it discloses extraneous or irrelevant considerations, will be subject to judicial scrutiny and correction. A speaking order will at its best be a reasonable and at its worst be at least a plausible one. The public should not be deprived of this only safeguard."
>
> "...There is an essential distinction between a court and an administrative tribunal. A Judge is trained to look at things objec-

> tively, uninfluenced by considerations of policy or expediency ; but, an executive officer generally looks at things from the standpoint of policy and expediency. The habit of mind of an executive officer so formed cannot be expected to change from function to function or from act to act. So it is essential that some restrictions shall be imposed on tribunals in the matter of passing orders affecting the rights of parties ; and the least they should do is to give reasons for their orders. Even in the case of appellate courts invariably reasons are given, except when they dismiss an appeal or revision in limine and that is because the appellate or revisional court agrees with the reasoned judgment of the subordinate court or there are no legally permissible grounds to interfere with it. But the same reasoning cannot apply to an appellate tribunal, for as often as not the order of the first tribunal is laconic and does not give any reasons."

25. With reference to an order of affirmance the learned Judge observed that where the original tribunal gives reasons, the appellate tribunal may dismiss the appeal or the revision, as the case may be, agreeing with those reasons and that what is essential is that reasons shall be given by an appellate or revisional tribunal expressly or by reference to those given by the original tribunal.

26. This matter was considered by a Constitution Bench of this Court in *Bhagat Raja case*[2] where also the order under challenge had been passed by the Central Government in exercise of its revisional powers under Section 30 of the Mines and Minerals (Regulation and Development) Act, 1957 read with Rules 54 and 55 of the Mineral Concession Rules, 1960. Dealing with the question as to whether it was incumbent on the Central Government to give any reasons for its decision on review this Court has observed : (SCR p. 309)

> "The decisions of tribunals in India are subject to the supervisory powers of the High Courts under Article 227 of the Constitution and of appellate powers of this Court under Article 136. It goes without saying that both the High Court and this Court are placed under a great disadvantage if no reasons are given and the revision is dismissed curtly by the use of the single word "rejected", or "dismissed". In such a case, this Court can probably only exercise its appellate jurisdiction satisfactorily by examining the entire records of the case and after giving a hearing come to its conclusion on the merits of the appeal. This will certainly be a very unsatisfactory method of dealing with the appeal."

27. This Court has referred to the decision in *Madhya Pradesh Industries case*[20] and the observations of Subba Rao, J., referred to above, in that decision have been quoted with approval. After taking note of the observations of Bachawat, J. in that case, the learned Judges have held : (SCR p. 315)

"After all a tribunal which exercises judicial or quasi-judicial powers can certainly indicate its mind as to why it acts in a particular way and when important rights of parties of far-reaching consequence to them are adjudicated upon in a summary fashion, without giving a personal hearing where proposals and counter-proposals are made and examined, the least that can be expected is that the tribunal should tell the party why the decision is going against him in all cases where the law gives a further right of appeal."

28. Reference has already been made to *Som Datt Datta case*[1] wherein a Constitution Bench of this Court has held that the confirming authority, while confirming the findings and sentence of a court martial, and the Central Government, while dealing with an appeal under Section 165 of the Act, are not required to record the reasons for their decision and it has been observed that apart from any requirement imposed by the statute or statutory rule either expressly or by necessary implication, it could not be said that there is any general principle or any rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision. In that case the court was primarily concerned with the interpretation of the provisions of Act and the Army Rules, 1954. There is no reference to the earlier decisions in *Harinagar Sugar Mills case*[19] and *Bhagat Raja case*[2] wherein the duty to record reasons was imposed in view of the appellate jurisdiction of this Court and the supervisory jurisdiction of the High Court under Articles 136 and 227 of the Constitution of India respectively.

29. In *Travancore Rayon Ltd.* v. *Union of India*[21] this Court has observed: (SCR p. 46 : SCC p. 874, para 11)

"The court insists upon disclosure of reasons in support of the order on two grounds : one, that the party aggrieved in a proceeding before the High Court or this Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous ; the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power."

30. In *Mahabir Prasad Santosh Kumar* v. *State of U.P.*[3] the District Magistrate had cancelled the licence granted under the U.P. Sugar Dealers' Licensing Order, 1962 without giving any reason and the State Government had dismissed the appeal against the said order of the District Magistrate without recording the reasons. This Court has held: (SCR pp. 204-05 : SCC p. 768, paras 6 and 7)

"The practice of the executive authority dismissing statutory appeals against orders which prima facie seriously prejudice the

21 (1969) 3 SCC 868 : (1970) 3 SCR 40

rights of the aggrieved party without giving reasons is a negation of the rule of law.

"Recording of reasons in support of a decision on a disputed claim by a quasi-judicial authority ensures that the decision is reached according to law and is not the result of caprice, whim or fancy or reached on grounds of policy or expediency. A party to the dispute is ordinarily entitled to know the grounds on which the authority has rejected his claim. If the order is subject to appeal, the necessity to record reasons is greater, for without recorded reasons the appellate authority has no material on which it may determine whether the facts were properly ascertained, the relevant law was correctly applied and the decision was just."

31. In *Woolcombers of India Ltd. case*[4] this Court was dealing with an award of an Industrial Tribunal. It was found that the award stated only the conclusions and it did not give the supporting reasons. This Court has observed: (SCR p. 507: SCC pp. 320-21, para 5)

"The giving of reasons in support of their conclusions by judicial and quasi-judicial authorities when exercising initial jurisdiction is essential for various reasons. First, it is calculated to prevent unconscious unfairness or arbitrariness in reaching the conclusions. The very search for reasons will put the authority on the alert and minimise the chances of unconscious infiltration of personal bias or unfairness in the conclusion. The authority will adduce reasons which will be regarded as fair and legitimate by a reasonable man and will discard irrelevant or extraneous considerations. Second, it is a well known principle that justice should not only be done but should also appear to be done. Unreasoned conclusions may be just but they may not appear to be just to those who read them. Reasoned conclusions, on the other hand, will have also the appearance of justice. Third, it should be remembered that an appeal generally lies from the decision of judicial and quasi-judicial authorities to this Court by special leave granted under Article 136. A judgment which does not disclose the reasons, will be of little assistance to the court."

32. In *Siemens Engineering & Manufacturing Co. of India Limited case*[5] this Court was dealing with an appeal against the order of the Central Government on a revision application under the Sea Customs Act, 1878. This Court has laid down : (SCR pp. 495-96 : SCC pp. 986-87, para 6)

"It is now settled law that where an authority makes an order in exercise of a quasi-judicial function, it must record its reasons in support of the order it makes. Every quasi-judicial order must be supported by reasons... If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with

the proliferation of administrative law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law."

33. *Tara Chand Khatri* v. *Municipal Corporation of Delhi*[22] was a case where an inquiry was conducted into charges of misconduct and the disciplinary authority, agreeing with the findings of the Inquiry Officer, had imposed the penalty of dismissal. The said order of dismissal was challenged on the ground that the disciplinary authority had not given its reasons for passing the order. The said contention was negatived by this Court and distinction was drawn between an order of affirmance and an order of reversal. It was observed : (SCR p. 208 : SCC p. 480, para 19)

> "....while it may be necessary for a disciplinary or administrative authority exercising quasi-judicial functions to state the reasons in support of its order if it differs from the conclusions arrived at and the recommendations made by the enquiring officer in view of the scheme of a particular enactment or the rules made thereunder, it would be laying down the proposition too broadly to say that even an ordinary concurrence must be supported by reasons."

34. In *Raipur Development Authority* v. *Chokhamal Contractors*[23] a Constitution Bench of this Court was considering the question whether it is obligatory for an arbitrator under the Arbitration Act, 1940 to give reasons for the award. It was argued that the requirement of giving reasons for the decision is a part of the rules of natural justice which are also applicable to the award of an arbitrator and reliance was placed on the decisions in *Bhagat Raja case*[2] and *Siemens Engineering Co. case*[5]. The said contention was rejected by this Court. After referring to the decisions in *Bhagat Raja case*[2], *Som Datt Datta case*[1] and *Siemens Engineering Co. case*[5] this Court has observed : (SCC pp. 751-52, para 35)

> "It is no doubt true that in the decisions pertaining to administrative law, this Court in some cases has observed that the giving of reasons in an administrative decision is a rule of natural justice by an extension of the prevailing rules. It would be in the interest of the

22 (1977) 1 SCC 472 : 1977 SCC (L&S) 151 : (1972) 2 SCR 198
23 (1989) 2 SCC 721

world of commerce that the said rule is confined to the area of administrative law... But at the same time it has to be borne in mind that what applies generally to settlement of disputes by authorities governed by public law need not be extended to all cases arising under private law such as those arising under the law of arbitration which is intended for settlement of private disputes."

35. The decisions of this Court referred to above indicate that with regard to the requirement to record reasons the approach of this Court is more in line with that of the American courts. An important consideration which has weighed with the court for holding that an administrative authority exercising quasi-judicial functions must record the reasons for its decision, is that such a decision is subject to the appellate jurisdiction of this Court under Article 136 of the Constitution as well as the supervisory jurisdiction of the High Courts under Article 227 of the Constitution and that the reasons, if recorded, would enable this Court or the High Courts to effectively exercise the appellate or supervisory power. But this is not the sole consideration. The other considerations which have also weighed with the Court in taking this view are that the requirement of recording reasons would (*i*) guarantee consideration by the authority; (*ii*) introduce clarity in the decisions ; and (*iii*) minimise chances of arbitrariness in decision-making. In this regard a distinction has been drawn between ordinary courts of law and tribunals and authorities exercising judicial functions on the ground that a Judge is trained to look at things objectively uninfluenced by considerations of policy or expediency whereas an executive officer generally looks at things from the standpoint of policy and expediency.

36. Reasons, when recorded by an administrative authority in an order passed by it while exercising quasi-judicial functions, would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But the other considerations, referred to above, which have also weighed with this Court in holding that an administrative authority must record reasons for its decision, are of no less significance. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. In our opinion, therefore, the requirement that reasons be recorded should govern the decisions of an administrative authority exercising quasi-judicial functions irrespective of the fact whether the decision is subject to appeal, revision or judicial review. It may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a court of law. The extent and nature of

the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge.

37. Having considered the rationale for the requirement to record the reasons for the decision of an administrative authority exercising quasi-judicial functions we may now examine the legal basis for imposing this obligation. While considering this aspect the Donoughmore Committee observed that it may well be argued that there is a third principle of natural justice, namely, that a party is entitled to know the reason for the decision, be it judicial or quasi-judicial. The Committee expressed the opinion that "there are some cases where the refusal to give grounds for a decision may be plainly unfair ; and this may be so, even when the decision is final and no further proceedings are open to the disappointed party by way of appeal or otherwise" and that "where further proceedings are open to a disappointed party, it is contrary to natural justice that the silence of the Minister or the Ministerial Tribunal should deprive them of the opportunity". (p. 80) Prof. H.W.R. Wade has also expressed the view that "natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice". (See Wade, *Administrative Law,* 6th edn. p. 548.) In *Siemens Engineering Co. case*[5] this Court has taken the same view when it observed that "the rule requiring reasons to be given in support of an order is, like the principles of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process". This decision proceeds on the basis that the two well known principles of natural justice, namely (*i*) that no man should be a judge in his own cause, and (*ii*) that no person should be judged without a hearing, are not exhaustive and that in addition to these two principles there may be rules which seek to ensure fairness in the process of decision-making and can be regarded as part of the principles of natural justice. This view is in consonance with the law laid down by this Court in *A.K. Kraipak* v. *Union of India*[24] wherein it has been held : (SCR pp. 468-69 : SCC p. 272, para 20)

> "The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely : (*i*) no one shall be a judge in his own cause (*nemo debet esse judex propria causa*), and (*ii*) no decision shall be given against a party without affording him a reasonable hearing

24 (1969) 2 SCC 262 : (1970) 1 SCR 457

(*audi alteram partem*). Very soon thereafter a third rule was envisaged and that is that *quasi*-judicial enquiries must he held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice."

38. A similar trend is discernible in the decisions of English courts wherein it has been held that natural justice demands that the decision should be based on some evidence of probative value. (See : *R.* v. *Deputy Industrial Injuries Commissioner ex p. Moore*[25] ; *Mahon* v. *Air New Zealand Ltd.*[26])

39. The object underlying the rules of natural justice "is to prevent miscarriage of justice" and secure "fair play in action". As pointed out earlier the requirement about recording of reasons for its decision by an administrative authority exercising quasi-judicial functions achieves this object by excluding chances of arbitrariness and ensuring a degree of fairness in the process of decision-making. Keeping in view the expanding horizon of the principles of natural justice, we are of the opinion, that the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities. The rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework whereunder jurisdiction has been conferred on the administrative authority. With regard to the exercise of a particular power by an administrative authority including exercise of judicial or quasi-judicial functions the legislature, while conferring the said power, may feel that it would not be in the larger public interest that the reasons for the order passed by the administrative authority be recorded in the order and be communicated to the aggrieved party and it may dispense with such a requirement. It may do so by making an express provision to that effect as those contained in the Administrative Procedure Act, 1946 of U.S.A. and the Administrative Decisions (Judicial Review) Act, 1977 of Australia whereby the orders passed by certain specified authorities are excluded from the ambit of the enactment. Such an exclusion can also arise by necessary implication from the nature of the subject matter, the scheme and the provisions of the enactment. The public interest underlying such a provision would outweigh the salutary purpose served by the requirement to record the reasons. The said requirement cannot, therefore, be insisted upon in such a case.

40. For the reasons aforesaid, it must be concluded that except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions is required to record the reasons for its decision.

25 (1965) 1 QB 456 : (1965) 1 All ER 81
26 1984 AC 648 : (1984) 3 All ER 201

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41. We may now come to the second part of the question, namely, whether the confirming authority is required to record its reasons for confirming the finding and sentence of the court martial and the Central Government or the competent authority entitled to deal with the post-confirmation petition is required to record its reasons for the order passed by it on such petition. For that purpose it will be necessary to determine whether the Act or the Army Rules, 1954 (hereinafter referred to as 'the Rules') expressly or by necessary implication dispense with the requirement of recording reasons. We propose to consider this aspect in a broader perspective to include the findings and sentence of the court martial and examine whether reasons are required to be recorded at the stage of (*i*) recording of findings and sentence by the court martial ; (*ii*) confirmation of the findings and sentence of the court martial ; and (*iii*) consideration of post-confirmation petition.

42. Before referring to the relevant provisions of the Act and the Rules it may be mentioned that the Constitution contains certain special provisions in regard to members of the Armed Forces. Article 33 empowers Parliament to make law determining the extent to which any of the rights conferred by Part III shall, in their application to the members of the Armed Forces be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline amongst them. By clause (2) of Article 136 the appellate jurisdiction of this Court under Article 136 of the Constitution has been excluded in relation to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces. Similarly clause (4) of Article 227 denies to the High Courts the power of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces. This Court under Article 32 and the High Courts under Article 226 have, however, the power of judicial review in respect of proceedings of courts martial and the proceedings subsequent thereto and can grant appropriate relief if the said proceedings have resulted in denial of the fundamental rights guaranteed under Part III of the Constitution or if the said proceedings suffer from a jurisdictional error or any error of law apparent on the face of the record.

43. Reference may now be made to the provisions of the Act and the Rules which have a bearing on the requirement to record reasons for the findings and sentence of the court martial. Section 108 of the Act makes provision for four kinds of courts martial, namely, (*a*) general courts martial ; (*b*) district courts martial ; (*c*) summary general courts martial and (*d*) summary courts martial. The procedure of court martial is prescribed in Chapter XI (Sections 128 to 152) of the Act. Section 129 prescribes that every general court martial shall, and every district or

summary general court martial may, be attended by a judge-advocate, who shall be either an officer belonging to the department of the Judge-Advocate General, or if no such officer is available, an officer approved of by the Judge-Advocate General or any of his deputies. In sub-section (1) of Section 131 it is provided that subject to the provisions of sub-sections (2) and (3) every decision of a court martial shall be passed by an absolute majority of votes, and where there is an equality of votes on either the finding or the sentence, the decision shall be in favour of the accused. In sub-section (2) it is laid down that no sentence of death shall be passed by a general court martial without the concurrence of at least two-thirds of the members of the court and sub-section (3) provides that no sentence of death shall be passed by a summary general court martial without the concurrence of all the members. With regard to the procedure at trial before the general and district courts martial further provisions are made in Rules 37 to 105 of the Rules. In Rule 60 it is provided that the judge-advocate (if any) shall sum up in open court the evidence and advise the court upon the law relating to the case and that after the summing up of the judge-advocate no other address shall be allowed. Rule 61 prescribes that the court shall deliberate on its findings in closed court in the presence of the judge-advocate and the opinion of each member of the court as to the finding shall be given by word of mouth on each charge separately. Rule 62 prescribes the form, record and announcement of finding and in sub-rule (1) it is provided that the finding on every charge upon which the accused is arraigned shall be recorded and, except as provided in these rules, shall be recorded simply as a finding of "Guilty" or of "Not guilty". Sub-rule (10) of Rule 62 lays down that the finding on charge shall be announced forthwith in open court as subject to confirmation. Rule 64 lays down that in cases where the finding on any charge is guilty, the court, before deliberating on its sentence, shall, whenever possible take evidence in the matters specified in sub-rule (1) and thereafter the accused has a right to address the court thereon and in mitigation of punishment. Rule 65 makes provision for sentence and provides that the court shall award a single sentence in respect of all the offences of which the accused is found guilty, and such sentence shall be deemed to be awarded in respect of the offence in each charge and in respect of which it can be legally given, and not to be awarded in respect of any offence in a charge in respect of which it cannot be legally given. Rule 66 makes provisions for recommendation to mercy and sub-rule (1) prescribes that if the court makes a recommendation to mercy, it shall give its reasons for its recommendation. Sub-rule (1) of Rule 67 lays down that the sentence together with any recommendation to mercy and the reasons for any such recommendation will be announced forthwith in open court. The powers and duties of judge-

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advocate are prescribed in Rule 105 which, among other things, lays down that at the conclusion of the case he shall sum up the evidence and give his opinion upon the legal bearing of the case before the court proceeds to deliberate upon its finding and the court, in following the opinion of the judge-advocate on a legal point may record that it has decided in consequence of that opinion. The said rule also prescribes that the judge-advocate has, equally with the presiding officer, the duty of taking care that the accused does not suffer any disadvantage in consequence of his position as such, or of his ignorance or incapacity to examine or cross-examine witnesses or otherwise, and may, for that purpose, with the permission of the court, call witnesses and put questions to witnesses, which appear to him necessary or desirable to elicit the truth. It is further laid down that in fulfilling his duties, the judge-advocate must be careful to maintain an entirely impartial position.

44. From the provisions referred to above it is evident that the judge-advocate plays an important role during the course of trial at a general court martial and he is enjoined to maintain an impartial position. The court martial records its findings after the judge-advocate has summed up the evidence and has given his opinion upon the legal bearing of the case. The members of the court have to express their opinion as to the finding by word of mouth on each charge separately and the finding on each charge is to be recorded simply as a finding of "guilty" or of "not guilty". It is also required that the sentence should be announced forthwith in open court. Moreover Rule 66(1) requires reasons to be recorded for its recommendation in cases where the court makes a recommendation to mercy. There is no such requirement in other provisions relating to recording of findings and sentence. Rule 66(1) proceeds on the basis that there is no such requirement because if such a requirement was there it would not have been necessary to make a specific provision for recording of reasons for the recommendation to mercy. The said provisions thus negative a requirement to give reasons for its finding and sentence by the court martial and reasons are required to be recorded only in cases where the court martial makes a recommendation to mercy. In our opinion, therefore, at the stage of recording of findings and sentence the court martial is not required to record its reasons and at that stage reasons are only required for the recommendation to mercy if the court martial makes such a recommendation.

45. As regards confirmation of the findings and sentence of the court martial it may be mentioned that Section 153 of the Act lays down that no finding or sentence of a general, district or summary general, court martial shall be valid except so far as it may be confirmed as provided by the Act. Section 158 lays down that the confirming authority may while confirming the sentence of a court martial mitigate or remit

the punishment thereby awarded, or commute that punishment to any punishment lower in the scale laid down in Section 71. Section 160 empowers the confirming authority to revise the finding or sentence of the court martial and in sub-section (1) of Section 160 it is provided that on such revision, the court, if so directed by the confirming authority, may take additional evidence. The confirmation of the finding and sentence is not required in respect of summary court martial and in Section 162 it is provided that the proceedings of every summary court martial shall without delay be forwarded to the officer commanding the division or brigade within which the trial was held or to the prescribed officer; and such officer or the Chief of the Army Staff or any officer empowered in this behalf may, for reasons based on the merits of the case, but not any merely technical grounds, set aside the proceedings or reduce the sentence to any other sentence which the court might have passed. In Rule 69 it is provided that the proceedings of a general court martial shall be submitted by the judge-advocate at the trial for review to the deputy or assistant judge-advocate general of the command who shall then forward it to the confirming officer and in case of district court martial it is provided that the proceedings should be sent by the presiding officer, who must, in all cases, where the sentence is dismissal or above, seek advice of the deputy or assistant judge-advocate general of the command before confirmation. Rule 70 lays down that upon receiving the proceedings of a general or district court martial, the confirming authority may confirm or refuse confirmation or reserve confirmation for superior authority, and the confirmation, non-confirmation, or reservation shall be entered in and form part of the proceedings. Rule 71 lays down that the charge, finding and sentence, and any recommendation to mercy shall, together with the confirmation or non-confirmation of the proceedings, be promulgated in such manner as the confirming authority may direct, and if no direction is given, according to custom of the service and until promulgation has been effected, confirmation is not complete and the finding and sentence shall not be held to have been confirmed until they have been promulgated.

46. The provisions mentioned above show that confirmation of the findings and sentence of the court martial is necessary before the said finding or sentence become operative. In other words the confirmation of the findings and sentence is an integral part of the proceedings of a court martial and before the findings and sentence of a court martial are confirmed the same are examined by the deputy or assistant judge-advocate general of the command which is intended as a check on the legality and propriety of the proceedings as well as the findings and sentence of the court martial. Moreover we find that in Section 162 an express provision has been made for recording of reasons based on

merits of the case in relation to the proceedings of the summary court martial in cases where the said proceedings are set aside or the sentence is reduced and no other requirement for recording of reasons is laid down either in the Act or in the Rules in respect of proceedings for confirmation. The only inference that can be drawn from Section 162 is that reasons have to be recorded only in cases where the proceedings of a summary court martial are set aside or the sentence is reduced and not when the findings and sentence are confirmed. Section 162 thus negatives a requirement to give reasons on the part of the confirming authority while confirming the findings and sentence of a court martial and it must be held that the confirming authority is not required to record reasons while confirming the findings and sentence of the court martial.

47. With regard to post-confirmation proceedings we find that subsection (2) of Section 164 of the Act provides that any person subject to the Act who considers himself aggrieved by a finding or sentence of any court martial which has been confirmed, may present a petition to the Central Government, the Chief of the Army Staff or any prescribed officer superior in command to the one who confirmed such finding or sentence and the Central Government, the Chief of the Army Staff or other officer, as the case may be, may pass such orders thereon as it or he thinks fit. Insofar as the findings and sentence of a court martial and the proceedings for confirmation of such findings and sentence are concerned it has been found that the scheme of the Act and the Rules is such that reasons are not required to be recorded for the same. Has the legislature made a departure from the said scheme in respect of post-confirmation proceedings? There is nothing in the language of subsection (2) of Section 164 which may lend support to such an intention. Nor is there anything in the nature of post-confirmation proceedings which may require recording of reasons for an order passed on the post-confirmation petition even though reasons are not required to be recorded at the stage of recording of findings and sentence by a court martial and at the stage of confirmation of the findings and sentence of the court martial by the confirming authority. With regard to recording of reasons the considerations which apply at the stage of recording of findings and sentence by the court martial and at the stage of confirmation of findings and sentence of the court martial by the confirming authority are equally applicable at the stage of consideration of the post-confirmation petition. Since reasons are not required to be recorded at the first two stages referred to above, the said requirement cannot, in our opinion, be insisted upon at the stage of consideration of post-confirmation petition under Section 164(2) of the Act.

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48. For the reasons aforesaid it must be held that reasons are not required to be recorded for an order passed by the confirming authority confirming the findings and sentence recorded by the court martial as well as for the order passed by the Central Government dismissing the post-confirmation petition. Since we have arrived at the same conclusion as in *Som Datt Datta case*[1] the submission of Shri Ganguli that the said decision needs reconsideration cannot be accepted and is, therefore, rejected.

49. But that is not the end of the matter because even though there is no requirement to record reasons by the confirming authority while passing the order confirming the findings and sentence of the court martial or by the Central Government while passing its order on the post-confirmation petition, it is open to the person aggrieved by such an order to challenge the validity of the same before this Court under Article 32 of the Constitution or before the High Court under Article 226 of the Constitution and he can obtain appropriate relief in those proceedings.

50. We will, therefore, examine the other contentions that have been urged by Shri Ganguli in support of the appeal.

51. The first contention that has been urged by Shri Ganguli in this regard is that under sub-section (1) of Section 164 of the Act the appellant had a right to make a representation to the confirming authority before the confirmation of the findings and sentence recorded by the court martial and that the said right was denied inasmuch as the appellant was not supplied with the copies of the relevant record of the court martial to enable to him to make a complete representation and further that the representation submitted by the appellant under sub-section (1) of Section 164 was not considered by the confirming authority before it passed the order dated May 11, 1979 confirming the findings and sentence of the court martial. The learned Additional Solicitor General, on the other hand, has urged that under sub-section (1) of Section 164 no right has been conferred on a person aggrieved by the findings or sentence of a court martial to make a representation to the confirming authority before the confirmation of the said findings or sentence. The submission of learned Additional Solicitor General is that while sub-section (1) of Section 164 refers to an order passed by a court martial, sub-section (2) of Section 164 deals with the findings or sentence of a court martial and that the only right that has been conferred on a person aggrieved by the finding or sentence of a court martial is that under sub-section (2) of Section 164 and the said right is available after the finding and sentence has been confirmed by the confirming authority. We find considerable force in the aforesaid submission of learned Additional Solicitor General.

52. Section 164 of the Act provides as under :

"164. (1) Any person subject to this Act who considers himself aggrieved by any order passed by any court martial may present a petition to the officer or authority empowered to confirm any finding or sentence of such court martial and the confirming authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety of the order passed or as to the regularity of any proceeding to which the order relates.

(2) Any person subject to this Act who considers himself aggrieved by a finding or sentence of any court martial which has been confirmed, may present a petition to the Central Government, the Chief of the Army Staff or any prescribed officer superior in command to the one who confirmed such finding or sentence and the Central Government, the Chief of the Army Staff or other officer, as the case may be, may pass such orders thereon as it or he thinks fit."

53. In sub-section (1) reference is made to orders passed by a court-martial and enables a person aggrieved by an order to present a petition against the same. The said petition has to be presented to the officer or the authority empowered to confirm any finding or sentence of such court martial and the said authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety of the order or as to the regularity of any proceedings to which the order relates. Sub-section (2), on the other hand, makes specific reference to finding or sentence of a court martial and confers a right on any person feeling aggrieved by a finding or sentence of any court martial which has been confirmed, to present a petition to the Central Government, Chief of the Army Staff or any prescribed officer. The use of the expression "order" in sub-section (1) and the expression "finding or sentence" in sub-section (2) indicates that the scope of sub-section (1) and sub-section (2) is not the same and the expression "order" in sub-section (1) cannot be construed to include a "finding or sentence". In other words insofar as the finding and sentence of the court martial is concerned the only remedy that is available to a person aggrieved by the same is under sub-section (2) and the said remedy can be invoked only after the finding or sentence has been confirmed by the confirming authority and not before the confirmation of the same. Rule 147 of the Rules also lends support to this view. In the said rule it is laid down that every person tried by a court martial shall be entitled on demand, at any time after the confirmation of the finding and sentence, when such confirmation is required, and before the proceedings are destroyed, to obtain from the officer or person having the custody of the proceeding a copy thereof, including the proceedings upon revision, if any. This rule

envisages that the copies of proceedings of a court martial are to be supplied only after confirmation of the finding and sentence and that there is no right to obtain the copies of the proceedings till the finding and sentence have been confirmed. This means that the appellant cannot make a grievance about non-supply of the copies of the proceedings of the court martial and consequent denial of his right to make a representation to the confirming authority against the findings and sentence of the court martial before the confirmation of the said finding and sentence. Though a person aggrieved by the finding or sentence of a court martial has no right to make a representation before the confirmation of the same by the confirming authority, but in case such a representation is made by a person aggrieved by the finding or sentence of a court martial it is expected that the confirming authority shall give due consideration to the same while confirming the finding and sentence of the court martial.

54. In the present case the representation dated December 18, 1978 submitted by the appellant to the confirming authority was not considered by the confirming authority when it passed the order of confirmation dated May 11, 1979. According to the counter-affidavit filed on behalf of Union of India this was due to the reason that the said representation had not been received by the confirming authority till the passing of the order of confirmation. It appears that due to some communication gap within the department the representation submitted by the appellant did not reach the confirming authority till the passing of the order of confirmation. Since we have held that the appellant had no legal right to make a representation at that stage the non-consideration of the same by the confirming authority before the passing of the order of confirmation would not vitiate the said order.

55. Shri Ganguli next contended that the first and the second charge levelled against the appellant are identical in nature and since the appellant was acquitted of the second charge by the court martial his conviction for the first charge cannot be sustained. It is no doubt true that the allegations contained in the first and the second charge are practically the same. But as mentioned earlier, the second charge was by way of alternative to the first charge. The appellant could be held guilty of either of these charges and he could not be held guilty of both the charges at the same time. Since the appellant had been found guilty of the first charge he was acquitted of the second charge. There is, therefore, no infirmity in the court martial having found the appellant guilty of the first charge while holding him not guilty of the second charge.

56. Shri Ganguli has also urged that the findings recorded by the court martial on the first and third charges are perverse inasmuch as

there is no evidence to establish these charges. We find no substance in this contention.

57. The first charge was that the appellant on or about December 25, 1975, having received 60.61 meters woollen serge from M/s Ram Chandra & Brothers, Sadar Bazar, Jhansi for stitching 19 coats and 19 pants for Class IV civilian employees of his unit with intent to defraud got 19 altered ordnance pattern woollen pants issued to the said civilian employees instead of pants stitched out of the cloth received. To prove this charge the prosecution examined Ram Chander PW 1 and Triloki Nath PW 2 of M/s Ram Chandra & Brothers, Sadar Bazar, Jhansi who have deposed that 60.61 meters of woollen serge cloth was delivered by them to the appellant in his office in December 1975. The evidence of these witnesses is corroborated by B.D. Joshi, Chowkidar, PW 3, who has deposed that in the last week of December 1975, the appellant had told him in his office that cloth for their liveries had been received and they should give their measurements. As regards the alteration of 19 ordnance pattern woollen pants which were issued to the civilian employees instead of the pants stitched out of the cloth that was received, there is the evidence of N/Sub. P. Vishwambharam PW 19 who has deposed that he was called by the appellant to his office in the last week of December 1975 or the first week of January 1976 and that on reaching there he found ordnance pattern woollen pants lying by the side of the room wall next to the appellant's table and that the appellant had called Mohd. Sharif PW 15 to his office and had asked him to take out 19 woollen trousers out of the lot kept there in the office. After Mohd. Sharif had selected 19 woollen trousers the appellant told Mohd. Sharif to take away these pants for alteration and refitting. The judge-advocate, in his summing up, before the court martial, has referred to this evidence on the first charge and the court martial, in holding the appellant guilty of the first charge, has acted upon it. It cannot, therefore, be said that there is no evidence to establish the first charge levelled against the appellant and the findings recorded by the court martial in respect of the said charge is based on no evidence or is perverse.

58. The third charge, is that the appellant having come to know that Capt. Gian Chand Chhabra while officiating OC of his unit, improperly submitted wrong Contingent Bill No. 341/Q dated September 25, 1975 for Rs 16,280 omitted to initiate action against Capt. Chhabra.

59. In his summing up before the court martial the judge-advocate referred to the CDA letter M/IV/191 dated November 20, 1975 (Ex. 'CC') raising certain objections with regard to Contingent Bill No. 341/Q dated September 25, 1975 for Rs 16,280 and pointed out that the said letter was received in the unit on or about November 28, 1975 and bears

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the initials of the appellant with the aforesaid date and remark "Q Spk with details". This would show that the appellant had knowledge of the Contingent Bill on November 28, 1975. It is not the case of the appellant that he made any complaint against Captain Chhabra thereafter. It cannot, therefore, be said that the finding recorded by the court martial on the third charge is based on no evidence and is perverse.

60. In the result we find no merit in this appeal and the same is accordingly dismissed. But in the circumstances there will be no order as to costs.

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(BEFORE RANGANATH MISRA, P.B. SAWANT AND K. RAMASWAMY, JJ.)

STATE OF BIHAR AND OTHERS .. Appellants;

Versus

DR SANJAY KUMAR SINHA AND OTHERS .. Respondents.

Civil Appeal No. 3658 of 1989†, decided on November 15, 1989

Universities — Medical Colleges — Post graduate courses — Session — Courses must commence from May 2 every year — Time schedule indicated in Dr Dinesh Kumar case must be strictly followed by everyone running post graduate medical courses — Default shall be seriously viewed in future — Prospectus for admission requiring completion of house job of 12 months on or before May 31, 1989 constituted non-compliance with the order, for, if the courses of study are to commence from May 2 as directed by the Court, the last qualifying date could not have been fixed as May 31 — However, default condoned as State's mistake in fixing a date beyond the cut off date has misled a group of candidates — Estoppel

Dr Dinesh Kumar v. *Motilal Nehru Medical College, Allahabad,* (1987) 4 SCC 459, *relied on*

Dr Sanjay Kumar Sinha v. *State of Bihar,* AIR 1989 Pat 241, *party reversed*

Appeal disposed of R-M/9680/C

Advocates who appeared in this case :

Pramod Swarup, Advocate, for the Appellants;

M.C. Bhandare, Senior Advocate (A.K. Goel and Ms Gyan Sudha Misra, Advocates, with him) for the Respondents;

S.P. Kalra and Shailendra Bhardwaj, Advocates, for the All India Institute of Medical Sciences;

G.L. Sanghi, Senior Advocate (A. Sharan, Advocate, with him) for the Intervenor.

JUDGMENT

1. Special leave granted.

2. Challenge in this appeal is to the order dated March 30, 1989 made by the Ranchi Bench of the Patna High Court in a writ petition under Article 226 of the Constitution. The High Court was moved by a

† From the Judgment and Order dated March 30, 1989 of the Patna High Court in C.W.J.C. No. 334 of 1989

BEFORE THE NATIONAL GREEN

TRIBUNAL

(SOUTH ZONE)

Appeal no. 5 of 2020

Yashashvi Fish Mills and Oil Company

...Appellant

Vs

Union of India and Others

...Respondent

TYPED SET OF CITATIONS FILED ON

BEHALF OF THE APPELLANT

M/s T.K Bhaskar

Srinath Sridevan

K. Harishankar

COUNSEL FOR APPELLANTS