THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 6.03.2007

WP (C) 1331/2007

RAMESH DUTTA ...Petitioner

- versus -

THE STATE ELECTION COMMISSION ...Respondent

WITH

WP (C) 1336/2997

ASHOK KUMAR ....Petitioner

-versus-

THE STATE ELECTION COMMISSION ...Respondent

W.P. (C) 1399/2007

ASHOK JINDAL ...Petitioner

-versus-

THE STATE ELECTION COMMISSION ...Respondent

WITH

W.P. (C) 1400/2007

NEERAJ KUMAR ...Petitioner

-versus-

THE STATE ELECTION COMMISSIONIONER & ANR....**Respondents**

WITH

W.P. (C) 1401/2007

MONU CHADHA **...Petitioner**

-versus-

GOVT. OF NCT. & ANOTHER **...Respondents**

WITH
W.P. (C) 1477/2007

RAJ SINGH MAAN **...Petitioner**

-versus-

THE STATE ELECTION COMMISSION **...Respondent**

WITH

W.P. (C) 1513/2007

N.K. JAIN **...Petitioner**

-versus-

UOI AND OTHERS **...Respondents**

Advocates who appeared in this case:

For the Petitioners : Mr V.P. Chaudhary Sr Advocate with Mr Digvijay Rai, Mr S.P.Singh Chaudhary with Mr Imram Khan, Mr Krishan Kumar, Mr R.K. Saini, Mr A.K. Singh, Mr Jasbir Singh Malik. and Mr A.K. Singla.

For the Respondents : Mr Suresh Tripathi, Mr J.R. Midha with Mr Maneesh K. Shukla, Mr Sanjeev Sabharwal, Ms Sonia Mathur.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in Digest? Yes

BADAR DURREZ AHMED, J (ORAL)

The Challenge & Resistance

1. All these petitions pertain to the reservation of seats of Councillors in the Municipal Corporation of Delhi [MCD] for scheduled castes and women. The forthcoming election of the MCD would be conducted on the basis of this reservation and allotment of seats. The petitioners are those who intended to contest in the next election to be held on 05.04.2007 but, have allegedly been shut out because the wards from where they wanted to contest have been allotted to either scheduled castes or women.

2. In these writ petitions the common challenge is to the Notification dated 17.02.2007 bearing F.No. SEC/MCD/Admn./2007/3938 issued by the Election Commissioner of The National Capital Territory of Delhi in purported exercise of powers conferred by sub-sections (7) and (8) of section 3 of The Delhi Municipal Corporation Act, 1957 (hereinafter referred to as "the DMC Act") read with the Government of India, Ministry of Home Affairs Notification No. U-14011/187/93-Delhi dated 14.12.1993[1], whereby the number of seats to be reserved for women

1 By this notification the Central Government directed that the powers exercisable by it under the fourth proviso to sub-section (6) and sub-sections (7) and (8) of section 3 of the DMC Act shall be exercisable by the Election Commission of the National Capital Territory of Delhi.

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 and the same were allotted to the wards as per the table given in the notification itself. The challenge is that:-

(1) the Notification dated 17.02.2007 does not disclose the manner in which the seats were reserved for scheduled castes and/or for women;

(2) the manner indicated in the counter affidavit filed on behalf of the State Election Commission for Delhi is arbitrary and contrary to the constitutional provisions;

(3) even the manner indicated in the counter affidavit has not been followed and this has given way to a policy of "pick and choose" which is impermissible; and

(4) in any event, no notification under section 5(2)(c), (d) & (e) of the DMC Act has been issued, which is a mandatory requirement.

3. The challenge is resisted by the State Election Commission for the National Capital Territory of Delhi on two counts. The first is the issue of maintainability of these writ petitions in view of the provisions of article 243ZG of the Constitution of India. The second being that the criterion adopted by the State Election Commission is objective and cannot be faulted and has been uniformly followed in allotting the seats for Scheduled Castes and women.

The Background

4. Before I take up these issues, a brief note on the background would be necessary. The Municipal Corporation of Delhi was established under section 3 of the DMC Act. The Councillors are chosen by direct election from the various wards into which Delhi is divided. Initially, the total number of councillors was eighty (80) and, twelve (12) seats out of these were reserved for members of the Scheduled Castes[2]. By virtue of the Constitution (Seventy-fourth) Amendment Act, 1992, Part IX-A pertaining to municipalities was inserted in the Constitution. This was followed by amendments in the DMC Act by virtue of Act No. 67 of 1993 which, inter alia, assigned 134 wards to DMC. By a notification dated 20.12.1993, the Lt. Governor of the NCT of Delhi, in exercise of powers conferred by sub-section (6) of section 3 of the DMC Act and on the basis of the population of Delhi as per the 1991 Census, determined the number of seats to be 134 and also determined that, out of these seats, 25 shall be reserved for the members of Scheduled Castes keeping in view the ratio of Scheduled Caste population to the total population of Delhi based on the 1991 Census.

2 See: section 3(5) of the DMC Act.

5. On 30.12.1993, the Election Commissioner of the NCT of Delhi issued a notification no. F. Sec./Notification/F016/93/1215, in purported exercise of powers under proviso 4 to sub-section (6), sub-sections (7) and (8) of section 3 of the DMC Act, determining the total number of seats for women and also for women belonging to the Scheduled Castes category from amongst the seats reserved for Scheduled Castes and also determined the manner of rotation of the total reserved seats in the Corporation. But, this notification ran into problems and was withdrawn[3].

6. Consequently, another notification dated 18.03.1994 was issued by the Election Commission of the NCT of Delhi determining that out of the 25 seats reserved Scheduled Castes, 9 seats shall be reserved for women belonging to Scheduled Castes. By a further Notification dated 21.03.1994, the said Election Commission determined that the total number of seats reserved for women shall be 37 other than those reserved for Scheduled Castes. Ultimately, by a notification dated 23.03.1994 issued under proviso 4 to sub-section (6) of section 3, sub-sections (7) and (8) (including the proviso thereto) of section 3 and clauses (c), (d) and (e) of sub-section (2) of section 5 of the DMC Act, the Election Commissioner of the NCT of Delhi notified the reservation by allotment of seats for

3 See: 1995 I AD (Delhi) 467.

women, members of Scheduled Castes and women belonging to Scheduled Castes and the manner of reservation and rotation of reserved seats in different wards for six terms. For this purpose, the 134 wards were divided into five groups, four groups comprising of 32 wards each and a fifth group of 6 wards. The reservation and rotation formulae were set out in the notification on the basis of these groups.

7. This notification of 24.03.1994 was the subject matter of challenge in CWP No. 1571/1994 (***Shri Hem Raj Arya & ors v. The Election Commission of the NCT of Delhi & ors***). The petitioners therein had alleged that the formula adopted by the said Election Commission for reservation and rotation was wholly arbitrary, irrational, unintelligible, confusing and suffered from various legal infirmities. As in the present petitions, in that petition also, there was no dispute with regard to the total number of seats and the reservation for Scheduled Castes, Schedule Caste women and women in the general category. There was also no challenge to the delimitation of wards as such. The only dispute was with regard to the manner of reservation of wards in terms of sub-clauses (c) and (d) of sub-section (2) of section 5 of the DMC Act. By its judgment dated 12.01.1995, a division bench of this court dismissed the petition (CWP No. 1571/1994) in the following manner:-

> "We are of the view that since no malafides on the part of the respondents have been pleaded or proved in adopting the stated method of reservation of seats, it is not for this Court to go into the minute details of the manner of reservation particularly when the Court is neither conceived with any statutory formula which had to be applied to test the correctness of the method adopted nor any precise fool proof mathematical formula can be spelt out for the said purpose. The method adopted for reservation of wards cannot be struck down merely because another method would be more fair, scientific or logical. The court should only interfere if the impugned action is patently arbitrary, unconsciously unfair, discriminatory or malafide, which as already noted, is neither pleaded nor proved. In that view of the matter we do not find any ground to interfere. There is no merit in the petition and the same is accordingly dismissed."

The general election of Councillors of the MCD in 1997 were held on the basis of this notification of 23.03.1994.

9. Prior to the holding of elections for the next term, a notification dated 27.11.2001 was issued by the Central Government, in supersession of the said notification of 23.03.1994, directing and notifying that the reservation by allotment of seats for women, members of the Scheduled Castes and women belonging to the Scheduled Castes and the manner of reservation and rotation of reserved seats in different wards for the next elections to the Delhi Municipal Corporation shall remain the same as it was for the earlier Delhi Municipal Corporation which was established

after the commencement of the Delhi Municipal Corporation (Amendment) Act, 1993 and as notified by the Election Commission of the NCT of Delhi vide notification dated 23.03.1994 and shall continue to apply till fresh delimitation of wards takes place. This meant that the reserved seats as specified for the first term in the 23.03.1994 notification would continue to be reserved for the next election without following the scheme of rotation for the second term specified in the notification of 23.03.1994. As indicated in the notification of 27.11.2001, the Central Government was of the view that there is neither legal requirement under the DMC Act to rotate the reserved seats every five years nor is it feasible to do so as it involves taking and completion of census before ascertaining the reservation and rotation of seats of the Delhi municipal Corporation. This notification of 27.11.2001 was essentially a stop-gap arrangement as the fresh delimitation of wards was to be undertaken after completion of the 2001 Census which was then underway and was unlikely to be completed before the next election which was due in March, 2002. The 2002 elections were, therefore, held on the same basis as the 1997 elections without rotating the reserved seats either of Scheduled Castes or of women.

10. The five-year term of the Councillors elected in 2002 is drawing to an end. The new set of Councillors have to be in place by 10.04.2007.

The elections are slated to be held on 05.04.2007. The notification for the elections is scheduled to be issued on 10.03.2007. At present only the moral code of conduct has been put in place on 23.02.2007. In the meanwhile, the census 2001 has been completed. By a Notification dated 17.01.2007, the Lt Governor of the NCT of Delhi determined the total number of seats of Councillors in the Municipal corporation of Delhi as 272 and out of that seats reserved for the members of the Scheduled castes as 46. Another notification dated 07.02.2007 was issued by the Administrator of NCT of Delhi, under section 5(2) of the DMC Act, determining the extent of each of the aforesaid two hundred and seventy two wards as noted in the Table 'A' given in the said notification.

11. Ultimately, the impugned notification dated 17.02.2007 came to be issued. The notification reads as under:-

"(TO BE PUBLISHED IN PART IV OF THE DELHI GAZETTE EXTRAORDINARY)

STATE ELECTION COMMISSION
NATIONAL CAPITAL TERRITORY OF DELHI
OLD HINDU COLLEGE BUILDING COMPLEX, NIGAM BHAWAN,
KASHMERE GATE, DELHI-110 006.

F.No. SEC/MCD/Admn./2007 Dated the 17th Feb., 2007

NOTIFICATION

WHEREAS the Lt. Governor of the National Capital Territory of Delhi has determined total number of seats of Councillors in the Municipal Corporation of Delhi as 272 and out of that seats reserved for the members of the Scheduled Castes as 46 under Sub-section (6) of Section 3 of the Delhi Municipal Corporation Act, 1957 (Act No. 66 of 1957) as amended by the Delhi Municipal Corporation (Amendment) Act (Act No. 66 of 1993) and Delhi Municipal Corporation (Amendment) Act 2007 (Delhi Act of 2007) hereinafter referred to as 'the said act' vide Government of National Capital Territory of Delhi, Department of UD, Notification No. 7(367)(8)/2002/UD/989 dated 17.1.2007 published in Delhi Gazette Extraordinary;

AND WHEREAS under sub-section (7) of Section 3 of the said Act, seats shall be reserved for women belonging to the Scheduled Castes, from among the seats for the Scheduled castes, the number of such seats being determined by the Central Government by order published in the Official Gazette which shall not be less than one-third of the total number of seats reserved for the Scheduled Castes;

AND WHEREAS under sub-section (8) of Section 3 of the said Act, seats shall be reserved for women, the number of said seats being determined by the order published in Official Gazette by the Central Government which shall not be less than one-third of total number of seats other than those reserved for Scheduled Castes;

NOW, THEREFORE, in exercise of the powers conferred by sub section (7) and (8) of section 3 of the said Act read with the Government of India, Ministry of Home Affairs Notification No. U-14011/187/93-Delhi dated the 14th December, 1993 I, S.P. Marwah, Election Commissioner of the National Capital Territory of Delhi, hereby determine the number of seats to be reserved for women belonging to the Scheduled Castes from amongst the seats reserved for the Scheduled Castes as 16 and number of seats for women (General) from amongst the unreserved seats as 76, and allot the same as per the Table below :-

No. & Name of Ward	**Category**	**No. & Name of Ward**	**Category**
1- Narela	G	16- Jahangir Puri-I	SC
2- Bankner	G	17 - Samaypur Badli	G
3- Alipur	W	18 - Libas Pur	W
4- Bakhtawar Pur	G	19- Bhalswa	G
5- Bhalswa Jahangir Pur	SC	20 - Jahangir Puri-II	G
6- Mukund Pur	G	21- Rohini	W
7- Burari	W	22 - Rithala	G
8- Jharoda	G	23 - Budh Vihar	G
9- Malka Ganj	SC	24- Vijay Vihar	W
10 -Timar Pur	G	25- Pooth Kalan	SC- W
11- Mukherjee Nagar	W	26- Sahibabad Dault Pur	SC
12 - G.T.B.Nagar	G	27- Begumpur	G
13 - Dhir Pur	G	28- Bawana	G
14 - Adarsh Nagar	W	29 -Karala	W
15 - Sarai Pipal Thala	G	30- Mundaka	G
31- Nangloi Jat West	SC	52 - Naharpur	W
32- Nilothi	G	53 - Pitampura South	G
33- Pratap Vihar	W	54 - Pitampura North	G
34- Nithari	G	55 - Shalimar Bagh North	W
35- Kirari Suleman Nagar	SC	56 - Shalimar Bagh South	G
36- Prem Nagar	G	57 - Paschim Vihar South	W
37 - Sultanpuri East	SC- W	58 - Paschim Vihar North	G
38 - Mangol Puri North	SC	59 - Rani Bagh	W
39 - Sultanpur Majra	G	60 - Saraswati Vihar	G
40- Sultanpuri South	G	61 - Tri Nagar	W
41 -Guru Harkishan Nagar	W	62 - Rampura	G

No. & Name of Ward	Category	No. & Name of Ward	Category
42- Peragharhi	SC	63 - Kohat Enclave	G
43 - Nangloi East	G	64 - Shakur Pur	SC
44- Quammruddin Nagar	G	65 - Nimri Colony	SC- W
45- Rohini South	G	66 - Sawan Park	SC
46- Mangolpuri East	SC- W	67 - Wazirpur	G
47- Mangolpuri	G	68 - Ashok Vihar	G
48 -Mangolpuri West	SC	69 - Kamla Nagar	W
49 - Rohini North	W	70 - Rana Pratap Bagh	G
50- Rohini Central	G	71 - Sangam Park	SC
51 - Rohini East	G	72 - Model Town	G
73 - Shastri Nagar	W	93 - Baljit Nagar	SC- W
74- Inder Lok Colony	SC	94 - West Patel Nagar	G
75 - Kishan Ganj	G	95 - East Patel Nagar	SC
76 - Deputy Ganj	G	96 - New Ranjit Nagar	G
77 - Kashmere Gate	W	97 - Kirti Nagar	W
78 - Majnu Ka Tilla	SC	98 - Man Sarover Garden	G
79 - Jama Masjid	G	99 - Moti Nagar	W
80 - Chandni Chowk	G	100 - Karampura	G
81 - Minto Road	W	101- Raja Garden	G
82 - Kucha Pandit	SC	102 - Raghubir Nagar	SC- W
83 - Bazar Sita Ram	G	103 - Punjabi Bagh	G
84 - Turkman Gate	G	104 - Madipur	SC
85 - Idgah Road	SC- W	105 - Rajouri Garden	G
86 - Ballimaran	G	106 -Tagore Garden	W
87 - Ram Nagar	SC	107 - Vishnu Garden	G
88 - Qasabpura	G	108 - Khyala	W
89 - Paharganj	G	109 - Janakpuri North	G
90 - Model Basti	SC- W	110 - Nangal Raya	W
91 - Karol Bagh	G	111 - Hari Nagar	G
92 - Dev Nagar	SC	112 - Subhash Nagar	W
113 - Mahavir Nagar	G	134 - Nangli Sakravati	W
114 - Tilak Nagar	W	135 - Kakraula	G
115 - Major Bhupinder Singh Nagar	G	136 - Matiala	W
116 - Vikaspuri East	W	137 - Roshanpura	G
117 - Janak Puri West	G	138 - Najafgarh	G
118 - Janak Puri South	W	139 - Dichaon Kalan	W
119 - Milap Nagar	G	140 - Khera	G
120 - Sitapuri	W	141 - Bijwasan	W

No. & Name of Ward	Category	No. & Name of Ward	Category
121 - Kunwar Singh Nagar	G	142 - Raj Nagar	G
122 - Hastsal	W	143 - Kapashera	G
123 - Vikas Puri	G	144 - Mahipalpur	W
124 - Vikas Nagar	W	145 - Palam	G
125 - Mohan Garden	G	146 - Sadh Nagar	G
126 - Nawada	W	147- Mahavir Enclave	W
127 - Uttam Nagar	G	148 - Madhu Vihar	G
128 - Bindapur	W	149 - Rajinder Nagar	G
129 - Dabri	G	150 - Pusa	SC- W
130 - Manglapuri	W	151 - Inderpuri	SC
131 - Sagarpur	G	152 - Naraina	G
132 - Sagarpur West	W	153 - Daryaganj	W
133 - Chhawla	G	154 - Nizamuddin	G
155 - Lajpat Nagar	G	175 - Aya Nagar	W
156 - Bhogal	SC	176 - Bhati	G
157 - Kasturba Nagar	W	177 - Sangam Vihar	G
158 - Kotla Mubarak Pur	G	178 - Deoli	G
159 - Adnrewsganj	G	179 - Tigri	SC- W
160 - Amar Colony	W	180 - Dakshin Puri Ext.	SC
161 - Malviya Nagar	G	181 - Khanpur	G
162 - Village Hauz Rani	G	182 - Ambedkar Nagar	SC- W
163 - Safdarjang Enclave	W	183 - Madangir	SC
164 - Hauz Khas	G	184 - Pushp Vihar	G
165 - Vasant Vihar	G	185 - Tughlakabad Extn.	W
166 - Munirika	W	186 - Sangam Vihar West	G
167 - R.K. Puram	G	187 - Sangam Vihar Central	W
168 - Nanak Pura	G	188 - Sangam Vihar East	G
169 - Lado Sarai	W	189 - Chiragh Delhi	W
170 - Mehrauli	G	190 - Chitranjan Park	G
171 - Vasant Kunj	SC	191 - Shahpur Jat	W
172 - Kishangarh	G	192 - Greater Kailash I	G
173 - Said-ul-Ajaib	W	193 - Sri Niwaspuri	G
174 - Chhatarpur	G	194 - East of Kailash	W
195 - Govind Puri	G	216 - Gharoli	G
196 - Kalkaji	G	217 - Vinod Nagar	W
197 - Tughlakabad	W	218 - Mandawali	G
198 - Pul Pehlad	G	219 - Mayur Vihar Phase -II	G
199 - Tekhand	G	220 - Patpar Ganj	W

No. & Name of Ward	Category	No. & Name of Ward	Category
200 -Harkesh Nagar	SC	221 - Kishan Kunj	G
201 - Jaitpur	W	222 - Laxmi Nagar	G
202 - Meetheypur	G	223 - Shakarpur	W
203 - Badarpur	G	224 - Pandav Nagar	G
204 - Molarband	W	225 - Anand Vihar	G
205 - Zakir Nagar	G	226 - Vishwash Nagar	SC
206 - Okhla	G	227 - I.P. Extention	W
207 - Madanpur Khadar	W	228 - Preet Vihar	G
208 - Sarita Vihar	G	229 - Krishna Nagar	G
209 - Mayur Vihar Phase-I	G	230 - Geeta Colony	W
210 - Dallopura	SC- W	231 - Ghondli	G
211 - Trilok Puri	SC	232 - Anarkali	G
212 - New Ashok Nagar	G	233 - Dharam Pura	W
213 - Kalyan Puri	SC- W	234 - Gandhi Nagar	G
214 - Khichripur	G	235 - Azad Nagar	G
215 - Kondli	SC	236 - Raghubar Pura	W
237 - Shahdara	G	255 - Ghonda	W
238 - Jhilmil	G	256 - Yamuna Vihar	G
239 - Vivek Vihar	W	257 - Subhash Mohalla	G
240 - Dilshad Colony	G	258 - Kardampuri	W
241 - Dilshad Garden	G	259 - Janta Colony	G
242 - New Seema Puri	G	260 - Babar pur	G
243 - Nand Nagri	SC- W	261 - Jiwanpur	G
244 - Sunder Nagari	SC	262 - Gokalpur	SC- W
245 - Durga Puri	SC-W	263 - Saboli	G
246 - Ashok Nagar	W	264 - Harsh Vihar	SC
247 - Ram Nagar	G	265 - Shiv Vihar	G
248 - Welcome Colony	G	266 - Karawal Nagar East	W
249 - Chauhan Bangar	W	267 - Nehru Vihar	G
250 - Zaffrabad	G	268 - Mustafabad	W
251 - New Usmanpur	G	269 - Khajoori Khas	G
252 - Mauj Pur	W	270 - Tukhmir Pur	W
253 - Bhajanpura	G	271 - Karawal Nagar West	G
254 - Brahampuri	G	272 - Sonia Vihar	W

N.B. - SC - indicates ward reserved for Scheduled Castes.
- SC (W) - indicates ward reserved for women belonging to Scheduled Castes.
- W – indicates ward reserved for women (General).
- G – indicates General (unreserved) ward.

(S.P. MARWAH)

ELECTION COMMISSIONER OF THE NATIONAL CAPITAL TERRITORY OF DELHI."

The Issue of Maintainability

12. Objection to the maintainability of the writ petitions was, as mentioned above, taken straight-away by Mr Tripathi, the learned counsel appearing on behalf of the Election Commission of the NCT of Delhi. He referred to article 243ZG of the Constitution and submitted that the notification of 17.02.2007 cannot be called in question in any court. He placed reliance on the decision of the Supreme Court in the case of ***Anugrah Narain Singh v. State of U.P. : (1996) 6 SCC 303*** to contend that Article 243ZG constituted a complete and absolute bar to considering any matter relating to Municipal elections on any ground whatsoever. He referred to the following passage in the said decision :-

> "11. The question that came up for decision before the Allahabad High Court has been stated in the judgment in the following words:
>
> > ... the common question raised in all these petitions is as to whether in terms of Article 243-ZG of the Constitution there is complete and absolute bar in considering any matter relating to Municipal Election on any ground whatsoever after the publication of the notification for holding Municipal Election.
>
> 12. The answer must be emphatically in the affirmative. The bar imposed by Article 243-ZG is two-fold. Validity of laws relating to delimitation and allotment of seats made under Article 243-ZA cannot be question in any Court. No election

> to a Municipality can be questioned except by an election petition. Moreover, it is well settled by now that if the election is imminent or well underway, the Court should not intervene to stop the election process. If this is allowed to be done, no election will ever take place because someone or the other will always find some excuse to move the Court and stall the elections....”

Mr Tripathi referred to the Supreme Court decision in ***Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman:*** ***(1985) 4 SCC 689*** wherein it was observed thus:-

> "no High Court in the exercise of its powers under Article 226 of the Constitution should pass any orders, interim or otherwise, which has the tendency or effect of postponing an election, which is reasonably imminent and in relation to which its writ jurisdiction is invoked. The imminence of the electoral process is a factor which must guide and govern the passing of orders in the exercise of the 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 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,.... The High Courts must observe a self-imposed limitation on their power to act under Article 226, by refusing to pass orders or give directions which will inevitably result in an indefinite postponement of elections to legislative bodies, which are the very essence of the democratic foundation and functioning of our Constitution."

Mr Tripathi also placed reliance upon ***State of U.P. v. Pradhan Sangh Kshettra Samiti:(1995) Supp(2) SCC 305*** and ***Meghraj Kothari v. Delimitation Commission:*** ***AIR 1967 SC 669: (1967) 1 SCR 400.***

13. Mr V.P. Chaudhary, the learned senior counsel appearing on behalf of the petitioners contended that the writ petitions were maintainable and that the decision of the Supreme Court in ***Anugrah Narain Singh*** *(supra)*, in fact, came to the aid of the petitioners. According to him, even the decision in ***Hassan Uzzaman*** *(supra)* did not militate against the power of this court to maintain the present petitions. Those decisions, as contended by Mr Chaudhary, led to the conclusion that courts should adopt a hands-off policy once the election process was under-way or imminent. The courts should not interfere when such interference would stall the process of election and thereby stultify the very processes of democracy. However, there was no bar to entertain petitions of the present nature as the election process had not started and the orders sought are not such as would postpone the election. He also contended that the bar of Article 243ZG is not at all attracted as the validity of any law passed under Article 243ZA is not under challenge.

14. At this juncture, a reference to the relevant provisions of the Constitution and the DMC Act would be necessary. Article 243ZG, which falls under Part IXA of the Constitution, reads as under:-

> "**243ZG. 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 243ZA shall not be called in question in any court;
>
> (b) no election to any Municipality 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."

The present petitions clearly do not call in question any election and, therefore, Article 243ZG (b) has no application. For clause (a) to apply, the "validity" of a "law" relating to the delimitation of constituencies or a "law" relating to the allotment of seats to such constituencies must be in question. Moreover, such "law" must have been made or purported to have been made under article 243ZA. What is challenged in the present petitions is the notification dated 17.02.2007. Would this notification fall within the meaning of "law"? Could it be said that the notification, if it is "law", was made or purports to have been made under article 243ZA? These are some of the questions that need to be answered. First of all, let us examine the provisions of article 243ZA :-

> "**243ZA. Elections to the Municipalities.**— (1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Municipalities shall be vested in the State Election Commission referred to in article 243K.
>
> (2) 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 Municipalities."

A reference to sub-article (2) of article 243ZA would immediately make it clear that the "law" that is referred to in article 243ZG must be a "law" made by the Legislature of a State and it must make provision with respect to matters relating to or in connection with elections to a municipality. The provisions of sections 3 and 5 of the DMC Act are certainly "law" of this kind. But, their validity is not in question. It is the notification which has purportedly been issued under these provisions that is under challenge. To appreciate the true nature of the notification dated 17.02.2007, it would be necessary to examine the relevant provisions of sections 3 and 5 of the DMC Act. Sections 3 and 5, so much as is relevant, reads as under:-

> **"3. Establishment of the Corporation** .--
>
> xxxx xxxx xxxx
>
> xxxx xxxx
>
> (6) Upon the completion of each census after the establishment of the Corporation the number of seats shall be on the basis of the population of Delhi as ascertained at that census and shall be determined by the Central Government by notification in the Official Gazette and the number of seats to

be reserved for the members of the Scheduled Castes shall, as nearly as may be, bear the same ratio to the total number of seats as the population of Scheduled Castes bears to the total population of Delhi:

Provided that the total number of seats shall in no case be more than one hundred and thirty-four or less than eighty:[4]

Provided further that the determination of seats as aforesaid shall not affect the then composition of the Corporation until the expiry of the duration of the Corporation:

Provided also that for the first election to the Corporation to be held immediately after the commencement of the Delhi Municipal Corporation (Amendment) Act, 1993, the provisional population figures of Delhi as published in relation to 1991 census shall be deemed to be the population of Delhi as ascertained in that census:

Provided also that the seats reserved for the Scheduled Castes may be allotted by rotation to different wards in such manner as the Central Government may, by order published in the Official Gazette, direct.

(7) Seats shall be reserved for women belonging to the Scheduled Castes, from among the seats reserved for the Scheduled Castes, the number of such seats being determined by the Central Government by order published in the Official Gazette which shall not be less than one-third of the total number of seats reserved for the Scheduled Castes.

(8) Seats shall be reserved for women, the number of such seats being determined by order published in the Official Gazette by the Central Government which shall not be less than the one-third of total number of seats other than those reserved for the Scheduled Castes:

4 The figure has now been raised to two hundred and seventy two.

Provided that such seats reserved for women shall be allotted by rotation to different wards in such manner as the Central Government may, by order published in the Official Gazette, direct in this behalf."

(underlining added)

"5. Delimitation of wards .-- (1) For the purposes of election of councillors, Delhi shall be divided into single-member wards in such manner that the population of each of the wards shall, so far as practicable, be the same throughout Delhi.

(2) The Central Government shall, by order in the Official Gazette, determine,--

(*a*) the number of wards;

(*b*) the extent of each ward ;

(*c)* the wards in which seats shall be reserved for the Scheduled Castes;

(*d*) the wards in which seats shall be reserved for women; and

(*e*) the manner in which seats shall be rotated under sub-sections (6) and (8) of Section 3."

(underlining added)

These statutory provisions with regard to reservation of seats for Sheduled castes and women flow from article 243T of the Constitution of India, which is as under:-

"243-T. Reservation of seats. -- (1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes in every Municipality 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 Municipality as the population of the Scheduled Castes in the Municipal area or of the Scheduled Tribes in the Municipal area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Municipality.

(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 Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality.

(4) The offices of Chairpersons in the Municipalities shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide.

(5) The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in Article 334.

(6) Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Municipality or offices of Chairpersons in the Municipalities in favour of backward class of citizens."

(underlining added)

15. So, the number of seats to be reserved for Scheduled castes is to be determined by the proportion of the Scheduled Caste population to the total population. Such seats reserved for the Scheduled Castes "may" be allotted by rotation to different constituencies. Both, article 243T and the fourth proviso to section 3(6) of the DMC Act, use the word "may", making it clear that it is not mandatory that the seats reserved for the Scheduled Castes must be rotated. Rotation of seats reserved for women, however, is mandatory. Both, article 243T and the provisions of section 3(7) & (8) of the DMC Act, make it mandatory that at least one third of the seats shall be reserved for women. However, while article 243T makes the rotation of these seats for women discretionary by the use of the word "may" in sub-article (3), the DMC Act makes such rotation mandatory by use of the word "shall" in the proviso to section 3(8). The acts which need to done by the Central Government with regard to the number of seats and the reservation of seats for scheduled castes and women are spelt out in section 5(2) of the DMC Act. The Central Government is required to, by order in the Official Gazette, determine, (*a*) the number of wards; (*b*) the extent of each ward ; (*c)* the wards in which seats shall be reserved for the Scheduled Castes;(*d*) the wards in which seats shall be reserved for women; and (*e*) the manner in which seats shall be rotated under sub-sections (6) and (8) of Section 3. Therefore, while sub-sections (6), (7)

and (8) speak of the total number of seats, the number of seats to be reserved for scheduled castes and the number of seats to be reserved for women, section 5(2) deals with not only the number of wards and the extent of each ward, but, also with the identification of the wards in which seats shall be reserved for the Scheduled Castes; the identification of the wards in which seats shall be reserved for women; and, the manner in which seats shall be rotated under sub-sections (6) and (8) of section 3.

16. Examined in this light, the notification dated 17.02.2007, though it purports to be a notification issued under sub-sections (7) and (8) of section 3 of the DMC Act, touches upon the subjects of section 5(2) of the DMC Act inasmuch as it identifies the seats reserved for scheduled castes and for women. Of course, it does not specify the manner of rotation of these seats, as, according to the counsel for the Election Commission of NCT of Delhi, the manner of rotation need not be specified now as the allotment of seats is being done afresh after the increase in the number of seats. It would be done the next next time when the need to rotate the seats would arise.

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. <u>There was ample opportunity under the Act to raise objections before finalisation of the delimitation process.</u> 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."
>
> (underlining added)

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 ***Anugraya 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.

22. It must be re-emphasised that in the present case the provisions of the DMC Act are not challenged. There is also no challenge to the exercise of delimitation carried out or to the extent of the constituencies after the exercise of delimitation. There is also no challenge to the number of constituencies nor is there any challenge to the number of seats to be reserved for Scheduled Castes and women. On the other hand, in ***Anugrah***

Narain Singh's case *(supra)*, the validity of the provisions of the Uttar Pradesh Municipal Adhiniyam, 1959 were in question. In this context, the Supreme Court held:-

> **"24.** The validity of Sections 6-A, 31, 32 and 33 of the U.P. Act dealing with delimitation of wards cannot be questioned in a court of law because of the express bar imposed by Article 243-ZG of the Constitution. Section 7 contains rules for allotment of seats to the Scheduled Castes, the Scheduled Tribes and the Backward Class people. The validity of that section cannot also be challenged. <u>That apart, in the instant case, when the delimitation of the wards was made, such delimitation was not challenged on the ground of colourable exercise of power or on any other ground of arbitrariness. Any such challenge should have been made as soon as the final order was published in the Gazette after objections to the draft order were considered and not after the notification for holding of the elections was issued.</u> As was pointed out in *Lakshmi Charan Sen case*[5], that the fact that certain claims and objections had not been disposed of before the final order was passed, cannot arrest the process of election."
>
> (underlining added)

23. Since the validity of the provisions of the Act had been questioned, the Supreme Court held that the same was beyond question in a Court of law because of the express bar imposed by Article 243ZG of the Constitution. But, it is also apparent that the Supreme Court was of the view that if there was any challenge to the delimitation of wards on the ground of colourable exercise of power or on any other ground of arbitrariness, such a challenge should have been made as soon as the final

5 (1985) 4 SCC 689

order was published in the Gazette and not after the notification for holding of elections was issued. Clearly, even the delimitation of wards could be challenged on the ground of colourable exercise of power or on any other ground of arbitrariness provided the challenge was brought to the Court before the notification for holding of elections was issued. In the present case, immediately upon the issuance of a Notification of 17.02.2007, the petitioners have approached this Court, prior to the issuance of notification for holding of elections. Not only this, the delimitation of wards is not in question nor is the validity of any provision of the DMC Act. The only question is with regard to the manner in which seats have been allocated for the Scheduled Castes and women. Clearly, there is nothing in the decisions of ***Anugrah Narain Singh*** *(supra)* or ***Hassan Uzzaman*** *(supra)* which militates against the maintainability of the present writ petitions.

24. Another aspect of ***Anugrah Narain Singh's*** case *(supra)* needs to be considered inasmuch as that clearly shows that the present writ petitions are maintainable. Section 32 of the U.P. Municipal Corporation Adhiniyam, 1959 reads as under:-

> "32. *Delimitation Order* .-- (1) The State Government shall by order --

(*a*) divide a municipal area into wards in such manner that the population in each ward shall, so far as practicable, be the same throughout the municipal area;

(*b*) determine the number of wards into which a municipal area shall be divided;

(*c*) determine the extent of each ward;

(*d*) determine the number of seats to be reserved for the Scheduled Castes, the Scheduled Tribes, Backward Classes and women.

(2) The draft of the Order under sub-section (1) shall be published in the Official Gazette for objections for a period of not less than seven days.

(3) The State Government shall consider any objection filed under sub-section (2) and the draft Order shall, if necessary, be amended, altered or modified accordingly and thereupon it shall become final."

25. It may be noted that this provision is similar to Section 5 of the DMC Act. The only difference being that the requirement of publishing a draft order and of inviting objections and taking out a final list is not there in the DMC Act. But, that does not have any bearing for the purposes of the present writ petitions. In respect of Section 32 of the UP Act of 1959, the Supreme Court, in ***Anugrah Narain Singh*** *(supra)* observed as under:-

> **"25.** In this connection, it may be necessary to mention that there is one feature to be found in the Delimitation Commission Act, 1962 which is absent in the U.P. Act. Section 10 of the Act of 1962 provided that the Commission shall cause each of its order made under Sections 8 and 9 to be published in the Gazette of India and in the Official Gazettes of the States concerned. 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. Because of these specific provisions of the Delimitation Commission Act, 1962, in the case of *Meghraj Kothari* v. *Delimitation Commission*[6], this Court held that notification of orders passed under Sections 8 and 9 of that Act had the force of law and therefore, could not be assailed in any court of law because of the bar imposed by Article 329. The U.P. Act of 1959, however, merely provides that the draft order of delimitation of municipal areas shall be published in the Official Gazette for objections for a period of not less than seven days. The draft order may be altered or modified after hearing the objections filed, if any. Thereupon, it shall become final. It does not lay down that such an order upon reaching finality will have the force of law and shall not be questioned in any court of law. For this reason, it may not be possible to say that such an order made under Section 32 of the U.P. Act has the force of law and is beyond challenge by virtue of Article 243-ZG. But any such challenge should be made soon after the final order is published. The Election Court constituted under Section 61 of the U.P. Act will not be competent to entertain such an objection. In other words, this ground cannot be said to be comprised in sub-clause (*iv*) of clause (*d*) of Section 71 of the U.P. Act. In the very nature of things, the Election Court cannot entertain or give any relief on this score. The validity of a final order published under Section 33 of the U.P. Act is beyond the ken of Election Court constituted under Section 61 of the said Act."

(underlining added)

It is abundantly clear that the Supreme Court distinguished the provisions of Section 32 of the U.P. Act of 1959 from the provisions of the Delimitation Commission Act, 1962, which were considered in ***Megraj Kothani*** *(supra)* (another decision relied upon by Mr Tripathi who appeared on behalf of the Election Commission of NCT of Delhi). The

6 AIR 1967 SC 669

Supreme Court observed that it may not be possible to say that an order made under Section 32 of the UP Act of 1959, had the force of law and was beyond challenge by virtue of Article 243ZG of the Constitution. It, further held that any such challenge should be made soon after the final order is published. So, a distinction was made between the order made under the Delimitation Commission Act, 1962, which, in terms of the provisions therein, had the "force of law" and the provisions of Section 32 of the U.P. Act, which, though final, did not have the force of law and was, therefore, not beyond the challenge by virtue of Article 243ZG. The only thing was that the challenge should be made immediately or soon after the publication of the final order. There is no provision in the DMC Act also which expressly makes an order passed by the Central Government under Section 5 (2) of the DMC Act to have the force of law. Clearly, an order made by the Central Government under Section 5 (2) determining the number of wards, extent of each ward, the wards in which seats shall be reserved for the Scheduled Castes, the wards in which the seats shall be reserved for women and the manner in which seats shall be rotated under Sub-Section (6) and (8) of Section 3 of the

DMC Act would not have the force of law and, consequently, would not be beyond challenge by virtue of Article 243ZG of the Constitution.

26. In ***Election Commission of India v. Ashok Kumar***: ***2000 (8) SCC 216,*** the Supreme Court observed that the jurisdiction of Courts is carved out of the sovereign power of the State and that people of free India are 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. It held that access to Court is an important right vested in every citizen, implying the existence of power of the Court to render justice according to law. Where a statute is silent and judicial intervention is required, Courts strive to redress grievances according to what are perceived to be principles of justice, equity and good conscience. The Supreme Court also held that it is no longer debatable that the power of judicial review is a basic feature of the Constitution. Referring to an earlier decision in the case of ***Digvijay Mote v. UOI: 1993 (4) SCC 175***, the Supreme Court in ***Ashok Kumar*** *(supra)* held that the powers conferred on the Election Commission are not unbridled; judicial review would be permissible over a statutory body exercising its function affecting public law rights though the review would depend on the facts and circumstances of each case. It was pointed out that the power conferred on the Election commission by virtue of Article 324 (and, similarly on the Election Commission of NCT of Delhi under Article

243ZA (1)) has to be exercised not mala fide, not arbitrarily, not with partiality but in keeping with the guidelines of the rule of law. In ***Ashok Kumar*** *(supra)* the Supreme Court summed up the powers of Court, with reference to Article 329 (b) (which is similar to Article 243 ZG (b)) as under:-

> **"32.** 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 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."

It is obvious that even with regard to Article 329 (b) which is *pari materia* to Article 343Z (b), judicial review is not completely barred. It is permissible if the decision does not amount to "calling in question an election" and if it subserves the progress of an election and facilitates the completion of an election. Within these parameters, judicial review of decisions of statutory bodies on the ground of *mala fides* or arbitrary

exercise of power or exercise of authority in breach of law can be called in question before the High Court.

27. A review of all the above decisions clearly indicates that in the fact situation obtaining in the present case, there is no bar to the maintainability of the present writ petitions. Firstly, the validity of a statute is not called any question. Secondly, the Notification dated 17.02.2007 does not have the force of law and, therefore, it is not hit by the bar under Section 243ZG. Thirdly, the election process has not commenced. Fourthly, the directions sought by the petitioners are to facilitate the election in accordance with the rule of law and not to impede the process of election. For all these reasons, I hold that the writ petitions are maintainable.

Was it necessary to disclose the manner in which seats were reserved for Scheduled Castes and/or for women in the notification dated 17.02.2007 itself?

28. It was contended by Mr V.P. Chaudhary that the manner in which the seats were reserved for Scheduled Castes and/or for women has not been indicated in the Notification of 17.02.2007 and, therefore, the Notification is liable to be set aside. This contention has to be examined in

the context of the provisions themselves. The fourth proviso to Section 3 (6) of the DMC Act stipulates that the seats reserved for the Scheduled Castes may be allotted by rotation to different wards in such manner as the Central Government may, by order published in the Official Gazette, direct. Similarly, the proviso to Section 3 (8) of the DMC Act prescribes that seats reserved for women shall be allotted by rotation to different wards in such a manner as the Central Government may, by order published in the Official Gazette, direct in this behalf. Section 5 (2) (e) requires the Central Government to, by order in the Official Gazette, determine the manner in which seats shall be rotated under Sub-Sections (6) and (8) of Section 3. There is, therefore, no doubt that when the Central Government decides to allot seats by rotation for the Scheduled Castes, the manner of such rotation must be notified and published in the Official Gazette. It is also clear that insofar as seats reserved for women are concerned, the same have to be allotted by rotation to different wards and the manner of such rotation has to be published in the Official Gazette. However, there is no stipulation in the provisions of the DMC Act which requires the Central Government to notify the manner in which seats shall be reserved for the Scheduled Castes or the wards in which seats shall be reserved for women. It is only the manner of rotation of such seats which requires to be published in the Official Gazette. Therefore, the contention

of the learned counsel for the petitioners that the manner in which the seats have been reserved for Scheduled Castes and for women by virtue of the notification dated 17.02.2007 has not been disclosed in the Notification, is of no consequence. The said Notification has been issued after the fresh exercise of delimitation had been carried out. The number of seats have been increased from 134 to 272. Consequently, the number of seats for Scheduled Castes and for women have also been altered. In fact, the entire area covered by the Municipal Corporation of Delhi bears a new look as new wards have been created and existing wards have been altered. This being the first Notification after the exercise of delimitation, the question of rotation of seats reserved for Scheduled Castes and/or for women would not arise for the impending election. It would, of course, arise for the next election. So, insofar as the present Notification is concerned, rotation not being contemplated, there was no necessity for notifying the manner of allotment of seats for Scheduled Castes and/or for women. This, however, does not mean that there should be no manner at all and that the Central Government can arbitrarily determine which are the seats which need to be reserved for Scheduled Castes and which for women. As long as the manner exists and is discernable from the records, it would not be necessary to publish the same in the Official Gazette. Therefore, the non-

publication of the manner of allotment of seats for Scheduled Castes and/or for women, ipso facto, would not mean that the Notification is bad.

Whether the manner in which seats were reserved for Scheduled Castes and/or for women, as indicated in the counter affidavit filed on behalf of the State Election Commission, was arbitrary and contrary to Constitutional provisions?

29. It was contended on behalf of the petitioners that the manner indicated in the said counter affidavit was arbitrary and repugnant to the provisions of the Constitution. To appreciate this submission, it would be necessary to examine the manner indicated in the counter affidavit. The Election Commission of NCT of Delhi has filed a counter affidavit through its Secretary Mr V.K. Harit. It is stated in the counter affidavit that the Lt. Governor of Delhi by an order dated 17.01.2007 was pleased to determine 46 seats to be reserved for the members belonging to Scheduled Castes. It was pointed out that by virtue of the Notification dated 14.12.1993, the powers of the Central Government under Section 3 (7) and 3 (8) of the DMC Act, were delegated to the Election Commission for NCT of Delhi. In exercise of such power, it was determined that 16 seats out of the seats reserved for Scheduled Castes were to be reserved for women belonging to the Scheduled Castes. A further 76 seats were to be reserved for women belonging to the general category.

30. The seats were allocated by first allotting the seats reserved for Scheduled Castes. These 46 seats were allotted on the basis of arranging them in descending order of percentage of population of Scheduled Castes in each of the wards and, thereafter, by allotting them serially, subject to the condition that not more than two seats are reserved for Scheduled Castes in any one assembly segment. The counter affidavit reveals that the underlying object of such an exercise is that the seats reserved for Scheduled Castes are not concentrated in one place and that they are, as far as possible, evenly distributed. After the exercise of allotting 46 seats for Scheduled Castes was done, the next task was to allot 16 seats out of these 46 seats to women belonging to the Scheduled Castes. This was achieved by taking the first of the two seats in each of the assembly segments and allocating them for women. This was adopted for the first 15 assembly constituencies. The 16th seat was allotted to the last assembly constituency which had only one reserved seat for Scheduled Castes and, accordingly, Ward No. 245 – Durga Puri was reserved for Scheduled Caste woman.

31. Thereafter, the exercise of allotting the 76 seats for women in the general category was undertaken. The avowed formula was that every third seat among the unreserved seats was to be allotted to women. This

was also subject to the condition that not more than two seats be reserved either for Scheduled Castes or for woman in a assembly constituency.

32. The grievance of the petitioners is that there is no rational basis for allocating Scheduled Caste seats in accordance with the said descending order of percentage of population. It is also contended that there is no rational basis for fixing two seats per assembly segment as the wards have no link with assembly segments.

33. As regards the question of allotting seats reserved for Scheduled Castes candidates on the basis of percentage of population or of ranking the same in descending order is concerned, it may be instructive to examine the provisions of Section 38 of the Government of National Capital Territory of Delhi Act, 1991, which deals with the power of the Election Commission to delimit constituencies for the Legislative Assembly. The said Section 38, *inter alia*, provides that the Election Commission shall, in the manner provided therein, distribute and delimit seats to the Legislative Assembly having regard to, *inter alia*, the provision that constituencies in which seats are reserved for the Scheduled Castes shall, as far as practicable, be located in areas where the proportion of their population to the total population is comparatively large. This

makes it clear that seats are to be reserved for Scheduled Castes on the basis of the proportion of their population to the total population. Seats which have a higher proportion would be given preference for reservation over those which have a lower proportion. Therefore, the allotment of seats for Scheduled Castes on the basis of ranking them in descending order of the percentage of population of Scheduled Castes in such seats, is clearly contemplated under Section 38 of the Government of NCT Act, 1991 insofar as Legislative Assembly Constituencies are concerned. It is true that there is no such prescription in the DMC Act. Perhaps, because, under the DMC Act, rotation of such seats is contemplated whereas under the Government of NCT Act, 1991 no such rotation is contemplated. Be that as it may, the fact remains that allotment of seats on the basis of descending proportion of population of Scheduled Castes has been recognized as a valid manner of allotment of seats and, therefore, the same cannot be regarded as being irrational or arbitrary or contrary to the Constitution.

34. Insofar as the contention that there is no rational basis of limiting allotment of seats for Scheduled Castes or women to two per assembly segment is concerned, it appears that the only basis for this submission is that Municipal wards have no connection with Legislative

Assembly seats. While this may be true in the strict sense, it must be noted that the wards themselves have been arranged in a manner that no ward falls within two assembly segments. The wards have been arranged in groups of four per each assembly segment. Sixty-eight (68) assembly seats fall within the Municipal Corporation of Delhi and, therefore, there are 68 x 4 = 272 wards for the Municipal Corporation of Delhi. Therefore, it would not be correct to say that the wards have no link or nexus with assembly segments. They have a definite geographical link with their respective assembly segments and, by restricting the reservation of two wards for each assembly segment for Scheduled Castes and women, the Election Commission has sought to achieve the object of distributing the reserved seats evenly, as far as possible, through-out the area covered by the Municipal Corporation of Delhi. Clearly, the objection raised by the petitioners is untenable.

Whether even the manner indicated in the counter affidavit has not been followed and this has given way to a policy of "pick and choose"?

35. The next contention on behalf of the petitioners was that even if it is assumed that the Election Commission of NCT of Delhi has evolved the correct formula/manner of allotment of seats for Scheduled Castes and for women, the same has not been uniformly implemented. This has been

illustrated by way of the following example. Assuming that seats have been correctly allotted up to and including ward No. 55 -- Shalimar Bagh (North), it has been pointed out that this seat having been allocated for woman under the General Category, ward No. 58 – Paschim Vihar (North) ought to have been reserved for women, being the third seat thereafter in the General Category. However, what has been done is that instead of reserving ward No 58 – Paschim Vihar (North), the State Election Commission has reserved Ward No 57 – Paschim Vihar (South) for women when it is only the second Constituency after Ward No 55 – Shalimar Bagh (South). By the same logic Ward No 59 - Rani Bagh ought not to have been reserved for women.

36. The learned counsel appearing for the Election Commission of NCT of Delhi could not give an answer to this. I have also examined this aspect minutely and I find that the contention raised on behalf of the petitioners has to be sustained. Indicating a particular manner for allotment of seats for reserved candidates is one thing and its application is another thing. While I have not found any fault with the formula sought to be adopted by the Election Commission of NCT of Delhi, I find that the formula has not been uniformly applied. An instance of the non-application of such a formula has been indicated above. That is not the

only instance. A Chart has been filed on behalf of the petitioners indicating numerous such discrepancies. In fact, in my view, even if one seat is wrongly allotted, since other seats are to be allotted in series, the entire allotment goes bad. It is not that there is any allegation of *mala fides* in allocating the seats, but that by not allocating the seats on the basis of an avowed formula gives rise to suspicion that a policy of pick and choose could have been employed. In my view, this is a serious error and cannot be permitted to be perpetrated.

Whether a mandatory requirement has been flouted inasmuch as the Notification dated 17.02.2007 does not purport to be a Notification under Section 5 (2) of the DMC Act?

37. It was contended on behalf of the petitioners that no Notification under Section 5 (2) of the DMC Act has been issued. It was submitted that the Notification dated 17.02.2007 has been issued in exercise of powers conferred by Sub-Section (7) and (8) of Section 3 of the DMC Act. It was contended that while the provisions of Section 3 speak of the total number of seats, the number of seats to be reserved for Scheduled Castes and the number of seats to be reserved for women, Section 5 (2) deals with not only the number of wards and the extent of each ward but also with the identification of the wards in which seats shall be reserved for the Scheduled Castes, the identification of the wards in

which seats shall be reserved for women and the manner in which such seats shall be rotated. It was contended that unless the Notification under Section 5 (2) is issued, there can be no identification of the reserved seats and, therefore, this mandatory requirement has not been fulfilled. Technically speaking, the Notification dated 17.02.2007 does not expressly indicate that it is a Notification issued under Section 5 (2) of the DMC Act. But, this would not come in the way for determining the question of validity of the Notification. Whether the provisions of Section 5 (2) of the DMC Act are expressly mentioned in the Notification itself, or not, does not in any way, detract from the position that the Central Government and its delegate, the Election Commission of NCT of Delhi, had the power under Section 5 (2) of the DMC Act to identify the seats which were to be reserved for Scheduled Castes and/or women. It is apparent that the Notification of 17.02.2007 not only determined the number of seats to be reserved for women belonging to the Scheduled Castes from amongst the seats reserved

for Scheduled Castes as 16 and the number of seats for women (General) from amongst unreserved seats as 76, it also allocated the same as per the table indicated in the Notification itself. Therefore, although, the Notification does not refer to the provisions of Section 5 (2) of the DMC Act, it has clearly been issued in exercise of the powers thereunder. It is

well settled that the mere non-mention of a provision of a Statute in the Notification would not mean that the Notification is without jurisdiction provided, of course, the power to issue such a Notification is vested in the authority which issued the Notification. There is no doubt that the Election Commission of NCT of Delhi has the power. The only grievance is that the provisions of Section 5 (2) have not been mentioned in the impugned Notification. This is not a serious or a fatal infirmity. The Notification dated 17.02.2007 would have to be deemed to be a Notification also issued in exercise of powers under Section 5 (2) of the DMC Act.

Conclusion

38. Accordingly, I hold that these writ petitions are maintainable. I also hold that there is no statutory requirement for disclosing the manner of allotment of seats reserved for the Scheduled Castes or women in the notifications issued under section 5(2) of The DMC Act. However, such a manner must be discernible from the records of the Central Government (including its delegates). The manner must be reasonable and not arbitrary or discriminatory or mala fide. The manner indicated in the present case of identifying seats reserved for scheduled castes based on the twin criteria of ranking seats in decreasing proportion of population and limiting them to not more than two per assembly segment cannot be interfered with as it is neither arbitrary nor discriminatory nor malafide. Even the criterion of

allotting every third seat from the list of wards arranged as per the serial numbers of the wards for women cannot be questioned. However, as indicated above, the impugned notification of 17.02.2007 has gone wrong in not uniformly applying these criteria. The same is, therefore, set aside.

39. During the course of hearing, yesterday (i.e., 05.03.2007), the learned counsel for the Election Commission of NCT of Delhi had indicated that a fresh notification would be issued under section 3(6), (7) and (8) and 5(2)(c) and (d) of the DMC Act and the manner of allotment of seats for Scheduled Castes, women belonging to Scheduled Castes and women (general) would also be specified. A draft of the proposed notification was presented before the court. The manner of allotment of seats has been indicated as under:-

a) Seats for the Scheduled Castes shall be arranged in the descending order of the percentage of Scheduled Castes population in each ward and shall be reserved in that order. To ensure that the seats reserved for Scheduled Castes are not concentrated and are equally spread, to the extent possible, throughout the area under MCD jurisdiction, not more than 2 wards in an Assembly segment shall be reserved for the Scheduled Castes.

b) By the above arrangement, 15 Assembly Constituencies will have 2 seats reserved for Scheduled Castes. The Ist of these 2 seats in each such Assembly Constituency will be reserved for women belonging to the Scheduled Castes. The 16th seat reserved for women belonging to the Scheduled Castes will be the Scheduled Caste seat

falling in the last assembly having only one Scheduled Castes. The 16th seat reserved for Scheduled Castes women will, thus, be 245 Durga Puri.

c) Every 3rd seat from amongst the 226 unreserved seats will be reserved for women (general). That way the 75th women seat would go to ward 271 - Karawal Nagar (West). The remaining 76th seat will go to the last remaining ward No. 272-Sonia Vihar.

I see no difficulty with allotment of seats in the proposed manner. Since, the election to be held on 05.04.2007 is to be notified by 10.03.2007, it is directed that the fresh proposed notification based on the above manner of allotment of seats is issued immediately.

40. It is made clear that there is no necessity of rotating the scheduled caste seats in the future terms, though, the Central Government may do so. There is, however, a necessity that the seats reserved for women under both the scheduled caste and general categories be rotated. The manner of such rotation must be indicated the next term.

41. With these directions and observations these writ petitions stand disposed of.

BADAR DURREZ AHMED
(JUDGE)

March 06, 2007
HJ/J.