

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,  
BENCH AT AURANGABAD.

WRIT PETITION NO. 6389 OF 2006  
WITH  
WRIT PETITION NO. 7232 OF 2006  
WITH  
WRIT PETITION NO. 7267 OF 2006  
WITH  
WRIT PETITION NO. 7410 OF 2006  
WITH  
WRIT PETITION NO. 7517 OF 2006  
WITH  
WRIT PETITION NO. 7731 OF 2006

WRIT PETITION NO. 6389 OF 2006

Prashant Bansilal Bamb,  
age 35 years, occ business,  
r/o At post Lasur Station,  
Tq. Gangapur, Dist. Aurangabad.

PETITIONER

VERSUS

1. The State of Maharashtra  
through Rural Development Dept.  
Mantralaya, Mumbai.
2. The State Election Commission,  
New Administrative Building,  
First Floor, Opp. Mantralaya,  
Mumbai.
3. The Zilla Parishad, Aurangabad  
Through its Chief Executive Officer,  
Aurangabad.
4. The District Collector, Aurangabad.

RESPONDENTS

Shri P.M. Shah, Senior Counsel holding for Shri P.S.  
Shendurnikar, Advocate for the petitioner.  
Shri S.T. Shelke, Advocate for respondent no. 2.  
Shri D.R. Kale, Advocate for respondent no. 3.  
Shri N.B. Khandare, Government Pleader for the State.

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## WRIT PETITION NO. 7232 OF 2006

1. Vishnu Dadarao Pacharne PETITIONERS  
age 38 years, occ agril,  
r/o Panshendrat, Tq. & Dist. Jalna.
2. Uttamrao s/o Karbhari Wagh  
age 60 years, occ agril,  
r/o Gondegaon, Tq. & Dist. Jalna.

VERSUS

1. The State Election Commission RESPONDENTS  
through its Commissioner,  
New Administrative Building  
1st Floor, Opp. Mantralaya, Mumbai.
2. District Collector, Jalna.
3. Zilla Parishad, Jalna  
through its Chief Executive Officer.
4. Panchayat Samiti Jalna,  
through its Block Development Officer
5. The State of Maharashtra  
through Rural Development Department  
Mantralaya, Mumbai.

Shri S. V. Gangapurwala, Advocate for the  
petitioners.

Shri S.T. Shelke, Advocate for respondent no. 1.

Shri N.B. Khandare, Government Pleader for the State.

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## WRIT PETITION NO. 7267 OF 2006

- Gangadhar s/o Kadaji Wayal PETITIONER  
age 60 years, occ agril,  
r/o Pangri (Wayal), Tq. Mantha  
Dist. Jalna.

VERSUS

1. The State Election Commission RESPONDENTS  
through its Commissioner,  
New Administrative Building,  
1st floor, Mantralaya, Bombay.



age 32 years, occ social service,  
r/o Kaulkhed,  
Tq. Udgir, Dist. Latur.

VERSUS

1. The State Election Commission  
through its Commissioner,  
New Administrative Building,  
1st Floor, Opp. Mantralaya,  
Mumbai.
2. District Collector, Latur.
3. Zilla Parishad, Latur.
4. The State of Maharashtra,  
through its secretary,  
Rural development Department  
Mantralaya, Mumbai.

RESPONDENTS

Shri P.G. Rodge, Advocate for the petitioner.  
Shri S.T. Shelke, Advocate for respondent no. 1.  
Shri N.B. Khandare, Government Pleader for the State.

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WRIT PETITION NO. 7731 OF 2006

Sunil s/o Bhimrao Kanse  
age 29 years, occ agril,  
r/o at Diwate, Post Ladjalgaon,  
Tq. Shevgaon, Dist. Ahmednagar.

PETITIONER

VERSUS

1. The State Election Commission  
through its Commissioner,  
New Administrative Building  
1st floor, opp. Mantralaya,  
Mumbai 32.
2. The District Collector, Ahmednagar.
3. The Zilla Parishad, Ahmednagar.
4. The Panchayat Samiti, Shevgaon  
through its Block Development Officer,  
Dist. Ahmednagar.
5. The State of Maharashtra,  
through Rural development Department

RESPONDENTS

Mantralaya, Mumbai.

Shri Y.V. Kakade, Advocate for the petitioner.  
Shri S.T. Shelke, Advocate for respondent nos. 1 & 3.  
Shri N.B. Khandare, Government Pleader for the State.

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CORAM : NARESH H. PATIL AND  
R.M. BORDE, JJ.

DATE : 9TH FEBRUARY, 2007.

ORAL JUDGMENT (Per Naresh H Patil, J.):

1) Rule. Rule returnable forthwith. Respective respondents waive service of rule. The petitioners in this group of petitions in substance raise identical issue. Therefore, the petitions are heard together and are being decided by a common judgment and order.

2) The petitioners seek directions to respondents to follow rotation policy for the general elections to Panchayats in the State of Maharashtra to be held in the year 2007, in compliance with the Maharashtra Zilla Parishad and Panchayat Samitis (Manner and Rotation of Reservation of Seats) Rules, 1996.

3) The learned Senior Counsel states that the State Election Commission under its supervision held

elections to Panchayats for the first time in the year 1997 and thereafter in the year 2002. The election held in the year 1997 was conducted after the Rotation Rules of 1996 were notified i.e. on 30-10-1996. The State Election Commission ought to have rotated the seats for the next election which was held in the year 2002. In a proceeding of Writ Petition No.5386/2006, statement was made on behalf of State Election Commission on oath that the rotation policy will be followed in the next election. According to the learned senior counsel, substantial and vital time is lost by the Commission since after judgment and order passed by Division Bench of this Court in Writ Petition No.5386/2006 on 3-10-2006. The Special Leave Petition filed in the Supreme Court by the State Election Commission against the said judgment and order passed by the Division Bench of this Court was dismissed as withdrawn by an order dated 17-1-2007. The duration of the present Panchayats would expire on 20-3-2007. Therefore, in accordance with the constitutional mandate of Article 243-E, the State Election Commission shall hold election to constitute the Panchayat before expiry of its duration. The learned senior counsel further submitted that the State Election Commissioner's version that in view of the delimitation of divisions, rotation of seats in

accordance with the Rules of 1996 was not possible, is not acceptable. The learned counsel submits that the view adopted by the Commission is not correct. In view of the provisions of law, the Rules of 1996 and the constitutional mandate, State Election Commission is equipped with enough powers to hold elections by giving true meaning to the intention of the Legislature and the constitutional provisions framed in this direction. The learned counsel states that if the State Election Commission fails to rotate the seats this time, even in the next general election to the Panchayats, the Commission would not be in a position to rotate the seats. The Commission need not wait till suitable rules according to the view of the Commission are framed by the State of Maharashtra. The Commission shall make endeavour and effort to hold elections by harmoniously construing the rules and exercising its powers conferred under the Constitution.

4) Affidavits-in-reply were filed by the contesting respondent. The stand of the State Election Commission is that the State Election Commission had undertaken delimitation of constituencies as per provisions of section 12 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 (hereinafter referred to as the "Act of

1961"). According to the Commission, the final census figures were available with the Commission in the year 2003 and based on the same, delimitation of the electoral division was done by the Commission. The Commission finds difficulty in rotating the reservation of seats in accordance with the Rules of 1996. The Commission has treated the present election to be the first election after delimitation of the electoral divisions after census figures of 2001 were made available. According to the learned counsel Shri. Shelke appearing for the Commission, the reserved seats were not rotated but the reservation was provided considering this election to be the first election after carving out delimitation of electoral divisions. According to the learned counsel, the physical boundaries of many divisions and blocks have undergone changes in view of the fluctuation of the population. Therefore, it was not possible for the Commission to rotate the seats as compared to the reservation which was maintained in the last election held in the year 2002. In the view of the Commission, there was further difficulty in observing reservation in the scheduled areas. The election programme declared by the Election Commission earlier on 21-12-2006 came to be stayed by an order issued by the State Election Commission on 17-1-2007.



5) The learned Government Pleader Shri. Khandare, appearing for the State submitted that there is no impediment in the Rules of 1996 for holding elections by rotating seats. The mandate of the law ought to have been followed by the Commission in implementing the Rules of 1996 by providing rotation.

6) We have considered the submissions advanced by the respective counsel. We are informed that the term of the present Zilla Parishads in the State is to expire on 20-3-2007.

. Article 243-K (1) of the Constitution of India reads as under :-

**"243-K. Elections to the Panchayats:-** (1) 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-D of the Constitution of India refers to reservation of seats. Sub Article (3) :-

"243-D. Reservation of seats.--

(1) ....

(2) ....

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

Article 243-E speaks of duration of Panchayats thus:-

**243-E. Duration of Panchayats, etc.--** (1) Every Panchayat, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer.

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

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

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

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

7) The constitutional provisions make it clear that the election to the Panchayat is to be held before the expiry of its duration which in this case is coming to an

end on 20-3-2007.

8) On behalf of the State Election Commission, it was submitted that the Rule 4(1) and (2) of Rules of 1996 are not harmoniously drafted and there are impediments in its implementation, more particularly, in view of the delimitation of the division, based on the census figures of 2001. The physical boundaries of the divisions have undergone change due to fluctuation of population. Therefore, it would not be possible to maintain reservation of the electoral division in the descending order. The counsel submitted that it is not possible to even maintain reservation based on population ratio of the reserved class in relation to the electoral division.

9) We have perused these rules. We find that State Election Commission held first election under its supervision and control in the year 1997 and second election was held under its supervision in the year 2002. These elections were held after Rules of 1996 were framed and notified on 30-10-1996. In Writ Petition No.5385 of 2001 (Avinash Vs. Zilla Parishad) affidavit-in-reply was filed by Deputy Collector on behalf of the State Election Commission stating therein that the State Election Commission determined the strength of the Zilla Parishad, Aurangabad on the basis of population of 2001 census. As per the provisions of rule 4 of the Rules of 1996, the

seats were reserved for the Scheduled Castes and the Scheduled Tribes and, therefore, the question of rotation as contended by the petitioner did not arise. It was further averred that the rotation system will be implemented in the subsequent election.

10) The learned counsel for the Commission states that in the year 2002 census figures of the year 1990 were available and the delimitation of divisions was done on the basis of available census figures of 1990. Therefore, rotation of seats in accordance with the Rules of 1996 could not be followed.

11) Writ Petition No.5386 of 2006 (Uday Pawar vs. State Election Commission and others) was filed before this Court praying for issuance of appropriate writ for declaring that reservation of seats for the Scheduled Castes and the Scheduled Tribes and women prescribed by the State Election Commission in respect of 60 electoral divisions be quashed and set aside and the respondents therein be directed to prescribe reservation in accordance with the Rules of 1996. The writ petition came to be allowed by judgment and order dated 3-10-2006. In para 6 of the said judgment this Court observed:

"6. Admittedly, it seems that the rotation policy as is contemplated

under the relevant Rules has not been followed. The Rules are explicit in this behalf. It is no doubt true that because of the increase in the population that there would be increase in the number of seats and reservation is likely to overlap resulting in repetition of the reservation in respect of some posts. However, while doing so the authorities must apply their minds and ensure that the rule regarding rotation of reservation is followed both in letter as well as in spirit. Apparently this does not appear to have been done in the present matter."

The State Election Commission filed Special Leave Petition No.17539 of 2006 against the judgment and order passed by this Court in Writ Petition No.5386 of 2006. On 17-1-2007, the Apex Court passed following order:

"The learned counsel for the petitioner seeks permission to withdraw the Special Leave Petition. He submits that he would like to move High Court by way of a review petition. Permission sought for is granted. Accordingly, the Special Leave Petition is dismissed as withdrawn."

12) The learned counsel Shri. Shelke has informed this Court that review petition of the judgment and order passed by this Court in Writ Petition No.5386 of 2006 was filed along with condonation of delay application and the

Division Bench has issued notice on the said application and the next date in the said matter for hearing for condonation of delay application is stated to be 14-2-2007. The learned counsel for the Commission informs that the application for grant of interim relief was also filed along with review petition which is also pending.

13) From the constitutional scheme, we find that power of superintendence, direction and control of election to the Panchayat vests in the State Election Commission consisting of a State Election Commissioner. The Constitution contemplates a free and fair election and vests comprehensive responsibility of superintendence direction and control of the conduct of election in the Election Commission. This responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances.

14) While considering the scope and ambit of Article 324 of the Constitution of India, Apex Court in the case of **Mohinder Singh Gill Vs. Chief Election Commissioner** reported in (1978) 1 SCC 405 observed :

"It is true that Article 324 has to be read in the light of the constitutional scheme and the Representation of the People Acts of 1950 and 1951. The Article, however, 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."

It was further observed :

"Article 324, on the face of it, vests vast functions which may be powers or duties essentially administrative and marginally even adjudicative or legislative."

15) Provisions of Article 243-K are *pari materia* to those of Article 324 of the Constitution of India. Article 243-K operates in areas left unoccupied by the legislation. The words "superintendence, direction and control" are indicative of the broad sweep of the constitutional provisions. This is amplified by the expression "conduct of election" in respect where the Election Commission exercised superintendence and control.

16) Article 243-D stipulates that the seats shall be reserved for women, the Scheduled Castes and the Scheduled Tribes which may be allotted by rotation to different constituencies in Panchayats. In the case of *Mohinder Singh Gill* (supra) it was observed:

"Even so, situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it is that the

Constitution has made comprehensive provision in Article 324 to take care of surprise situations. That power itself has to be exercised, not mindlessly nor mala fide, nor arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation. More is not necessary to specify; less is insufficient to leave unsaid. Article 324, in our view, operates in areas left unoccupied by legislation and the words 'superintendence, direction and control, as well as 'conduct of all elections', are the broadest terms. Myriad maybes, too mystic to be precisely presaged, may call for prompt action to reach the goal of free and fair election."

"Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, 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 but where such law is silent Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from, pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice in so far as conformance to such canons can reasonably and realistically be required of it as fairplay-in-action in a most important area of the constitutional order, viz., elections."

17) It is contended by the learned counsel for the Commission that the provisions of sub rule (2) of rule 4



of the Reservation Rules of 1996 are directly in conflict with the constitution mandate. It is contended that the rotation rules do not take into consideration the population of the concerned reserved category and if the rules are to be followed in such circumstances, the aspect with respect to the density of population of reserved category in a particular area will have to be ignored which would be in conflict with the constitutional mandate spelt out from Article 243-D of the Constitution of India. It is further contended that there is repugnance between sub rule (2) of Rule 4 of the Reservation Rules of 1996 and Article 243-D and, as the constitutional mandate will have prevalence over the rules, according to the respondents, the rules will have to be ignored. At the first place, the argument advanced by the learned counsel for the respondents that the rules are in conflict with the constitutional mandate is misplaced. Article 243-D in terms provide for rotation of different constituencies in a Panchayat. The rules lay down procedure for prescribing the rotation. The policy of rotation prescribed under the Constitution which has been sought to be regulated by the rules cannot be said to be in conflict with the constitutional mandate. It will have to be emphasised that when the Parliament or the State Legislature enacts a law relating to or in connection with the election, the Commission, is required to act in conformity with the said provisions. In case, where the law is silent, the

Commission has ample powers to act for the avowed purpose for smooth functioning of elections. It would be apt to refer to the decision rendered by the Supreme Court in the matter of **A.C. Jose Vs. Sivan Pillai and others AIR 1984 SC 921**. In para 25 it is observed :

"To sum up, therefore, the legal and constitutional position as regards conduct of elections is as follows:

(a) when there is no Parliamentary legislation or rule made under the said legislation, the Commission is free to pass any orders in respect of the conduct of elections,

(b) where there is an Act and express Rules made thereunder, it is not open to the Commission to override 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 Art.324.

(c) where the Act or the Rules are silent, the Commission has no doubt plenary powers under Art.324 to give any direction in respect of the conduct of election."

18) While considering the powers of the Election Commission in respect of conduct of elections which has been sourced from Article 324 of the Constitution of India, the Supreme Court has observed in **AIR 2002 SC 2112 in Union of India v. Association for Democratic Reforms**

and another :

"Under Article 324, the superintendence, direction and control of the 'conduct of all elections' to Parliament and to the Legislature of every States vests in Election Commission. The phrase 'conduct of elections' is of wide amplitude which would include power to make all necessary provisions for conducting free and fair elections. Article 324 operates in areas left unoccupied by legislation and the words 'superintendence, direction and control' as well as 'conduct of all elections' are the broadest terms. The silence of statute has no exclusionary effect except where it flows from necessary implication. It is settled that the power of the Commission is plenary in character in exercise thereof. In a statutory provisions or rules, it is known that every contingency could not be foreseen or anticipated with precision, therefore, Commission can cope with situation where the field is unoccupied by issuing necessary orders."

"The jurisdiction of the Election Commission is wide enough to include all powers necessary for smooth conduct of elections and the word 'elections' is used in a wide sense to include the entire process of election which consists of several stages and embraces many steps. The limitation on plenary character of power is when the Parliament or State Legislature has made a valid law relating to or in connection with elections, the Commission is required to act in conformity with the said provisions. In case where law is silent, Article 324 is a reservoir of power to act for the avowed purpose of having free and fair elections. Constitution has taken care of

leaving scope for exercise of residuary power by the Commission in its own right as a creature of the Constitution in the infinite situations that may emerge from time to time in a large democracy, as every contingency could not be foreseen or anticipate by the enacted laws or the rules. By issuing necessary direction, Commission can fill the vacuum till there is legislation on the subject."

19) We, therefore, find that the State Election Commission would adopt suitable measures for giving effect to the constitutional provisions read with Rules of 1996 for following the rotation policy. In view of the fact that the duration of the Panchayats is coming to an end on 20-3-2007, the State Election Commission after considering the available rules and the provisions of law shall take effective steps in holding elections. The learned counsel for the State Election Commission submits that after delimitation of divisions on the basis of census figures of 2001, the present election would be the first election for observing the Rule of 1996. We do not accept this proposition. In the next election which would occur in the year 2012, the Election Commission would be equipped with the census figures of 2010-2011. To a question posed to the learned counsel as to whether the Commission would be in a position to rotate the seats in the next election?, the learned counsel for the Commission expressed inability of the Commission to rotate the seats,

in view of the stand which the Commission has taken now. In substance, the implementation of the Rules of 1996 would not be observed if the argument of the Commission is accepted. The non observance of Rules of rotation of seats not only violates the legislative mandate and expectations but would go contrary to the spirit of Article 243-D of the Constitution of India. Therefore, it would be obligatory on the part of the State Election Commission under its powers to devise suitable modalities by harmoniously considering the available provisions of law and rules to hold elections by rotating the seats. The State Election Commission must be aware of its statement made before this Court by filing affidavit in Writ Petition No.5385 of 2001 wherein it was contended that the rotation system will be implemented in the subsequent election. The State Election Commission shall devise suitable modalities under its powers to give true effect and meaning to the rotation policy as envisaged in the constitutional schemes and the Rules of 1996.

20) The Division Bench of this Court has disposed of Writ Petition No.5386 of 2006 on 3-10-2006. The State Election Commission preferred a special leave petition to the Supreme Court which was later on withdrawn on 17-1-2007 by the Commission while making a statement before the Apex Court that a review petition would be

filed in this Court in connection with the judgment and order passed by Division Bench of this Court in Writ Petition No.5386 of 2006. Thereafter, a review petition has been filed in this Court by the State Election Commission. In this process, substantial and vital time is lost during which the Election Commission could have taken effective steps in exercise of its powers conferred under Article 243-K for holding elections of the Panchayats in the State of Maharashtra. During the course of hearing of these petitions it was repeatedly contended by the counsel appearing for the Commission that the Commission requires suitable guidance and suggestions from this Court as to how to implement the Rules of 1996. At the same time, the Commission maintained its stand throughout in the pleadings and in the oral arguments that the Rules of 1996 cannot be implemented. We may only observe that the approach consistently maintained by the Commission in this regard is not approved by this Court.

21) Considering the constitutional provisions, the law and the Rules of 1996 framed in this regard, we are of the considered opinion that the State Election Commission shall, in exercise of its powers conferred by Article 243-K of the Constitution of India, take effective and meaningful steps in implementing the spirit of the constitutional and legal provision of rotation policy while reserving the seats in the ensuing Panchayat

elections in the State of Maharashtra.

22) For the reasons stated above, we allow these petitions in the terms and the directions and observations as made above. Rule is made absolute. No order as to costs.

23) Authentic copy duly signed by the Personal Assistant shall be supplied to the petitioners, the State Election Commission and the State of Maharashtra as per rules.

(R.M. BORDE, J.)

dyb/uniplex/title

(NARESH H. PATIL, J.)

Authenticated copy

( Mrs. D. Y. Bhogle )  
P.A. to Hon'ble Judge.