PETITIONER:
ELECTION COMMISSION OF INDIA THROUGH SECRETARY

Vs.

RESPONDENT:
ASHOK KUMAR & ORS.

DATE OF JUDGMENT: 30/08/2000

BENCH:
CJI , R.C. Lahoti & K G Balakrishnan

JUDGMENT:

R.C. Lahoti, J.

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An interim order passed by the High Court in exercise of its writ jurisdiction under Article 226 of the Constitution, during the currency of the process of election, whereby the High Court has stayed the Notification issued by the Election Commission of India containing direction as to the manner of counting votes and has made directions of its own on the subject, has been put in issue by the Election Commission of India filing these appeals by special leave under Article 136 of the Constitution.

The facts in brief. The 12th Lok Sabha having been dissolved by the President of India on 26.4.1999, the Election Commission of India announced the programme for the General Election to constitute the 13th Lok Sabha. Pursuant thereof, the polling in the State of Kerala took place on 11.9.1999. The counting of votes was scheduled to take place on 6.10.1999.

In exercise of the powers conferred by Rule 59A of the Conduct of Election Rules, 1961, the Election Commission of India issued a notification published in Kerala Gazette Extra-ordinary dt. 1st October, 1999 which reads as under:-

NOTIFICATION

No.470/99/JUD-II(H.P.) -- WHEREAS, rule 59A of the Conduct of Elections Rules, 1961 provides that where the Election Commission apprehends intimidation and victimisation of electors in any constituency and it is of the opinion that it is absolutely necessary that ballot papers taken out of all ballot boxes used in that constituency should be mixed before counting, instead of being counted polling stationwise, it may, by notification in the Official Gazette, specify such constituency;

2. AND WHEREAS, on such specification under the said rule 59A of the Conduct of Election Rules, 1961, the ballot papers of the specified constituency shall be counted by being mixed instead of being counted polling stationwise.

3. AND WHEREAS, the Election Commission has carefully considered the matter and has decided that in the light of the prevailing situation in the State of Kerala, and in the

interests of free and fair election and also for safety and security of electors and with a view to preventing intimidation and victimisation of electors in that State, each of the Parliamentary Constituencies in the State except 11-Ernakulam and 20-Trivandrum Parliamentary Constituencies, may be specified under the said rule 59A for the purposes of counting votes at the General Election to the House of the People, 1999 now in progress;

4. NOW, THEREFORE, the Election Commission hereby specifies each of the said Parliamentary Constituencies except 11-Ernakulam and 20-Trivandrum Parliamentary Constituencies in the State of Kerala, as the constituencies to which the provisions of rule 59A of the Conduct of Elections Rules, 1961 shall apply for the purposes of counting of votes at the current General Election to the House of the People.

BY ORDER

Sd/- (K.J. RAO) Secretary, Election Commission of India

In Ernakulam and Trivandrum constituencies electronic voting machines were employed for polling. In all other constituencies of Kerala voting was through ballot papers.

On 4.10.1999, two writ petitions were filed respectively by the respondents No.1 & 2 herein, laying challenge to the validity of the above notification. In O.P. No.24444/1999 filed by respondent No.2, who was a candidate in the election and has been a member of the dissolved Lok Sabha having also held the office of a Minister in the Cabinet, it was alleged that large scale booth capturing had taken place in the Lok Sabha election at Kannur, Allappuzha and Kasaragod constituencies. Similar allegations of both capturing were made as to polling stations throughout the State. At such polling stations, the polling agents of Congress party and their allies were not allowed to sit in the polling booths. In 70 booths polling was above 90%, in 25 booths the percentage of polling was more than 92% and in 5 booths it was 95% and above. The presiding officers and the electoral officers did not take any action on the complaints made to them and they were siding with the ruling party (Left Democratic Front or the LDF). At some places the representatives of the Congress party were ordered to be given police protection by the Court but no effective police protection was given. There are other polling booths where the percentage of polling has been very low, as less as 7.8% in booth No.21 at Manivara Government School. No polling was recorded in booth No.182. In 27 booths polling was 26%. Complaints were also made to the Chief Election Commissioner. Under Section 135A of the Representation of the People Act, 1951, booth capturing is an offence.

O.P. No.24516/1999 was filed by respondent No.1, who contested from the Allapuzha constituency as an independent candidate, alleging more or less similar facts as were alleged in O.P. No.24444/1999.

In both the writ petitions it is alleged that in the matter of counting the Election Commission of India issued guidelines on 22nd September, 1999 which directed ___ All the ballot boxes of one Polling Station will be distributed to one table for counting the ballot papers. There was no

change in the circumstances ever since the date of the above-said guidelines and yet on 28.9.1999 the Election Commission of India issued the impugned notification. According to both the writ petitioners, if counting took place in accordance with the directions issued on 28.9.1999, valuable piece of evidence would be lost as the allegations as to booth capturing could best be substantiated if the counting of votes took place polling stationwise and not by mixing of votes from the various booths. An interim relief was sought for by both the writ petitioners seeking suspension of the notification dated 28.9.1999.

Notice of the writ petition and applications seeking interim relief was served on the standing counsel for the State Government and the Government Pleader who represented the Chief Electoral Officer. Paucity of time and the urgency required for hearing the matter did not allow time enough for service of notice on the parties individually.

The prayer for the grant of interim relief was opposed by the learned counsel appearing for the respondents before the High Court by placing reliance on Article 329(b) of the Constitution. According to the writ petitioners before the High Court, the normal rule was to count votes boothwise unless exceptional circumstances were shown to exist whereupon Rule 59A could be invoked. According to the learned counsel for the respondents before the High Court, in Ernakulam and Trivandrum parliamentary constituencies, polling was done with the aid of voting machines and hence excepting these two constituencies the Election Commission of India formed an opinion for invoking Rule 59A which the Election Commission of India was justified, well within its power to do. In the opinion of the High Court, in view of large number of allegations of booth capturing (without saying that such allegations were correct) it was necessary to have the votes counted boothwise so that the correctness of the allegations could be found out in an election petition which would be filed later, on declaration of the results. The High Court also believed the averment made in the affidavits filed in support of the stay petitions wherein it was stated that training was given to the officers for counting the votes boothwise, i.e. with mixing or without mixing. Mixing of votes of all booths will take more time in counting and require engagement of more officers. The learned Government Pleader was not able to demonstrate before the High Court if the notification dated 28.9.1999 was published in the official gazette. On a cumulative effect of the availability of such circumstances, the High Court by its impugned order dated 4th October, 1999 directed the Election Commission and Chief Electoral Officer to make directions in such a way that counting was conducted boothwise consistently with the guidelines dated 22.9.1999.

On 5.10.1999 the Election Commission of India filed the special leave petitions before this court which were taken up for hearing upon motion made on behalf of the petitioner-appellant. A copy of the official gazette dated 1st October, 1999 wherein the notification dated 28.9.1999 was published, was also produced for the perusal of this court on the affidavit of Shri K.J. Rao, Secretary, Election Commission of India. This court directed notices to be issued and in the meanwhile operation of the order of the Kerala High Court was also directed to be stayed.

When the matter came up for hearing after notice, leave

was granted for filing the appeals and interim direction dated 5.10.1999 was confirmed to remain in operation till the disposal of appeals. At the final hearing it was admitted at the Bar that in view of the impugned order of the High Court having been stayed by this court, the counting had taken place in accordance with the Notification dated 28.9.1999 made by the Election Commission of India. In view of these subsequent events, the appeals could be said to have been rendered infructuous. However, the learned counsel for the appellant submitted that the issue arising for decision in these appeals is of wide significance in as much as several writ petitions are filed before the High Courts seeking interim directions interfering with the election proceedings and therefore it would be in public interest if this court may pronounce upon the merits of the issue arising for decision in these appeals. We have found substance in the submission so made and, therefore, the appeals have been heard on merits.

The issue arising for decision in these appeals is the jurisdiction of the High Court to entertain petitions under Article 226 of the Constitution of India and to issue interim directions after commencement of the electoral process.

Article 324 of the Constitution contemplates constitution of the Election Commission in which shall vest the superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under the Constitution. The words superintendence, direction and control have a wide connotation so as to include therein such powers which though not specifically provided but are necessary to be exercised for effectively accomplishing the task of holding the elections to their completion. Article 329 of the Constitution provides as under:-

329. 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 327 or article 328, shall not be called in question in any court;

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

The term election as occurring in Article 329 has been held to mean and include the entire process from the issue of the Notification under Section 14 of the Representation of the People Act, 1951 to the declaration of the result under Section 66 of the Act.

The constitutional status of the High Courts and the nature of the jurisdiction exercised by them came up for the consideration of this Court in M.V. Elisabeth and Ors. Vs.

Harwan Investment and Trading Pvt.Ltd., Goa - 1993 Supp (2) SCC 433. It was held that the High Courts in India are superior courts of record. They have original and appellate jurisdiction. They have inherent and supplementary powers. Unless expressly or impliedly barred and subject to the appellate or discretionary jurisdiction of Supreme Court, the High Courts have unlimited jurisdiction including the jurisdiction to determine their own powers. The following statement of law from Halsburys Laws of England, [4th Edn., Vol.10, para 713] was quoted with approval:- Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognisance of the particular court.

This Court observed that the jurisdiction of courts is carved out of sovereign power of the State. People of free India are the sovereign and the exercise of judicial power is articulated in the provisions of the Constitution to be exercised by courts under the Constitution and the laws thereunder. It cannot be confined to the provisions of imperial statutes of a bygone age. Access to court which is an important right vested in every citizen implies the existence of the power of the Court to render justice according to law. Where Statute is silent and judicial intervention is required, Courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience.

That the power of judicial review is a basic structure of Constitution ___ is a concept which is no longer in@@
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Is there any conflict between the jurisdiction conferred on the High Courts by Article 226 of the Constitution and the embargoes created by Article 329 and if so how would they co-exist came up for the consideration of a Constitution Bench of this Court in N.P.Ponnuswami Vs. The Returning Officer, Namakkal Constituency & Ors. - AIR 1952 SC 64. The law enunciated in Ponnuswami was extensively dealt with, also amplified, by another Constitution Bench in Mohinder Singh Gill and Anr. Vs. The Chief Election Commissioner, New Delhi and Ors. - AIR 1978 SC 851. The plenary power of Article 329 has been stated by the Constitution Bench to be founded on two principles : (1) The peremptory urgency of prompt engineering of the whole election process without intermediate interruptions by way of legal proceedings challenging the steps and stages in between the commencement and the conclusion; (2) The provision of a special jurisdiction which can be invoked by an aggrieved party at the end of the election excludes other form, the right and remedy being creatures of statutes and controlled by the Constitution. On these principles the conclusions arrived at in Ponnuswamis case were so stated in Mohinder Singh Gills case:-

(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance

that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

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

However, the Constitution Bench in Mohinder Singh Gills case could not resist commenting on Ponnuswamis case by@@
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observing (vide para 25) that the non-obstante clause in Article 329 pushes out Article 226 where the dispute takes the form of calling in question an election, except in special situations pointed out at, but left unexplored in Ponnuswami.

Vide para 29 in Mohinder Singh Gills case, the Constitution Bench noticed two types of decisions and two types of challenges : The first relating to proceedings which interfere with the progress of the election and the second which accelerate the completion of the election and acts in furtherance of an election. A reading of Mohinder Singh Gills case points out that there may be a few controversies which may not attract the wrath of Article 329 (b). To wit : (i) power vested in a functionary like the Election Commission is a trust and in view of the same having been vested in high functionary can be expected to be discharged reasonably, with objectivity and independence and in accordance with law. The possibility however cannot be ruled out where the repository of power may act in breach of law or arbitrarily or malafide. (ii) A dispute raised may not amount to calling in question an election if it subserves the progress of the election and facilitates the completion of the election. The Election Commission may pass an order which far from accomplishing and completing the process of election may thwart the course of the election and such a step may be wholly unwarranted by the Constitution and wholly unsustainable under the law. In Mohinder Singh Gills case, this Court gives an example (vide para 34). Say after the President notifies the nation on the holding of elections under Section 15 and the Commissioner publishes the calendar for the poll under Section 30 if the latter orders returning officers to accept only one nomination or only those which come from one party as distinguished from other parties or independents, which order would have the effect of preventing an election and not promoting it, the Courts intervention in such a case will facilitate the flow and not stop the election stream.

A third category is not far to visualise. Under Section 81 of the Representation of the People Act, 1951 an election petition cannot be filed before the date of election, i.e., the date on which the returned candidate is declared elected. During the process of election something may have happened which would provide a good ground for the election being set aside. Purity of election process has to be preserved. One of the means for achieving this end is to deprive a returned candidate of the success secured by him by resorting to means and methods falling foul of the law of elections. But by the time the election petition may be filed and judicial assistance secured material evidence may be lost. Before the result of the election is declared assistance of Court may be urgently and immediately needed to preserve the evidence without in any manner intermeddling with or thwarting the progress of election. So also there may be cases where the relief sought for may not interfere or intermeddle with the process of the election but the jurisdiction of the Court is sought to be invoked for correcting the process of election taking care of such aberrations as can be taken care of only at that moment failing which the flowing stream of election process may either stop or break its bounds and spill over. The relief sought for is to let the election process proceed in conformity with law and the facts and circumstances be such that the wrong done shall not be undone after the result of the election has been announced subject to overriding consideration that the Courts intervention shall not interrupt, delay or postpone the ongoing election proceedings. The facts of the case at hand provide one such illustration with which we shall deal with a little later. We proceed to refer a few other decided cases of this court cited at the Bar.

In Lakshmi Charan Sen Vs. A.K.M. Hassan Uzzaman (AIR 1985 SC 1233) writ petitions under Article 226 of the Constitution were filed before the High Court asking for the writs of mandamus and certiorari, directing that the instructions issued by the Election Commission should not be implemented by the Chief Electoral Officer and others; that the revision of electoral rolls be undertaken de novo; that claims, objections and appeals in regard to the electoral roll be heard and disposed of in accordance with the rules; and that, no notification be issued under S.15(2) of the Representation of the People Act, 1951 calling for election to the West Bengal Legislative Assembly, until the rolls were duly revised. The High Court entertained the petitions and gave interim orders. The writ petitioners had also laid challenge to validity of several provisions of Acts and Rules, which challenge was given up before the Supreme Court. The Constitution Bench held though the High Court was justified in entertaining the writ petition and issuing a rule therein since, the writ petition apparently contained a challenge to several provisions of Election Laws, it was not justified in passing any order which would have the effect of postponing the elections which were then imminent. Even assuming, therefore, that the preparation and publication of electoral rolls are not a part of the process of election within the meaning of Article 329(b), we must reiterate our view that the High Court ought not to have passed the impugned interim orders, whereby it not only assumed control over the election process but, as a result of which, the election to the Legislative Assembly stood the risk of being postponed indefinitely.

In Election Commission of India Vs. State of Haryana - AIR 1984 SC 1406 the Election Commission fixed the date of election and proposed to issue the requisite notification. The Government of Haryana filed a writ petition in the High Court and secured an ex-parte order staying the issuance and publication of the notification by the Election Commission of India under Sections 30, 56 and 150 of the Representation of the People Act, 1951. This Court deprecated granting of such ex-parte orders. During the course of its judgment (vide para 8) the majority speaking through the Chief Justice observed that it was not suggested that the Election Commission could exercise its discretion in an arbitrary or mala fide manner; arbitrariness and mala fide destroy the validity and efficacy of all orders passed by public authorities. The minority view was recorded by M.P. Thakkar, J. quoting the following extract from A.K.M. Hassan Uzzaman (1982) 2 SCC 218 :- The imminence of the electoral process is a factor which must guide and govern the passing of orders in the exercise of the High Courts 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 that process indefinitely by creating a situation in which, the Government of a State cannot be carried on in accordance with the provisions of the Constitution.

and held that even according to Hassans case the Court has the power to issue an interim order which has the effect of postponing an election but it must be exercised sparingly (with reluctance) particularly when the result of the order would be to postpone the installation of a democractic elected popular Government.

In Digvijay Mote Vs. Union of India & Ors. - (1993) 4 SCC 175 this Court has held that the powers conferred on the Election Commission are not unbridled; judicial review will be permissible over the statutory body, i.e., the Election Commission exercising its functions affecting public law rights though the review will depend upon the facts and circumstances of each case; the power conferred on the Election Commission by Article 324 has to be exercised 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.

Anugrah Narain Singh and Anr. Vs. State of U.P. & Ors. - 1996 (6) SCC 303 is a case relating to municipal elections in the State of Uttar Pradesh. Barely one week before the voting was scheduled to commence, in the writ petitions complaining of defects in the electoral rolls and de-limitation of constituencies and arbitrary reservation of constituencies for scheduled castes, scheduled tribes and backward classes the High Court passed interim order stopping the election process. This Court quashed such interim orders and observed that if the election is imminent or well under way, the Court should not intervene to stop the election process. If this is allowed to be done, no election will ever take place because some one or the other will always find some excuse to move the Court and stall the elections. The importance of holding elections at regular intervals cannot be over- emphasised. If holding of elections is allowed to stall on the complaint of a few individuals, then grave injustice will be done to crores of other voters who have a right to elect their representatives

to the democratic bodies.

In C. Subrahmanyam Vs. K. Ramanjaneyullu and Ors. - (1998) 8 SCC 703 this Court has held that non-compliance of a provision of the Act governing the elections being a ground for an election petition, the writ petition under Article 226 of the Constitution of India should not have been entertained.

In Mohinder Singh Gills case (supra) the Election Commission had cancelled a poll and directed a re-polling. The Constitution Bench held that a writ petition challenging the cancellation coupled with repoll amounted to calling in question a step in election and is therefore barred by Article 329 (b). However, vide para 32, it has been observed that had it been a case of mere cancellation without an order for repoll, the course of election would have been thwarted (by the Election Commission itself) and different considerations would have come into play.

Election disputes are not just private civil disputes between two parties. Though there is an individual or a few individuals arrayed as parties before the Court but the stakes of the constituency as a whole are on trial. Whichever way the lis terminates it affects the fate of the constituency and the citizens generally. A conscientious approach with overriding consideration for welfare of the constituency and strengthening the democracy is called for. Neither turning a blind eye to the controversies which have arisen nor assuming a role of over- enthusiastic activist would do. The two extremes have to be avoided in dealing with election disputes.

Section 100 of the Representation of the People Act, 1951 needs to be read with Article 329 (b), the former being a product of the later. The sweep of Section 100 spelling out the legislative intent would assist us in determining the span of Article 329 (b) though the fact remains that any legislative enactment cannot curtail or override the operation of a provision contained in the Constitution. Section 100 is the only provision within the scope of which an attack on the validity of the election must fall so as to be a ground available for avoiding an election and depriving the successful candidate of his victory at the polls. The Constitution Bench in Mohinder Singh Gills case (vide para 33) asks us to read Section 100 widely as covering the whole basket of grievances of the candidates. Sub-clause (iv) of clause (d) of sub-section (1) of Section 100 is a residual catch-all clause. Whenever there has been non-compliance with the provisions of the Constitution or of the Representation of the People Act, 1951 or of any rules or orders made thereunder if not specifically covered by any other preceding clause or sub-clause of the Section it shall be covered by sub-clause (iv). The result of the election insofar as it concerns a returned candidate shall be set aside for any such non-compliance as abovesaid subject to such non-compliance also satisfying the requirement of the result of the election having been shown to have been materially affected insofar as a returned candidate is concerned. The conclusions which inevitably follow are: in the field of election jurisprudence, ignore such things as do not materially affect the result of the election unless the requirement of satisfying the test of material effect has been dispensed with by the law; even if the law has been breached and such breach satisfies the test of material

effect on the result of the election of the returned candidate yet postpone the adjudication of such dispute till the election proceedings are over so as to achieve, in larger public interest, the goal of constituting a democratic body without interruption or delay on account of any controversy confined to an individual or group of individuals or single constituency having arisen and demanding judicial determination.

To what extent Article 329 (b) has an overriding effect on Article 226 of the Constitution? The two Constitution Benches have held that Representation of the People Act, 1951 provides for only one remedy; that remedy being by an election petition to be presented after the election is over and there is no remedy provided at any intermediate stage. The non-obstante clause with which Article 329 opens pushes out Article 226 where the dispute takes the form of calling in question an election (see para 25 of Mohinder Singh Gills case, supra). The provisions of the Constitution and the Act read together do not totally exclude the right of a citizen to approach the Court so as to have the wrong done remedied by invoking the judicial forum; nevertheless the lesson is that the election rights and remedies are statutory, ignore the trifles even if there are irregularities or illegalities, and knock the doors of the courts when the election proceedings in question are over. Two-pronged attack on anything done during the election proceedings is to be avoided ___ one during the course of the proceedings and the other at its termination, for such two-pronged attack, if allowed, would unduly protract or obstruct the functioning of democracy.

The founding fathers of the Constitution have consciously employed use of the words no election shall be called in question in the body of Section 329 (b) and these words provide the determinative 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.

For convenience sake we would now generally sum up our conclusions 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 so 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 courts 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.

These conclusions, however, should not be construed as a summary of our judgment. These have to be read alongwith the earlier part of our judgment wherein the conclusions have been elaborately stated with reasons.

Coming back to the case at hand it is not disputed that the Election Commission does have power to supervise and direct the manner of counting of votes. Till 22nd September, 1999 the Election Commission was of the opinion that all the ballot boxes of one polling station will be distributed to one table for counting the ballot papers and that would be the manner of counting of votes. On 28.9.1999 a notification under Rule 59A came to be issued. It is not disputed that the Commission does have power to issue such notification. What is alleged is that the exercise of power was mala fide as the ruling party was responsible for large scale booth capturing and it was likely to lose the success of its candidates secured by committing an election offence if material piece of evidence was collected and preserved by holding polling stationwise counting and such date being then made available to the Election Tribunal. Such a dispute could have been raised before and decided by the High Court if the dual test was satisfied : (i) the order sought from the Court did not have the effect of retarding, interrupting, protracting or stalling the counting of votes and the declaration of the results as only that much part of the election proceedings had remained to be completed at that stage, (ii) a clear case of mala fides on the part of Election Commission inviting intervention of the Court was made out, that being the only ground taken in the petition. A perusal of the order of the High Court shows that one of the main factors which prevailed with the High Court for passing the impugned order was that the learned Government Advocate who appeared before the High Court on a short

notice, and without notice to the parties individually, was unable to tell the High Court if the notification was published in the Government Gazette. The power vested in the Election Commission under Rule 59A can be exercised only by means of issuing notification in the official gazette. However, the factum of such notification having been published was brought to the notice of this Court by producing a copy of the notification. Main pillar of the foundation of the High Courts order thus collapsed. In the petitions filed before the High Court there is a bald assertion of mala fides. The averments made in the petition do not travel beyond a mere ipsi dixit of the two petitioners that the Election Commission was motivated to oblige the ruling party in the State. From such bald assertion an inference as to mala fides could not have been drawn even prima facie. On the pleadings and material made available to the High Court at the hearing held on a short notice we have no reason to doubt the statement made by the Election Commission and contained in its impugned notification that the Election Commission had carefully considered the matter and then decided that in the light of the prevailing situation in the State and in the interests of free and fair election and also for safety and security of electors and with a view to preventing intimidation and victimisation of electors in the State, a case for direction attracting applicability of Rule 59A for counting of votes in the constituencies of the State, excepting the two constituencies where electronic voting machines were employed, was made out. Thus, we find that the two petitioners before the High Court had failed to make out a case for intervention by the High Court amidst the progress of election proceedings and hence the High Court ought not to have made the interim order under appeal though the impugned order did not have the effect of retarding, protracting, delaying or stalling the counting of votes or the progress of the election proceedings. The High Court was perhaps inclined to intervene so as to take care of an alleged aberration and maintain the flow of election stream within its permissible bounds.

The learned counsel for the Election Commission submitted that in spite of the ballot papers having been mixed and counting of votes having taken place in accordance with Rule 59A it would not be difficult for the learned Designated Election Judge to order a re-count of polls and find out polling-wise break-up of the ballots if the election- petitioner may make out a case for directing a re-count by the Court. In his submission the grievance raised before the High Court was fully capable of being taken care of at the trial of the election petition to be filed after the declaration of the results and so the bar of Article 329(b) was attracted. In this connection he invited our attention to Chaper XIV-B Counting of Votes of Handbook for Returning Officers (1998) issued by Election Commission of India. This is an aspect of the case on which we would not like to express any opinion as the requisite pleadings and material are not available before us.

For the foregoing reasons, the appeals are allowed. The impugned orders of the High Court are set aside. No order as to the costs.

We make it clear that anything said in this order shall not prejudice any plea raised or any issue arising for decision in any election petition which has been filed or

may be filed and the same shall be decided on its own merits un-obsessed by any observation made herein.