

NITIN BANDOPANT SALAGRE

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v.

THE STATE ELECTION COMMISSION & ANR.

(Civil Appeal No.5855 of 2019)

AUGUST 05, 2019

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[ASHOK BHUSHAN AND NAVIN SINHA, JJ.]

Mumbai Municipal Corporation Act, 1888 – ss. 9, 33 and 34 – Filling of casual vacancy – General election for electing Councillor for Bombay Municipal Corporation was conducted and one candidate was declared successful for the seat reserved for backward class of citizens – A complaint was filed against the said successful candidate on the ground that she had wrongly claimed to be a member of backward class citizen – The District Caste certificate scrutiny committee invalidated the caste certificate of the said candidate – Consequently, the said candidate was disqualified by the Corporation – On account of disqualification, a casual vacancy arose in the ward – The State Election Commission issued a notification dated 09.05.2019 notifying the byelection for ward to fill up casual vacancy u/s.9 of the Act – Writ petitions were filed by the appellants before the High Court for direction to set aside the notification dated 09.05.2019 – The appellant claimed that since he had secured second highest votes from the said ward, he was entitled to be declared as elected as per s.33 of the Act – Earlier, appellant had filed another writ petition before the High Court to decide the election petition for declaring the appellant as elected candidate expeditiously – In that writ petition, the High Court had directed the Court of Small Causes to decide the election petition expeditiously – Writ petitions for direction to set aside the notification dated 09.05.2019 were dismissed by the High Court – On appeal before the Supreme Court, the appellants contended that since election petition was pending consideration, the State Election Commission had no jurisdiction to issue notification for holding a byelection for electing councillor – Held: By mere pendency of election petition filling up of casual vacancy is not to be deferred or postponed – State Election Commission before proceeding to fill up a casual vacancy u/s. 9 has to advert to the statutory prescription

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- A *u/s. 34 and take a conscious decision by due application of mind and thereafter to proceed to fill up vacancy arose – In each case of casual vacancy, there may be different circumstances without adverting to which State Election Commission cannot decide to fill up the casual vacancy – In the instant case, when an election petition*
- B *was already filed challenging the election of returned candidate since before invalidation of his or her caste certificate in which election petition prayer was also made to declare the candidate securing second highest votes as deemed elected, the State Election Commission may not call for fresh election without considering the said aspect of the matter – Further, Commission had issued*
- C *notification dated 09.05.2019 on subject regarding preparation of voters list for byelection for filling up vacancies of Municipal Corporation but no notification was issued fixing dates for byelection of the wards in question – Therefore, State Election Commission directed to take a fresh decision before issuing any notification fixing dates for holding a byelection of wards –*
- D *Impugned judgment of the High Court set aside.*

Allowing the appeals, the Court

- E **HELD: 1. Section 33(2) of the Mumbai Municipal Corporation Act, 1888 incorporated the statutory Scheme that if Chief Judge of Small Causes Court finds that the person whose election is objected to is disqualified for being a councillor, or if he finds that the election is not a valid election, he shall set it aside. In either case, he shall direct that the candidate in whose favour the next highest number of valid votes has been recorded shall be deemed to have been elected. Thus, the statutory Scheme**
- F **recognises the person, who has secured the second highest votes to be deemed to be elected, which provision has been incorporated for specific purpose and object. It is a matter of common knowledge that holding of election is a cumbersome process involving lot of time, involvement of manpower and expenditure. Municipal Corporations under the Act, 1888 has**
- G **been entrusted with a large number of powers and jurisdiction and every five years, the election for constituting Municipal Corporation is to be undertaken. The right in a person, who has secured the second highest number of votes has been recognised to obviate holding of fresh elections. Thus, the Legislative**
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Scheme itself recognises the declaration of a person securing second highest votes as deemed to have been elected. The said purpose and object has to be given effect to while interpreting the provisions of the Act. The second part of Section 9 specifically provides for filling up of the casual vacancy in the manner as provided in Section 34, the question as to “whether there is no other candidate, who can be deemed to be elected in his place” becomes relevant and necessary. For answering the said question, the State Election Commission has to apply its mind and look into all necessary facts pertaining to ward in question. It is further relevant to notice that the requirement of finding out answer to the above question is relevant when an election petition has already been filed by a person claiming that there is a candidate, who can be deemed to be elected in place of returned candidate. When there are no election petitions filed under Section 33 or where no prayer is made for declaring candidate obtaining second highest votes, the above question becomes irrelevant and has no bearing on filling up of the casual vacancy. The use of the expression in Section 9, i.e., “as soon as it conveniently may be” indicates that Statute gives discretion to the State Election Commission to hold byelections for a casual vacancy. The Statute does not mandate holding of byelections, i.e., filling up of casual vacancy as soon as the casual vacancy arises. Discretion has been given to the Commission for a purpose and object. [Para 26] [1137-B-H; 1138-A]

2. One of the factors in taking a decision regarding filling up of the casual vacancy is as to whether there is no other candidate, who can be deemed to be elected in place of the returned candidate. All these aspects have to be looked into and considered by the State Election Commission before proceeding to hold elections. But this Court makes it clear that the statutory Scheme does not indicate that by mere filing of an election petition questioning the election of returned candidate of ward and seeking a declaration in favour of the election petitioner shall ipso facto put an embargo in the right of State Election Commission to proceed to fill up the casual vacancy. The State Election Commission has been statutorily obliged to find out as to whether there is no other candidate, who can be deemed to be elected in

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A place of returned candidate, only thereafter it is obliged to hold fresh elections. It postulates a decision making process by due application of mind considering all relevant and necessary factors, eschewing the irrelevant. [Para 27] [1138-B-D]

B 3. In view thereof, with regard to statutory Scheme under Act, 1888 regarding filling up of casual vacancy, this Court arrives at following conclusions:-

C (i) By mere pendency of election petition filling up of casual vacancy is not to be deferred or postponed. State Election Commission before proceeding to fill up a casual vacancy under Section 9 has to advert to the statutory prescription under Section 34 and take a conscious decision by due application of mind and thereafter to proceed to fill up vacancy arose. In each case of casual vacancy, there may be different circumstances without adverting to which State Election Commission cannot decide to fill up the casual vacancy; (ii) A casual vacancy caused due to D invalidation of caste certificate of returned candidate has to be filled up in a manner provided in Section 34 of Act, 1888; (iii) When an election petition has already been filed challenging the election of returned candidate since before invalidation of his or her caste certificate in which election petition prayer is also made E to declare the candidate securing second highest votes as deemed elected, the State Election Commission may not call for fresh election without considering the above aspect of the matter. [Para 36] [1143-C-G]

F 4. Although Commission has issued notification dated 09.05.2019 on subject regarding preparation of voters list for byelection for filling up vacancies of Municipal Corporation but no notification having yet been issued fixing date for byelection of wards in question, this Court is of the view that State Election Commission may take a fresh decision before issuing any notification fixing dates for holding a byelection of wards in G question. [Para 38] [1140-B-C]

Jyoti Basu and Others v. Debi Ghosal and Others
(1982) 1 SCC 691 : [1982] 3 SCR 318 – relied on.

H *D. Sanjeevayya v. The Election Tribunal, Andhra Pradesh and Others* AIR 1967 SC 1211 : [1967] SCR

NITIN BANDOPANT SALAGRE v. STATE ELECTION COMMISSION & ANR. 1125

489 ; Election Commission of India v. Telnagana Rastra Samiti and Another (2011) 1 SCC 370 : [2010] 14 SCR 468; Pramod Laxman Gudadhe v. Election Commission of India and Others (2018) 7 SCC 550 : [2018] 4 SCR 397 – referred to. A

Case Law Reference B

[1967] SCR 489	referred to	Para 6	
[2010] 14 SCR 468	referred to	Para 6	
[2018] 4 SCR 397	referred to	Para 6	
[1982] 3 SCR 318	relied on	Para 14	C

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5855 of 2019

From the Judgment and Order dated 10.06.2019 of the High Court of Judicature at Bombay in Writ Petition Lodging No. 1577 of 2019 D

With

Civil Appeal Nos. 5857, 5856 and 5858 of 2019.

Ms. Meenakshi Arora, Sr. Adv., Vinay Navare, Chintamani Bhangoji, Sudhanshu S. Choudhari, Surabhi Guleria, Yogesh Kolte, Mahesh P. Shinde, Advs. for the Appellant. E

Atmaram N. Nadkarni, ASG, Sanjay Hegde, Sr. Adv., Manoj Sharma, Alok Singh, Pramod Kathane, Deepak Shukla, Gaurav Bhardwaj, Kapil Kaushik, Pramod Dayal, Braj K. Mishra, Vijay Kumar, Dhaval S. Deshpande, Ms. Bharti Tyagi, Ashish Wad, Mrs. Jayashree Wad, Sidharth Mahajan, Ms. Sukriti Jaggi, Advs. for the Respondents. F

The Judgment of the Court was delivered by

ASHOK BHUSHAN, J.

1. These appeals have been filed against the common judgment of the Bombay High Court dated 10.06.2019 by which separate writ petitions filed by the appellants have been dismissed. G

2. The question of law raised in all these appeals being common, all the appeals have been heard together and are being decided by this common judgment. For deciding these appeals, it shall be sufficient to

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- A refer the facts and pleadings in Civil Appeal No. 5855 of 2019 – Nitin Bandopant Salagre Vs. The State Election Commission & Anr.

3. The general elections for electing councillor for Bombay Municipal Corporation were held in February, 2017. One Mrs. Kesharben Murji Patel was declared elected on 23.02.2017 as councillor from Ward No.76. Ward No.76 was reserved for backward class of citizens. Mrs. Kesharben Murji Patel had wrongly claimed to be a member of backward class citizen. The appellant filed a complaint before District Caste Certificate Scrutiny Committee and has also filed Election Petition No.52 of 2017 before Chief Judge of Small Causes Court, Mumbai under Section 33 of the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as “Act, 1888) challenging the election of Mrs. Kesharben Murji Patel. The District Caste Certificate Scrutiny Committee by its order dated 19.08.2017 invalidated the caste certificate of Mrs. Kesharben Murji Patel. Writ Petition No. 181 of 2018 was filed by Mrs. Kesharben Murji Patel seeking direction to the Corporation not to disqualify her. The writ petition No. 181 of 2018 was dismissed on 02.04.2019 against which special leave petition (C) No.8946 of 2019 was filed, which too was dismissed on 24.04.2019. Mrs. Kesharben Murji Patel was disqualified by order dated 05.04.2019 of the Corporation. On account of disqualification of Mrs. Kesharben Murji Patel from Ward No.76, a casual vacancy arose in the said ward. The appellant claimed to have secured second highest number of votes from Ward No.76, hence he claimed that he ought to have been declared by Chief Judge of Small Causes Court as having elected from Ward No.76. The State Election Commission, Maharashtra issued a notification dated 09.05.2019 notifying the byelection for Ward No.76 of the Corporation to fill up casual vacancy arising under Section 9 of the Act, 1988. The Writ Petition (C) No.1577 of 2019 has been filed by the appellant in the Bombay High Court praying for following reliefs:-

- G “(a) That this Hon’ble Court be pleased to quash and set aside the Notification dated 9th May, 2019 issued by the Respondent No.1 State Election Commission thereby notifying the by-elections for Ward No.76 of Respondent No.2 Corporation to fill up the casual vacancy arisen under Section 9 of MMC Act, 1888.
- H (b) This Hon’ble Court be pleased to direct the learned Small Causes Court at Mumbai to expedite the proceedings in the

Municipal Election Petition No.52 of 2017 filed by the petitioner, within such time limit as this Hon'ble Court may deem fit and proper. A

(c) Pending hearing and final disposal of this petition, the Notification dated 9th May, 2019 issued by the Respondent No.1 State Election Commission thereby notifying the byelections for Ward No.76 of Respondent No.2 Corporation, be kindly ordered to stayed. B

(d) Ad-interim/interim relief in terms of prayer clause (c) above be kindly granted.

(e) Such other and further relief as this Hon'ble Court may deem fit and proper be kindly granted.” C

4. By an interim order passed on 16.05.2019, the High Court permitted State Election Commission to proceed with for preparation of voters list, however, notification declaring election of the wards was not to be published till 12.06.2019. It is also relevant to notice that Writ Petition (L) No.1288 of 2019 was filed by the appellant where direction was sought for deciding Election Petition No.52 of 2017, which writ petition was disposed of by the High Court on 04.06.2019 requesting the learned Judge of the Small Causes Court at Bombay to decide the election petition expeditiously as possible and in any event by 31st August, 2019. Similarly, three other petitioners have filed writ petitions in the High Court being Writ Petition No.1453 of 2019 – Sandeep Raju Naik Vs. The State Election Commission & Ors.; Writ Petition No.1578 of 2019 – Geeta Kiran Bhandari Vs. The State Election Commission and Writ Petition No. 1462 of 2019 – Eknath (Shankar) Dnyandeo Hundar Vs. The State Election Commission. In all the writ petitions, one of the reliefs claimed was to cancel the notification dated 09.05.2019 issued by the State Election Commission, by which State Election Commission, Maharashtra has issued a notification for preparation of voters list for byelections for filling up of vacant posts in the Municipal Corporation. The wards from which appellants had contested the elections of councillor were included in the notification. High Court heard all the writ petitions together. High Court had also dispensed with filing of the affidavits of the parties. High court by impugned judgment dated 10.06.2019 dismissed all the four writ petitions, aggrieved by which judgment, these appeals have been filed. D
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A 5. We have heard learned counsel appearing for the appellants, learned counsel for the State Election Commission and learned counsel appearing for Municipal Corporation as well as learned counsel for intervener.

6. Learned counsel for the appellant challenging the judgment of High Court contends that the appellants being candidates having secured second highest votes in the election of councillor and the returned candidates having been declared disqualified, the appellants are entitled to be declared as elected as per Section 33 of Act, 1888. The Election Petition of the appellants where prayer for declaring the appellants as elected candidates being pending consideration, the State Election Commission had no jurisdiction to issue notification for holding a byelection for electing councillor. It is submitted that the Statute contemplates that the candidates securing second highest votes shall be deemed to be elected as councillor in case of setting aside of the election. Holding of byelections till the election petition of the appellant is pending, is not permissible in law. Learned counsel for the appellant has placed reliance on judgments of this Court in **D. Sanjeevayya Vs. The Election Tribunal, Andhra Pradesh and Others, AIR 1967 SC 1211; Election Commission of India Vs. Telnagana Rastra Samiti and Another, (2011) 1 SCC 370 and Pramod Laxman Gudadhe Vs. Election Commission of India and Others, (2018) 7 SCC 550**. It is submitted that in event byelection is permitted to be held and some other person is declared elected in the said election and in the election petition if declaration is made in favour of appellant that he shall be deemed to be elected from the ward of the Municipal Corporation, there shall be two candidates claiming to represent the constituency, which is not permissible as per the statutory Scheme. It is further submitted that the Division Bench has not followed the view of an earlier Division Bench judgment dated 17.09.2007 in **Writ Petition No.6846 of 2007-Jagdish Kutty Amin Vs. Municipal Corporation of Brihanmumbai & 2 Ors.** and for taking a different view, matter ought to have been referred to a larger bench.

G 7. Learned counsel for the respondents refuting the submissions of the learned counsel for the appellant contends that filing of election petition by appellant does not have an effect of postponing the filling up of casual vacancy by the State Election Commission. It is submitted

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that term of councillor being five years and admittedly returned candidate having been declared disqualified, the ward cannot remain unrepresented. The election petition filed by the appellant may or may not be decided during the tenure of the Municipal Corporation. Had the Statute intended that till the election petition is decided with regard to claim of petitioners claiming declaration as elected candidates, the byelection be not held, there ought to have been some specific provisions in the statutory Scheme. It is submitted that filling up of casual vacancy, which has arisen within the meaning of Section 9 of Act, 1888 is not dependent on any election petition filed under Section 33 of the Act, 1888. The course of action as contemplated by Section 33(2) is only relevant for the election petition, which has been filed under Section 33, which does not have any effect of stopping or staying the filling up of casual vacancy. It is submitted that the Scheme in the Representation of the People Act, 1951 is entirely different from the Scheme in Act, 1888, hence the judgments relied by counsel for the appellant are not relevant.

8. We have heard the learned counsel for the parties and have perused the records.

9. The present is a case where returned candidates have been held to be disqualified on account of invalidation of caste certificate. The disqualification of the returned candidates, who were initially elected from concerned ward of the Municipal Corporation has attained finality giving rise to casual vacancy in the office of councillor. Section 9 of the Act, 1888 deals with casual vacancy, which is as follows:-

“9.Casual vacancies how to be filled up.

In the event of non-acceptance of office by a person elected to be a councillor or of the death, resignation or disqualification of a councillor, of his becoming incapable of acting during the term of his office there shall be deemed to be a casual vacancy in the office and such vacancy shall be filled up, as soon as it conveniently may be, by the election of a person thereto who shall hold office so long only as the councillor in whose place he is elected would have been entitled to hold it if the vacancy had not occurred.

The casual vacancy in the office of an elected councillor shall be filled up in the manner provided in section 34:

A Provided that no election shall be held to fill up such vacancy if it occurs within six months preceding the date on which the term of office of the Councillor expires under section 6A.”

10. Section 33 of the Act deals with election petitions to be heard and disposed of by the Chief Judge of the Small Causes Court, which is
B as follows:-

“**33.Election petitions to be heard and disposed of by Chief Judge of the Small Cause Court.** (1) If the qualification of any person declared to be elected for being a councillor is disputed, or if the validity of any election is questioned, whether by reason of
C the improper rejection by the State Election Commissioner of a nomination or of the improper reception or refusal of a vote, or for any other cause or if the validity of the election of a person is questioned on the ground that he has committed a corrupt practice within the meaning of section 28F, any person enrolled in the
D municipal election roll may, at any time, within ten days from the date on which the list prescribed under clause (k) of section 28 was available for sale or inspection apply to the Chief Judge of the Small Cause Court. If the application is for a declaration that any particular candidate shall be deemed to have been elected, the applicant shall make parties to his application all candidates
E who, although not declared elected, have, according to the results declared by the State Election Commissioner under section 32, a greater number of votes than the said candidate, and proceed against them in the same manner as against the said candidate.

(1A) The applicant shall, whenever so required by the Chief Judge,
F deposit in the Court a sum of Rs. 500 in cash or Government securities of equivalent value at the market rate of the day as security for any costs which the applicant may be ordered to pay to other parties to the said application.

(2) If the said Chief Judge, after making such inquiry as he deems
G necessary, finds that the election was a valid election and that the person whose election is objected to is not disqualified, he shall confirm the declared result of the election. If he finds that the person whose election is objected to is disqualified for being a councillor, he shall declare such person’s election null and void. If he finds that the election is not a valid election, he shall set it
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aside. In either case he shall direct that the candidate, if any, in whose favour the next highest number of valid votes is recorded after the said person and against whose election no cause of objection is found, shall be deemed to have been elected. A

(2A) When an election of a person is questioned on the ground that he has committed a corrupt practice within the meaning of section 28F, the Chief Judge shall, if he is satisfied that a candidate has committed such corrupt practice, declare a candidate disqualified both for the purposes of that election and of such fresh election as may be held during the current term of office of the councillors elected at the general election and shall set aside the election of such candidate if he has been elected. B C

(3) The said Chief Judge's order shall be conclusive.

(4) * * * * *

(5) Every election not called in question in accordance with the foregoing provisions shall be deemed to have been to all intents a good and valid election." D

11. Section 34 contains a heading "Procedure if election fails or is set aside". Section 34 is as follows:-

"34.Procedure if election fails or is set aside. E

(1) If at any general election or an election held to fill a casual vacancy, no councillor is elected, or the election of any councillor is set aside under sub-section (2) of section 33 and there is no other candidate who can be deemed to be elected in his place under the said sub-section, the State Election Commissioner shall appoint another day for holding a fresh election and a fresh election shall be held accordingly. F

(2) A councillor elected under this section shall be deemed to have been elected to fill a casual vacancy under section 9."

12. In the facts of the present case, there is no dispute that election petitions challenging the elections of the returned candidates were filed by the appellants before the Chief Judge, Small Causes Court prior to the invalidation of caste certificate by District Caste Certificate Scrutiny Committee and further in the election petition, the prayer has been made G

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A by the appellant that he be also declared elected. Prayer (c) of the election petition is as follows:-

“c) The petitioner be declared elected from ward no.76 of the respondent no.1 Corporation, having secured the next highest number of valid votes after the respondent No.3 and against whose election, no cause of objection is found.”

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13. The State Election Commission has started process for holding byelection for filling up of vacant posts in the Municipal Corporation. Whether filing of election petition or pendency of election petition, where one of the prayers is that petitioner be deemed elected from the ward in question, has effect of postponing the byelections and the State Election Commission is denuded from proceeding with holding byelections are the questions, which need to be answered in these appeals.

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14. This Court in **Jyoti Basu and Others Vs. Debi Ghosal and Others, (1982) 1 SCC 691: AIR 1982 SC 983** has laid down that right to elect, the right to be elected and the right to dispute an election are statutory rights. In paragraph No. 8 of the judgment, following has been observed:-

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“8. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to election law unless statutorily embodied.....”

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15. Thus, answer to all issues, which have arisen in these appeals has to be deciphered from the statutory Scheme of Act, 1888. “Disqualification of a councillor” is one of the circumstances mentioned in Section 9, which causes a deemed casual vacancy in the office. Section

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9 of the Act also contemplates filling up of the casual vacancy. Further with regard to filling up of vacancy, a rider has been incorporated under Section 9 by following words:- A

“as soon as it conveniently may be”

16. What is the purpose and meaning of the above expression has to be examined. Section 9 of the Act is in two parts, the second part has been inserted in Section 9 by Bombay Act No.28 of 1935. First part of Section 9 provides that a casual vacancy shall be filled up as soon as it conveniently may be by the election of a person thereto. By addition of second part, it is provided that casual vacancy shall be filled up in the manner provided in Section 34. We have to look into Section 34 to find out as to the manner provided for casual vacancy to be filled up. As noted above, Section 34(1) provides that if at any general election or an election held to fill a casual vacancy, no councillor is elected, or the election of any councillor is set aside under sub-section (2) of section 33 and there is no other candidate who can be deemed to be elected in his place, the State Election Commissioner shall appoint another day for holding a fresh election. One of the conditions incorporated in sub-section(1) of Section 34 for appointing another day for holding fresh election is that “there is no other candidate who can be deemed to be elected in his place”, thus, in a case, there is a candidate who can be deemed to be elected in place of a returned candidate, date for election is not to be appointed. B
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17. The submission needs to be considered is as to whether Section 34(1) has to confine in itself for its operation with respect to Section 33(2), i.e., when an election petition of a returned candidate is set aside or the operational conditions as contained in Section 34(1) shall be attracted with regard to filling up of casual vacancy under Section 9. Had second part of Section 9, i.e., “the casual vacancy in the office of an elected councillor shall be filled up in the manner provided in Section 34” been not there in Section 9, there was no difficulty in confining operation of Section 34 only to election petition under Section 33(2). F

18. The phrase “The casual vacancy in the office of an elected councillor shall be filled up in the manner provided in Section 34.” was added in Act, 1888 by Bombay Act XXVIII of 1935. Section 34 as it exists at present was also substituted by Act XXVIII of 1935. We need G

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- A to look into the Statement of Objects and Reasons for amendment in Sections 9 and 34. The Statement of Objects and Reasons which were published along with Bill No. XXXVI OF 1935 in Bombay Government Gazette dated 17.09.1935 is as follows:

“STATEMENT OF OBJECTS AND REASONS.

- B Section 34 of the City of Bombay Municipal Act (III of 1888) provides that if no councillor is ‘elected at a general election, the retiring councillor or councillors shall, if willing to serve, be deemed to be re-elected; that if the retiring councillor is not willing to serve, or some of the retiring councillors are willing to serve and some are not, and also in certain other contingencies the
- C Corporation shall fill up the vacancy or vacancies by co-option within fifteen days of a report made by the Municipal Commissioner in that behalf; and that failing such action by the Corporation the vacancy or vacancies are to be filled up by election. These provisions date from a time when local self-
- D government may be said to have been in its infancy; and it was probably apprehended that a sufficient number of councillors to fill up vacancies may not be forth-coming. The provisions also appear to have been intended to avoid the trouble and expense of holding a fresh election after a general election
- E had proved infructuous. Conditions have changed since and owing to the keen interest taken in local self-government at the present day, there is no likelihood of a sufficient number of candidates not being available to contest an election. It also seems desirable that where an election has been set aside and in the other contingencies contemplated in sections 33 and
- F 34 the electors should be given an opportunity of returning other representatives of their own choice. The Bill is intended to carry out this object.

16th September, 1935

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(Signed) S. N. BHUTTO.
By order of His’ Excellency the Governor,
K. C. SEN,”

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19. We may also notice the statutory Scheme of Act, 1888 prior to its amendment made in the year 1935. Section 9 as it existed prior to Amendment 1935 was to the following effect: A

“9. Casual Vacancies How to be filled up –

In the event of non-acceptance of office by a person elected or appointed, to be a councillor or of the death, resignation or disqualification of a councillor, or of his becoming incapable of acting previous to the day for retirement, there shall be deemed to be a casual vacancy in the office and such vacancy shall be filled up, as soon as it conveniently may be, by the election or appointment, as the case may be, of a person thereto, who shall hold office so long only as the councillor in whose place he is elected or appointed would have been entitled to hold it, if the vacancy had not occurred.” B C

20. Section 34 as it originally existed in Act, 1888 was to the following effect: D

“34. Procedure of election if fails

1. If from any cause no councillor is elected at any general election, not being one of the first general elections held in accordance with this Act, the retiring councillor or councillors shall, if willing to serve, be deemed to be re-elected. E

2. If, in any such case, the retiring councillor is not willing to serve, or some of the retiring councillors are willing to serve and some are not, or

if, in the case of a first general election held in accordance with this Act, or of an election to fill a casual vacancy, no councillor is elected, or F

if, in the case of any election, an insufficient number of councillors are elected,

the commissioner shall without delay inform the corporation of the circumstances, and thereupon the corporation, so far as it is constituted, may appoint a duly qualified person to fill the vacancy, or each vacancy, as the case may be, and if the corporation shall fail within fifteen days after receipt of such information to appoint G

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A a person as aforesaid, the commissioner shall appoint another day for holding a fresh election.

3. A fresh election held under this section shall be held subject in all respects to the same provisions as if it were an election to fill a casual vacancy.”

B 21. The Scheme of Act, 1888 as it originally stood provided for retiring councillors, who are willing to serve to be deemed to be re-elected, in case no councillor is elected at any general election.

22. The above provisions were made with intention to avoid the trouble and expense of holding a fresh election after the general election had proved infructuous. The Statement of Objects and Reasons of Bill No. XXXVI of 1935 noticed that owing to the keen interest in the Local Self Government at the present day, there is no likelihood of a sufficient number of candidates not being available to contest an election. The Statement of Objects and Reasons of 1935 Amendment also contemplates that an elector should be given an opportunity of returning other representatives of their own choice subject to contingencies contemplated in Sections 33 and 34.

23. In Section 34 as noticed above, one of the contingencies is provided in sub-section (1) of Section 34 for appointing another date of holding fresh election when no other candidate who may be deemed to be elected is available. Thus, when a candidate who can be deemed to be elected is available, fresh election should not be immediately initiated.

24. The addition of second part in Section 9 by 1935 Amendment that “the casual vacancy in the office of an elected councillor shall be filled up in the manner provided in Section 34” has to be given meaning. Sections 9 and 34 has to be read together to find out the meaning and purpose and to interpret both the provisions to harmonise the statutory Scheme. It is true that Section 34 contemplates one of the contingencies for holding a fresh election when election of any or all of the councillors is set aside under sub-section (2) of Section 33.

G 25. When a casual vacancy arises due to disqualification of a returned candidate, whether that is not covered by Section 34(1)? In the cases before us, the returned candidate is disqualified by invalidation of caste certificate, the outcome of invalidation of caste certificate is same as setting aside their election. When we read Section 9 and Section 34,

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the event of invalidation of caste certificate of returned candidate shall also be covered by Section 34(1) and contingency as provided under Section 34(1) shall be held applicable in that event. A

26. Section 33(2) incorporated the statutory Scheme that if Chief Judge of Small Causes Court finds that the person whose election is objected to is disqualified for being a councillor, or if he finds that the election is not a valid election, he shall set it aside. In either case, he shall direct that the candidate in whose favour the next highest number of valid votes has been recorded shall be deemed to have been elected. Thus, the statutory Scheme recognises the person, who has secured second highest votes to be deemed to be elected, which provision has been incorporated for specific purpose and object. It is a matter of common knowledge that holding of election is a cumbersome process involving lot of time, involvement of manpower and expenditure. Municipal Corporations under the Act, 1888 has been entrusted with large number of powers and jurisdiction and every five years, the election for constituting Municipal Corporation is to be undertaken. The right in a person, who has secured second highest number of votes has been recognised to obviate holding of fresh elections. Thus, the Legislative Scheme itself recognises declaration of a person securing second highest votes as deemed to have been elected. The said purpose and object has to be given effect to while interpreting the provisions of the Act. As noticed above, when second part of Section 9 specifically provides for filling up of the casual vacancy in the manner as provided in Section 34, the question as to “whether there is no other candidate, who can be deemed to be elected in his place” becomes relevant and necessary. For answering the said question, the State Election Commission has to apply its mind and look into all necessary facts pertaining to ward in question. It is further relevant to notice that the requirement of finding out answer to the above question is relevant when an election petition has already been filed by a person claiming that there is a candidate, who can be deemed to be elected in place of returned candidate. When there are no election petitions filed under Section 33 or where no prayer is made for declaring candidate obtaining second highest votes, the above question becomes irrelevant and has no bearing on filling up of the casual vacancy. The use of the expression in Section 9, i.e., “as soon as it conveniently may be” indicates that Statute gives discretion to the State Election Commission to hold byelections for a casual vacancy. Statute

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- A does not mandate holding of byelections, i.e., filling up of casual vacancy as soon as the casual vacancy arises. Discretion has been given to the Commission for a purpose and object.

27. One of the factors in taking a decision regarding filling up of the casual vacancy is as to whether there is no other candidate, who can be deemed to be elected in place of returned candidate. All these aspects have to be looked into and considered by State Election Commission before proceeding to hold elections. But we make it clear that the statutory Scheme does not indicate that by mere filing of an election petition questioning the election of returned candidate of ward and seeking a declaration in favour of the election petitioner shall ipso facto put an embargo in the right of State Election Commission to proceed to fill up the casual vacancy. The State Election Commission has been statutorily obliged to find out as to whether there is no other candidate, who can be deemed to be elected in place of returned candidate, only thereafter it is obliged to hold fresh elections. It postulates a decision making process by due application of mind considering all relevant and necessary factors, eschewing the irrelevant.
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28. Now, we come to the judgments of this Court, which have been relied by learned counsel for the appellant delivered in reference to the Representation of the People Act, 1951. Section 150 of the Representation of the People Act, 1951 deals with casual vacancies in the State Legislative Assemblies, which is as follows:-
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- “150. Casual vacancies in the State Legislative Assemblies.—(1)** When the seat of a member elected to the Legislative Assembly of a State becomes vacant or is declared vacant or his election to the Legislative Assembly is declared void, the Election Commission shall, subject to the provisions of sub-section (2), by a notification in the Official Gazette, call upon the Assembly constituency concerned to elect a person for the purpose of filling the vacancy so caused before such date as may be specified in the notification, and the provisions of this Act and of the rules and orders made thereunder shall apply, as far as may be, in relation to the election of a member to fill such vacancy.
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- (2)** If the vacancy so caused be a vacancy in a seat reserved in any such constituency for the Scheduled Castes or for any Scheduled Tribes, the notification issued under sub-section (1)
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shall specify that the person to fill that seat shall belong to the Scheduled Castes or to such Scheduled Tribes, as the case may be.” A

29. In **D. Sanjeevayya Vs. The Election Tribunal, Andhra Pradesh and Others (supra)** provisions of Section 150 in context of Sections 84 and 98(c) came to be considered. In the above case, appellant had resigned his seat in the Legislative Assembly and thereafter filed a writ petition in Andhra Pradesh High Court praying for a writ in the nature of mandamus commanding the Election Commission of India to act under Section 150 of the Act and call upon the constituency to elect a person for the purpose of filling up the vacancy caused by resignation. The Election Petition No.180 of 1962 was filed, which was pending in the Election Tribunal, Hyderabad. One of the prayers was also to stay further proceedings in the trial of the election petition. In paragraph No.5 of the judgment, following was observed:- B C

“5. It is therefore not permissible, in the present case, to interpret Section 150 of the Act in isolation without reference to Part III of the Act which prescribes the machinery for calling in question the election of a returned candidate. When an election petition has been referred to a Tribunal by the Election Commission and the former is seized of the matter, the petition has to be disposed of according to law. The Tribunal has to adjudge at the conclusion of the proceeding whether the returned candidate has or has not committed any corrupt practice at the election and secondly, it has to decide whether the second respondent should or should not be declared to have been duly elected. A returned candidate cannot get rid of an election petition filed against him by resigning his seat in the Legislature, whatever the reason for his resignation may be. In the present case, the election petition filed by Respondent 2 has prayed for a composite relief namely, that the election of the appellant should be declared to be void and that Respondent 2 should be declared to be duly elected. In a case of this description the Election Commission is not bound immediately to call upon the Assembly constituency to elect a person for the purpose of filling the vacancy caused by the resignation of the appellant. It is open to the Election Commission to await the result of the election petition and thereafter decide whether a bye-election should be held or not. If the election petition is ultimately dismissed D E F G H

- A or if the election is set aside but no further relief is given, a bye-election would follow. If, however, Respondent 2 who filed the election petition or any other candidate is declared elected the provisions of Section 150 of the Act cannot operate at all because there is no vacancy to be filled. In the present case, therefore, we hold that the Election Commission is not bound under Section 150 of the Act to hold a bye-election forthwith but may suspend taking action under that section till the result of the election petition filed by Respondent 2 is known.”
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30. This Court held in the above case that it is open to the Election Commission to await the result of the election petition and thereafter decide whether a bye-election should be held or not. This Court held that Election Commission is not bound under Section 150 to hold a bye-election.
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31. Another judgment, which has been relied by the appellant is judgment of this Court in **Election Commission of India Vs. Telnagana Rastra Samiti and Another (supra)**. In the above case, writ petition was filed by the respondent challenging the decision of the Commission not to hold bye-election to two constituencies in the State of Andhra Pradesh. Twelve members of the Assembly had resigned. Commission issued a press note notifying the holding of bye-elections for ten vacancies but two vacancies were not notified since election petitions were pending in which election petitioners had sought to be declared as elected. Writ petition seeking a direction to hold election was filed. The High Court in the writ petition issued direction to the Commission to hold election. The Election Commission of India being aggrieved by that judgment had come up in this Court. Reliance was placed on Section 151A, which was inserted in the Act by amendment. The judgment of **D. Sanjeevayya** case was referred to and relied. This Court laid down following in paragraph No.46:-
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- “46. We are, therefore, of the firm view that the introduction of Section 151-A in the Constitution did not alter the position as far as the provisions of Section 84 and consequently Sections 98(c) and 101(b) of the 1951 Act are concerned, since although a casual vacancy may have occurred within the meaning of Section 150 of the 1951 Act, those vacancies in which election petitions had been filed and were pending cannot be held to have become available for the purposes of being filled up within the time prescribed under Section 151-A of the 1951 Act. Article 190(3)(b) of the Constitution
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merely indicates that if a Member of a House of a Legislature of a State resigns his seat by writing to the Speaker and such resignation is accepted, his seat shall become vacant. It does not introduce any element of compulsion on the Election Commission to hold a bye-election ignoring the provisions of Section 84 of the Act. In such cases, we have little hesitation in holding that such casual vacancies are not available for being filled up and the Commission will have to wait for holding elections in such constituencies until a decision is rendered in regard to the latter part of Section 84 of the 1951 Act during the life of the House. The view expressed by the High Court that a case has to be decided in accordance with the laws as existing on the date of adjudication, while salutary in principle, are not attracted to the facts of this case in view of the provisions of Section 84 of the 1951 Act.

The above judgments of this Court do recognise a discretion in Election Commission to hold a bye-election.

32. It is relevant to notice that Scheme in the Representation of the People Act, 1951 is little different with regard to filling up of casual vacancies. Under Section 101 enumerate grounds for which a candidate other than the returned candidate may be declared to have been elected, which are as follows:-

“101. Grounds for which a candidate other than the returned candidate may be declared to have been elected.—If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the High Court is of opinion—

(a) that in fact the petitioner or such other candidate received a majority of the valid votes; or

(b) that but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a majority of the valid votes,

the High Court shall, after declaring the election of the returned candidate to be void declare the petitioner or such other candidate, as the case may be, to have been duly elected.”

A 33. As per Section 101, there are some limited grounds on which
a candidate other than the returned candidate may be declared to have
been elected. The judgments of this Court in **D. Sanjeevayya (supra)**
and **Election Commission of India (supra)** have to be read dealing
with Scheme under the Representation of the People Act, 1951.
B Judgments of this Court in the above two cases being dealing with
Representation of People Act and the statutory Scheme for electing
councillor in the Municipal Corporation being different, we have to rest
our judgment on the statutory Scheme of Act, 1888.

34. Another judgment relied by the appellant is **Pramod Laxman
Gudadhe Vs. Election Commission of India and Others (supra)**,
C which is again on Representation of People Act, 1951 and observations
made by this Court have to be confined to the statutory Scheme of the
Representation of People Act. This Court noticed in paragraph No.16
of the above judgment earlier judgment of this Court in **Election
Commission of India** case, in which following has been laid down:-

D “16. The Court in *Election Commission of India case, (2011)*
I SCC 370 went on to say that the introduction of Section 151-A
did not alter the position as far as the provisions of Section 84 and,
consequently, Sections 98(c) and 101(b) of the Act are concerned,
although a casual vacancy may have occurred within the meaning
E of Section 150 of the Act. The Court made a distinction between
the two categories of vacancies, namely, vacancies in which
election petitions had been filed and are pending and other
vacancies where no such cases were filed and pending. The Court
opined that in the first category of cases, the vacancies could not
have been treated to be available for the purposes of filling up
F within the time prescribed under Section 151-A of the Act merely
because a member of the House of a Legislature of a State had
resigned and the same had been accepted by the Speaker. To
arrive at the said conclusion, emphasis was laid on Section 84 of
the Act. In the second category of cases, the Court pronounced
G that the vacancies would have to be construed as clear vacancies
warranting action under Section 151-A of the Act.”

35. We have already observed that applicability of Section 34
with respect to filling up of casual vacancy under Section 9 shall arise
only when an election petition is already pending and has been filed by a
H candidate claiming declaration in favour of a person, who has secured

the second highest votes. When there is no election petition pending seeking such declaration, casual vacancy under Section 9 has to be filled up without any impediment. We further make it clear that when Section 9 second part provides that casual vacancy has to be filled up in the manner as provided under Section 34, the conditions enumerated in Section 34 has to be strictly construed. Thus, when election of any councillor is set aside or it fails, only then Section 34 has to be looked into. Section 34 may not be attracted in all categories of casual vacancies as referred to in Section 9 but present case being a case where returned candidates having been declared disqualified due to invalidation of caste certificate, i.e., the election stand in law annulled and seat declared vacant, the applicability of Section 34 cannot be denied.

36. From the foregoing discussions, with regard to statutory Scheme under Act, 1888 regarding filling up of casual vacancy, we arrive at following conclusions:-

- (i) By mere pendency of election petition filling up of casual vacancy is not to be deferred or postponed. State Election Commission before proceeding to fill up a casual vacancy under Section 9 has to advert to the statutory prescription under Section 34 and take a conscious decision by due application of mind and thereafter to proceed to fill up vacancy arose. In each case of casual vacancy, there may be different circumstances without advert to which State Election Commission cannot decide to fill up the casual vacancy.
- (ii) A casual vacancy caused due to invalidation of caste certificate of returned candidate has to be filled up in a manner provided in Section 34 of Act, 1888.
- (iii) When an election petition has already been filed challenging the election of returned candidate since before invalidation of his or her caste certificate in which election petition prayer is also made to declare the candidate securing second highest votes as deemed elected, the State Election Commission may not call for fresh election without considering the above aspect of the matter.

37. In the present cases, filing of affidavit having been dispensed with by the High Court in the writ petition, there is no affidavit of State Election Commission on record to indicate as to whether State Election

- A Commission has adverted to Section 34 before starting process of holding byelections to fill up the casual vacancy or not. We are of the view that the Commission may be asked to take a fresh decision regarding holding of byelections to fill up casual vacancy in these cases.

38. Although Commission has issued notification dated 09.05.2019 on subject regarding preparation of voters list for byelection for filling up vacancies of Municipal Corporation but no notification having yet been issued fixing date for byelection of wards in question, we are of the view that State Election Commission may take a fresh decision before issuing any notification fixing dates for holding a byelection of wards in question keeping in view the observations and conclusions as above.

- C 39. In the result, the appeals are allowed, impugned judgment of the High Court is set aside, the State Election Commission may take a fresh decision regarding holding of by-election of the wards in question keeping in view the observations and conclusions as made above.

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Ankit Gyan

Appeals allowed.