REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO.631 OF 2017

Shailesh Manubhai Parmar ... Petitioner

Versus

Election Commission of India Through The Chief Election Commissioner & Ors. ... Respondents

J U D G M E N T

Dipak Misra, CJI.

In the instant writ petition preferred under Article 32 of the Constitution of India, the petitioner who is the Chief Whip of the Indian National Congress party in Gujarat Legislative Assembly challenges the circular dated 1st August, 2017 issued by the Secretary, Gujarat Legislature Secretariat, the Respondent No.3 herein, in relation to the conduct of elections for the Council of States. Though the circular covers various aspects, he has challenged the availability of the option "None of the Above" (NOTA).

2. It is asserted that the Election Commission of India had issued directions to the Chief Electoral Officers of all the States and the Union Territories (except Andaman & Nicobar Islands, Chandigarh, Dadra & Nagar Haveli, Daman & Diu and Lakshadweep) directing that the option of NOTA could be applicable for elections in the Rajya Sabha and the said option shall be printed on the ballot paper in the language or languages in which the ballot paper is printed as per the directions issued by the Election Commission in pursuance of sub-rule (1) of Rule 22 and sub-rule (1) of Rule 30 read with Rule 70 of the Conduct of Election Rules, 1961 (for short, 'the Rules'). Reference has been made to the communication dated 12th November, 2015 by the 1st respondent to the Chief Electoral Officers of all the States giving further directions regarding the manner of voting in preferential system but we are only concerned with the applicability of NOTA to the Rajya Sabha elections. It is contended in the petition that the circulars issued by the Election Commission of India introducing NOTA to the elections in respect of members of the Rajya Sabha are contrary to the mandate of Article 80(4) of the Constitution of India and the decision of this Court in ***People's Union for Civil Liberties and another v.***

Union of India and another (PUCL)[1]. It does not lend any support to the understanding of the Election Commission for introducing such an option in respect of Rajya Sabha elections. It is averred that Section 59 of the Representation of the People Act, 1951 (for brevity, 'the 1951 Act') provides for the manner of voting at elections and Section 169 empowers the Central Government, after consulting the Election Commission, to make rules for carrying out the purposes of this Act. Reference has been made to Part VI of the Rules which makes special provisions for voting at elections by Assembly members and Rule 70 provides that Rules 37(8) to 40A shall apply. Relying on the interpretation of the said Rules, it is urged that the scheme of the Rules referred to above and Rules 71 to 76 do not remotely conceive of NOTA but the same has been brought in by issuance of circular by the Election Commission and, hence, the same is unconstitutional.

3. A counter affidavit has been filed by the 1st respondent contending, *inter alia*, that the constitutional courts do not interdict in the election process and challenge can only be made after the election is over by filing an election petition before the

[1] (2013) 10 SCC 1

appropriate court; that as per the pronouncement in ***PUCL***'s case, there is no distinction between direct and indirect elections and, hence, the provision of NOTA in the ballot paper of the elections has been made applicable by the Election Commission to Rajya Sabha to effectuate the right of electors guaranteed to them under Section 79A of the Act; that though there is no need for secrecy in Rajya Sahba elections because the law makes it open voting, yet that does not take away the right of the elector not to vote by expressing the option of NOTA; that even assuming the position that the judgment in ***PUCL***'s case does not indicate that this Court ever intended to apply the option of NOTA to Rajya Sabha elections, yet the Election Commission has issued letter dated 24th January, 2014 and further reiterated by letter dated 12th November, 2015 that the option of NOTA would be applicable to elections in Rajya Sabha; and that elections had already been held by applying the said option and, therefore, there is no justification to challenge the said directions at a belated stage. Be it noted, the first two points were advanced as preliminary objections and all the other grounds raised pertained to the validity of the circular issued by the 1st respondent.

4. We may immediately note that the issue of introduction of an election process does not arise in the present case. As regards the issue of maintainability of the writ petition, no argument was advanced in that regard and, we have no hesitation to say, correctly so.

5. To understand and appreciate the controversy, it is imperative to scrutinize what has been envisaged under Article 80(4) of the Constitution. Article 80 deals with the composition of the Council of States. Article 80(4) reads as follows:-

> "(4) The representatives of each State in the Council of States shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote."

6. In ***Ananga Uday Singh Deo v. Ranga Nath Mishra and others***[2], a three-Judge Bench has dealt with the nature of election to the Council of States. It is useful to reproduce a few passages from the same:-

> "41. The system of proportional representation by single transferable vote comes into operation only if there is more than one candidate to be elected. The election is held by multi-member constituencies. All the candidates who compete for the seats allotted to a constituency have their names printed on

[2] (2002) 1 SCC 499

one ballot paper. Each elector has only one vote in the sense that it will be capable of electing one candidate only. But that vote will not be wasted in case the candidate whom he wishes to elect has got more than the required number of votes, called the "quota". The elector is required to indicate his multiple preferences by placing the figures 1, 2 and 3 in order of preferences. The surplus votes in the hands of the candidates declared elected are transferred to the then candidates."

x x x x

43. Rule 74 provides that the Returning Officer after rejecting the ballot papers which are invalid arrange the remaining ballot papers in parcels according to the first preference recorded for each candidate; count and record the number of papers in each parcel and the total number; and credit to each candidate the value of the papers in his parcel. Rule 76 provides for ascertainment of quota. It provides that at any election where more than one seat is to be filled, every valid ballot paper shall be deemed to be of the value of 100, and the quota sufficient to secure the return of a candidate at the election shall be determined by adding the value credited to all the candidates and then dividing the total by a number which exceeds by one the number of vacancies to be filled and then to add one to the quotient ignoring the remainder, if any, and the resulting number is the quota. In simple words it would work as under:

$$\frac{\text{Total Number of ballot papers} + 1}{\text{Number of members to be elected} + 1} = \text{Quota}$$

44. Rule 78 provides that if at the end of any count or at the end of the transfer of any parcel or sub-parcel of an excluded candidate

> the value of ballot papers credited to a candidate is equal to, or greater than the quota, that candidate shall be declared elected."

7. Presently, we may refer to Rules 79, 80 and 81 of the Rules which read as follows:-

> "79. *Transfer of surplus.*—(1) If at the end of any count the value of the ballot papers credited to a candidate is greater than the quota, the surplus shall be transferred, in accordance with the provisions of this Rule, to the continuing candidates indicated on the ballot papers of that candidate as being next in order of the elector's preference.
>
> (2) If more than one candidate have a surplus, the largest surplus shall be dealt with first and the others in order of magnitude:
>
> Provided that every surplus arising on the first count shall be dealt with before those arising on the second count and so on.
>
> (3) Where there are more surpluses than one to distribute and two or more surpluses are equal, regard shall be had to the original votes of each candidate and the candidate for whom most original votes are recorded shall have his surplus first distributed; and if the values of their original votes are equal, the returning officer shall decide by lot which candidate shall have his surplus first distributed.
>
> (4)(*a*) If the surplus of any candidate to be transferred arises from original votes only, the returning officer shall examine all the papers in the parcel belonging to that candidate,

divide the unexhausted papers into sub-parcels according to the next preferences recorded thereon and make a separate sub-parcel of the exhausted papers.

(*b*) He shall ascertain the value of the papers in each sub-parcel and of all the unexhausted papers.

(*c*) If the value of the unexhausted papers is equal to or less than the surplus, he shall transfer all the unexhausted papers at the value at which they were received by the candidate whose surplus is being transferred.

(*d*) If the value of the unexhausted papers is greater than the surplus, he shall transfer the sub-parcels of unexhausted papers and the value at which each paper shall be transferred shall be ascertained by dividing the surplus by the total number of unexhausted papers.

(5) If the surplus of any candidate to be transferred arises from transferred as well as original votes, the returning officer shall re-examine all the papers in the sub-parcel last transferred to the candidate, divide the unexhausted papers into sub-parcels according to the next preferences recorded thereon, and then deal with the sub-parcels in the same manner as is provided in the case of sub-parcels referred to in sub-rule (4).

(6) The papers transferred to each candidate shall be added in the form of a sub-parcel to the papers already belonging to such candidate.

(7) All papers in the parcel or sub-parcel of an elected candidate not transferred under this Rule shall be set apart as finally dealt with.

80. ***Exclusion of candidates lowest on the poll.—***(1) If after all surpluses have been transferred as hereinbefore provided, the number of candidates elected is less than the required number, the returning officer shall exclude from the poll the candidate lowest on the poll and shall distribute his unexhausted papers among the continuing candidates according to the next preferences recorded thereon; and any exhausted papers shall be set apart as finally dealt with.

(2) The papers containing original votes of an excluded candidate shall first be transferred, the transfer value of each paper being one hundred.

(3) The papers containing transferred votes of an excluded candidate shall then be transferred in the order of the transfers in which, and at the value at which, he obtained them.

(4) Each of such transfers shall be deemed to be a separate transfer but not a separate count.

(5) If, as a result of the transfer of papers, the value of votes obtained by a candidate is equal to or greater than the quota, the count then proceeding shall be completed but no further papers shall be transferred to him.

(6) The process directed by this Rule shall be repeated on the successive exclusions one after another of the candidates lowest on the poll until such vacancy is filled either by the election of a candidate with the quota or as hereinafter provided.

(7) If at any time it becomes necessary to exclude a candidate and two or more candidates have the same value of votes and are the lowest on the poll, regard shall be had to the original votes of each candidate and the candidate for whom fewest original votes are recorded shall be excluded; and if the values of their original votes are equal the candidates with the smallest value at the earliest count at which these candidates had unequal values shall be excluded.

(8) If two or more candidates are lowest on the poll and each has the same value of votes at all counts the returning officer shall decide by lot which candidate shall be excluded.

81. ***Filling the last vacancies.—***(1) When at the end of any count the number of continuing candidates is reduced to the number of vacancies remaining unfilled, the continuing candidates shall be declared elected.

(2) When at the end of any count only one vacancy remains unfilled and the value of the papers of some one candidate exceeds the total value of the papers of all the other continuing candidates together with any surplus not transferred, that candidate shall be declared elected.

(3) When at the end of any count only one vacancy remains unfilled and there are only two continuing candidates and each of them has the same value of votes and no surplus remains capable of transfer, the returning officer shall decide by lot which of them shall be excluded; and after excluding him in the manner aforesaid, declare the other candidate to be elected."

8. In ***Ananga Uday Singh Deo*** (supra), interpreting the said Rules, the Court held :-

> "46. Rule 79 comes into operation in case a candidate or more than one candidate has received more votes than the required quota. If at the end of any count the value of the ballot papers credited to a candidate is greater than the quota, the surplus shall be transferred in accordance with the provisions of this Rule, to the continuing candidates indicated on the ballot papers of that candidate as being next in order of the elector's preference. After working out the surplus votes in order of preference in favour of the remaining candidates, the surplus votes are transferred to the remaining candidates and added to the value of votes polled by that candidate. In this exercise if any candidate reaches the requisite quota, then he is declared elected.
>
> 47. If no candidate wins on transfer of the surplus votes obtained by him from the surplus of votes from the candidate who is already declared elected, then the provision of exclusion of candidates lowest on polled votes as provided under Rule 80 comes into operation. The Returning Officer then excludes from the poll the candidate lowest on the poll and distributes his unexhausted ballot papers among the continuing candidates according to the next preference recorded thereon. The process is continued till the total number of vacancies is filled up."

From the aforesaid analysis by the Court, it is discernible that the vote of an elector has certain value and that there is transfer of surplus votes.

9. In ***PUCL***'s case, the constitutional validity of Rules 41(2), 41(3) and 49-O of the Rules was challenged to the extent that the said Rules violate the secrecy of voting which is fundamental to the concept of free and fair election and is required to be maintained as per Section 128 of the 1951 Act and Rules 39 and 49-N of the Rules. The Court referred to the decision in ***Lily Thomas v. Speaker, Lok Sabha and others***[3] wherein it has been stated that voting is a formal expression of will or opinion by the person entitled to exercise the right on the subject or issue in question and that right to vote means the right to exercise the right in favour of or against the motion or resolution and such a right implies right to remain neutral as well. Thereafter, the Court referred to Section 79 of the 1951 Act and Rules 41(2), 41(3) and 49-O of the Rules and opined that the Rules make it clear that a right not to vote has been recognized both under the 1951 Act and the Rules. It further expressed:-

> "….A positive "right not to vote" is a part of expression of a voter in a parliamentary democracy and it has to be recognised and given effect to in the same manner as "right to vote". A voter may refrain from voting at an election for several reasons including the reason that he does not consider any of the candidates in the field worthy of his vote. One

[3] (1993) 4 SCC 234

> of the ways of such expression may be to abstain from voting, which is not an ideal option for a conscientious and responsible citizen. Thus, the only way by which it can be made effectual is by providing a button in the EVMs to express that right. This is the basic requirement if the lasting values in a healthy democracy have to be sustained, which the Election Commission has not only recognised but has also asserted."

10. The Court considered the stand of the Election Commission that in the larger interest of promoting democracy, a provision for NOTA should be made in the EVMs/ballot papers, for such an option, apart from promoting free and fair elections in a democracy, will provide an opportunity to the elector to express his dissent or disapproval against the contesting candidates and will have the benefit of reducing bogus voting. Eventually, the Court held that Rules 41(2) and 41(3) and Rule 49-O of the Rules are *ultra vires* Section 128 of the 1951 Act and Article 19 of the Constitution to the extent they violate secrecy of voting. However, the Court held:-

> "57. Giving right to a voter not to vote for any candidate while protecting his right of secrecy is extremely important in a democracy. Such an option gives the voter the right to express his disapproval with the kind of candidates that are being put up by the political parties. When the political parties will realise that a large number of people are expressing their disapproval with the candidates being put up

> by them, gradually there will be a systemic change and the political parties will be forced to accept the will of the people and field candidates who are known for their integrity.
>
> 58. The direction can also be supported by the fact that in the existing system a dissatisfied voter ordinarily does not turn up for voting which in turn provides a chance to unscrupulous elements to impersonate the dissatisfied voter and cast a vote, be it a negative one. Furthermore, a provision of negative voting would be in the interest of promoting democracy as it would send clear signals to political parties and their candidates as to what the electorate thinks about them."
>
> [Emphasis added]

11. On the basis of the aforesaid analysis, the Court directed the Election Commission to make necessary provision in the ballot papers/EVMs for another button called "None of the above (NOTA)" so that the voters, who come to the polling booth and decide not to vote for any of the candidates in the fray, are able to exercise their right not to vote while maintaining their right of secrecy.

12. In this context, understanding of the principle laid down in ***Kuldip Nayar and others v. Union of India and others***[4] in that regard is quite instructive. Interpreting the words

[4] (2006) 7 SCC 1

'representatives of the States" used in Articles 80(1)(b), 80(1)(2), 80(4), the Constitution Bench ruled:-

> "204. Upon being given their plain meaning, the words "representatives of the States" in Article 80(1)(b), Article 80(2) and Article 80(4) must be interpreted to connote persons who are elected to represent the State in the Council of States. It is the election that makes the person elected the "representative". In order to be eligible to be elected to the Council of States, a person need not be a representative of the State beforehand. It is only when he is elected to represent the State that he becomes a representative of the State. Those who are elected to represent the State by the electoral college, which for present purposes means the elected Members of the Legislative Assembly of the State, are necessarily the "representatives" of the State."

The aforesaid passage shows the nature of representation in the Council of States. It is clear as crystal that the nature of the representative is different, for he becomes a representative of the State. This is in contradistinction to an elected candidate who is elected by the voters in a direct election because he represents a constituency.

13. We may further note with profit that in the said case, the Court had adverted to secrecy of voting for the election of the Council of States. The Court noted that in the wake of "emerging trend of cross-voting in the Rajya Sabha and Legislative Council

elections", elections "by open ballot" were incorporated. The Court further noted that the cumulative effect of the amendments to Sections 59, 94 and 128 of the Act brought about by Act 40 of 2003 is that election for filling up of seats in the Council of States is to be held by open ballot and the requirements of maintenance of secrecy of voting is now made subject to an exception mentioned in the proviso. The Court adverted to the concept of free and fair elections and noted the contention that the disclosure of choice or any fear or compulsion or even a political pressure under a whip goes against the concept of free and fair elections and that immunity from such fear or compulsion can be ensured only if the election is held on the principle of secret ballot.

14. Adverting to various decisions, the larger Bench opined that the procedure by which an election has to be held should further the object of free and fair election and as the Parliament noted that in election to the Council of States, members elected on behalf of political parties misuse the secret ballot and cross-vote and there had been breach of discipline by political parties for collateral and corrupt considerations, it legislated to provide for an open ballot. The Court further observed that the principle of

secrecy is not an absolute principle though the said principle is meant to ensure free and fair elections. However, the higher principle is free and fair election and purity of election. The larger Bench further proceeded to state:-

> "464. The secrecy of ballot is a vital principle for ensuring free and fair elections. The higher principle, however, is free and fair elections and purity of elections. If secrecy becomes a source for corruption then sunlight and transparency have the capacity to remove it. We can only say that legislation pursuant to a legislative policy that transparency will eliminate the evil that has crept in would hopefully serve the larger object of free and fair elections."

15. We may presently refer to the notification issued by the Election Commission on 24.01.2014. After referring to the ***PUCL***'s judgment and the doubt expressed with regard to the applicability of the option of NOTA during elections of Rajya Sabha, the Commission has instructed thus:-

> "The Commission has dully considered the matter and it has been decided that the NOTA option will also be applicable for elections to Rajya Sabha. Accordingly, the Commission hereby directs that after the name and particulars of the last candidate on the ballot paper another panel may be provided and the words "None of the above (NOTA)" shall be printed therein in the language or languages in which the ballot paper is printed as per direction issued by the Commission in pursuance of Sub-Rule (1) of Rule 22 and Sub-

> Rule (1) of Rule 30, read with Rule 70 of the Conduct of Election Rules, 1961.
>
> 2. Please bring the above instructions to the notice of the Returning Officers for Conduct of Elections to the Council of States for compliance during the current biennial elections to Rajya Sabha already announced to fill up the vacancies to be caused in the month of April 2014 and all future elections to Rajya Sabha.
>
> 3. Necessary instruction with regard to marking of ballot paper for exercising the option of "None of the Above" and the counting of votes in view of the above option will be issued shortly."

16. A further circular has been issued on 12.11.2015 which lays down thus:-

> "2. It has been brought to the notice of the Commission that there have been some cases where electors, having marked Ist preference against one of the candidates put cross mark or mentioned subsequent preference (2nd, 3rd, etc.) against NOTA, which have led to rejection of the ballot paper. In the light of such cases, the Commission has considered the matter afresh and, with a view to ensuring the compliance of rule 73(2) of the CE Rules 1961 and adoption of a uniform approach towards the requirement of providing for NOTA option and the manner of voting in preferential system using single transferable vote, the Commission has given the following directions for exercising of NOTA option in elections to Rajya Sabha and State Legislative Councils:-

(i) Marking against NOTA shall be by way of writing figures 1, 2, 3, etc. as in the case of marking preference for candidates, i.e in international form of Indian numerals or in the Roman form or in any Indian language;

(ii) If preference '1' is marked against NOTA, it shall be treated as a case of not voting for any of the candidates and such ballot shall be treated as invalid, even if '1' is also marked against any other candidate in addition to being marked against NOTA;

(iii) If 1st preference is validly marked against one of the candidates, and 2nd preference is marked against NOTA, such ballot paper shall be treated as valid for the candidate for whom 1st preference has been marked, provided there is no other ground to invalidate it, under rule 73(2). In such case, at the stage of examining 2nd preference, the ballot paper shall be treated as exhausted as the 2nd preference is marked against NOTA. Similarly, if 1st and 2nd preferences are validly marked against a candidate each and 3rd preference is marked against NOTA, the ballot shall be valid for the first count and for the purposes of the 2nd preference, but, at the stage of examining the 3rd preference, if such stage comes, the ballot shall be treated as exhausted. These instructions shall apply for subsequent preferences also.

(iv) If 1st preference and subsequent preferences, if any, are validly marked against the candidates and cross/tick is marked against NOTA, the ballot paper shall not be rejected as invalid only on this ground, and the preferences marked against the candidates shall be considered and counted accordingly. However, the general provisions of the rules and the Commission's instructions regarding marks that may identify the voter shall apply in the case of the mark against NOTA option, and if the RO considers that the mark put

> therein reasonably points towards identification of the voter within the meaning of rule 73(2)(d), that would render the ballot liable to rejection on that ground."

17. In the instructions to the voters for casting vote in Rajya Sabha, it has been stated that:-

> "5. Out of the candidates shown in the Ballot Paper, if you do not want to elect any candidate, then in the column "Show your Order of Preference", against "NOTA" figure of "1" is required to be shown. In the column against "NOTA", instead of figure "1", alternative preference numbers 2, 3, 4 etc. can also be shown.
>
> 6. This figure of "1" can be put against the name of only one candidate or against "NOTA"."

18. The criticism advanced is that the circulars are not in accordance with the procedure envisaged under the 1951 Act and the Rules. Placing reliance on ***Ram Jawaya Kapur v. State of Punjab***[5] and ***Bishambhar Dayal Chandra Mohan and others v. State of Uttar Pradesh and others***[6], it is urged that it is beyond the power of the Election Commission, the first respondent herein, to introduce NOTA to the elections of the members to the Council of States. As we notice, the Election Commission has treated the pronouncement in ***PUCL***'s case as

[5] (1955) 2 SCR 225
[6] (1982) 1 SCC 39

its source of power. The decision in ***PUCL*** relates to direct elections. The Court, in fact, has clearly observed that the directions pertain to the Parliament and State Legislative Assemblies which is constituency based and grants an option to the voters to exercise the benefit of NOTA. In the said decision, emphasis has been laid on universal adult suffrage conferred on the citizens of India by the Constitution and the entitlement of a voter to come to the polling booth and decide to vote for any candidate or to exercise the right not to vote. There has been distinction between direct and indirect elections. In ***Kuldip Nayar*** (supra), the Constitution Bench has drawn the distinction by expressing thus:-

> "441. Voting at elections to the Council of States cannot be compared with a general election. In a general election, the electors have to vote in a secret manner without fear that their votes would be disclosed to anyone or would result in victimisation. There is no party affiliation and hence the choice is entirely with the voter. This is not the case when elections are held to the Council of States as the electors are elected Members of the Legislative Assemblies who in turn have party affiliations."

And again:-

> "454. The distinguishing feature between "constituency-based representation" and

> "proportional representation" in a representative democracy is that in the case of the list system of proportional representation, members are elected on party lines. *They are subject to party discipline. They are liable to be expelled for breach of discipline*. Therefore, to give effect to the concept of proportional representation, Parliament can suggest "open ballot". *In such a case, it cannot be said that "free and fair elections" would stand defeated by "open ballot". As stated above, in a constituency-based election it is the people who vote whereas in proportional representation it is the elector who votes*. This distinction is indicated also in the Australian judgment in *R.* v. *Jones*[7].In constituency-based representation, "secrecy" is the basis whereas in the case of proportional representation in a representative democracy the basis can be "open ballot" and it would not violate the concept of "free and fair elections", which concept is one of the pillars of democracy."

19. The aforesaid passages throw immense light on the distinction between direct and indirect elections and especially on the concept of indirect election which encompasses proportional representation. There is voting by open ballot and it has been so introduced to sustain the foundational values of party discipline and to avoid any kind of cross voting thereby ensuring purity in the election process. They have been treated as core values of democracy and fair election. It is worth to note that in a voting for members of the Council of States, the nature of voting by an

[7] (1972) 128 CLR 221

elector is a grave concern. It is because in such an election, there is a party whip and the elector is bound to obey the command of the party. The party discipline in this kind of election is of extreme significance, for that is the fulcrum of the existence of political parties. It is essential in a parliamentary democracy. The thought of cross voting and corruption is obnoxious in such a voting. In this context, we may refer with profit to the authority in ***Ravi S. Naik v. Union of India and others***[8]. In the said case, the question arose relating to the disqualification of a Member of the State Legislature under Article 191(2) read with the Tenth Schedule to the Constitution. The two-Judge Bench referred to the decision in ***Kihoto Hollohan v. Zachillhu and others***[9] and addressed the issue of defection covered under paragraphs 2(1)(a) and 2(1)(b) of the Tenth Schedule. Referring to the said paragraphs, the Court ruled:-

> "….The said paragraph provides for disqualification of a member of a House belonging to a political party "if he has voluntarily given up his membership of such political party". The words "voluntarily given up his membership" are not synonymous with "resignation" and have a wider connotation. A person may voluntarily give up his membership of a political party even though he

[8] 1994 Supp (2) SCC 641
[9] 1992 Supp (2) SCC 651

> has not tendered his resignation from the membership of that party. Even in the absence of a formal resignation from membership an inference can be drawn from the conduct of a member that he has voluntarily given up his membership of the political party to which he belongs."

20. Paragraphs 2(1)(a) and 2(1)(b) of the Tenth Schedule to the Constitution read as under:-

> "1) Subject to the provisions of paragraphs 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House—
>
> (a) if he has voluntarily given up his membership of such political party; or
>
> (b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorized by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention.
>
> *Explanation* – For the purposes of this sub-paragraph,-
>
> (a) an elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member;
> (b) a nominated member of a House shall,-
> (i) where he is a member of any political party on the date of his nomination as such

> member, be deemed to belong to such political party;
> (ii) in any other case, be deemed to belong to the political party of which he becomes, or, as the case may be, first becomes, a member before the expiry of six months from the date on which he takes his seat after complying with the requirements of article 99 or, as the case may be, article 188."

21. The appellants therein were disqualified by the Speaker of the House under the Goa Legislative Assembly (Disqualification on Grounds of Defection) Rules, 1986. Dealing with the aspect of disqualification, the Court ruled:-

> "A candidate voluntarily gives up his membership and inference can be drawn from his conduct that he has voluntarily given up the membership of the political party."

A distinction has been drawn between resignation and voluntarily giving up.

22. It is demonstrable that an elector can be disqualified if he voluntarily gives up his membership of the political party. It is submitted by Dr. Abhishek Manu Singhvi that an elector belonging to a particular party may not voluntarily give up the membership but can exercise his choice of NOTA despite his political party setting up a candidate. According to the learned senior counsel, this creates an anomalous situation and brings in horse trading, corruption and use of extra constitutional methods

which were sought to be avoided by the introduction of the Tenth Schedule in the Constitution by the Constitution (Fifty-Second Amendment) Act, 1985. It is necessary to mention here that the said amendment was introduced to eradicate the evil of political defection. The Statement of Objects and Reasons to the said amendment provides thus:-

> "The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of our democracy and the principles which sustain it. With this object, an assurance was given in the Address by the President to Parliament that the Government intended to introduce in the current session of Parliament an anti-defection Bill. This Bill is meant for outlawing defection and fulfilling the above assurance."

On a keen scrutiny of the Statement of Objects and Reasons and the concept of disqualification to rule out defection, it is clear that the same is indirectly defeated by the introduction of NOTA.

23. In a democracy, the purity of election is categorically imperative. The democratic body polity, as has been held in ***Manoj Narula v. Union of India*** [10] , stipulates that the quintessential idea of democracy is abhorrent to corruption and laws emphasize on prevalence of genuine orderliness, positive

[10] (2014) 9 SCC 1

propriety, dedicated discipline and sanguine sanctity by constant affirmance of constitutional morality which is the pillar stone of good governance. The purity of democracy does not withstand anything that has the potential to create an incurable chasm in the backbone of a democratic setup. The law is meant to eradicate the same. When one analyses the exercise of choice of NOTA in the voting process of the Council of States where open ballot is permissible and secrecy of voting has no room and further where the discipline of the political party/parties matters, it is clear that such choice will have a negative impact. An elector, though a single voter, has a quantified value of his vote and the surplus votes are transferable. There is existence of a formula for determining the value of the vote. The concept of vote being transferable has a different connotation. It further needs to be stated that a candidate after being elected becomes a representative of the State and does not represent a particular constituency. The cumulative effect of all these aspects clearly conveys that the introduction of NOTA to the election process for electing members of the Council of States will be an anathema to the fundamental criterion of democracy which is a basic feature of the Constitution. It can be stated without any fear of

contradiction that the provisions for introduction of NOTA as conceived by the Election Commission, the first respondent herein, on the basis of the ***PUCL*** judgment is absolutely erroneous, for the said judgment does not say so. We are disposed to think that the decision could not have also said so having regard to the constitutional provisions contained in Article 80 and the stipulations provided under the Tenth Schedule to the Constitution. The introduction of NOTA in such an election will not only run counter to the discipline that is expected from an elector under the Tenth Schedule to the Constitution but also be counterproductive to the basic grammar of the law of disqualification of a member on the ground of defection. It is a well settled principle that what cannot be done directly, cannot be done indirectly. To elaborate, if NOTA is allowed in the election of the members to the Council of States, the prohibited aspect of defection would indirectly usher in with immense vigour.

24. We may further add with profit that the purpose of introduction of NOTA in ***PUCL***'s case is that a provision for negative voting can send a clear message to the political parties and what a voter thinks about the candidates in the fray. Thus,

the said decision is directly relatable to a direct election, one man, one vote and one value.

25. In this context, we may usefully refer to Article 324 of the Constitution. It reads thus:-

> "324. Superintendence, direction and control of elections to be vested in an Election Commission
> (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission)
> (2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President
> (3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission
> (4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the

> functions conferred on the Commission by clause (1)
> (5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine; Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment: Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner
> (6) The President, or the Governor of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1)"

26. Interpreting the said Article, the Constitution Bench in ***Kuldip Nayar*** (supra) held:-

> "427. In this context, we would say that where the law on the subject is silent, Article 324 is a reservoir of power for the Election Commission to act for the avowed purpose of pursuing the goal of a free and fair election, and in this view it also assumes the role of an adviser. But the power to make law under Article 327 vests in Parliament, which is supreme and so, not bound by such advice. We would reject the argument by referring to what this Court has already said in Mohinder Singh Gill (1978) 1

> SCC 405 and what bears reiteration here is that the limitations on the exercise of "plenary character" of the Election Commission include one to the effect that "when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission, shall act in conformity with, not in violation of, such provisions"

From the aforesaid passage, it is quite clear that the Election Commission has to act within the four corners of law made by the Parliament. That apart, if any direction is issued by this Court interpreting a provision for furtherance of purity of election, it will be obligatory on the part of the Commission to act in accordance with the same. The Commission cannot be allowed to conceive of certain concepts or ideas or, for that matter, think of a different dimension which would not fit into the legal framework.

27. It can be said without a speck of doubt that the decision taken by the Election Commission as regards the introduction of NOTA in the election of the members to the Council of States also runs counter to what has been stated hereinabove. NOTA will destroy the concept of value of a vote and representation and encourage defection that shall open the doors for corruption which is a malignant disorder. It has to be remembered that

democracy garners its strength from the citizenry trust which is sustained only on the foundational pillars of purity, integrity, probity and rectitude and such stronghold can be maintained only by ensuring that the process of elections remains unsullied and unpolluted so that the citadel of democracy stands tall as an impregnable bulwark against unscrupulous forces. The introduction of NOTA in indirect elections may on a first glance tempt the intellect but on a keen scrutiny, it falls to the ground, for it completely ignores the role of an elector in such an election and fully destroys the democratic value. It may be stated with profit that the idea may look attractive but its practical application defeats the fairness ingrained in an indirect election. More so where the elector's vote has value and the value of the vote is transferrable. It is an abstraction which does not withstand the scrutiny of, to borrow an expression from Krishna Iyer, J., the "cosmos of concreteness". We may immediately add that the option of NOTA may serve as an elixir in direct elections but in respect of the election to the Council of States which is a different one as discussed above, it would not only undermine the purity of democracy but also serve the Satan of defection and corruption.

28. In view of the aforesaid analysis, the writ petition is allowed and the circulars issued by the Election Commission, the first respondent herein, introducing NOTA in respect of elections to the Council of States are hereby quashed. There shall be no order as to costs.

.....CJI.
(Dipak Misra)

.....J.
(A.M. Khanwilkar)

.....J.
(Dr. D.Y. Chandrachud)

NEW DELHI;
AUGUST 21, 2018