

Gujarat High Court

Dineshbhai Chhaganbhai Gamit vs Gujarat State Election ... on 10 February, 2021

Bench: J.B.Pardiwala, Ilesh J. Vora

C/SCA/1429/2021

CAV JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 1429 of 2021

With

R/SPECIAL CIVIL APPLICATION NO. 1860 of 2021

With

R/SPECIAL CIVIL APPLICATION NO. 1862 of 2021

With

R/SPECIAL CIVIL APPLICATION NO. 2092 of 2021

With

R/SPECIAL CIVIL APPLICATION NO. 13373 of 2020

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA

Sd/-

and

HONOURABLE MR. JUSTICE ILESH J. VORA

Sd/-

=====

1 Whether Reporters of Local Papers may be allowed YES to see the judgment ?

2 To be referred to the Reporter or not ? YES

3 Whether their Lordships wish to see the fair copy
of the judgment ? NO

4 Whether this case involves a substantial question NO

of law as to the interpretation of the Constitution of India or any order made thereunder ?

=====

DINESHBHAI CHHAGANBHAI GAMIT Versus GUJARAT STATE ELECTION COMMISSION

=====

Appearance:

MR KP CHAMPANERI for the Petitioner in SCA No.1429 of 2021 MR ANAND YAGNIK for the
Petitioner in SCA Nos.1860 & 1862 of 2021 MR CP CHAMPANERI for the Petitioner in SCA
No.2092 of 2021 MR DHARMESH GURJAR for the Petitioner in SCA No.13373 of 2020 MS
ROOPAL PATEL for the Respondent No.1.

MS MANISHA LAVKUMAR SHAH, GOVERNMENT PLEADER with MS AISHVARYA GUPTA, AGP
f o r t h e R e s p o n d e n t (s) N o . 2 - S T A T E .

=====

CORAM: HONOURABLE MR. JUSTICE J.B.PARDIWALA and HONOURABLE MR. JUSTICE
ILESH J. VORA Date : 10/02/2021 CAV JUDGMENT (PER : HONOURABLE MR. JUSTICE
J.B.PARDIWALA)

1. Since the issues raised in all the captioned writ-applications are the same, those were taken up for hearing analogously and are being disposed of by this common judgment and order.

2. In all the captioned writ-applications, the common grievance that has been voiced is with regard to the rotation of the reserved seats for the forthcoming panchayat elections in the State of Gujarat. In other words, the grievance voiced is that the State Election Commission has failed to follow the Gujarat Taluka and District Panchayats Election (Manner of Allotment of Reserved Seats by Rotation) Rules, 1994, more particularly, the (Amendment) Rules, 2015.

3. For the sake of convenience, the Special Civil Application No.1429 of 2021 is treated as the lead matter.

4. By this writ-application under Article 226 of the Constitution of India, the writ-applicant, a resident of village Hindala, Taluka Songadh, District Tapi, and a member of Scheduled Tribe, desirous of contesting in the forthcoming Tapi District Panchayat elections, has prayed for the following reliefs :

"(A) This Hon'ble Court may be pleased to issue appropriate writ, order or direction in the nature of mandamus or any other appropriate writ, order or directions and be pleased to quash and set aside the impugned order, Annexure-G, dated 09.09.2020 passed by the respondent no.1 herein and further be pleased to direct the respondent no.1 to reserve ST-4, Chimer Constituency of Tapi District Panchayat for Scheduled Tribe General.

(B) This Hon'ble Court may be pleased to issue appropriate writ, order or direction in the nature of mandamus or any other appropriate writ, order or directions and be pleased to direct the respondent no.1 to follow the procedure prescribed under rules, Annexure-A, B and D, and publish a fresh order reserving ST-4, Chimer Constituency of Tapi District Panchayat for Scheduled Tribe General in the ensuing elections.

(C) Pending admission and hearing, this Hon'ble Court may be pleased to stay the implementation, operation and execution of impugned order Annexure-G, till and pending hearing and final disposal of present petition.

(D) Be pleased to pass such other and further reliefs, as the nature and circumstances of the present case may require;"

5. The case put up by the writ-applicant may be summarised as under :

5(1) The writ-applicant is a resident and a registered voter of the Hindala village of the Songadh Taluka. The said village is a part of the 4-Chimer constituency. The said seat in the Tapi District Panchayat has been reserved for a Scheduled Tribe woman.

5(2) It is the case of the writ-applicant that the Chimer constituency is reserved for a woman of Scheduled Tribe past 20 years and no male member of Scheduled Tribe is able to contest the election from the said constituency. The writ-applicant is desirous of contesting the election from the said constituency but is unable to do so for the aforesaid reason.

5(3) It is the case of the writ-applicant that in exercise of powers conferred by sub-section (5) of Section 274 read with sub-section (5) of Section 10 and sub-section (5) of Section 11 of the Gujarat Panchayats Act, 1993 (for short, 'the Act 1993'), the Government of Gujarat has framed the rules, namely, the Gujarat Taluka and District Panchayats Election (Manner of Allotment of Reserved Seats by Rotation) Rules, 1994 (for short, 'the Rules 1994'). By Notification dated 5 th August 2015, these rules came to be amended by way of the Gujarat Taluka and District Panchayats Election (Manner of Allotment of Reserved Seats by Rotation) (Amendment), Rules, 2015.

5(4) It is the case of the writ-applicant that the provisions of the amended rules have not been followed by the State Election Commission while passing the final order of allotment of reserved seats of the Tapi District Panchayat. In other words, the allotment is contrary to the amended rules. According to the writ-applicant, the State Election Commission is empowered to prescribe the manner of allotment and rotation of seats under the provisions of Article 243-D and Article 243-T respectively of the Constitution of India for the purpose of elections of panchayats and municipalities respectively.

5(5) It is pointed out that the respondent no.1, i.e. the Gujarat State Election Commission, issued an order dated 24 th July 2020 in the form of guidelines to be followed for the purpose of allotment of reserved seats.

5(6) The Government of Gujarat, in exercise of powers conferred under sub-section (5) of Section 274 read with Section 16 of the Act 1993, framed the rules called, 'the Gujarat Taluka and District Panchayats (Delimitation of Electoral Division) Rules, 2010 (for short, 'the Rules 2010'). It is pointed that Rule 5 of the said Rules provides for the publication of a proposed order and inviting of suggestions from the general public prior to the publication of the final order in this regard.

5(7) It is the case of the writ-applicant that the Election Commission addressed a communication dated 9th September 2020 to the respondent no.2, i.e. the District Election Officer and Collector, Tapi, providing the final order prescribing the manner of allotment and reservation of seats of the Tapi District Panchayat. It is this communication which is the subject matter of challenge in the present litigation.

SUBMISSIONS ON BEHALF OF THE WRIT-APPLICANT :

6. Mr. Champaneri, the learned counsel appearing for the writ-applicant, vehemently submitted that the impugned order at Annexure-G referred to above has been issued in violation of the provisions of the Rules 2010. It is argued that the proposed order was not published and the objections, if any, from the general public were not invited. It is argued that the amended rules of 2015 have been overlooked while passing the impugned order. The manner of allotment and reservations of seats is in violation of the procedure prescribed by the Legislature and, therefore, is violative of Article 243-D of the Constitution of India.

7. Mr. Champaneri invited the attention of this Court to the averments made in paragraphs 15, 16, 17 and 18 respectively to this writ-application to demonstrate in what manner the rules with regard to the rotation of seats as amended in 2015 have not been followed. The averments are quoted as under :

"15. At this stage, it is submitted that while providing for reservation to Schedule Caste Special Serial Number for Schedule Caste is required to be followed in rotation, which is based upon the population of Schedule Caste. During the last elections held in the year 2015 seat bearing Special Serial Number SC-1 was reserved. Hence during this elections seat bearing Special Serial Number SC-2 Nizar (ST-20) is required to be reserved, which is reserved.

Excluding the above reservation, 23 seats are required to be reserved for Schedule Tribe following the separate roster of Schedule Tribe. During the elections held in the year 2015 seat bearing Special Serial Number ST-1 to ST-24 were reserved for the said category.

16. Hence during the ensuing elections onwards seat bearing Special Serial Number ST-25, 23 seats are required to be reserved. Accordingly, seats bearing ST-25, 26, 1, 2, 4, 5, 7, 8, 9, 14, 15, 16 are reserved for women of Schedule Tribe, while seats bearing ST-3, 6, 10, 11, 12, 13, 17, 18, 19, 21, 22 are reserved for General Category of Schedule Tribe. Thus, the seats are reserved for women of the Schedule Tribe without following any pattern while making reservation, which is an arbitrary action. As per the provisions of amended rules of 2015, while giving priority to women, one seat is required to be reserved for women while next seat as per the roster is required to be reserved for General Category of Schedule Tribe. Thus, the respondent no.1 has not considered the provisions of amended rules of 2015 while making reservation and hence the impugned reservation deserves to be quashed and set aside.

17. As per the amended provisions of the amended rules, women are required to be prioritized in odd numbers. Considering the roster from ST-25 and prioritizing the women in odd number ST-4, Chimer Constituency should have been reserved for Schedule Tribe General. However, it is reserved for Schedule Tribe woman. Thus, the allotment of seats is made without following the due process of law and that the same has resulted into depriving the petitioner from contesting the election, in an arbitrary manner.

18. Even otherwise, it is submitted that rotation means not only implementing successively reservation of one or the other nature from amongst Schedule Castes, Schedule Tribes, Socially and

Economically Backward Classes and women but to prescribe a manner of rotation and to follow the same. It is submitted that a bare perusal of the reservation and manner of allotment for women in the election held in the year 2015 and in the ensuing elections would suggest that no procedure has been followed while reserving the seats for women much less the procedure prescribed under rules of 1994 and/or amended rules of 2015. Further, it appears that in both the elections no roster has been followed while reserving the seats of women and that such reservation is left to the sweetwill of the political dictates. The State Election Commission has no authority to give a go-bye to the procedure prescribed in the manner of allotment and reservation of seats and hence the impugned order deserves to be quashed and set aside."

8. In such circumstances referred to above, Mr.Champaneri prays that the impugned order at AnneXure-G dated 9 th September 2020 passed by the State Election Commission be quashed and set-aside and the State Election Commission be directed to reserve the ST-4-Chimer constituency of the Tapi District Panchayat for Scheduled Tribe (General). Mr.Champaneri prays that this Court may issue an appropriate writ or direction to the respondent no.1 to follow the procedure prescribed under the Rules and publish a fresh order reserving the ST-4-Chimer constituency of the Tapi District Panchayat for Scheduled Tribe (General) in the ensuing elections.

9. Mr.Champaneri, in support of his submissions, has placed reliance on the following decisions :

(i) Election Commission of India through Secretary vs. Ashok Kumar, (2000) 8 SCC 216;

(ii) Mohanbhai Jethabhai Pariya vs. State of Gujarat, (2011) 5 GLR 4559;

(iii) Dineshbhai Palabhai Patar vs. Gujarat State Election Commission, (Special Civil Application No.19261 of 2016, decided on 23.11.2016)

10. We also heard Mr.Anand Yagnik, the learned counsel appearing for the writ-applicant in the Special Civil Application No.1860 of 2021 and the Special Civil Application No.1862 of 2021 respectively, Mr.C.P.Champaneri, the learned counsel appearing for the writ-applicant in the Special Civil Application No.2092 of 2021 and Mr.Dharmesh Gurjar, the learned counsel appearing for the writ-applicant in the Special Civil Application No.13373 of 2020.

SUBMISSIONS ON BEHALF OF THE RESPONDENT NO.1 - GUJARAT STATE ELECTION COMMISSION :

11. Ms.Roopal Patel, the learned counsel appearing for the Election Commission, has vehemently opposed this writ-application. Ms.Patel has raised a preliminary objection as regards the maintainability of this writ-application. According to Ms.Patel, this writ-application is not maintainable in view of the bar of Article 243-O of the Constitution of India. According to Ms.Patel, the dispute relates to the allotment of seats for the forthcoming elections of the Tapi District Panchayat, for which the election programme has already been notified on 23 rd January 2021. It is pointed out that the voting for the said election is to take place on 28th February 2021. It is argued that the writ-application is hit by the constitutional bar under Article 243-O of the Constitution of

India. It is argued that the validity of delimitation and allotment of seats made under Article 243-K of the Constitution of India cannot be questioned in any court. According to Ms.Patel, no election to a panchayat can be questioned on any grounds except by way of an election petition.

12. It is argued that the writ-applicant has preferred the present writ-application as he intends to contest the election from the Chimer constituency but, as the seat of the said constituency is reserved for a Scheduled Tribe woman, he is unable to contest the said election. According to Ms.Patel, the right to contest election is not a fundamental right, and in such circumstances, the writ-applicant cannot maintain a writ-application under Article 226 of the Constitution of India. It is argued that the right to contest the election is a right which flows from a statute, and as none of the fundamental rights or any other legal rights of the writ-applicant could be said to have been infringed, the present writ-application is not maintainable.

13. Ms.Patel would submit that assuming for the moment without admitting that the present writ-application is maintainable, the writ-applicant has no case on merits. According to Ms.Patel, there is no merit in the contention canvassed on behalf of the writ-applicant that the impugned order dated 9th September 2020 came to be published without inviting the objections from the general public. According to Ms.Patel, the mandate of Rule 5 of the Delimitation Rules 2010 applies only when there is a fresh delimitation or allotment of reserved seats. As there was no fresh delimitation or allotment undertaken for the ensuing elections, it was not necessary to comply with the requirement under Rule 5 of the Rules 2010.

14. Ms.Patel would argue that as per Rule 3 of the rules 1994, the general serial numbers are allotted to all the constituencies/wards constituted for the conduct of elections to the District Panchayats. As per Rules 4 and 5 thereof, the electoral division are allotted the special serial numbers based upon the population of the Scheduled Castes and Scheduled Tribes in the order of the electoral division consisting of the highest percentage of the population of the Scheduled Castes and Scheduled Tribes, as the case may be.

15. It is argued that the allotment of seats is required to be done in accordance with the special serial numbers of the entire roster consisting of the various constituencies arranged in accordance with their respective special serial numbers and need to be exhausted. Once the same is exhausted, the roster is required to be restarted from the electoral division having the highest percentage of the respective reserved category of the population. As regards the allotment/rotation of seats for the year 2015, a small note has been provided to us for the purpose of explaining how the seats have been allotted/rotated. The note reads thus :

"I. Allotment/Rotation of seats for the year 2015

(a) In the year, 2015, election was to be held for 26 seats in the Tapi District Panchayat. In consonance with the population as per the Census of 2011, one seat was reserved for a candidate belonging to Scheduled Caste, 24 seats were reserved for candidates belonging to Scheduled Tribes [12 seats: Scheduled Caste (Women) and 12 seats: Scheduled Caste] and 1 seat was reserved for candidates belonging to SEBC

category.

(b) All constituencies were first allotted General Serial Numbers from S. no. 1 to 26. (NOTE: Tapi is predominantly a tribal district) The same is evident from at pg. no. 56 of the petition.

(c) Subsequently, as per Rule 5 of the 1994 Rules, Borda constituency in Songadh Taluka was allotted special serial number: ST-1 and Chimer constituency in Songadh Taluka was allotted special serial number: ST-4 and such Special serial numbers were allotted in the order of the electoral divisions having highest percentage of the Scheduled Caste Tribe population.

(d) It should be noted that considering the chronology as specified in the 1994 Rules, one seat in ward bearing Special Serial Number, SC:1 (Nizar ward, Nizar Taluka) was allotted for Scheduled Caste candidate. Thereafter, the allotment of seats for Scheduled Caste candidates was started from the ward bearing Special Serial Number: ST-1 up until the ward bearing Special Serial Number: ST-24.

(e) It is also pertinent to note that the proviso to Rule 5 of the 1994 Rules, makes it clear that whilst allotting reserved seats by rotation in a Taluka, if more than one seat is to be allotted, the seats bearing the odd nos., i.e., 1st, 3rd and so on, shall be allotted to the woman belonging to the Scheduled Tribes. Thus, the first seat, third seat, fifth seat and so on, in each Taluka is to be allotted to a ST female candidate.

(f) A perusal of the table provided on pg. no. 56 of the petition would indicate that the following seats fall within the Songadh Taluka:

i. Borda - SC:1 - 1st Seat in Songadh Taluka (General S.no.5) ii. Aamalgudi - SC:3 - 2nd Seat in Songadh Taluka (General S.no.1) iii. Chimer - SC:4 - 3rd Seat in Songadh Taluka (General S.no.8) iv. Dhajamba - SC:6 - 4th Seat in Songadh Taluka (General S.no.9) v. Dosavda - SC:9 - 5th seat in Songadh Taluka (General S.no.11) vi. Bhimpura - SC:11 - 6th Seat in Songadh Taluka (General S.no.3) vii. Gunsada - SC:15 - 7th Seat in Songadh Taluka (General S.no.14)

(g) Therefore, considering the provisions of Rule 5 and the proviso thereto, the 1st, 3rd, 5th and 7th seats in the Songadh Taluka were allotted for ST (Women) Candidates.

II. Allotment/Rotation of seats for the year 2020-21

(a) For the election process which is underway (February, 2021), the allotment of reserved seats was notified vide notification dated 09.09.2020. Elections are to be held for 26 seats, out of which 1 seat is reserved for Scheduled Caste Candidate, 23 seats for scheduled Tribe candidates [12 seats: Scheduled Tribe (Women) and 11 seats: Scheduled Tribe] and 2 seats for candidates belonging to SEBC category [1 seat: SEBC (Woman) and 1 seat: SEBC].

(b) Considering that there has been no change in the territorial limits in the constituencies, the General and Special Serial numbers allotted for the 2015 election were continued.

(c) In the last election held in the year 2015, the seat bearing Special Serial Number - SC: 1, i.e. Nizar seat in Nizar Taluka was allotted for Scheduled caste Candidate. For the upcoming elections, the seat bearing SC:2, i.e. Veldha in Nizar Taluka has been allotted for a Scheduled Caste candidate. Thus, establishing that rotation has taken place for seats reserved to Scheduled Caste Seats.

(d) In respect of the Scheduled Tribe candidates, considering that for the 2015 election, the allotment of seats was carried out for seats bearing Special Serial Numbers, ST:1 to ST:24, this time the allotment was started from seat bearing Special Serial Number ST: 25, i.e., Valod and ST: 26, i.e., Nizar. It should be noted that considering that a full cycle of the rotation was completed, i.e. till ST: 26, the allotment was thereafter, continued from seat bearing Special Serial Number, ST:1, i.e. Borda in Songadh Taluka.

(e) It is reiterated that the proviso to Rule 5 of the 1994 Rules, makes it clear that in case of allotment of reserved seats by rotation for the district panchayat, while allotting seats in the Taluka, where more than one seat is to be allotted, the seats bearing the odd nos., i.e., 1st, 3rd and so on, shall be allotted to the woman belonging to the Scheduled Tribes.

(f) A perusal of the table provided on pg. no. 51 of the petition would indicate the following:

Special Name of Constituency Serial Number		Allotment of Seat
25	Valod (Tal: Valod)	ST (Female)
26	Nizar (Tal: Nizar)	ST (Female)
1	Borda (Tal: Songadh)	ST (Female) [1st Seat in Songadh Taluka]
2	Vadpadanesu (Tal: Ucchal)	ST (Female)
3	Aamalgudi (Tal: Songadh)	ST (Male/Female) [2nd Seat in Songadh Taluka]
4	Chimer (Tal: Songadh)	ST (Female) [3rd Seat in Songadh Taluka]
5	Baambaba (Tal: Fukarmunda)	ST (Female)
6	Dhaajamba (Tal: Songadh)	ST (Male/Female) [4th Seat in Songadh Taluka]
7	Holvan (Tal: Vyara)	ST (Female)
8	Karjvel (Tal: Vyara)	ST (Female)
9	Dosvada (Tal: Songadh)	ST (Female) [5th Seat in Songadh Taluka]
10	Mohini (Tal: Ucchal)	ST (Male/Female)
11	Bhimpura (Tal: Songadh)	ST (Male/Female) [6th Seat in Songadh Taluka]
12	Pati (Tal: Holvan)	ST (Male/Female)
13	Ketrakui (Tal: Vyara)	ST (Male/Female)

14	Ucchal (Tal: Ucchal)	ST (Female)
15	Gunsada (Tal: Songadh)	ST (Female) [7th Seat in Songadh Taluka

16. Ms.Patel, the learned counsel appearing for the State Election Commission, in support of her preliminary objection as regards the maintainability of the writ-application, has placed reliance on the following two decisions :

(i) Ismail Noormohmad Mehta and others vs. State of Gujarat and others, (1996)¹
GLR 549;

(ii) Prafulbhai Ladhabhai Raiyani vs. State of Gujarat and others (Special Civil
Application No.19068 of 2015, decided on 26th November 2015).

17. In such circumstances referred to above, Ms.Patel prays that there being no merit in the present writ-application, the same be rejected.

**SUBMISSIONS ON BEHALF OF THE RESPONDENT NO.2 - DISTRICT ELECTION OFFICER AND
COLLECTOR :**

18. Ms.Manisha Lavkumar Shah, the learned Government Pleader, assisted by Ms.Aishvarya Gupta, learned AGP appearing for the respondent no.2, has vehemently opposed the present writ-application. According to Ms.Shah, all the writ-applications deserve to be rejected only on the ground that those are not maintainable in view of the bar of Article 243-O of the Constitution of India.

19. Ms.Shah invited the attention of this Court to the decision of the Supreme Court in the case of State of U.P. and others vs. Pradhan Sangh Kshettra Samiti and others, reported in 1995 Supp (2) SCC 305, more particularly, the observations made by the Supreme Court in paragraphs 45 therein. Paragraph 45 reads thus :

"45. What is more objectionable in the approach of the High Court is that although clause (a) of Article 243-O of the Constitution enacts a bar on the interference by the courts in electoral matters including the questioning of the validity of any law relating to the delimitation of the constituencies or the allotment of seats to such constituencies made or purported to be made under Article 243-K and the election to

any panchayat, the High Court has gone into the question of the validity of the delimitation of the constituencies and also the allotment of seats to them. We may, in this connection, refer to a decision of this Court in *Meghraj Kothari v. Delimitation Commission & Ors.* [(1967) 1 SCR 400]. In that case, a notification of the Delimitation Commission whereby a city which had been a general constituency was notified as reserved for the Scheduled Castes. This was challenged on the ground that the petitioner had a right to be a candidate for Parliament from the said constituency which had been taken away. This Court held that the impugned notification was a law relating to the delimitation of the constituencies or the allotment of seats to such constituencies made under Article 327 of the Constitution, and that an examination of sections 8 and 9 of the Delimitation Commission Act showed that the matters therein dealt with were not subject to the scrutiny of any court of law. There was a very good reason for such a provision because if the orders made under sections 8 and 9 were not to be treated as final, the result would be that any voter, if he so wished, could hold up an election indefinitely by questioning the delimitation of the constituencies from court to court. Although an order under Section 8 or 9 of the Delimitation Commission Act and published under Section 10[1] of that Act is not part of an Act of Parliament, its effect is the same. Section 10[4] of that Act puts such an order in the same position as a law made by the Parliament itself which could only be made by it under Article 327. If we read Articles 243-C, 243-K and 243-O in place of Article 327 and sections 2 [kk], 11-F and 12-BB of the Act in place of Sections 8 and 9 of the Delimitation Act, 1950, it will be obvious that neither the delimitation of the panchayat area nor of the constituencies in the said areas and the allotments of seats to the constituencies could have been challenged or the Court could have entertained such challenge except on the ground that before the delimitation, no objections were invited and no hearing was given. Even this challenge could not have been entertained after the notification for holding the elections was issued. The High Court not only entertained the challenge but has also gone into the merits of the alleged grievances although the challenge was made after the notification for the election was issued on 31st August, 1994."

20. According to Ms.Shah, the notification issued by the State Election Commission as impugned in the present writ-application could be said to be a 'law' relating to the delimitation of the constituencies or the allotment of seats to such constituencies. According to Ms.Shah, it was held by the Supreme Court that neither the delimitation of the panchayat area or the formation of the constituencies in the said areas and the allotment of seats to the constituencies could be challenged nor the court could entertain such challenge except on the ground that before the delimitation, no objections were invited and no hearing was afforded. In short, according to Ms.Shah, the question with regard to sub-clause (b) or sub-clause (a) of Article 243-O of the Constitution has already been answered by the Supreme Court in the terms mentioned herein above and does not require any further consideration. It is argued that since sub-clause (a) of Article 243-ZG is in the same terms as of Article 243-O, the question posed with regard to sub-clause (a) of Article 243-ZG is also answered by the above judgment.

21. Ms.Shah placed significant reliance on a decision of this High Court in the case of Thakore Shanabhai Gedalbhai vs. State Election Commission and others, (2005) 3 GLH 686, to fortify her submissions as regards the bar as contained in Article 243-O of the Constitution of India. In Thakore Shanabhai Gedalbhai (supra), the challenge was to the orders of the Returning Officer mainly on the ground that the reasons assigned by him for rejecting their nomination paper, i.e. non-filing of a mandate of a political party along with the nomination paper, were extraneous to the provisions contained in the Act 1993 and the Rules 1994. It was argued before the Division Bench on behalf of the petitioners therein that the scheme of the rules contained in Part-IV of the Rules neither provided for filing of a mandate of a political party along with the nomination paper nor was it one of the grounds specified in Rule 15(2) of the Rules for rejection of the nomination paper and, therefore, the Returning Officer could be said to have committed a grave illegality by rejecting their nomination paper. This Court declined to entertain the writ-application considering the bar as contained in Article 243-O of the Constitution of India. The final conclusion drawn by the Court is as under :

"(I) The bar contained in Article 243-O of the Constitution against the court's interference in the electoral matters is absolute and a petition filed under Article 226 of the Constitution questioning the election to a Panchayat cannot be entertained except after determination of the dispute in an Election Petition filed in accordance with the provisions of the law enacted by the State Legislature.

(II) A petition filed under Article 226 of the Constitution challenging the illegal or improper rejection or acceptance of nomination paper for an election to the Panchayat cannot be entertained by invoking conclusion No. 3 of paragraph 32 of Supreme Court's Judgement in Ashok Kumar's case (supra) because any direction by the High Court in such matters would impede the election process and delay finalization of the election (III) A petition filed under Article 226 of the Constitution involving challenge to the orders passed or action taken after the commencement of election process cannot be entertained except where direction is sought for expediting the process of election.

(IV) An illegal or improper rejection of nomination for election to the Panchayat can be challenged by filing an Election Petition under Section 31 of the Panchayats Act."

22. Ms.Shah vehemently submitted that the right to vote and the right to contest an election has consistently been held to be a statutory right and not a fundamental right and this position was reaffirmed in the judgment of the Supreme Court in Dr. K.Krishna Murthy and others vs. Union of India and another, reported in (2010) 7 SCC 202, which upheld the constitutional validity of the provisions of Article 243-D of the Constitution of India. It is submitted that once it has been held that the right to vote or to get elected is a statutory right, the rotation flows out of a statutory provision. The Constitution, having made only an enabling provision, there is no violation of a fundamental right.

23. Ms.Shah vehemently submitted that the election programme came to be declared by the State Election Commission by way of a Circular dated 23 rd January 2021. This Circular came to be issued by the State Election Commission for the purpose of conducting elections in the six municipal corporations, 81 municipalities, 31 district panchayats and 231 taluka panchayats. According to Ms.Shah, it is not correct to say that the said Circular should not be construed as a notification issued by the State Election Commission. In any view of the matter, according to Ms.Shah, even if it is not to be treated as a notification, still the election process could be said to have commenced with effect from 23rd January 2021. In such circumstances also, according to Ms.Shah, these writ-applications may not be entertained as any relief as prayed for, if granted, may create lot of hindrances in the smooth conduct of the elections.

24. Ms.Shah would submit that even otherwise on merits, the writ-applicants have no case worth the name and the writ-applications deserve to be rejected.

ANALYSIS :

25. Having heard the learned counsel appearing for the parties and having gone through the materials on record, two questions fall for our consideration : First, whether the writ-applications are maintainable ? In other words, whether this Court has no jurisdiction to entertain the present writ-applications under Article 226 of the Constitution of India in view of the bar under Article 243-O of the Constitution of India ? Secondly, if the writ-applications are held to be maintainable, then whether the impugned notification issued by the State Election Commission as regards the allotment of seats could be said to be contrary to the statutory provisions governing the same ?

ISSUE OF MAINTAINABILITY :

26. Before we proceed to decide the first question as regards the maintainability of the present writ-applications, we must look into few relevant provisions of law :

Article 243.- In this part, unless the context otherwise requires, -

(f) 'population' means the population as ascertained at the last preceding census of which the relevant figures have been published;

Article 243-D: Reservation of Seats.

(1) Seats shall be reserved for--

(a) the Scheduled Castes; and

(b) the Scheduled Tribes, in every Panchayat and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Panchayat as the population of the Scheduled Castes in that Panchayat area or of the Scheduled Tribes in that Panchayat area bears to the total population of that area and such seats may be

allotted by rotation to different constituencies in a Panchayat.

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

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

Article 243-K. Elections to the Panchayats.- The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor.

(2) Subject to the provisions of any law made by the Legislature of a State the conditions of service and tenure of office of the State Election Commissioner shall be such as the Governor may by rule determine:

Provided that the State Election Commissioner shall not be removed from his office except in like manner and on the like ground as a Judge of a High Court and the conditions of service of the State Election Commissioner shall not be varied to his disadvantage after his appointment.

(3) The Governor of a State shall, when so requested by the State Election Commission, make available to the State Election Commission such staff as may be necessary for the discharge of the functions conferred on the State Election Commission by clause (1).

(4) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with, elections to the Panchayats.

243-O. Bar to interference by courts in electoral matters. --Notwithstanding anything in this Constitution--

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies made or purporting to be made under article 243K, shall not be called in question in any court;

(b) no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any Law made by the Legislature of a State.

27. In exercise of the powers conferred by sub-section (5) of Section 274 read with sub-section (5) of Section 10 and sub-section (5) of Section 11 of the Gujarat Panchayats Act, 1993, the Government of Gujarat framed the Gujarat Taluka and District Panchayats Election (Manner of Allotment of

Reserved Seats by Rotation) Rules, 1994. The relevant excerpt of the Rules being Rules 3, 4 and 5 and the 2015 Amendment thereto are reproduced as under:

"3. Assignment of serial number to electoral divisions.- (1) Each electoral division in a taluka and each electoral division in a district shall be assigned by the Election Commission a name based on the name of that village the area of which is included in such electoral division.

(2) Where an electoral division consists of more than one village, it shall be assigned the name of that village which has higher population.

(3) Where more than one electoral division consists of an area of the same village the electoral division shall be assigned the name of the village suffixed by serial numbers in accordance with the number of wards of such village comprised in each of such electoral divisions, beginning with the electoral division having lower serial number of wards of such village.

(4) (a) The names of electoral divisions of a taluka and the name of electoral divisions of a district shall be separately arranged by the Election commission in an English alphabetical order: Provided that where there is more than one village having the name of the same letter of English alphabets the electoral divisions of those villages shall be distinguished by reference to succeeding letter of the alphabets of the names of such village.

(b) Thereafter the electoral divisions as so arranged in the English alphabetical order shall be assigned serial numbers in that alphabetical order.

(5) The serial numbers assigned to the electoral divisions of a taluka and those assigned to electoral divisions of a district under this rule shall be known as general serial numbers.

4. Allotment of seats reserved for Scheduled Caste:

(1) For the purpose of allotment of the number of seats determined by the State Government as reserved for the Scheduled Castes under sub-clause (i) clause (a) of sub-section (5) of section 10 and sub-clause (i) of clause (a) of sub-section (5) of section 11 the Election Commission shall determine the electoral divisions of a taluka and those of a district, which consists of population of the Scheduled Castes and such electoral division of a taluka and a district shall be serially arranged in accordance with the percentage of population of the Scheduled Castes in such electoral division beginning with the electoral division consisting of the highest percentage of the population of the Scheduled Castes and shall be assigned serial number of SC1, SC2, and so on.

(2) The serial numbers as so assigned shall be known as special serial numbers for the Scheduled Castes.

(3) The Election 'Commission shall first allot the number of seats reserved for the Scheduled Castes (including one third of such seats reserved for women belonging to the Scheduled Castes) serially to the electoral divisions bearing special serial numbers for Scheduled Castes by rotation so however

that preference shall be given to allotment of seats reserved for the women.

5. As per the amendment to the 1994 Rules in 2015, a proviso was inserted after Rule 4, which has been reproduced as hereunder:

Provided that in case of allotment of reserved seats by rotation for the district panchayat, the State Election Commission while allotting the seats in the taluka where more than one seat is to be allotted, shall allot the odd number of seats i.e. 1st, 3rd and so on to the woman belonging to the Scheduled Castes ensuring that such allotment does not exceed the total number of reserved seats determined as per the provisions of section 11 of the Gujarat Panchayats Act, 1993.

6. Allotment of seats reserved for Scheduled Tribes:

(1) For the purpose of allotment of the number of seats determined by the State Government as reserved for the Scheduled Tribes under sub-clause (i) of clause (a) of sub-section (5) of section 10 and sub-clause (i) of clause (a) of sub-section (5) of section 11 the Election Commission shall determine the electoral divisions of a taluka and those of a district which consist of population of the Scheduled Tribes and such electoral divisions of a taluka and district shall be serially arranged in accordance with the percentage of population of the Scheduled Tribes in each electoral division beginning with the electoral division consisting of the highest percentage of the population of the Scheduled Tribe and shall be assigned serial number as ST1, ST2, and so on.

(2) The serial numbers as so assigned shall be known as special serial numbers for the Scheduled Tribes.

(3) The Election Commission shall after having allotted the seats reserved for the Scheduled Castes under sub-rule (3) of rule 4 allot the number of seats reserved for the Scheduled Tribes (including one third of such seats reserved for women belonging to the Scheduled Tribes) serially to the electoral divisions bearing special serial numbers for the Scheduled Tribes by rotation so however that preference shall be given to allotment of seats reserved for the women."

7. As per the amendment to the 1994 Rules in 2015, a proviso was inserted after Rule 5, which has been reproduced as hereunder:

Provided that in case of allotment of reserved seats by rotation for the district panchayat, the State Election Commission while allotting the seats in the taluka where more than one seat is to be allotted, shall allot the odd number of seats i.e. 1st, 3rd and so on to the woman belonging to the Scheduled Tribes ensuring that such allotment does not exceed the total number of reserved seats determined as per the provisions of section 11 of the Gujarat Panchayats Act, 1993.

28. We are of the view that the law purporting to relate to the delimitation of the constituencies or allotment of seats to such constituencies cannot encroach upon the plenary jurisdiction reserved by the Constitution in favour of the Election Commission. In other words, the provisions of Article 243-O of the Constitution does not constitute an absolute bar to the powers of judicial review vested

in the Constitutional Courts under Article 226 of the Constitution of India. It is altogether different to say that the writ court, in its discretion, may decline to entertain the writ-application considering that the election programme had already been declared and any interference after the declaration of the election programme may create lot of hindrances or obstructions in the smooth conduct of the election. However, it is difficult for us to take the view that the provisions of Article 243-O(a) should be construed to impose an absolute embargo on the exercise of jurisdiction under Article 226 of the Constitution of India.

29. If the jurisdiction of the Constitutional Courts is also barred, then the power of judicial review, which is the basic feature of the Constitution, is deemed to have been taken away. There is difference between 'power of judicial review' and 'judicial power'. The 'power of judicial review' is specially conferred on the Constitutional Courts, i.e. the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution, respectively. The other Courts and the Tribunals created under different enactments are conferred with 'judicial powers'. Such Courts and the Tribunals created under different enactments cannot exercise the 'power of judicial review'.

30. In a catena of decisions, the Supreme Court had considered the scope and ambit of 'judicial review'. Patanjali Sastri, C.J. speaking for the Court in the State of Madras vs. V.G. Row, reported in AIR 1952 SC 196, observed (at p.199 of AIR):

"Before proceeding to consider this question, we think it right to point out what is sometimes overlooked, that our Constitution contains express provision for judicial review of legislation as to its conformity with the Constitution, unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted 'due process' clause in the Fifth and Fourteenth Amendments. If, then, the Courts in this country face upto such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution."

31. While considering the validity of the Constitution (25th Amendment) Act, 1971, the theory of basic structure was propounded by the Supreme Court in Kesavananda Bharathi vs. State of Kerala, reported in (1973) 4 SCC 225. Majority of the Judges held that the separation of powers of the legislature, executive and judiciary is one of the basic features of the Constitution. J.M.Shelat and A.N.Grover, JJ., held:

"The function of interpretation of the Constitution being thus assigned to the judicial power of the State, the question whether a subject of law is within the ambit of one or more powers of the legislature, conferred by the Constitution would always be the question of interpretation by the Constitution."

32. They observed that the power of judicial review is one of the important features of the Federal Constitution. They also quoted with approval the opinion of Patanjali Sastri, C.J., in V.G. Row's case (supra) that judicial review is undertaken by the Courts not out of any desire to tilt as legislative authority in a crusader's spirit, but in discharge of a duty plainly laid down therein by the

Constitution. P.Jaganmohan Reddy, J. observed as under:

"A sovereign democratic republic, Parliamentary democracy, the three organs of the State, certainly in my view constitute the basic structure."

33. Hans Raj Khanna J., observed:

"Our Constitution postulates Rule of law in the sense of supremacy of the Constitution and the Jaws as opposed to arbitrariness. The vesting of power of exclusion of judicial review in a legislature, including State Legislature, contemplated by Article 31-C, in my opinion, strikes at the basic structure of the Constitution."

34. By reading these individual Judgments in Keshavanand Bharathi's case (supra), the consensus of opinion that has emerged is that the judicial review is one of the basic features of the Constitution and that the Parliament has no power to amend the basic structure or feature of the Constitution.

35. The constitutional validity of the Constitution (39th Amendment) Act, 1975, fell for the consideration of the Supreme Court in Smt. Indira Nehru Gandhi vs. Raj Narain, reported in AIR 1975 SC 2299. Majority of the Judges declared clause (4) of Article 329-A as introduced by the Constitution 39 th Amendment Act of 1975 as unconstitutional. Khanna, J., dealing with the contention of the learned Solicitor General, that according to the judgment in Keshavananda Bharathi's case (supra) no fundamental right is part of the basic structure of the Constitution, by quoting the observations in Keshavananda Bharthi's case (supra), held that the power of amendment under Article 368 does not include power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. As regards the 'basic feature' of the Constitution, K.K.Mathew, J., observed:

"This Constitution has a basic structure comprising the three organs of the Republic: the Executive, the Legislature, and the Judiciary..... Neither of these three separate organs of the Republic can take over the function assigned to the other. This is the basic structure or scheme of the system of Government of the Republic laid down in this Constitution whose identity cannot, according to the majority view in Keshavananda's case, be changed even by resorting to Art.

368."

36. Y.V.Chandrachud, J., held:

"Basic structure', by the majority Judgment is not a part of the fundamental rights nor indeed a provision of the Constitution. The theory of basic structure is woven out of the conspectus of the Constitution and the amending power is subject to it because it is a Constituent power."

37. The Constitution (42nd Amendment) Act, 1976, which added Clauses (4) and (5) to Article 368 placing Constitutional amendments beyond the purview of the judicial review, was challenged in *Minerva Mills Ltd. vs. Union of India*, reported in AIR 1980 SC 1789. The Constitution Bench declared new clauses (4) and (5) Articles 368 as unconstitutional holding:

"A limited amending power is one of the basic features of the Constitution and therefore the limitations on the power cannot be destroyed. In other words, Parliament cannot; under Art. 368 expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features."

38. When the Constitutionality of sub-clause (d) of clause (2) of Article 323-A of the Constitution fell for the consideration, a Full Bench of the Andhra Pradesh High Court in *S.Harinath v. State of H.P.*, (1993) 2 Andh LT 471, considering the decisions referred to above, held:

"From a close examination of the views expressed by the majority in *Keshavananda (2)* (supra) we get a clear picture that the power of Parliament under Art. 368 to amend the Constitution does not extend to abrogating the basic features of the Constitution. What are integral to the Constitution cannot be destroyed by Parliament in exercise of its constituent power under Art. 368. Even though the language employed in Art. 368 is wide, the nature of the constituent power confined in Parliament is subject to the aforesaid limitations. It is, therefore, followed that not being a sovereign body with unlimited powers, whatever powers are confided in it must be exercised within the specified limitations. What it can do in exercise of its constituent power, it cannot do in exercise of legislative power. The power of judicial review is a basic feature of the Constitution and an integral part of our Constitutional system. The independence of the Constitutional Courts, the Supreme Court and the High Courts, is assured by the Constitution and the power of judicial review is vested in them."

39. In *S.Fakruddin* (supra) the vires of the rules relating to the conduct of Elections of the Members and the Members of the Zilla Parishads fell for the consideration of a Special Full Bench consisting of Five Judges of the Andhra Pradesh High Court.

Dealing with the contention that Article 243-O introduced by Constitution (73rd Amendment) Act, 1992, bars interference by Courts in electoral matters, it was held:

"A constitution amendment which tends to take away the Constitutional Courts' power that is the power of the High Court under Art. 226 of the Constitution, shall be invalid. There can be no matter in the hands of the legislature in its function as the law maker which will be kept out of the scrutiny of the Courts however limited that scrutiny be. Even the conservative view that if there is an alternative effective and efficient mechanism for judicial review which is as independent as the High Court, its power under Art. 226 of the Constitution will not be available leaves scope for the

court to see whether the mechanism is such that the Court should refrain and not exercise its jurisdiction, court is inclined to extend this principle and hold as respects the matters which are sought to be excluded from the judicial review under Art. 243-O of the Constitution which has been brought in by the 73rd Amendment."

40. As regards the power of judicial review of the High Courts and the Supreme Court, it was observed:

"The consensus of the opinion is that judicial review is a basic feature except in respect of matters which are specifically excluded by the Constitution as originally enacted and that "Courts act as the real interpreters of the real will of the people they perform an essential judicial function

The basic features of the Constitution stand projected, for Art. 32, the power of the Supreme Court, cannot be taken away and its power under Art. 136 can be a proper safeguard of judicial review of any adjudication by the alternative authority or forum, provided however it is an effective alternative institutional mechanism or arrangement of judicial review. It is through the power of judicial review conferred on an independent institutional authority such as the High Court that the rule of law is maintained, and every organ of the State is kept within the limits of the law."

41. Thus, the Full Bench, in S.Fakruddin (supra), squarely considered this issue and held that the provisions of Article 243-O(a) cannot be construed to impose any such absolute embargo on the exercise of jurisdiction under Article 226 of the Constitution. The Full Bench also held that the Legislature of the State is quite competent to make laws concerning the composition of Panchayats or delimitation of constituencies or allotment of seats, but such competence is subject to the provisions of the Constitution as stipulated under Article 243-K of the Constitution. This means that the State Legislature can make laws in addition to what has been preserved for it under Article 243-C of the Constitution and not extending the matters which are left to the exclusive control of the State Election Commission under Article 243-K(1) of the Constitution. This means that if the State Legislatures were to make any law, usurping to itself the control of preparation of the electoral roll or for conduction of elections to Panchayats, such a law, would then, encroach upon the jurisdiction which the Constitution has reserved to the State Election Commission. Such a law, according to us, cannot claim immunity from challenge based on the provisions of Article 243-O of the Constitution. This Court, exercising its extraordinary jurisdiction under Article 226 of the Constitution, would then not only be entitled to but be duty-bound to examine the validity of such a contention.

42. In Smt. Bharati Reddy vs. The State of Karnataka and others, (Civil Appeal No.10587 of 2017 arising out of SLP (Civil) No.17059 of 2017, decided on 17.8.2017), the Supreme Court had the occasion to consider clause (b) of Article 243-O of the Constitution. In the said case, the appellant before the Supreme Court was elected as a member of the district panchayat, which was reserved for General (Women) category in the election held on 20th February 2016. The State Government issued a notification reserving the post for Backward Class (B) (Women). The election of the appellant was challenged before the High Court on the ground that she did not belong to Backward

Class (B) and that she had contested the election on the basis of a false certificate issued by the Tahsildar. A preliminary objection was raised by the appellant before the High Court as regards the maintainability of the writ petition having regard to the bar contained in clause (b) of Article 243-O of the Constitution. The Single Judge of the High Court rejected the writ-application on the ground of maintainability in view of the bar contained in Article 243-O of the Constitution. The matter went before the Supreme Court. The Supreme Court took the view that the power of judicial review under Article 226/227 of the Constitution of India being an essential feature of the Constitution, neither be tinkered with nor eroded. We quote the relevant observations as under:

"9. A bare reading of sub-section (b) of Article 243-O would show that election to any panchayat cannot be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State.

10. Adhyaksha and Upadhyaksha of the Zilla Panchayat are elected in accordance with Section 177 of the Karnataka Gram Swaraj and Panchayat Raj Act, 1993 and Rule 7 of Karnataka Panchayat Raj (Election of Adhyaksha and Upadhyaksha of Zilla Panchayat) Rules, 1994. The said Rule reads as under:

"7. Election dispute petition: (1) any member of Zilla panchayat, in whose jurisdiction the Zilla Panchayat lies, can question the election of Adhyaksha and Upa-Adhyaksha before the said District Judge, within 15 days from the date of declaration of election result by depositing Rs 2,000/- alongwith an Election Petition. It is clear from this Rule that a non-member of Zilla Panchayat cannot maintain an election petition."

11. Learned senior counsel for the appellant contended that in spite of Article 226 of the Constitution, the High Court had no jurisdiction to entertain the writ petition in view of the bar contained in clause (b) of Article 243-O of the Constitution. It was argued that the aggrieved person will have to avail himself the remedy provided in Rule 7 and cannot approach the High Court in the first instance under Article 226 of the Constitution of India.

12. We do not find any merit in this contention. We are of the view that a voter in a particular panchayat cannot be rendered remediless if he is aggrieved by the election of the Adhyaksha of the Panchayat. In *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr.* (1973) 4 SCC 225, a thirteen Judge Bench of this Court held that Article 368 of the Constitution does not enable the Parliament to alter the basic structure or framework of the Constitution. The basic structure of the Constitution could not be altered by any constitutional amendment and it was held in unambiguous terms that one of the basic features is the existence of constitutional system in judicial review. This view was followed by a Constitution Bench in *Minerva Mills Ltd. and Ors. v. Union of India and Ors.* (1980) 3 SCC 625. In *L. Chandra Kumar v. Union of India and Ors.* (1997) 3 SCC 261, a seven Judge Bench of this Court has held that jurisdiction conferred upon the High Courts under Articles 226/227 of the Constitution and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution. While this jurisdiction

cannot be ousted, other courts and tribunals may perform a supplementary role in discharging the powers conferred by Articles 226/227 and Article 32 of the Constitution of India. It has been held as under:

"We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded." In *I.R. Coelho (dead) by Lrs. v. State of Tamil Nadu* (2007) 2 SCC 1, a Bench of nine Judges has again held that power of judicial review is the part of the basic structure of the Constitution. The power to amend cannot be equated with the power to frame the Constitution."

13. It is thus clear that power of judicial review under Articles 226/227 of the Constitution is an essential feature of the Constitution which can neither be tinkered with nor eroded. Even the Constitution cannot be amended to erode the basic structure of the Constitution. Therefore, it cannot be said that the writ petition filed by respondent Nos. 6 to 9 under Article 226 of the Constitution is not maintainable. However, it is left to the discretion of the court exercising the power under Articles 226/227 to entertain the writ petition.

14. In *Charan Lal Sahu* (supra) relied upon by the learned senior counsel, the question for consideration was maintainability of an election petition presented by a candidate challenging the election to the Office of the President of India who has not been duly nominated under Section 14A of the Presidential and Vice-Presidential Elections Act, 1952. This decision has no application to the facts of the present case.

15. As noticed above, though respondent Nos. 6 to 9 are the voters are not the members of the Zilla Panchayat. They are aggrieved by the election of the appellant to the office of the Adhyaksha. They cannot challenge the election of the appellant to the office of Adhyaksha by filing an election petition as they are not the members of the Zilla Panchayat in question. In our view, a voter of the Zilla Panchayat who is not a member cannot be denied an opportunity to challenge the election to the office of Adhyaksha under Articles 226/227 of the Constitution. Therefore, we hold that the writ petition filed by respondent Nos. 6 to 9 before the High Court is maintainable."

43. We may clarify in context with the decision of the Supreme Court referred to above that ultimately the Supreme Court observed that it would be within the discretion of the court whether to entertain a writ-application or not ? In other words, although the Supreme Court took the view that the writ-applications could be said to be maintainable, yet the writ-applicants may not be entitled to any discretionary relief if the petitions are filed at a belated stage and the elections are imminent.

44. The principle that the Judges of the Constitutional Courts have not only powers but also duty to pronounce upon the validity of laws under our constitutional set up, was highlighted by the learned Chief Justice by observing thus :

"...Our Constitution is founded on a nice balance of power among the three wings of the State viz., the Executive, the Legislature and the Judiciary. It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If Courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled."

45. In the precise context of the provisions of Article 243-O of the Constitution, the Full Bench of the Andhra Pradesh High Court, in *S.Fakruddin (supra)*, after considering the decisions of the Hon'ble Supreme Court in *N.P. Ponnuswami vs. Returning Officer, Namakal* AIR 1952 SC 64; *The State of Madras vs. V.G. Row* - AIR 1952 SC 196; and *Kihota Hollohon vs. Zachilhu* - AIR 1993 SC 412, held that the bar in Article 243-O of the Constitution is to the ordinary jurisdiction of the courts and not to the extraordinary jurisdiction under Articles 136 and 226 of the Constitution. The Full Bench did not declare Article 243-O of the Constitution as unconstitutional but clarified that it does not take away the power of the High Court under Article 226 of the Constitution to examine the validity of any law relating to elections, including delimitation of the constituencies or allotment of seats to such constituencies made or purporting to be made under Article 243-K of the Constitution.

46. The Full Bench also noted the clear statement to this effect in the judgment of the Hon'ble Supreme Court in the case of *Lakshmi Charan Sen vs. A.K.M. Hassan Uzzaman*, reported in AIR 1985 SC 1233, that the High Court concerned acted within its jurisdiction in entertaining a writ petition and in issuing a writ Rule Nisi since the petition questioned the vires of the laws of election law. The Supreme Court, no doubt, held in this case that though the jurisdiction is undoubtedly vested in the High Court, the High Court should loathe to make any orders, interim or otherwise which have the tendency or effect of postponing the election, which is reasonably imminent and concerning which its writ jurisdiction is invoked. The Apex Court held that the fact that the Court has the power to do a certain thing, does not mean that it must exercise that power regardless of consequences.

47. We have to our advantage a very erudite and exhaustive judgment on the subject delivered by the High Court of Allahabad in the case of *Sant Ram Sharma vs. State of U.P.* rendered in Public Interest Litigation (PIL) No.54764 of 2015, decided on 9th October 2015. In the said case, the issue raised before the court pertained to the constitutional validity of the Uttar Pradesh Panchayat Raj (Reservation and Allotment of Seats and Offices) (Tenth Amendment) Rules, 2015, Rules of 2015. These Rules were published in the Government Gazette on 16 th September 2015. The Rules amended the provisions of the Uttar Pradesh Panchayat Raj (Reservation and Allotment of Seats and Offices) Rules, 1994, Rules of 1994. The amended Rules of 2015 were challenged on the ground that they were ultra vires Article 243-D, Article 243-K and the provisions of Section 11-A(5) and Section 12(5) of the Uttar Pradesh Panchayat Raj Act, 1947. A preliminary objection was raised to the maintainability of the writ-applications on the ground that Article 243-O(a) of the Constitution contains a bar on the validity of any law relating to the delimitation of the constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 243-K being called into question in any court. The Division Bench of the Allahabad High Court, speaking through the Hon'ble Chief Justice Dr.D.Y.Chandrachud (As His Lordship then was), observed that the

constitutional challenge to the validity of the Rules of 2015 would fall for consideration only if Article 243-O is held not to bar the court in the exercise of its jurisdiction under Article 226 from considering such a challenge. The Hon'ble Court took notice of the fact that the election process for holding the elections to the Gram Panchayats in the State of Uttar Pradesh had not yet commenced and, therefore, the bar under clause (b) of Article 243-O was not yet attracted. His Lordship, after an exhaustive consideration of Part IX of the Constitution and the statutory provisions in the State of Uttar Pradesh, took the view that the batch of writ-applications were maintainable and Article 243-O of the Constitution was not a bar for the court to entertain the writ-applications. We quote the relevant observations thus :

"Article 243-O finds a parallel in the provisions of Article 243ZG (which forms a constituent part of Part IXA dealing with the municipalities) and Article 329 (forming part of Part XV which deals with the elections). Article 243-O commences with a non-obstante clause which operates 'notwithstanding anything contained in the Constitution'.

Under clause (a), where a law is made or is purported to be made under Article 243K, and the law relates to the delimitation of the constituencies or to the allotment of seats to such constituencies, the validity of such a law cannot be called into question in any court. Clause (b) contains a bar by which an election to a panchayat cannot be called into question except in the form of an election petition presented to an authority in a manner which is provided by a law made by the State Legislature.

In the present case, the arguments before this Court have proceeded on the basis, which is undisputed, that as yet no notification has been issued by the State Election Commission declaring elections to gram panchayats. Hence the issue which has then canvassed by the Advocate General before the Court is in relation to the bar contained in clause (a) of Article 243-O. In order for the bar under Article 243-O to apply, two conditions must be fulfilled. The first condition is that the law must be made or must be purported to be made under Article 243K. Clause (4) of Article 243K empowers the state legislatures, subject to the provisions of the Constitution, to make provisions with respect to all matters relating to or in connection with elections to the panchayats. The first condition for the applicability of clause

(a) of Article 243-O is, hence, that the law must be made by the legislature of a state under Article 243K. The second condition is that the law must relate to the delimitation of constituencies or the allotment of seats to such constituencies. Clause (4) of Article 243K confers a wide power upon the state legislature to make provisions with respect to all matters relating to or in connection with the elections to the panchayats. While engrafting the bar in clause (a) of Article 243-O, the Constitution has not excluded the jurisdiction of the High Courts to test the validity of any law whatsoever, but a law of a specific nature, namely, a law which relates to the delimitation of constituencies or allotment of seats. Moreover, before the bar can be attracted, there must be a law which must be made by the legislature of a state. That is the clear intendment of the reference to Article 243K in Article 243-O. If the intent of the Constitution was to include within the constitutional sweep of the bar, every law, including an order, bye-law, rule, regulation, notification, custom or usage having in

the territory of India, the force of law [that being the definition of the expression 'law' in Article 13 (3) (a)], such a provision would have been made in clause (a) of Article 243-O. By referring to a law relating to the delimitation of constituencies or the allotment of seats to such constituencies made or purporting to be made under Article 243K, the Constitution has carefully imposed a bar confined to that area alone. Moreover, the power of judicial review under Article 226 has consistently been held to be a part of the basic structure of the Constitution."

48. In the aforesaid context, the Hon'ble Court observed that the purpose of the bar under clause (a) of Article 243-O is to impart sanctity to the legislation relating to the delimitation of the constituencies and allotment of seats to the constituencies.

Moreover, the disputes over elections have to be addressed in the form of an election petition after the result is declared. That is why the provisions contained in clause (a) of Article 243-O have structured the nature and extent of the bar by providing that it is only in respect of a law falling within the ambit of Article 243-K and relating to the delimitation of the constituencies or to the allotment of seats to those constituencies, that the bar would stand attracted. Their Lordships held that the bar cannot displace a challenge to the constitutional validity of any subordinate legislation.

49. The principal argument canvassed on behalf of the respondents that the impugned notification issued by the first respondent, i.e. the State Election Commission, relating to the delimitation of the constituencies and allotment of reserved category seats to different constituencies in the Tapi District Panchayat and the panchayats of other districts are matters relating to elections issued under Article 243-K(1) of the Constitution of India and, therefore, the same cannot be called in question under Article 226 of the Constitution of India in view of the bar under Article 243-O of the Constitution of India, is unacceptable to us. The impugned notification relating to the delimitation and allotment of reserved category seats to different constituencies came to be issued before the issue of programme of elections by the respondent. It is not in dispute that the first respondent - State Election Commission has issued the Circular with respect to the programme of elections. At the same time, it is also not in dispute that the State Election Commission had not issued the Notification till the date this Court heard the matters. The term 'election' referred to in Article 243-K relates to the proceeding commencing from the date of notification of elections till the date of declaration of results. In such circumstances, the impugned notification relating to the delimitation of the constituencies and allotment of reserved category seats to different constituencies are not the matters relating to the proceedings commencing from the date of notification of elections till the date of declaration of results. Article 243-O(a) of the Constitution specifies that the validity of any law relating to the delimitation of the constituencies or allotment of seats to such constituencies cannot be called in question in any court. There is no reference in Article 243-O with regard to the word 'rotation'. The absence of the word 'rotation' in Article 243-O of the Constitution makes it clear that there is no bar for the courts to exercise its judicial review in the matter of allotment of seats by rotation to different constituencies. At this stage, we must look into the decision of the Supreme Court in the case of Ashok Kumar (supra). In this case, the Election Commission of India announced the programme for the general election to constitute the Thirteenth Lok Sabha. After the commencement of the process of election, two writ petitions were filed before the High Court of Kerala challenging the validity of the election notification issued by the Election Commission of

India. The High Court granted an interim order by exercising its power under Article 226 of the Constitution of India staying the counting of votes pending the disposal of the writ petitions. Against this interim order granted by the High Court, the Election Commission of India filed the SLPs before the Supreme Court of India. The Supreme Court allowed the SLPs and set-aside the interim order passed by the Kerala High Court. In the case on hand before us, the State Election Commission has not issued any notification commencing the process of election. In the writ-applications before us, the notification relating to the delimitation and allotment of seats to different constituencies is called in question. The Supreme Court, in Ashok Kumar (supra), held in paragraphs 31 and 32 as under :

"31. The founding fathers of the Constitution have consciously employed use of the words "no election shall be called in question" in the body of Article 329(b) and these words provide the terminative test for attracting applicability of Article 329(b). If the petition presented to the Court "calls in question an election" the bar of Article 329(b) is attracted. Else it is not.

32. For convenience sake we would now generally sum up our conclusion by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:

(1) If an election, (the term election being widely interpreted to as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.

(2) 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. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

(3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

(4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the Court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the Court.

(5) The Court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The Court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the Court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the Court would act with reluctance and shall not act, except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material".

In view of the law laid down by the Supreme Court in Ashok Kumar's case, there is no bar for this Court to entertain the writ petitions under Article 226 of the Constitution before us."

50. We may also refer to and rely upon a Division Bench decision of the Karnataka High Court in the case of A.Ramdas vs. State of Karnataka, ILR (2001) Karnataka 5354. The High Court held as under :

"17. First attending to the objection raised regarding jurisdiction of this Court to entertain pleas of constitutional invalidity of the impugned notification based on Article 243-ZG, Section 21(1A) of the Municipal Act, Section 13(1A) of the Corporation Act, in our considered opinion, in view of the pronouncement of the Supreme Court in the case of L.Chandra Kumar v. Union of India, the above provisions sought to ouster the jurisdiction of the Court cannot apply to High Courts and the Supreme Court since if any such interpretation is sought to be put, the provisions may face the risk of being declared unconstitutional. In para 99 of the judgment, it has been declared by the Supreme Court that -

"The jurisdiction conferred upon the High Court under Article 226 and 227 of the Constitution, and upon the Supreme Court under Article 32 of the Constitution in part of the inviolable basic structure of our constitution. While this jurisdiction cannot be ousted, the other Courts and Tribunals may perform a supplemental role in discharging the powers conferred by Article 226 and 227 and 32 of the Constitution.""

51. As noted above, the argument canvassed on behalf of the respondents is that the impugned notification falls within the ambit of 'law' as held by the Supreme Court in the case of Pradhan Sangh Kshettra Samiti (supra).

52. We take notice of the fact that in the case of Pradhan Sangh Kshettra Samiti (supra), the decision of the Supreme Court in Meghraj Kothari vs. Delimitation Commission, AIR 1967 SC 669, has been considered and discussed, wherein it was held that an order made by the Delimitation Commission under Section 9 and published as a Notification under Section 10(1) of the Delimitation Commission Act, 1962, was a 'law' relating to delimitation under Article 327 and could not be questioned in any court because of the express provision of Article 329(a) of the Constitution of India.

53. We are afraid, it is difficult for us to accept the argument canvassed on behalf of both the learned counsel appearing for the respondents as regards the impugned notification falling within the ambit of 'law'. An identical argument was canvassed before a Division Bench of the Kerala High Court in the case of V.Kunhabdulla and another vs. State of Kerala and others, reported in AIR 2000 Kerala 376. The Kerala High Court negatived the contention holding as under :

"We may now proceed to consider the second limb of the contention of the respondents, viz. that an order passed by the Election Commission will have force of 'law' when published in the Gazette and in that view the same be 'law' for the purpose of Article 243(c) of the Constitution and as such beyond challenge before any Court of Law. Much reliance was placed on the decision of the Supreme Court in Meghraj Kothari v. Delimitation Commission, AIR 1967 SC 669 wherein it was held that an order made by the Delimitation Commission under Section 9 and published as a notification under Section 10(1) of the Delimitation Commission Act, 1962 was a 'law' relating to delimitations under Article 327 and could not be questioned in any Court because of the express provisions of Article 329(a). Having considered the aforesaid decision we are afraid the same will be of no assistance to the respondents in advancing their case before us. Of course, it is true that Section 10(1) of the Delimitation Act, 1962 provides that "upon publication in the Gazette of India every such order shall have the force of law and shall not be called in question in any Court of Law.

However, in the Act what is provided under Section 10(3) is that the order made by the Authorised Officer shall not be called in question in any Court of Law. Under Section 10A or under Section 10(3) of the Act nothing is provided to the effect that the order will have force of law after it is published in the gazette. The decision in Meghraj Kothari, AIR 1967 SC 669 (supra) is clearly distinguishable since the provision considered therein is Section 10(2) of the Delimitation Commission Act, 1962 which expressly provided that the delimitation order when published in the gazette shall have the force of law. In paragraph 16 of the judgment it was, therefore, held that an order under Section 8 or 9 and published under Section 10(1) would not be saved merely because of the use of the expression "shall not be called in question in any Court." But if by the publication of the order in the Gazette of India it is to be treated a law made under Article 327, Article 329 would prevent any investigation by any Court of law. However, as there is no provision in Section 10A that the order passed by the Election Commission will have force of law when published in the Gazette, the same will not be law for the purpose of Article 243(o) and therefore a writ petition preferred under Article 226 will be perfectly maintainable. The reliance placed by the respondents on Meghraj Kothari v. Delimitation Commission (AIR 1967 SC 669) (supra) is therefore thoroughly misplaced. That apart it stands to reason that the order of de limitation pasded by the District Collector after undertaking a lengthy exercise. thereby exhaust-ing the power relating to delimitation should enjoy complete immunity from being called in question in any Court of Law (vide Section 10 (31 of the Act) much less by a lesser authority like Election Commission whose only power is to rectify errors apparent on the face of the record (vide. Section 11 of the Act) and not to sit in judgment over the order of the Collector like an appellate or revisional authority. Section 10(3) thus gives finality to the order passed by the Collector under Section 10(1) which cannot be touched subsequently by the Election Commission

(except to correct errors apparent on the face of the record as enjoined under Section 11 of the Act) under the purported exercise of the power to review conferred under Section 10A added by Act 13/2000. An order passed under Section 10A does not enjoy a similar protection provided for an order passed under Section 10(1) of the Act. No finality is attached to the order passed by the Election Commission under Section 10A and no bar is provided so as to prevent a challenge of the order under Article 226. The net result therefore, is that the bar under Article 243(o) of the Constitution is not attracted to the facts of the present case. In this context it is pertinent, to note that the bar under Article 243(o) necessarily pre-supposes the existence of a valid law. If the law is vulnerable to attack under the Constitution being offensive to Article 14 and similar provisions of the Constitution such law cannot claim immunity from judicial review under Article 243(o)(a)."

54. We are in respectful agreement with the view taken by the Division Bench of the Kerala High Court as referred to above.

55. We also have to our advantage one decision of the Delhi High Court in the case of Ramesh Dutta and others vs. State Election Commission and others, reported in 2007 (144) DLT

286. The litigation before the Delhi High Court was one relating to the reservation of seats of Councillors in the Municipal Corporation of Delhi for Scheduled Castes and women. The challenge in the said case was to the notification issued by the Election Commissioner, whereby the number of seats to be reserved for women belonging to the Scheduled Castes from amongst the seats reserved for the Scheduled Castes were determined to be 16 and the number of seats for women (General) from amongst the unreserved seats to be 76. The challenge was on manifold grounds. The challenge was resisted by the State Election Commission for the National Capital Territory of Delhi on two counts. First, on the issue of maintainability of the writ-applications in view of the provisions of Article 243-ZG of the Constitution, secondly, on the ground that the criterion adopted by the State Election Commission was objective and could not have been faulted and had been uniformly followed in allotting the seats for the Scheduled Castes and women.

56. On the issue of maintainability, the Delhi High Court held as under:

"17. Coming back to the question of whether the Notification of 17.02.2007 is "law" as is referred to in Article 243ZA and 243ZG of the Constitution, I find that the "law"

that is referred to in Article 243ZA is a law made by a legislature of a State. The notification dated 17.02.2007 has been issued, not by a legislative body, but by the exercise of a power under a statutory provision for issuance of such a notification. So, though in the wider sense, the said notification may fall within the ambit of "law" as is commonly understood, it would not be "law made by a legislature of a State". An examination of the issue of whether the notification was issued in exercise of a legislative function or an administrative function, may not be necessary, inasmuch as Article 243ZA of the Constitution speaks of a "law made by a legislature" and not a law made by a delegate in exercise of a legislative function under a particular statute. However, since this issue was discussed in the course of arguments, it would be instructive to note that the Supreme Court in the case of UOI v. Cynamide India Limited (1987) 2 SCC 720 observed that while an attempt to draw a

distinct line between a legislative and administration functions has been said to be "difficult in theory and impossible in practice", it would be necessary that the line is sometimes drawn as different legal rights and consequences may follow. The Supreme Court was of the view that the distinction between the two has usually been expressed as "one between the general and particular". A legislative act involves the creation and promulgation of a general rule of conduct without reference to particular cases; whereas, an administrative act is the making of and issuance of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy. The Court reiterated that legislation is a process of formulating a general rule of conduct without referring to particular cases and usually operating in the future and that administration is the process of performing particular acts, of issuing particular orders or of making decisions which apply general rules to particular cases.

18. Viewed in this light, it becomes immediately clear that the provisions of the DMC Act formulate the general rule for de-limitation, number of seats to be reserved for Scheduled Castes and women, the possibility of rotating such seats etc. The specific and particular orders have been left to the Central Government. That has been done by virtue of notifications issued from time to time. The Notification dated 17.02.2007 is one such Notification. It relates to a particular situation applying the general Rules prescribed under the DMC Act. Therefore, in my view, the impugned Notification of 17.02.2007 would not fall within the description of a Notification having been issued in exercise of a legislative function.

19. In this connection, the Constitution Bench decision of the Supreme Court in the case of *Shri Sitaram Sugar Co. Ltd. v. UOI* (1990) 3 SCC 223 (at page 246), may be fruitfully referred to. This decision also echoed the sentiment of the earlier decision in the case of *UOI v. Cynamide India Limited* (supra) that to distinguish clearly between legislative and administration functions has been regarded as "difficult in theory and impossible in practice". Referring to authoritative texts on the subject, the Supreme Court observed that legislative power is the power to prescribe the law for the people in general, while administrative power is the power to prescribe the law for them, or apply the law to them in particular situations. The Supreme Court observed that the Courts, for practical reasons, have distinguished legislative orders from the rest of the orders by reference to the principle that the former is of general application. They are made formally by publication and for general guidance with reference to which individual decisions are taken in particular situation. It was further observed in the said decision (*Sita Ram Sugar Co. Ltd.*) that a statutory instrument (such as a rule, order or regulation) emanates from the exercise of delegated legislative power which is a part of the administrative process resembling enactment of law by the legislature. The Supreme Court also observed that in border line or mixed cases it is best that they are left unclassified. So, while I am of the view that the Notification, in question, has not been issued in exercise of a legislative function, it may be argued that the situation is not so clear-cut. As indicated in the Supreme Court decision referred to above, in such a situation, it would be best to leave it unclassified as either a Notification issued in exercise of a legislative function or an administrative function. This would, as indicated above, not have any bearing on the decision that the Notification of 17.02.2007 is not covered by the expression "law made by a legislature of a State" and, therefore, would not be "law" made or purporting to be made under Article 243ZA. Consequently, the bar to interference by Courts set up by the provisions of Article 243ZG(a) of the Constitution would not be

triggered.

20. Let me now examine the decision of the Supreme Court in Anugrah Narain Singh (supra) which was heavily relied upon by Mr Tripathi, who appeared on behalf of the Election Commission of NCT of Delhi. Mr Tripathi had, as pointed out above, contended on the strength of the said decision, that Article 243ZG constitutes a complete and absolute bar to consider any matter relating to Municipal elections on any ground whatsoever. It is true that the Supreme Court in Anugrah Narain Singh (supra), in paragraph 12 quoted earlier in this judgment, had observed that the validity of laws relating to delimitation and allotment of seats made under Article 243ZA cannot be questioned in any Court and that it was well settled that if the election is imminent or well under way the Court should not intervene to stop the election process. But, these observations must be seen in the light of the special circumstances and other observations made in the said decision itself, as submitted by the learned Counsel for the petitioners. First of all, it must be noted that the petitions which were the subject matter before the Supreme Court in Anugrah Narain Singh (supra) were writ petitions which had been filed not only after the process of delimitation had been completed long time ago but also after the issuance of the election notification. To be precise, the process of delimitation had been completed before June, 1995 and the election notification had been issued on 11.10.1995. The writ petitions were filed later. In this context, the Supreme Court observed as under:

"7. Another important feature of this case, which was ignored by the High Court, was that the process of reservations for various wards and delimitation of constituencies had been completed before June 1995.

There was ample opportunity under the Act to raise objections before finalisation of the delimitation process. Section 32 of the Uttar Pradesh Municipal Corporation Adhiniyam, 1959 (hereinafter referred to as "the U.P. Act") has empowered the State Government to divide the municipal areas into wards on the basis of the population and determine the number of wards into which the municipal area should be divided. The State Government may also determine the number of seats to be reserved for the Scheduled Castes, Scheduled Tribes, Backward Classes and women. The State Government is required to issue an order for this purpose which has to be published in the Official Gazette for objections for a period of not less than seven days. After considering the objections that may be filed, the draft order may be amended, altered or modified. Whatever the State Government does, after considering the objections, will be the final order. That process has been gone through. If it is the case of the writ petitioners that they filed objections to the draft orders and their objections were overruled arbitrarily, they should have challenged it forthwith. In fact the notifications of reservation of various wards and delimitation of constituencies had been completed before June 1995. After all these things became final, the writ petitioners waited till 26-10-1995 to file this writ petition when the last date for withdrawal of nomination papers was over. This writ petition should have been dismissed on the ground of laches only. At a time when the election process was in full swing, huge expenditures had been incurred by the candidates, the political parties and also the Government for this purpose, some of the candidates had already

been declared elected unopposed, the Court decided to intervene and stop the elections.

A reading of the above passage from the Supreme Court decision in Anugrah Narain Singh (supra) indicates that the Supreme Court was of the view that if the petitioners therein were aggrieved by the reservation of wards and delimitation of constituencies they should have challenged it forthwith when the exercise had been completed by June, 1995. The writ petitioners ought not to have waited till 26.10.1995 to file the writ petitions when even the last date for withdrawal of nominations papers was over. The Supreme Court observed that the writ petitions ought to have been dismissed on the ground of laches alone and the Court ought not to have interfered and decided to stop the elections at a time when the election process was in full swing, huge expenses had been incurred by the candidates and political parties and also some of the candidates had already been declared elected unopposed. None of these special circumstances arise in the present case. The notification was issued on 17.02.2007. It was published in the newspapers on 18.02.2007 which happened to be a Sunday. The petitioners lost no time and the first of the writ petitions was filed on 22.2.2007. The Model Code of Conduct was made applicable on 23.3.2007 and the election notification is yet to be issued. Therefore, the situation as obtaining in the case before the Supreme Court and the one that presents itself in these petitions are entirely different."

21. There is no doubt that the Court cannot interfere with the election process once it is underway. The election process commences by the issuance of the election notification. That event has not yet happened. There were further special circumstances before the Supreme Court in the case of Anugraha Narain Singh (supra) none of which are present in the present case. The special circumstances being, as indicated in paragraph 14 of the said decision, that no Municipal election had been held in the State for nearly ten years and the dates of the elections were fixed under the direction given by the High Court in another case.

The Supreme Court observed that the elections of Panchayats and Municipal Bodies cannot be

over-emphasised and that if the holding of elections is allowed to be stalled on the whims of a few individuals, then grave injustice would be done to crores of other voters who have the right to elect their representatives to the local bodies. The Court observed that as a result of the order of the High Court of Allahabad, elections of the local bodies which were going to be held after a long lapse of nearly ten years were postponed indefinitely. None of these special circumstances arise in the present case. Moreover, there is no pronouncement in the said decision of the Supreme Court with regard to there being no power with the High Court to interfere at a stage before the issuance of election notification (i.e., prior to the commencement of the election process) and in a manner which would not have the effect of stalling the election. The Supreme Court also referred to the earlier decision in the case of Hassan Uzzaman (supra), wherein it was held that the Court must not interfere with the election process and must not pass any order, interim or otherwise, which would have the effect of postponing an election, which is reasonably imminent. It observed that the

imminence of the electoral process is a factor which must guide and govern the passing of orders in the exercise of High Court's writ jurisdiction. The more imminent such process, the greater ought to be the reluctance of the High Court to do anything, or direct anything to be done which will postpone the process indefinitely. The High Courts were directed to observe a self-imposed limitation on their power to act under Article 226, by refusing to pass orders or give directions which would inevitably result in an indefinite postponement of elections to the legislative bodies which are the very essence of the democratic foundation and functioning of our Constitution. These observations of the Supreme Court make three things clear. Firstly, the High Courts have power under Article 226 of the Constitution to pass orders when the election process has not commenced. The second, that the High Court must exercise a self-imposed limitation to invoke such powers when the elections are reasonably imminent and this limitation must be directly proportional to the imminence of the election process. Thirdly, the High Court must not act in a manner which would result in an indefinite postponement of an election. It is, therefore, clear that the power to act in such matters is there under Article 226 of the Constitution but it must be exercised subject to the limitations mentioned above."

57. Thus, having given our thoughtful consideration to the issue as regards the maintainability of the present writ-applications, we are of the view that the bar to interference by the courts in electoral matters under Article 243-O of the Constitution can be divided into two parts. The bar under the first part (under clause (a) of the said Article) pertains to a challenge prior to the actual process of election, whereas, the bar under the second part (under clause (b) of the said Article) pertains to a challenge on the culmination of the election process. In so far as the present controversy is concerned, the claim raised by the writ-applicants being before the commencement of the electoral process, it can fall only under the first part referred to above, i.e. within the ambit of Article 243-O(a). Besides the same, a close examination of Article 243-O(a) of the Constitution reveals that the bar contemplated under Article 243-O pertains to a challenge to a legal provision/legislative enactment relating to the delimitation of the constituencies or alternatively the validity of any law relating to the allotment of seats to such constituencies made or purporting to be made under Article 243-K of the Constitution. Insofar as the controversy before us is concerned, the same does not fall in any of the aforesaid two classifications, and as such, for all intentions and purposes, were considered to be beyond the scope and purview of Article 243-O(a) of the Constitution of India.

58. Ms. Shah, the learned Government Pleader appearing for the respondent no.2, placed significant reliance on the decision of the Supreme Court in the case of Pradhan Sangh Kshettra Samiti (supra). It was a case where the validity of the delimitation of the constituencies and the allotment of seats to them were under challenge. Further, that was a case where the High Court entertained the challenge against the validity of the delimitation of the constituencies after the election notification. The observations made in the said judgment need to be understood in the backdrop of the facts of the case, and if it is so done, it can be seen that the said judgment cannot be accepted as an authority for the proposition sought to be canvassed by the learned counsel appearing for the respondents.

59. As held by the Supreme Court in the case of Harnek Singh vs. Charan Singh and others, reported in (2005)8 SCC 383, that although Article 243-O of the Constitution mandates that all election disputes must be determined only by way of an election petition, yet this by itself may not per se bar

the judicial review, which is the basic structure of the Constitution. It is altogether a different thing to say that ordinarily such jurisdiction would not be exercised. There is a fine distinction between 'writ petition per se not maintainable' and 'writ petition relating to election ordinarily should not be entertained'.

60. At this stage, we must also look into the two judgments of this High Court relied upon by the learned counsel appearing for the State Election Commission. In Ismail Noormohmad Mehta (supra), a writ-application was filed by few ex-members of the outgoing elected body praying to set aside the demarcation of the wards made by the Gujarat State Election Commission. This litigation had something to do with the election of Sihor Nagarpalika. A learned Single Judge of this Court declined to interfere having regard to the fact that the election process had already commenced. This Court took notice of the definition of the term 'election' as defined in Section 2(7A) of the Gujarat Municipalities Act. The definition reads as under :

"2(7A) "Election" means and includes the entire election process commencing from the division of wards and all stages culminating into election of a councillor and it is always deemed to have meant and included the entire election process as aforesaid."

61. Taking into consideration the above referred definition, this Court held as under :

"In view to this definition, the election process in respect of the said Municipality has already commenced by the division of wards. Thus, since the election process has already commenced, such process cannot be called in question except by an election petition, in the manner provided for in Section 14 of the said Act and the High Court cannot entertain the petition in view of the bar imposed by Article 243-ZG on the Courts to interfere in electoral matters except by the election petition. The decision of Supreme Court in N.P. Ponnuswami's case therefore cannot assist the petitioners. In fact, the Supreme Court in N.P. Ponnuswami (supra) has in terms held, in context of election to the State Legislature, that having regard to its important functions in a democratic set-up, 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. Thus if any irregularity is committed while election is in progress, it should be brought before the Special Tribunal by means of the election petition and not be made a subject of dispute before the Court in view of specific provisions of Article 243-ZG of the Constitution. In the context and setting of the expression "No election to any Municipality can be called in question appearing in Article 243-ZG", it is clear that even on the ground of improper de-limitation of the constituencies, election to any municipality cannot be called in question except by an election petition and in such a manner as may be provided for in the State Law. In other words, the law made by the State Legislature can be the only source of calling in question the elections of any Municipality and the grounds of challenge can only be such as are provided by such law. Therefore, this petition challenging the

de-limitation of wards done under the Notification issued by the State Election Commission cannot be entertained by this Court."

62. The second decision relied upon is Prafulbhai Ladhabhai Raiyani (supra). In the said case, the writ-applicant challenged the order passed by the Returning Officer of the Gondal Municipality rejecting the objections raised by him to the nomination of the respondent no.7 therein. This matter had something to do with the election to the Gondal Nagarpalika. The State Election Commission had declared the programme for election. Having regard to the same, this Court declined to entertain the writ-application, holding as under :

"11. From such decisions, it can be seen that interference by the Court in exercise of writ jurisdiction during an intermediate stage of election to the local bodies is a rare and exceptional phenomena. Only in a given case as highlighted by the Supreme Court in case of Ashok Kumar (supra), decision of the Election Commission is found to be male fide, judicial review would be open. There too, interference would not permit derailing, delaying or protracting the ensuing election. Power can be exercised for facilitating the process of free and fair election."

63. In our opinion, both the aforementioned decisions are not helpful to the respondents in any manner.

64. In view of the aforesaid, we answer the first question posed by us as regards the maintainability of these writ-applications in the affirmative. We hold that the writ-applications are maintainable and not hit by the bar contained in Article 243-O of the Constitution of India.

65. We now proceed to consider the second question as regards the non-adherence to the rules relating to the rotation of seats.

66. By and large, the grievance redressed in all the writ-applications is that the rotational policy has been given a total go-bye. It is conceded that the State Government has provided the reservation in accordance with law and the allotment of seats also is in accordance with law. However, the seats are not rotated in accordance with the rules. It has been pointed out that in some cases past twenty years, there has been no rotation. It is argued that the rotational policy is a safeguard against the possibility of a particular office being reserved in perpetuity.

67. The learned counsel appearing for the respondents has given us more than a fair idea as regards the allotment/rotation of seats. It is the case of the respondents that the rotation had been carried out in 2015 in accordance with the 1994 Rules and in 2020 also, the same has been done in accordance with the Rules.

68. We should be mindful of the fact that entertaining the challenge raised by the writ-applicants as regards the rotation of seats at the last minute should not hamper or delay the electoral process. Any interference at this stage by this Court should not prevent the election to be held in this very month of February and such interference should not lead to challenge by the members of the other panchayats who may not be satisfied by the policy of rotation adopted by the Commission.

69. As observed by the Supreme Court in *Ashok Kumar* (supra), any decisions sought and rendered will not amount to 'calling in question an election' if it sub-serves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election. Subject to the same, the actions taken or orders issued by the Election Commission are open to judicial review on the well-settled parameters which enable the judicial review of the decision of the statutory bodies such as on a case of malafide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

70. The writ-applicants have come before this Court complaining about the allotment and rotation of seats as, though they want to contest the election, still they are not able to because of the allotment of seats in the constituencies. In other words, one of the writ-applicants is a male member of a Scheduled Tribe and he wants to contest the election, but so far as the constituency from where he wants to contest the election is concerned, it has been allotted to a female member of a Scheduled Tribe and this is going on past four elections. We may only say, at the cost of repetition, that the right to vote and the right to contest an election has consistently been held to be a statutory right and not a fundamental right and this position was re-affirmed in the judgment of the Supreme Court in *Dr.K.Krishna Murthy* (supra), which upheld the constitutional validity of the provisions of Article 243-D of the Constitution of India. Once it has been held that the right to vote or to get elected is a statutory right, rotation flows out of the statutory provision.

71. In the aforesaid context, we may refer to the observations made by the Allahabad High Court in the case of *Sant Ram Sharma* (supra) as under :

"There are two perspectives in which this grievance can be looked at. First and foremost, it is a well settled principle of law that electoral franchise is not a fundamental right. Electoral franchise is subject to regulation by statute. Article 243D of the Constitution which provides for the reservation of seats, has specifically contemplated that the manner in which the reservation of seats and offices of chairpersons in the panchayats would be worked out, would be governed by state legislation. While making an enabling provision for rotation of reserved seats among territorial constituencies (the Supreme Court held that rotation is an enabling provision in *Krishna Murthy's* case), the Constitution has carefully not laid down either the manner in which the rotation would be carried out or the periodicity of the reservation. Article 243D would indicate an area of constitutional silence where, while framing Part IX, it has been left to the discretion of the state legislatures to determine the manner in which seats would be allocated to reserved constituencies and the manner in which rotation would be made.

The second important aspect which must be noted in this regard is that in making an allotment of reserved seats among territorial constituencies, Article 243D contemplates, firstly, that the number of seats which are reserved will bear, as nearly as may be, the same proportion to the total number of seats to be filled in by election in that panchayat as the population of the Scheduled Castes and the Scheduled Tribes in that panchayat area bears to the total population of that area. Under clause

(f) of Article 243, population is ascertained on the basis of the published figures of the last census. Article 243D spells out the basis on which the total number of seats which are reserved for the Scheduled Castes and the Scheduled Tribes shall be determined. Article 243D also provides for the extent of reservation for women, as we have noticed earlier, which is an area where the horizontal reservation intersects with a vertical reservation of one-third of the total number of seats in favour of women. In the case of chairpersons of panchayats, the Constitution lays down the basis on which the total number of offices of chairpersons would be reserved for the Scheduled Castes and the Scheduled Tribes. Similarly, there is a stipulation of the extent to which the reservation in favour of women is made, namely one-third of the total number of offices of chairpersons in the panchayat at each level. The Constitution lays down a broad principle or norm of rotation. There are thus two elements of constitutional philosophy which have to be balanced. The first is a representation to the Scheduled Castes and Tribes commensurate with their share of the population as ascertained in the last published census figures. This by its very nature is not static but must evolve so as to be commensurate with the share of population. The second constitutional precept of rotation is that one category does not hold a perpetual reservation to a particular seat. Both these concepts are in the very nature of their application not static. Beyond this, the Constitution has evidently not spelt out the details of the regulation or procedure by which the actual allotment of seats would take place among reserved constituencies in panchayats or in regard to the manner in which the rotation would be carried out. There is, therefore, a broad area of discretion which has been left open to the state legislatures under the Constitution. Once this basic principle is borne in mind, having due regard to the principles which have been laid down by the Supreme Court in *K Krishna Murthy* (supra), there is no manner of doubt that the state legislature and its delegate which frames the subordinate legislation, would have a requisite measure of discretion in regard to the methodology to be followed for the allotment of seats to territorial constituencies and the manner in which the principle of rotation is to be implemented.

The proviso which has been introduced by the tenth amendment to Rule 4 (4) has envisaged that the allotment of seats shall be made afresh to different territorial constituencies without taking into consideration the status of allotment in previous elections in specified contingencies. Such a contingency occurs when there is a general delimitation of territorial constituencies of gram panchayats of the State on the basis of a general modification of panchayat areas "or otherwise". The proviso must be construed as conferring a power on the state to commence rotation afresh on a general delimitation exercise in respect of territorial constituencies of panchayats on the basis of a general modification of panchayat areas. We are of the view that the expression "or otherwise" must be read down to mean that the circumstances in which the allotment of seats would be made afresh without taking into consideration the status of allotment in previous elections, must be based on reasonable and objective criteria akin to those specified. In other words, whether an allotment should be made afresh without having due regard to the status of allotment in a previous election, cannot be left to the unguided discretion of the State. Such a restraint would have to be read into the powers of the State Government in order to ensure against an arbitrary exercise of power. In each case, where the State Government attempts to initiate a fresh allotment of territorial constituencies in terms of the proviso to Rule 4 (4), it is for the State Government, in the event of a challenge, to demonstrate before the Court the reasons on the basis of which such a determination was made. The amendment would in our view is hence not *ultra vires*."

72. The election programme as declared by the State Election Commission in the form of a Circular dated 23 rd January 2021 is as under :

"ELECTION PROGRAMME Sr. Description Election Programme No.

Municipal District/ Taluka Corporations Panchayats/ Municipalities 1 Date of declaration of the 23.01.2021 23.01.2021 election 2 Date of issuance of the Circular 01.02.2021 08.02.2021 3 Last date for filing the 06.02.2021 13.02.2021 nomination 4 Date for verification of the 08.02.2021 15.02.2021 nomination 5 Last date for withdrawing the 09.02.2021 16.02.2021 nomination 6 Date of election 21.02.2021 28.02.2021 (Sunday) (Sunday) From 7:00 a.m. to 7:00 a.m. to 6:00 6:00 p.m. p.m. 7 Date of re-election (If necessary) 22.02.2021 01.03.2021 8 Date of counting the votes 23.02.2021 02.03.2021 9 Date of completion of the 26.02.2021 05.03.2021 election process

73. Having taken the view that the writ-applications are maintainable, we could have gone into the second issue on merits. However, considering the election programme as referred to above, we decline to enter into the second issue having regard to the time now left for holding the elections and any interference at this stage would result in undue delay of the election process. Rotation of seats is a complex process. We are bound by the Constitutional prohibition and should not, at this stage, undo rotation which has already been put into motion and on the basis of such rotation hundreds of people are going to contest the elections in different categories allotted to them.

74. We may refer to very important observations of the Supreme Court in the case of Anugrah Narain Singh and another vs. State of U.P. and others, reported in (1996) 6 SCC 303, as contained in paragraph 35 :

"Lastly, the Court on no account should have directed postponement of the elections by the impugned judgment and order dated 13th November, 1995. On 11th October, 1995, the notification for holding the municipal elections was issued. 16th to 20th October, 1995 was the period during which the nomination papers could be filed. 24th October, 1995 was the last date for withdrawal of nomination papers. Voting was to take place between 17 th November to 20th November, 1995. The writ petition was filed as late 26th October, 1995 on the allegation that there were defects in the electoral rolls, delimitation of constituencies and reservation of seats. A similar writ petition moved before the Lucknow Bench of the Allahabad High Court (W.P. No. 2997 of 1995) had been dismissed by the Court on 18th October, 1995. Barely one week before the voting was scheduled to commence, the Court decided to intervene in the matter regardless of the repeated warnings given by this Court in a number of earlier decisions. The Court decided to intervene in the matter and stop the election process while it was nearing completion. In Lakshmi Charan's case, it was held that the Court should not intervene even when the elections were imminent. Here, the election was well underway."

75. Our aforesaid discussion may be summarised as under :

(1) Article 243-O of the Constitution of India does not per se bar judicial review, which is part of the basic structure of the Constitution, although such jurisdiction should not ordinarily be exercised. There is a difference between 'power of judicial review' and 'judicial power'. The 'power of judicial review' is specially conferred on the Constitutional Courts, i.e. the High Courts and the Supreme Court, under Articles 226 and 32 of the Constitution, respectively.

(2) It is settled principle that where there is an effective alternative remedy under the statute, the High Court should not exercise its jurisdiction as a self-imposed restriction. In electoral matters, the High Court observes self-imposed limitations and declines to interfere with the election process when once the election notification is issued. But, where the constitutional validity of an Act or a Rule or provision of an Act affecting the election is challenged, or where an error in exercising such jurisdiction or malafides or non-compliance of rules of natural justice is established, the High Court has got ample power to render justice by exercising the power of judicial review conferred on it under Article 226 of the Constitution of India.

(3) The bar of interference by 'courts' in electoral matters should be understood as the bar against the ordinary courts and not against the Constitutional Courts, and it cannot be said that the Parliament intended to take away the power of judicial review of the Constitutional Courts by incorporating Article 243-O of the Constitution. If Article 243-O of the Constitution has to be construed so as to bar the jurisdiction of the Constitutional Courts, i.e. the High Courts and the Supreme Court, the same will be against the basic structure or the basic feature of the Constitution, and accordingly, it is void.

(4) The right to contest an election is neither a fundamental right nor a common law right. It is a right conferred by a statute. At the most, in view of Part IX having been added in the Constitution, a right to contest an election for an office in Panchayat may be said to be a constitutional right - a right originating in the Constitution and given shape by a statute. But even so, it cannot be equated with a fundamental right. The State which is vested with the power to implement the constitutional mandate of reservation and rotation and has put in place a legislative and executive measure to implement the mandate cannot be found to have objected judicial review so as to interfere the mandate under law and to ensure that the elections are not only conducted within the time prescribed but also in the manner as mandated under law.

(5) The High Court should not intervene even when the elections are imminent. In other words, the election is well underway.

76. For the foregoing reasons, we decline to go into the second question at the last minute of the elections. It is not possible for this Court to grant any relief to the writ-applicants at this stage.

77. In the result, all the writ-applications fail and are hereby rejected.

(J. B. PARDIWALA, J.) (ILESH J. VORA, J.) /MOINUDDIN