

Election Commission Of India vs Shivaji & Ors on 10 November, 1987

Equivalent citations: 1988 AIR 61, 1988 SCR (1) 878, AIR 1988 SUPREME COURT 61, 1988 (1) SCC 277, 1988 21 REPORTS 16, (1987) 4 JT 298 (SC), 1987 5 JT 298, (1988) 1 SCJ 348

Author: E.S. Venkataramiah

Bench: E.S. Venkataramiah, K.N. Singh

PETITIONER:
ELECTION COMMISSION OF INDIA

Vs.

RESPONDENT:
SHIVAJI & ORS.

DATE OF JUDGMENT 10/11/1987

BENCH:
VENKATARAMIAH, E.S. (J)
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VENKATARAMIAH, E.S. (J)
SINGH, K.N. (J)

CITATION:
1988 AIR 61 1988 SCR (1) 878
1988 SCC (1) 277 JT 1987 (4) 298
1987 SCALE (2) 996

ACT:
Representation of the People Act, 1951 -Whether High Court can entertain a petition questioning an election under Article 226 of the Constitution and rectify an error in the process of election before declaration of result of election held under the provisions.

HEADNOTE:
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The Governor of Maharashtra by a notification dated 18th September, 1987, issued under section 16 of the Representation of the People Act, 1951 ('the Act') called upon six local authorities Constituencies in the State of Maharashtra to elect one member from each of the said

constituencies to fill the vacancies in the Maharashtra Legislature Council. On the same day, the Election Commission of India, the appellant, issued a notification under section 30 of the Act fixing the calendar of events for the purpose of holding the elections. Osmanabadcum-Latur-Beed Local Authorities constituency was one of the said six constituencies. Under the notification of the Election Commission, the last date for the withdrawal of the candidatures was 28th September, 1987 and the poll, if necessary, was to be taken on the 18th October, 1987 and the entire election process was to be completed within 21st October, 1987.

Respondents 1 to 5 filed a writ petition in High Court challenging the validity of the notification issued by Election Commission on 18th September 1987, on the ground that the notification was invalid because the Zilla Parishad of Osmanabad and Latur districts which were within the constituency had not been constituted and the Administrators were appointed to run the said Zilla Parishads and, therefore, the members of the Zilla Parishads who were entitled to take part in the said elections had been deprived of their right to participate in the said election. Along with the writ petition, an application was made praying for the postponement of the last date of withdrawal of the candidates from 28th September, 1987 to 1st October, 1987. A Single Judge of the High Court passed an order on September 26, 1987, issuing notice on the writ petition and passing an interim order ex-parte directing the postponement of last date of withdrawal of the candidatures from 28th September, 1987 to October 1, 1987. On October 1, 1987, a Division Bench of

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the High Court dismissed the writ petition. The High Court did not take any observation as to the effect of the interim order passed by it earlier on the election programme.

18 Candidates withdrew their candidature by 1st October, 1987, the last date for withdrawal of candidatures as per the interim order passed by the High Court. In the circumstances, the Election Commission postponed the date of poll from 18th October, 1987 (as originally notified) to 18th November, 1987, in compliance with the spirit underlying section 30(d) of the Act, which contemplated an interval of 20 days between the last date for withdrawal of candidatures and the date of poll and notified the change of the date of poll in the official Gazette. It also notified 4th November, 1987 as the date before which the election had to be completed instead of 21st October, 1987, originally fixed.

On 16-10-1987, the respondents 1 to 5 filed a review petition before the High Court, seeking a direction that the election programme might be renotified on the ground that clear 20 days' interval was not there between the last date of withdrawal of candidatures and the date of poll

originally fixed, viz. 18th October, 1987. The High Court on 16th October 1987, passed an order adjourning the case to October 26, 1987 and staying the election fixed for the 18th October, 1987 till it passed further order on 26th October 1987, even though it was brought to the notice of the High Court that the Election Commission had on 16.10.1987 already postponed the date of poll from 18th October, 1987 to 1st November, 1987. Aggrieved by the interim order in the writ petition postponing the last date of withdrawal of the candidatures from 28th September, 1987, to October 1, 1987 and by the interim order passed on October 16, 1987 in the Review Petition, the Election Commission appealed to this Court for relief by special leave.

Allowing the appeal, the Court,

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HELD: A dispute regarding election to the Legislative Council of a State can be raised only under the provisions contained in Part VI of the Act. Section 80 A of the Act provides that the Court having jurisdiction to try on election petition shall be the High Court. In view of the non obstante clause contained in Article 329 of the Constitution, the power of the High Court to entertain a petition questioning an election on whatever grounds under Article 226 of the Constitution is taken away. If there was any ground relating to the non-compliance with the provisions of the Act and the Constitution on which the validity of any election process could be questioned, the person interested in question-

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ing the election has to wait till the election is over and institute a petition in accordance with section 81 of the Act calling in question the election of the successful candidate within forty five days from the date of election of the returned candidate but not earlier than the date of election. The High Court even though it had issued an interim order in the writ petition on 26.9.1987 postponing the last date for withdrawal of the 13 candidatures to 1st October, 1987, dismissed the petition by its judgment dated 1.10.1987. Having dismissed the petition on 1.10.1987, the High Court committed a serious error in entertaining a review petition in the very same writ petition on 16.10.1987 and passing an order staying the election which had been earlier fixed for 18.10.87 till further orders "looking to the mandatory provisions of section 30 of Representation of the People Act." The High Court failed to recall to its mind that it was not its concern under Article 226 of the Constitution to rectify any error even if there was an error committed in the process of election at any stage prior to the declaration of the result of the election notwithstanding the fact that the error in question related to a mandatory provision of the statute relating to the conduct of the election. If there was any such error committed in the course of the election process, the

Election Commission had the authority to set it right by virtue of power vested in it under Article 324 of the Constitution as decided in Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi & Ors., [1978] 2 S.C.R. 272, and to see that the election process was completed in a fair manner. [886A-B, G-H; 887E-H]

In this case, 75% of the total electorate (including the number of members of the Zilla Parishads of Osmanabad and Latur districts who would have been voters had the said Zilla Parishads been constituted) were entitled to vote. Since the existing position in the constituency satisfied the guideline prescribed by the Election Commission, the election from the said constituency had been ordered. It was only on account of the interim order passed by the High Court on 26.9.1987 postponing last date for withdrawal of the candidatures from 28.9.1987 to 1.10.1987 and not on account of any mistake committed by the Election Commission that the interval between the last date of withdrawal and the date of poll, originally fixed as 18.10.1987 fell short of the period of twenty days prescribed by clause (d) of section 30 of the Act. After the judgment of the High Court was pronounced dismissing the writ petition on 1.10.1987, in order to ensure that there was an interval of 20 days between the last date for withdrawal of candidatures and the date of poll, the Election Commission had on its own postponed the date of poll on 1.11.1987 and published a notification in the official Gazette even before the Court passed another interim order on 16.10.1987 in

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the Review Petition. All these changes in the calendar of events of the election came about because of the earlier interim order of the High Court. It is not the law that every non-compliance with the provisions of the Act or the Constitution will vitiate an election. It is only when it is shown that the result of the election was materially affected by such non-compliance that the High Court would have the jurisdiction to set aside an election in accordance with section 100(1)(d)(iv) of the Act. [888C-G]

The High Court grievously erred in entertaining the review petition and passing an interim order on 16.10.1987. Both the interim orders-the one passed on 26.9.1987 postponing the last date of withdrawal of the candidatures, and the other, passed on 16.10.1987-were without jurisdiction. There was hardly any justification for entertaining the review petition in the circumstances of the case and issuing notice thereon particularly after the High Court itself had rejected the writ petition on the ground that it had no jurisdiction to interfere with the process of election at that stage in view of the provisions of Article 329(b) of the Constitution. The Review Petition before the High Court was liable to be dismissed. The entire proceedings in the High Court amounted to a clear abuse of the process of law. [889B-D]

OBSERVATION: The success of democracy is dependent upon the cooperation of the Legislature, the press, the political parties and above all the citizenry, and each of them discharging the duties assigned to it. Every member of the body politic should play his legitimate role for the success of the democracy. Some times, the success of democracy also depends upon the observance of restraint on the part of the Constitutional functionaries. [888H; 889A-B]

Inderjit Barua & Ors. v. Election Commission of India & Ors., [1985] Supp. 3 S.C.R. 225 A.I.R 1984 S.C. 1911; N.P. Ponnuswami v. Returning officer Namakkal Constituency and Ors., [1952] S.C.R. 218; Lakshmi Charan Sen & Ors. etc. v. A.K.M. Hassan Uzzaman & Ors. etc., [1985] Supp. 1 S.C.R. 493 and Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi & Ors. J [1978] 2 S.C.R. 272, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2849 of 1987. (In Special Leave Petition (Civil) No. 12198 of 1987).

From the Judgment and order dated 26.9.1987 of the Bombay High Court in W.P. No. 1459 of 1987.

G. Ramaswamy, Additional Solicitor General and Ms. A Subhashini for the Petitioner.

Dr. Y.S. Chitale, A.M. Khanwilkar, A.S. Bhasme and Mrs. Jayshree Wad for the Respondents.

Dr. N.M. Ghatate and S.V. Deshpande for the Intervenor. The Judgment of the Court was delivered by VENKATARAMIAH, J. We are very much disturbed by the manner in which the High Court of Bombay (Aurangabad Bench) has interfered not once but twice with the process of election which was being held under the provisions of the Representation of the People Act, 1951 (hereinafter referred to be 'the Act') to the Legislative Council of the State of Maharashtra from the Osmanabad-cum-Latur-cum-Beed Local Authorities Constituency. The Governor of Maharashtra by a notification dated 18th September, 1987 issued under section 16 of the Act called upon six local authorities constituencies in the State of Maharashtra to elect one member from each of the said constituencies in order to fill the vacancies in the Maharashtra Legislative Council which had been caused by the retirement of the members representing the said constituencies on the expiration of their terms of office. On the same day the Election Commission of India, the appellant herein, issued a notification under section 30 of the Act fixing the calendar of events for the purpose of holding the elections accordingly. Osmanabad-cum-Latur-cum-Beed Local Authorities constituency was one of the six constituencies referred to above. According to the notification issued by the Election Commission the last date for making nominations was 25th September, 1987. p The date for the scrutiny of nominations was 26th September, 1987. The last date for the withdrawal of candidatures was 28th September, 1987 and the date on which the Poll, if necessary, was to be taken was 18th October, 1987. The entire election process had to be completed within 21st October, 1987.

Respondents 1 to 5 Shivaji son of Vishwanath Gangane, Prof. K.S. Shinde, Prabhakar son of Bapurao Pudale, Shankarrao Madhavrao Mane and Ashok son of Rangnath Magar filed a writ petition under Article 226 of the Constitution in Writ Petition No. 1459 of 1987 on September 26, 1987 before the High Court of Bombay (Aurangabad Bench) challenging the validity of the notification issued by the Election Commission on 18th September, 1987 on the ground that the notification was invalid because the Zilla Parishad of Osmanabad and the Zilla Parishad of Latur district which were within the constituency had not been constituted and the Administrators were appointed to run the said Zilla Parishads and therefore the members of the said Zilla Parishads who were entitled to take part in the said elections had been deprived of their right to participate in the said election. Along with the writ petition an application was made for an interim order and the counsel who moved the said application just prayed for the postponement of the last date for withdrawal of candidatures from 28th September, 1987 to 1st October, 1987. It is not clear why such a prayer was made. The learned Single Judge before whom the writ petition came up for consideration however passed an order on September 26, 1987 issuing notice on the writ petition and passing an interim order ex parte directing the postponement of the last date of withdrawal of candidatures from 28th September, 1987 to October 1, 1987. A Division Bench of the High Court which was presided over by the learned Single Judge who had issued the interim order earlier heard the writ petition on October 1, 1987 and dismissed it by the order passed on the same day. In the course of its order the Division Bench relied on the decision in *Inderjit Barua & Ors v. Election Commission of India & Ors.*, [1985] Supp. 3 S.C.R. 225=AIR 1984 S.C. 1911 which had laid down that the validity of an election process under the Act could be challenged only in an election petition filed under the Act as provided by Article 329(b) of the Constitution. While dismissing the writ petition the High Court did not make any observation as to the effect of the interim order passed by it earlier on the election programme. 18 candidates withdrew their candidatures by 1st of October, 1987 which was the last date for withdrawal of candidatures as per the interim order passed by the High Court. In the circumstances the Election Commission considered it fair to postpone the date of poll from 18th October, 1987 (as originally notified) to some later date in order to secure compliance with the spirit underlying section 30(d) of the Act which contemplated an interval of 20 days between the last date for withdrawal of candidatures and the date of poll. Ordinarily a week's postponement would have been in the opinion of the Election Commission adequate in the present case but as the postponement of one week would have led to the date of poll falling during the festival season the Election Commission revised the date of poll as 1st November, 1987 and notified the change of the date of poll in the official Gazette on 15th October, 1987. The Election Commission also notified under the same notification the date before which the election had to be completed as 4th November, 1987 instead of 21st October, 1987 which was the date fixed for that purpose originally. But on 16.10.1987 respondent 1 to 5 filed a Review Petition in Civil Application for Review No. 2035 of 1987 before the High Court seeking a direction to the effect that the election programme might be renotified on the ground that clear 20 day's interval was not there between the last date of withdrawal of candidatures and the date of poll which had been originally fixed as 18th October, 1987. The said Review Petition came up for consideration on the 16th October, 1987 before the very same Bench which had dismissed the Writ Petition earlier on 1st October, 1987. On that occasion it is alleged that it was brought to the notice of the High Court by the learned counsel appearing for the State of Maharashtra, Collector, Osmanabad and the Returning officer for the Osmanabad-Latur-Beed Local Authority Constituency and the District Returning officer for Maharashtra Legislative Council

Constituency No. 26, osmanabad-Latur- Beed Local Authority Constituency, osmanabad, that the Election Commission had on 15.10.1987 already postponed the date of poll from 18th October, 1987 to the 1st November, 1987. Despite the above submission made by the said counsel the High Court was pleased to make the following order on 16th October, 1987.

"Notice before admission. In this matter, the election fixed for the 18th October, 1987 will have to be stayed till we pass further order on 26th October, 1987, looking to the mandatory provision of section 30 of the Representation of the People Act, S.O.. till 26-10-1987."

The case was adjourned to October 26, 1987 for hearing. Aggrieved by the interim order passed in the writ petition postponing the last date of withdrawal of the candidatures from 28th September, 1987 to October 1, 1987 and by the interim order passed on October 16, 1987 in the Review Petition the Election Commission has filed this appeal by special leave.

The Special Leave Petition filed in the above case came up for hearing on October 27, 1987. On that date this Court directed issue of notice on the Special Leave Petition and also ordered stay of the operation of the stay order which had been passed by the High Court. The Election Commission was permitted to proceed with the election process. The contesting respondents took notice of the petition in the Court through their counsel. The case was adjourned to 30th October, 1987 for final hearing. On 30th October, 1987 the case was heard and the Court passed the following order:

"Special leave granted. The appeal is heard. We allow the appeal, set aside the order dated 16.10.1987 pas-

sed by the High Court of Bombay at Aurangabad and dismiss the Review Petition No. 2035 of 1987 in writ petition No. 1459 of 1987. The Election Commission shall proceed with the election in accordance with law. Respondent Nos. 1 to 5 shall pay Rs.5000 by way of costs to the appellant. Reasons will follow."

The appeal was accordingly allowed with costs. The following are the reasons for allowing the appeal.

Part XV of the Constitution contains the provisions relating to the elections. Article 324(1) of the Constitution vests 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 the President and the Vice-President held under the Constitution in the Election Commission. Article 327 of the Constitution provides that subject to the provisions of the Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of each House or Houses. In exercise of the power granted under Article 327 of the Constitution Parliament has enacted the Act to provide for the conduct of elections to the either House of Parliament, to the

House or either House of the Legislature of each State, qualifications and disqualifications for membership of those Houses, corrupt practices and other offences in connection with such elections and the decision of doubts and disputes arising out of or in connection with the such elections. Article 329(b) of the Constitution provides that notwithstanding anything contained in the Constitution no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

The disputes regarding the elections have to be settled in accordance with the provisions contained in Part VI of the Act. Section 80 of the Act states that no election shall be called in question except by an election petition presented in accordance with the provisions of Part VI of the Act. The expression 'election' is defined by section 2(d) of the Act as an election to fill a seat or seats in either House of Parlia-

ment or in the House or either House of the Legislature of a State A other than the State of Jammu and Kashmir. Thus a dispute regarding election to the Legislative Council of a State can be raised only under the provisions contained in Part VI of the Act. Section 80A of the Act provides that the Court having jurisdiction to try an election petition shall be the High Court. An election petition has to be presented in accordance with section 81 of the Act. In view of the non obstante clause contained in Article 329 of the Constitution the power of the High Court to entertain a petition questioning an election on whatever grounds under Article 226 of the Constitution is taken away. The word 'election' has by long usage in connection with the process of selection of proper representatives in democratic institutions acquired both a wide and a narrow meaning. In the narrow sense it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling, or a particular candidate being returned unopposed when there is no poll. In the wide sense, the word is used to connote the entire process culminating in a candidate being declared elected and it is in this wide sense that the word is used in Part XV of the Constitution in which Article 329(b) occurs. In *N.P. Ponnuswami v. Returning officer, Namakkal Constituency and Ors*, [1952] S.C.R. 218 this Court held that the scheme of Part XV of the Constitution and the Act seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special Tribunal and should not be brought up at an intermediate stage before any court. Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplated, one of them being any dispute relating to the pre-polling stage. In the above decision this Court ruled that having regard to the important functions which the legislatures have to perform in democratic countries, it had always been recognised to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections were over so that the election proceedings might not be unduly retarded or protracted. Hence even if there was any ground relating to the noncompliance with the provisions of the Act and the Constitution on which the validity of any election process could be questioned, the person interested in questioning the elections has to wait till the election is over and institute a petition in accordance with section 81 of the Act calling in question the election of the successful candidate

within fortyfive days from the date of election of the returned candidate but not earlier than the date of election. This view has been reaffirmed by this Court in Lakshmi Charan Sen & Ors. etc. v. A.K.M. Hassan Uzzaman & Ors. etc., [1985] Supp. 1 S.C.R. 493 and in Inderjit Barua & Ors etc. v. Election Commission of India & Ors. (supra). Realising the effect of Article 329 (b) of the Constitution the High Court even though it had by oversight issued an interim order in writ Petition No. 1459 of 1987 on 26.9.1987 postponing the last date for withdrawal of candidatures to 1st October, 1987 dismissed the petition by its judgment dated 1.10.1987. The relevant part of its judgment reads as follows:

"The challenge must fail mainly on two grounds. First on the ground that the stage has reached of withdrawals of nominations for the said election which was infact, fixed on 30th but has been postponed because of our orders as on today. Article 329(b) bars every challenge to any election including all the election process which commences from the date of notification in the official Gazette, except by way of election petition under the Representation of People Act. Mr. Chapalgaonkar, appearing for the respondent has relied upon a decision-reported in AIR 1984 Supreme Court page 1911 to support this plea that all election including every election process must be challenged only by way of election petition under the Representation of the People Act."

Having thus dismissed the petition on 1. 10.1987 the Court committed a serious error in entertaining a Review Petition in the very same writ petition on 16.10.1987 and passing an order staying election which had been earlier fixed for 18. 10.1987 till further orders "looking to the mandatory provisions of section 30 of the Representation of the People Act". The High Court failed to recall to its mind that it was not its concern under Article '26 of the Constitution to rectify any error even if there was an error committed in the process of election at any stage prior to the declaration of the result of the election notwithstanding the fact that the error in question related to a mandatory provision of the statute relating to the conduct of the election If there was any such error committed in the course of the election process the Election Commission had the authority to set it right by virtue of power vested in it under Article 324 of the Constitution as decided in Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi & Ors. [1978] 2 S.C.R. 272 and to see that the election process was completed in a fair manner.

It is true that the Zilla Parishads of Osmanabad and the Latur districts had not been constituted and administrators were functioning in their place. The total voters in the local authorities constituency in question were 577 out. Of which 533 were members of Municipal Councils and 44 were members of the Zilla Parishads. Even if the Zilla Parishads of osmanabad and Latur districts had been in existence the total number of their members would not have exceeded above 110. As such more than 3/4th of the voters entitled to vote in the constituency in question were in existence. The Election Commission had a guideline that if at least 75% of the local authorities in a local authority constituency were functioning and again at least 75% of the voters in the total electorate were available, then the electorate should be asked to elect their representative to the Legislative Council. In the instant case 75% of the total electorate (including the number of members of the Zilla Parishads of Osmanabad and Latur districts who would have been voters had the said Zilla Parishad been constituted) were entitled to participate. Since the existing position in the constituency

satisfied the guideline prescribed by the Election Commission, the election from the said constituency had been ordered. It was only on account of the interim order passed by the High Court on 26.9.1987 postponing last date for withdrawal of candidatures from 28.9.1987 to 1.10.1987 and not on account of any mistake committed by the Election Commission the interval between the last date of withdrawal and the date of poll which had been originally fixed as 18.10.1987 fell short of the period of twenty days prescribed by clause (d) of section 30 of the Act. After the judgment of the High Court was pronounced dismissing the writ petition on 1. 10.1987 in order to ensure that there was an interval of 20 days between the last date for the withdrawal of candidatures and the date of poll, the Election Commission had on its own postponed the date of poll to 1.11.1987 and had published a notification in the official Gazette of the State Government even before the Court passed another interim order on 16.10.1987 in the Review Petition. All these changes in the calendar of events of the election in question came about because of the earlier interim order of the High Court. It has to be stated here that it is not the law that every non-compliance with the provisions of the Act or of the Constitution will vitiate an election. It is only when it is shown that the result of the election was materially affected by such non-compliance the High Court would have jurisdiction to set aside an election in accordance with section 100(1)(d)(iv) of the Act. The High Court was in error in thinking that it alone had the exclusive power to protect the democracy. The success of democracy is dependent upon the cooperation of the Legislature, the Executive, the Judiciary, the Election Commission, the press the political parties and above all the citizenry and each of them discharging the duties assigned to it. Every member of the body politic should play his legitimate role for the success of the democracy. Some times the success of democracy also depends upon the observance of restraint on the part of the constitutional functionaries.

We are constrained to observe that the High Court grievously erred in entertaining the review petition and in passing an interim order on 16. 10.1987. We are of the view that both the interim orders the one passed on 26.9.1987 postponing the last date of withdrawal of candidatures from 28.9.1987 to 1.10.1987 and the other passed on 16.10.1987 were without jurisdiction. There was hardly any justification for entertaining the review petition in the circumstances of this case and for issuing notice thereon particularly after the High Court. itself had rejected the writ petition on the ground that it had no jurisdiction to interfere with the process of election at that stage in view of the provisions of Article 329(b) of the Constitution. The review petition filed before the High Court was liable to be dismissed. We directed respondents 1 to 5 to pay Rs.5,000 to the appellant by way of costs since the entire proceedings in the High Court amounted to a clear abuse of the process of law. These are the reasons for our order passed on 30. 10.1987 allowing the appeal.

S.L.

Appeal allowed.