

**AFR****Court No. - 41****Case :-** WRIT - C No. - 53941 of 2015**Petitioner :-** Suresh Jaiswal**Respondent :-** State of U.P. and Another**Counsel for Petitioner :-** S.K. Singh Paliwal, Shashi Nandan**Counsel for Respondent :-** C.S.C.**Along with**

WRIC/54655/2015	WRIC/55657/2015	WPIL/53931/2015
WRIC/57449/2015	WRIC/54398/2015	WRIC/55274/2015
WRIC/54455/2015	WPIL/55641/2015	WRIC/54066/2015
WRIC/57152/2015	WRIC/54064/2015	WRIC/54074/2015
WRIC/55455/2015	WRIC/54411/2015	WRIC/55551/2015
WRIC/54407/2015	WPIL/57248/2015	WRIC/54710/2015
\WRIC/56520/2015	WRIC/54713/2015	WRIC/55525/2015
WPIL/54749/2015	WRIC/55230/2015	WRIC/54752/2015
WPIL/55343/2015	WRIC/54756/2015	WRIC/55210/2015
WRIC/54051/2015	WRIC/55562/2015	WRIC/54589/2015
WRIC/55408/2015	WRIC/53854/2015	WRIC/55318/2015
WPIL/52668/2015	WRIC/55575/2015	WRIC/54666/2015
WRIC/55305/2015	WRIC/54268/2015	WRIC/55275/2015
WRIC/54400/2015	WRIC/56517/2015	WRIC/54225/2015
WRIC/56559/2015	WRIC/55269/2015	WRIC/54094/2015
WRIC/55308/2015	WRIC/54606/2015	WRIC/55561/2015
WRIC/54200/2015	WPIL/55559/2015	WRIC/54643/2015
WRIC/55552/2015	WRIC/54057/2015	WRIC/54625/2015
WRIC/55902/2015	WRIC/53443/2015	WRIC/57360/2015
WRIC/54042/2015	WRIC/56692/2015	WRIC/54503/2015
WRIC/55008/2015	WRIC/53978/2015	WRIC/54435/2015
WPIL/54040/2015	WRIC/54620/2015	WRIC/53845/2015
WRIC/54253/2015	WRIC/54549/2015	WPIL/54629/2015
WRIC/54423/2015	WRIC/54612/2015	WRIC/54291/2015
WRIC/54627/2015	WPIL/53112/2015	WRIC/54425/2015
WPIL/53771/2015	WRIC/55726/2015	

**Hon'ble Mrs. Sunita Agarwal, J.****Hon'ble Mahesh Chandra Tripathi, J.****Hon'ble Suneet Kumar, J.**

1. Heard Shri Manish Kumar Pandey, learned counsel appearing for the petitioner, Shri Neeraj Tripathi learned Addl. Advocate General assisted by Shri Shashank Shekhar Singh

learned Addl. Chief Standing Counsel and Shri Tarun Agarwal learned counsel appearing for the State Election Commission.

2. This Larger Bench has been constituted under the orders of Hon'ble the Chief Justice on a reference made by the Division Bench vide judgment and order dated 29.09.2015.

3. For the elections of Panchayats, namely Gram Panchayat, Kshetra Panchayat, Zila Panchayat, State of U.P., process had been initiated in the year 2015. During the said process, a Government order dated 11.08.2015 was issued to adopt certain procedure for reservation and allotment of seats with some modification as provided in the earlier Government order dated 09.07.2010. After receipt of objections on the list of the constituencies, it appears that the District Magistrate had proceeded to decide all objections by means of an order dated 13.09.2015. It appears that at this stage, a number of writ petitions were filed by different persons challenging the manner and methodology adopted by the State Government in delimitation of constituencies, reservation and allotment of seats. Objections were raised on the decision of the State Government vide Government order dated 05.09.2015 wherein it was notified that in Three-tier Panchayat Elections, the proceedings for reservation and allotment of seats for Pramukh, Kshetra Panchayat; members, Kshetra Panchayat and member of Zila Panchayat would continue as per the time-table notified for the same, whereas, the proceedings for reservation and allotment of seats for the Gram Panchayats be kept in abeyance till further orders were passed.

4. In addition to the challenge made against the decision of the District Magistrate on the objections of the petitioner to the list of reservation and allotment of seats, another issue raised

was that there was no justification for postponing the elections of Gram Panchayats though the term of Gram Panchayats was about to expire and further that in Three-tier system, without elections for Gram Panchayats, the constitution of Kshetra Panchayat and Zila Panchayat was not possible. The relief, thus, was sought to issue writ in the nature of mandamus commanding the respondents to re-frame the reservation of territorial constituency of Zila Panchayat.

5. Before the Division Bench, the original records from the office of the District Magistrate in the matter of application of reservation as per U.P. Panchayat Raj (Reservation and Allotment of Seats and Offices) Rules' 1994 in respect of particular seats in each District were summoned by the order dated 22.09.2015. While examining the said record, certain objections were made by the Division Bench in the order dated 23.09.2015, which is quoted in the referral order. On 24.09.2015, certain more records were examined by the Court and it had framed the issues which arose for consideration before it. The matter was fixed for further hearing on 28.09.2015.

6. The relevant observations of the Division Bench in the order dated 24.09.2015 are quoted herein:-

*"how can the elections for Zila Panchayat be held without the first level of three tier panchayat elections, namely, village panchayat elections being first held and then the intermediary level elections of kshetra panchayat."*

7. It appears that on 24.09.2015, when the matter was taken up, State had raised objections regarding maintainability of the writ petitions before the District Magistrate. To strengthen its stand, reliance had been placed upon the

judgment of the Coordinate Bench in the case of **Rishipal Singh vs. State of U.P. and others**<sup>1</sup>; as well as in **Rajesh Kumar Singh vs. State of U.P. and other**<sup>2</sup>. The order dated 24.09.2015 passed in the case of **Rishipal Singh**<sup>1</sup> as reproduced in the referral order is relevant to be extracted hereunder:-

*"The relief which has been sought in these proceedings which have been instituted as a public interest litigation is as follows:*

*"A. Issue a writ order or direction in the nature of mandamus directing the Respondent Authorities to cancel the reservation of the seat of Ward No.18 of Zila Panchayat, Meerut to the other backward class (OBC) category and instead of it the said seat may be declared as Unreserved (UR) in the coming Zila Panchayat Elections."*

*On 21 September 2015, the State Election Commission has issued a notification for elections to the Zila Panchayats. In view of the constitutional bar contained in Article 243-O of the Constitution, it would not be appropriate or proper for the Court to entertain the petition once the electoral process has been initiated. Hence, we decline to exercise our writ jurisdiction under Article 226 of the Constitution on that ground. The petition is, accordingly, dismissed. There shall be no order as to costs."*

8. Having noticed the said order passed by the Coordinate Bench, the Division Bench which has referred the question to the larger Bench passed an order dated 28.09.2015 noticing the argument of learned counsel for the

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petitioners that constitutional remedies as provided under Article 226 of the Constitution of India being basic feature of the Constitution cannot be taken away and the Writ Court can examine the legality of the statutory provisions, in case, they are in violation of the constitutional provisions, including the provisions contained in Article 14 of the Constitution of India. It was argued that the Hon'ble Supreme Court has already held that even the laws put under the 9th Schedule are amenable to exercise of writ jurisdiction. The provisions of U.P. Zila Panchayat Kshetra Panchayat Adhiniyam' 1961 cannot be elevated to any higher position than the Acts put in the 9th Schedule.

9. The arguments of the State-respondents, on the other hand, was that the writ petitions were liable to dismissed in view of the Constitutional bar contained in Article 240-O of the Constitution. The Court though had proceeded to examine the said question as reflected in its order dated 28.09.2015, but on 29.09.2015, on the arguments raised by the learned Advocates for the parties, the Division Bench in its referral order dated 29.09.2015, had recorded its disagreement with the view taken by the Coordinate Bench in the case of **Rishi Pal Singh**<sup>1</sup> (in its order dated 24.09.2015), and observed that the view taken by the said Bench that once the notification for elections of Zila Panchayat had been issued by the State on 21.09.2015, the Constitutional bar under Article 243-O of the Constitution of India in entertaining the writ petition got attracted, was not correct.

10. After having considered the submissions advanced by

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the learned Advocates on the said issue, it has proceeded to record in paragraph No.'11' of the referral order as under:-

*“11. Having considered the submissions advanced by learned counsels at bar with reference to the judgments relied upon, we find that the self-imposed restrictions by a Writ Court under Article 226 of the Constitution of India in matters of holding of elections have been stringently resorted to, and any interference in the process of elections is ordinarily discouraged. In matters where process of election has commenced interference by Writ Court at the intermediate stage is ordinarily not to be resorted. It has been emphasized time and again by the Hon'ble Supreme Court that once the process of election has commenced, any person aggrieved should be allowed to raise his grievance by filing an election petition only. However, in cases where election is not being held in accordance with the Constitution or there are inherent defects or breaches of election law rendering the whole election itself a farce, would warrant an interference under Article 226 of the Constitution of India is the moot question?”*

11. Proceeding further, the decision of the Constitution Bench in the case of **L. Chandra Kumar Vs. Union of India and others**<sup>3</sup> was noted to observe that the power of judicial review by the High Court under Article 226 of the Constitution and Hon'ble Supreme Court under Article 32 is an integral and essential feature of the Constitution and, therefore, constitutes part of its basic structure. It was then observed in paragraph No.'18' of the referral order that subject to the inherent limitation on the scope of the exercise of power of High Court under Article 226, in matters relating to holding of elections, the Court was of the considered opinion that the

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3. 1997 (3) SCC 261

constitutional bar contained in Article 243-O of the Constitution would not be a bar on the jurisdiction of the Constitutional Courts under Article 226 & 32 of the Constitution of India and, therefore, it could not confirm to the view expressed by the Co-ordinate Bench in the judgement and order dated 24.09.2015 in **Rishi Pal**<sup>1</sup>.

12. In paragraph No.'20' of the referral order, the Division Bench has expressed the difficulty it faced to accept the view taken by the Co-ordinate Bench in **Rishi Pal Singh**<sup>1</sup>, in the following words:-

*“20. This Bench finds it difficult to accept the law as laid down by the Division Bench of this Court in Public Interest Litigation (PIL) No. 54008 of 2015 (Rishipal Singh Vs. State of U.P. And others) to the effect that though reservation of seats for the elections is under challenge but once the notification for election of Zila Panchayat has been issued, it would not be appropriate or proper for the Court to entertain the petition once the electoral process has been initiated, in view of the constitutional bar contained in Article 243-O of the Constitution of India.”*

13. It has further recorded in paragraph No.'21' as under:-

*“21. In our opinion, if the very process of holding election or implementation of reservation under the Rules, in respect of the various constituencies of Zila Panchayat has to be challenged, then the only remedy available to a person, not belonging to the reserved category in question for which the seat has been reserved, is to file petition*

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*under Article 226 of the Constitution of India. He has no remedy elsewhere. His challenge to the process of reservation may ultimately succeed or may not succeed, is a different issue, but it cannot be said that the writ petition is not maintainable. The writ petition raising such issue, in our opinion, have to be entertained, notwithstanding the bar contained in Article 243-O of the Constitution of India.”*

14. In the light of the above, following questions have been referred for examination by the Larger Bench:-

*"(a) Whether, constitutional remedy of judicial review under Article 226 of the Constitution of India, which has been recognised as a basic feature of constitution in L. Chandra Kumar Vs. Union of India, 1997 (3) SCC 261 could be curtailed in view of the bar created under Article 243-O of the Constitution of India?*

*(b) Whether, a writ petition under Article 226 of the Constitution of India can be refused to be entertained for the reason that a notification for holding the Panchayat elections has been issued by the State in view of Article 243-O of the Constitution of India, even where:*

*(i) vires of election laws is questioned,*  
*(ii) Government Orders issued for effecting the election are stated to be in breach of election laws/arbitrary,*  
*(iii) actual implementation by the State of election laws/Government Orders is stated to be in breach of the provisions,*

*(iv) any other similar issue?*

*(c) Whether, the High Court in exercise of power under Article 226 of the Constitution of India can interfere in the election process, if the elections are not being held in accordance with the Constitution of India or there is inherent*

*defects or breaches of the election law making the entire election a mockery or a farce?*

*(d) Whether, this Court would permit ongoing process of election, in the facts of the present case, or not?*

*(e) Whether, the vires of the election laws as well as reservation of seats can be subjected to challenge only in a petition under Article 226 of the Constitution of India or else the aggrieved person is rendered remedy less?*

*(f) Whether, the judgment of the Division Bench in the case of Rishipal Singh vs. State of U.P. and others (supra) has laid down the correct law?*

15. It is pertinent to note at this stage, that at the point of time when the referral order was passed, the elections were in progress and various writ petitions were filed raising different issues including some relating to reservation of the various constituencies.

16. It is admitted that the elections were held in the year 2015 and the Panchayats in Three-tier system namely Gram Panchayat, Kshetra Panchayat and Zila Panchayat had been constituted. Nothing has been brought before us to state that any issue having legal ramifications on the elections held in the year 2015 have been brought to challenge which would have required invocation of powers of this Court under Article 226 of the Constitution of India.

17. In the light of the abovenoted facts, we first proceed to examine as to whether in all propriety, this Larger Bench has to answer the questions referred to it or issues have become academic now. We also propose to examine the circumstances in which the reference has been made to note as to whether the

decision of the Co-ordinate Bench in **Rishipal Singh**<sup>1</sup>, correctness of which has been doubted by the referral Bench, came in its way and it could not have entered into or adjudicated the dispute, on its own, in view of the conflict of opinion. Further, whether the doubts raised by it to make the reference before the Larger Bench, in fact, arose or not.

18. As far as the first issue is concerned, as noted above, the writ petitions in this bunch were filed against the order of the District Magistrate, Azamgarh in the matter of reservation and allotment of constituencies for Three-tier Panchayat elections, i.e. Gram Panchayat, Kshetra Panchayat and Zila Panchayat. The prayer for mandamus was to command the respondent to re-frame the reservation of territorial constituencies so that a particular ward may not be reserved in any category. The challenge was, thus, to the realtime exercise done by the State Government for delimitation, reservation and allotment of seats. In so far as the Gram Panchayats are concerned, the entire procedure for the purpose has been provided in Section 11 (f) & 12 of the U.P. Panchayat Raj Act' 1947 read with the U.P. Panchayat Raj (Reservation and Allotment of Seats and Offices) Rules' 1994. Another dispute with regard to the Government notification dated 13.09.2015 was only this much that without elections of Gram Panchayats, which were postponed by the State Government by the said notification, the constitution of Kshetra Panchayat and Zila Panchayat was not possible.

19. It is informed by Sri Neeraj Tripathi learned Additional Advocate General and Sri Tarun Agarwal learned counsel for the State Election Commission that the elections

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for constitution of Three-tier local bodies namely Gram Panchayat, Kshetra Panchayat and Zila Panchayat had been completed in the year 2015 itself. The dispute raised by the petitioners before the Division Bench that the constitution of Kshetra Panchayat and Zila Panchayat would not be possible in view of the postponement of elections of Gram Panchayat, therefore, was rendered infructuous in the year 2015 itself.

20. Now the issue with regard to the reservation and allotment of territorial constituencies for the elections of Zila Panchayat and Kshetra Panchayat, i.e. actual exercise done by the State is concerned, it appears that a preliminary objection was raised by the State and the Election Commission regarding maintainability of the writ petition in view of the issuance of notification for election to the Zila Panchayat by the State Election Commission. The argument was that in view of the Constitutional bar contained in Article 243-O of the Constitution, once the election process had been initiated, the exercise of writ jurisdiction under Article 226 of the Constitution of India to challenge the actual exercise of reservation and allotment of seats, was not possible. In other words, the plea of bar of Article 243-O of the Constitution of India was raised by the State to entertain the constitutional remedy in view of the nature of the dispute before the Division Bench.

21. On the said plea, with due regards, the Division Bench was required to examine the issue and express its opinion. The only reason why the Division Bench opined that the matter should be referred to the Larger Bench was, that it was of the view that the Constitutional bar contained in Article 243-O of the Constitution would not be an absolute bar on the

jurisdiction of the Constitutional Courts under Article 226 of the Constitution of India and that a Co-ordinate Bench while delivering the judgement and order dated 24.09.2015 took a contrary view.

22. We have already reproduced the order of the Co-ordinate Bench in the preceding paragraph, which was found in contradiction by the Division Bench referring the matter to the larger Bench.

23. Having carefully read the order in **Rishi Pal Singh**<sup>1</sup>, it is found that the Division Bench therein had refused to entertain the writ petition, at the outset, noticing that in view of the notification issued by the State Election Commission, considering the Constitutional bar contained in Article 243-O of the Constitution, it would not be appropriate or proper for the Court to entertain the public interest writ petition, once the election process had been initiated. Expressing the said view, the Court had declined to exercise writ jurisdiction under Article 226 of the Constitution on that ground only. From the bare reading of the said judgment, we may notice here that the opinion of the Division Bench in **Rishi Pal Singh**<sup>1</sup> was not on any question of law adjudicated by it, rather it was passed in view of the nature of relief sought in the case before it. The challenge to the election process was brought by way of a Public Interest Litigation. The Court therein found that after notification of the Election Commission, the issues raised before it could not be adjudicated. In our opinion, the dismissal of PIL in **Rishi Pal Singh**<sup>1</sup> on the ground stated therein was neither a law laid down by it nor was binding as a precedent upon the Bench referring the matter, restricting it

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from entering into the preliminary objection or the controversy in the bunch of writ petitions raised before it.

24. It appears that only reason which weighed in the mind of the Division Bench that the matter should be referred to the Larger Bench as various questions of law of general public importance may arise in the trial of the said cases or other cases in future.

25. The observations in paragraph Nos.'20' & '21' of the reference order quoted above reflect the difficulties expressed by the Division Bench in deciding the issues raised before it.

26. In our opinion, the dismissal of the Public Interest Litigation by the Division Bench in **Rishi Pal Singh**<sup>1</sup> was more of a question of judicial propriety rather than on the power to exercise jurisdiction to adjudicate on the question of law raised before that Bench.

27. It appears that within the limits of self-imposed restrictions which is to be exercised in the matter of elections by a Writ Court, the Division Bench dealing with the Public Interest Litigation had refused to entertain the writ petition after notification was issued by the Election Commission.

28. In this context, it would not be out of place to mention here that the Constitutional Bench of the Apex Court in the case of **Laxmi Charan Sev Vs. A.K.M. Hasan Usman**<sup>4</sup> has made a clear statement in paragraph No.'28' as under:-

*“28. We have expressed the view that preparation and revision of electoral rolls is a continuous process, not connected with any particular election. It may be difficult consistently with*

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4. AIR 1985 SC 1233

*that view, to hold that preparation and revision of electoral rolls is a part of the 'election' within the meaning of [Article 329\(b\)](#). Perhaps, as stated in Halsbury in the passage extracted in Ponnuswami, the facts of each individual case may have to be considered for determining the question whether any particular stage can be a part of the election process in that case. In that event, it would be difficult to formulate a proposition which will apply to all cases alike."*

29. The aforesaid observations though were made in the interim order of the courts but in the final order, the Constitutional Bench reiterates the above view in the following words:-

*"The order dated March 30, 1982 which we will presently reproduce, contains our reasons in support of this conclusion. Very often, the exercise of jurisdiction, especially the writ jurisdiction involves questions of propriety rather than of power. The fact that the Court has the power to do a certain thing does not mean that it must exercise that power regardless of the consequences."*

30. The question of conflict between the jurisdiction conferred in the High Court under Article 226 and the embargo created by the Constitution under Article 329 was firstly considered in the case of **N.P. Ponnuswami vs Returning Officer, Namakkal**.<sup>5</sup> The law enunciated in **N.P. Ponnuswami (supra)**<sup>5</sup> was extensively dealt with in **Mohindra Singh Gill Vs. Chief Election Commissioner**<sup>6</sup>, the Constitutional Bench noticed two types of decisions and two types of challenges in paragraph No.'29' of the report:-

(i) The first relates to proceedings which interfere with the progress of the election and;

5. AIR 1952 SC 64

5. AIR 1952 SC 64

6. 1978 (1) SCC 405

(ii) the second which accelerates the completion of elections and acts in furtherance of an election.

A third category has been evolved in the judgment rendered by the Apex Court in the case of **Election Commission of India Vs. Ashok Kumar & others**<sup>7</sup>, wherein the Apex Court has observed that there may be a situation where something has happened which is calling foul of the law of election and by the time an election petition is filed and judicial assistance secured, material evidence may be lost. If the wrong committed is left undone in such a case until after the result of election, the relief actually given may not amount to anything at all. The invocation of the constitutional remedy under Article 226 or Article 32 of the Constitution of India may be possible even during the election process.

31. We may note that we are not called upon to answer whether in the facts of the cases at hand, the aforesaid third category of question for interference in election arises or not.

32. In **Election Commission of India Vs. State of Haryana**<sup>8</sup>, the Constitutional Bench noticed the following observations in interim order of A.K.M. Hasan<sup>4</sup> with approval:-

*“The imminence of the electoral process is a factor which must guide and govern the passing of orders in the exercise of the High Court's writ jurisdiction. The more imminent such process, the greater ought to be the reluctance of the High Court to do anything, or direct anything to be done, which will postpone that process indefinitely by creating a situation in which, the Government of a State cannot be carried on in accordance with the provisions of the Constitution.”*

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7.2000 (8) SCC 216

8. AIR 1984 SC 1406

4.AIR 1985 SC 1233

33. In **Digvijay Mote Vs. Union of India**<sup>9</sup>, **Anugrah Narain Singh & another Vs. State of U.P. & others**<sup>10</sup>, **C. Subrahmanyam Vs. K. Ramanjaneyullu & others**<sup>11</sup>, it is held that where non-compliance of provision of the Act, governing the election is a ground for election petition, the writ petition under Article 226 of the Constitution of India should not have been entertained.

34. The law settled by the Apex Court in **Ashok Kumar**<sup>7</sup> has been followed consistently in umpteen number of decisions.

35. We may clarify that we are not on the issue of entertainability of the bunch of writ petitions by the Division Bench as the said issue was required to be adjudicated by it in view of law laid down by the Apex Court in the matter of scope of interference in the election process in writ jurisdiction.

36. We are only scrutinizing whether the decision in **Rishipal**<sup>1</sup> was binding on the Division Bench and it could not have addressed the controversy before it on the question of entertainability of the writ petitions.

37. In the case of **Tika Ram and others versus State of U.P and others**<sup>12</sup>, the Apex Court has observed that a decision does not become precedent unless a question is directly raised and considered therein, so also it does not become the law declared unless the question is actually decided upon.

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9.1993 (4) SCC 175

10 1996 (6) SCC 303

11 1998 (8) SCC 703

7.2000 (8) SCC 216

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12 . 2009 (10) SCC 689

38. With greatest of respect, we are of the view that there was no conflicting opinion facing their Lordships, preventing them from deciding the question itself.

39. After due deliberations of the Counsels for the parties, hearing them at length, we do not find that the questions which were framed by the Division Bench in the referral order, actually arose for adjudication before it in the bunch of writ petitions. For instance, on question (b), we find that before the Division Bench:-

- (i) vires of election law was not questioned;
- (ii) arbitrariness of the government order issued in the process of election being in breach of election laws was not an issue;
- (iii) the issue regarding actual implementation by the state of the election laws being in breach of the legal provision may be the issue which would have arisen for consideration, had it decided to entertain the writ petition.

40. Similarly, the questions (c), (d), (e) are the issues of larger general importance framed by the Division Bench which may or may not have arisen for consideration, had it entered into the issues on merits.

41. We, however, do not find it proper to express any opinion as to whether the said issues would have arisen, had the Division Bench entertained the writ petition, as this is not the question before us to answer.

42. Now, Question-(a) pertains to the law laid down by the Apex Court in *L. Chandra Kumar (supra)* which, in our opinion, could have been read and duly applied by the Division Bench for answering the question before it, i.e., as to whether it would entertain the writ petition in the light of the notification

issued by the State Election Commission for elections of the Zila Panchayat and the bar under Article 243-O of the Constitution of India is attracted or not. The said issue though has been discussed in few paragraphs of the reference order and some views have been expressed by the Division Bench in paragraph Nos.'20' & '21' of the reference order but whether the said question arose for consideration in the facts and circumstances of these cases, i.e. in the nature of the controversy and the issues before it or not, is not clear.

43. Lastly, question (f), with due respect, is not a proper question as expressed above. The Division Bench in the case of **Rishi Pal Singh**<sup>1</sup> did not lay down any legal proposition so as to make it a binding precedent on any other Co-ordinate Bench or the Benches of lesser strength of this Court.

44. Thus, in absence of a binding precedent, there was no conflict facing the Division Bench which has made the reference. The question No.(f) regarding the correctness of law laid down by the Division Bench in **Rishi Pal Singh**<sup>1</sup>, in our respectful opinion, did not arise at all.

45. The point is whether this is a reference under Chapter V Rule 6 of the Allahabad High Court Rules' 1952:-

46. The scheme of Chapter V Rule 6 of the Allahabad High Court Rules' 1952 provides as under:-

*“6. Reference to a larger Bench:- The Chief Justice may constitute a Bench of two or more Judges to decide a case or any question of law formulated by a Bench hearing a case. In the latter event the decision of such Bench on the question so formulated shall be returned to the Bench hearing*

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*the case and that Bench shall follow that decision on such question and dispose of the case after deciding the remaining questions, if any, arising therein.”*

47. The reading of the said provision goes to show that on conflicting opinion expressed by two Benches of the same strength, larger Bench may be constituted by Hon'ble the Chief Justice to decide the questions of law formulated by the Bench hearing the case.

48. Before a Full Bench of this Court in **Suo Moto Action Taken by the Court Vs. I.C.I.C.I. Bank Limited, Allahabad**<sup>13</sup>, a question arose as to whether the reference made by the Division Bench was proper or not and further whether the academic issues on question of law had to be answered by the Full Bench.

49. Considering the scope of Chapter V of Rule 6 of the High Court Rules, it was held therein that reference cannot be made for the mere necessity of creating a precedent. If a question of law of whatever importance arises before the Division Bench, ordinarily, the Division Bench should decide it itself and not refer it to a Larger Bench, unless there is conflict of precedent, which makes it impossible for the Division Bench to decide this way or other. It was further held that where the questions of law are formulated by a Division Bench for reference and decision, the case has to be alive before the Division Bench itself. Thus, in other words, in both eventuality where there is no conflict of precedent or the case is not alive before the Division Bench, reference to a Larger Bench should not be made for the mere necessity of creating a

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13. 2006 (4) ADJ 106

precedent. Paragraph '13', '14', '18', '19', '20' of the said report are relevant to be reproduced herein:-

*“13. We respectfully follow the Kerala special Bench judgment relied upon by Mr. Mitra appeared for ICICI, being the case of Babu Premarajan reported at . Passages would be found at page 449 to the effect that if a question of law of whatever importance arises before the Division Bench, ordinarily the Division Bench should decide it itself and not refer it to a larger Bench, unless there is a conflict of precedent, which makes it impossible for the Division Bench to decide this way or the other. This was opined in Kerala, even though there was a rule of the High Court which, on a plain reading, appeared to allow two Hon'ble Judges of a Division Bench to refer any questions to a larger Bench merely on their Lordships agreement.*

*14. As such, if the writ petition before the Hon'ble Division Bench is still alive, the Division Bench is fully at liberty in its own aisdoun to decide all the questions itself and indeed all the questions purportedly got referred to the larger Bench.*

*18. The other point is whether it is a reference under Chapter V Rule 6 that the Division Bench has in reality resorted to. The said rule is quoted below:-*

*“6. Reference to a larger Bench.-The Chief Justice may constitute a Bench of two or more Judges to decide a case or any question, of law formulated by a Bench hearing a case. In the latter event the decision of such Bench on the question so formulated shall be returned to the Bench hearing the case and that Bench shall follow that decision on such question and dispose of the case after deciding the remaining questions, if any, arising therein .*

*19. The first part of the rule refers to constitution of a Bench by the Chief Justice himself by use of his own*

*administrative discretion. This is not one such case.*

*20. So far as the second part of the rule is concerned, where the questions of law are formulated by a Division Bench for reference and decision, the case has to be alive before the Division Bench itself. If the case is alive in the present case, then also a reference under the second limb, is, with the greatest of respect, improper, because nothing prevented the Division Bench from deciding the questions itself. There were no conflicting Division Benches facing their Lordships and as such, the Kerala principle mentioned above applies with full force.”*

50. In saying so, the Full Bench has relied upon the Full Bench judgment of Kerala High Court in **Babu Premarajan Vs. Superintendent of Police, Kasaragode & others**<sup>14</sup>, wherein even the rule of the Kerala High Court permitted the Division Bench to refer any question to a Larger Bench merely on their Lordships agreement.

51. The said Rule of Kerala High Court Rules' which was subject matter of consideration therein reads as under:-

*.....Powers of a Bench of two Judges.--The powers of the High Court in relation to the following matters may be exercised by a Bench of two Judges, provided that if both Judges agree that the decision involves a question of law they may order that the matter or question of law be referred to a Full Bench.....*

52. The Kerala High Court had noted therein the meaning of word "reference" in Stroud's Judicial Dictionary of Words and Phrases, 4th edition, Volume I, page 65, to observe in para '49' as under:-

*“Meaning of Reference:- Reference has been stated to mean the sending of a pending case, for some question*

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14 . AIR 2000 (2) 417 (FB)

*therein, by the Court in which it is pending to a private person or some other tribunal to hear and determine the cause of the question.”*

***Para '49' of the report:-***

49. *The last question referred for our decision is viz. whether a reference by a Division Bench to a Full Bench is permissible merely because both Judges in a Division Bench so agree that the decision involves a question of law. Section 4 has been reproduced in para 6 above. It deals with the powers of a Bench of two Judges, Indeed powers of the High Court. The proviso says that when both Judges agree that the decision involves a question of law, they may order that the matter or question of law be referred to a Full Bench. Whereas in Section 3, a single Judge is required to refer the entire case for being heard and determined by a Bench of two Judges, Under Section 4, a Division Bench may refer the entire case or question of law to a Full Bench. Assuming that to be so, it is difficult to appreciate why a Division Bench should not decide the question of law and merely because both the Judges agree that the decision involves a question of law. It should be referred to a Full Bench or the entire matter be referred to a Full Bench.*

*If a question of law arises before a Division Bench, which situation is not uncommon, is it open to a Division Bench not to decide it and refer it to a Full Bench. One can understand when there is a conflict of Division Bench decisions on a question of law and there is no subsequent decision of the Apex Court on the point; in such a situation a reference to Full Bench would undoubtedly be justified. In the light of the cases we have discussed above, there is no doubt that the power of two Judges in a Division Bench to refer a question of law to a Full Bench must be exercised*

*sparingly and only in cases where there is a conflict of opinion of Division Benches of this Court and there is no latter decision of the Apex Court on that point. Obviously, if there is a subsequent decision of the Apex Court which resolves the conflict or, in the light of which, one of the Division Bench decisions must be taken to be impliedly overruled and the other Impliedly upheld, the Division Bench is obliged to follow the view which has been impliedly upheld by the subsequent decision of the Apex Court. Our answer to the third question would, therefore, be that the provisions of [Section 4](#) of the Act contemplate a reference by a Division Bench, not merely because both the Judges of the Division Bench agree that the decision involves a question of law. Such a reference by a Division Bench to a Full Bench is permissible only if there is a conflict of Division Bench decisions of this Court and there is no latter decision of the Apex Court resolving the said conflict directly or impliedly.”*

53. Thus, from the above discussion, it is found that when it appears to a Single Bench or a Division Bench that there are conflicting decisions of the Co-ordinate strength of the same Court or that a question of law of importance having conflicting views arises in the trial of a case, the Judge or the Bench passes an order that the papers be placed before the Chief Justice of the High Court with the request to form the Special or Full Bench to hear and decide the case on the questions raised in the case.

54. Normally, the judge concerned should make a reference briefly indicating reasons for his views which necessitated to refer the matter to a Larger Bench but the same is not indispensable.

55. At the same time, we may clarify that if reasons are not stated in respect of the order of reference, the Full Bench cannot decline to answer the questions referred to it. The brief reasons for making a reference, however, has to be indicated so as to enable the Larger Bench to know the minds of Hon'ble Judge(s) making the reference.

56. In the instant matter, as expressed above, we could not find any conflict between two decisions which warranted a reference before the Larger Bench.

57. The questions, in the reference order, framed by the Division Bench, assuming conflict of opinion in the election matters, with due respect, are sweeping. On a plain reading of the order of reference, it appears that their Lordships have referred the questions to the Larger Bench with a view to create a precedent assuming that those questions of law of importance may arise in election matters and an authoritative pronouncement of a Larger Bench is needed on the subject.

58. The pronouncement by a Full Bench, with due regards to the learned Judges referring the matter, on hypothetical conflict, would not be a proper judicial exercise.

59. We may note that there is difference between the question whether a writ petition would lie to the High Court and as to the scope of interference in writ jurisdiction. From the decisions referred above, it can be seen that judicial intervention in election matters should be minimal. Though, there cannot be an absolute bar in exercise of discretionary jurisdiction in a writ by the Constitutional Court. Each matter has to be examined with due care and circumspection by the Court keeping in mind the self imposed limitations and the

Constitutional bar under 243-O of the Constitution of India. There cannot be a straight-jacket formula. The whole idea of self imposed limitations is to provide an internal remedy in such cases without compelling the parties to go all the way to the Constitutional courts or increase the burden of that Court, unnecessarily.

60. In our considered view, an issue being of importance by itself, cannot be a ground for referring the matter to the Larger Bench.

61. Further, the last question which remains to be considered that if nothing survives, then answering the questions referred, as issues of general importance, by us would be an academic exercise. The Full Bench in **Suo Moto Action**<sup>13</sup> has held that such an exercise is beyond the jurisdiction of the Court. Paragraph Nos.'24', '25' & '26' are relevant to be quoted as under:-

*“24. ....It is the problem of the Court having no jurisdiction to answer questions of law merely academically and in the vacuum. Mr. Prasad has already filed another writ petition No. 13778 of 2006 where by he specifically challenges the same contract of the debt collector as being contrary to public policy. But in the case before the Division Bench, which is before us, either nothing survives or something survives for which the Division Bench is itself to give its decision including those on points of law.*

*25. If nothing survives, then our answering the questions referred as public interest law points, would suffer from this problem that, the declaration of law would be wholly*

13 . 2006 (4) ADJ 106

academic and a mere enunciation of law made by the Court without there being a case surviving in which to make the pronouncement. That such declaration might be used later on by the parties to have even their own rights declared, in one particular manner, is no reason or argument why the Court can have seisin or jurisdiction over mere points of law referred as such.

*26. The Courts have jurisdiction to decide on points of law only when those arise in relation to and are incidental to questions raised by parties affecting their own rights, liabilities and interest. The Court is all the time deciding questions of law, but it is a paradox that the Court has no jurisdiction to decide a question of law, and a question of law only, like a Professor answering questions to a persistent law student.”*

62. We, therefore, find that the questions referred are hypothetical and are only of the academic importance as it is not known whether the issues raised survive or not. The reference cannot be answered by the Larger Bench even if it is of the view that the settled law has not been considered by the Division Bench while making the reference. Furthermore, the questions referred cannot be answered as questions of general importance as there was no conflict.

63. Moreover, from amongst the questions referred, those which arise in the facts and circumstances of the instant case(s), if alive, are left open to be answered by the Division Bench.

64. We may clarify that we do not express any opinion as to whether the issues raised in the bunch of writ petitions are still alive or not.

65. We, however, hold that the reference to the Full Bench was not properly made and it is annulled, accordingly.

66. It is further clarified that the observations made herein above are in order to examine whether the reference was properly made and none of them would cause prejudice to the rights and contentions of the parties in any proceeding whether in the bunch before the Division Bench, or in any other matter.

67. The reference to the Larger Bench, accordingly, stands answered.

68. The writ petitions shall now be placed before the regular Bench according to the roster for disposal in light of the above.

**Order Date :-20.12.2019**  
Himanshu

**(Sunita Agarwal,J.)**

**(Mahesh Chandra Tripathi,J.)**

**(Suneet Kumar,J.)**