

PETITIONER:
SPECIAL REFERENCE NO. 1 OF 1974

Vs.

RESPONDENT:

DATE OF JUDGMENT 05/06/1974

BENCH:
RAY, A.N. (CJ)
BENCH:
RAY, A.N. (CJ)
REDDY, P. JAGANMOHAN
KHANNA, HANS RAJ
PALEKAR, D.G.
MATHEW, KUTTYIL KURIEN
BEG, M. HAMEEDULLAH
CHANDRACHUD, Y.V.

CITATION:
1974 AIR 1682 1975 SCR (1) 504
1974 SCC (2) 33

ACT:

Constitution of India, 1950, Article 54--An electoral college consisting of meaning of.
Constitution of India, Article 71 (4)--Dissolution of a State Legislative Assembly--Vacancy in the electoral college, if occurs on such dissolution.
Constitution of India, 1950, Articles 54, 55 and 62--Election to the office of the President--Completion of election before the expiration of the term in case of vacancy caused by the expiry of the term--Whether mandatory. Presidential and Vice-Presidential Elections Act, 1952, Section 7 read with section 4--Completion of the election before the expiration of the term--Whether contemplated.
Constitution of India. 1950, Article 56(1)(c) "successor". meaning of--President, whether can continue in office after the expiration of his term.
Constitution of India, 1950, Article 143(1)--Statement of facts set out in order of Reference--Supreme Court, whether can go behind the recitals.

HEADNOTE:

The Gujarat State Legislative Assembly having been dissolved on the 15th day of March, 1974. a general election for constituting a new Legislative Assembly can be held only after the Assembly constituencies have been delimited afresh on the basis of the 1971 census under article 170 of the Constitution of India and the provisions of the Delimitation Act, 1972. In as much as it will be impossible to complete the general election to the Legislative Assembly for the State of Gujarat before the expiration of the term of office of the President of India i.e. on the 14th day of August, 1974, in exercise of the powers conferred upon him by clause (1) of article 143 of the Constitution of India, the President of India referred the following question to the Supreme Court of India for consideration and report its opinion thereon :

(1) Whether on a true and correct

interpretation of articles 54, 55, 56, 62 and 71 of the Constitution of India the electoral college mentioned in article 54 is to consist only of the elected members of such of the Legislative Assemblies of the States as are in existence at or before the expiration of the term of office of President under article 56(1) of Constitution of India.

(2) Whether on a true and correct interpretation of the provisions of article 71(4) of the Constitution of India, when the Legislative Assembly or Assemblies of any State or States is or are dissolved it will amount to a vacancy or vacancies having occurred in the electoral college within the meaning of the said article.

(3) Whether in view of the Provisions contained in, inter alia, articles 54, 62(1) and 71(4) of the Constitution of India election of the office of President must be held before the expiration of the term of the outgoing President notwithstanding the fact that at the time of such election the Legislative Assembly or Assemblies of any State or States is or are dissolved.

(4) Whether the dissolution of the Legislative Assembly or Assemblies of any State or States precludes the holding of election to the office of President.

(5) Where the Legislative Assembly or Assemblies of any State or States is or are dissolved before the expiration of the term of office of the outgoing President under article 56(1) of the Constitution of

505

India. how and when is the election to fill the vacancy in the office of President to be held and completed on a correct interpretation of the relevant provisions of the Constitution of India to make the Constitution of India workable regarding the office of President.

(6) Whether in the event of the election to the office of President not being completed before the expiration of the term of office of President under article 62(1) of the Constitution, the President can notwithstanding the expiration of the term, continue to hold office under clause (c) of the proviso to article 56(1) of the Constitution of India.

HELD that : (1) Only such persons who are elected members of both Houses of Parliament and the Legislative Assemblies of the States on the date of the election to fill the vacancy caused by the expiration of the term of office of the President will be entitled to cast their votes at the election. [523C]

The members of electoral college mentioned in Article 54 are not both Houses of Parliament and the Legislative Assemblies of the States. The words, 'an electoral college consisting of' in Article 54 mean that the electoral college shall consist of persons mentioned therein. The words 'consisting of' refer to the strength of the electoral college. The Houses of Parliament and the Legislative Assemblies are mentioned in Article 54 for the purpose of showing the qualifications of members of electoral college. If the

Legislative Assembly of a State is dissolved, the members of the dissolved Assembly do not fulfill the character of elected members of a State Assembly. The elected members of a dissolved Legislative Assembly being no longer members of the electoral college consisting of the elected members of both Houses of Parliament and elected members of the Legislative Assemblies of the States, are not entitled to cast votes at the Presidential election. [517 E-F; 518 F-H]

(2) The vacancies caused by the dissolution of an Assembly or Assemblies will be covered by Article 71(4).

In *Narayan Bhaskar Khare v. The Election Commissioner of India*. [1957] S.C.R. 1081, this Court found that not holding the election in Himachal Pradesh could not hold up the election of the President. It may be said on the analogy of the observations in the *Khare* case that there are vacancies in the electoral college by reason of the fact that there are no elected members of the Legislative Assembly of a State where the Legislative Assembly is dissolved. Article 71(4) was really introduced after the *Khare* case to shut out any challenge to the election on the ground that there was any vacancy among members of the electoral college. In view of the Constitutional declaration or exposition of Article 71(4), it is manifest that the language is of wide amplitude, viz., existence of any vacancy for any reason 'whatever' among the members of the electoral college. It will take in any case where a person who as an elected member of the Houses of Parliament or the Legislative Assembly of a State became entitled to be a member of the electoral college but ceased to be an elected member at the relevant date of the election and therefore became disentitled to cast vote at the election and that vacancy among members of the electoral college was not filled up.

Questions as to, what would be the position if there is "mala fide dissolution" of a State Legislative Assembly or Assemblies or if there is, after the dissolution of the Assembly or Assemblies a "mala fide refusal" to hold elections thereto within reasonable time before the Presidential election and also the question as to what would be the effect of the dissolution of a substantial number of State Legislative Assemblies before the Presidential election left open? [516 E; 520 C; E-H]

3. 4 and 5. The election to the office of the President must be held before the expiration of the term of the President notwithstanding the fact that at the time of such election the Legislative Assembly of a State is dissolved. The election to fill the vacancy in, the office of the President is to be held and completed having regard to Articles 62(1), 54, 55 and the Presidential and Vice-Presidential Elections Act, 1952. [523F]

506

The fixed term of Office mentioned in Article 56(1) as well as the mandate in Article 62(1) that the election to fill a vacancy caused by the expiration of the term of office shall be completed before the expiration of the term reflects the dominant constitutional purpose and intent regarding the time when the election of the President is to be held. Further, the provision in Article 62(2)

that an election to fill a vacancy in the office of the President by reason of his death, resignation or removal or otherwise be held as soon as possible after and in no case later than six months from the date of the occurrence of the vacancy shows that the time to 'hold an election to fill a vacancy is also mandatory in chapter. [513 B]

Khare case followed.

The completion of election before the expiration of the term

in the case of vacancy caused by the expiry of the term as well as filling the vacancy by holding an election not later than six months from the date, of the occurrence of the vacancy in the other case does not contain any provision for extension of time. Provisions contained in Article 83 providing for extension of the period beyond the period of five years may be referred here by way of contrast. [513 D] The word "otherwise" occurring in Article 62(2) of the Constitution does not refer to a vacancy caused by the expiration of the term of office for the obvious reason that the same is the subject matter of Article 62(1). The marginal note to Article 62 fully bears this out. Further a President whose term has expired can continue to hold the office only under Article 56(1) (c) until his successor enters upon his office. Article 56(1)(c) is complementary to Article 62(1). Vacancy under this Article does not enable the President to continue in office. [513 6; 514 B] Provisions of section 7 of the Presidential and Vice-Presidential Elections Act, 1952, are to be considered along with section 4 of the Act. This Act indicates that the provisions contemplate the completion of the election before the expiration of the term. If the completion of the election before the expiration of the term is not possible because of the death of the prospective candidate, it is apparent that the election has commenced before the expiration of the term but completion before the expiration of the term is rendered impossible by an act beyond the control of human agency. The necessity for completing the election before the expiration of the term is enjoined by the Constitution in public and State interest to see that the governance of the country is not paralysed by non-compliance with the provision in Article 52 that there shall be a President of India. The impossibility of the completion of the election to fill the vacancy in the office of the term of office in case of death of a candidate as may appear from section 7 of the 1952 Act does not rob Article 62(1) of its mandatory character. [514 D-E; 515 D-E] Article 55 which indicates the methods of calculating as to how many votes an elected member of the electoral college can cast at the Presidential election, has no concern with the competence of the election of the President because of the dissolution of the Legislative Assembly of a State. [518 C-D]

Article 62 is the constitutional mandate and other provisions like Article 54, 55 subserve Article 62. The Legislative Assemblies of the States are not members of the electoral college. None of the Articles 368, 54, 55 can rob Article 62 of its constitutional content. Article 62 stands-by itself independent of any other provision. [519 F]

Khare case discussed. Bratt v. Brat (1826) 3 Adams 210 , it p. 216 and Raburton v. Loveland (1832) 2 D & Cf. 480 referred to.

(6) Article 56 (1) (c) applies to a case where a successor has not entered his office and only in such circumstances can a President whose term has expired continue. [523 E-F]

The expression "successor" in Article 56 (1) (c) means a successor elected before or even after the expiration of the term stated Article 62(1). The term of office of the President is fixed. The election to fill the vacancy caused by the expiration of the term is to be completed before the expiration of the term. It is in that cortex, that the outgoing President, notwithstanding the expiration of

the term, continues to hold office under Art. 56(1) until

his successor enters upon office. The successor can only enter upon his office after he takes the oath under Article 60. He can take oath only after the election. It is possible that the successor cannot enter upon his office on the day following the expiration of the term of office of the outgoing President for unavoidable reasons. That is why Articles 56 (1), 56(1) (c) and 62 (1) are to be read together to give effect to the constitutional intent and content that the election to fill the vacancy caused by the expiration of the term of the President is to be completed before the expiration of the term. [516 F-G]

Held also that : (1) This Court is bound by the recitals in the order of Reference. Under Article 143(1) this Court accepts the statement of fact set out in the reference. The truth or otherwise of the facts cannot be enquired or gone into nor can this Court go into the question of bona fides or otherwise of the authority making the reference. This Court cannot go behind the recital. This Court cannot go into disputed questions of fact in its advisory jurisdiction under Article 143 (1). [521 D-E]

Re. Kerala Education Bill case, [1959] S.C.R. 995 followed. Re Allocation of Lands and Building in a Chief Commissioner's Province [1943] F.C.R. 20 and Re Levy of Estate Duty, [1944] F.C.R. 317 referred.

(ii) The Legislative Assembly of the State of Gujarat has been dissolved. Therefore, any election which has to be held to the Legislative Assembly of the State of Gujarat can only be held after the delimitation of the constituencies under the Delimitation Act, 1972. Any Legislative Assembly of a State which is to be composed after 1971 census is to be in accordance with Article 170 of the Constitution. The expression "Population" in Article 170 means the population as ascertained at the last preceding census of which the relevant figure have been published. [523 BC; 522 E]

ARGUMENTS

Attorney-General

The provisions of Articles 52, 53 and 77 (1) as well as several other provisions of our Constitution clearly show that without a President the governance of the country under our Constitution will come to a standstill. The makers of the Constitution of every country providing for a President consider a definite term of office for the President to be of primary importance and express their intention accordingly in their constitution. The makers of our Constitution have also done so. The election of the President before the expiration of the definite period of term of his office must necessarily also be of primary importance in order to achieve, the intention of the makers of the Constitution to give the President a definite Period of his term as President.

Thus clause (1) of Article 62 is expressed in peremptory and mandatory language to give effect to the intention of the makers of the Constitution-, it operates independently and is not circumscribed or conditioned by or dependent on any other provision of the Constitution. Clause (2) of Article 62 makes this still clearer. The contingencies referred in 65 (1) are the same as those referred to in 62 (2). Sub-sections (3) and (4) of Section 4 of the Presidential and Vice Presidential Elections Act, 1952, enacted in pursuance of powers conferred under Art. 71(3) point to the same conclusion regarding the peremptory and mandatory character of Art. 62. Reading proviso (c) to clause (1) of Art. 56 in the context of 56 (1) and 62, it becomes clear that, notwithstanding the expiration of his term, the President will continue to hold office only for a very brief period

until his successor enters upon his office. A comparison of clause (3) 3 of Article 12 of the Constitution of Eire with Art. 62 of our Constitution will also indicate the peremptory and mandatory character of the latter. Peremptory and mandatory character of 62(1) is no longer res integra : Narayan.Bhaskar Khare v. The Election Commission of India [1957] S.C.R. 1081.

Article 54 merely lays down the qualifications for membership of the 'electoral college'-mentioned therein and, in effect, only specifies the electorate for the Presidential election. Nominated members have no place in that. Art. 54 may be read in either of the two ways; one the electoral college denotes the full strength of the elected members of the Legislatures, if all the elective seats therein had been

508

filled up at the relevant time or, two, it is to consist of such of the elected members of the Legislatures as are actually elected members at the relevant time. On the first view, it would almost be impossible to hold the Presidential election, because the full strength of elected members is rarely available at the relevant time. On the second view, in the context of 71(4) there will be no difficulty in holding the election at the relevant time. If the first view is accepted, after 1961 Article 71(4) will bar any question as to the validity of the election on the plea of existence of any vacancy among the members of the electoral college electing the President. Whichever view of Article 54 be taken, it would not affect the validity of Presidential election held at a time when the Legislative Assembly of a State is not in existence. Art. 71(4) will operate as a bar to questioning the validity of the election.

The "electoral college" mentioned in Art. 71(4) is the same "electoral college" as in Art. 54. This "electoral college" is independent of the Legislatures mentioned in Article 54, notwithstanding that the elected members of these Legislatures constitute the "electoral college". The words "any vacancy" in Art. 71 (4) indicate that the vacancy may be of any nature, that is due to any cause, or may be of any magnitude.' The expression "any vacancy for whatever reason" does not admit of any limitation on its purport or scope. The words "for whatever reason" emphasis that the nature or magnitude of the reason for any such vacancy is immaterial. The dissolution of Legislative Assembly of a State would only be a cause resulting in vacancies among members of the electoral college within the meaning of 71(4).

The clear implication of 71 (4) read with Articles 54, 56 (1), 62 (1) and 65 is that the election of President must be held before the expiration of the term of office of President, as peremptorily laid down in 62(1), or, as the case may, as soon as possible, and in no case later than six months from the date of occurrence of the vacancy due to any of the causes mentioned in 62(2), as also peremptorily laid down in that clause.

Article 55 has no more effect than indicating how the votes to be cast at the Presidential election are to be calculated. This Article lays down that if the formula laid down therein are applied. uniformity and parity would be secured. If there should be a vacancy in the "electoral college" on either of the two interpretations on Article 54, the formula laid down in Art. 55 will still be applicable and will be applied and no question regarding the validity of the election of the President for non-compliance with Art. 55 can possibly arise.

Solicitor-General

It is fairly clear that the Electoral College consists of individual members and not of the various legislatures. The usual language in other statutes where qualifications are prescribed does not occur in Article 54. This is because in the other statutes after laying down the qualifications a judicial procedure for determination as to who qualifies becomes necessary. By the very nature of provisions of Art. 54 all that is eliminated.

The provisions of Art. 56(1)(c) while enabling the outgoing President to continue reiterate that his term nonetheless has expired. Art. 62(1) binds itself with the limit of time within which the election of a successor must take place. The limit of time is the expiry of the term of the out-going President.

There is no reason to depart from the natural interpretation of the language of Art. 54, 56 and 62, by any supposed principles to be inferred from the so-called federal nature of the Indian Constitution. Although the President is Part of the constitutional machinery, but having regard to functions assigned to him, namely that of a Constitutional head, always acting according to the advice of the Central Cabinet, it does not matter to any state as to who occupies the office of the President nor is there any federal principle violated by permitting the members of the existing legislatures constituting the electoral college to elect the President. The Union Territories have their representation only through the Members of Parliament. This is no reason why the same principle should not be applicable for instance, when the Gujarat Assembly is not there, the Members of Parliament from Gujarat constituencies are there to represent

509

it in the electoral college, The electoral college is always duly constituted consisting of the members to answer the description of Art. 54.

Art. 71(4) excludes a plea based on the contrary interpretation by using the expression "for whatever reasons" qualifying the vacancy.

Additional Solicitor General :

In the working of the Constitution the framers clearly contemplated dissolution of Legislative Assemblies and even of the House of the People not only by expiration of time but even earlier Articles 172(1) and 174(2) regarding Legislative Assemblies; Articles 83(2) and 85(2)(b) regarding the House of the People. The framers of the Constitution, therefore, knew that there may not be in existence an elected House of the People or a Legislative Assembly of a State at every point of time in the working of the Constitution. Therefore, when Article 54 speaks of elected members of the House of the People and elected members of the Legislative Assemblies of the States, it only prescribes the composition or strength of the elected college. It does not specify at what point of time this strength or composition is to be determined. The words, "consisting of" do not mean "Must at the time of election consist of".

Deliberative assemblies are not incompetent to perform their duties or exercise powers because of vacancies in their membership *Fishwill v. Cleland* C.L.R. 186 (188-89 and 198-99) and *Amayal Achi v. Lakshmi Achi* [1945] F.C.R.

1. If the vacancies resulting in non-representation of an entire State in the Council of States or the Houses of the People do not affect the constitution of the Council of States or the House of the People or its power to carry on

its functions, it is difficult to understand how the absence or representation of an entire State in the electoral college makes a difference in the composition or functioning of the electoral college.

Article 62(1) deals with periodical vacancies and Article 62(2) deals with casual vacancies. Reading articles 54 and 62 together it becomes clear that before the end of the periodical vacancy or within six months of the occurrence of the casual vacancy the new President must be elected from amongst the members of the electoral college mentioned in Art. 54.

Article 55 relates to the mode of calculation of votes and guarantees that the elections will be held and must be held in the time schedule prescribed in Art. 62. The mode of computation of votes on the basis of total strength has been followed by the Election Commission, ever since the first Presidential election in 1952.

If any doubt remained with regard to the composition of the electoral college that doubt stood resolved by Art. 71(4). The words "any vacancy" in this article would also include vacancy arising by reason of compulsion of law namely, dissolution. The words "for whatever reason" put the matter beyond doubt. Article 71(4) is based on two pre-suppositions; (1) that Art. 54 deals with the total strength of the electoral college but not the time of election and (2) that Art. 62 deals with the time of election and the election must be held at the time there mentioned irrespective of whether or not the total strength factually exists at that time.

The speeches made in the Parliament during the Constitution (Eleventh Amendment) Bill disclose that the contingency that has now arisen, namely, a State of the Union being unrepresented through members of its Legislative Assembly consequent upon dissolution was contemplated and provided for in Art. 7 (4).

Article 56(1)(c) does not contemplate any possible "successor" but only a successor who has been elected—that is the President-elect. This is clear from the words "until his successor enters upon his office."

Death is a contingency contemplated under sec. 7 of the Presidential and Vice-Presidential Elections Act 1952 would have to be worked out within the time schedule fixed in article 62(1) of the Constitution read with sec. 4(1) of 510

the Act and if necessary by amending sec. 4(1) of the Act to, meet the contingency of death occurring at a date very near the date of expiry of the term of office of outgoing President.

The notification under sec. 8 of the Delamination Act 1972 having already been published under sec. 10 of that Act prior to the date of dissolution of the Gujarat Legislative Assembly, the constituencies have to be delimited so as to accommodate 182 seats in the place of 168 seats.

Bihar :

Except in cases specifically provided for under clause (2) of Art. 62 this article requires that the election to fill the vacancy at the expiration of the period of 5 years from the date on which the President entered upon his office, shall be completed before the expiration of the term. This mandate of the framers of the Constitution is not qualified by the Proviso to Art. 56. In fact, Article 62 peremptorily and in absolute terms enjoins that election be held in the natural course before the expiration of the term; and even in unforeseen circumstances "not later than 6 months from the date of the occurrence of the vacancy."

Though Art. 71(4) does not envisage a contingency where a State Legislature has been dissolved, the words of Art. 62 have an inexorable force. There can be no difficulty in applying the formula contained in Art. 55 and working out the scale of representation in spite of the dissolution of Legislative Assembly of a State.

Manipur

Art. 62(1) is mandatory and the election to elect a new President to the vacancy is to be completed before the expiration of the term of office of the President irrespective of the dissolution of the Legislative Assembly or Assemblies of a State or States. The elected members of both Houses of Parliament can represent the people of State whose legislative assembly has been dissolved. Art. 71(4) is also intended to cover the vacancy caused by the dissolution of a Legislative Assembly.

Tamil Nadu :

On a true and correct sense of the interpretation of Articles 54, 55, 56, 62 and 71, the electoral college need consist only of the elected members of such assemblies as are in existence at the time of expiration of the period of office of the outgoing President. Dissolution of a Legislative Assembly will amount to "Vacancy" in electoral college within the meaning of Art. 71(4). It follows, therefore, that the election of the President must be held before the expiration of the term of the outgoing President notwithstanding the fact that at the time of such election the Legislative Assembly of a State is dissolved.

On a correct interpretation of the relevant articles of the Constitution, Art. 71(4) cannot include within its scope "vacancies" by reason of dissolution of Assemblies or the House of People made mala fide or in colourable exercise of power or with an ulterior purpose. Further, if the House of the People or majority of the Assemblies is dissolved and reelection to the House or Assembly is deliberately not conducted within a specified period, the election of the President should not take place. Ordinarily, election to the dissolved House or Assemblies should be completed within reasonable time before the expiry of the term of the outgoing President. Art. 62(1) should be construed as subject to the implied limitation that if election to the dissolved assembly or the House of People is not held within a specified period except for a sufficient cause, the election to the office of the President should not take place. The question whether there is sufficient cause or not for not holding the election is for the Supreme Court to decide.

Bharatiya Jana Sangh

Under Article 143(1) of the Constitution it is not obligatory for the Supreme Court to give opinion. It may in certain cases decline to express opinion under its advisory jurisdiction. As this Reference has not been made by reason of

511

any bonafide doubt existing in the mind of Govt.-but with a view to trying to secure judicial approval for a course of political action Govt. has already decided on, the Supreme Court should decline to express any opinion on this Reference unless :

(a) The Govt. agrees to modify the Terms of Reference so as to cover the two important aspects, namely, (i) inclusion of Art. 170 and also the Delamination Act and (ii) inclusion of the question as to whether the election would be valid if the Govt. by its own acts of omission or commission, denies to the representatives of Gujarat an opportunity of

participating in the elections; and
(b) Government unreservedly commits itself to abiding by Supreme Court's opinion.

The "electoral college" mentioned in Article 54 does not consist only of the elected members of such Legislative Assemblies as are in existence at the time of the holding of Presidential election but consists of elected members of all the State Legislative Assemblies, and of the two House of Parliament, and if any one of the Assemblies is not in existence, the electoral college is incomplete. When the Legislative Assembly of any State is dissolved, it will not amount to "any vacancy" in the electoral college within the meaning of Article 71(4). The functioning of the Constitution is predicated upon the existence of and not on the absence of the Legislatures. This is evident from Articles 79 and 168.

Art. 55(2) is so designed as to maintain parity between the States as a whole and the Union, and uniformity amongst States inter se. There is a purpose behind this. That purpose is to maintain the neutral character of the President as between the Centre and the States, and the States inter se.

If the election to the office of the President be held in the absence of the Legislative Assembly in one or more States, the federal structure of the Constitution would be undermined and the people of the States who have not participated in the election of the President might develop a doubt that they may not get justice from the President in their disputes with the Union or States which participated in the election.

Immediate holding of elections after dissolution of the State Legislative Assembly or the Lok Sabha is mandatory and the provisions of Art. 170 and of the Delimitation Act of 1972 should be interpreted as directory in order to harmonise these provisions with the provisions of Articles 54, 56, 62, 79 and 168 of the Constitution.

The election to the office of President cannot be validly held, when at the time of such election the Legislative Assembly of any State is dissolved. To hold the election in the absence of a Legislative Assembly will directly violate the provisions of Articles 54, 55, 79 and 168 of the Constitution.

The President can continue to hold the office under 56(1)(c) notwithstanding the expiration of the term. But a healthy convention will be to abide by the directory provision given in Art. 62(1) and to hold the election during the term of the President.

Indian National Congress (O)

The members of Electoral College are not specifically elected for the purpose of voting in Presidential Election. The parity between the States and the Centre provided for in Art. 55 cannot be possibly achieved if one or more States remain totally unrepresented. Art. 71(4) is intended to cover an altogether different situation. The vacancy in the electoral college can only mean that certain seats in an assembly may be vacant but not that the whole House is absent on account of its dissolution.

A harmonious construction of the relevant provisions of the Constitution will reveal that if any State Assembly is not in existence a fresh election to the State Assembly should be held before the election to the office of the President.

Indian Muslim League :

The "electoral college" spoken of in Article 54 consists of both the Houses of Parliament as well as of all the State Assemblies. It is not legal to hold

512

election if one or more State Assemblies are not in existence at or before the expiration of the term of office of the President. Otherwise the uniformity in the scale of representation of the different States at the election of the President cannot be maintained. The parity between the States as a whole and the Union will also be destroyed. The dissolution of a Legislative Assembly amounts to non-existence of a constituent unit of the electoral college. It is not a casual vacancy contemplated in Art. 71(4).

Though ordinarily the President's election must be completed before the expiration of the term, the aid of Art. 62 cannot be so taken as to affect the basic provision in Art. 54 regarding the composition of the electoral college. The proviso to Art. 56(1)(c) enables the President to continue in office even after the expiry of his term. There is no provision that the election of the President cannot be postponed for a very short and reasonable period. No election can be held in the absence of complete electoral college. The elections to the State Assembly can be completed without any unreasonable delay and Presidential election held thereafter.

Socialist Party :

The President can continue in office beyond his term of office, but not beyond six months from the date on which vacancy occurs. However, even without the President or the Vice-President, there can be no constitutional vacuum for the office of the President because the Chief Justice or the senior most judge of the Supreme Court can officiate as a President of India under President (Discharge of Functions) Act 1969.

The vacancy spoken of in Art. 71(4) is only a casual vacancy. Vacancies caused by the non-existence of any State Legislative Assembly or even of Lok Sabha in future would disturb the uniformity in the scale of representation of different states as well as parity between the states as a whole and the Union. Holding of election to the office of the President in the absence of a Legislative Assembly will clearly violate Art. 55. Not only that. It will also amount to destruction of the Federal structure and also the basic principle, of republicanism, namely, equality of States in the Union to take part in the Presidential Election.

JUDGMENT:

ADVISORY JURISDICTION : Special Reference No. 1 of 1974. (Reference under Article 143 of the Constitution of India.) Niren De, Attorney General of India, Lal Narain Sinha, Sol. General of India and R. N. Sachthey, for Attorney General of India.

F. S. Nariman Addl. Solicitor General of India, S. P. Nayar and Girish Chandra, for Election Commission.

Lal Narain Sinha, Solicitor General of India, and M. N. Shroff, for Advocate General for the State of Maharashtra.

S. Govind Swaminathan, G. Ramaswamy and A. Subhashini for Tamil Nadu Balbhadra Prasad Singh and U. P. Singh for Bihar.

M. Veerappa for Karnataka.

R. P. Kapoor, for Madhya Pradesh.

M. N. Abdul Khader and K. R. Nambiyar for Kerala.

N. Ibotambi Singh and R. N. Sachthey for Manipur.

S. N. Kachker and O. P. Rana for Uttar Pradesh.

L. M. Singhvi, U. P. Singh and S. M. Jain for, Rajasthan.

For the Applicants Interveners: Rajinder Lal Kohli, S. K.

Bagga, S. Bagga, Satish Kohli and Yash Bagga, for P. S. Wallace.

C. L. Lakhanpal, S. K. Mehta, K. R. Nagaraja, M. Qamaruddin, Vinod Dhawan and V. Mayakrishnan, for Indian National Congress (O)

513

Santokh Singh and N. R. Choudhry for Socialist Party.

Bashir Ahmed, Shakeel Ahmed and K. L. Hathi for Indian Union Muslim League.

L. K. Advani, President, Bhartiya Jana Sangh, appeared in person for Bhartiya Jana Sangh.

M. M. Bajaj and Harinder Singh Khera appeared in persons,

The Judgment of the Court was delivered by

RAY, C.J.-This Reference has been made by the President under Article 143(1) of the Constitution of India for the opinion of this Court on certain questions of constitutional importance bearing upon the election to fill the vacancy on the expiry of the term of office of the President on 24th August, 1974.

The Reference turns on the principal question as to whether the election to fill the vacancy caused on the expiry of the term of office of the President must be completed before the expiry of the term of office notwithstanding the fact that the Legislative Assembly of the State of Gujarat is dissolved.

Article 52 states that there shall be a President of India.

Article 56(1) states that the President shall hold office for a term of five years from the date on which he enters upon his office. Article 60 states that every President before entering upon his office shall make and subscribe an oath or affirmation as mentioned therein. Article 63(1) states that an election to fill a vacancy caused by the expiration of the term of the office of President shall be completed before the expiration of the term. Article 56(1) (c) states that the President shall, notwithstanding, the expiration of his term, continue to hold office until his successor enters upon his office.

The fixed term of office mentioned in Article 56(1) as will as the, mandate in Article 62(1) that the election to fill a vacancy caused by the expiration of the term of office shall be completed before the expiration of the term reflects the dominant constitutional purpose and intent regarding the time when the election of the President is to be held. Further, the provision in Article 62(2) that an election to fill a vacancy in the office of the President by reason of his death, resignation or removal or otherwise be held as soon as possible after and in no case later than six months from the date of the occurrence of the vacancy shows that the time to hold an election to fill a vacancy is also mandatory in character.

The completion of election before the expiration of the term in the: case of vacancy caused by the expiry of the term as well as filling the vacancy by holding an election not later than six months from the date of the occurrence of the vacancy in the other case does not contain any provision for extension of time. By way of contrast reference may be made to Article 83 where it is said that though the expiration of the period of five years shall operate as a dissolution of the house the period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

514

The interveners suggested that the word "otherwise"

occurring in Article 62(2) of the Constitution contemplates a case of filling a vacancy occurring by the expiration of the term but where such vacancy cannot be filled up by completing the election before the expiration of the term by reason of dissolution of the Assembly. The interveners submitted that a vacancy could in such a case be filled up not later than six months from the date of the occurrence of the vacancy. The submission of the interveners is unsound. The word "otherwise" does not refer to a vacancy caused by the expiration of the term of office for the obvious reason that the same is the subject matter of Article 62(1). The marginal note to Article 62 fully bears this out. Further, a President whose term has expired can continue to hold the office only under Article 56(1) (c) until his successor enters upon his office. Article 56(1) (c) is complementary to Article 62(1). Here successor means a successor elected before or even after the expiration of the term stated in Article 62(1) and as fully explained later on.

The word "otherwise" may take in cases where, for example, a President become disqualified to hold the office or where his election is declared void, and, therefore, he cannot hold the office. In such cases, an election is to be held not later than six months from the date of the occurrence of the vacancy.

Article 65(1) provides that where the office of the President by reason of his death, resignation or removal or otherwise becomes vacant, the Vice-President shall act as President until the date on which a new President elected to fill vacancy enters upon his office. Article 56(1) is complementary to Article 62(2). An election to fill a vacancy in the office of the President for the reasons mentioned in Article 62(2) obviously does not attract Article 56(1) (c). This is another reason which establishes that the word "otherwise" used in relation to vacancy in the office of the President under Article 62(2) cannot cover the case of a vacancy in the office of the President by the expiration of the term. Vacancy under Article 62(2) does not enable the President to continue in office.

The interveners suggested that section 7 of the Presidential and Vice-Presidential Elections Act, 1952 hereinafter referred to as the 1952 Act shows that an election to fill the vacancy in the office of the President may not be completed before the expiration of the term. The interveners, therefore, submitted that it could not be held that the completion of election before the expiration of the term was a mandatory provision.

Section 7 of the 1952 Act states that if a candidate whose nomination has been made and is found to be in order on scrutiny, dies after the time fixed for nomination and a report of his death is received by the Returning Officer before the commencement of the poll, the Returning Officer shall, upon being satisfied of the fact of the death of the candidate, countermand the poll and report the fact to the Election Commission, and all proceedings with reference to the election shall be commenced a new in all respects as if for a new election.

These provisions in section 7 of the 1952 Act are to be considered along with section 4 of the 1952 Act. Section 4(3) of the 1952 Act

515

states that in the case of an election to fill a vacancy caused by the expiration of the term of office of the President or Vice-President, the notification under sub-section (1) shall be issued on, or as soon as conveniently-

may be after, the sixtieth day before the expiration of the term of office of the outgoing President or Vice-President, as the case may be, and the dates shall be so appointed under the said sub-section that the election will be completed at such time as will enable the President or the Vice-President thereby elected to enter upon his office on the day following the expiration of the term of office of the outgoing President or Vice-President, as the case may be.

The 1952 Act indicates that the provisions contemplate the completion of the election before the expiration of the term. Section 7 of the 1952 Act speaks of the contingency of death. In spite of the countermanding of the election in the case of death of a person whose nomination has been found in order it is provided that any other candidate whose nomination was valid at the time of the countermanding of the poll will not be required to present a fresh nomination. Again, it is provided that no person who has withdrawn his candidature before the countermanding of the poll shall be ineligible for being nominated as a candidate for the election. Therefore, it is the same process of Presidential election which, was commenced under the Act for completion before the expiration of the term. It is true that fresh nominations can be presented by persons other than those whose nominations have been found to be in order. That is only because people are given the choice for presenting fresh nomination papers for candidates of choice because of the new and unanticipated events. It is not entirely a fresh election. It is in some respects a new election. It is in other respects a continuation of the election which commenced but could not be completed because of death.

In determining the question whether a provision is mandatory or directory, the subject matter, the importance of the provision, the relation of that provision to the general object intended to be secured by the Act will decide whether the provision is directory or mandatory. It is the duty of the courts to get at the real intention of the legislature by carefully attending the whole scope of the provision to be construed. The key to the opening of every law, is the reason and spirit of the law, it is the *animus impotentia*, the intention of the law maker expressed in the law itself, taken as a whole". (See *Bratt v. Bratt* (1826) 3 Addams 210 at p. 216).

If the completion of election before the expiration of the term is not possible because of the death of the prospective candidate it is apparent that the election has commenced before the expiration of the term but completion before the expiration of the term is rendered impossible by an act beyond the control of human agency. The necessity for completing the election before the expiration of the term is enjoined by the Constitution in public and State interest to see that the governance of the country is not paralysed by non-compliance with the provision that there shall be a President of India.

The impossibility of the completion of the election to fill the vacancy in the office of the President before the expiration of the term of office in the case of death of a candidate as may appear from section 7 of the 1952 Act does not rob Article 62(1) of its mandatory character.

516

The maxim of law *impotentia excusat legem* is intimately connected with another maxim of law *lex non cogit ad impossibilia*. *Impotentia excusat legem* is that when there is a necessary or invincible disability to perform the mandatory part of the law that *impotentia* excuses. The law

does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him." Therefore, when it appears that the performance of the formalities prescribed by a statute, has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance of the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See, Broom's Legal Maxims 10th Edition at pp. 1962-63 and Craies on Statute Law 6th Ed. p. 268).

The effect of Article 62(1) was considered by this Court in Narayan Bhasker Khare v. The Election Commission of India reported in [1957] S.C.R. 1081. Das, C.J. spoke, for the constitution Bench of seven learned Judges. The petitioner there made an application under Article 71(1) of the Constitution invoking the jurisdiction of this Court to inquire into and decide what had been described as a grave doubt in connection with the election of the President and to direct the Election Commission not to proceed with the polling which had been fixed for 6 May, 1957 but to hold the same after completing the elections to the Lok Sabha and the Legislatures in all the States of the Indian Union including the Union territory. One of the contentions in that case was that one of the petitioners was a prospective candidate for election to the Lok Sabha from one of the Punjab constituencies where election was yet to be held and he would be prevented from exercising his right to vote for the election of the President. This Court held that Article 62 of the Constitution required that the election of the President must be completed within the time fixed by it and this provision is conceived in the interest of the people in general and is mandatory in character. The interveners submitted that the observation of this Court in the Khare case (supra) about the peremptory requirement to fill the vacancy caused by the expiration of the term of office was obiter. That is not so. Das, C. J. speaking of Article 62 said "it is necessary to bear in mind this clear mandatory provision of the Constitution". That is the true position. There, is another important observation in the Khare case (supra). It was contended there that the electoral college mentioned in Article 54 must be constituted after elections in all States and Union Territories are completed and should consist of all the elected members falling within both the categories because the Presidential election could not be held until the vacancies were filled up. Elections did not take place in Himachal Pradesh. Elections in two Constituencies of the State of Punjab also did not take place. It was held that the election process could not be held up till after the expiry of the five years term because it would involve non-compliance with the mandatory provisions of Article 62. Das, C. J. referred to the electoral college said that

517

if there are vacancies in Parliament or in the Legislature of one or more States, the election of the President required by Article 62(1) to be held before the expiry of the term of the outgoing President cannot be held up until the vacancies were filled up. This Court found that not holding the election in Himachal Pradesh could not hold up the election of the President.

The term of office of the President is fixed. The election to fill the vacancy caused by the expiration of the term is to be completed before the expiration of the term. It is in that context that the outgoing President notwithstanding the expiration of the term continues to hold office under Article 56(1) until his successor enters upon office. The successor can only enter upon his office after he takes the oath under Art. 60. He can take oath only after the election. It is possible that the, successor cannot enter upon his office on the day following the expiration of the term of office of the outgoing President for unavoidable reasons. That is why Articles 56(1), 56(1) (c) and 62(1) are to be read together to give effect to the constitutional intent and content that the election to fill the vacancy caused by the expiration of the term of the President is to be completed before the expiration of the term.

The interveners submitted that the true character of Article 62 depended on Articles 54 and 55 of the Constitution. Article 54 states that the President shall be elected by the members of an electoral college consisting of (a) the elected members of both Houses of Parliament; and (b) the elected members of the Legislative Assemblies of the States. The Constitution-makers may well have visualised that all legislative bodies should be in existence at the time of the Presidential election and all elected members of such bodies should participate in that election. But that is only an ideal. The realisation of this ideal is not practicable, because of the likely vacancies in the legislative bodies due to death, disqualification, resignation and the like.

Article 55(1) states that as far as practicable, there shall be uniformity in the scale of representation of the different States at the election of the President. Article 55(2) states that for the purpose of securing such uniformity among the States inter se as well as parity between the States as a whole and the Union, the number of votes which each elected member of Parliament and of the Legislative Assembly of each State is entitled to cast at such election shall be determined in a manner set out in the sub-article.

The interveners submitted that the units of the electoral college were Houses of Parliament and the Legislative Assemblies of States. The Jan Singh submitted that the democratic character of the Constitution demanded that there should be elected members of Legislative Assemblies of States to be entitled to cast votes at such election. It was said that if States were denied such right, they would be denied representation. It was also said that if States were denied the right to cast votes at the election, the parity between the States and the Union would be disturbed. The members of electoral college mentioned in Article 54 are not both Houses of Parliament and the Legislative Assemblies of the States.

518

The essence as well as scope of. Article 54 is merely to prescribe qualifications required for electors to elect President. The elected members of both Houses of Parliament and the Legislative Assemblies of States are the only members of the electoral college.

The essence of Article 55 merely lies in the application of formulae each elector having the required qualifications under Article 54 shall be entitled to exercise the number of votes in accordance with Article 55. Neither Article 54 nor Article 55 has anything to do either with the time of the election to fill the vacancy before the expiration of the term or to prevent the holding of the election before the

expiration of the term by reason of dissolution of Legislative Assembly of a State.

The electoral college as mentioned in Article 54 is independent of the Legislatures mentioned in Article 54. None of the Legislatures mentioned in Article 54 has-for the purpose of that Article any separate identity vis-a-vis the electoral college. The electoral college compendiously indicates a number of persons, holding the qualifications specified in the Article to constitute the electorate for the election of the President and to act as independent electors.

Neither Article 54 nor Article 55 prescribes the circumstances in which or the time when the election of the President shall take place. Article 55 has no concern with the competence of the election of the President because of dissolution of the Legislative Assembly of a State. Article 55(2) deals with the formulae for securing uniformity among the States inter se and parity between States as a whole and the Union. It is important to notice that parity is not between each State separately as a unit on the one hand and the Union on the other but between the States as a whole and the Union.

Article 55(1) states that as far as practicable, there shall be uniformity in the scale of representation. It is indisputable that the uniformity among the States inter se and parity between the States as a whole and the Union which are contemplated in Article 55(2) are not the same thing as uniformity in the scale of representation of the different States contemplated in Article 55(1). The words 'as far as practicable' in Article 55(1) in relation to uniformity in the scale of representation of the States are important. Article 55(1) shows that the words 'as far as practicable' indicate that in practice the scale of representation may not be uniform because of the actual number of electors entitled at the date of election to cast their votes. The actual number of electors at the date of the election of the President may not be equal to the total number of all the elected members of both Houses of Parliament and all Legislative Assemblies of all States.

Article 55 indicates the methods of calculating as to how many votes, an elected member of the electoral college can cast at the Presidential election. Article 55 has nothing to do with any vacancy in the electoral college or as mentioned in Article 71 (4), or a cesser of membership of the electoral college, by reason of a member not fulfilling the character of elected member of both Houses of Parliament or of Legislative Assemblies of States.

The words 'an electoral college, consisting of' in Article 54 mean that the electoral college shall consist of persons mentioned therein. The

519

words 'consisting of' refer to the strength of the electoral college. The Houses of Parliament and the Legislative Assemblies are mentioned in Article 54 only for the purpose of showing the qualifications of electoral college. The dissolution of the Assembly means that there are no elected members of that dissolved Assembly. The electoral college is always ready to meet the situation at the expiry of the term of office or any vacancy caused by death, resignation or removal or otherwise. The elected members of a dissolved Legislative Assembly of a State are no longer members of the electoral college consisting of the elected members of both Houses of Parliament and elected members of the Legislative Assemblies of the States and are, therefore, not entitled to cast votes at the Presidential election.

It was said by the interveners that Article 54 reflects the democratic pattern of participation by the States in the choice of the President and if a State were denied such a right, it would be undemocratic. Recourse was taken to Article 368 to show that Articles 54 and 55 were mentioned in the proviso to Article 368 and if any amendment of Article 54 and 55 was required consent of the States was necessary. It was, therefore, said by the interveners that Articles 54 and 55 read with Article 368 would be a key to the interpretation of Article 62 that no election of the President could be held without the representation of elected members of Legislative Assemblies of the State where the Assembly has been dissolved. These submissions on behalf of the interveners are without substance.

Article 54 lays down the qualifications for membership of the electoral college. The Gujarat State Assembly has been dissolved under Article 174. As a result of the dissolution, there are no elected members of the Legislative Assembly in a State. The electoral college consists of elected members of State Assemblies. If the Legislative Assembly of a State is dissolved, the members of that dissolved Legislative Assembly do not fulfil the character of elected members of a State Assembly. It will not only be undemocratic but also unconstitutional to deny the elected members of both the Houses of Parliament as well as the elected members of the Legislative Assemblies of the States the right to elect the President in accordance with the provisions of the Constitution only because the Assembly of a State is dissolved. The true meaning of Article 54 is that such persons as possess the qualification of being elected members of both Houses of Parliament and of Legislative Assemblies of States at the crucial time of the date of election will be eligible members of the electoral college entitled to cast vote at the election to fill the vacancy caused by the expiration of the term of office of the President.

The submissions of the interveners that Article 62 will be construed in the light of Articles 54, 55 and 368 are unsound. It has always to be remembered that Constitution is "the revelation of great purposes" which were intended to be achieved by the Constitution as a continuing instrument of Government. In *Warburton v. Loveland* (1832) 2D & CL. 480 it has been said that 'no rule of construction can require that when the words of one part of a statute convey a clear meaning, it shall be necessary to introduce another part of a statute for the purpose of controlling or diminishing the efficacy of the first part'. Article 62 is the constitutional date and other provisions like

520
Articles 54, 55 subserve Article 62. The Legislative Assemblies of the States are not members of the electoral college. None of the Articles 368, 54, 55 can rob Article 62 of its constitutional content. Article 62 stands by itself independent of any other provision.

It is appropriate at this stage to refer to provisions contained in Article 71(4) of the Constitution. Article 71(4) was introduced by Constitution (Eleventh Amendment) Act, 1961. The provision in Article 71(4) is that the election of a person as President or Vice-President shall not be called in question on the ground of the existence of any vacancy for whatever reason among the members of the electoral college electing him. Article 71(4) was introduced after the decision of this Court in the *Khare* case, (supra). Das, C.J. said in the *Khare* case (supra) that though there are vacancies in the Parliament or the

State Legislative Assemblies by reason of elections not having been held in Himachal Pradesh and two Constituencies in the State of Punjab, the holding of Presidential Election cannot be postponed. This Court in the Khare case (supra) stated that doubts or disputes of that nature could be canvassed only after the conclusion of the entire election. No opinion was expressed in the Khare case (supra) as to whether a vacancy of the type in that case in the electoral college could be a ground for calling in question the election of the President. To remove all doubts, Article 71 (4) was introduced.

If as a result of dissolution of a Legislative Assembly of a State, there are no elected members of the Legislative Assembly of a State, a State will not have any elected members of a State Legislative Assembly to qualify for the electoral college. It may be said on the analogy of the observations in the Khare case (supra) that there are vacancies in the electoral college by reason of the fact that there are no elected members of the Legislative Assembly of a State where the Legislative Assembly is dissolved. That matter will not be a ground either for preventing the holding of the election on the expiry of the term of the President or suggesting that the election to fill the vacancy caused by the expiry of the term of the office of the President could be held only after the election to the Legislative Assembly of a State where the Legislative Assembly is dissolved is held.

Under Article 54 only elected members of both Houses of Parliament and the Legislative Assemblies of the States are members of the electoral college. The numerical strength of the electoral college will be the total number of elected members of both Houses of Parliament and the Legislative Assemblies of the States. At any particular time there may not be the full strength of the electoral college. At the relevant date of the Presidential election if a person who was prior to that relevant date an elected member of the Houses of Parliament or of the Legislative Assemblies of the States and ceased to become an elected member of any of the legislative bodies by reason of death or resignation or disqualification or dissolution of the legislative body such a person would not possess the qualification to be an elector. Article 71(4) was really introduced after the Khare case (supra) to shut out any challenge to the election on the ground that there was any vacancy among members of the electoral college. In view of the constitutional declaration or exposition

521

of Article 71(4) it is manifest that the language is of wide amplitude, viz., existence of any vacancy for any reason whatever among the members of the electoral college. It will take in any case where a person who as an elected member of the Houses of Parliament or the Legislative Assembly of a State became, entitled to be a member of the electoral college but ceased to be an elected member at the relevant date of the election and therefore became disentitled to cast vote at the election and that vacancy among members of the electoral college was not filled up.

We refrain from expressing any opinion on the question which has been posed during arguments as to what would be the position if there is "mala fide dissolution" of a State Legislative Assembly or Assemblies, or if there is, after the dissolution of the Assembly or Assemblies, a "mala fide refusal" to hold elections thereto within reasonable time before the Presidential election because such a question does not arise on the present Reference. Likewise, we

refrain from expressing any opinion on the effect of the dissolution of a substantial number of State Legislative Assemblies before the, Presidential election.

The intervener Jana Singh submitted that the Reference should be declined for four reasons. First, that the recital in the order of Reference that election to the Legislative Assembly of the State of Gujarat is impossible is not correct. It was said that the election is possible. Second, the vital question is not whether the Presidential election could be valid or not in the absence of the Gujarat State Assembly but whether the election of the President would be valid if the authority charged with election by acts of omission or commission have not held the Gujarat Assembly election. Third, the election to the State Assembly of Gujarat could have been held on the basis of the 1961 census. Fourth, Article 143 stipulates a general doubt about the Constitution and not doubts of parties.

This Court is bound by the recitals in the order of Reference. Under Article 143(1) we accept the statements of fact set out in the reference. The truth or otherwise of the facts cannot be inquired or gone into nor can Court go into the question of bona fides or otherwise of the authority making the reference. This Court cannot go behind the recital. This Court cannot go into disputed questions of fact in its advisory jurisdiction under Article 143(1).

The Federal Court in *Re. The Allocation of Lands and Buildings in a Chief Commissioner's Province* [1943] F.C.R. 20 a Reference under section 213(1) of the Government of India Act which is similar to Article 143 said that though the terms of that section do not impose an obligation on the Court, the court should be unwilling to accept a Reference except for good reasons. This Court accepted the Reference for reasons which appeared to be of constitutional importance as well as in public interest.

In *Re. Kerala Education Bill* case [1959] S.C.R. 995 Das, C.J. referred to the Reference in *Re. The Allocation of Lands and Building and the Reference in Re. Levy of Estate Duty* [1944] F.C.R. 522

317 and the observation in both the cases that the Reference should not be declined excepting for good reasons. This Court accepted the Reference on the Questions of law arising or likely to arise. Das, C.J. in *In Re. Kerala Education Bill* case said that it is for the President to determine what questions should be referred and if he does not have any serious "doubt" on the provisions, it is not for any party to say that doubts arise out of them. In short, parties appearing in the Reference cannot go behind the order of Reference and present new questions by raising doubts.

On behalf of the intervener Jana Sangh reliance was placed on section 10(4) of the Delimitation Act, 1972 hereinafter referred to as the 1972 Act. Broadly stated, the submission on behalf of the Jana Sangh is that by reason of section 10(4) of the 1972 Act election to the Gujarat Legislative Assembly could be held on the basis of the 1961 census, and the existing electoral rolls.

The 1972 Act in section 8 speaks of the readjustment of number of seats. This readjustment is on the basis of the latest census figures. The latest census of 1971. The Delimitation Commission has by order under section 8 of the 1972 Act determined the total number of seats to be assigned to the Gujarat State Assembly as 182. The previous number was 168. Under section 9 of the 1972 Act the Commission shall distribute the seats in the Legislative Assembly to

single member territorial constituencies and delimit them on the latest census figures. The Commission has published proposals for de-limitation and invited objections. The Commission has not yet made any order determining the delimitation of Assembly constituencies.

The provisions contained in Article 170 repel the submission that the election to the Gujarat Legislative Assembly can be held on the basis of 1961 census. Article 170 provides that the Legislative Assembly of each State shall consist of not more than five hundred, and not less than sixty, members chosen by direct election from territorial constituencies in the State. Each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it shall, so far as practicable, be the same throughout the State. The expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published. The 1971 census has been published. Upon the completion of each census, the total number of seats and the division of each State into territorial constituencies shall be readjusted by such authority and in such manner as Parliament may by law determine. The Delimitation Commission under the 1972 Act is engaged in the division of the State into territorial constituencies.

It is apparent and there is nothing in section 10(4) of the 1972 Act to the contrary which enjoins the Election Commission to hold elections to the House of the People or the Legislative Assembly dissolved after the census of 1971 according to the electoral rolls prepared of the constituencies delimited on the basis of the census of 1961. It is evident that under clause (2) of Article 170 read with the Explanation and clause (3) of Article 170 elections to the Legislative

523

Assembly after the relevant figures of the population of the last preceding census have been ascertained and published can only be held on that basis of the total number of seats in the Legislative Assembly of each State and the division of each State into territorial constituencies readjusted by the Election Commission under the 1972 Act. Now that the census figures of 1971 have been published elections have to be held under Article 170 only after delimitation of the constituencies has been made in accordance with clauses (2) and (3) of Article 170.

When a notification under section 8 of the 1972 Act has been published by assigning 182 seats to the Gujarat Assembly which notification under section 10(2) of the 1972 Act has the force of law and cannot be questioned in any court, elections to these 182 seats cannot be held on the basis of the old electoral rolls because those electoral rolls applied only to the 168 seats as fixed under the old Delimitation Act.

,It is provided in Article 170 that the readjustment by the Delimitation Commission shall not affect representation in the Legislative Assembly until the dissolution of the then existing Assembly. 'The Legislative Assembly of the State of Gujarat has been dissolved. Therefore, any election which has to be held to the Legislative Assembly of the State of Gujarat can only be held after the Delimitation of constituencies under the 1972 Act. Any Legislative Assembly of a State which is to be composed after the 1971 census is to be in accordance with Article 170. The contention of Jana Sangh is without substance.

On behalf of the intervener Socialist Party, it was said

that the Constitution (Eleventh Amendment) Act, 1961 is unconstitutional. We cannot go into that question in this Reference.

For the foregoing reasons we give the following answers

1. Only such persons who are elected members of both Houses of Parliament and the Legislative Assemblies of the States on the date of the election to fill the vacancy caused by the expiration of the term of office of the President will be entitled to cast their votes at the election.

2. Subject to the aforesaid observation as to the effect of the dissolution of a substantial number of the Legislative Assemblies the vacancies caused by the dissolution of an Assembly or Assemblies will be covered by Article 74(4).

3, 4 and 5. The election to the office of the President must be held before the expiration of the term of the President notwithstanding the fact that at the time of such election the Legislative Assembly of a State is dissolved. The election to fill the vacancy in the office of the President is to be held and completed having regard to Articles 62(1), 54, 55 and the Presidential and Vice-Presidential Elections Act, 1952.

6. Article 56(1)(c) applies to a case where a successor as explained in the foregoing reasons has not entered on his office and only in such circumstances can a President whose term has expired continue.

V.M.K. Reference answered accordingly.

524