

PEOPLE'S UNION FOR CIVIL LIBERTIES AND ANOTHER A  
V.

UNION OF INDIA AND ANOTHER  
Writ Petition (Civil) No.161 of 2004

FEBRUARY 23, 2009 B

(B.N. AGRAWAL AND G.S. SINGHVI, JJ.)

REPRESENTATION OF THE PEOPLE ACT, 1951/CONDUCT  
OF ELECTION RULES, 1951:

*Sections 33A, 33B/Rules 41(2) and 49-O – Right to negative voting and to keep it secret – Appropriate directions to Election Commission to make necessary provision in the ballot papers and in Electronic Voting Machines – Prayed for in Writ Petition – Held: C.B. Judgment in **Kuldip Nayar's** case has not overruled or discarded the ratio in **Association for Democratic Reforms and PUCL**, both by 3 Judges Bench, tends to create a doubt whether the right of voter to exercise his choice for the candidate is a necessary concomitant of the voter's freedom of expression guaranteed under Article 19(1)(a) of the Constitution – Thus the issue needs a clear exposition of law by a larger Bench – Also the width and amplitude of the power of the Election Commission under Article 324 of the Constitution needs further consideration by a larger Bench in the light of Supreme Court Judgments recognizing elector's right to be informed of the assets and antecedents of the candidates – Reference to larger Bench.* C D E F

In the Writ Petition, the petitioners have prayed for striking down Rules 41(2) and 49-O of the Conduct of Election Rules, 1961 and for a direction to the Election Commission to make appropriate provision in the ballot papers and Electronic Voting Machines (EVMs) so as to enable the voters to exercise their right of negative voting and also ensure that exercise of such right is kept secret. G

Referring the matter to a larger Bench, the Court

A HELD: 1. Democracy is a part of the basic structure  
of our Constitution and rule of law and free and fair  
election are basic features of democracy. Democracy  
B postulates that there should be periodical elections so  
that people may be in a position either to re-elect the same  
representatives or choose new representatives.  
C Democracy also contemplates that elections should be  
free and fair and the voters should be in a position to vote  
for the candidates of their choice. The pre-requisite of this  
is that the elections are not rigged and manipulated and  
the candidates or their agents are not able to resort to  
unfair means and malpractices. [Para 1] [925-A-B]

2. In view of the judgments in *Association for  
Democratic Reforms*, and *PUCL*, a new dimension was  
D given to the right of sovereign i.e. the people to make  
choice of their representatives after knowing the assets  
and antecedents of the persons seeking election to the  
legislatures. These judgments also gave an expansive  
E meaning to the term 'expression' used in Article 19(1)(a)  
by declaring that in the democratic set up of our country  
the elector's right to have complete information about the  
candidates and then express his choice for a particular  
person, are necessary concomitant of the freedom of  
expression guaranteed under Article 19(1)(a). [Para 8]  
[934-H;35-A-B]

F *Union of India vs. Association of Democratic Reforms  
and Anr.* (2002) 5 SCC 294 (LB) and *People's Union for Civil  
Liberties vs. Union of India* (2003) 4 SCC 399 – referred to.

3. Having carefully read paragraphs 349 to 364 of the  
judgment in *Kuldip Nayar vs. Union of India* [(2006) 7 SCC  
G 1] which are found under the head 'Right to Vote – A  
Constitutional/Fundamental Right', it is seen that  
eventhough the Constitution Bench did not overrule or  
discard the ratio of the three-Judges Bench judgments in  
*Union of India vs. Association of Democratic Reforms and Anr.*  
H [(2002) 5 SCC 294 (LB)] and *People's Union for Civil Liberties*

vs. *Union of India* [(2003) 4 SCC 399], the opening line of para 362 tend to create a doubt whether the right of voter to exercise his choice for the candidate is a necessary concomitant of the voter's freedom of expression guaranteed under Article 19(1)(a) of the Constitution. Therefore, this issue needs a clear exposition of law by a larger Bench. Further, the width and amplitude of the power of the Commission under Article 324 needs further consideration by a larger Bench in the light of the judgments of this Court whereby the elector's right to be informed about the assets and antecedents of the persons seeking election to the legislature has been duly recognized. [Para 20] [944-H; 945-A-C]

*Smt. Indira Nehru Gandhi v. Shri Raj Narain and another* 1975 Supp. SCC 1; *Mohinder Singh Gill v. Chief Election Commissioner* (1978) 1 SCC 405; *Lily Thomas v. Speaker, Lok Sabha and others* (1993) 4 SCC 234; *State of U.P. v. Raj Narain* (1975) 4 SCC 428; *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India* (1985) 1 SCC 641; *Kanhiya Lal Omar v. R.K. Trivedi* (1985) 4 SCC 628; *Common Cause (A Registered Society) v. Union of India* (1996) 2 SCC 752; *N.P. Ponnuswami v. Returning Officer* 1952 SCR 218; *G. Narayanaswami v. G. Pannerselvan* (1972) 3 SCC 717; *C. Narayanaswamy v. C.K. Jaffer Sharief* (1994) Supp 3 SCC 170; *Jyoti Basu v. Debi Ghosal* (1982) 1 SCC 691; *Kuldip Nayar v. Union of India* (2006) 7 SCC 1; *Jagan Nath v. Jaswant Singh* 1954 SCR 892; *Rama Kant Pandey v. Union of India* (1993) 2 SCC 438; *Keshvananda Bharti v. State of Kerala* 1973 (4) SCC 225; *S. Raghubir Singh Gill v. S Gurcharan Singh Tohra* 1980 Supp SCC 53 and *Kihoto Hollohan v. Zachillhu* 1992 Supp. (2) SCC 651 – referred to.

#### Case Law Reference

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|------------------|-------------|--------|
| 1975 Supp. SCC 1 | referred to | Para 1 |
| (1978) 1 SCC 405 | referred to | Para 3 |
| (1993) 4 SCC 234 | referred to | Para 4 |

- A (2002) 5 SCC 294 (LB) referred to Para 5  
 (1975) 4 SCC 428 referred to Para 6  
 (1985) 1 SCC 641 referred to Para 6
- B (1985) 4 SCC 628 referred to Para 6  
 (1996) 2 SCC 752 referred to Para 6  
 (2003) 4 SCC 399 referred to Para 7  
 1952 SCR 218 referred to Para 7
- C (1972) 3 SCC 717 referred to Para 7  
 (1994) Supp 3 SCC 170 referred to Para 7  
 (1982) 1 SCC 691 referred to Para 7
- D (2006) 7 SCC 1 referred to Para 14  
 1954 SCR 892 referred to Para 15  
 (1993) 2 SCC 438 referred to Para 15  
 1973 (4) SCC 225 referred to Para 19
- E 1980 Supp SCC 53 referred to Para 19  
 1992 Supp. (2) SCC 651 referred to Para 19
- F CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil)  
 No.161 of 2004  
 Rajinder Sachhar, Sanjay Parikh, Jitin Sani, Mamta Saxena, A.N. Singh, for the Appellant.  
 Meenakshi Arora, S.K. Mendiratta, Survrajyoti Gupta, for the Respondents.
- G A. Sharan, ASG, Navin Prakash, Gaurav Agarwal, Rekha Pandey, C.K. Sharma, S.N. Terdol, D.S. Mahra, for Union of India..
- H The Judgement of the Court was delivered by

G.S. SINGHVI, J.

A

1. Democracy is a part of the basic structure of our Constitution and rule of law and free and fair election are basic features of democracy. Democracy postulates that there should be periodical elections so that people may be in a position either to re-elect the same representatives or choose new representatives. Democracy also contemplates that elections should be free and fair and the voters should be in a position to vote for the candidates of their choice. The pre-requisite of this is that the elections are not rigged and manipulated and the candidates or their agents are not able to resort to unfair means and malpractices. These are, in substance, the observations made by H.R. Khanna, J. in his concurring judgment in **Smt. Indira Nehru Gandhi v. Shri Raj Narain and another** [1975 Supp. SCC 1].

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2. Sir Winston Churchill described the importance of vote in a democratic election in the following words:

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"At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper – no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point".

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3. In **Mohinder Singh Gill v. Chief Election Commissioner** [(1978) 1 SCC 405], the Constitution Bench, after quoting the words of Sir Winston Churchill, proceeded to add 'if we may add, the little, large Indian should not be hijacked from the course of free and fair elections by mob muscle methods, or subtle perversion of discretion by men "dressed in little, brief authority". For "be you ever so high, the law is above you".

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4. In **Lily Thomas v. Speaker, Lok Sabha and others** [(1993) 4 SCC 234], the Court elucidated meaning of the term voting in the following words:

"Voting is the formal action of will or opinion by the person

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A entitled to exercise his right on the subject and issue in question. Right to vote means right to exercise the right in favour or against the motion. Such a right implies the right to remain neutral as well."

B 5. The scope of the citizen's right to express his/her opinion through the medium of the franchise was further developed in **Union of India v. Association for Democratic Reforms and another** [(2002) 5 SCC 294 (LB)]. That case emanated from the directions given by Delhi High Court to the Union of India and Election Commission of India (for short 'the Commission') to implement the recommendations made by the Law Commission in its 170<sup>th</sup> Report and make necessary changes in Rule 4 of the Conduct of Election Rules, 1961 [for short, 'the Rules']. Simultaneously, the Court considered the prayer made in the writ petition filed by petitioner no.1 herein under Article 32 of the Constitution for issue of a direction to the candidates to declare their assets and the facts relating to criminal case, if any, registered or pending against them before the election. After noticing the background in which directions were given by the High Court, this Court framed the following questions:

- E "1. Whether the Election Commission is empowered to issue directions as ordered by the High Court?
2. Whether a voter — a citizen of this country — has right to get relevant information, such as assets, qualification and involvement in offence for being educated and informed for judging the suitability of a candidate contesting election as MP or MLA?"
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G 6. The Court then discussed various facets of the term 'election' and width and amplitude of the Commission's power under Article 324, referred to various judgments including those of **Mohinder Singh Gill v. Chief Election Commissioner** (supra), **State of U.P. v. Raj Narain** [(1975) 4 SCC 428], **Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India** [(1985) 1 SCC 641], **Kanhiya Lal Omar v. R.K. Trivedi** [(1985) 4 SCC 628], **Common Cause (A Registered Society) v.**

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PEOPLE'S UNION FOR CIVIL LIBERTIES AND ANOTHER 927  
V. UNION OF INDIA AND ANOTHER [G.S. SINGHVI, J.]

**Union of India** [(1996) 2 SCC 752] and laid down seven A  
propositions of which proposition Nos.1, 2, 4, 5 and 7 are  
extracted below:

- "1. The jurisdiction of the Election Commission is wide enough to include all powers necessary for smooth conduct of elections and the word "elections" is used in a wide sense to include the entire process of election which consists of several stages and embraces many steps. B
2. The limitation on plenary character of power is when Parliament or State Legislature has made a valid law relating to or in connection with elections, the Commission is required to act in conformity with the said provisions. In case where law is silent, Article 324 is a reservoir of power to act for the avowed purpose of having free and fair election. The Constitution has taken care of leaving scope for exercise of residuary power by the Commission in its own right as a creature of the Constitution in the infinite variety of situations that may emerge from time to time in a large democracy, as every contingency could not be foreseen or anticipated by the enacted laws or the rules. By issuing necessary directions, the Commission can fill the vacuum till there is legislation on the subject. In *Kanhiya Lal Omar* case the Court construed the expression "superintendence, direction and control" in Article 324(1) and held that a direction may mean an order issued to a particular individual or a precept which many may have to follow and it may be a specific or a general order and such phrase should be construed liberally empowering the Election Commission to issue such orders. C D E F G
4. To maintain the purity of elections and in particular to bring transparency in the process of election, the H

- A Commission can ask the candidates about the expenditure incurred by the political parties and this transparency in the process of election would include transparency of a candidate who seeks election or re-election. In a democracy, the electoral process
- B has a strategic role. The little man of this country would have basic elementary right to know full particulars of a candidate who is to represent him in Parliament where laws to bind his liberty and property may be enacted.
- C 5. The right to get information in democracy is recognised all throughout and it is a natural right flowing from the concept of democracy. At this stage, we would refer to Article 19(1) and (2) of the International Covenant on Civil and Political Rights, which is as under:
- D (1) Everyone shall have the right to hold opinions without interference.
- E (2) Everyone shall have the right to freedom of expression; *this right shall include freedom to seek, receive and impart information and ideas of all kinds*, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- F 7. Under our Constitution, Article 19(1)(a) provides for freedom of speech and expression. Voter's speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For
- G this purpose, information about the candidate to be selected is a must. Voter's (little man — citizen's) right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of
- H democracy. The little man may think over before

making his choice of electing law-breakers as  
law-makers.” A

7. During the pendency of the appeal preferred by the Union of India against the directions given by Delhi High Court in the writ petition filed by Association for Democratic Reforms and another, the Representation of the People Act, 1951 (for short ‘the Act’) was amended by Amending Act No. 3 of 2002 and Section 33A and Section 33B were inserted in it. People’s Union for Civil Liberties challenged the vires of Section 33B by which it was declared that notwithstanding anything contained in any judgment, decree or order of any court or any direction or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under the Act or the rules made thereunder. A three-Judge Bench comprising of M.B. Shah, P. Venkatarama Reddy and D.M. Dharmadhikari, JJ. expressed separate but concurring opinions and declared Section 33B to be unconstitutional – **People’s Union for Civil Liberties v. Union of India** [(2003) 4 SCC 399]. M.B. Shah, J. who was a party to the earlier judgment in **Union of India v. Association for Democratic Reforms and another** (supra), referred to the judgments in **N.P. Ponnuswami v. Returning Officer** [1952 SCR 218], **G. Narayanaswami v. G. Pannerselvan** [(1972) 3 SCC 717], **C. Narayanaswamy v. C.K. Jaffer Sharief** [(1994) Supp 3 SCC 170] and observed: B  
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“It has to be stated that in an election petition challenging the validity of election, rights of the parties are governed by the statutory provisions for setting aside the election but this would not mean that a citizen who has right to be a voter and elect his representative in the Lok Sabha or Legislative Assembly has no fundamental right. Such a voter who is otherwise eligible to cast vote to elect his representative has statutory right under the Act to be a voter and has also a fundamental right as enshrined in Chapter III. Merely because a citizen is H

A a voter or has a right to elect his representative as  
per the Act, his fundamental rights could not be  
B abridged, controlled or restricted by statutory  
provisions except as permissible under the  
C Constitution. If any statutory provision abridges  
fundamental right, that statutory provision would be  
void. It also requires to be well understood that democracy  
based on adult franchise is part of the basic structure of  
the Constitution. The right of an adult to take part in election  
process either as a voter or a candidate could be restricted  
by a valid law which does not offend constitutional  
provisions."

Shah, J. then held that Section 33B was enacted for doing  
away with the effect of judgment in **Union of India v.**  
D **Association for Democratic Reforms** (supra) and this could  
not have been done by the legislature. Conclusions (D) and (E)  
recorded by Shah, J. which have bearing on this case are  
extracted below:

E "(D) The contention that as there is no specific fundamental  
right conferred on a voter by any statutory provision to  
know the antecedents of a candidate, the directions given  
by this Court are against the statutory provisions is, on the  
face of it, without any substance. In an election petition  
challenging the validity of an election of a particular  
F candidate, the statutory provisions would govern respective  
rights of the parties. **However, voters' fundamental right**  
to know the antecedents of a candidate is  
independent of statutory rights under the election  
law. A voter is first citizen of this country and apart  
from statutory rights, he is having fundamental rights  
G conferred by the Constitution. Members of a  
democratic society should be sufficiently informed  
so that they may cast their votes intelligently in  
favour of persons who are to govern them. Right to  
vote would be meaningless unless the citizens are  
H well informed about the antecedents of a candidate.

There can be little doubt that exposure to public gaze and scrutiny is one of the surest means to cleanse our democratic governing system and to have competent legislatures.

(E) It is established that fundamental rights themselves have no fixed content, most of them are empty vessels into which each generation must pour its content in the light of its experience. The attempt of the Court should be to expand the reach and ambit of the fundamental rights by process of judicial interpretation. During the last more than half a decade, it has been so done by this Court consistently. There cannot be any distinction between the fundamental rights mentioned in Chapter III of the Constitution and the declaration of such rights on the basis of the judgments rendered by this Court.

P. Venkatarama Reddi, J. agreed with M.B. Shah, J. that Section 33B does not pass the test of constitutionality and proceeded to observe:

"In a democratic republic, it is the will of the people that is paramount and becomes the basis of the authority of the Government. The will is expressed in periodic elections based on universal adult suffrage held by means of secret ballot. ... Nothing is therefore more important for sustenance of democratic polity than the voter making an intelligent and rational choice of his or her representative. For this, the voter should be in a position to effectively formulate his/her opinion and to ultimately express that opinion through ballot by casting the vote. The concomitant of the right to vote which is the basic postulate of democracy is thus twofold: first, formulation of opinion about the candidates and second, the expression of choice by casting the vote in favour of the preferred candidate at the polling booth. ... The voter/citizen should have at least the basic

A information about the contesting candidate, such as his  
involvement in serious criminal offences. ... An enlightened  
and informed citizenry would undoubtedly enhance  
democratic values. **Thus, the availability of proper and  
relevant information about the candidate fosters and  
promotes the freedom of speech and expression  
both from the point of view of imparting and receiving  
the information....** I would say that such information will  
certainly be conducive to fairness in election process and  
integrity in public life. The disclosure of information would  
facilitate and augment the freedom of expression both  
from the point of view of the voter as well as the media  
through which the information is publicised and openly  
debated."

Reddi, J. referred to the judgment in **Union of India v.  
Association for Democratic Reforms** and another (supra),  
dictionary meanings of the word 'expression' and reiterated that  
"freedom of voting by expressing preference for a candidate is  
nothing but freedom of expressing oneself in relation to a matter  
of prime concern to the country and the voter himself". His  
lordship then noted that in **Jyoti Basu v. Debi Ghosal** [(1982)  
1 SCC 691], the Court had treated the right to elect as neither a  
fundamental right nor a common right but pure and simple  
statutory right and expressed his view in the following words:

F "With great reverence to the eminent Judges, I would like  
to clarify that the right to vote, if not a fundamental right, is  
certainly a constitutional right. The right originates from  
the Constitution and in accordance with the constitutional  
mandate contained in Article 326, the right has been  
shaped by the statute, namely, the RP Act. That, in my  
understanding, is the correct legal position as regards the  
nature of the right to vote in elections to the House of the  
People and Legislative Assemblies. It is not very accurate  
to describe it as a statutory right, pure and simple. Even  
with this clarification, the argument of the learned Solicitor  
General that the right to vote not being a fundamental

right, the information which at best facilitates meaningful exercise of that right cannot be read as an integral part of any fundamental right, remains to be squarely met. **Here, a distinction has to be drawn between the conferment of the right to vote on fulfilment of requisite criteria and the culmination of that right in the final act of expressing choice towards a particular candidate by means of ballot.** Though the initial right cannot be placed on the pedestal of a fundamental right, but, at the stage when the voter goes to the polling booth and casts his vote, his freedom to express arises. The casting of vote in favour of one or the other candidate tantamounts to expression of his opinion and preference and that final stage in the exercise of voting right marks the accomplishment of freedom of expression of the voter. That is where Article 19(1)(a) is attracted. Freedom of voting as distinct from right to vote is thus a species of freedom of expression and therefore carries with it the auxiliary and complementary rights such as right to secure information about the candidate which are conducive to the freedom."

Reddi, J. then proceeded to record 9 Conclusions of which Conclusion Nos.1 and 2 read as under:

"(1) Securing information on the basic details concerning the candidates contesting for elections to Parliament or the State Legislature promotes freedom of expression and therefore the right to information forms an integral part of Article 19(1)(a). This right to information is, however, qualitatively different from the right to get information about public affairs or the right to receive information through the press and electronic media, though, to a certain extent, there may be overlapping.

(2) The right to vote at the elections to the House of the

A People or Legislative Assembly is a constitutional right but not merely a statutory right; freedom of voting as distinct from right to vote is a facet of the fundamental right enshrined in Article 19(1)(a). The casting of vote in favour of one or the other candidate marks the accomplishment of freedom of expression of the voter."

B D.M. Dharmadhikari, J. agreed with most of the conclusions recorded by M.B. Shah and P.V. Reddi, JJ. and observed:

C "Democracy based on "free and fair elections" is considered as a basic feature of the Constitution in the case of Kesavananda Bharati. Lack of adequate legislative will to fill the vacuum in law for reforming the election process in accordance with the law declared by this Court in the case of Assn. for Democratic Reforms obligates this Court as an important organ in constitutional process to intervene.

D In my opinion, this Court is obliged by the Constitution to intervene because the legislative field, even after the passing of the Ordinance and the Amendment Act, leaves a vacuum. This Court in the case of Assn. for Democratic Reforms has determined the ambit of fundamental "right of information" to a voter. The law, as it stands today after amendment, is deficient in ensuring "free and fair elections". This Court has, therefore, found it necessary to strike down Section 33-B of the Amendment Act so as to revive the law declared by this Court in the case of Assn. for Democratic Reforms.

E F With these words, I agree with Conclusions (A) to (E) in the opinion of Brother Shah, J. and Conclusions (1), (2), (4), (5), (6), (7) and (9) in the opinion of Brother P.V. Reddi, J."

G H 8. By the above noted two judgments, a new dimension was given to the right of sovereign i.e. the people to make choice

of their representatives after knowing the assets and antecedents of the persons seeking election to the legislatures. These judgments also gave an expansive meaning to the term 'expression' used in Article 19(1)(a) by declaring that in the democratic set up of our country the elector's right to have complete information about the candidates and then express his choice for a particular person, are necessary concomitant of the freedom of expression guaranteed under Article 19(1)(a).

9. Now by means of this petition, People's Union for Civil Liberties (petitioner no.1), which has been fighting for protection of human rights and civil liberties of the people for last three decades and Era Sezhiyan (petitioner no.2), who is one of the founder members of Dravida Munnetra Kazhagam (DMK) and a well known parliamentarian seek to add another dimension to the sovereign's right to express his choice for the candidate at an election by contending that right to vote in secrecy includes the right of negative voting. They have prayed for striking down Rules 41(2) and 49-O of the Rules and also for issue of a direction to the Commission to make appropriate provision in the ballot papers and Electronic Voting Machines (EVMs) so as to enable the voters to exercise their right of negative voting and also ensure that exercise of this right is kept secret. To support their plea that secrecy of ballot a *sine qua non* for exercise of the right of freedom of expression guaranteed to the electors under Article 19(1)(a) of the Constitution, the petitioners have relied upon Article 21(3) of Universal Declaration of Human Rights which were adopted by the General Assembly of the United Nations in December, 1948, Article 25(b) of the International Covenants on Civil and Political Right and the judgments of this Court in **Mohinder Singh Gill v. Chief Election Commissioner** (supra) and **Union of India v. Association for Democratic Reforms and another** (supra). They also referred to letter dated 10.12.2001 in which the Commission has advocated in favour of the electors' right of negative voting. The petitioners have pleaded that Rules 41 and 49-O of the Rules are violative of Articles 19(1)(a) and 21 of the

- A Constitution and Section 128 of the Act inasmuch as the provisions contained therein violate secrecy of the vote and voter. It is also the petitioners' case that in exercise of its power under Article 324 of the Constitution, the Commission can direct modification of the existing EVMs to enable the voters to exercise their right of negative voting.

10. In the counter-affidavit filed on behalf of the Union of India, the very maintainability of the writ petition has been questioned on the ground that the petitioners have not claimed violation of any of their fundamental rights enshrined in Part III of the Constitution. The stand of Union of India is that the right of the elector to vote is a statutory right and not a fundamental right and, therefore, the writ petition filed under Article 32 cannot be entertained. The further case of the Union of India is that the right of an elector to vote does not include the right of negative voting and, therefore, Rules 41(2) and 49-O cannot be dubbed as unconstitutional or *ultra vires* the provisions of Section 128 of the Act.

11. On behalf of the Commission, its Secretary, Shri K.F. Wilfred has filed an affidavit supporting the cause of the petitioners. In paragraphs 3(i) and (ii) of his affidavit, Shri Wilfred has averred that the elector may like to refrain from casting vote for several reasons including the one that he does not consider any of the candidates as deserving of his vote and that this can be expressed either by staying away from the polling or by going to the polling station and informing the Presiding Officer of his intention not to vote or by positively discarding all the candidates. According to Shri Wilfred, the Election Commission had considered the issue of providing a separate panel in the Balloting Unit of the EVMs, so that the elector can reject all the candidates without disclosing his identity and to this effect letters dated 10.12.2001 and 5.7.2004 were sent to the Government of India, Ministry of Law, Justice and Company Affairs but necessary amendment has not been carried out in the Act and Rules.

12. Shri Rajinder Sachar, learned senior counsel appearing for the petitioners argued that the right of an elector to vote at an election in secrecy includes the right of negative voting *qua* all candidates and the Commission is duty bound to provide appropriate mechanism in the EVMs for effective exercise of that right. Learned senior counsel referred to the judgments in **Union of India v. Association for Democratic Reforms** (supra) and **People's Union for Civil Liberties (PUCL) v. Union of India** (supra) and argued that when the Court has already recognized the right of an elector to know the antecedents of the candidates and freely exercise his franchise as an integral part of the fundamental right guaranteed under Article 19(1)(a) of the Constitution, Rules 41(2) and 49-O of the Rules are liable to be declared unconstitutional because they violate the elector's right to vote in secrecy. Shri Sachar submitted that the Court should direct the Commission to take effective and adequate measures to protect the right of an elector not only to refuse to cast vote after going to the polling booth but also the right to indicate positive negation for all candidates and that too in secrecy because adult suffrage has been treated as an essential component of democracy. Learned senior counsel pointed out that even though some of the provisions contained in the Act and Rules recognise the importance of secrecy of ballot, Rules 41(2) and 49-O destroy the freedom of an elector when he refuses to vote in favour of any candidate, inasmuch as the agents of the candidates are able to easily identify the person who refuses to cast vote. As regards, the objection raised by respondent no.1 to the locus of the petitioners to file petition under Article 32 of the Constitution, Shri Sachar submitted that in view of two judgments of three-Judge Benches whereby the right of an elector to make choice of the candidate has been treated as fundamental right guaranteed under Article 19(1)(a) of the Constitution, the petitioners are entitled to seek intervention of the Court for striking down the impugned rules and for issue of a mandamus to the Commission to take steps under Article 324 for effective exercise of the right of negative voting vested in the electors.

A        13. Ms. Meenakshi Arora, learned counsel for the  
Commission submitted that in view of the judgments of this Court  
in **Union of India v. Association for Democratic Reforms**  
(supra) and **People's Union for Civil Liberties (PUCL) and**  
B        **another v. Union of India and another** (supra), the petitioners  
have the right to challenge the constitutionality of the impugned  
rules and seek direction for appropriate modification in the  
EVMs to enable the electors to exercise their fundamental rights  
of negative voting. Ms. Arora argued that if the electors right to  
know the assets and antecedents of the candidates and then  
C        make their choice is a fundamental right guaranteed under  
Article 19(1)(a), there is no rationale to exclude the right of  
negative voting from the purview of that Article. Learned counsel  
highlighted the distinction between the right to elect and physical  
exercise of the right to vote by pointing out that while the former  
D        falls in the domain of statutory right, the latter is a necessary  
concomitant of the freedom of expression guaranteed under  
Article 19(1)(a). Ms. Arora then submitted that if the rules are  
amended or the Court so directs, the Commission can take  
steps to modify existing EVMs to enable the electors to exercise  
E        their right of negative voting in secrecy.

14. Shri Amarendra Sharan, learned Additional Solicitor  
General relied upon the judgments of the Constitution Benches  
in **Ponnuswami's case** and **Kuldip Nayar v. Union of India**  
[(2006) 7 SCC 1] and argued that the writ petition should be  
F        dismissed as not maintainable because the right to vote at an  
election has not been treated as a fundamental right guaranteed  
under Part III of the Constitution. He submitted that the right to  
elect and to vote can, at best be regarded as statutory right  
available to an elector under the Act but the same cannot be  
G        treated as flowing from the right to freedom of expression  
guaranteed under Article 19(1)(a) of the Constitution. Shri  
Sharan pointed out that the framers of the Constitution have  
recognized the importance of secrecy of ballot by making  
specific provision to that effect in the election of President and  
H        Vice-President under Articles 55 and 66 respectively, but no

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such provision has been made in Article 326 which postulates election to the House of People and the Legislative Assemblies on the basis of adult suffrage and argued that the right of negative voting in secrecy cannot be read into Article 326 of the Constitution by implication. Learned counsel submitted that secrecy of ballot is effectively protected by Rule 49-O of the Rules and violation thereof is punishable under Section 128(2) of the Act and the impugned provisions cannot be nullified by assuming that the same are violative of Article 19(1)(a) of the Constitution. Learned Additional Solicitor General lastly submitted that Article 324 cannot be used by the Commission for giving new dimension to the secrecy of ballot which is not envisaged by the Constitution and the Act.

15. We have given our most anxious consideration to the entire matter. In view of the objection raised by the learned Additional Solicitor General, we shall first deal with the issue of maintainability of the writ petition. In last five decades, the Courts of this country have repeatedly held that democracy is one of the basic features of the Constitution and free and fair election based on universal adult suffrage is an essential component of democracy. Till 1996, this Court treated the right to elect as a statutory right only because it did not have the occasion to consider the issue in the backdrop of concerted attempts made by the interested quarters to corrupt and hijack the process of election and participation in election of persons with devious antecedents. In **Jyoti Basu v. Debi Ghosal** (supra), this Court while allowing the appeal filed by appellant Jyoti Basu, who was elected to the House of People from 19-Barrackpore Parliamentary constituency against the order of the High Court refusing to strike down the names of some of the ministers of the West Bengal Government, who were impleaded as parties to the election petition, referred to the judgments in **N.P. Ponnuswami v. Returning Officer** (supra) and **Jagan Nath v. Jaswant Singh** [1954 SCR 892] and held:

"The right to elect, to be elected and to dispute an election are neither fundamental rights nor common law rights but

- A are simply statutory rights and therefore are subject to statutory limitations. Similarly, an election petition is not an action at common law, nor in equity but is a statutory proceeding to which only statutory rules apply. The statute concerned with the election matters is the Representation of the People Act which is a complete and self-contained code and within it must be found any rights claimed in relation to an election or an election dispute."
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- In **Rama Kant Pandey v. Union of India** [(1993) 2 SCC 438] a three-Judge Bench examined challenge to the Representation of the People (Amendment) Ordinance, 1992 (Ordinance No.1/1992) and the Representation of the People (Second Amendment) Ordinance, 1992 (Ordinance No.2/1992) by which provision for countermanding elections in certain circumstances was amended and period of twenty days specified in Section 30 was reduced to fourteen days. It was argued on behalf of the petitioner that the voters' right to choose their representative for a particular constituency cannot be whittled down by the amendments. While rejecting the argument, the Court recorded the following preface:
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- D

- E "Before proceeding to examine the merits of the argument addressed on behalf of the petitioner it will be useful to note that the right to vote or to stand as a candidate for election is neither a fundamental nor a civil right. In England also it has never been recognised as a common law right."

- F 16. Faced with serious criticism of attempts made by vested interest to corrupt the process of election by clandestinely providing funds in the form of black money to the political parties, Parliament amended the Companies Act, Income-Tax Act and the Representation of the People Act. The object of these amendments was to bring transparency in election-funding. Common Cause, a society registered under the Societies Registration Act filed petition under Article 32 of the Constitution for issue of a direction to the political parties to annually file return of income. A two-Judge Bench examined the issue at some length and declared that political parties are under a
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- H

statutory obligation to file return in accordance with the provisions of the Income Tax Act. The Court also directed the Ministry of Finance to make investigation/enquiry against each of the defaulting political parties and initiate necessary action including penal action under Section 276-CC of the Income Tax Act. While dealing with the powers of the Commission under Article 324, the Court held as under: A B

"Superintendence and control over the conduct of election by the Election Commission envisaged under Article 324 include the scrutiny of all expenses incurred by a political party, a candidate or any other association or body of persons or by any individual in the course of the election. The expression "Conduct of election" in Article 324 of the Constitution of India is wide enough to include in its sweep, the power of the Election Commission to issue – in the process of the conduct of elections – directions to the effect that the political parties shall submit to the Commission for its scrutiny, the details of the expenditure incurred or authorised by the political parties in connection with the election of their respective candidates." C D

17. After six years came the judgment in **Union of India v. Association for Democratic Reforms** (supra) which can be termed as an important judicial benchmark in the field of electoral reforms. In that judgment, the Court declared that where law is silent, Article 324 is a reservoir of power for the Commission and the same can be used for free and fair election; that the Commission can fill in the vacuum till there is a legislation on the subject to meet the particular situation or contingency; to maintain purity of election and to bring transparency in the process of election, the Commission can ask the candidate about the expenditure incurred by the political parties. The Court further held that the elector has right to know full particulars of a candidate who is to represent him in legislature and that under Article 19(1)(a) voter's right of speech and expression in case of election would include casting of votes. Proposition No.7 extracted hereinabove contains this enunciation of law. E F G H

- A 18. The ratio of the judgment in **Union of India v. Association for Democratic Reforms** (supra) was reiterated by another three-Judge Bench in **People's Union for Civil Liberties v. Union of India** (supra). Two of the Judges constituting the Bench, namely, M.B. Shah and P. Venkatarama
- B Reddi, JJ. recorded separate detailed opinions. Shah, J. held that an elector who is otherwise eligible to cast vote and to elect his representative has statutory right under the Act to be a voter and has also a fundamental right as enshrined in Chapter III. Reddi, J. drew fine distinction between conferment of the right
- C to vote on fulfillment of requisite criteria and the culmination of that right in the final act of exercising choice towards a particular candidate by means of ballot and held that though the initial right cannot be placed on the pedestal of a fundamental right, but casting of a vote in favour of one or the other candidate
- D tantamounts to expression of his opinion and preference and exercise of that right marks accomplishment of freedom of expression of voter where Article 19(1)(a) is attracted. In the opinion of Reddi, J., freedom of voting as distinct from the right to vote is a species of freedom of expression and therefore
- E carries with it the auxiliary and complementary rights such as right to secure information about the candidate which are conducive to the freedom. The 3<sup>rd</sup> Member of the Bench, namely, D.M. Dharmadhikari, J. expressed his agreement with the other two Judges.
- F 19. In **Kuldip Nayar v. Union of India** (supra) on which reliance has been placed by the learned Additional Solicitor General, the Constitution Bench examined the petitioner's challenge to the Representation of People (Amendment) Act
- G 40 of 2003 by which the requirement of domicile in the concerned State for getting elected to the Council of States was deleted. The Court also examined validity of the amendments in Sections
- H 59, 94 and 128 of the Act by which open ballot system was introduced for election to the Council of States. According to the petitioner, this system violated the principle of secrecy, which is the essence of free and fair elections. While dealing with the

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question whether deletion of the requirement of domicile was *ultra vires* the Constitution, the Court adverted to the concept of federalism, role of Upper House – Council of States vis-à-vis House of People and held that the Amending Act No.40 of 2003 does not violate the provisions of the Constitution. The Court then considered the issue relating to violation of secrecy of ballot, referred to the amendments made in Sections 59, 94 and 128 of the Act and held that the requirement of maintenance of secrecy of voting is now made subject to exception qua election to the Council of States. The Constitution Bench then reiterated that democracy is a basic feature of the Constitution and the edifice of democracy rests on a system of free and fair election, referred to **Keshvananda Bharti v. State of Kerala** [1973 (4) SCC 225], **Smt. Indira Nehru Gandhi v. Shri Raj Narain and another** (supra), **Mohinder Singh Gill v. Chief Election Commissioner** (supra), **S. Raghubir Singh Gill v. S Gurcharan Singh Tohra** [1980 Supp SCC 53], **Kihoto Hollohan v. Zachillhu** [1992 Supp. (2) SCC 651], **Union of India vs. Association for Democratic Reforms** (supra), **People's Union for Civil Liberties v. Union of India** (supra) and then proceeded to consider whether right to vote is a constitutional right or a fundamental right. On this aspect of the matter, the Constitution Bench referred to paragraphs 42, 46.4, 46.5, 46.7 of the judgment in **Union of India vs. Association for Democratic Reforms** (supra) and noted the views expressed in **Jyoti Basu v. Debi Ghosal** (supra), **People's Union for Civil Liberties v. Union of India** (supra) and **Rama Kant Pandey v. Union of India** (supra). In para 356, the Court extracted para 62 of the judgment of Shah, J. in **People's Union for Civil Liberties v. Union of India** (supra). In paragraphs 356 to 359, the Court extracted the observations of P.Venkatarama Reddi, J. In para 360, the Court referred to the observations made by D.M. Dharamadhikari, J. and declined to accept the argument of the petitioners that as per majority view in **People's Union for Civil Liberties v. Union of India** (supra), right to vote is a constitutional right besides it being a facet of fundamental right under Article 19(1)(a) of the

A Constitution. For the sake of convenience, paragraphs 361 to 364 of the judgment in **Kuldip Nayar v. Union of India** (supra) are extracted below:-

B "361. The argument of the petitioners is that the majority view in *People's Union for Civil Liberties*, therefore, was that a right to vote is a constitutional right besides that it is also a facet of fundamental right under Article 19(1)(a) of the Constitution.

C 362. We do not agree with the above submission. It is clear that a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression, while reiterating the view in *Jyoti Basu v. Debi Ghosal* that a right to elect, fundamental though it is to democracy, is neither a fundamental right nor a common law right, but pure and simple, a statutory right.

D 363. Even otherwise, there is no basis to contend that the right to vote and elect representatives of the State in the Council of States is a constitutional right. Article 80(4) merely deals with the manner of election of the representatives in the Council of States as an aspect of the composition of the Council of States. There is nothing in the constitutional provisions declaring the right to vote in such election as an absolute right under the Constitution.

F 364. Be that as it may, the moot contention that has been raised by the petitioners is that the election of Members of the Council of States is provided for in the Constitution and, therefore, is a part of the Constitution and that it is an inherent requirement of the principle of free and fair election that the right to vote be invariably accompanied by the right of secrecy of vote so as to ensure that the freedom of expression through vote is real."

H 20. We have carefully read paragraphs 349 to 364 of the aforesaid judgment, which are found under the head Right to Vote – A Constitutional / Fundamental Right and find that even

though the Constitution Bench did not overrule or discard the ratio of the two three-Judges Bench judgments in **Union of India v. Association for Democratic Reforms** (supra) and **People's Union for Civil Liberties v. Union of India** (supra), the opening line of para 362 tend to create a doubt whether the right of voter to exercise his choice for the candidate is a necessary concomitant of the voter's freedom of expression guaranteed under Article 19(1)(a) of the Constitution. Therefore, this issue needs a clear exposition of law by a larger Bench. We are further of the view that width and amplitude of the power of the Commission under Article 324 needs further consideration by a larger Bench in the light of the judgments of this Court whereby the elector's right to be informed about the assets and antecedents of the persons seeking election to the legislature has been duly recognized.

21. The file of the case may, therefore, be placed before Hon'ble the Chief Justice for appropriate order.

G.N.

Matter referred to larger Bench