

Rajasthan High Court

Pata Ram Bheel vs State Of Rajasthan And Ors. on 20 October, 2004

Equivalent citations: RLW 2005 (1) Raj 415, 2005 (1) WLC 322

Author: N Mathur

Bench: N Mathur, R Vyas

JUDGMENT N.N. Mathur, J.

1. This group of writ petitions has been filed before issuance of the notification for municipal elections seeking direction to- postpone the process of election pointing- out serious defects in delimitation of wards, arbitrary reservation of wards for SC/ST, OBC & Women,

2. The main thrust of the challenge is that the delimitation of wards and reservation of seats provided under Section 9, 11, 13, and 14 of the Rajasthan Municipalities Act, 1959, hereinafter referred to as "the Act of 1959, read with Article 243P(g) of the Constitution of India have not been done as per the latest census of 2001 but the last census report of 1991. It is not in dispute that the ensuing Municipal Elections are proposed to be held on the basis of delimitation of wards and reservation of seats as per the last census report of 1991 and not the latest census report of 2001. However, it is submitted inter alia that five years' term of forty five local bodies (Corporation/Council/Board) is going to expire on 28.11.2004. As per the Constitutional mandate under Article 243U, whereby the elections for the Municipal Corporations/Councils/Boards are required to be conducted before expiry of the term but on account of respondent order passed by the Delimitation Commission, no determination could be made. It is further submitted that no prejudice is caused, as the final Electoral Roll which is yet to be published, has been prepared on the basis of the latest survey report. A plea has been raised on behalf of the respondent- Election Commission in terms of Article 243ZG of the Constitution that there is complete & absolute bar of interference by courts in electoral matters relating to local authorities. Thus, the following issues arise for consideration.

(i) Whether it is obligatory on the respondents to conduct the ensuing Municipal Elections only on the basis of delimitation of wards & reservation of seats as provided under Sections 9, 11, 13 & 14 of the Act of 1959 read with Article 243P(g) of the Constitution as per the latest Census of 2001 instead of last Census of 1991?

(ii) Whether Delimitation Act, 2002 has no application to the Municipal Elections, as it has been specially enacted for readjustment of allocation of seats to the House of the People in the State?

(iii) Whether it is mandatory for the State Government to hold the Municipal Elections before expiry of the term of five years?

(iv) Whether in terms of Article 243ZG of the Constitution, there is a complete & absolute bar in considering any matter relating to Municipal Election on any ground even before the publication of the Notification for holding Municipal Elections by the Court?

3. We have heard Mr. P.S. Bhati, Mr. Rajesh Joshi & Mr. S.D. Vyas learned counsel for the petitioners, Mr. N.M. Lodha learned Additional Advocate General & r. Manish Bhandari learned counsel for the State Election Commission and considered the rival contentions.

4. Part IX & IXA of the Constitution were introduced by (Seventy - third Amend- ment) Act, 1992 and (Seventy-fourth Amendment) Act, 1992. By these two parts, the highest importance was attached to the holding of Panchayat as well as Municipal Elections with the intention to take democracy to the grass root level. Article 40 of the Constitution which enshrines one of the Directive Principles of the State Policy, lays down that the State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. While the said directive principle applies to village Panchayats, it was felt that urban local bodies should also be organised and endowed with such powers and authority as are necessary to enable them to function as units of self-government. Though Local Authorities viz; Panchayati Raj Institutions and Urban local bodies have been in existence in the Country for a long time, it was observed that these institutions have not been able to acquire the status and dignity of viable and responsive people's bodies due to a variety of reasons including absence of regular elections, prolonged supersessions, inadequate representation of weaker sections like the Schedule Castes and the Scheduled Tribes and women, insufficient devolution of powers and lack of financial resources. Accordingly, a provision has been made in the Constitution for direct elections in the Urban local bodies; constitution of Committee as the ward level or other levels in Municipal Corporations; representations of Chairpersons of such Committees in Municipal Corporations; reservation of seats for the Scheduled Castes and the Scheduled Tribes in proportion to their population; reservation of seats for women; fixing tenure of five years for Local Authorities and holding elections within a period of six months in the even of supersessions of any such Authority. The amendment empowers the State Legislature to make provisions with respect to elections to Local Authorities including barring interference by courts in electoral matters relating to Local Authorities.

5. Part IXA of the Constitution of India deals with the municipalities. Article 243P provides definition of 'municipality' and 'population' as follows:

"243 P. Definitions.- In this Part, unless the context otherwise requires,-

(a) 'Committee' means a Committee constituted under Article 243S;

(b) 'district' means a district in a State;

(c) 'Metropolitan area' means an area having a population of ten lakhs or more, comprised in one of Municipalities or Panchayats or other contiguous areas, specified by the Governor by public Notification to be Metropolitan area for the purposes of this Part;

(d) 'Municipal area' means the territorial area of a Municipality as is notified by the Governor;

(e) 'Municipality' means an institution of self government constituted under Article 243Q;

(f) 'Panchayat' means a Panchayat constituted under Article 243B;

(g) 'population' means the population as ascertained at the last preceding census of which the relevant figures have been published."

6. Article 243Q provides for constitution of Municipalities as follows:

"243Q. Constitution of Municipalities.-(1) There shall be constituted in every State, -

(a) a Nagar Panchayat (by whatever name called) for a transitional area, that is to say, an area in transition from a rural area to an urban area.

(b) a Municipal Council for a smaller urban area; and

(c) a Municipal Corporation for a larger urban area, In accordance with the provisions of this Part:

Provided that a Municipality under this clause may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township.

(2) In this article, a transitional area' a 'smaller urban area' or 'larger urban area' means such area as the Governor may, having regard to population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance of such other factors as he may deem fit, specify by public. Notification for the purpose of this Part."

7. The composition of municipalities has been dealt with in Article 243R which provides that all seats in a municipality shall be filled by persons chosen by direct election from the territorial constituencies in the Municipal area and for this purpose each Municipal area shall be divided into territorial constituencies to be known as wards.

8. Article 243T deals with reservation of seats and provides as under:

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

(2) Not less than one-third of the total number of seats reserved under clause(1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved form women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality.

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

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

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

9. Article 243U provides duration of municipalities as under:

"243U. Duration of Municipalities, etc. - (1) Every Municipality, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer: Provided that a Municipality shall be given a reasonable opportunity of being heard before its dissolution.

(2) No amendment, of any law for the time being in force shall have the effect of causing dissolution of a Municipality at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in clause (1).

(3) An election to constitute a Municipality shall be completed,-

(a) before the expiry of its duration specified in clause (1);

(b) before the expiration of a period of six months from the date of its dissolution:

Provided that where the remainder of the period for which the dissolved Municipality would have continued is less than six months, its shall not be necessary to hold any election under this clause for constituting the Municipality for such period.

(4) A Municipality constituted upon the dissolution of a Municipality before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Municipality would leave continued under clause (1) has it not been so dissolved."

10. Article 243ZA provides that-

"243ZA. Elections to the Municipalities.- (1) The superintendence, direction and control of the preparation of electoral roll for, and the conduct of, all elections to the Municipalities shall be vested in the State Election Commission referred to in Article 243K.

(2) Subject to provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with, elections to the Municipalities."

11. The Legislature of the State has been empowered to make laws providing for all matters relating to or in connection with the election to the Municipalities. Under Article 243K, the superintendence, direction and control of the preparation of electoral roll for, and the conduct of, all elections to the Panchayats are vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor.

12. Article 243ZF imposes a time limit of one year within which the provisions of the State laws relating to the municipalities which were inconsistent with the provisions of Part 1X-A have to be amended and brought in line with the amended provisions. Thus, the Rajasthan Municipalities (Election) Rules, 1994 was enacted to bring the Rajasthan Municipalities Act, 1959 in line with the newly added provisions of the Constitution of India. Section 9, particularly 1A, 13 & 14, which have material bearing on the controversy involved in the instant case, are referred hereinafter:

"9. Composition of Boards:-

(1) Subject to the provisions contained in the succeeding sub-sections, but save as provided in the following provisions of this sub-section, all seats in a municipality shall be filled by persons chosen by direct election from the territorial constituencies known as wards, the number of such seats, not being less than thirteen, being fixed by the State Government from time by time by notification in the Official Gazette:

"{(a) the following shall be represented on the board, council or corporation, as the case may be, viz:-

(i) a member of the Rajasthan Legislative Assembly representing a constituency which comprises wholly or partly the area of a municipality; and

(ii) three persons or ten percent of the number of elected members of the municipality, whichever is less, having special knowledge or experience in municipal administration, to be nominated by the state government by notification in the Official Gazette:

Provided that

(i) the provisions contained in Section 26 and Section 59 of this Act shall be applicable to the persons to be nominated or nominated under sub-clause (ii);

(ii) the State Government shall have power to withdraw a member nominated under sub-clause (ii) at any time;

(iii) the term of co-opted members, if any, who were co-opted and are continuing as such on the date of commencement of the Rajasthan Municipalities (Second Amendment) Act, 2000 (Act No. 22 of 2000) shall come to an end upon such commencement:

Provided further that a member referred to in sub-clause (ii) shall not have the right to vote in the meeting of a board, council or corporation, as the case may be;"}

(b) a member of the House of the People representing a constituency which comprise wholly or partly the area of a municipality with a municipal council or, as the case may be, a municipal corporation shall be represented on the council or corporation of such municipality.

{Provided that a member referred to in Sub-clause (i) of clause (a) shall have a right to vote in the meeting of board, council or corporation and a member referred to in Clause (b) shall have a right to vote in the meetings of a council or corporation.' } (1A) Upon the completion of each census after the establishment of the board, the number of seats shall be re- determined by the State Government by notification in the Official Gazette on the basis of the population of the municipal area within the territorial jurisdiction of the Board as ascertained at the latest census:

Provided the the determination of seats as aforesaid shall not affect the then composition of the board until the expiry of the duration of the board.} (2) In so fixing the total number of seats for a board, the State Government shall specify the number respectively of general seats and of seats reserved {for women and) for members of the scheduled castes or for members of the scheduled tribes or for both {or persons belonging to Backward classes} as the State Government may in each case determine.

(3) The number of seats {reserved for Scheduled Castes or Scheduled Tribes) shall, in relation to the total number of seats fixed for a board bear the same proportion as the population of the Scheduled Castes or Scheduled Tribes in the Municipality bears to the total population thereof, (xxxx) {(3A) The percentage of seats reserved for Backward Classes shall be such as the percentage of the combined population of Scheduled Castes and Scheduled Tribes in relation to the total population of the municipality falls short of fifty:

Provided that the percentage of seats so reserved for Backward Classes shall not exceed (twenty one) Provided further that at least one seat shall be reserved for Backward Classes in every municipality where the percentage of the combined population of Scheduled Castes and Scheduled Tribes in relation to the total population in the municipality does not exceed seventy."} {(3B) One-third of the seats reserved for the Scheduled Castes or the Scheduled Tribes or the Backward Classes shall be reserved for the women belonging to such Castes, Tribes or, as the case may be, classes.

{(3C) One-third (including the number of seats reserved under subsection (3B) of the total number of seats shall be reserved for women.

{(3D) The reservation of seats for Scheduled Castes and Scheduled Tribes and Backward Classes under sub-section (2) and (3A) and (3B) shall cease to have effect on the expiration of the period specified in Article 334 of the Constitution of India."

(4) AH the seats for a board, general as well as reserved shall be filled up (by direct election from the wards in municipal area and such election shall be held) in the manner provided for by and in (the prescribed manner) {Explanation If a fraction forms part of the number of seats computed under this section, the number of seats shall be increased to the next higher number in case the fraction consists of half or more of a seat and the fraction shall be ignored in case it consist of less than half of a seat."}

13. It is manifest from reading of Section 9 that all the seats in a municipality shall be filled by persons chosen by direct election from the territorial constituencies known as wards. Section 9(1A) provides that-

"(1A) Upon the completion of each census after the establishment of the board, the number of seats shall be re- determined by the State Government by notification in the official Gazette on the basis of the population of the municipal area within the territorial jurisdiction of the board as ascertained at the latest census:

Provided that the determination of seats as aforesaid shall not affect the then composition of the board until the expiry of the duration of the board."

14. Our attention was invited to definition of 'population' as given under Article 243P(g), according to which the 'population' means the population as ascertained at the last preceding census of which the relevant figures have been published. The Constitutional mandate as provided under Article 243S is that there shall be constituted Wards Committees, consisting of one or more Wards, within the territorial area of a Municipality having a population of three lakhs or more. Therefore, the last published census figure must be the basis for delimitation of wards.

15. Section 13 of the Act of 1959 provides that the State Government shall, by order, divide a Municipality into wards in such manner that the population in each wards shall, as far as possible, be the same throughout the municipal area. Sub-section (3) of Section 13 provides that notwithstanding anything contained in the Act, the division of wards for the purpose of holding elections of the Municipal Board or Municipal Council shall be made, by the State Government on the basis of latest Assembly Electoral Rolls.

16. Section 14 provides contents & procedure of delimitation. When the seats are fixed under Section 9(2) and wards are divided and allotted under Section 13, the order of delimitation is to be issued containing details of the ward mentioned in sub-section (1) of Section 14. The wards reserved for the Scheduled Caste or Scheduled Tribe are distributed to different parts of the municipal area, where to proportion of the population of such Caste or Tribe is comparatively large.

17. Reverting back to Section 9(1 A) which provides that upon the completion of each census after the establishment of the board, the number of seats shall be re-determined by the State Government by Notification in the official Gazette on the basis of the population of the municipal area with the-territorial jurisdiction of the board as ascertained at the latest census. Sub-section (13A) of Section 3 defines "latest census figures" which means the figures as ascertained at the last preceding census of which the relevant figures have been published. Sub-section 22 of Section 3 defines 'population' according to which the "population" used with reference to any local area, means the population of such local area as ascertained at the last preceding census of which the relevant figures have been published. Thus, it is manifest that the last census figure has material being on the composition and process of Municipal Elections. The Constitutional mandate is to hold the Municipal Elections on regular intervals on the basis of the latest census.

18. At this juncture, it will be relevant to refer to Rule 5 of the Rajasthan Municipalities (Election) Rules, 1994, which provides for reservation of seats for SC/ST on the basis of the population, Rule 5 reads as follows:-

"5. Reservation of reserved wards - (1) The number of wards to be reserved for Scheduled/Castes/Scheduled Tribes/Backward Classes and also for women shall be determined by the officer, in accordance with the provisions of act.

(2) The Officer shall for the purpose of reservation of seats for Scheduled Castes, first identify the wards which consist of the population of the Scheduled Castes and such wards shall be serially arranged in the descending order of percentage of population of Scheduled Castes, and shall be assigned serial number as S.C. 1 S.C. 2 and so on.

(3) The serial number so assigned be known as special serial number for Scheduled Castes.

(4) The Officer shall allocate the number of seats reserved for scheduled castes (including) one-third of such seats reserved for women, belonging to the Scheduled Castes; Serially to wards bearing special serial number for Scheduled Castes.

(5) The Officer shall also for the purpose of reservation of seats for Scheduled Tribes, proceed to identify the wards which consist of population of Scheduled Tribes and such wards shall be serially arranged in the descending order of percentage of population of Scheduled Tribes and shall be assigned serial number as S.T. 1, S.T. 2 and so on.

(6) The serial number so assigned shall be known as special serial number for Scheduled Tribes.

(7) The Officer shall also allocate the seats reserved for Scheduled Tribes (including one-third of such seats reserved for women belonging to Scheduled Tribes) serially to the Wards bearing special serial number for Scheduled Tribes.

(8) Where a ward becomes common to be reserved for Scheduled Castes & Scheduled Castes or Scheduled Tribes, as the case may be, whichever has higher percentage of Scheduled Castes or



Scheduled Tribes.

(9) In every succeeding general election, the list of wards bearing special serial number for Scheduled Castes, or as the case may be, Scheduled Tribes shall-

(i) Continue to be operated serially from special serial number following the special serial number, where the allocation of seats reserved for the Scheduled Castes or, as the case may be, the Scheduled Tribes had ended in the preceding election.

(ii) Be operated till it is exhausted, and

(iii) Be re-operated from the beginning after it is exhausted.

(10) The Officer after having determined and allocated seats reserved for Scheduled Castes and Scheduled Tribes, shall allocate the number of seats reserved for backward Classes (including one third seats reserved for women belonging to Backward Classes), to remaining ward by draw of lots.

(11) The ward to be reserved for women shall be one third to total number of wards in a municipality to be determined by draw of lots by the officer.

(12) Wherever Seats are to be reserved by draw of lots the officer shall fix the place, date and time for the purpose of drawing lots and inform the members of the legislative Assembly representing a constituency which comprises wholly or partly the area of the municipality and the recognized political parties in the State of Rajasthan. The lots shall be drawn in the manner as determined by the officer in the presence of such members of the legislative Assembly or the nominees of the recognized political parties who may be present at the appointed time.

Explanation-For the purpose of this rule and the succeeding rules, recognized political parties means the political parties recognized in State as such under the Election Symbols (Reservation and Allotment) Order, 1968.

(13) Ward reserved for Backward classes and women by drawn of lots in the first general election shall be excluded while drawing lots for such reservation in succeeding elections till the cycle is completed.

[(14) The provisions of sub-rule (1) to (13) shall be subject to the provisions of Rule 3]."

19. Infact, the respondent-State in its reply has admitted in terms that as per Sections 9, II and 13 of the Act of 1959, determination of wards/seats is required to be made as per the latest census. However, it is pleaded that it could not be done in view of the restraint order passed by the Delimitation Commissions constituted under the provisions of delimitation Act of 2002. It is submitted that in the State of Rajasthan, there was a census in the year 2001. In response to the letter of the Director, Local Self Department, the Directorate of Census Operation vide communication dated 7.11.2002 informed that the census will take time and the said work was

expected to be completed by December, 2003. The Delimitation Commission vide order dated 9.1.2002 issued a direction not to make any change in the administrative units, meaning thereby a ban on change of boundaries of municipal wards. It is further averred that a relaxation was made in the said restraint order for a period of three weeks i.e. from 23.1.2004 to 15.2.2004 but the State Government was not having the authenticated figures of the latest/final census of 2001 from the Directorate of Census Operation and, as such, the delimitation of wards was not possible on the basis of the last Census i.e. of 2001. It is further pointed out that vide Circular dated 3.2.2004, the Directorate of Census Operations informed that information about the Census 2001 was available on C.D. on payment basis. The Chief Electoral officer on the request of the State Government made a request to the Delimitation Commission for further relaxation of time but the same was declined under Communication dated 23/25th March, 2004. Thus, according to the respondents, despite all efforts, it was not possible to undertake the division of wards and allotment of seats on the basis of the last Census Report i.e. of 2001 in view of the restraint order passed by the Delimitation Commission. In these circumstances, the respondents, with a view to comply with the Constitutional mandate to conduct elections to constitute a Municipality before the expiry of duration as specified in Clause (1) of Article 243U were left to no option but to proceed with free election process on the basis of the last available Census Report of 1991.

20. It is submitted by the learned counsel for the petitioners that the explanation given by the respondents is not sustainable, as the Delimitation Act, 2002 has no application to the Municipal Elections. Learned counsel has invited our attention to the preamble of the Delimitation Act, 2002, in short "the Act of 2002", which reads as follows:

"An Act to provide for the readjustment of the allocation of seats in the House of the People to the States, the total number of seats in the Legislative Assembly of each State, the division of each State and each Union territory having a Legislative Assembly into territorial constituencies for elections to the House of the People and Legislative Assemblies of the States and Union territories and for matters connected therewith."

21. It is evident that the Act of 2002 has been enacted to provide for the readjustment of the allocation of seats in the House of the People to the States having a Legislative Assembly, which has no application to the Municipal Elections. It is, however, submitted by Mr. N.M. Lodha, learned AAG, that under the Act of 2002, the Delimitation Commission has wide power including the power of a Civil Court. The non-compliance of the directions given by the Delimitation Commission is penal in character. Thus, the State Government could not comply-with the directions of the Delimitation Commission. We are unable to agree with the submission of the learned counsel. Having perused the Delimitation Act of 2002, we are of the view that it has no application to the Rules of Municipal Election. The respondent- State and the State Election Commission have fallen in error in not complying-with the different statutory provisions in the matter of determination of wards/seats as per the latest Census Report 2001 on the pretext of not changing the, administrative Units Under the directions of the Delimitation Commission. As we have held that the Delimitation Act, 2002 has no application to the Municipal Elections, the explanation given by the respondents for not taking into account the Census of 2001 deserves to be rejected. However, it appears that the State Government as well as the State Election Commission were misled by the directives issued by

the Delimitation Commission.

22. Article 243U casts an obligation on the State Election Commission to conduct elections to constitute a Municipality before the expiry of duration i.e. five years. The words used "no longer" are of great significance, as it indicates an emphasis that in no case, the life of a municipality should be allowed to continue beyond the maximum period of five years. It emerges from a combined reading of Clauses (1) & (3) of Article 243U that duration of a Municipality is five years and no longer and further the election to constitute a Municipality has to be completed before the expiry of period of five years. Thus, there can be no escape from the conclusion that in view of the Constitutional mandate, the State Government and the State Election Commission are under obligation to hold the election to constitute a Municipality before expiry of period of five years.

23. Having held that the respondents have committed error in determining the wards and reserving seats on the basis of Census Report of 1991 being contrary to the statutory provisions, which provides the latest Census Report as the basis; further question which arises for consideration is as to whether in terms of Article 243ZG, this Court in exercise of power under Article 226 of the Constitution is prohibited from exercising the jurisdiction to issue a writ to postpone the elections and hold that same only after rectifying the error committed. We have also emphasized that there is a Constitutional mandate to hold the Municipal Elections before the expiry of its tenure of five years.

24. Holding of Election in time and holding them in accordance with the law, are both matters of paramount importance. Dealing with the identical situation, the Apex Court in Election Commission of India v. Ashok Kumar (1), has advised to adopt a very conscientious approach by observing that neither turning a blind eye to the controversies which have arisen nor assuming a role of over-enthusiastic activist would do. The two extremes have to be avoided in dealing with election disputes. It would be profitable to extract para 28 from the judgment referred-to above which reads thus:-

"28. Election disputes are not just private civil disputes between two parties. Though there is an individual or a few individuals arrayed as parties before the Court but the stakes of the constituency as a whole are on trial. Whichever way the lis terminates it affects the fate of the constituency and the citizens generally. A conscientious approach with overriding consideration for welfare of the constituency and strengthening the democracy is called for. Neither turning a blind eye to the controversies which have arisen nor assuming a role of overenthusiastic activist would do. The two extremes have to be avoided in dealing with election disputes."

25. It is contended by Mr. N.M. Lodha, learned Additional Advocate General and Mr. Manish Bhandari learned counsel for the State Election Commission that in terms of Article 243ZG of the Constitution, there is a complete & absolute bar for the Court in considering any matter relating to Municipal Elections on any ground even before publication of the notification holding Municipal Elections, more particularly keeping in view the Constitutional mandate to hold the Municipal Elections on regular intervals before expiry of its tenure.

26. On the other hand, it is submitted by Mr. S.D. Vyas, learned counsel for the petitioners, that the respondents cannot be permitted to hold Elections in farcical manner making mockery of democracy. Learned counsel submits that keeping in view the manner in which the respondents have thrown to the wind the constitutional guarantee regarding the constitution & composition of the municipalities, has shaken the confidence of the people in the Electoral process. Keeping in view this aspect, Article 243ZG be not treated as an absolute bar. It is vehemently argued that this Court is not entirely without jurisdiction to interfere, when it finds that the provisions of the Constitution are being flouted in holding Elections. It is further submitted that in such a situation, this Court has not only the jurisdiction but also a duty to intervene and set right the Election process.

27. There is much force in the contention of Mr. S.D. Vyas, learned counsel appearing for the petitioners. Learned counsel has referred-to a decision of the Apex Court in Special Reference No. I/1964 reported in AIR 1965 SC 745 (2), wherein it is held that unlike a court of limited jurisdiction, the superior Court is entitled to determine for itself the question about its own jurisdiction. In this context, learned counsel has also referred- to the observations of the Division Bench jurisdiction of the Kerala High Court in V. Kunhabdulla v. State of Kerala (3), which reads thus:

"We feel that in a situation like the present one, absence of judicial review will create a constitutional despot beyond the pale of accountability; a 'Frankenstein's monster' who may manipulate the system into elected despotism. There cannot be any dispute that the power conferred upon the Election Commission under the Constitution and the Act is very wide and do not contain any limitation. But the said power being a constitutional and public law power is amenable to judicial review on certain limited grounds and the narrow area in which the exercise of power by the Election Commission could be subjected to judicial review included the grounds where the decision is perverse of malafide or based on wholly extraneous and irrelevant grounds and is therefore no decision at all."

28. The contention of Mr. S.D. Vyas, learned counsel for the petitioner, cannot be said to be without substance. The Municipality is a democratic elected body and the result of any election under a majority system depends infact not only on the way people vote but the way, votes are distributed among the constituencies/wards. It cannot be lost sight that functions of the Elections Commission in the matter of delimitation are adjudicative and, as such, the principles of natural justice are attracted. If a power has been exercised on a non-consideration or non-application of mind to the relevant factors, the exercise of power will be regarded as manifestly erroneous.

29. In M.V. Elisabeth v. Harwan Investment & Trading Pvt. Ltd. (4), the Apex Court held that the High Courts in India are superior Courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred and subject to the appellate or discretionary jurisdiction of the Supreme Court, the High Court have unlimited jurisdiction including the jurisdiction to determine their own powers. Thus, whether in a case, this Court should exercise its extra ordinary jurisdiction or not, will depend upon the facts and situations of each case. But while doing so, the Court has to keep in view the provisions like Article 329(b) or the Article 243ZG of the Constitution of India. Here, we are concerned with Article 243ZG of the Constitution, which reads as under:-

"243ZG. Bar to interference by courts in electoral matters.- Notwithstanding anything in this Constitution,-

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 243ZF shall not be called in question in any court;

(b) no election to nay Municipality shall be called in question except by an election petition presented to such authority and in such manner as in provided for by or under any law made by the Legislature of a State."

30. Thus, the provisions provides the bar twofold; (i) validity of law relating to determination of constituencies of the allotment of seats to such constituencies, made or purporting to be made under Article 243ZF shall not be called in question in any court and GO no panchayat election shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State.

31. The Apex Court while dealing with the bar provided by Section 329(b) of the Constitution, which is in pari materia with Article 243ZG, in N.P. Ponnuswami v. Returning Officer (5), held that the Courts would not interfere with the process of election i.e. for the date Notification is issued till the election petition is disposed of.

32. In Boddula Krishnaiah v. State Election Commissioner (6), the Apex Court reiterated that when the election process has been set in motion, the High Court would not be justified in interfering with the same giving direction to the Election Officer to stop the proceedings or conduct the election process afresh, in particular when election has already been held.

33. The question as to whether there is any conflict between the jurisdiction conferred on the High Court by Article 226 of the Constitution and the embargoes created by Article 329 of the Constitution and if so, how would they co-exist, came up for consideration before the Apex Court in Election Commission of India v. Ashok Kumar (supra). The Apex Court after having dealt with various decisions with reference to the bar contained under Article 329 of the Constitution in para 32 clarified the position of law as follows:-

"32. For convenience sake, we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows there from in view of the analysis made by us hereinabove:

1) If an election, (the term 'election' being widely interpreted so as to include all steps and entire proceedings commencing from the date of Notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.

2) Any decision sought and rendered will not amount to "calling in question as election" if it serves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

3) Subject to the above, the action taken or order issued by Election Commission are open to judicial review on the well- settled parameters which enable judicial review of the decision of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the Court has been sought for meely to correct of smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the Court.

5) The Court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings, The Court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the Country's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needles to say that in the very nature of the things the Court would act with reluctance and shall not act except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material."

34. Thus, we are of the opinion that the bar created under Article 243ZG of the Constitution will not be attracted in a case where the action of the Election commission is found to have affected the very purity or probity of election cutting at very root of the democratic process in gross violation of public law rights. In other wards, in such a situation, a petition under Article 226 of the Constitution would be maintainable before the Election process has commenced but it will have to be taken care that such a judicial intervention would be available only in a case where it does not disturb the mandate of the Constitution to hold the election before the completion of the tenure. Thus, it is imperative on the State Government as well as the State Election Commission to complete the process of delimitation of constituencies and reservation of seats atleast about an year before or in any case, six months before, so that the parties prejudicially affected may have an opportunity to seek redress. If the Election Commission fails in discharge of their obligation in this regard, it is always open for a citizen to seek mandamus from this Court against the State Election Commission as well as the State to perform their statutory obligation.

35. In the identical situation, the Apex Court in Anugrah Narain Singh v. State of U.P. (7), disapproved the direction of the High Court, which had an effect on postponement of elections. In Laxmi Charan Sen v. A.K.M. Hasan Uzzaman (8), the Apex Court held that the Court should not intervene when the election were imminent.

36. Keeping in view the urgency in the matter as urged by Mr. Lodha, learned Addl. Advocate General and Mr. Manish Bhandari learned counsel for the State Election Commission, the group of petitions were heard on top priority and the arguments were closed on 7th October, 2004. It was urged by the learned counsel for the State Election Commission that 15.10.2004 has been fixed as the date for publishing the Electoral roll and, as such, the controversy be resolved before the said date. During the course of arguments, there was not even a whisper that the State Government is contemplating to bring an ordinance. To nullify the controversy involved in the instant group of petitions i.e. holding of Municipal Elections on the basis of latest Census of 2001, instead of last Census of 1991, we had prepared the judgment to pronounce the same before 15.10.2004. Learned counsel for the petitioners informed this Court that the State Government has promulgated an ordinance in the name of the Rajasthan Municipalities (Amendment) Ordinance, 2004, hereinafter referred to as "the Ordinance of 2004" having the effect to hold the Elections on the basis of last Census of 1991, instead of latest Census of 2001. We are at pains to observe that the State Government did not show even the minimum courtesy to inform the Court about the promulgation of the Ordinance of 2004. Be that as it may, since the matter was heard by the Division Bench (consisting of Hon'ble Mr. N.N. Mathur & Hon'ble Mr. R.P. Vyas JJ.), which was not available on 13th October, 2004, as Hon'ble Mr. R.P. Vyas J. was sitting at Jaipur Bench of this Court, the case was posted on 18th October, 2004. On 18.10.2004, we allowed the petitioner to amend their petitions challenging the Ordinance of 2004.

37. We have heard learned counsel for the petitioners and learned Additional Advocate General, on the question of constitutional validity of the said Ordinance.

38. It is contended by the learned counsel that the impugned ordinance, on face, is malafide inasmuch as it has been promulgated in haste with an intention to short circuit the legal process as prescribed in the Constitution and to make the petitions infructuous. It is further submitted that the proviso to Section 9(1A) added by the impugned Ordinance runs counter to the Constitutional Scheme provided under Chapter 1XA of the Constitution of India. Learned counsel submits that the word 'population' has been defined under Article 243P(g) of the Constitution which means the population as ascertained at the last preceding Census of which the relevant figures have been published. The proviso to Section 9(1A) of the Act of 1959 as introduced by the impugned Ordinance has the effect of substituting the Census of 1991 in place of last preceding Census. Thus, the Ordinance is hit by Article 243P(g) of the Constitution. On the other hand, it is submitted by Mr. N.M. Lodha, learned Addl. Advocate General that it is settled position of law that since the power to make an Ordinance is legislative and not the executive power, its exercise cannot be questioned on such grounds as improper motives or non application of mind or on the ground of its propriety, expediency and necessity.

39. We have considered the rival contentions. The Apex Court considered in detail the ambit & scope of Article 213 of the Constitution in *A.K. Roy v. Union of India* (9). It was again considered in *Dr. D.C. Wadhwa v. State of Bihar* (10), popularly known as "Wadhwa's Case". The Apex Court dealt with colourable exercise of powers while examining challenge to the Ordinance promulgated by the President. This was further considered by the Apex Court in *S.R. Bommai v. Union of India* (11), popularly known as "Bommai's Case". In the said case, the Apex Court was dealing with the power of

President of India under Article 356 of the Constitution of India. The Court reiterated the true essential characteristics of the Indian Constitution that it is built around the democratic process and the principle of federalism. The Court while examining the question whether the aspect of satisfaction of the President was open to judicial review, held that it is not immune from judicial review.

40. In the instant case, knowing our limitations, we reject the contention attributing malafide to the State Government in promulgating the impugned Ordinance. However, we are of the view that the manner in which the Ordinance has been brought in, it appears to be ill-timed and ill-advised. The ordinance making power should be exercised not lightly but only when it is absolutely necessary to do so and the situation cannot otherwise be met effectively.

41. By the Ordinance of 2004 (Ordinance No. 10 of 2004), Section 9(1A) of the Act of 1959 has been amended. Section 2 of the Ordinance of 2004 reads as follows:

"2. Amendment of Section 9, Rajasthan Act No. 38 of 1959.- In sub- section (1-A) of Section 9 of the Rajasthan Municipalities Act, 1959. (Act No. 38 of 1959),

(i) for the existing punctuation mark "", appearing at the end of the existing proviso, the punctuation mark " shall be substituted and shall be deemed to have been substituted with effect from 1st July, 2004, namely:-

(ii) after the existing proviso so amended, the following proviso shall be added and shall be deemed to have been added with effect from 1st July, 2004, namely:-

"Provided further that such determination of seats on the basis of latest census shall take effect from such date as the State Govern- ment may, by order, specify and until such determination of seats take effect, any election to the municipalities may be held on the basis of the territorial limits of board or wards existing before such 'determination."

42. It is contended by the learned counsel for the petitioners that the impugned Ordinance of 2004 is contrary to the constitutional provisions of Article 243P, 243R, 243S, 243T and 243U of the Constitution of India. It is further submitted that Article 243P(g) provides definition of 'population', which means the population as ascer- tained at the last preceding census of which the relevant figures have been published. The effect of the impugned Ordinance of 2004 is that the meaning of the 'population' has been changed for the 'last census' to 'census of 1991'. According to the learned counsel, for the State legislature is not competent to change the definition of the 'population- by introducing a proviso to Section 9(1 A) by way of impugned Ordinance of 2004. On the other hand, it is submitted by Mr. N.M. Lodha, learned Additional Advocate General, that the definition of 'population' has not been changed in any way and, as such, the contention deserves to be rejected.

43. We have already surveyed the relevant provision of the Constitution as well as the Act of 1994. It is significant to notice that Article 243P(g) has referred to "last preceding census" while providing the definition of 'population.' Thus, the last pub- lished census figure must be the basis for



delimitation of wards. The word 'population' finds place in various provisions referred by us in earlier part of the order of the order. The effect of the impugned Ordinance of 2004 is that the term "last census" used in Article 243P(g) of the Constitution has been substituted as "census of 1991. Thus, the proviso added to Section 9(1A) by the impugned ordinance is in direct conflict with the definition of 'population' given under Article 243P(g) of the Constitution of India., The State Legislature is not competent to promulgate an ordinance in contravention of the Constitutional provisions. The State Government has exceeded its power in exercising the same indirectly by promulgating the Ordinance of 2004 amending Section 9(1A) of the Act of 1959. Thus, Section 2 of the impugned Ordinance of 2004 is per se illegal, arbitrary, unjust & unconstitutional. Thus, we hold Section 2 of the impugned Ordinance of 2004 ultra vires of the Constitution of India.

44. Reverting to power of this Court to interfere with the election matter, in the instant case, there is no grievance so far as the electoral process is concerned as the same has been prepared on the basis of the latest survey. Thus, having regard to the fact that elections are imminent, in our opinion, it is not a fit case in which we should exercise our jurisdiction under Article 226 of the Constitution;

45. Consequently, D.B. Civil Writ Petition No. 4188/2004 "Mahavir Jain v. State of Rajasthan" is partly allowed. Section 2 of the Rajasthan Municipalities (Amendment) Ordinance, 2004 being declared ultra vires of the Constitution of India, is hereby quashed. The bunch of writ petitions being devoid of merit stands dismissed. No order as to costs.