

CASE NO.:
Special Reference Case 1 of 2002

PETITIONER:
not available

RESPONDENT:
not available

DATE OF JUDGMENT: 28/10/2002

BENCH:
K.G. BALAKRISHNAN.

JUDGMENT:

O P I N I O N

BALAKRISHNAN, J.

I had the advantage of reading the Opinion in draft of my learned brothers V.N. Khare and Arijit Pasayat, JJ. and I fully concur with the opinion expressed by them regarding interpretation of Article 174 and the consequential answers to the reference made by the President of India, and I would like to add the following.

The Legislative Assembly of Gujarat was dissolved by the Governor of Gujarat on 19th July, 2002 in exercise of the powers conferred on him under Article 174(2)(b) of the Constitution. The full term of the Legislative Assembly would be expiring on 18th March, 2003. After the dissolution of the Assembly, the ruling party in the State of Gujarat requested the Election Commission for conducting fresh General Election urgently so that the new Legislative Assembly would be able to have its first session before 6th October, 2002. The ruling party of the State of Gujarat made this demand on the basis of the premise that under Article 174(1) of the Constitution, there shall not be more than six months' period in between the last session of the dissolved assembly and the first meeting of the next session of the Assembly to be newly constituted. Certain other political parties, public-spirited citizens and organisations urged the Election Commission not to hold the general election to the Gujarat State Legislative Assembly but to wait for some more time until the people who were affected by the communal riots and violence returned to their houses from the various relief camps where they were staying.

In the last week of February, 2002 an unfortunate incident took place at the railway station in Godhara in Gujarat in which a railway compartment was set on fire and several people who were occupants of that compartment died of burning. After this incident a spate of communal violence erupted in various parts of Gujarat and curfew was clamped in many cities of the State of Gujarat. Many people who had been the victims of such riots were put in the relief camps. Election Commission, which was requested to conduct the election, visited Gujarat and in the Order passed by the Election Commission on 16th August, 2002, the following observations were made:

(1) The Commission was of the opinion that Article 174(1) of the Constitution was applicable even in respect of dissolved Assemblies and in the Order it is stated that the Commission has, in the past, been taking the view that the six months mentioned in Article 174(1) of the Constitution applies not only to a Legislative Assembly in existence but also to dissolved assembly and elections to constitute a new Legislative Assembly have always been held within such time so as to enable the new Assembly to meet within the

period of six months from the last sitting of the last session of the dissolved Assembly;

(2) Commission was of the opinion that any other view on the interpretation of Article 174(1) of the Constitution may lead to extensive gaps between two Houses of a Legislative Assembly and the abuse of democracy, there being no provision in the Constitution or in any law in force prescribing a period during which an election to be held to constitute a new Legislative Assembly on the dissolution of the previous house;

(3) The Commission further observed that Article 174(1) of the Constitution cannot be read in isolation and it has to be read along with other relevant provisions of the Constitution, particularly Article 324 of the Constitution and this Article being not subject to the provisions of any other Article of the Constitution including Article 174(1), vests the superintendence, direction and control, inter alia, of the preparation of electoral rolls for, and conduct of, elections to Parliament and State Legislature in the Election Commission. The Commission further observed that free and fair election based on universal adult franchise being the basic feature of the Constitution the same cannot be held in view of the prevailing situation in Gujarat. The Commission was of the view that there was large scale movement and migration of electors due to communal riots and violence and they had not returned to their homes and they would not be able to go to the polling station to cast their votes and the electoral rolls had to be revised.

Therefore, the Election Commission came to the conclusion that it was not in a position to conduct free and fair election immediately after the dissolution of the Assembly and after the electoral roll is revised, the Commission would be in a position to conduct election to the General Assembly in the month of November/December, 2002.

The Commission was also of the view that Legislative Assembly should meet at least every six months as contemplated by Article 174(1) of the Constitution even when it has been dissolved and in case it was not feasible, that would mean that the Government of the State cannot be carried on in accordance with the provisions of the Constitution within the meaning of Article 356(1) of the Constitution and the President would step in and declare a state of emergency.

After the receipt of the report of the Election Commission, the Presidential Reference was made under Article 143(1) of the Constitution of India and the Order of Reference proceeded on the assumption that the mandate of the Constitution under Article 174(1) is that six months shall not intervene between the last sitting of the previous session and the date appointed for the first sitting in the next session and the Election Commission has all along been consistent that, normally, a Legislative Assembly should meet at least every six months as contemplated by Article 174(1) of the Constitution, even where it has been dissolved, and the Order of the Election Commission of India dated August 16, 2002 had not recommended any date for holding general election for constituting a new Legislative Assembly for the State of Gujarat. The new Legislative Assembly cannot come into existence so as to meet within the stipulated period of six months as provided under Article 174(1) of the Constitution of India. The following observation of the Election Commission was also noted in the Reference:

"AND WHEREAS the Election Commission has held that the non-

observance of the provisions of article 174(1) in the present situation would mean that the Government of the State cannot be carried in accordance with the provisions of the Constitution within the meaning of Article 356(1) of the Constitution and the President would then step in;

AND WHEREAS doubts have arisen with regard to the constitutional validity of the said order of the Election Commission of India as the order of the Election Commission which would result in a non-compliance with the mandatory requirement envisaged under article 174(1) of the Constitution under which not more than six months shall intervene between two sittings of the State Legislature;

AND WHEREAS in view of what has been hereinbefore stated, it appears to me that the questions of law hereinafter set out have arisen which are of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court of India."

The following three questions were referred to the Supreme Court of India for consideration:

- (i) Is article 174 subject to the decision of the Election Commission of India under article 324 as to the schedule of elections of the Assembly?
- (ii) Can the Election Commission of India frame a schedule for the elections to an Assembly on the premise that any infraction of the mandate of article 174 would be remedied by a resort to article 356 by the President?
- (iii) Is the Election Commission of India under a duty to carry out the mandate of article 174 of the Constitution, by drawing upon all requisite resources of the Union and the State to ensure free and fair elections?

After the receipt of the reference, notices were issued to all the States and all the recognised national political parties. On behalf of the Union of India, Solicitor General Shri Harish N. Salve appeared and raised the following contentions. It was contended on behalf of the Union of India that Article 174 is applicable even to dissolved assemblies and since there is no time limit at all for conducting fresh election, it would hypothetically lead to a situation of Council of Ministers continuing perennially after the dissolution of Assembly, which, in turn, would lead to a breakdown of the constitutional democracy. It was argued that there is no question of Article 174, or Article 85, or Article 75 or Article 164 coming in conflict with Article 324 and these provisions operate in different fields and the power of superintendence, direction and control of elections vested with the Election Commission should be exercised in the manner which would be consistent with the constitutional scheme of representative government. It is submitted that the Election Commission must use all the requisite resources of Union and the State to ensure free and fair election. It was further argued that the power under Article 356 is utterly irrelevant for ascertaining the constitutional mandate for holding elections and this power is highly discretionary and is to be exercised where there is a breakdown of the constitutional machinery. The executive government has no legal authority to compel the holding of elections not even Parliament can, by resolution, legally compel the Election Commission to fix a particular schedule for the elections. By the same token, the Election Commission cannot recommend or even proceed upon the premise of -- imposition of President's Rule, which would require executive action ratified by Parliament.

Shri Arun Jaitley, Sr. Advocate, appearing on behalf of the Bharatiya Janata Party contended that the view of the Election Commission that Article 174 is subject to Article 324 of the Constitution is wholly erroneous and contrary to the constitutional mandate. It was further submitted that Article 324 does not enable Election Commission to exercise untrammelled powers and the Commission must exercise power either of the Constitution or the law under Article 327 and 328. It was also argued that even when the Assembly is dissolved, the House continues to exist and, therefore, Article 174 is applicable even to dissolved assemblies. A reference was made to the Parliamentary practice in various other countries including Britain.

Shri Kapil Sibal, Sr. Advocate appearing on behalf of the Indian National Congress contended that Article 174 has no application to dissolved Assembly. However, he submitted that on dissolution of an Assembly, it is the duty of the Election Commission to conduct the election immediately and every step shall be taken to see that the new Legislative Assembly met for its first session at the earliest. However, it was submitted that Election Commission is the supreme authority, which should take a decision as to when a free and fair election can be held. Article 324 of the Constitution gives vast power to the Election Commission to decide the question as to when the election shall be held and if the Election Commission fails to carry out the constitutional mandate for any other extraneous reason, such decision can be challenged under judicial review. According to the counsel, any other interpretation of these constitutional provisions would lead to a situation where the Election Commission would be forced to conduct election when it is not possible to conduct a free and fair election and that would be against the constitutional spirit of a democratic government. It was submitted that as the Reference was based on the wrong assumption of the constitutional provisions, it need not be answered by this Court.

Shri Ram Jethmalani, Sr. Advocate appearing on behalf of the State of Bihar submitted that Article 174 applies to an Assembly whose personality/identity is not interrupted or altered by premature dissolution or expiry of its period of duration. Free and fair elections being a basic feature of a democratic and Republican Constitution, Article 174 will have to yield to Article 324. It was further submitted that Article 356 does not include the power to suspend the operation of Article 174. It was also submitted that Article 174 imposes a mandate only on the Governor of the State and is not concerned with the Election Commission.

Shri Rajeev Dhavan, Sr. Advocate appearing on behalf of the Communist Party of India (Marxist) also supported the contention raised by the counsel who appeared for Indian National Congress and contended that Article 174 is not applicable to dissolved Assembly. Similar contentions were raised by counsel for other political parties and counsel who appeared for various States.

Shri K.K. Venugopal, Sr. Advocate appearing on behalf of the Election Commission submitted that Article 174 has no application to dissolved Assemblies. It was submitted that free and fair election is the basic feature of the Constitution and the power of superintendence, direction and control of election vests with the Election Commission. It was further submitted that as the Reference has been made on the wrong premise, this Court need not answer the same. It was also submitted that the Election Commission has been trying its best to conduct election at the earliest even under very adverse circumstances and for the past 50 years Election Commission earned a good reputation as a free and independent body, which has conducted elections to various State Legislatures and the House of the People.

We are greatly beholden to other Senior Lawyers, M/s K. Parasaran, P.P. Rao, Milon Banerjee, M.C. Bhandare, Ashwani Kumar, P.N. Puri, A. Sharan, Devendra N. Dwivedi, A.M. Singhvi, Gopal Subramaniam, and Vijay Bahuguna, who had made very enlightening arguments on various vexed legal questions involved in this case.

The first and foremost question that arises for consideration is whether Article 174 is applicable in respect of a dissolved Assembly. The next question

that arises for consideration is the interplay of Article 147 and Article 324 of the Constitution. Incidentally, a question also may arise whether the Election Commission can postpone the election indefinitely on one pretext or the other and create a situation where there is a breakdown of democratic form of Government. Article 174 of the Constitution reads thus:

"174. Sessions of the State Legislature, prorogation and dissolution (1) The Governor shall from time to time summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.

(2) The Governor may from time to time

(a) prorogue the House or either House;

(b) dissolve the Legislative Assembly".

Article 324 of the Constitution reads as under :

324. Superintendence, direction and control of elections to be vested in an Election Commission

(1) 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 this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission).

(2)

(3) ..

(4)

(5)

(6) ..

Section 8 of the Constitution (First Amendment) Act, 1951 amended Article 174 of the Constitution. The amended Article requires the Governor to summon the House or each house of the Legislature of the State and this Article mandates that six months shall not intervene between the last sitting of one session and the date appointed for the first sitting of the next session. The sole object of Article 174(1) is to ensure accountability of executive to the people through their elected representatives. Article 164(2) states that the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State. In a democratic form of Government the responsibility of the Government is to the people of the country and the Members of the Legislative Assembly represent the people of the State and the Council of Ministers shall be collectively responsible to the Legislative Assembly. Therefore, frequency of the meeting of the Legislative Assembly is necessary, otherwise, there will not be any check and balance to the actions of the executive government. The Solicitor General contended that Article 174 would apply even to a dissolved assembly because the House as such is not dissolved and it was pointed out that when the British Parliament is dissolved, notice to summon the next session of the Parliament is simultaneously issued. On that basis, it was contended that Article 174 is even applicable to a dissolved Assembly. We do not find much force in this contention. The plain meaning of the words used in Article 174 itself would show that Article 174 has no application to a dissolved Assembly. The words "six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session" occurring in Article 174 clearly indicate that the interregnum between the two sessions shall not be six months

and that is applicable only in respect of a live Assembly. Once the Assembly is dissolved, Article 174 has no application.

Of course, in the Report of the Election Commission it is stated that that Commission has all along been taking the view that once the Assembly is dissolved it would take all possible steps to see that the first sitting of the next Assembly would be made possible within a period of six months of the last sitting of the dissolved Assembly. This is a very healthy convention which is being followed since the adoption of our Constitution and we must appreciate the action of the Election Commission in scheduling the election in such a way that the first session of the next Assembly meets within the period of six months of the last sitting of the dissolved Assembly. But that by itself is no reason to interpret that Article 174 would apply to a dissolved Assembly. Frequency of meeting as provided under Article 174 would apply to an Assembly which is in esse at that time.

Therefore, a question may arise that if Article 174 is not applicable to a dissolved Assembly, can the Election Commission postpone election for indefinite period so as to defeat the democratic form of Government? Is there any mandate in the Constitution or in the Representative of People Act, 1951 prescribing time to conduct the election? Obviously, neither the Constitution nor the Representation of People Act, 1951 prescribes any time limit for the conduct of election after the term of the Assembly is over either by premature dissolution or otherwise. Proviso to Section 15(2) of the Representation of People Act, 1951 states that where a general election is held otherwise than on dissolution of the existing House of the People, no notification for election shall be issued at any time earlier than six months prior to the date on which the duration of that House would expire under the provisions of clause (2) of Article 83. Once there is dissolution of the Assembly, the Election Commission shall take immediate steps to conduct the election and see that the new Assembly is formed at the earliest point of time. A democratic form of Government would survive only if there are elected representatives to rule the country. Any delay on the part of the Election Commission is very crucial and it is the Constitutional duty of the Election Commission to take steps immediately on dissolution of the Assembly. Article 324 of the Constitution gives vast powers to the Election Commission and time and again this Court has pointed out the extent of powers and duty vested with the Election Commission. It was argued by various counsel appearing on behalf of the various political parties as to what would be the position if the Election Commission would indefinitely postpone the election under some pretext or the other. So, the question posed was: 'Quis custodiet ipsos custodes' who will guard the guards themselves?

The Election Commission is vested with the power to decide the election schedule. It can act only in accordance with the Constitutional provisions. The election process for electing the new Legislative Assembly should start immediately on the dissolution of the Assembly. There may be cases where the electoral roll may not be up-to-date and in such case the Election Commission is well within its power to update the electoral roll and the time taken for such updating of the electoral roll shall be reasonable time. Ordinarily, the Election Commission would also require time for notification, calling of nomination and such other procedure that are required for the proper conduct of election. There may be situation where the Election Commission may not be in a position to conduct free and fair election because of certain natural calamities. Even under such situation the Election Commission shall endeavour to conduct election at the earliest making use of all the resources within its command. Ample powers are given to the Election Commission to coordinate all actions with the help of various departments of the Government including military and para-military forces. When an Assembly is dissolved by the Governor on the advice of the Chief Minister, naturally, the Chief Minister or his political party seeks fresh mandate from the electorate. The duty of the Election Commission is to conduct fresh election and see that a democratically elected Government is installed at the earliest and any decision by the Election Commission, which is intended to defeat this very avowed object of forming an elected Government can certainly be challenged before the Court if the decision taken by the Election Commission is perverse, unreasonable or for extraneous reasons and if the decision of the

Election Commission is vitiated by any of these grounds the Court can give appropriate direction for the conduct of the election.

The next point that arises for consideration to form an opinion regarding the questions referred to this Court is as to the application of Article 356 of the Constitution. Reference to Article 356 was incidentally made by the Election Commission to point out that if Article 174 cannot be complied with, the possible alternative is to invoke Article 356 and declare a state of emergency. I do not think that the solution suggested by the Election Commission is appropriate or justified. Article 356 has no application under any of these situations. It is an independent power to be exercised very rarely and this power is hedged in ever by so many Constitutional limitations. In view of the above discussion, the three questions made in the Reference can be answered in the following manner.

(i) Is Article 174 subject to the decision of the Election Commission of India under Article 324 as to the schedule of elections of the Assembly?

Article 174 and Article 324 operate in different fields. Article 174 does not apply to dissolved Assemblies. The schedule of the election of the Assembly is to be fixed having regard to the urgency of the situation that a democratically elected Government be installed at the earliest and the process of election shall start immediately on the dissolution of the Assembly. Though the ultimate authority to decide as to when a free and fair election can be conducted is Election Commission, such decisions shall be just and reasonable and arrived at having regard to all relevant circumstance. Any decision to postpone election on unreasonable grounds is anathema to democratic form of government and it is subject to judicial review on traditionally accepted grounds.

(ii) Can the Election Commission of India frame a schedule for the elections to an Assembly on the premise that any infraction of the mandate of Article 174 would be remedied by a resort to Article 356 by the President?

The framing of schedule for election for the new Legislative Assembly shall start immediately on dissolution of the Assembly and the Election Commission shall endeavour to see that the new Legislative Assembly meets at least within a period of six months of the dissolution. Article 356 regarding declaration of state of emergency in the State has no relevance to the fixation of the election schedule.

(iii) Is the Election Commission of India under a duty to carry out the mandate of Article 174 of the Constitution, by drawing upon all the requisite resources of the Union and the State to ensure free and fair elections?

The Election Commission is under a constitutional duty to conduct the election at the earliest on completion of the term of the Legislative Assembly on dissolution or otherwise. If there is any impediment in conducting free and fair election as per the schedule envisaged by the Election Commission, it can draw upon all the requisite resources of Union and State within its command to ensure free and fair election, though Article 174 has no application in the discharge of such constitutional obligation by the Election Commission. It is the duty of the Election Commission to see that the election is done in a free and fair manner to keep the democratic form of Government vibrant and active.