K. Venkatachalam vs A. Swamickan And Anr on 26 April, 1999

Equivalent citations: AIR 1999 SUPREME COURT 1723, 1999 (4) SCC 526, 1999 AIR SCW 1353, (1999) 3 JT 242 (SC), 1999 (5) SRJ 293, 1999 (2) UJ (SC) 1064, 1999 (3) JT 242, 1999 (3) LRI 40, (1999) 3 ALLMR 643 (SC), (1999) 3 KER LT 17, 1999 (3) ALL MR 643, 1999 (3) SCALE 12, (1999) 3 MAD LW 23, (1999) 4 SUPREME 333, (1999) 3 SCALE 12, (1999) 2 CURCC 98, (1999) 3 RECCIVR 110

Bench: D.P. Wadhwa, N. Santosh Hegde

CASE NO.:
Appeal (civil) 1719 of 1986

PETITIONER:
K. VENKATACHALAM

RESPONDENT:
A. SWAMICKAN AND ANR.

DATE OF JUDGMENT: 26/04/1999

BENCH:
D.P. WADHWA & N. SANTOSH HEGDE

JUDGMENT:

JUDGMENT 1999 (2) SCR 857 The Judgment of the Court was delivered by D.P. WADHWA, J Division Bench of the High Court of Judicature at Madras by its judgment dated April, 23, 1986 in Writ Appeal declared that K. Venkataehalam, appellant before us, was not qualified to sit as a member of the Legislative Assembly in Tamil Nadu as he did not possess the basic qualifications prescribed in Clause (c) of Article 173 of the Constitution read with Section 5 of Representation of the People Act, 1951 (for short "the Act"). The Division Bench held that the appellant was not an elector for Lalgudi Assembly Constituency and, therefore, did not possess the necessary qualification to be chosen from that constituency. High Court passed the impugned judgment in exercise of its jurisdiction under Article 226 of the Constitution. A single Judge of the High Court had, however, earlier dismissed `the writ petition challenging the election of the appellant on the ground that it was not maintainable under Article 226 of the Constitution in view of bar contained in Clause (b) of Article 329 of the Constitution.

General elections to the Legislative Assembly in Tamil Nadu were held in December, 1984 and both VenkatacIalam, the appellant and Swamickan, respondent were the candidates. In the result declared Venkatachalam was elected. A year after the date of election of Venkatachalam, petition under Article 226 of the Constitution was filed by Swamickan for a declaration that Venkatachalam was not qualified to be member of the Tamil Nadu Legislative Assembly representing Lalgudi Assembly Constituency since he was not elector in the electoral roll of Lalgudi Assembly

Constituency for the general elections in. question. He also prayed alternatively for writ of quo warranto directing Venkatachalam to show under what authority he was occupying the seat in Tamil Nadu Legislative Assembly as a member representing Lalgudi Assembly Constituency. Swamickan did not a present any petition calling in question the election of Venkatachalam under Section 81 of the Act. He alleged that Venkatachalam impersonated him for another person of the same name in the electoral roll of Lalgudi Assembly Constituency and thus sworn a false affidavit that he was elector of that constituency. It was alleged that the act of Venkatachalam was fraudulent and a criminal act, which came to be known to Swamickan after he scrutinized the entire electoral roll of the Lalgudi Assembly Constituency, By judgment dated December 3, 1985 a learned single Judge of the High Court dismissed the writ petition holding that Article 329(b) of the Constitution was a complete bar when remedy was available under the Act. Aggrieved Swamickan filed writ appeal which as noted above, was allowed by the Division Bench of the High Court by judgment dated April 23, 1986. High Court held that it was not powerless in exercise of its jurisdiction under Article 226 of the Constitution from declaring that the election of Venkatachalam was illegal inasmuch as he did not possess the basic constitutional and statutory qualifications. Aggrieved Venkatachalam got leave to appeal to this Court. His main contention has been that having regard to the provisions of Article 329(b) of the Constitution, High Court could not exercise its jurisdiction under Article 226 of the Constitution and further that a writ of quo warranto could not be issued after lapse of one year at instance of the candidate who was defeated in the elections.

There is no dispute and in fact there is no challenge to the finding of the High Court that Venkatachalam was not an elector in the electoral roll for the Lalgudi Assembly Constituency for general ejections of December, 1984 and that he in blatant and fraudulent manner represented to be an elector Of that constituency while using the similarity in the name of another person. This act on the part of the appellant eould well make him face criminal prosecution under laws of the country. High Court giving the declaration against the appellant went into wider issues. It considered the impact of Article 193 of the Constitution which provides penalty for sitting and voting when a person is not qualified to be member of the Legislative Assembty.

Before we consider rival contentions it may be appropriate to set out relevant provisions as contained in the Constitution and the Act.

As defined in Section 2(e) of the Act "elector" in relation to a constituency means a person whose name is entered in the electoral roll of that constituency for the time being in force and who is not subject to any of the disqualifications mentioned in section 16 of the Representation of the People Act, 1950(43 of 1950). Article 173 provides for qualifications for membership of the State Legislature. It is as under :-

> "173. Qualification for membership of the State Legislature. - A person shall not be qualified to be chosen to fill a seat in the Legislature of a State unless he-
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> (a) is a citizen of India, and makes and subscribes before some person authorized in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule;

(b) is, in the case of a seat in the Legislative Assembly, riot less than twenty-five years of age and, in the case of a seat in the Legislative Council, not less than thirty years of age; and

(c) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament."

Under Clause (3) of Article 190 a member vacates his seat in the Legislature if he becomes subject to any disqualification under Clauses (1) and (2) of Article 191. Article 191 provides for disqualification of membership and relevant with this are Articles 192 and 193, which may also be set out hereunder :-

"190. Vacation of seats.-(1).....,.

(2).....-

(3) If a member of House of the Legislature of a State-

(a) becomes subject to any of the disqualification mentioned in clause (1) or clause (2) of article 191; or

(b) resigns his seat by writing under his hand addressed to the Speaker or the Chairman as the case may be, and his resignation is accepted by the Speaker or the Chairman, as the case may be, his seat shall thereupon become vacant :

Provided that in the case of any resignation referred to in sub-clause (b), if from information received or otherwise and after making such inquiry as he thinks fit, the Speaker or the Chairman, as the case may be, is satisfied that such resignation is not voluntary or genuine, he shall not accept such resignation."

"191: Disqualification for membership-(I) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State-

(a) If he holds any office of profit under the Government of India or the government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holders;

(b) If he is of unsound mind and stands so declared by a competent court;

(c) If he is an undischarged insolvent;

(d) If he is not a citizen of India, or has voluntarily acquired the

citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

(e) If he is so disqualified by or under any law made by Parliament."

Explanation :-For the purpose of this clause, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

(2) A person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule:"

"192. Decision on question as to disqualifications of members.-(1) If any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of Article 191, the question shall be referred for the decision of the Governor and his decision shall be final.

(2) Before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion."

"193. Penalty for sitting and voting before making oath or affirmation under Article 188 or when not qualified or when disqualified.-If a person sits or votes as a member of the Legislative Assembly or the Legislative Council of a State before he has complied with the requirements of Article 188, or when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by Parliament or the Legislature of the State, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the State;"

Section 5 of the Act then provides for further qualifications for membership of a Legislative Assembly in view of Clause (c) of Article 173 of the Constitution. Section 5 of the Act is as under :-

"5. Qualifications for membership of a Legislative Assembly --A person shall not be qualified to be chosen to fill a seat in the Legislative Assembly of a State unless -

(a) in the case of a seat reserved for the Scheduled Castes or for the Scheduled Tribes of that State, he is a member of any of those castes or of those tribes, as the ease may be, and is an elector for any Assembly constituency in that State;

(b) in the case of a seat reserved for an autonomous district of Assam, he is a member of a Scheduled Tribe of any autonomous district and is an elector for the Assembly constituency in which such seat or any other seat is reserved for that district; and

(c) in the case of any other seat, he is an elector for any Assembly constituency in that State :

Provided that for the period referred to in Cl. (2) of Art 371-A, a person shall not be qualified to be chosen to fill any seat allocated to the Tuensang district in the Legislative Assembly of Nagaland unless he is a member of the regional council referred to in that article"

Again it is Clause (c) of Section 5 of the Act, which is relevant for our purpose. Chapter III of the Act prescribes disqualification for membership of Parliament and State Legislature, The term "disqualified" under Clause

(b) of Section 7 of the this Chapter means disqualified for being chosen as, and for being, a member of either House of parliament or of the Legislative Assembly or Legislative Council of a State. Under Section 8 of the Act a person convicted of an offence punishable under various sections mentioned therein shall be disqualified for a certain period from the date of such conviction. A person is also disqualified again for certain period if found guilty of a corrupt practice by an order under Section 8A of the Act. Sections 9, 9A, 10 and 10A also provide for various disqualifications.

Under Section 11, the Election Commission may, for reason to be recorded, remove any disqualification under this Chapter except under Section 8A.

Part VI of the Act provides for disputes regarding election. Under Clause

(d) of Section 79 falling under this Part `electoral right' means the right of a person to stand or not to stand as, or to withdraw or not to withdraw from being, a candidate, or to vote or refrain from voting at an election.

Under Section 80 of the Act no election shall be called in question except by an election petition presented in accordance with the provisions of Part VI. Election petition can be presented under Section 81 of the Act calling in question any election on one or more of the grounds specified in Section 100 or Section 101 of the Act and that petition can be filed by a candidate at such election or any elector within 45 days from the date of election of the returned candidate. Section 101 gives the grounds on which a candidates other than the returned candidate may be declared to have been elected. Section 123 defines corrupt practices. Both these Sections 101 and 123 of the Act are not relevant for our purposes. Sections 81 and 100 (in relevant part) are as under:-

"81. Presentation of petitions.-(1) An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of Section 100 and Section 101 to the High Court by any candidate at such election or any elector within forty five days from, but not earlier than, the date of election of the returned Candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates,

Explanation.-In this sub-section, `elector' means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

`(2) [Omitted by Act 47 of 1966] (3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition, and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition."

"100. Grounds for declaring election to be void.-(1) Subject to the provisions of sub-section (2) if the High Court is of opinion-

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution, or this Act or the Government of Union Territories Act, 1963 (20 of 1963): or

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or ,{c) that any nomination has been improperly rejected; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected-

(i) by the improper acceptance of any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under-this Act, the High Court shall declare the election of the returned candidate to be void."

Part XV of the Constitution deals with elections. Clause (b) of Article 329, which bars interference by court in electoral matters is as under :-

"329. Bar to interference by courts in electoral matters.- Notwithstanding anything in this Constitution

(a).....

> (b) no election to either House of Parliament or to me 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."

Oaths to which a candidate subscribes before and after his election are given in the Third Schedule of the Constitution and these are :-

> "A. Form of oath or affirmation to be made by a candidate for election to the Legislature of a State :
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> "I, A.B; having been nominated as a candidate to fill a seat in the Legislative Assembly (or Legislative Council), do swear in the name of god/solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established and that I will uphold the sovereignty and integrity of India."
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> "B. Form of oath or affirmation to be made by a member of the Legislature of a State :
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> "I, A.B., having been elected (or nominated) a member of the Legislative Assembly (or Legislative Council), do swear in the name of God/solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India and that I will faithfully discharge the duty upon which I am about to enter."

In support of his submission that jurisdiction of the High Court was barred under Article 226, Mr. Tripurari Ray, learned counsel for the appellant referred to various decisions of this Court in N.P. Punnuswami v. The Returning Officer, Namakhal Constituency, Namakhal, Salem Distt, and others, AIR (1952) SC 64; Durga Shankar Mehta v, Raghuraj Singh and others, AIR (1954) SC 520; Brundaban Nayak v. Election Commission of India, AIR (1965) SC 1892; Mohinder Singh Gill and another y. The Chief Election Commissioner, New Delhi and others, AIR (1978) SC 851; Krishna Baliabh Prasad Singh v. Sub Divisional Officer; Hilsa-cum-Returning Officer and others, AIR (1985) SC 1746 and Election Commission of India v. Shivaji and others, AIR (1988) SC 61.

In N.P: Punnuswami's case AIR (1952) SC 64, the appellant was one of the persons who had filed his nomination papers for election to the Madras Legislative Assembly from a constituency in Salem District. The Returning Officer rejected his nomination papers on certain grounds. The appellant thereupon filed writ petition in the High Court under Article 226 of the Constitution seeking a writ of certiorari to quash the orders of the Returning Officer and for a direction to him to include his name in the list of valid nominations to be published. High Court dismissed the petition on the ground that it had no jurisdiction to interfere with the orders of the Returning Officer by reason of the provisions of Article 329

(b) of the Constitution. The appellant contended before this Court that the view expressed by the High Court was not correct and that the jurisdiction of High Court was not affected by Article 329

(b) of the Constitution. This Court said that it would be a fair inference from the provisions of the Act to state that the Act provided for only one remedy, that remedy being an election petition to be presented after the election was over, and there was no remedy provided at any intermediate stage. It was contended before this Court that since the Act was enacted subject to the provisions of the Constitution, it could not bar the jurisdiction of the High Court to issue writs under Article 226 of the Constitution.The Court said that this argument, however, was completely shut out by reading of the act along with Article 329 (b) of the Constitution and that it would be noticed that the language used in that Article and in Section 80 of the Act was almost identical, with this difference only that the Article is preceded by the words `notwithstanding anything in this Constitution'. The Court then said that those words were quite apt to exclude the jurisdiction of the High Court to deal with any matter, which may arise while the elections were in progress. This Court arrived at the following Conclusions :-

> "(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time-schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.
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> (2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does hot affect the "election", and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the "election" and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any Court while the election is in progress."

Finally this Court said that Article 329 (b) was primarily intended to exclude or oust the jurisdiction of all courts in regard to electoral matters and to lay down the only mode to which an election could be challenged.

In Durga Shankar Mehta case AIR (1954) SC 520, a certain Legislative Assembly constituency in Madhya Pradesh was a double member constituency, being general and reserved, Reghuraj Singh, who was a candidate for a general seat and had lost election, filed a petition before the Election Tribunal challenging the election of both the general and reserved category candidates oh the ground that successful reserved constituency candidate, who had been declared elected to the reserved seat in the said constituency, was at all times under 25 years of age and was consequently not qualified to be chosen to fill a seat in the Legislative Assembly of the State under Article 173 of the Constitution. The Election Tribunal set aside the elections of both the candidates, general and reserved. On appeal by the general seat candidate this Court set aside the order of Election Tribunal qua him but upheld against the reserved seat candidate holding his election to be void. The Court observed :-

> "When a person is incapable of being chosen as a member of a State Assembly under the provisions of the Constitution itself but has nevertheless been returned as such at an election, it can be said without impropriety that there has been non-compliance with the provisions of the Constitution materially affecting the result of the election. There is no material difference between "non-compliance" and "non-observance" or "breach" and this item in clause (c) of sub-section (2) may be taken as a residuary provision contemplating cases where there has been infraction of the provisions of the Constitution or of the Act but which have not been specifically enumerated in the other portions of the clause. When a person is not qualified to be elected a member, there can be no doubt that the Election Tribunal has got to declare his election to be void. Under section 98 of the Act this is one of the orders which the Election Tribunal is competent to make. If it is said that section 100 of the Act enumerates exhaustively the grounds on which an election could be held void either as a whole of with regard to the returned candidate, we think that it would be a correct view to take that in the case of a candidate who is constitutionally incapable of being returned as a member there is non- compliance with the provisions of the Constitution in the holding of the election and as such sub-section (2)(c) of section 100 of the Act applies."

In Brundaban Nayak case AIR (196 5) SC 1892, the question be fore this Court was the interpretation of Article 192 of the Constitution. The appellant was elected to the Legislative Assembly of Orissa and had been appointed as a Minister in the Council of Ministers in the State. P. Biswal, respondent No. 2 applied to the Governor alleging that appellant had incurred a disqualification subsequent to his election under Article l9l(l)(e) of the Constitution read with Section 7 of the Act. Under the instructions of the Governor of the State the Chief Secretary forwarded the said complaint to the Election Commission of India for its opinion. The appellant moved the Punjab High Court under Article 226 of the Constitution praying that inquiry by the Election Commission be quashed on the ground that it was incompetent and without jurisdiction. High Court summarily dismissed the writ petition. This Court granted special leave to appeal to the appellant. There was no doubt that the allegations made by the respondent No.2 in his complaint before the Governor prima facie indicated that the disqualification on which he relied had arisen subsequent to the election of the appellant. After examining the Clause (I) of Article 192 of the Constitution this Court observed that what the said Clause required was that a question should arise and how it arises or by whom it is raised or in what circumstance it is raised, are not relevant for the purpose of the application of the Clause, All that is relevant is that a question of this type mentioned by the clause should arise. Then this Court said :-

> "Then as to argument based on the words "the question shall be referred for the decision of the Governor", these words do not import the assumption that any other authority has to receive the complaint and after a prima facie and initial investigation about the complaint, send it on or refer it to the Governor for his decision. These words merely emphasise that any question of the type contemplated by clause (1) of Article 192 shall be decided by the Governor and Governor alone; no other authority can decide it, nor can the decision of the said question as such fall within the jurisdiction of the Courts, That is the significance of the words "shall be referred for

> the decision of the Governor." If the intention was that the question must be raised first in the Legislative Assembly and after a prima facie examination by the Speaker ft Should be referred by him to the Governor, Article 192(1) would have been worded in entirely different manner. We do not think there is any justification for reading such serious limitations in Article 192(1) merely by implication,"

Finally this Court said that scheme of Article 192(l)and (2) is absolutely clear. The decision on the question raised under Article 192(1) has no doubt to be pronounced by the Governor but that decision has to be in accordance with the provisions of the Election Commission. This Court dismissed the appeal.

In Mohinder Singh Gilt case AIR (1978) SC 851, the Election Commissioner had ordered re-poll after cancelling the whole poll as there were disturbances inasmuch as poll ballot papers were destroyed and the ballot documents from one segment of the constituency were also taken away. The poll proceeded as ordained almost to the very last stages, but the completion of the counting was aborted due to mob violence allegedly mobilised at the instance of the third respondent whom the appellant said was losing and the appellant himself winning by a margin of nearly 2000 votes. One of the questions raised before this Court was: "Is Article 329(b) a blanket ban on all manner of questions which may have impact on the ultimate result of the election, arising between two temporal termini viz., the notification by the President calling for the election and the declaration of the result by the returning officer? Is Article 226 also covered by this embargo and, if so, is Section 100 broad enough to accommodate every kind of objection, constitutional, legal or factual, which may have the result of invalidation of an election and the declaration of the petitioner as the returned candidate and direct the organization of any steps necessary to give full relief ?"

> This Court considered its earlier decision in the case of Punnuswami, AIR (1952) SC 64. Analysing Article 329(b) of the Constitution this Court said that the sole remedy for an aggrieved party, if he wants to challenge any election, is an election petition. And this exclusion of all Other remedies includes constitutional remedies like Article 226 because of the non obstante clause. If what is impugned is an election the ban operates provided the proceedings `calls it in question' or puts it in issue, not otherwise. What is the high policy animating this inhibition? Is there any interpretative alternative which will obviate irreparable injury and permit legal contests in between? How does Section 100(l)(d)(iv) of the Act integrates into the scheme? The Court referred to the provisions of Section 100(l)(d)(iv) and also Section 98 of the Act. The Court then held :-
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> "30. The plenary bar of Article 329(b) rests on two principles : (1) The peremptory urgency of prompt engineering of the whole election process without intermediate interruptions by way of legal proceedings challenging the steps and stages in between the commencement and the conclusion. (2) The provision of a special jurisdiction which can be invoked by an aggrieved party at the end of the election excludes other form, the right and remedy being creatures of statutes and controlled by the Constitution. Durga Shartkar Mehta, [1955] 1 SCR 267; AIR (1954) SC 520 has

affirmed this position and supplemented it by holding that, once the Election Tribunal has decided, the prohibition is extinguished and the Supreme Court's over all power to interfere under Article 136 springs into action. In Hari Mehta, [1955] 1 SCR 1104; AIR (1955) SC 233, this Court upheld the rule in Purmusami, AIR (1952) SC 64 excluding any proceeding, including one under Article 226, during the on-going process of election, understood in the comprehensive sense of notification down to declaration. Beyond the declaration conies the election petition, but beyond the decision Of the Tribunal the ban of Article 329(b) does not bind.

31. If' election, bears the larger connotation, if'calling in question' possesses a semantic sweep in plain English, if policy and principle are tools for interpretation of statutes, language permitting, the conclusion is irresistible, even though the argument contra may have emotional impact and ingenious appeal, that the catch-ail jurisdiction under Article 226 cannot consider the correctness, legality or otherwise of the direction for cancellation integrated with re-poll. For, the prima facie purpose of such a re-poll was to restore a detailed poll process and to complete it through the salvationary effort of a re-poll. Whether, in fact or law, the order is validly made within his powers or violative of natural justice can be examined later by the appointed instrumentality, viz., the Election Tribunal. That aspect wilt be explained presently. We proceed on the footing that re-poll in one polling station or in many polling stations, for good reasons, is lawful. This shows that re-poll in many or all segments, all pervasive or isolated, can be lawful. We are not considering whether the act was bad for other reasons. We are concerned only to say that if the regular poll, for some reasons has failed to reach the goal of choosing by plurality the returned candidate and to achieve this object a fresh poll (not a new election) is needed, it may still be a step in the election. The deliverance of Dunkirk is part of the strategy of counter- attack. Wise of valid, is another matter.

32. On the assumption, but leaving the question of the validity of the direction for re-poll open for determination by the Election Tribunal, we hold that a writ petition challenging the cancellation coupled with re-poll amounts to calling in question a step in `election' and is, therefore, barred by Article 329(b). If no re-poll had been directed the legal perspective would have been very different. The mere cancellation would have been then thwarted the course of the election and different considerations would have come into play. We need not chase a hypothetical case."

In Krishna Ballabh Prasad Singh case, AIR (1985) SC 1746 this Court with reference to jurisdiction of the High Court under Article 226 of the Constitution in an election matter where form 21C or 21D had not been issued under the Rule 64 of the Conduct of Election Rules, 1961 observed as under:-

"It is plain that the declaration envisaged by the law that a candidate has been elected is the declaration in Form 21C or Form 2ID. The declaration in Form 21C is made in a general election and the declaration in Form 21D is made when the election is held to fill a casual vacancy, It is now settled law that the right to vote, the right to stand as a

candidate for election and the entire procedure in relation thereto are created and determined by statute. Accordingly, when S.66 of the Representation of the People Act, 1951 provides that the result of the election shall be declared in the manner provided by the Act or the Rules made thereunder. The declaration can be effected in that manner only. The manner is clearly expressed in Rule 64 of the Conduct of Election Rules, 1961. There is no other manner. There must be a declaration in Form 21C or Form 2ID. The announcement by the Returning Officer that the petitioner ,had been elected has no legal status because the declaration in Form 21C had not yet been drawn up. Even the grant of the certificate of election in Form 22 to the petitioner cannot avail him because Rule 66 contemplates the grant of such certificate only after the candidate has been declared elected under S.66, which refers us back to Rule 64 and, therefore, to Form 21C. There having been no declaration in Form 21C at the relevant time, the grant of the certificate of election in Form 22 to the petitioner was meaningless.

We are of opinion that the process of election came to an end only after the declaration in Form 21C was made and the consequential formalities were completed. The bar of Clause (b) of Article 329 of the Constitution came into operation only thereafter and an election petition alone was maintainable. The writ petition cannot be entertained."

In Election Commission of India v. Shivaji and others, AIR (1988) SC 61, this Court had again occasion to consider the jurisdiction of the High Court under Article 226 vis-a-vis Article 329(b) of the Constitution. It also referred to its earlier decision in Punnuswami case [1952] SCR 218 and Mohinder Singh Gill case [1978] 2 SCR 272.

In all these cases there is a common message that when the poll or re-poll process is on for election to the Parliament or Legislative Assembly, High Court cannot exercise its jurisdiction under 226 of the Constitution and that remedy of the aggrieved parties is under the Act read with Article 329(b) of the Constitution. The Act provides for challenge to an election by filing the election petition under Section 81 on one or more grounds specified in sub-section(l) of Sections 100 and 101 of die Act. There cannot be any dispute that there could be a challenge to the election of the appellant by filing an election petition on the ground improper acceptance of his nomination inasmuch as the appellant was hot an elector on the electoral roll of Lalgudi Assembly Constituency and for that matter also by any non-compliance, with the provisions of the Constitution or of the Act. If an election petition had been filed under Section 81 of the Act High Court would have certainly declared the election of the appellant void. It was, therefore, submitted that respondent could not invoke the jurisdiction of the High Court under Article 226 of the Constitution in view of Article 329(b) of the Constitution read with Sections 81 and 100 of the Act and only an election petition was maintainable to challenge the election of the appellant. That right the respondent certainly had to challenge the election of the appellant. Election petition under Section 81 of the Act had to be filed within forty-five days from the date of election of the returned candidate, that is the appellant in the present case. This was not done.There is no provision under the Act that an election petition could be filed beyond the period of limitation prescribed under Section 81 of the Act. That being so the

question arises if the respondent is without any remedy particularly when it is established that the appellant did not have the qualification to be elected to the Tamil Nadu Legislative Assembly from Lalgudi Assembly Constituency.

Mr: Balakrishnamurthy, learned counsel for the first respondent submitted that in such circumstances where the appellant lacked basic and fundamental qualification to be elected as required by the Constitution, it could not be said that a petition under Article 226 of the Constitution was not maintainable. Here jurisdiction under Article 226 is sought to be exercised after declaration of the election of the appellant. He referred to Article 193 of the Constitution which provides for penalty for sitting and voting when a person is not qualified to be a member of the Legislative Assembly. In support of his submission reference was made to a decision of this Court in Election Commission, India v. Saka Venkata Rao, AIR (1953) SC 210. In this case the respondent was convicted and sentenced to a term of seven years rigorous Imprisonment in the year 1942. He was released on the occasion of celebration of the Independence Day on August 15, 1947. In June, 1952 there was to be a by-election to a reserved seat in the Kakinada constituency in Madras Legislative Assembly and the respondent, desiring to offer himself as a candidate but finding himself disqualified under the Act, as five years had not elapsed from his release, applied to the Election Commission on April 2, 1 952 for exemption so as to enable him to contest the election. The respondent did not receive any reply till May 5, 1952, the last date of filing nominations. He filed his nomination on that day. No exception was taken to it either by the Returning Officer or any other candidate. Election was held on June 14, 1952 and the respondent was declared elected on June 16, 1952 and the result of the election was duly published in the Gazette on June 1 9, 1952. Respondent, thereafter took his seat as member of the Assembly on June 27,1952, Meanwhile the Election Commission rejected the respondents application for exemption and communicated such rejection to the respondent by its letter dated May 13, 1952, which it is alleged was not received by him. The Speaker of the Legislative Assembly on July 3, 1952 brought the aforesaid communication of the Election Commission to the notice of the respondent. As a question arose as to the respondent's disqualification the Speaker referred the matter to the Governor of Madras, who in turn forwarded the case to the Election Commission for its opinion as required under Article 192 of the Constitution, In the writ petition filed by the respondent in the High Court under Article 226 of the Constitution one of the submissions made by the Election Commission was that Article 192 was, on its true construction, applicable to cases of disqualification which arose both before and after the election and that the reference of the question as to respondent's disqualification to the Governor of Madras and the latter's reference of the same to the Election Commission for its opinion were competent and valid. This Court referred to articles 190(3), 191, 192 and 193 of the Constitution and observed as under :-

> "Article 191, which lays down the same set of disqualifications for election as well as for continuing as a member, and Article 193 which prescribes the penalty for sitting and voting when disqualified, are naturally phrased in terms wide enough to cover both pre-existing and supervening disqualifications; but it does not necessarily follow that Articles 190(3) and 192(1) must also be taken to cover both, Their meaning must depend on the language used, which, we think, is reasonably plain. In our opinion these two articles go together and provide a remedy when a member incurs a

> disqualification after he is elected as a member. Not only do the words "becomes subject" in Article 190(3) and "has become subject"

in Article 192(1) indicates change in the position of the member after he was elected, but the provision that his seat is to become thereupon vacant, that is to say, the seat which the member was filling, therefore, becomes vacant on his becoming disqualified, further reinforces the view that the article contemplates only a sitting member incurring the disability while so sitting. The suggestion that the language used in Article 190(3) can equally be applied to a pre-existing disqualification as a member can be supposed to vacate his seat the moment he is elected is a strained and farfetched construction and cannot be accepted. The Attorney General admitted that if the word "is" were substituted for "becomes" or "has become", it would more appropriately convey the meaning contended for by him, but he was unable to say why it was not used."

Finally, this Court said that Articles 190(3) and 192(1) are applicable only to disqualifications to which a member becomes subject after he is elected as such, and that neither the Governor nor the Election Commission has jurisdiction to inquire into the respondent's disqualification which arose long before his election.

It may be noted that in this case an argument was raised by the Attorney- General that Articles 190 to 193 should be read together and that Article 190(3) and Article 192(1) would include within its scope pre-existing disqualifications as well. This argument was negatived by this Court when it said :-

> "The Attorney-General argued that the whole fasciculus of the provisions dealing with "disqualifications Of Members," viz., Article 190 to 193, should be read together, and as Articles 191 and 193 clearly cover both pre-existing and supervening disqualifications, Articles 190 and 192 should also be similarly understood as relating to both kinds of disqualification. According to him all these provisions together constitute an integral scheme whereby disqualifications are laid down and machinery for determining questions arising in regard to them is also provided. The use of the word "become" in Articles 190(3) and 192(1) is not inapt, in the context, to include within its scope pre-existing disqualifications also, as becoming subject to a disqualification is predicated of "a member of a House of Legislature", and a person, who being already disqualified, gets elected, can, not inappropriately be said to "become" subject to the disqualification as a member as soon as he is elected. The argument is more ingenious than sound;"

This Court further went on to add:-

> "It was said that on the view that Articles 190(3) and 192(1) deal with disqualification incurred after election as a member, there would be no way of unseating a member who became subject to a disqualification after his nomination and before his election, for such a disqualification is no ground for challenging the election by an election petition under Article 329 of the Constitution read with Section 100 of the

> Representation of the People Act, 1951. If this is an anomaly, it arises out of a lacuna in the latter enactment which could easily have provided for such a contingency, and it cannot be pressed as an argument against the respondent's construction of the constitutional provisions. On the other hand, the Attorney-General's contention might, if accepted, lead to conflicting decisions by the Governor dealing with a reference under Article 192 and by the Election Tribunal (now the High Court) inquiring into an election petition under Section 100 of the Parliamentary statute referred to above."

From this judgment it is clear that this Court held that Article 191, which lays down the same set of disqualification for election as well as for continuing as a member and Article 193, which prescribes the penalty for sitting and voting when disqualified, are naturally phrased in terms wide enough to cover both pre and supervening qualifications. But it also held that it does not necessarily follow that Articles 190(3) and 192(1) must also be taken to cover both. It, therefore, held that Articles 190(3) and 192(1) go together and provide remedy when a member incurs a disqualification after he is elected as a member. This Court was examining the issue if action under Article 192 could be taken when the respondent Venkata Rao had already incurred disqualification prior to his nomination for being elected to the Madras Legislative Assembly and that after his release from the conviction prescribed for him to file his nomination was yet hot over. This Court, therefore, held that action under article 192 could not be taken against Venkata Rao.

In the present case the appellant was not an elector in the electoral roll of Lalgudi Assembly Constituency. He, therefore, could not be elected as a member from that constituency. How could a person who is not an elector, from that constituency could represent the constituency? He lacked the basic qualification under Clause (c) of Article 173 of the Constitution read with Section 5 of the Act which mandated that a person to be elected from an Assembly constituency has to be elector of that constituency. The appellant in the present case is certainly disqualified for being a member of the Legislative Assembly of Tamil Nadu. His election, however, was not challenged by filing an election petition under Section 81 of the Act, Appellant knows he is disqualified. Yet he sits and votes as a member of the Legislative Assembly. He is liable to penalty of five hundred rupees in respect of each day on which he so sits or votes and that penalty is recoverable as debt due to the State. There has not been any adjudication under the Act and there is no other provision of the Constitution as to how penalty so incurred by the appellant has to be recovered as a debt due to the State. Appellant is liable to penalty nevertheless as he knows he is not qualified for membership of the Legislative Assembly and yet he acts contrary to law.

The question that arises for consideration is if in such circumstances High Court cannot exercise its jurisdiction under Article 226 of the constitution declaring that the appellant is hot qualified to be member of the Tamil Nadu Legislative Assembly from Lalgudi Assembly Constituency. On the finding recorded by the High Court it is clear that the appellant jn his nomination form impersonated a person known as `Venkatachalam s/o Pethu', taking advantage of the fact that such person bears his first name. Appellant would be even criminally liable as he filed his nomination on affidavit impersonating himself If in such circumstances he is allowed to continue to sit and vote in the Assembly his action would be fraud to the constitution.

In view of the judgment of this Court in the case of Election Commission of India v. Saka Varikata Rao, AIR (1953) SC 210 it may be that action under Article 192 could not be taken as the disqualification which the appellant incurred was prior to his election. Various decisions of this Court, which have been referred to by the appellant that jurisdiction of the High Court under Article 226 is barred challenging the election of a returned candidate and which we have noted above, do not appear to apply to the case of the appellant now before us. Article 226 of the Constitution is couched in widest possible term and unless there is clear bar to jurisdiction of the High Court its powers under Article 226 of the Constitution can be exercised when there is any act which is against any provision of law or violative of constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. In circumstances like the present one bar of Article 329(b) will not come into play when case falls under Articles 191 and 193 and whole of the election process is over. Consider the case where the person elected is not a citizen of India. Would the Court allow a foreign citizen to sit and vote in the Legislative Assembly and not exercise jurisdiction under Article 226 of the Constitution?

We are, therefore, of the view that the High Court rightly exercised its jurisdiction in entertaining the writ petition under Article 226 of the Constitution and declared that the appellant was not entitled to sit in tamil Nadu Legislative Assembly with consequent restraint order on him from functioning as a member of the Legislative Assembly, The net effect is that the appellant ceases to be a member of the Tamil Nadu Legislative Assembly. Period of the Legislative Assembly is long since over. Otherwise we would have directed respondent No. 2, who is Secretary to Tamil Nadu Legislative Assembly, to intimate to Election Commission that Lalgudi Assembly constituency seat has fallen vacant and for the Election Commission to take necessary steps to hold fresh election from that Assembly Constituency. Normally in a case like this Election Commission should invariably be made a party.

When leave to appeal was granted to the appellant by this Court operation of the impugned judgment was suspended. Respondent No. 2 shall intimate to the State Government as to for how many days the appellant sat as a member of the Legislative Assembly and it would be for the State Government to recover penalty from the appellant in terms of Article 193 of the Constitution.

This appeal is dismissed with costs.