DIGVIJAY MOTE

v.

UNION OF INDIA AND ORS.

AUGUST 16, 1993

[M.N. VENKATACHALIAH, C.J. AND S. MOHAN, J.]

Constitution of India—Article 324—Judicial Review—Exercise of power by Election Commission under the article, held, not altogether unreviewable—Judicial review permissible over statutory body exercising functions affecting public law rights—Articles 14, 19, 326, 51-A—Natural justice—Representation of the People Acts 1950 and 1951—PIL.

The petitioner claimed to be an active social worker and a keen observer of the existing electoral process. He filed this petition in the public interest with the sole object of cleansing the existing electoral process and to contest the election.

He contended that the electoral process was afflicted with distortions, very often intentionally. The absence of representative from Assam in the 9th Lok Sabha and from Jammu and Kashmir in the 10th Lok Sabha were cited as examples.

He prayed *inter alia* that the proceedings in, and privileges of, members of the existing Lok Sabha be stayed; the Council of Ministers be injuncted from acting; the voting rights and privileges of elected members from Punjab be restrained: the Chief Election Commissioner be debarred from acting; and elections to the Lok Sabha and Legislative Assemblies be conducted under the authority, supervision, direction and control of this Court till the pendency of this petition.

Dismissing the petition, this Court

HELD: 1. The conduct of election is in the hands of the Election Commission which has the power of superintendence, direction and control of election vested in it as per Article 324 of the Constitution. Consequently, if the Election Commission is of the opinion that having regard to the disturbed conditions of a State or a part thereof, free and fair elections could not be held it may postpone the same. However, this power is not unbridled. Judicial review will still be permissible over the statutory

A **body exercising its functions effecting public law rights. [557-C-D, E]**

Clive Lewis, *Judicial Remedies in Public Law* **- referred to.**

On importing the principle of natural justice into Article 324 (1), *Mohinder Singh Gill* **v.** *Chief Election Commissioner,* **[1978] 2 SCR 272 at**
B **298 and 307, referred to. [558-D]**

2. The resultant position is that it cannot be stated that the exercise of power under Article 324 is not altogether unreviewable. The review will depend upon the facts and circumstances of each case. [560-F]

C **3. To every democracy, election is essential. No doubt, such elections will have to be free and fair. [556-D-H]**

N.P. Ponnuswami **v.** *Returning Officer, Namakkal Constituency,* **[1952] SCR 218, 229 and** *Mohinder Singh Gill* **v.** *The Chief Election Commissioner,* **[1978] 2 SCR at 285, referred to.**

D

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) Nos. 384 to 386 of 1993.

Under Article 32 of the Constitution of India.

E Petitioner in person.

The Judgment of the Court was delivered by

MOHAN, J. These Writ Petitions have been preferred by way of Public Interest Litigation for the enforcement of fundamental rights, Politi-
F cal rights and fundamental duties of the people and electorate-citizens of India under, *inter alia*, Articles 14 and 19 read with Articles 326 and 51-A and various statutory provision.

The following prayers are made before us in Writ Petition (Civil) No. 385 of 1993:-

G

(1) direct Respondent 4 to stay the proceedings and functions of the exiting Lok Sabha and the privileges of its members until the disposal of this petition;

(2) direct Respondent 4 to injunct the Council of Ministers
H headed by Mr. P.V. Narsimha Rao, from aiding and advising the

President forthwith;

(3) restrain the voting rights and other privileges of the elected members of Parliament from the State of Punjab until final hearing and disposal of this petition;

(4) issue a writ of *mandamus* or writ in the nature of *mandamus* or an order or injunction debarring Respondent-3 from discharging the functions of or officiating as Chief Election Commissioner until the final hearing and disposal of this petition;

(5) issue a writ of *mandamus* against Respondent Nos. 2 and 3 directing each of them not to proceed with the holding of Parliamentary General Election in the State of Jammu & Kashmir until the final hearing and disposal of this petition;

(6) declare that until the disposal of this petition, elections or general elections to the Lok Sabha/Legislative Assemblies shall be held under the authority, supervision, direction and control of this Hon'ble Court until arrangements are made as prayed in the petition;

(7) restrain the Respondent 1 from amending the Constitution or the Representation of the People Act or enacting new legislation or taking any major policy decision until the final hearing and disposal of this petition;

(8) direct Respondent No. 2 to afford access to the petitioner herein to enable him to refer the public documents and other papers and reports in the library of the Respondent No. 2, to effectively pursue this petition before this Hon'ble Court; and

(9) pass such further and other orders as this Hon'ble Court may deem fit and proper under the circumstances of the case.

The petitioner claims to be an active social worker. He further claims that he is a keen observer of the electoral process in the Republic of India. This petition has been preferred in public interest with the sole object of cleansing the existing electoral process and to contest the election. The petitioner has every prospect of winning the election.

According to the petitioner, the election process in this country is

A afflicted with distortion, very often intentionally. When the Parliamentary elections were held in the country in December, 1984, the State of Assam which elects 14 Representatives to the Lok Sabha was delinked on the ground that the electoral rolls were not updated. This is in violation of Articles 14 and 19 of the Constitution. The State of Assam and Punjab have become the worst victims of terrorist activities. During the entire terms of
B Ninth Lok Sabha, Assam did not have its representation. Tenth Lok Sabha was constituted including the Representatives from Assam and Punjab State, however, Jammu & Kashmir State had been deleted.

Thus, according to him, all the consequential proceedings, leading to
C the prayers, are illegal. The petitioner appearing in- person reiterates the same.

To every democracy, election is essential. No doubt, such elections will have to be free and fair. Fazal Ali, J. in *N.P. Ponnuswami* v. *Returning Officer, Namakkal Constituency*, [1952] SCR 218, 229, as quoted in
D *Mohinder Singh Gill* v. *The Chief Election Commissioner*, [1978] 2 SCR 272 at 285, explained thus:

> "The concept of democracy as visualised by the Constitution presupposes the representation of the people in Parliament and State legislatures by the method of election. And, before an elec-
E tion machinery can be brought into operation, there are three requisites which require to be attended to, namely, (1) there should a set of laws and rules making provisions with respect to all matters relating to, or in connection with, elections, and it should be decided as to how these laws and rules are to be made; (2) there should be an executive charged with the duty of securing the due
F conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections. Articles 327 and 328 deal with the first of these requisites, article 324 with the second and article 329 with the third requisite."

G Again Krishna Iyer, J. in *Mohinder Singh Gill's* case (supra) at page 285 stated:

> "A free and fair election based on universal adult franchise is the basic; the regulatory procedures vis-a-vis the repositories of functions and the distribution of legislative, executive and judicative'
H roles in the total scheme, directed towards the holding of free

elections, are the specifics. Part XV of the Constitution plus the Representation of the People Act, 1950 (for short, the 1950 Act) and the Representation of the People Act, 1951 (for short, the Act), Rules framed thereunder, instructions issued and exercises prescribed, constitute the package of electoral law governing the parliamentary and assembly elections in the country. The super-authority is the Election Commission, the kingpin is the returning officer, the minions are the presiding officers in the polling stations and the electoral engineering is in conformity with the elaborate legislative provisions." A B

The conduct of election is in the hands of the Election Commission which has the power of superintendence, directions and control of election vested in it as per Article 324 of the Constitution. Consequently, if the Election Commission is of the opinion that having regard to the disturbed conditions of a State or a part thereof, free and fair elections could not be held it, postpone the same. Accordingly, on account of unsettled conditions, the elections in the States of Assam and Jammu & Kashmir could be postponed. C D

However, it has to be stated this power is not unbridled. Judicial review will still be permissible, over the statutory body exercising its functions affecting public law right. We may, at this stage, usefully quote *'Judicial Remedies in Public Law'* - Clive Lewis, page 70: E

"The term "public law" has, in the past, been used in at least two senses. First, it may refer to the substantive principles of public law governing the exercise of public law powers, and which form the grounds for alleging that a public body is acting unlawfully. These are the familiar Wednesbury principles. A public law "right" in this sense could be described as a right to ensure that a public body acts lawfully in exercising its public law powers. The rights could be described in relation to the individual heads of challenge, for example, the right to ensure that natural justice is observed, or to ensure that the decision is based on relevant not irrelevant considerations, or it taken for a purpose authorised by statute, or is not Wednesbury unreasonable. Secondly, "public law" may refer to the remedies that an individual may obtain to negative an unlawful exercise of power. These are essentially remedies used to set aside unlawful decisions, or prevent the doing of unlawful acts, F G H

A or compel the performance of public duties. These remedies now include the prerogative remedies of certiorary, *mandamus* or prohibition, and the ordinary remedies of declarations and injunctions when used for a public law purpose involving the supervisory jurisdiction of the courts over public bodies".

B Again at page 122 it is stated:

"Statute may impose a duty on a public body to act in certain circumstances and may grant corresponding rights to an individual. There may still be the question of whether or not the circumstances
C exist or the individual has demonstrated his eligibility. That question may be a matter for the public body to determine. If the public body makes some error of law or other public law wrong in coming to its determination, the court may quash the determination."

Reference can also be made to *Mohinder Singh Gill's* case (supra)
D once again where the principle of natural justice was imported into Article 324 (1). At page 298 it was stated:

"We decide tow questions under the relevant article, not *arquendo*, but as substantive pronouncements on the subject. They are:

E

(a) ....

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

F

The answer is provided at pages 298 and 299:

"Article 324, which we have set out earlier, is a plenary provision vesting the whole responsibility for national and State elections
G and, therefore, the necessary powers to discharge that function. It is true that Art. 324 has to be read in the light of the Constitutional scheme and the 1950 Act and the 1951 Act. Sri Rao is right to the extent he insists that if competent legislation is enacted as visualized in Article 327 the Commission cannot shake himself free from the enacted prescription. After all, as Mathew, J. has observed in
H Indira Gandhi: (supra)

"In the opinion of some of the judges constituting the majority in *Bharati's* case (supra), Rule of Law is a basic structure of the Constitution apart from democracy. A

The rule of law postulates the pervasiveness of the spirit of law throughout the whole range of government in the sense of excluding arbitrary official action in any sphere." (p.523) B

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

Even so, situations may arise which enacted law has not provided for Legislators are not prophets but pragmatists. So it is that the Constitution has make comprehensive provision in Art. 324 to take care of surprise situations. That power itself has to be exercise, not mindlessly nor *mala fide*, nor arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation. More is not necessary to specify; less is insufficient to leave unsaid. Article 324, in our view, operates in areas left unoccupied by legislation and the words 'superintendence, direction and control' as well as 'conduct of all elections' are the broadest terms. Myriad maybes, too mystic to be precisely presaged, may call for prompt action to reach the goal of free and fair election. It has been argued that this will create a constitutional despot beyond the pale of accountability; a Frankenstein's monster who may manipulate the system into elected despotism - instances of such phenomena are the tears of history. To that the retort may be that the judicial branch, at the appropriate stage, with the potency of its benignant power and within the leading strings of legal guidelines, can call the bluff, quash the action and bring order into the process. Whether we make a triumph or travesty of democracy depends on the man as much as on the Great National Parchment. Secondly, when a high functionary like the Commissioner is vested with wide powers the law expects him to act fairly and legally. Article 324 is D E F G H

A geared to the accomplishment of free and fair elections expeditiously. Moreover, as held in Virendra [1958] SCR 308 and Harishankar [1955] 1 SCR 380 discretion vested in a high functionary may be reasonably trusted to be used properly, not perversely. If it is misused, certainly the Court has power to strike down the act. This is well established and does not need further case law confirmation. Moreover, it is useful to remember the warning of Chandrachud, J. :

B

"But the electorate lives in the hope that a sacred power will not so flagrantly be abused and the moving finger of history warns of the consequences that inevitably flow when absolute power has corrupted absolutely. The fear of perversion is no test of power."

C

At page 307 it is stated:

"Nobody will deny that the Election Commission in our democratic scheme is a central figure and a high functionary. Discretion vested in him will ordinarily be used wisely, not rashly, although to echo Lord Camden wide discretion is fraught with tyrannical potertion even in high personages, absent legal norms and institutional checks, and relaxation of legal canalisation on generous 'VIP' assumptions may boomrang. Natural justice is one such check on exercise of power."

D

E

The resultant position is that it cannot be stated that the exercise of power under Article 324 is not altogether unreviewable. The review will depend upon the facts and circumstances of each case.

F We find absolutely no merit whatever in the Writ Petitions which are hereby dismissed *in limine.*

U.R. Petitions dismissed.