

Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition (PIL) No. 21 of 2019

Vipul Jain ...Petitioner
Vs.
State of Uttarakhand and others ...Respondents

AND

Writ Petition (PIL) No. 133 of 2019

Ashirvad Goswami ...Petitioner
Vs.
State of Uttarakhand and another ...Respondents

Mr. Abhijay Negi, learned counsel for the petitioner in both the Writ Petitions.
Mr. Paresh Tripathi, learned Chief Standing Counsel for the State of Uttarakhand.
Mr. Sanjay Bhatt, learned Standing Counsel for the State Election Commission.
Mr. Saurav Adhikari, learned Standing Counsel for the Union of India.

Common Judgment

Judgment Reserved : 01.10.2019

Judgment Delivered : 17.10.2019

Chronological list of cases referred :

1. (1978) 1 SCC 405
2. (2013) 4 SCC 642
3. (1997) 6 SCC 241
4. (2014) 9 SCC 1
5. (2010) 12 SCC 1
6. (1996) 3 SCC 416
7. AIR 1952 SC 64
8. (1985) 4 SCC 689
9. AIR 2018 SC 3964
10. (1969) 3 SCC 238
11. AIR 1994 SC 678
12. (2009) 5 SCC 212)
13. 2002 10 SCC 432
14. (1995) 6 SCC 749
15. AIR (1963) SC 1909
16. 1995 5 SCC 730
17. (1986) 2 SCC 68
18. (2010) 3 SCC 571
19. (2004) 7 SCC 698
20. Order in Writ Petition (S/B) No. 45 of 2014 dated 21.05.2019
21. (2017) 5 SCC 163
22. (2016) 16 SCC 346
23. (2017) 8 SCC 670
24. 2007 (1) UD 155
25. (2004) 11 SCC 26
26. (1983) 2 SCC 33
27. Order in Writ Petition (M/S) No.2302 of 2019 dated 19.09.2019
28. (2005) 3 SCC 313
29. (1983) 4 SCC 645
30. (2016) 4 SCC 269
31. (2002) 1 SCC 100
32. (1942) AC 601
33. (2004) 5 SCC 1
34. AIR 1957 All 414
35. AIR 1966 SC 81
36. (1984) 2 SCC 673
37. (1976) 1 SCC 671
38. (1986) 2 SCC 679
39. AIR 1966 SC 81
40. 1992 (1) SCC 548
41. (2005) 13 SCC 287

42. AIR 1990 SC 334
43. (2017) 7 SCC 221
44. (2017) 11 SCC 42
45. (2011) 13 SCC 77
46. (1976) 2 SCC 883
47. (1971) 2 SCC 747
48. (1970) 1 SCC 248
49. (2013) 3 SCC 641
50. (2015) 2 SCC 796
51. AIR 1992 SC 96
52. (1992) 1 SCC 489
53. (1999) 7 SCC 298
54. (2004) 4 SCC 714
55. (1985) 3 SCC 169
56. 1989 Supp (2) SCC 364
57. (2003) 7 SCC 546
58. (1994) 4 SCC 448
59. 1995 Supp (2) SCC 731
60. (1973) 4 SCC 225 at Para 1535
61. AIR 1992 SC 196
62. (2014) 8 SCC 470
63. AIR 2006 SC 1975
64. (2006) 2 SCC 670
65. (2008) 1 SCC 683
66. 2008 28 JT 639
67. (2008) 16 SCC 1
68. (1994) 1 SCC 682
69. (2013) 9 SCC 659
70. (2019) 3 SCC 224
71. AIR 2007 SC 269
72. AIR 1984 SC 921
73. (2002) 5 SCC 294
74. (2002) 8 SCC 337
75. (1991) 3 SCC 567
76. (1995) 4 SCC 611
77. (1985) 4 SCC 628
78. (1977) 4 SCC 161
79. (2018) 9 SCC 100
80. (2006) 7 SCC 1
81. (1999) 6 SCC 667
82. AIR 2001 Delhi 126
83. (2011) 1 SCC 228
84. AIR 1952 SC 16
85. (1880) 5 AC 214 (HL)
86. (1976) 1 SCR 667
87. 1858 EB & E 1024
88. (1912) 3 LN 518
89. (1968) 1 ALL ER 694
90. (2018) 188 AIC 280
91. (2007) 6 MLJ 116 (Mad)

**Coram: Hon'ble Ramesh Ranganathan, C.J.
Hon'ble Alok Kumar Verma, J.**

Ramesh Ranganathan, C.J.

“The Indian voter shall not be hijacked from the course of free and fair elections by *mob muscle methods, or subtle perversion of discretion by men 'dressed in little, brief authority'*. For ‘be you ever so high, the law is above you”.

So said Justice V.R. Krishna Iyer in **Mohinder Singh Gill v. Chief Election Commr.**¹.

2. Corruption has the potential of corroding the marrows of the economy. Corruption is not to be judged by degree, for corruption mothers disorder, destroys societal will to progress, accelerates underserved ambition, kills the conscience, jettisons the glory of the institutions, paralyses the economic health of a country, corrodes the sense to civility and mars the marrows of governance. (**Niranjan Hemchandra Sashittal and another vs. State of Maharashtra**²). Corrupt Electoral practices make a mockery of holding free and fair elections, and weaken democratic structures more particularly at the grass-root level ie the panchayat raj institutions.

3. The petitioners cry, before this Court, is that foreign jaunts, expensive holidays for voters, both within the country and abroad, kidnapping and threatening them (elected representatives of the Kshetra and Zila Panchayats), luring them with large sums of money on the eve of elections are among the factors which determine the flawed outcomes in the indirect elections to the offices of Block Pramukhs, and Chairmen of Zila Panchayats in the State: both the State Government and the State Election Commission have done little to curb this menace which plague indirect elections to the second and third tier Panchayati Raj institutions; and intervention by the High Court, under Article 226 of the Constitution of India, is their only hope of ensuring free and fair elections.

4. Before considering the submissions, made in this regard, in greater detail later in this order, and in examining the scope of interference by the High Court in such matters, let us take note of the pleadings of the parties to these writ proceedings. Writ Petition (PIL) No. 21 of 2019 has been filed in public interest seeking a writ of mandamus directing the State Government and the State Election Commission to frame extensive guidelines, governing the conduct of Panchayati elections in the State of Uttarakhand, to eliminate all possible sources of corruption such as sponsored foreign trips, kidnapping, sale of votes etc.

5. Writ Petition (PIL) 133 of 2019 is filed seeking a writ of mandamus directing the State Government, and the State Election

Commission, to prevent acts of corruption in the panchayat polls by reducing the time-frame between different tiers of elections so that buying and selling of votes can be stopped; and for the respondents to show what new Rules/Regulations have been framed by them to curb modern day corrupt practices such as foreign tours, etc. in panchayati elections.

6. In the affidavit filed in support of Writ Petition (PIL) No. 21 of 2019, the petitioner states that there are 13 Zila Panchayats corresponding to 13 Districts, and 96 Blocks with every Block having approximately 40 seats; in the previous Panchayati Raj elections, held during the years 2003, 2008 and 2014, horse-trading, corruption and use of money-power held sway over the elections; several newspapers, including the Rudrapur-Kashipur edition of Amar Ujala newspaper dated 25.07.2014, have referred to various attempts made to lure Block Development Council (BDC) members to vote for the election of a particular member to the office of the Block Pramukh; several BDC members went missing, only to surface later after having enjoyed trips to Bangkok, Kathmandu etc; not only foreign trips, but blatant use of money-power is prevalent to garner votes in the Panchayat Raj Elections; the same newspaper carried a report that a BDC member had stated that the operational rate for the vote of a member was Rs. 10 Lakhs; this defeated the very object of having Panchayats as units of local self-governance; as the Panchayat Raj system hopes to promote self-governance at the lowest end of democratic society, those who govern must understand the larger aims and objects of public affairs; all village folk must have an effective say in the decisions pertaining to their region and their welfare, and rural India should not only have a sense of satisfaction from such elections, but actual hands on experience in governance of their own affairs; the object of ensuring that panchayati raj institutions function as units of local self-governance is being compromised; the State Government has, constantly, turned a blind eye and no Regulations/Rules are in place to control the muscle and money-power which come into play in indirect elections to the second and third tiers of the Panchayati Raj Institutions; the State Government has also failed to discharge its functions of making Rules under Section 126 of the Uttarakhand Panchayati Raj Act, 2016 (for short the

“2016 Act”); this Court should consider issuing a mandamus to the State Government, and the State Election Commission, to take immediate steps to prevent electoral outcomes by sale of offices; such blatant misuse of muscle and money-power sees the vote, given by a common villager, go down the drain; as held in **Vishakha and others v. State of Rajasthan and others**³, the power to issue a writ of mandamus accompanies with it the power to issue directions for prevention; and the State Election Commission should be directed to frame extensive guidelines to prevent such miscarriage of justice, and cheating of voters in the ensuing 2019 panchayati raj institutions elections.

7. In the affidavit filed in support of Writ Petition (PIL) 133 of 2019, the petitioner complains of the failure of the respondents to check corruption, in the Panchayati Raj framework, including kidnapping of members, and of horse-trading taking place on a large scale in these elections. He would submit that Smt. Sushma Fartiyal, a candidate for the post of Adhyaksha of the Zila Panchayat, Champawat, had informed the State Election Commission, by her letter dated 05.08.2014, that, when Smt. Meena Tiwari was coming for voting, another candidate Mr. Kaushal Adhikari had pulled her by force to the booth where she had requested that the entire election result and process be withheld; complaints were made by two candidates in Uttarkashi, contesting for the post of Zila Panchayat Adhyaksh and Zila Panchayat Up-Adhyaksh in July, 2014, that the third candidate for the post of Zila Panchayat Adhyaksh had indulged in massive corrupt practices, and had sought rejection of her nomination papers; these complaints were not taken to their logical conclusion; prevalence of such large scale corrupt practices is mainly because of the huge time gap between the different tiers of the Panchayat Elections; in the previous three Panchayat Elections held in the years 2003, 2008 and 2014, horse-trading, corruption, and use of money power were omni-present factors; several newspaper reports showed that large scale attempts were made to lure BDC members to vote them to the Office of Block Pramukhs of different regions; several BDC members were taken on extensive foreign trips to Bangkok and Kathmandu, and other exotic locations; candidates, who practice such

corrupt means, are elected to office on a *quid pro quo* basis; this, in turn, results in their becoming corrupt and dishonest administrators; and despite being fully aware of such sponsored foreign trips, money-power display and use, neither the State Legislature nor the State Government has taken effective steps to prevent the same.

8. The petitioner would further state that he does not expect the Court to legislate; what he seeks is a writ in the nature of mandamus directing the respondents to fulfill their public duty of ensuring free and fair elections in the State of Uttarakhand; the State Election Commission has also not put in place guidelines to prevent such incidents from taking place, and to ensure that, at the level of Block Pramukhs and Zila Parishad Adhyakshas, rampant money and muscle-power do not dictate electoral outcomes; when electoral offices are put up for sale, the very object of having grass-root governance is defeated, the vote given by a common villager simply goes down the drain, and is subject to the sale and purchase of BDC members as influenced by Block Pramukh aspirants; and the newspaper reports make out a very strong case towards nudging the State Government and the State Election Commission to frame wide guidelines to prevent such acts of collecting votes in the ensuing 2019 Panchayati Raj Elections.

9. In the counter-affidavit, filed on behalf of the Government of Uttarakhand, it is stated that the petitioner has not cited any instance in support of his allegation that elected members of the BDC and the Zila Panchayat are influenced during elections; and the Writ Petition has been filed with general allegations and is, therefore, not maintainable. After referring to Articles 40 and 243K of the Constitution of India, and to the Statement of Objects and Reasons for introduction of Part IX in the Constitution, it is stated that, in terms of Section 55(1) and 92 of the 2016 Act, Block Pramukhs and Chairmen of the Zila Panchayats are being elected by elected members of Kshetra Panchayats and Zila Panchayats; the State Government has been issuing guidelines, from time to time, in order to ensure free and fair elections; while issuing guidelines, the provisions of Section 171 IPC are kept in mind; Letter Nos. 1453 and 1469 were issued by

the State Election Commission on 16.07.2014; whenever complaints of illegality are received, action, under the provisions of the IPC, is being taken in accordance with law; reference to Section 126 and 134 of the 2016 Act are not in context; the Model Code of Conduct remains in force during elections, and any kind of violation of the Model Code of Conduct is taken very seriously; the Model Code of Conduct is extensive, and takes care of every law applicable in the election process; the petitioner has not been able to make out a case against the State Government; and the Writ Petition is, therefore, liable to be dismissed.

10. In its counter-affidavit, the Government of India would submit that the State Election Commission has been empowered with the superintendence, direction and control of preparation of electoral rolls and the conduct of elections to Panchayats under Article 243K of the Constitution of India; and, subject to the provisions of the Constitution, the Legislature of a State has been conferred the power to make provisions with respect to all matters relating to, or in connection with, elections to Panchayats.

11. In its counter-affidavit, the State Election Commission submits that the Writ Petition has been filed seeking guidelines to be made; while alleging that elected members of the BDC and Zila Panchayats are being influenced during elections to the office of Block Pramukh and Chairman, Zila Panchayat, no instances have been cited by the petitioner to support these allegations; and the Writ Petition has been filed with general allegations and is, therefore, not maintainable. After referring to the Statement of Object and Reasons, for introducing Part IX of the Constitution of India, Articles 40 and 243 K of the Constitution of India, it is stated that the State Election Commission has been issuing guidelines from time to time, including those issued on 16.07.2014; during elections, the Model Code of Conduct remains in force; any kind of violation of the Model Code of Conduct is taken very seriously; the Model Code of Conduct is extensive, and takes care of every law applicable in the election process; and the petitioner has not been able to make out a case for interference.

12. In the supplementary counter-affidavit, filed on behalf of the State Election Commission, it is stated that only two instances of corrupt practice/kidnapping were reported to the Commission, in the 2014 Panchayati Raj elections, for which prompt action was taken; the first instance related to elections to Zila Panchayat Adhyaksh at Champawat on 01.08.2014; the State Election Commission took prompt action by directing the District Magistrate/District Election Officer, Champawat on 02.08.2014 to take action on the complaints and apprise the State Election Commission about the progress and action taken till date; the District Magistrate, by letter dated 03.08.2014, informed that an F.I.R. was lodged on 30.07.2014 against Mr. Khushal Singh Adhikari; and the complaint of Mrs. Sushma Fartiyal, in her letter dated 05.08.2014, was attended to by the State Election Commission which, by its letter dated 07.08.2014, had directed the District Magistrate to take action.

13. In his rejoinder affidavit, the petitioner would submit that several instances have been referred to in the writ-affidavit regarding failure to follow the basic nuances and tenets of Panchayati Raj Governance, which was introduced in the Indian Constitution, as a mode to increase transparency in grass-root governance; the counter-affidavit shows that the State Election Commission wants to wash its hands off from its responsibilities of ensuring transparent Panchayati Raj elections, in the State of Uttarakhand, by delegating all roles and duties to the State Election Commissioner; the extensive annexures, filed along with the Writ Petition, clearly show that three leading Hindi Media publications, namely, Amar Ujala, Dainik Jagran and Hindustan have all covered several cases of extortion, kidnapping, bribery, funded foreign trips for elected members in the election of Block Pramukhs and Zila Parishad Chairmen; specific instances of those from Haldwani and Pithoragarh were referred to; rate-cards for the sale of every single vote in the 2014 elections, in the districts of Nainital, Haridwar etc, along with preferred locations for such travel such as Bangkok, Kathmandu, have been detailed and explained in the Writ Petition; these are the factors which have moved the petitioner to file the Writ Petition in Public Interest; the petitioner has extensively referred to the Constituent

Assembly Debates; rampant corruption, in the indirect elections, leads to a further acts of corruption while holding such political offices; the State of Uttarakhand is bound to take action to curb such rampant acts of corruption; the State Government has failed in its responsibilities of cracking down on such sources of corruption by merely stating that, in case of complaints, action is being taken; the State Election Commission is offering a typical bureaucratic response to a humongous problem that emanates out of this lackadaisical attitude of not being pro-active in implementing the Constitution of India in its letter and spirit; the vague assurance that, on complaints being received, action has been taken, is of no consequence; no material has been placed on record to show that the State Election Commission has taken any action, despite specific averments of corrupt practices; and the State Election Commission has constantly turned a blind eye, and has not framed Rules/Regulations to regulate the muscle and money-power that plague the Panchayati Raj system.

14. The issues raised in the Writ Petitions relate to the failure of the State Legislature to make laws, the State Government to frame Rules and the State Election Commission to issue guidelines to prevent corrupt electoral practices, on the eve of the indirect elections to the offices of Block Pramukhs and Chairmen, Zila Panchayats, and the need for the High Court to issued directions to these stakeholders in the panchayat raj system to make laws/frame Rules and issue guidelines respectively, or in the alternative for the High Court to itself issue necessary guidelines till laws/Rules are made by the Legislature/Rule making authority. The petitioners also seek a mandamus to the State Election Commission to effectively discharge its constitutional obligations of holding free and fair elections to the offices of Block Pramukhs and Chairman, Zila Panchayats. Elaborate submissions, both oral and written, have been made by Mr. Abhijay Negi, learned counsel for the petitioner, Mr. Paresh Tripathi, learned Chief Standing Counsel for the State Government, and Mr. Sanjay Bhatt, learned Standing Counsel for the State Election Commission. It is convenient to examine the rival submissions, made by learned counsel on either side, in this regard under different heads.

I. SCOPE OF INTERFERENCE BY THE HIGH COURT TO CURB THE SCOURGE OF HORSE-TRADING AND USE OF MONEY AND MUSCLE POWER IN THE INDIRECT ELECTIONS BEING HELD TO THE SECOND AND THIRD TIER PANCHAYAT RAJ INSTITUTIONS :

15. Mr. Abhijay Negi, learned counsel for the petitioners, would submit that Panchayati Raj Institutions derive power from, and occupy a special place in, the Constitution; Article 40 of the Constitution of India came into being from Article 31- A in the draft Constitution; the provision for Panchayati Raj was unanimously included therein; the 73rd Constitutional Amendment has a tremendous potential for social transformation, and to bring about a sea-change in the age-old, oppressive, anti-human and status quoist traditions of Indian society; the main purpose behind this amendment is to ensure democratic decentralization on the Gandhian principle of participatory democracy so that Panchayats may become viable and responsive institutions of governance; the Supreme Court, while quoting Dr. Ambedkar in its judgment in **Manoj Narula v. Union of India**⁴, has observed that “traditions and conventions have to grow to sustain the value of such a morality. The democratic values survive and become successful where the people at large, and the persons-in-charge of the institution, are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints”; the present factual situation, where horse-trading and use of money and muscle power prevail in such indirect elections, warrants interference by the High Court to save the spirit of Panchayati Raj by reducing the time frame and by pro-active monitoring of elections; the annexures, attached to the Writ Petition, show how every mainstream newspaper in the State of Uttarakhand, from different regions of the State, have reported on the buying and selling of Kshetra Panchayat and Zila Panchayat Members- going as far as identifying the market rates, for their sale, district-wise; it would help if the time-frame given for the second rung Panchayat elections is reduced to one week (as is the practice in Himachal Pradesh); the Petitioner has not asked the Court to legislate, but to issue directions/guidelines; matters

needing directions to prevent horse-trading and use of money and muscle power include: ensuring daily/regular attendance of elected zila panchayat members, BDC members before the returning officer to curb the trend of foreign trips and national trips; the Kshetra Panchayat members and the Zila Panchayat members may take permission/or intimate the Returning Officer before leaving the village/district; ensuring impartial election observers- at the level of the District Returning Officer to come from outside the State; ensuring videography outside polling booths; regular raids to check stacking of cash/liquor in the homes of candidates; monitoring the moveable and immovable assets of such candidates on a weekly basis; facilitating anonymous complaint collection and redressal system through a designated authority; giving awards on intelligence gathering on corruption; and fixing a time-frame to address corruption complaints.

16. On the other hand Mr. Paresh Tripathi, learned Chief Standing Counsel for the State of Uttarakhand, would submit that the petitioners have not made any specific allegation regarding the alleged corruption, nor has the same been substantiated by producing cogent and clinching evidence; rather, only vague and general allegations are leveled in the present PILs; the contention that the Uttarakhand Panchayati Raj Act, 2016 does not provide any mechanism for preventing such corruption is apparently erroneous; Section 8(2), 53(2) and 90(2) of the Uttarakhand Panchayati Raj Act, 2016 (hereinafter referred to as the “2016 Act”) provides for disqualification on the ground of corruption, and the authority competent to decide the dispute can declare the candidate, found involved in corrupt practices, disqualified for 5 years from the date of such declaration; Section 131(4)(2)(b)(h)(1) provides a complete mechanism for the competent authority to set-aside the election of a candidate found to have indulged in bribery, or of having resorted to undue influence, or of having otherwise acted illegally; the State Legislature has taken due care to ensure that no corrupt practice prevails in the Panchayat Elections; Section 171 IPC takes care of election offences which are non-cognizable and bailable ; neither Article 40 nor Part IX of the Constitution of India contain any provision which can be said to have been violated by the respondents; an election petition can be filed by any

candidate participating in the election or by any elector; the word “elector” includes in it every person who has cast his vote be it in a direct election, or in an indirect election; in an in-direct election, any candidate, who was a candidate in the direct election, becomes an “elector” (in case he is not contesting the indirect election) as he has to cast his vote; the said “elector” can take recourse to Section 131 and the other relevant provisions of the Act; the State Legislature has ensured that no candidate gets elected by using corrupt practices of bribery or undue influence; the provisions of the Act, in that regard, cover in it almost all methods, which can be exercised by any candidate or any other person with the connivance of the candidate, falling within the ambit of corrupt practices; and the grievance raised by the petitioner, to the effect that there must be some mechanism either by the Legislature or by the Executive, deserves to be rejected.

17. Mr. Sanjay Bhatt, learned Standing Counsel for the State Election Commission, would submit that the petitioner has filed the Writ Petition *pro bono*, inter alia, seeking to formulate guidelines governing the conduct of indirect elections of Panchayati Raj Institutions, i.e. Pramuks of the Kshetra Panchayats and Adhyakshas of Zila Panchayats, in order to eliminate maximum possible sources of corruption i.e. sponsor of foreign trips, kidnapping and sale of voters; the Petitioner has not cited any example to support this allegation; the Writ Petition has been filed with general allegations referring to some newspaper clippings which are not admissible in evidence; the petitioner is seeking to formulate some mechanism to curb corruption at the pre-election stages; a mechanism for pre-election and post-election redressal is already there in the Statute Book; Chapter IX-A of the Indian Penal Code and Section 8(2), 53(2), 90(2), 126, 128, 131 of the Uttarakhand Panchayati Raj Act, 2016 are the provisions to deal with corrupt practices at the pre-election and post-election stages; since the field is already occupied by a law made by the competent legislature, there is no need to develop a new mechanism only on the basis of presumptions, assumptions, conjectures and surmises; and the petitioner, who claims to be a public spirited person and a vigilant citizen, made no efforts to report any

kind of corruption in the direct or indirect elections of panchayats or local bodies.

18. In examining the rival submissions under this head, it is useful, at the outset, to take note of the relevant constitutional provisions regarding panchayats, and the statutory provisions under the 2016 Act, regarding corrupt practices, and offences, in elections to offices in Panchayati Raj Institutions. While enacting laws, in the exercise of its powers under Articles 245 and 246 of the Constitution of India read with Entry 5, List II of the Seventh Schedule, the State Legislature is required to bear-in-mind the Directive Principles of State Policy in Article 40 in Part IV of the Constitution, which, in view of Article 37, is fundamental in governance and obligates the State Legislature to apply these principles in making laws. Article 40 of the Constitution relates to organization of village panchayats and requires the State to take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. Part IX of the Constitution of India, which relates to Panchayats, was inserted by the Constitution 73rd Amendment Act, with effect from 24.04.1993. By the Seventy-third Amendment of the Constitution, panchayats, which were previously a mere unit under Article 40, became an “**institution of self-governance**”. What was in a nebulous state, as one of the directive principles under Article 40, has, through the Seventy-third Constitutional Amendment, metamorphosed to a distinct part of the constitutional dispensation with detailed provisions for the functioning of panchayats. The 73rd amendment has heralded a new era- a turning point in the history of local self-governance with sweeping consequences in view of decentralisation, grass-root democracy, people’s participation, gender equality and social justice. (**Bhanumati v. State of U.P.**⁵). It is a very powerful “tool of social engineering”, and has unleashed tremendous potential for social transformation to bring about a sea change in the age-old, oppressive, anti-human and status quoist traditions of Indian society. (**Bhanumati**⁵).

19. The Statement of Objects and Reasons appended to the Constitution (Seventy-second Amendment) Bill, 1991, which was enacted as

the Constitution (Seventy-third Amendment) Act, 1992, stated that, though the Panchayati Raj institutions have been in existence for a long time, it had been observed that these institutions were not able to acquire the status and dignity of viable and responsive people's bodies due to a number of reasons including absence of regular elections.

20. The main object of the 73rd amendment is to ensure democratic decentralisation on the Gandhian principles of participatory democracy so that the panchayat may become viable and responsive people's bodies as an institution of governance, and it may acquire the necessary status and function with dignity by inspiring respect of the common man. The Seventy-third Amendment to the Constitution was introduced for strengthening the Preambular vision of democratic republicanism which is inherent in the constitutional framework. (**Bhanumati**⁵). Decentralisation is perceived as a precondition for preservation of the basic values of a free society. Republicanism, which is the "sine qua non" of this amendment, is compatible both with democratic socialism and radical liberalism. Republicanism pre-supposes that laws should be made by active citizens working in concert. (**Bhanumati**⁵).

21. Section 243(d), in Part-IX of the Constitution, defines 'Panchayat' to mean an institution (by whatever name called) of self-government, constituted under Article 243-B, for the rural areas. Article 243-B relates to constitution of panchayats, and clause (1) thereunder provides for the constitution, in every State, of Panchayats at the village, intermediate and district levels in accordance with the provisions of Part-IX. Article 243-G relates to the powers, authority and responsibility of panchayats and, thereunder, the State Legislature is conferred the power, by law, to endow the panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government; and for such law to contain provisions for the devolution of powers and responsibilities upon panchayats at the appropriate level, subject to such conditions as may be specified therein, with respect to, among others, the implementation of schemes for economic development and social justice as

may be entrusted to them, including those in relation to matters listed in the Eleventh Schedule.

22. The Eleventh Schedule to the Constitution contains a wide range of topics with respect to which power can be conferred on the panchayats to implement schemes for economic development and social justice. These subjects include agriculture, land improvement, minor irrigation, fisheries, social forestry and farm forestry, small-scale industries, drinking water, roads, culverts, bridges, ferries, waterways, rural electrification, poverty alleviation programme, education, health and sanitation, family welfare, welfare of the weaker sections and in particular the Scheduled Castes and the Scheduled Tribes, public distribution system etc. The State Legislature may not be obliged to make laws to confer power on the panchayats on all these subjects at one go, and can make such provisions over a period of time.

23. Article 243-C relates to composition of panchayats and under Clause (1), subject to the provisions of Part-IX, the legislature of a State may by law make provisions with respect to the composition of panchayats. Clause (3) of Article 243-C confers power on the State Legislature, by law, to provide for the representation of the Chairpersons of the panchayats at the village level, at the intermediate level and at the district level. Clause (5) of Article 243-C is relevant for the purpose of this discussion. Clause (5)(a) stipulates that the Chairperson of a panchayat at the village level shall be elected in such manner as the legislature of a State may, by law, provide; and (b) the Chairperson of a panchayat at the intermediate level or the district level shall be elected by, and from amongst, the elected members thereof.

24. Article 243-F relates to disqualifications for membership and, under clause (1)(a), a person shall be disqualified for being chosen as, and for being, a member of a panchayat if he is so disqualified by or under any law for the time being in force for the purpose of elections to the Legislature of the State concerned or (b) if he is so disqualified by or under any law made by the State Legislature. The disqualifications prescribed by Article

243-F of the Constitution are both those which apply to elections to the State Legislature and those which the State Legislature has prescribed, by law, as a disqualification, which, in the case on hand, is the 2016 Act.

25. Chapter X of the 2016 Act relates to Kshetra Panchayats and its office bearers and their elections. Section 53 of the 2016 Act prescribes the disqualifications for membership of a Kshetra Panchayat and, under Section 53(1)(a), a person shall be disqualified for being elected as and for being a member of a Kshetra Panchayat, if he is so disqualified by or under any law for the time being in force for the purposes of election of the State Legislature. Section 53(2) prescribes disqualifications because of corruption, and thereunder an authority competent to decide election disputes under the Act, or the Rules made thereunder, may declare any candidate found to have committed any corrupt practice to be incapable, for any period not exceeding five years from the date of the declaration, of being chosen as a member of a Kshetra Panchayat, or to be elected as a Pramukh of a Kshetra Panchayat. Section 55(1) of the 2016 Act provides that the elected members of every Kshetra Panchayat shall elect a Pramukh and a Senior Up-Pramukh and a Junior Up-Pramukh from among themselves.

26. Chapter XVI, in Part-IV of the 2016 Act, relates to establishment and incorporation of Zila Panchayats. Section 90 relates to the disqualifications for being chosen as and for being a Chairman, Vice-chairman or member of a Zila Panchayat and, under clause (1), a person shall be disqualified for being chosen as and for being a Chairman, Vice-chairman or member of a Zila Panchayat, if he (a) is so disqualified by or under any law for the time being in force for the purposes of election to the State Legislature. Several other disqualifications are also prescribed, among which is clause (m), whereunder, if a person has been convicted of an election offence, he shall be disqualified for being chosen as a Chairman of the Zila Panchayat. Section 90(2) also prescribes disqualifications due to corruption and, thereunder, an authority competent to decide election disputes under the Act, or the rules made thereunder, may declare any candidate, found to have committed any corrupt practice, to be incapable, for

any period not exceeding five years from the date of declaration, of being chosen as or of being appointed or retained in any office of a Zila Panchayat. Chapter XVII relates to Zila Panchayats, the office bearers and their election. Section 92(1) stipulates that, in every Zila Panchayat, the Chairman and the Vice Chairman shall be elected by the elected members of the Zila Panchayat from amongst themselves. Sub-section (2) of Section 92 provides that the election of Chairman and Vice chairman may be held notwithstanding any vacancy in the office of the elected members of the Zila Panchayat.

27. Section 131(4)(b)(4)(h)(1) prescribes that the election of a person as the Chairman of a Panchayat shall not be called in question except by an application presented to such authority, within such time and in such manner as may be prescribed, on the ground that the election has not been a free election by reason that the corrupt practice of bribery or undue influence has extensively prevailed at the election. Clause (2) stipulates that the following shall be deemed to be corrupt practices of bribery or undue influence for the purposes of the Act. Under clause (A) (1) thereunder, bribery means to allow (a) a person to stand or not to stand as or to withdraw from being a candidate at an election; or (b) an elector to vote or refrain from voting at an election; or as a reward to (i) a person for having so stood or not stood, or for having withdrawn his candidature; or (ii) an elector for having voted or refrained from voting or reward to vote in his favour (a) to propose or promise any gift or reward on the part of a candidate, or any other person whosoever with the connivance of the candidate. Clause (B) defines 'undue influence' to mean any direct and indirect interference or attempt to interfere on the part of a candidate or of any other person with the connivance of the candidate with the free exercise of any electoral right. Under the proviso thereto, any such person who threatens any candidate, or any elector, or any person in whom a candidate or an elector is interested, with injury of any kind including social ostracism and ex-communication or expulsion from any caste or community; (2) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or

spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of the clause.

28. The 2016 Act provides for elector malpractices to be questioned by way of an election petition after completion of the election process evidently because elections should be concluded as early as possible according to the time schedule, and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over so that the election proceedings may not be unduly retarded or protracted. [**Boddula Krishnaiah and others vs. State Election Commissioner, A.P. & others**⁶; **N.P. Ponnuswami vs. Returning Officer, Namakkal Constituency**⁷; **Lakshmi Charan Sen vs. AKM Hassan Uzzaman**⁸; **West Bengal State Election Commission vs. Communist Party of India (Marxist)**⁹]. The fact, however, remains that the aforesaid statutory provisions, which provide for action to be taken post elections, do not contemplate measures to prevent the commission of such electoral offences. More often than not, the process of adjudication of an election petition takes so long that the term of office, of the elected representative, itself comes to an end, thereby rendering the election petition infructuous.

29. Chapter IX-A of the Indian Penal Code are the offences relating to elections. Sections 171-B and 171-C define 'bribery' and 'undue influence' respectively. Under clauses (i) and (ii) of Section 171-B, whoever gives gratification with the object of inducing a person to exercise any electoral right or of rewarding any person for having exercised any such right; or (ii) accepts any gratification for exercising any such right, commits an offence of bribery. Section 171-C (i) provides that, whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right, commits the offence of undue influence at an election. Whoever threatens a candidate with injury of any kind or induces or attempts to induce a candidate or voter to believe that he, or any person in whom he is interested, will become or will be rendered an object of Divine displeasure or of spiritual censure, also commits the offence of undue influence of elections. Section 171-E prescribes the punishment for bribery with imprisonment for a term which may extend to one year or with fine or with both. Section 171-

F prescribes the punishment for undue influence with imprisonment which may also extend to one year, or with fine, or with both. Section 171-H relates to illegal payments in connection with an election, for which the punishment prescribed is a fine, which may extend to Rs. 500/-. Section 171-I relates to the failure to keep election accounts, for which the punishment prescribed is also a fine, which may extend to Rs. 500/-. Like election petitions, mere registration of FIRs, for electoral offences under Chapter IX-A of the IPC, hardly serve as a deterrent for candidates to indulge in electoral malpractices, and to those resorting to horse trading or the use of money and muscle power to capture the offices of Block Pramukhs and Chairmen of Zila Panchayats.

30. The issues highlighted in these Writ Petitions relate to elections of the Chairperson at the intermediate level called the Block Pramukhs of the Kshetra Panchayat, and at the district level called the Chairman of the Zila Panchayat. Unlike elections to gram panchayats and to the territorial constituencies of the Kshetra Panchayats and the Zila Panchayats, where people directly vote to elect their representatives, election to the offices of Block Pramukhs and the Chairmen of Zila Panchayats is indirect; and it is the elected members who, in turn, elect the Block Pramukhs and the Chairmen of the Zila Panchayats. It is before and during elections to these offices, that money and muscle power, besides other corrupt practices, are said to have decided the electoral outcomes, to several of these offices, in the previous elections held in the years 2003, 2008 and 2014. The petitioners' complaint is that prevalence of money and muscle power, and other forms of corruption, are rampant in Panchayati Raj indirect elections, and neither the State Government nor the State Election Commission have made any attempts to curb these evil and illegal practices, and to ensure free and fair elections, so that the will of the people residing in the panchayats at the intermediate level and at the district level prevails, and neither money and muscle power, nor horse-trading, affect the free and fair elections of Chairpersons of these bodies.

31. The newspaper clipping of Amar Ujala dated 25.07.2014, enclosed along with the Writ Petition, refers to votes of Block Development

Council members being bought for lakhs of rupees; of one vote, for the Block Pramukh or the Zila Panchayat Chairman, being sold for Rs. 15.00 lakhs; apart from payment of money, some of such BDC and other members having been sent to Bangkok, Kathmandu, Goa etc, only for them to return on the eve of election day. Reference is made to such malpractices in district Udham Singh Nagar; to district Almora where BDC Members are alleged to have been taken on tours to Kausani, Munsiyari, Nainital, Goa etc; to district Pithoragarh, where the price is said to be Rs. 10.00 lakhs per vote; and to district Nainital, where the price of each vote, for a Block Pramukh, is said to range between Rs. 4.00-11.00 lakhs. Enclosed to the Writ Petition, are other newspaper reports which, among others, refer to complaints having been given to the District Magistrate and District Superintendent of Police that an elected BDC Member was missing right from the day she was successfully elected as a BDC Member; and that one of the candidates for Block Pramukh was suspected to have kidnapped her.

32. It is true that newspaper reports do not constitute primary evidence. A news item, without any further proof of what had actually happened through witnesses, is at best a second-hand secondary evidence. Such news items cannot be said to prove themselves although they may be taken into account with other evidence. (**Samant N. Balkrishna & others vs. George Fernandez & others**¹⁰). The increasing electoral malpractices make availability of evidence difficult, and this cannot be ignored while applying the standard of proof for the proof of a corrupt practice. (**Godakh Yashwant Rao Kankar Rao vs. Bala Saheb Vikhe Patil**¹¹). This is more so as neither the bribe-giver nor the recipient of the bribe are likely to complain of such electoral malpractices, the former because it helps him occupy the elected office, and the latter because he has been adequately compensated for his vote.

33. Even if some of the allegations mentioned therein are discounted on the ground that newspapers tend to sensationalize and exaggerate, it does appear that money and muscle power held sway during elections, to several offices of Block Pramukhs and Chairmen, Zila Panchayats in the State, in the previous elections.

34. Persons, who spend large sums of money in buying votes or in providing expensive holidays (both within the country and abroad) to voters in these indirect elections, can hardly be expected not to resort to corrupt practices after they are elected, and during their term of office of five years. Judicial notice can be taken of the several complaints made to the High Court, by invoking its public interest litigation jurisdiction, of misappropriation of public funds or misuse of public offices for extraneous considerations by those who are elected to these offices. Instances of misappropriation of funds in execution of public works, in allotment of plots and buildings to near relatives of these elected representatives, are many. While blatant resort to electoral malpractices during elections renders the very object of ensuring free and fair elections redundant, post-election malpractices including misappropriation of public funds and flagrant misuse of authority, renders the very object of Part IX of the Constitution, to strengthen Panchayat Raj institutions and to enable people at the grass-root to govern themselves, an absolute mockery. While we are in complete agreement with the submission of Mr. Abhijay Negi, learned counsel for the petitioners, that action must be taken to prevent such electoral malpractices from occurring, and not await a post-election correction, the question which necessitates examination is what action the High Court can take in the exercise of its jurisdiction under Article 226 of the Constitution of India?

II. WOULD THE HIGH COURT, IN THE EXERCISE OF ITS JURISDICTION UNDER ARTICLE 226, BE JUSTIFIED IN DIRECTING THE STATE LEGISLATURE AND THE STATE GOVERNMENT TO MAKE LAWS-RULES TO REMEDY THE SITUATION?

35. Mr. Abhijay Negi, learned counsel for the petitioners, would submit that the present legal regime only provides for a post-election remedy to question electoral mal-practices; due to lack of a legislative or an executive framework to deal with/curb pre-election malpractices, the legal field lies completely vacant; Sections 8, 53, 90, 128 of the 2016 Act relate to provisions, such as an election petition, to question corrupt practices, only after the election process is complete; there is no provision in the Act that expressly deals with pre-election corruption/preventive measures to curb

corruption; this omission is fatal to grass roots democracy; Section 171 IPC also deals only with scenarios after the incident has already occurred; Section 126 of the 2016 Act vests the rule making power with the State Government; Section 134 of the Act provides for the State to take effective steps to provide effective Panchayati Raj; the Executive has not discharged the statutory and constitutional mandate, entrusted upon it, of making rules; High Courts in India can/have stepped in to deal with situations where the Executive has failed to act; they have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the government; in all such cases, the High Court can give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion; best international/comparative constitutional practices warrant interference by Constitutional Courts when the Executive fails; the power of High Court includes the power to do complete justice, to mould the relief, and to issue directions; and the present factual situation warrants interference by the High Court, to save the spirit of Panchayati Raj as enshrined in the Constitution, by reducing the time frame and by pro-active monitoring of elections. Learned counsel would rely on **Destruction of Public and Private Property vs. State of A.P. & others**¹²; **Union Territory, Chandigarh & others vs. Avtar Singh & others**¹³; **B.C. Chaturvedi vs. Union of India & others**¹⁴; **Shivdeo Singh & others vs. State of Punjab & others**¹⁵; **State of Maharashtra vs. Manubhai Pragaji Vashi & others**¹⁶; **State of Himachal Pradesh & others vs. Umed Ram Sharma & others**¹⁷; **State of West Bengal & others vs. Committee for Protection of Democratic Rights & others**¹⁸; **Bhanumati**⁵. He would further submit that the doctrine of *stare decisis* is not to be followed only in an identical (*pari-materia*) factual scenario, but whenever judicial principles

as enunciated can be applied, as is the present case. He would rely on **Punjab National Bank v. R.L. Vaid & others**¹⁹ in this regard.

36. On the other hand Mr. Paresh Tripathi, learned Chief Standing Counsel for the State of Uttarakhand, would submit that, although Section 126 and 128 of the 2016 Act confer power on the State Government to make Rules, however, as is evident from the said Sections also, no power is vested in the State Government to frame Rules to curb/ prevent the alleged corrupt practices during election nor has any such remedy been provided under the Act; the questions which arise for kind consideration are whether the High Court can issue directions to the respondents to make law/ scheme/ guidelines/policy in this regard?; and whether it can frame law/ scheme/ guidelines/policy itself; a Full Bench of this Court, in **Dhananjay Verma Vs. State of Uttarakhand & others**²⁰ has, after referring to numerous judgments of the Supreme Court, held that **“it is not within the power of the Court to legislate law”**; **a Writ of Mandamus cannot be issued to the Legislature to incorporate a particular law or to Rule making Authority to make Rules in a particular manner or even to the Government to make a policy**; in **State of U.P. v. Subhash Chandra Jaiswal**²¹, the Supreme Court held that the power to make policy is not the function of the Court, and the Court cannot direct the competent authority to make law be it plenary or subordinate, nor should it even direct that policy/guidelines should be made by the competent authority; the State Legislature has, in its wisdom, chosen to provide post-election remedies regarding action to be taken against persons involved in corrupt practices; as the Legislature itself has not chosen to make any provision for taking steps at the pre-election/ during election stage(s), no such law/ policy/ guidelines can be directed to be framed by the respondents; and the High Court does not possess powers akin to the power conferred on the Supreme Court under Article 142 of the Constitution of India. He would rely on **Soni Kumari vs. Deepak Kumar**²²; **Chairman & Managing Director, FCI & others v. Jagdish Balram Bahira & others**²³; and **Shailendra Singh v. State of Uttaranchal**²⁴ in this regard.

37. Section 126 of the 2016 Act, to which reference is made by the petitioner, confers power on the State Government to make Rules and, under sub-section (1) thereof, the State Government may, by notification in the Gazette, make rules consistent with the Act in respect of any matter or matters for which the power of making rules is expressly or by implication conferred by the Act, and may also make Rules which are otherwise requisite for carrying out the purposes of the Act. Under Section 126(2), any rule made under sub-section (1) may be general for all Zila Panchayats, all Kshetra Panchayats, and all Gram Panchayat and special for any one or more Zila Panchayats or Kshetra Panchayats to be specified. Section 128 of the 2016 Act confers powers on the State Government to make rules for Panchayats and, under sub-section (1) thereof, the State Government may, by notification in the Gazette, make rules for carrying out the purposes of this Act. Section 128(2) provides that, in particular and without prejudice to the generality of the foregoing powers, such rules may provide for (i) any matter for which powers to make provision is conferred expressly or by implication on the State Government by the Act.

38. It is unnecessary for us to examine whether the State Government can, in the absence of any specific provision in the 2016 Act, make Rules to provide for a mechanism to prevent electoral malpractices, which negate the very object of holding free and fair elections. Suffice it to note that neither the 2016 Act, nor the Rules made thereunder, contain any such provision. It is a truism that the legislature should change laws to keep the law abreast of change. (**Dias Jurisprudence, 5th Edition, Page 147; State of Punjab & others vs. Devans Modern Breweries Ltd. & others²⁵**). The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. (**State of Gujarat and others vs. Raman Lal Keshav Lal Soni & others²⁶; Pinki Devi vs. State of Uttarakhand & others²⁷**). The law does not remain static. It does not operate in a vacuum. As social norms and values change, laws too have to be reinterpreted, and recast. (**B.P. Achala Anand vs. S. Appi Reddy & others²⁸**). Law is a dynamic science, the social utility of which consists in its willingness to re-adjust its postulates in order to accommodate

emerging trends. (**Deena @Deen Dayal & others vs. Union of India & others**²⁹). As new situations arise, the law must evolve to meet the challenge of such new situations. (**M.C. Mehta & another vs. Union of India & others**³⁰). The need to evolve notwithstanding, seldom do laws make provision in anticipation of emerging challenges, and more often than not, come up with solutions (not always satisfactory) long after the event.

39. It is also true that all possible legal measures, to impart justice, should be utilized. (**Roshan Deen vs. Preeti Lal**³¹). The judiciary cannot cling to age-old notions of any underlying philosophy behind interpretation, and must move with the times. When the nature of things change, law must change too. (**Davies vs. Powell**³²). Law does not stand still; it moves continuously. A judge must consciously seek to mould the law so as to serve the needs of the time. (**B.P. Achala Anand**²⁸; **Pinki Devi**²⁷). The question is how far can the Courts go to do so? Whether the High Court can direct the State Legislature to make such laws or the State Government to make such Rules or whether it can, in the absence of a statutory legal framework on these aspects, issue guidelines/instructions till the Legislature or the Rule making authority step in?

40. The powers of judicial review, conferred on the High Court, are wide in scope. The High Courts are authorised under Article 226 of the Constitution, to issue directions, orders or writs to any person or authority, including any Government. The right conferred by Article 226 can be exercised not only for the enforcement of fundamental rights, but “for any other purpose” as well i.e. for enforcement of any legal right conferred by a statute. (**Committee for Protection of Democratic Rights**¹⁸). Under the constitutional scheme, the Supreme Court and the High Courts are both courts of record. The High Court is not a court ‘subordinate’ to the Supreme Court. In a way the canvas of judicial powers vesting in the High Court is wider, in as much as it has jurisdiction to issue all prerogative writs conferred by Article 226 of the Constitution for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose. (**Committee for Protection of Democratic Rights**¹⁸; **Tirupati Balaji Developers (P) Ltd. vs. State of Bihar**³³). Article 226 of the Constitution

confers power on the High Court to issue “directions, orders or writs”. The so-called high prerogative writs come in only incidentally, the real power conferred is to issue "directions, orders or writs”. (**Aidal Singh & others vs. Karan Singh & others**³⁴). Article 226 of the Constitution enables the High Courts to mould the reliefs to meet the peculiar and extraordinary circumstances of the case. (**Committee for Protection of Democratic Rights**¹⁸; **Dwarka Nath vs. Income Tax Officer, Special Circle D-ward, Kanpur & another**³⁵).

41. The power conferred on the High Court, under Article 226 of the Constitution, is to advance justice and not to thwart it (**State of U.P. vs. District Judge, Unnao**³⁶; **Roshan Deen**³¹). Article 226 is designedly couched in comprehensive phraseology to enable the High Court to reach injustice wherever it is found. (**Jasbhai Motibhai Desai vs. Roshan Kumar, Haji Bashir Ahmed**³⁷; **Destruction of Public & Private Properties**¹²; **Comptroller and Auditor-General of India vs. K.S. Jagannathan**³⁸; **Dwarkanath vs. ITO, Kanpur**³⁹).

42. We cannot, however, ignore the fact that, under our Constitutional scheme, Parliament and the State Legislatures exercise sovereign power to enact laws, and no outside power or authority can issue a direction to enact a particular piece of legislation. (**State of J & K vs. A.R. Zakki**⁴⁰; **Suresh Seth vs. Commr., Indore Municipal Corporation**⁴¹; **Supreme Court Employees’ Welfare Association vs. Union of India**⁴²; **Mangalam Organics Ltd. vs. Union of India**⁴³; and **Dhananjay Verma**²⁰). The judiciary, one among the three branches of the State, is co-equal to the other two branches i.e. the executive and the legislature. Each has specified and enumerated constitutional powers. The judiciary is assigned the function of ensuring that executive actions accord with the law, and that laws and executive decisions accord with the Constitution. (**State of Himachal Pradesh and Ors. vs. Satpal Saini**⁴⁴; **Dhananjay Verma**²⁰). It is always appropriate for each of the organs to function within its domain. (**State of U.P. vs. M/s Mahindra and Mahindra Ltd.**⁴⁵; **vs. Subhash Chandra Jaiswal**²¹).

43. Exercise of power, whether by the legislature or by its delegate, is an exercise of legislative power. No court should issue a mandate to a legislature to enact a particular law. Similarly no court should direct a subordinate legislative body to enact or not to enact a law which it may be competent to enact. (**Supreme Court Employees' Welfare Association**⁴²; **A.R. Zakki**⁴⁰; **State of Andhra Pradesh vs. T. Gopalakrishna Murthi and Ors.**⁴⁶; **Subhash Chandra Jaiswal**²¹; **Mangalam Organics Ltd.**⁴³; **Narinder Chand Hem Raj vs. Lt. Governor, Administrator, Union Territory Himachal Pradesh**⁴⁷; **Dhananjay Verma**²⁰). While it has the power to strike down a law on the ground of want of authority, the High Court would not sit in appeal over the policy of the State Legislature in enacting a law. (**Rusom Cavasiee Cooper vs. Union of India**⁴⁸). Just as it would not direct a legislature to enact a particular law, (**Supreme Court Employees' Welfare Association**⁴²), the High Court, under Article 226 of the Constitution of India, would also not direct the Executive to exercise power by way of subordinate Legislation, pursuant to the power delegated by the Legislature to enact a law, in a particular manner. (**Indian Soaps and Toiletries Makers Association vs. Ozair Husain and Ors.**⁴⁹; **Dhananjay Verma**²⁰).

44. It is not within the domain of the Court to legislate. Courts interpret the law, and exercise jurisdiction to declare the law unconstitutional. (**Census Commissioner vs. R. Krishnamurthy**⁵⁰; **Mangalam Organics Ltd.**⁴²). The power to legislate has not been conferred on the Courts and, therefore, the Court would, ordinarily, not add words to a statute or read words into it which are not there. (**Union of India vs. Deoki Nandan Aggarwal**⁵¹; **Suresh Seth**⁴¹; **Subhash Chandra Jaiswal**²¹). A writ of Mandamus would not be issued to the Legislature to enact a particular law, or to the Rule making authority to make rules in a particular manner. (**Dhananjay Verma**²⁰).

45. Mr. Abhijay Negi, learned counsel for the petitioners, would rely on **Avtar Singh**¹³, to submit that the High Court can issue directions to the State Government to prevent corrupt electoral malpractices. In the said judgment, the Supreme Court, while observing that they were aware that

creation or abolition of post was a policy decision of the Government with which the Court usually does not interfere, held that, having regard to the devolution and decentralisation of power as well as the constitutional mandate engrafted in Articles 243 to 243-O, the appropriate authority should create the post of Block Development and Panchayat Officer which was the statutory obligation of the authority, so that the incumbent of the said post would discharge his statutory duties as engrafted in the Act and the Rules made thereunder.

46. As the Court can neither issue a mandamus to the Legislature to make a law or to the State Government to make rules, and it cannot indulge in any such exercise of law making itself, can it, as the Supreme Court has done in **Avatar Singh**¹³ and in several other cases, issue guidelines/instructions which would prevail till legislation-plenary or subordinate is made.

47. In **B.C. Chaturvedi**¹⁴, on which great stress has been placed on behalf of the petitioners, Justice B.L. Hansaria, in his concurring opinion, held that the mere fact that there is no provision parallel to Article 142 relating to the High Courts, can be no ground to think that the High Court has not to do complete justice; the power to do complete justice inheres in every court, not to speak of a Court of plenary jurisdiction like a High Court; however, this power is not as wide as the Supreme Court has under Article 142 of the Constitution.

48. We must, however, bear-in-mind that the Constitution has, by Article 142, empowered the Supreme Court to make such orders as may be necessary “for doing complete justice in any case or matter pending before it”, which authority the High Court does not enjoy. The jurisdiction of the High Court, in writ proceedings, is circumscribed by limitations which cannot be transgressed on the whim or subjective sense of justice varying from Judge to Judge. (**State of Punjab vs. Surinder Kumar**⁵²; **Chairman, Grid Corpn. of Orissa Ltd (Gridco) vs. Sukamani Das**⁵³). The power conferred on the High Court, under Article 226 of the Constitution of India, is not on par with the constitutional jurisdiction conferred upon the Supreme

Court under Article 142 of the Constitution of India. (**State of U.P. vs. Johri Mal**⁵⁴; **State of H.P. vs. A parent of a Student of Medical College**⁵⁵; and **Asif Hameed vs. State of J&K**⁵⁶). The power conferred under Article 226 of the Constitution is not akin to the power conferred under Article 142 of the Constitution. (**Johri Mal**⁵⁴; **Guruvayoor Devaswom Managing Committee vs. C.K. Rajan**⁵⁷). Exercise of the extraordinary jurisdiction, constitutionally conferred on the Supreme Court under Article 142(1) of the Constitution, can be of no guidance on the scope of Article 226. (**State of Haryana vs. Naresh Kumar Bali**⁵⁸; **State of H.P. vs. Mahendra Pal**⁵⁹). That the Supreme Court has, in several cases, issued guidelines/instructions, to prevail till the Legislature steps in, would not justify the High Court following suit, as the power conferred on the High Court, under Article 226 of the Constitution of India, cannot be equated to the power conferred on the Supreme Court, under Article 142 of the Constitution of India, to do complete justice.

49. We must also bear-in-mind that judicial review is not intended to create what is sometimes called judicial oligarchy, the aristocracy of the robe, covert legislation, or Judge-made law. The proper forum to fight for the wise use of the legislative authority is that of public opinion and the legislative assemblies. Such contest cannot be transferred to the judicial arena. While the primary duty of Judges is to uphold the Constitution and the laws without fear or favour, they must remember that the Constitution is meant not merely for people of their way of thinking but for people of fundamentally differing views, (**Kesavananda Bharati vs. State of Kerala**⁶⁰), and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to cloud our judgment. (**Mr. Justice Holmes, p.82-83 1931 Edn.; State of Madras vs. V.G. Row**⁶¹; **Kesavananda Bharati**⁶⁰).

50. The concept of a Judge being an individual possessing unlimited powers and authority, is but a delusion. (**Subrata Roy Sahara vs. Union of India**⁶²; **Subhash Chandra Jaiswal**²¹). Justice administered according to individual whim, desire, inclination and notion of justice would lead to confusion, disorder and chaos. (**Gurdev Kaur vs. Kaki**⁶³; **Subhash**

Chandra Jaiswal²¹). No Judge can believe that there are no barriers or fetters to the exercise of their powers. (**R. Krishnamurthy**⁵⁰; **Subhash Chandra Jaiswal**²¹). For the highest exercise of judicial duty is to subordinate one's private personal pulls and one's private views to the law of which we the Judges are the guardians—those impersonal convictions that make a society a civilised community, and not the victims of personal rule. (**R. Krishnamurthy**⁵⁰; **Subhash Chandra Jaiswal**²¹).

51. Judges should remember that there is a line, though thin, which separates adjudication from legislation. That line should not be crossed or erased. (**Vemareddy Kumaraswamy Reddy vs. State of A.P.**⁶⁴; **Subhash Chandra Jaiswal**²¹). The doctrine of judicial restraint restricts the power of the Court and does not permit the Court to ordinarily encroach into the legislative or executive domain. There is a broad separation of powers in the Constitution, and it would not be proper for one organ of the State to encroach into the domain of another. (**Aravali Golf Club vs. Chander Hass**⁶⁵; **State of A.P. vs. P. Laxmi Devi**⁶⁶; **Manoj Sharma vs. State**⁶⁷; **Subhash Chandra Jaiswal**²¹). The temptation to interfere notwithstanding, judicial restraint is in order, with a reminder that Courts are not the panacea for all ills in society. If the existing electoral laws do not measure up to existing realities, the lacuna in the law is for the legislature to fill, lest the impression is reinforced that its inaction is deliberate for the convenience of everyone. (**Gadakh Yashwantrao Kankarrao vs. Balasaheb Vikhe Patil**⁶⁸). As shall be elaborated later in this order, the farthest that Court can go is to request the Legislature/Rule making authority to consider the feasibility of making laws/Rules to provide measures to prevent occurrence of electoral malpractices, instead of waiting, till after the event, for the long drawn process of post-election correction to be undertaken.

III. POWER OF THE HIGH COURT TO ENFORCE POSITIVE DUTIES AND CREATE STRUCTURES:

52. Mr. Abhijay Negi, learned counsel for the petitioners, would refer to **Chapter 4, Human Rights Transformed by Professor Sandra Fredman** on the topic *Justiciability and the Role of Courts*, and to **Chapter 5, Human Rights Transformed by Professor Sandra Fredman** on the

topic *Restructuring the Courts: Public Interest Litigation in the Indian Courts*, to submit that, responding to the needs of positive duties litigation, Courts energize the political process; Courts can act as a catalyst for the democratic pressures which make incompetent governments act; the PIL procedure has infused constitutional litigation in India with a vitality which could not have been achieved without institutional innovations; PIL jurisdiction has also been a central component in the campaign against corruption; Courts have frequently enforced a range of positive duties, to create structures, modify institutions, facilitate self-help, or provide alternatives; Judges should intervene when the Executive fails, in the context of a highly malfunctioning State; and Courts have a role to play in ensuring that the voice of all is actually heard, not just in response to a question already framed but in the framing of the question itself.

53. On the other hand Mr. Paresh Tripathi, learned Chief Standing Counsel for the State of Uttarakhand, would submit that the contention regarding “dialogical review” is also of no help to the petitioner in as much as the 2016 Act has taken due care for action to be taken against candidates found involved in unfair electoral practices be it a bribe or undue influence; Professor Sandra Fredman, on whose article the petitioner has based his arguments, states that PIL is shaped as a dialectic between social activists and the Court: PIL, normally, is a litigation raised when the common public is unable to raise the grievance; in the case on hand the petitioner has not shown how the common man has suffered violation of any of his rights be it legal or fundamental, and he is unable to take appropriate remedies against the same; even if the present PIL is said to have a laudable object, yet the law as propounded by the Supreme Court, time and again, is that “even if an object is laudable the Courts should restrain itself from exercising the powers vested in the other two limbs i.e. the Legislature and the Executive”.

54. Mr. Sanjay Bhatt, learned Standing Counsel for the State Election Commission, would submit that the issue is not just legal, rather it has some social characteristics as well, for which social awareness is also required; the collective responsibility of every voter is "to elect the best and reject the worst"; this alone can curb corruption and ensure free and fair

elections in a democratic system; the Petitioner has espoused a noble cause to curb corruption in the election process; and the State Election Commission is committed to ensuring free and fair elections by exercising the powers given to it by the Constitution of India.

55. In Chapter 4 of her seminal work **“Human rights Transformed”**, on the topic **“Justiciability and the Role of Courts”**, Sandra Fredman opines that, in order to fashion a legitimate role for the Courts, it is necessary to find a way of enhancing rather than undermining democratic participation; participation can either take the form of bargaining on the basis of interests, or of deliberative democracy; deliberative democracy requires parties to come prepared to produce reasons for their opinions which can convince others, but also to be prepared to be convinced themselves; parties to the process can become aware of the extent to which they may have adapted their preferences to their limited circumstances, or have been influenced by powerful forces in society, and a wider range of perspectives may be opened up; and the aim of democracy is to increase the scope for deliberation.

56. On the objection that a courtroom, far from enhancing democratic participation, is an arena in which the elite are able to augment their already powerful position, Ms. Fredman opines that litigation is sufficiently expensive, protracted, and framed in mystifying language, to make it inaccessible to most people. Thus, to the extent that litigation permits the litigants to participate in the political process, it does so in a wholly unrepresentative manner, privileging those with the resources and energy to pursue their grievance. The current structure of many Courts makes this a real criticism. However, it is not a necessary feature of justifiability. If courts are going to be taken seriously as a deliberative fora, then accessibility and equality within the courtroom must be a priority. Legal aid, demystifying language, and a simpler and more accessible procedure and tone are all possible. It is only by giving an opportunity to those who cannot participate fully in the democratic process that litigation supplements democracy; not by giving a further platform to those already well represented in that process; and a major contribution of the Indian

Courts has been to demonstrate ways in which Courts can be opened up to the most disadvantaged in society.

57. In Chapter V, on the topic “**Restructuring the Courts: Public Interest Litigation in the Indian Courts**”, Ms. Fredman states that, while there are many who see the Supreme Court of India as energizing the political process, triggering action where apathy previously reigned, others consider that the Courts have encroached on executive power, leading to paralysis and a sapping of initiative; this controversy masks a more fundamental question, namely what function the Court should be serving; its achievements can only fairly be mapped against an underlying paradigm of what can and should be expected of it; ultimately, Courts cannot supplant either political activism or the legislative process; nor can Courts make good the failings of executive government, whether the latter are due to incompetence, lack of resources, or lack of political will; what Courts can do, however, is to act as a catalyst for the democratic pressures which ultimately make recalcitrant or incompetent governments act; a democratic role for the court entails enhancing accountability, facilitating deliberative democracy, and promoting equality; the ideal behind the PIL is to conduct the Courts as a vehicle for social conversation between co-equal citizens; and instead of interest-bargaining, where success depends on economic or political power, the judicial process requires decision-making based on a dynamic inter-play between the different perspectives brought together in the social conversation.

58. She adds that the notion of judicial conversation de-centres the judicial role itself, portraying litigation not as a transfer of hierarchical power to the Court, but as a trigger for democratic interaction between judges, government actors, and different social and political groups; groups without a voice in the political process are able to enter into the conversation and shape its outcome; this in turn highlights the role of social groups themselves in setting the litigation agenda, and, therefore, shaping the pattern of judicial intervention, not just in terms of the issues that come to Court, but also in terms of the perspectives through which the judicial conversation is filtered; the notion of judicial conversation also highlights

the need to achieve governmental cooperation; perhaps the most fundamental questions about the proper role of the Court, has been the question of proper separation of powers between executive and judiciary, which in turn triggers concerns about the nature of democracy; many of those active in the field tend to criticize the Court both when it takes too interventionist a line and when it refuses to intervene or fails to intervene effectively; the formula most often cited is that judges should intervene when government fails; in this context of a highly malfunctioning State, there are a wide range of situations in which judicial prompting does no more than require the government to act in ways it has already committed itself to, but which it has simply failed to honour; the agenda of PIL is shaped as a dialectic between social activists and Courts; the aim of PIL was always to prevent the Court from simply replicating the disparities in power and economic position in the wider society; to keep this ideal alive requires ongoing vigilance; the primary source of such vigilance must be social activism itself, rather than the top-down control of the court; a key issue is therefore the willingness and ability of social rights activists to bring social action petitions in the appropriate contexts, and to formulate the claim in such a way as to open up areas of conversation which the ordinary paths of 'legality' bypass and negate; however, the Court also has a role to play in ensuring that the voice of all is actually heard, not just in response to a question already framed but in the framing of the question itself.

59. Sandra Fredman suggests that the PIL jurisdiction should be tailored to achieve what it was intended for; a central aspect of this mission is to step in when government fails to act; at the same time, there is no reason to believe that Courts will always succeed where the government has failed; Courts cannot substitute for recalcitrant governments nor can they replace political activity; what Courts can do is to act as a catalyst for the democratic pressures which ultimately make recalcitrant governments act; at its most basic, the PIL procedure enables ordinary people to require governments to be accountable, that is, to come to Court and explain and justify their actions or inactivity; beyond that, the PIL procedure, with its open doors to all interested parties, facilitates genuine conversation,

requiring governments to listen and interact with civil society, and groups within civil society to listen and interact with each other; and, most importantly, it permits the conversation to take place on equal terms.

60. On whether the Court's involvement should end with the conversation, or should it go much further, Ms. Fredman opines that it is inevitable that there should be moments of closure in the conversation; the way in which closure is effected can open up new beginnings, but can also constitute a point of no return; the ideal would be for the Court to energize the political process, rather than paralyzing it by taking over its functions; positive duties should be primarily fulfilled by the initiative of the democratic process itself, with the Courts acting as facilitators rather than substitutes; the openness of PIL to many perspectives is also its strength, provided that in transcending the limitations of the bipolar adversarial process, PIL is used to facilitate deliberation in the place of interest bargaining; if it takes over too many executive functions, the ongoing supervisory jurisdiction of the Court can itself become rigid and inaccessible; energizing the political process requires the creation of structures which can themselves manage implementation, which are responsive to a range of interests, and which can deal with polycentric implications, with judicial supervision acting as a facilitator rather than a substitute; and this is a delicate tightrope to walk, but is nevertheless a goal to be aspired to.

61. In their article '**Constitutional Dialogue: An Overview**', (published in *Utrecht Law Review*) Anne Meuwese and Marnix Snel state that 'Constitutional dialogue' has rapidly become more important in the process of public decision-making ; the 'dialogue' does not need to be explicitly shaped as such; Courts or other constitutional actors do not need to acknowledge that they are engaged in a dialogue; in the case of Courts, for instance, they can implicitly invite other relevant actors to react by phrasing their judgments in a certain way; and instances of dialogue may be called 'constitutional' because of their aspiration to contribute to, implement or event shape the basic norms that govern the actions of public entities and their exercise of coercive power in particular.

62. On theorizing constitutional dialogue, the authors state that the concept of constitutional dialogue is most often referred to by scholars with regard to the proper role of the judiciary in relation to the executive and legislative branches of government; the classical statement by Bickel that ‘judicial review is a counter-majoritarian force in a legal system’ has led scholars to engage in a debate to either sustain or circumvent the majoritarian difficulty, using the concept of ‘constitutional dialogue’ in many cases; the core of constitutional dialogue between the judiciary and the legislature is that they engage in a conversation about constitutional meaning, in which both actors (should) listen in order to learn from each other’s perspectives, which can then lead to modifying their own views accordingly; by ‘institutional dialogue’ is meant that ‘courts and legislatures participate in a dialogue aimed at achieving a proper balance between constitutional principles and public policies and the existence of this dialogue constitutes a good reason for not conceiving of judicial review as democratically illegitimate’ and applies ‘anywhere legislatures are able to reverse, modify, avoid, or otherwise reply to judicial decisions nullifying legislation’; in this way, ‘dialogue’ represents the ‘middle way between judicial supremacy on the one hand, and legislative supremacy on the other’; as the legislature, helped by institutional mechanism, can modify judicial decisions regarding constitutional matters, the sharp edges are being removed from the ‘counter-majoritarian dilemma.’; while courts and legislatures share responsibility for respecting constitutional values, each has a distinct relationship to a constitutional conflict; this is not only because they are differently situated, but also because they each bring distinct and valuable perspectives to constitutional judgment given their different institutional characteristics and responsibilities; co-ordinate construction theories claim that courts and legislatures enter into the dialogue from their own distinct positions; theories of judicial principles are more court-focused, placing the dialogic qualities mainly on the side of the judiciary; both theories accommodate two different perspectives on the source and function of the dialogue; the first, ‘reactive’, perspective suggests that dialogue is generated as a result of the political branches checking principled court

interpretations in the event of judicial error; the other perspective, that can be characterized as geared towards ‘prevention’, focuses on how dialogue emerges through the legislative articulation of policy objectives when the legislature responds to judicial decisions; partnership theories subscribe to the latter perspective, hypothesizing that dialogue often begins with legislators when they initially consider whether legislation is consistent with written constitutional norms; it then continues in individual cases, where the deliberations of the legislature are conveyed through legal argument and where the deliberations of the court are revealed through its judgments. The dialogue subsequently returns to the legislature, which considers if and how to respond to the court’s decision. One starting point of partnership theories, and one in which they differ from co-ordinate construction theories and theories of judicial principle, is that they do not presume that courts are better able to resolve disagreement about the meaning of rights in a principled manner.

63. As noted hereinabove the views of Ms. Fredman are that accessibility and equality within the court-room should be a priority if Courts are to be taken seriously as a deliberative fora; only by giving those, who cannot participate fully in the democratic process, an opportunity can litigation supplement democracy; Courts can act as a catalyst for democratic pressures which ultimately makes governments act; Courts can enhance accountability, facilitate deliberative democracy, and thereby promote equality by using PIL as a vehicle for social conversation; the role of the judiciary is to trigger democratic interaction between judges, government actors, and different social and political groups; judicial conversation also highlights the need to achieve governmental cooperation; the agenda of PIL is shaped as a dialectic between social activists and Courts; the primary source of vigilance must be social activism itself, rather than top-down control from Courts; neither can the Courts substitute for recalcitrant Governments, nor can they replace political activity; and it can only act as a catalyst for democratic pressures which ultimately makes recalcitrant governments act. On providing a closure to the deliberative process, Ms. Fredman opines that the ideal for the Court would be to energize the political

process, rather than paralyzing it by taking over its functions, which requires creation of structures which can themselves manage implementations, which are responsive to a wide range of interests.

64. Anne Meuwese and Marnix Snel are of the view that Courts can invite other relevant actors; the core of constitutional dialogue between the Judiciary and the Legislature is that they engage in a conversation about constitutional meaning, in which both of them learn from each other's perspectives, which can lead to modifying their own views; Courts and Legislatures participate in a dialogue aimed at achieving the proper balance between constitutional principles and public policies; and, while Courts and Legislatures share responsibility for respecting constitutional values, each has a distinct relationship to a constitutional conflict.

65. While providing a forum to activists to espouse social causes, and other causes in larger public interest, and inviting responses from State actors would, undoubtedly, ignite a wide ranging debate, Courts must not, in the process, forget the limits beyond which they cannot carry these deliberations forward. While the temptation to intervene is no doubt strong, the judicial branch of the State must remember that it also, like the other organs of the State, derives its powers only from the Constitution, and cannot encroach or transgress upon the powers and duties entrusted, by the Constitution, on the Legislature or the Executive.

66. If Courts cannot indulge in the exercise of law making, or direct the legislature and the executive to do so, how should the elaborate judicial conversation, or the constitutional dialogue, we have had so far be given closure?

67. In **S. Subramaniam Balaji vs. State of T.N.**⁶⁹, the Supreme Court, considering that there was no enactment that directly governed the issue, directed the Election Commission to frame guidelines for the same. While holding that they were mindful that the Election Commission did not have the authority to regulate any act which is done before the announcement of the date of release of the election manifesto, the Supreme

Court held that, nevertheless, an exception can be made in this regard as the purpose of the election manifesto is directly associated with the election process. The Election Commission was directed to take up this task as early as possible. The Supreme Court also recorded the need for a separate legislation to be passed by the legislature in this regard for governing the political parties in our democratic society.

68. Again in **Public Interest Foundation vs. Union of India**⁷⁰, the issue that arose for consideration was whether disqualification for membership could be laid down by the Court beyond Articles 102(a) to (d) and the law made by Parliament under Article 102(e). The Supreme Court held that, if the alternative proposal put forth by the petitioners were to be accepted, it would tantamount to adding a new ground for disqualification which was beyond the pale of the judicial arm of the State; any attempt to the contrary will be a colourable exercise of judicial power; though criminalization in politics is a bitter manifest truth, which is a termite to the citadel of democracy, the Court cannot make the law; directions to the Election Commission, of the nature as sought in the case at hand, is not constitutionally permissible; and the judicial arm of the State being laden with the duty of being the final arbiter of the Constitution, and the protector of constitutional ethos, cannot usurp the power it does not have. The Supreme Court, however, recommended to Parliament to bring out a strong law making it mandatory for political parties to revoke membership of persons against whom charges are framed in heinous and grievous offences and not to set up such persons in elections, both for Parliament and the State Assemblies.

69. Considering the urgent need for electoral reforms, more particularly in matters which impede free and fair elections, and to prescribe preventive measures to prevent corrupt electoral practices in indirect elections to Panchayat Raj Institutions, we request both the State Legislature and the State Government, in terms of the law declared by the Supreme Court in **Public Interest Foundation**⁷⁰; and **S. Subramaniam Balaji**⁶⁹, and to examine the feasibility of enacting laws and making Rules on these aspects.

IV. CAN THE STATE ELECTION COMMISSION BE DIRECTED BY THE HIGH COURT TO CURB ELECTORAL MALPRACTICES WHICH HINDER FREE AND FAIR ELECTIONS?

70. Mr. Abhijay Negi, learned counsel for the petitioners, would submit that the State Election Commission's failure to curb electoral corruption warrants interference by this Court, and for mandatory directions/guidelines to be issued; Panchayati Raj Institutions derive their power from, and occupy a special place in, the Constitution; Constitutional values – Constitutional Institutions support each other; the State Election Commission's failure to curb corruption warrants interference of the Court to issue mandatory directions/guidelines; that the State Election Commission has failed to exercise its powers is evident from their own admission that they have received only two complaints, which have not been taken to their fruition; the Rules framed by the Commission are of the year 2003 which are incapable of combatting the present-day corrupt practices; and the State Election Commission has candidly stated, that Constitutional institutions support each other, and that the Commission is willing and eager to implement any directions that this Court may deem fit to issue. Learned counsel would rely on **Kishansing Tomar vs. Municipal Corporation of the City of Ahmedabad & others**⁷¹; and **AC Jose vs. Sivan Pillai**⁷².

71. On the other hand Mr. Paresh Tripathi, learned Chief Standing Counsel for the State of Uttarakhand, would submit that the State Election Commission has filed an affidavit bringing on record the guidelines issued by it with regards holding of Panchayat Elections, specifically with regards bribe, undue influence etc. by a candidate; and the said Notifications/guidelines/ directions of the Commission have not been subjected to challenge, by the petitioners, in the present writ proceedings.

72. Mr. Sanjay Bhatt, learned Standing Counsel for the State Election Commission, would submit that the State Election Commission has been conducting free and fair elections of the three tier Panchayats and local bodies; after creation of the State of Uttarakhand, elections to Panchayat institutions were held for the first time in the year 2003; in order to curb

corruption, and put a check on the massive use of money power, the Commission issued an order on 1st January 2003 while exercising its powers under Article 243K of the Constitution of India; this order dated 1st January 2003 required every candidate, contesting the election, to maintain an account of election expenses in a given performa, and the same is to be lodged before the designated officer within a period of 30 days after the declaration of result, failing which they will be declared ineligible to contest elections for the next 06 years; the three tier Panchayat elections were held in the State of Uttarakhand on three occasions i.e. in the years 2003, 2008 and 2014; in the last elections held in 2014, around 18,000 candidates contested, of which more than 2000 did not submit details of their election expenses, and consequently they were held ineligible to contest elections for the next 06 years; in addition, the Commission issues a model code of conduct during all elections, and every candidate, his agent and voter are bound to follow the same, failing which appropriate action is taken by them in accordance with law; only two incidents of corrupt practices were reported to the Commission for which prompt action was taken; the first incident relates to the election of the Adhaykash Zila Panchayat Champawat on 01.08.2014; a first information report was lodged on 30.08.2014 wherein one Mr. Khushal Singh Adhikari was shown as an accused, and the investigation is going on; Smt. Sushma Fartiyal, candidate for the post of Adhyakaha Zila Panchayat, Champawat, made a complaint vide her letter dated 05.08.2014; the Incharge, Panchsthani Chunawalaya, Champawat, vide letter No. 826 dated 07.08.2014, submitted his inquiry report to the effect that the said complaint was not found correct; another complaint was received from Shri Mukul Dhek through e-mail; a detailed report was submitted by the Panchsthani Chunawala vide letter No. 878 dated 29.08.2014, and by the District Magistrate/District Election Officer, Champawat vide letter No. 901 dated 15.09.2014, informing that elections were held peacefully, and the agents of both the candidates had also endorsed that free and fair elections were held; the second incident related to district Uttarkashi; Smt. Vimla Nautiyal, candidate for the post of Adhyaksha Zila Panchayat and Smt. Revati Devi, candidate for the post of Upadhyaksha Zila Panchayat made a complaint on 30.07.2014; the inquiry

officer opined that a prima facie case of influencing elections, and provoking religious sentiments had been made out; he suggested that an F.I.R. be lodged under Sections 171(C) and 171(F) I.P.C, and Section 123(ii) and (iii) of the Representation of Peoples Act, 1951; consequently an F.I.R. was registered against Smt. Jasoda Rana, and Shri Prakash Chandra Ramola on 02.08.2014 at the Police Station; no complaint was received with regards the three tier panchayat elections, held in the years 2003 and 2008, for the posts of Pramukh, Kshetra Panchayat and Adhyaksha, Zila Panchayat; there is no allegation or evidence in the Writ Petition that the State Election Commission did not or could not conduct free and fair elections; if any complaints of undue influence, corruption or otherwise comes to light, immediate action would be taken by the State Election Commission; and whenever any complaint of violation of any law, relating to the election, is reported to the State Election Commission the same is taken very seriously, and the violators are taken to task.

73. Democracy is government by the people. It is a continual participative operation, not a cataclysmic, periodic exercise. The little man, in his multitude, marking his vote at the poll does a social audit of his Panchayat plus the political choice of his proxy. Although the full flower of participative government rarely blossoms, the minimum credentials of popular government is an appeal to the people, after every term, for a renewal of confidence. So we have adult franchise and general elections as constitutional compulsions. 'The right of election is the very essence of the Constitution' (Junius). The heart of the Panchayati Raj system is free and fair elections, periodically held, based on adult franchise. (**Mohinder Singh Gill¹; Union of India vs. Assn. for Democratic Reforms⁷³**). In a democracy, the electoral process has a strategic role. (**Assn. for Democratic Reforms⁷³**).

74. "Democracy and free and fair election are inseparable twins. There is almost an inseverable umbilical cord joining them, the little man's ballot and not the bullet of those who want to capture power, is the heart beat of democracy. The path of the little man to the polling booth should be free and unhindered, and his freedom to elect a candidate of his choice is the

foundation of a free and fair election. [**Special Reference No. 1 of 2002, In re (Gujarat Assembly Election matter)**⁷⁴]. In a democracy, periodical elections are conducted for having efficient governance and for the benefit of citizens — voters (**Mohinder Singh Gill**¹; **Assn. for Democratic Reforms**⁷³), and the little-large Indian (voter) should not be hijacked from the course of free and fair elections. In a continual participative operation of periodical elections, the voter does a social audit of his candidate. (**Assn. for Democratic Reforms**⁷³).

75. The process of elections, to be truly meaningful, should be free and fair. For this purpose, it is necessary to ensure there is an independent and impartial body to oversee the process of elections, completely insulated from all kinds of extraneous pressures. (**A Critical Study of the Position of the Chief Election Commissioner in the Light of Cases Such as SS Dhanoa vs. Union Of India**⁷⁵ and **TN Seshan vs. Union Of India**⁷⁶ – **Ashwini Chawla**). On the floor of the Constituent Assembly Sir H.N. Kuzro said, “If the electoral machinery is defective or is not efficient or is worked by people whose integrity cannot be depended upon, democracy will be poisoned at the source (**Constituent Assembly Debates (New Delhi: Official Report), vol. VIII, June 16, 1949, at 923**)”. The Constituent Assembly chose to enact specific constitutional provisions with respect to elections. The Drafting Committee on Fundamental Rights prepared a report to the effect that the independence of elections, and avoidance of any executive interference, should be a fundamental right. As Dr. Ambedkar said, “Many people felt that if the elections were conducted under the auspices of an executive authority, which did not have sufficient power, that will certainly vitiate the process of free elections.” The House did not incorporate this as a fundamental right, but, without any dissent, decided that there should be an independent body called the “Election Commission” that should be free from all kinds of executive interference. A high degree of importance was placed, by the Constituent Assembly, on free and fair elections. (**A Critical Study of the Position of the Chief Election Commissioner in the Light of Cases Such as SS Dhanoa**⁷⁵ and **TN Seshan**⁷⁶ – **Ashwini Chawla**).

76. In the development of a genuine electoral administration what is required is an administrative machine, capable of conducting elections with impartiality and without confusion (T.E. Smith, *“Elections in Developing Countries: A Study of Electoral Procedures used in Tropical Africa, South-East Asia and the British Caribbean”*: (1960); **Role of Election Commission in Electoral Reforms – Neetu Gupta**). As shall be detailed hereinafter, the expression **“conduct of elections”**, in Article 243-K (1) of the Constitution, is of wide amplitude, and confers power on the State Election Commission to make all necessary provisions for conducting free and fair elections. (**Assn. for Democratic Reforms**⁷³).

77. Article 243-K, in Part IX of the Constitution, relates to Elections to the Panchayats and, under clause (1) thereof, the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor. Article 243-K vests the same powers in the State Election Commission as are vested in the Election Commission of India under Article 324. The words in the former provision are in *pari materia* with the latter. (**Kishansing Tomar**⁷¹). The words, **“superintendence, direction and control”** as well as **“conduct of elections”**, used both in Articles 243-K(1) and 324(1) are in the **“broadest of terms”**, and this is equally relevant in respect of the powers of the State Election Commission as well. (**Kishansing Tomar**⁷¹; **Special Reference No. 1 of 2002, In re**⁷⁴; and **Mohinder Singh Gill**¹). The words **“superintendence”**, **“direction”** and **“control”** are wide enough to include all powers necessary for the smooth conduct of elections. (**Kanhiya Lal Omar vs. R.K. Trivedi**⁷⁷).

78. Section 2(23), 2016 Act, defines **“State Election Commission”** to mean the State Election Commission referred to in Article 243-K of the Constitution of India. Section 2(27) defines **“State Election Commissioner”** to mean an officer of the State Government appointed, designated or nominated as such by the State Election Commission, in consultation with

the State Government. Section 59(1) of the 2016 Act stipulates that the conduct, superintendence, direction and control of elections to the office of Pramukh, Up-Pramukh and a Member shall be vested in the State Election Commission. Section 59(2) stipulates that, subject to the superintendence, direction and control of the State Election Commission, the State Election Commissioner shall supervise and perform all functions relating to the conduct of the elections of the Pramukh, the Up-Pramukh and Members. Section 59(3) provides that the State Government shall, in consultation with the State Election Commission, and by notification, appoint the date or dates for general election or by-election of the Pramukh, the Up-Pramukh and the Members of a Kshetra Panchayat. Section 59(4) stipulates that, for the above purposes, there shall be established a State Election Commission at the State level. Section 96(1) of the 2016 Act stipulates that the superintendence, direction and control of the conduct of elections to the office of Chairman, Vice chairman and a Member shall be vested in the State Election Commission. Section 96(2) provides that, subject to the superintendence, direction and control of the State Election Commission, the State Election Commissioner shall supervise and perform all functions relating to the conduct of the election of the Chairman, Vice chairman and Member of the Zila Panchayat. Section 96(3) stipulates that the State Government shall, in consultation with the State Election Commission and by notification, appoint the date or dates for general election or by-election of the Chairman, Vice-Chairman and Members of a Zila Panchayat. Section 96(4) stipulates that, for above purpose, there shall be established a State Election Commission at the State level. Section 131 (1) of the 2016 Act stipulates that, subject to the supervision and control of the State Election Commission, the District Magistrate shall supervise the conduct of all elections of Chairman and Vice-chairman and members of Panchayats in the district, and shall perform all functions related to it. While wide powers are conferred on the State Election Commission to conduct free and fair elections, the 2016 Act does not specifically prescribe measures to prevent the commission of such corrupt practices including bribery and undue influence during the course of elections.

79. The Election Commission is a creature of the Constitution. (**All Party Hill Leaders' Conference vs. Capt. W.A. Sangma**⁷⁸). The significance of the State Election Commission, which is a constitutional body, should be recognized. The directions of the Commission should be complied in the same manner in which the directions of the Election Commission of India are followed during the elections for Parliament and the State Legislatures. In the domain of elections to panchayats under Part IX, for the conduct of the elections to these bodies, the State Election Commission enjoys the same status as the Election Commission of India. (**Kishansing Tomar**⁷¹). The State Election Commissions are to function independent of the State Governments concerned, in the matter of their powers of superintendence, direction and control of all elections and the preparation of electoral rolls for, and the conduct of, all elections to panchayats. (**Kishansing Tomar**⁷¹; **Durga Das Basu : Commentary on the Constitution of India : 8th Edition**). In this direction, it is necessary for all the State Government to recognize the significance of the State Election Commission, which is a constitutional body, and they shall abide by the directions of the Commission. (**Durga Das Basu: Commentary on the Constitution of India : 8th Edition**). In the matter of conduct of elections, the State Government should render full assistance and cooperation to the State Election Commission and respect the latter's assessment of the needs in order to ensure that free and fair elections are conducted. (**Kishansing Tomar**⁷¹).

80. The constitutional scheme with regards holding of elections is clear. The Constitution has provided for the establishment of a high power body to be in charge of the elections to Panchayati Raj Institutions, called the State Election Commission. Article 243-K of the Constitution contains detailed provisions regarding the constitution of the Commission and its general powers. The powers of the State Election Commission, in respect of conduct of elections, is subject to the law made by Parliament or by the State Legislatures, provided the same do not encroach upon the plenary powers of the State Election Commission. (**Kishansing Tomar**⁷¹; **Special Reference No. 1 of 2002, In re**⁷⁴; **Mohinder Singh Gill**¹). Two limitations are laid on

the plenary character in the exercise of the power under Article 243-K. Firstly, when the State Legislature has made a valid law relating to or in connection with elections, the State Election Commission shall act in conformity with, and not in violation of, such provisions *but, where such a law is silent, Article 243-K is a reservoir of power to act for the avowed purpose of, not divorced from, pushing forward a free and fair election with expedition.* (**Mohinder Singh Gill¹; Assn. for Democratic Reforms⁷³**).

81. The State Election Commission, in the garb of passing orders for regulating the conduct of elections, cannot take upon itself a purely legislative activity which has been reserved under the scheme of the Constitution only to the State Legislatures. The Commission is not a third Chamber in the legislative process within the scheme of the Constitution. Merely being a creature of the Constitution will not give it plenary and absolute power to legislate as it likes without reference to the law enacted by the legislatures. (**A.C. Jose⁷²; Public Interest Foundation⁷⁰**). The Commission cannot conceive of certain concepts or ideas or, for that matter, think of a different dimension which would not fit into the legal framework. (**Shailesh Manubhai Parmar vs. Election Commission of India⁷⁹**).

82. When there is no legislation, or rule made under the said legislation, the Commission is free to pass any orders in respect of the conduct of elections. Where there is an Act, and express Rules are made thereunder, it is not open to the Commission to over-ride the Act or the Rules and pass orders in direct disobedience to the mandate contained in the Act or the Rules. In other words, the powers of the Commission are meant to supplement rather than supplant the law (both statute and Rules) in the matter of superintendence, direction and control as provided by Article 243-K. Where the Act or the Rules are silent, the Commission has no doubt plenary powers under Article 243-K to give any direction in respect of the conduct of election (**A.C. Jose⁷²**); and to act for the avowed purpose of pursuing the goal of a free and fair election. (**Kuldip Nayar vs. Union of India⁸⁰; Public Interest Foundation⁷⁰; Shailesh Manubhai Parmar⁷⁹**).

83. The Election Commissioner is a high dignitary whose independence, impartiality and fair mindedness are intended to be guaranteed by the Constitution. Since the Election Commissioner is, inter alia, charged with the solemn duty of conducting elections, he has to discharge manifold functions and powers in facilitating free and fair elections avowedly wedded to democratic principles. (**Capt. W.A. Sangma**⁷⁸). In order to ensure the independence and impartiality of the Commission, it is provided, in the proviso to Article 243-K(2), that the Election Commissioner shall not be removed from his office except in the like manner and on the like grounds as a Judge of the High Court, and his conditions of service shall not be varied to his disadvantage after his appointment. (**Kanhiya Lal Omar**⁷⁷). Proviso (b) to Article 217 of the Constitution stipulates that a High Court Judge may be removed from his office by the President in the manner provided in clause (4) of Article 124 for the removal of a Judge of the Supreme Court. Article 124(4) provides that a Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority, of not less than two-thirds of the members of that House present and voting, has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. Save impeachment by Parliament, the State Election Commissioner cannot be removed from his office before completion of his term.

84. Wide powers are conferred on the State Election Commission to ensure free and fair elections. Clause (3) of Article 243-K obligates the Governor of a State (i.e the State Government), whenever so requested by the State Election Commission, to make available such staff as may be necessary for the discharge of the functions conferred on the State Election Commission by clause (1). The State Election Commission is in charge of the whole conduct and supervision of elections which involves a plethora of details and a variety of activities, and starts off with the election notification. An administrative machinery to execute these enormous and diverse jobs is fabricated, creating offices, powers and duties, and delegation of functions.

(Mohinder Singh Gill¹; Public Interest Foundation⁷⁰). Section 131(2) of the 2016 Act provides that every local authority and the management of every educational institution, receiving grant-in-aid from the State Government in the district, shall, when so required by the District Magistrate, make available to him, or to any other officer appointed by the District Magistrate as Nirvachan Adhikari, Sahayak Nirvachan Adhikari, in accordance with the directions issued by the State Election Commission, such staff as may be necessary for the performance of any duties in connection with such elections. Section 131(3) stipulates that the State Election Commission may, likewise, require all or any of the local authorities and the managements of all or any of such institutions as aforesaid in the State to make available to any officer, referred to in Section 131(2), such staff as may be necessary for the performance of any duties in connection with such elections and they shall comply with every such requisition. Section 131(4) provides that, where any employee of any local authority or institution, referred to in Section 131(2) or (3), is appointed to perform any duty in connection with such elections, he shall be bound to perform such duty.

85. For its independent and effective functioning the State Election Commission, where it feels that it is not receiving the co-operation of the State Government concerned in discharging its constitutional obligation of holding elections to panchayats, may approach the High Courts for a writ of mandamus or such other appropriate writs directing the State Government concerned to provide all necessary co-operation and assistance to the State Election Commission to enable the latter to fulfill the constitutional mandate. **(Kishansingh Tomar⁷¹; Durga Das Basu : Commentary on the Constitution of India : 8th Edition)**.

86. The word “election” includes the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the process of choosing a candidate **(Assn. for Democratic Reforms⁷³)**, and the result of the election process. **(Kanhiya Lal Omar⁷⁷; Assn. for Democratic Reforms⁷³)**.

87. The State Election Commission is responsible for the maintenance of the rule of law, and should act bona fide. Fair play-in-action is the most important factor in elections. Fairness imports an obligation to see that no wrongdoer candidate benefits by his own wrong. (**Mohinder Singh Gill¹; Public Interest Foundation⁷⁰**).

88. Article 243-K of the Constitution of India operates in areas left unoccupied by legislation and the words ‘superintendence, direction and control’, as well as ‘conduct of all elections’, are in the broadest terms. *The silence of a statute has no exclusionary effect except where it flows from necessary implication.* Article 243-K vests a wide power and where some direct consequence on candidates emanates from its exercise, this functional obligation must be read. (**Mohinder Singh Gill¹; Assn. for Democratic Reforms⁷³**). Since the conduct of elections is vested under Article 243-K(1) in the State Election Commission, *Part IX of the Constitution took care to leave the scope for exercise of residuary power by the Commission, in its own right,* as a creature of the Constitution, in the infinite variety of situations that may emerge from time to time. Every contingency cannot be foreseen, or anticipated with precision. That is why there is no hedging in Article 243-K. The State Election Commission may be required to cope with some situations which may not be provided for in the enacted laws and the rules. (**Mohinder Singh Gill¹; Public Interest Foundation⁷⁰; Assn. for Democratic Reforms⁷³**).

89. While construing the expression ‘**superintendence, direction and control**’ in Article 243-K, one has to remember that every norm which lays down a rule of conduct cannot possibly be elevated to the position of legislation or delegated legislation. *There are some authorities or persons in certain grey areas who may be sources of rules of conduct and who at the same time cannot be equated to authorities or persons who can make law,* in the strict sense in which it is understood in jurisprudence. Any power granted by the Constitution for a specific purpose should be construed liberally so that the object for which the power is granted is effectively achieved. (**Kanhiya Lal Omar⁷⁷; Assn. for Democratic Reforms⁷³**). In the exercise of its powers under Article 243-K, the State Election Commission can

issue suitable directions to maintain the purity of the elections, and in particular to bring transparency in the election process. (**Common Cause (A Registered Society) vs. Union of India**⁸¹; **Assn. for Democratic Reforms**⁷³).

90. The expression ‘**Conduct of election**’ is wide enough to include in its sweep, the power to issue directions — in the process of the conduct of an election. (**Common Cause (A Registered Society)**⁸¹; **Assn. for Democratic Reforms**⁷³). By issuing necessary directions, the Commission can fill the vacuum till there is legislation on the subject. (**Assn. for Democratic Reforms**⁷³). The word “direction” used in Article 243-K(1) may mean an order issued to a particular individual or a precept which many may have to follow and it may be a specific or a general order, and such phrase should be construed liberally empowering the Election Commission to issue such orders. (**Kanhiya Lal Omar**⁷⁷; **Assn. for Democratic Reforms**⁷³).

91. The Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the State Election Commission. This responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances. (**Mohinder Singh Gill**¹; **Assn. for Democratic Reforms**⁷³; **Public Interest Foundation**⁷⁰). *The power of the Commission under Article 243-K of the Constitution is plenary in character.* (**Mohinder Singh Gill**¹; **A.C. Jose**⁷²; **Kanhiya Lal Omar**⁷⁷; **Assn. for Democratic Reforms**⁷³).

92. The State Election Commission had issued guidelines on 01.01.2003, (nearly seventeen years ago) and yet several allegations of horse-trading, use of money and muscle power continued in the subsequent Panchayati Raj Elections. In the exercise of its powers under Article 243-K(1), the State Election Commission, by its proceedings dated 16.07.2014, informed candidates, contesting for the offices of Chairman, Deputy Chairman and other District Panchayats posts, of the need to maintain daily details of the expenditure in the specified items required by the election

officer; and for declaration of their income tax pan number, and whether they are income tax assesseees or not. Their attention was also drawn to the provisions of Chapter IX-A of the Indian Penal Code regarding electoral offences. The voter was also informed of the need to be vigilant regarding his own safety, of the need to ensure compliance with the directions of the State Election Commission for free and fair elections, and to exercise his vote freely and impartially without fear, including the fear of being bullied. All stake-holders, including those contesting the elections and the electors, were informed that a model code of conduct was in force to ensure fairness of the election; candidates should not indulge in any act which are likely to hurt people on grounds of religion, community, caste or social class, or the possibility of creating tension; and resort to caste, community and religious sentiments, directly or indirectly, to secure votes was impermissible.

93. Criminalization of politics is the result of growing influence of money power during elections. (**Gadakh Yashwantrao Kankarrao vs. E.V. alias Balasaheb Vikhe Patil**⁶⁸; **Association for Democratic Reforms v. Union of India (UOI) and Ors**⁸²). In **Public Interest Foundation**⁷⁰, the Supreme Court observed that the society had a legitimate expectation to be governed by proper constitutional governance; the voters cry was for systematic sustenance of constitutionalism; and the country feels agonized when money and muscle power become the supreme power. In **Common Cause (A Registered Society)**⁸¹, it was contended that elections in the Country were fought with the help of money power which was gathered from black sources and, once elected to power, it becomes easy to collect tons of black money, which was used for retaining power, and for re-election; and this vicious circle had totally polluted the basic democracy in the country. The Supreme Court held that the purity of election was fundamental to democracy, and to maintain the purity of elections, and in particular to bring transparency in the process of election, the Election Commission can take action. (**Assn. for Democratic Reforms**⁷³).

94. Among the basic features of the Constitution are (i) the Supremacy of the Constitution; (ii) the Rule of law; (iii) Judicial review; (iv) the sovereign, democratic, republican structure; (v) the parliamentary system

of government; and (vi) the principle of free and fair elections (**J & K National Panthers Party vs. Union of India**⁸³; **14thEdn. Of Shorter Constitution of India by D.D. Basu**). The obligation to hold free and fair elections, which is a basic feature of the Constitution, cannot be negated or circumscribed even by a constitutional amendment, let alone by litigation – plenary or subordinate. The obligation to hold free and fair elections is entrusted by the Constitution on the Election Commission of India for elections to Parliament and the State Legislature, and on the State Election Commission for Panchayati Raj Elections. The jurisdiction of the High Court, under Article 226 of the Constitution of India, can always be invoked for the failure of the State Election Commission to discharge its constitutional obligations of holding free and fair elections.

95. On its jurisdiction being invoked, the High Court, exercising its jurisdiction under Article 226, has the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where a constitutional or a public authority has failed to discharge its constitutional obligations or to exercise the discretion conferred upon it. In such cases, the High Court can pass orders and give directions to compel the performance, in a proper and lawful manner, of the obligations or discretion conferred upon the constitutional or public authority, and in a proper case, in order to prevent injustice from resulting, the High Court may itself pass an order or give directions which the constitutional or public authority should have passed or given had it properly and lawfully exercised its discretion. (**K.S. Jagannathan**³⁸; **Destruction of Public & Private Properties**¹²).

96. Positive directions can be issued where there is a power coupled with a duty. (**Destruction of Public & Private Properties**¹²). There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. (**Destruction of Public & Private Properties**¹²; **Commr. of Police v. Gordhandas Bhanji**⁸⁴; **Julius**

vs. Lord Bishop of Oxford⁸⁵). If the circumstances of the case justify such directions, the High Court would be entitled in law to issue a writ of mandamus giving directions. (**Destruction of Public & Private Properties**¹²; **Hochtief Gammon vs. State of Orissa**⁸⁶).

97. The High Court has the power, by the prerogative writ of mandamus, to amend all errors which tend to the oppression of the subject or other misgovernment. Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, it is the duty of the High Court to be vigilant to apply it in every case to which it can be made applicable. (**Mayor of Rochester vs. R.**⁸⁷; **K.S. Jagannathan**³⁸; **R.V. Revising Barrister for the Borough of Hanley**⁸⁸; **Destruction of Public & Private Properties**¹²).

98. The purpose of an order of mandamus is to remedy defects of justice; and accordingly it will issue, to the end that justice may be done. (**Halsbury's Laws of England, 4th Edn., Vol. I, Para 89; Destruction of Public & Private Properties**¹²; **K.S. Jagannathan**³⁸). Where a discretion is conferred to promote the objects of Part-IX of the Constitution, by holding free and fair elections, if it appears that failure of the State Election Commission to exercise the discretion conferred on it by the Constitution and the laws, is to frustrate the said objects, the Court is entitled to interfere by an order of mandamus. (**Padfield vs. Minister of Agriculture, Fisheries and Food**⁸⁹; **Destruction of Public & Private Properties**¹²; **K.S. Jagannathan**³⁸). The High Court would, undoubtedly, have the power to issue directions to the State Election Commission to ensure that it discharges its constitutional obligations of holding free and fair elections.

99. The High Court would, however, refrain from issuing any directions which are either contrary to Part IX of the Constitution or to the 2016 Act and the Rules made thereunder. The High Court would also refrain from issuing any directions which may impede elections being held in time. In **Communist Party of India (Marxist) vs. State of West Bengal**⁹⁰, after the process of elections to Panchayats commenced in the State of West Bengal, a Division Bench of the Calcutta High Court issued

directions to the State Election Commission to accept nominations submitted in the electronic form. The names of those candidates were directed to be published in the list of candidates contesting the panchayat elections. Though it was conscious of the fact that the provisions of the Information Technology Act, 2000 did not apply to the West Bengal State Election Commission, which is a constitutional authority, the Division Bench of the Calcutta High Court nonetheless held that the provisions of the Information Technology Act, 2000 shall be deemed to be read into the provisions of the West Bengal Elections Act, 2003 (for short the “2003 Act”), as such a construction would further the democratic process and facilitate a fair and free election.

100. In the appeal preferred there-against the Supreme Court, in **Communist Party of India (Marxist) and Ors⁹**, held that the provisions contained in the 2003 Act and the rules constituted a complete code in regard to the conduct of the election, including in the matter of filing of nominations; neither the 2003 Act nor the Rules contemplated the filing of nominations in the electronic form; any reform of the electoral process, to permit the filing of nominations electronically, should be carried out by a legislative amendment; the High Court ought not to have issued a mandatory direction of this nature in the face of the specific provisions contained in the 2003 Act and the Rules; the discipline, which is mandated by the provisions of the Constitution and enforced by the enabling state law on the subject, must be maintained; any dispute in regard to the validity of the election should be espoused by adopting a remedy which is known to law, namely through an election petition; and it is at the trial of an election petition that factual disputes can be resolved on the basis of evidence.

101. As long as the directions are not contrary to the 2016 Act and the Rules, and does not impede elections being held on time, the High Court would be entitled, for just and valid reasons, to issue directions to the State Election Commission to effectively discharge its constitutional obligations of holding free and fair elections.

102. In **Association of Democratic Reforms vs. Union of India**⁸², the jurisdiction of the Delhi High Court was invoked by the petitioner seeking implementation of the recommendations in the 170th Law Commission Report, and to make necessary changes in Rule 4 of the Conduct of Elections Rules, 1961. The Law Commission had recommended debarring a candidate from contesting an election, if charges had been framed against him by a Court in respect of certain offences, and had emphasized on the necessity for a candidate, seeking to contest elections, to furnish details regarding criminal cases, if any, pending against him. It had also suggested that a true and correct statement of the assets owned by the candidate, his/her spouse and dependent relations should also be disclosed. The petitioner had also referred to the Vohra Committee report, and had contended that, despite the reports of the Law Commission and the Vohra Committee, successive Governments had failed to take any action and he had, therefore, filed the Writ Petition seeking implementation of the said reports, and for a direction to the Election Commission to make it mandatory for every candidate to provide information by amending Forms 2-A to 2-E prescribed under the Conduct of Elections Rules, 1961.

103. The Delhi High Court held that it was the function of Parliament to make necessary amendments in the Representation of the People Act, 1951 or the Elections Rules and, therefore, the Court could not pass any order, as prayed, for amending the Act or the Rules. The Delhi High Court, however, held that, for making a right choice, it was essential that the past of the candidate should not be kept in the dark as it was not in the interests of democracy and well being of the country. The Election Commission was directed to secure to voters the following information pertaining to each of the candidates contesting elections to Parliament and to the State Legislatures and the parties they represent: (1) whether the candidate is accused of any offence(s) punishable with imprisonment. If so, the details thereof; (2) assets possessed by a candidate, his or her spouse and dependent relations; (3) facts giving insight into the candidate's competence, capacity and suitability for acting as a parliamentarian or a legislator including details of his/her educational qualifications; (4) information which

the Election Commission considers necessary for judging the capacity and capability of the political party fielding the candidate for election to Parliament or the State Legislature.

104. This order of the Delhi High Court was challenged by the Union of India, by way of an appeal, to the Supreme Court in **Assn. for Democratic Reforms**⁷³. The questions which fell for consideration before the Supreme Court were: (1) whether the Election Commission was empowered to issue directions as ordered by the High Court? and (2) whether a voter — a citizen of this country — had the right to get relevant information, such as assets, qualification and involvement in offence for being educated and informed for judging the suitability of a candidate contesting election as MP or MLA?

105. It is in this context that the Supreme Court observed that it was not possible for the Court to give any directions for amending the Act or the statutory Rules; it was for Parliament to amend the Act and the Rules; no direction could be given, which would be contrary to the Act and the Rules; however, in case the Act or the Rules were silent on a particular subject, and the authority implementing the same had the constitutional or statutory power to implement it, the Court could, necessarily, issue directions or orders on the said subject to fill the vacuum or void till a suitable law was enacted; if there is no provision in the Act or the Rules, the High Court can issue directions to the Election Commission; the power of the Commission is plenary in character in exercise thereof; while making statutory provisions or rules, every contingency cannot be foreseen or anticipated with precision; the Commission can, therefore, deal with a situation, where the field is unoccupied, by issuing necessary orders; it had ample power to direct the Election Commission to fill the void, in the absence of suitable legislation covering the field; where there was inaction by the executive, for whatever reason, the judiciary must step in, in the exercise of its constitutional obligations to provide a solution till such time the legislature acts to perform its role by enacting proper legislation to cover the field; the adverse impact of lack of probity in public life leading to a high degree of corruption was manifold; if the field meant for the legislature and the executive is left

unoccupied detrimental to the public interest, the Supreme Court would have ample jurisdiction under Article 32 read with Articles 141 and 142 of the Constitution to issue necessary directions to the executive to subserve public interest; and, in this view of the matter, it cannot be said that the directions issued by the Delhi High Court were unjustified or beyond its jurisdiction.

106. As held by the Supreme Court, in **Association for Democratic Reforms**⁷³, in case the Act or the Rules are silent on a particular subject, and the implementing authority has the constitutional or statutory power to implement it, the Court can issue orders or directions; and if there is no provision in the Act or the Rules, the High Court can issue directions to the State Election Commission. While the 2016 Act contains provisions for a post-election correction of corrupt electoral practices, it contains no provision to prevent its occurrence. The State Election Commission has been conferred the power coupled with a duty, by Article 243-K(1) of the Constitution, to conduct free and fair elections. The High Court can, therefore, issue necessary directions to the State Election Commission to prevent the commission of corrupt electoral practices, and to ensure that free and fair elections are held.

107. The steps taken by the State Election Commission, during the 2014 elections, including the instructions it issued on 16.07.2014, do not appear to have had much impact, for while the State Election Commission states that they received only two complaints pursuant to which FIRs were registered, the newspaper clippings, enclosed along with the writ petition, show that several other events of electoral malpractices went unchecked. Even if a margin of exaggeration is conceded to newspaper reports, it does appear that several other events went unreported to the State Election Commission. Non-receipt of complaints by the State Election Commission may, possibly, be due to lack of public awareness of the duty of citizens to bring such electoral malpractices to the notice of the State Election Commission, or because such complaints were not forwarded to the State Election Commission by the electoral officers in the field. The consequence, of the failure of the State Election Commission to act with promptitude, is that it would embolden those, who had resorted to such practices earlier, to

repeat them in the succeeding elections secure in the belief that they would not be caught, and even if caught would go unpunished.

108. The 2003 guidelines, issued by the State Election Commission, need updation if newly emerging corrupt practices, including different forms of horse-trading, use of money and muscle power, are to be checked. Fresh guidelines may also be required to be made, and wide publicity given thereto, regarding the names and designation of the election officials to whom the general public should complain if corrupt electoral practices come to their notice; and what action the officials, to whom such complaints are addressed, should take. The candidates, contesting elections to the offices of Block Pramukh and Zila Adhyaksh, should be informed in writing that the State Election Commission has the power, in case it is satisfied that the election process is vitiated by electoral malpractices, to postpone the elections till it is able to ensure a free and fair elections, or to countermand the elections, and to hold elections afresh. Stringent action being taken by the State Election Commission, exercising its powers to the fullest extent, would undoubtedly act as a deterrent on candidates, contesting for the offices of Block Pramukh and Zila Adhyaksh, from indulging in such corrupt practices of horse-trading, and use of money and muscle power to garner votes for election to such offices.

109. Instead of expressing helplessness, and in waiting for complaints to be made to it, the State Election Commission should adopt a pro-active approach in discharging their constitutional obligation of holding free and fair elections, for the very creation and existence of the State Election Commission is only to ensure that the elections, to Panchayati Raj Institutions, are held in a free and fair manner, and that corrupt practices are curbed. If letters and newspapers reports can form the basis for the Superior Courts to entertain Writ Petitions, in the exercise of their Public Interest Litigation jurisdiction, there is no reason why newspaper reports should not be treated as complaints by the State Election Commission, and the allegations made therein promptly inquired into, and, if found true, for action to be taken forthwith to ensure that such corrupt practices are dealt with an iron hand, and are immediately nipped in the bud. Instead of waiting

for receipt of written complaints for it to act, the State Election Commission should treat information, from whatever be the source (including newspaper reports), as complaints which necessitate inquiry. If such information is found, on enquiry, not to be genuine, it goes without saying that no further action need be taken. If, on the other hand, the information is found to have some basis, then action should be taken forthwith to ensure free and fair elections at both the block and the district level Panchayat Raj institutions.

110. The remedy provided under the 2016 Act for a post-election correction, (by way of an election petition or by registering FIRs for electoral offences under the IPC), for the corrupt practices of horse-trading, muscle and money power etc, has, as past events show, not been much of a deterrence, for aspirants to the office of Block Pramukh and Zila Adhyaksh continue to indulge in such corrupt practices, secure in the belief that they would be able to drag on hearing of the Election Petition on one ground or the other till they complete their term of Office of five years, and thereby render the Election Petition, for a post-election correction of corrupt practices, infructuous.

111. Both under Part IX of the Constitution of India, and under the provisions of the 2016 Act, extensive powers have been conferred on the State Election Commission in the conduct of free and fair elections. All men and machinery involved in the election process, including the District Magistrates and the District Superintendents of Police, function under the overall control of the State Election Commission, for the discharge of their election duties till the entire election process is completed. Any complaint received by the District Magistrates, and the District Superintendents of Police, should not only be forwarded to the State Election Commission forthwith, but immediate action should also be taken at their end to enquire into the allegations made in the complaint; and, if the contents of the complaint are found to have some basis, for immediate action to be taken, including lodging an FIR against the accused under the Indian Penal Code, and submitting a report to the State Election Commission to enable it to decide whether the enquiry caused by the District Magistrates/District Superintendents of Police, and the contents of the report submitted by them,

warrant drastic action being taken to postpone the election process or even to cancel the elections itself.

112. The price of democracy (nay liberty itself) is not merely eternal vigilance, but perpetual and creative citizen's activity. (**Bhanumati**⁵). We find considerable force in the submission of Mr. Sanjay Bhatt, learned Standing Counsel for the State Election Commission, that greater social awareness can alone curb corruption, and ensure free and fair elections in a democratic system; and it is the collective responsibility of every voter to ensure that elections are held in a free and fair manner. The submission of the learned Standing Counsel that the petitioners, who invoked the Public Interest Litigation jurisdiction of this Court, did not choose to make a complaint to the State Election Commission in the previous elections, regarding such corrupt electoral practices, is not without merit, for it is the responsibility of each citizen, on their coming to know of such illegal acts, to bring such corrupt practices, to the notice of the District Magistrates, the District Electoral Officers, the Police establishment and the State Election Commission in writing.

113. Malpractices relating to foreign jaunts, or paid holidays to voters, both within the State and elsewhere in the country, can be easily curbed by the State Election Commission asking the candidates to forthwith furnish information regarding the source of funds for their travel to, and stay in, such exotic locations. As travelling abroad would require an endorsement on the passport, any complaint, regarding foreign travel of BDC members and Zila Panchayat members, can be easily verified from their passports. Travel by these members to holiday resorts/destinations, within the country or to Nepal, can be ascertained with a little more effort.

114. Wide and untrammelled powers are conferred on the State Election Commission to ensure free and fair elections. The primary duty of the State Election Commission is to ensure purity of election. It can interfere with the election process, if found manipulated. It has the power to cancel the election. In such cases, it is not necessary to direct the aggrieved party to file an election petition. (**Padma vs. State Election Commission**⁹¹;

Durga Das Basu : Commentary on the Constitution of India : 8th Edition). In discharging its constitutional obligations of holding free and fair elections, the State Election Commission has the power, if the circumstances so warrant and if it is satisfied that the election process is vitiated by corrupt practices, including hijacking of votes, use of money power to buy votes; and use of muscle power to threaten or coerce voters to vote in favour of a particular candidate, to postpone an election, or countermand it before declaration of the results.

115. If conditions, for the conduct of free and fair elections, are not conducive due to breakdown of law and order, or such other factors, that, in the opinion of the appropriate authorities, prevent the voters from choosing their candidates in a fair manner, the State Election Commission may postpone elections, but only for a reasonable period of time. In **Mohinder Singh Gill**¹, the Commission cancelled the poll in the entire constituency on receipt of a report from the Returning Officer that there had been large scale disturbances. The Supreme Court held that, if a general situation arises whereby serious mal-practices have affected the purity of the electoral process, power cannot be denied to the Election Commission to take an appropriate decision.

116. While we find considerable force in the suggestions, put forth by Mr. Abhijay Negi, learned counsel for the petitioners, that reduction of the window-period, from the date of declaration of results of the BDC Members or members of the Zila Panchayat, till the date of election to the office of the Block Pramukh and Chairman, Zila Panchayats, only to a period of 7-10 days (as in the State of Himachal Pradesh) may act as an impediment to horse-trading, we refrain from issuing a mandamus to the State Election Commission to do so, conscious as we are that it may amount to the Court interfering with the election process, the conduct and control of which has been entrusted by the Constitution to the State Election Commission alone. Suffice it, therefore, to direct the State Election Commission to consider the various suggestions made on behalf of the petitioners (which have been noted earlier in this order), including the suggestion that the time-gap, between the declaration of results in the direct

elections, and the date of election to the offices of Block Pramukh and Zila Adhyaksh, be reduced to the barest minimum to rid the election process of this plague of horse-trading, and blatant use of money and muscle-power to lure/browbeat voters, thereby making a mockery of holding a free and fair election.

SUMMARY:

117. Our opinion, as elaborately detailed hereinabove, and the directions we have issued to the State Election Commission and to the officials working under its control, are summarized as under:-

(1) Among the basic features of the Constitution is the principle of free and fair elections. The obligation to hold free and fair elections for Panchayati Raj Institutions is entrusted, by the Constitution, to the State Election Commission.

(2) The purity of elections is fundamental to democracy, and the State Election Commission can and should take action to maintain its purity, and in particular to bring transparency in the process of elections.

(3) The jurisdiction of the High Court, under Article 226 of the Constitution of India, can be invoked in cases where the State Election Commission fails to discharge its constitutional obligation to hold free and fair elections.

(4) The High Court has the power to issue necessary directions, in cases where a constitutional or a public authority fails to discharge its constitutional obligations, of holding free and fair elections, or to exercise the discretion conferred upon it under the Constitution and the laws.

(5) The High Court has the power, by the prerogative writ of mandamus, to amend all errors which tend to the oppression of the subject or other mis-governance.

(6) The High Court cannot, however, give any direction to the State Election Commission contrary to Part IX of the Constitution, or the 2016 Act and the Rules made thereunder.

(7) Besides directions, which are contrary to Part-IX of the Constitution or the 2016 Act or the Rules made thereunder, the High

Court would also refrain from issuing any directions to the State Election Commission which may impede elections being held within time.

(8) However, in areas where the 2016 Act and the Rules are silent, the High Court can issue directions to the State Election Commission to fill up the vacuum till a suitable legislation is made.

(9) Where the field is unoccupied, the State Election Commission has the power to issue necessary directions, and the High Court would have the power to direct the State Election Commission to fill the void, in the absence of suitable legislation covering the field.

(10) Where the State Election Commission fails to prevent electoral mal-practices which vitiate the process of free and fair elections, the High Court must, in the exercise of its constitutional powers under Article 226 of the Constitution, step in to ensure that the State Election Commission discharges its constitutional obligations of holding free and fair elections.

(11) As guidelines were issued nearly 17 years go on 01.01.2003, fresh guidelines may be required to be issued by the State Election Commission to check newly emerging corrupt practices, including different forms of horse-trading, use of money and muscle power etc.

(12) Non-receipt of complaints, regarding corrupt electoral practises, by the State Election Commission is due to lack of public awareness of the duty of citizens to bring such electoral malpractices to its notice, or because such complaints are not forwarded to the State Election Commission by the electoral officers in the field.

(13) Necessary guidelines should be issued, and wide publicity given, regarding the names and designations of election officials to whom the general public may complain if corrupt electoral practices come to their notice.

(14) The State Election Commission should also consider framing guidelines regarding the nature of action the officials, to whom such complaints are addressed, should take.

(15) The State Election Commission should inform candidates, contesting elections to the offices of Block Pramukh and Zila

Adhyaksh, in writing of its power, in case it is satisfied that the election process is vitiated by electoral malpractices, to postpone the elections till it is able to ensure free and fair elections, or to countermand the elections, and to hold elections afresh.

(16) Stringent action being taken by the State Election Commission, exercising its powers to the fullest extent, would deter candidates, contesting for these offices, from indulging in such corrupt practices of horse-trading, and use of money and muscle power to garner votes for election to such offices.

(17) The State Election Commission should adopt a pro-active approach in discharging its constitutional obligations of ensuring a free and fair election, and to curb corrupt electoral practices.

(18) Instead of waiting for receipt of a written complaint for it to act, the State Election Commission should treat information, from whatever be the source (including newspaper reports), as complaints which necessitate further inquiry.

(19) If letters and newspapers reports can form the basis for Superior Courts to entertain Writ Petitions, there is no reason why newspaper reports should not be treated as complaints by the State Election Commission, and the allegations made therein promptly inquired into.

(20) If, on such inquiry, it is found that the complaints are true, the State Election Commission should take action forthwith to nip the corrupt electoral practices in the bud.

(21) All men and machinery involved in the election process, including the District Magistrates and the District Superintendents of Police, function under the overall control of the State Election Commission, for the discharge of their election duties, till the entire election process is completed.

(22) Any complaint received by the District Magistrates and the District Superintendents of Police should not only be forwarded to the State Election Commission forthwith, but immediate action should also be taken at their end to enquire into the allegations made in the complaints.

(23) If the allegations are found to have some basis, immediate action, including lodging an FIR against the accused under the IPC, should be taken, and a report should be submitted by them to the State Election Commission.

(24) On receipt of such a report, the State Election Commission should consider whether the contents of the report warrant drastic action being taken to postpone the election process, or even to cancel the elections itself.

(25) For such corrupt practices to be curbed, active involvement of the general public is essential. It is the responsibility of each citizen, on coming to know of such illegal acts, to bring such corrupt practices to the notice of the concerned District Magistrate, other District Electoral Officers, Police officers and the State Election Commission.

(26) Malpractices relating to foreign jaunts or paid holidays to voters, both within the State and elsewhere in the country, can be easily curbed by the State Election Commission asking the candidates to submit information regarding the source of funds for their travel to, and their stay in, such exotic locations.

(27) As travelling abroad would require an endorsement on the passport, any complaint, regarding foreign travel of BDC members and Zila Panchayat members, can be easily verified from their passports.

(28) Details of travel by these members to holiday resorts/destinations, within the country or to Nepal, can also be ascertained with a little more effort.

(29) The State Election Commission has the power to interfere with the election process if it is found to have been manipulated including, if need be, by cancellation of the election itself.

(30) If the conditions, for the conduct of free and fair elections, are not conducive because of breakdown of law and order, or such other factors, that, in the opinion of the District Magistrate and the State Election Commission, prevent the voters from choosing their candidates in a free and fair manner, the State Election Commission may postpone elections for a reasonable period.

(31) If a situation arises whereby serious mal-practices have affected the purity of the electoral process, the State Election Commission has the power to cancel the election itself.

(32) In case the State Election Commission fails to take action on their complaints, regarding electoral malpractices on the eve of elections, it is open to the complainant to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India.

(33) Suggestions made for ensuring free and fair elections, and to maintain the purity and sanctity of the election process, should be considered by the State Election Commission.

(34) The State Election Commission shall consider the suggestions put forth in these writ petitions, as noted earlier in this order, regarding reduction of the time gap between the declaration of results in direct elections, and the date of election to the offices of Block Pramukh and Zila Adhyaksh, to the barest minimum to rid the election process of this plague of horse-trading, and blatant use of money and muscle-power to lure/browbeat voters to submission.

CONCLUSION:

118. With the aforesaid observations and directions, both the Writ Petitions are disposed of. However, in the circumstances, without costs.

(Alok Kumar Verma, J.)
17.10.2019

(Ramesh Ranganathan, CJ.)
17.10.2019

NISHANT