



**STATE ELECTION COMMISSION
MAHARASHTRA**

No. SEC 2018/NOTA/CR-10/Computerisation
New Administrative Building, 1st Floor,
Hutatma Rajguru Chowk, Madame Cama Road,
Mumbai 400 032.
Tel: 022-22023437 / 22026329
E-mail: sec.mh@gov.in
Website : www.mahasec.com
Date :-06/11/2018

Order

Whereas the superintendence, direction and control of conduct of elections to the Panchayats and the Municipalities in the State of Maharashtra are vested in the State Election Commission, Maharashtra in accordance with the provisions of Articles 243-K and 243-ZA of the Constitution of India.

2. And Whereas; following the judgement of the Hon'ble Supreme Court in the WP (Civil) no. 161/2004 in People's Union for Civil Liberties v/s Union of India dated 29/09/2013; the State Election Commission, Maharashtra **introduced NOTA (none of the above) option in the local body elections from November 2013** vide its order No.रानिआ-२०१३/प्र.क्र.११/का.१२, dated 12/11/2013, Clause 7 of which reads as follows,

‘निकाल जाहीर करताना None of the above वरीलपैकी एकही नाही या पर्यायासमोर नोंदविलेल्या मतांची संख्याविचारात न घेता ज्या उमेदवारास/ उमेदवारांना सर्वाधिक मते मिळाली असतील त्यांना विजयी उमेदवार म्हणून घोषित करण्यात यावे. म्हणजेच None of the above वरीलपैकी एकही नाही या पर्यायासमोर नोंदविलेल्या

मतांची संख्या सर्वाधिक मते मिळालेल्या उमेदवारांस मिळालेल्या मतांच्या संख्येपेक्षा जास्त असली तरी त्या उमेदवारास विजयी घोषित करण्यास प्रतिबंध राहणार नाही.'

3. And whereas, various political parties, research organisations, NGOs, thinkers etc have time and again brought to the notice of the State Election Commission since 2013 that, implementation of NOTA in the present format (as per clause 7 of the order dated 12.11.2013) has not given full effect to the above judgement of the Hon'ble Supreme Court dated 29.09.2013.

4. And Whereas, after getting the above feedback, State Election Commission has examined the following Judgement, Acts etc. in detail.

4.1 The above judgement of the Hon'ble Supreme Court in W.P. (Civil) 161 (2004) dated 29.09.2013.

4.2 All the Acts & Rules governing the elections to the local bodies in Maharashtra and

4.3 the principle that "a candidate who secures the highest number of valid votes polled should be declared as elected", and is followed in all the elections in India,

5. Hon'ble Supreme Court by its above judgement dated 29.09.2013 had wished that introduction of NOTA will improve the electoral process through-

- (a) increased voter participation,
- (b) compulsion on political parties to field good candidate; and
- (c) reflection of negative votes in election result.

5.1 Paragraphs 51, 52, 53, 54 & 55 of the above judgement are reproduced below for ready reference.

para 51 *'For democracy to survive, it is essential that the best available men should be chosen as people's representatives for proper governance of the country. This can be best achieved through men of high moral and ethical values, who win the elections on a positive vote.*

Thus in a vibrant democracy, the voter must be given an opportunity to choose none of the above (NOTA) button, which will indeed compel the political parties to nominate a sound candidate. This situation palpably tells us the dire need of negative voting'.

para 52 *No doubt, the right to vote is a statutory right but it is equally vital to recollect that this statutory right is the essence of democracy. Without this, democracy will fail to thrive. Therefore, even if the right to vote is statutory, the significance attached with the right is massive. Thus, it is necessary to keep in mind these facets while deciding the issue at hand.*

para 53 *'By providing NOTA button in the EVMs, it will accelerate the effective political participation in the present state of democratic system and the voters in fact will be empowered. We are of the considered view that in bringing out this right to cast negative vote at a time when electioneering is in full swing, it will foster the purity of the electoral process and also fulfil one of its objective, namely, wide participation of people'*

para 54 *Free and fair election is a basic structure of the Constitution and necessarily includes within its ambit the right of an elector to cast his vote without fear of reprisal, duress or coercion. Protection of elector's identity and affording secrecy is therefore integral to free and fair elections and an arbitrary distinction between the voter who casts his vote and the voter who does not cast his vote is violative of Article 14. Thus, secrecy is required to be maintained for both categories of persons.*

para 55 *'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 realize 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'.*

6. On examination of the above judgement, Acts etc. SECM finds that implementation of NOTA as per clause 7 of the Circular:

6.1 does not give effect to the judgement of the Hon'ble Supreme Court in W.P.161 (2004) dated 29.09.2013 since it -

- (i) has not led to increased voter participation,
- (ii) has not compelled Political Parties to field good candidates,
- (iii) does not reflect negative votes in election result and
- (iv) does not honour & respect the majority will / opinion of the people expressed through NOTA;

6.2 Violates the accepted principle by declaring a candidate as elected even though he/she has secured lesser votes than NOTA.

6.3 allows a candidate found unworthy by the majority voters to become their public representative;

6.4 Local Body Acts and Rules being silent on NOTA do not prohibit SEC from using plenary powers to fill this vacuous area. There is no provision of NOTA in any of the State Acts or rules made thereunder. They only provide that "the returning officer shall declare such candidate as elected who has secured largest number of votes".

7. And Whereas, after examining all the issues and facts, State Election Commission, Maharashtra feels that there is a strong case to - (i) consider NOTA as a "fictional electoral candidate", and (ii) amend the clause 7 of the order issued by it dated 12.11.2013 for giving effect to the judgement of Hon'ble Supreme Court in the true sense;

8. And Whereas, SECM has also examined the following orders of the Hon'ble Supreme Court :

8.1 Civil Appeal 3839 of 1982 Petitioner A. C. Jose v/s : Sivan Pillai & Others, dated 5/3/1984 where in Supreme Court has laid down rule about the plenary powers of the Election Commissions;

"To sum up, therefore, the legal and constitutional position 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, and*
- (d) where a particular direction by the Commission is submitted to the government for approval, as required by the Rules, it is not open to the Commission to go ahead with implementation of it at its own sweet will even if the approval of the Government is not given."*

8.2 Civil Appeal 7178 of 2001 Union of India v/s ADR and others, dated 2nd May, 2002, wherein Apex Court while clearly laying down *ratio decidendi* about the source and ambit of the power of the Election Commission, has observed that,

'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...'

'One has also to remember that the source of power in this case is the Constitution, the highest law of the land, which is the repository and source of all legal powers and 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.'

*'Thereafter, the Court observed that under Article 324, the **Commission can issue suitable directions to maintain the purity of election and in particular to bring transparency in the process of election.**'*

'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.'

'By issuing necessary directions, Commission can fill the vacuum till there is legislation on the subject.'

'The word "elections" 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.'

8.3 Appeal (Civil) 5756 of 2005 Petitioner Kishansing Tomar v/s Municipal Corporation of the City of Ahmadabad & Ors, dated 19/10/2006, wherein Supreme Court has observed that the State Election Commission has the same powers (including inherent plenary powers) like that of Election Commission of India in the domain of local body elections. It lays down that, *'In terms of Article 243K & 243ZA (1) the same powers are vested in the State Election Commission as the Election Commission of India*

under Article 324. The words in the former provisions are in pari materia with the latter provisions'.

8.4 Writ Petition (Civil) no. 784/2015 filed by Lok Prahari through its General Secretary S.N.Shukla v/s Union of India & Others, dated 16/02/2018, wherein Hon'ble Supreme Court has expressed deep concern about the undue accretion of assets by legislators in following words:

Para-22 '*...Various bodies such as the Law Commission of India and a Committee popularly known as the Vohra Committee constituted by the Government of India etc. pointed out various shortcomings in the working of the democracy and the need to address those concerns.'*

Para-30 '**UNDUE ACCRETION OF ASSETS of LEGISLATORS and their ASSOCIATES is certainly a matter which should alarm the citizens and voters of any truly democratic society.** Such phenomenon is a sure indicator of the beginning of a failing democracy. If left unattended it would inevitably lead to the destruction of democracy and pave the way for the rule of mafia. Democracies with higher levels of energy have already taken note of the problem and addressed it. Unfortunately, in our country, neither the Parliament nor the Election Commission of India paid any attention to the problem so far.'

Para 31. '*The increasing role of money power in elections is too well known and is one of the maladies which sometimes reduces the process of election into a mere farce by placing some privileged candidates with financial resources in a distinctly advantageous position as compared to other candidates. The result of such an election cannot reflect the true choice of the people. The system also sometimes deprives qualified and able persons of the prerogative to represent masses.'*

The Apex Court in this judgement has **expressed displeasure against the Parliament and Election Commission** for not paying attention to such problems. Thus there is a need to pay attention to all such

issues (including utility of NOTA) without any further delay so as to make elections pure, free, fair and transparent.

9. And Whereas, various political parties during the workshop on the subject of "Role of Political Parties towards Healthier Democracy" conducted by State Election Commission, Maharashtra (SECM) on 7th May 2018, expressed the opinion that NOTA should be treated as 'Fictional Electoral Candidate' and reelection should be held whenever NOTA gets highest votes as compared to other contesting candidates;

10. And Whereas, in view of above, State Election Commission has come to the conclusion that -

(i) implementation of NOTA in terms of circular issued by SECM on 12.11.2013 does not give effect to the judgement of Hon'ble Supreme Court dated 29.09.2013 fully in letter and spirit.

(ii) there is no provision in the local body Acts / Rules regarding NOTA and/or how to treat the votes polled by NOTA while declaring the results. Thus, there is a vacuous area.

(iii) SEC has the requisite authority to fill the above vacuous area by treating the NOTA as 'Fictitious Electoral Candidate' and amend the clause 7 of its circular dated 12.11.2013 in order to implement the judgement of Hon'ble Supreme Court in its true sense.

11. Now therefore, in exercise of the powers conferred by Articles 243-K and 243-ZA of the Constitution of India, read with provisions of sub-section (4) of section 18A of the Mumbai Municipal Corporation Act (Bom. III of 1888), sub - section (4) of section 14 of the Maharashtra Municipal Corporation Act, 1949, (Bom. LIX of 1949), sub-section (4) of section 10A of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act 1965; sub-section 4 of section 10A of the Maharashtra Village Panchayats Act 1958 (Bom. III of 1959), sub-section (4) of section 9A of the Maharashtra Zilla Parishads and Panchayat Samitis Act 1961 (Mah.

V of 1962) and of all other enabling powers of the State Election Commission in this behalf, clause - 7 of the Order dated 12/3/2013 passed by State Election Commission is hereby amended with immediate effect as below:

Order

12.1 (i) NOTA is to be treated as a **'Fictional Electoral Candidate'** while declaring the election results,

(ii) If in any election, all the contesting candidates individually receive lesser votes than the 'Fictional Electoral Candidate' i.e. NOTA, then none of the contesting candidate will be declared as elected and fresh election shall be held for that post.

(iii) In case, a contesting candidate and the 'Fictional Electoral Candidate' i.e. NOTA receive equal valid votes; then the contesting candidate (not NOTA) shall be declared as elected.

(v) Fresh election will start from nomination stage itself

(vi) However, if in reelection, NOTA again gets highest votes, then reelection will not be taken for second time and contesting candidate with highest votes (excluding NOTA) shall be declared as elected.

12.2 The following procedure shall be followed in such circumstances,

(i) If a returning officer, upon completion of counting but before declaration of result, finds that NOTA has received higher valid votes than all other contesting candidates individually; then he (i.e. returning officer) shall not declare the result for that particular seat/s and shall immediately send his Report to State Election Commission (in prescribed format).

(ii) Upon receipt of such report, the State Election Commission shall after satisfaction, declare the fresh election programme for the said seat/s.

12.3 These orders shall be applicable to the general and bye-elections to all the Urban Local bodies (Municipal Corporations, Municipal Councils, Nagar Panchayats) in Maharashtra with immediate effect.

By order of State Election Commissioner,



(Shekhar Channe)
Secretary

State Election Commission, Maharashtra.