

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**WRIT PETITION (PIL) NO. 154 of 2014**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE THE CHIEF JUSTICE MR. BHASKAR BHATTACHARYA** **Sd/-**

**and**

**HONOURABLE MR.JUSTICE J.B.PARDIWALA** **Sd/-**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ? Yes
- 2 To be referred to the Reporter or not ? Yes
- 3 Whether their Lordships wish to see the fair copy of the judgment ? No
- 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ? No
- 5 Whether it is to be circulated to the civil judge ? No

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SHASHIKANT MOHANLAL THACKER....Applicant(s)  
Versus  
STATE ELECTION COMMISSION & 1....Opponent(s)

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Appearance:  
MR SP MAJMUDAR with MR VIMAL A PUROHIT, ADVOCATE for the Applicant(s) No. 1  
MR MRUGESH A BAROT, ADVOCATE for the Applicant(s) No. 1  
MS MAITHILI MEHTA, AGP for the Opponent(s) No. 2

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**CORAM: HONOURABLE THE CHIEF JUSTICE MR. BHASKAR BHATTACHARYA**  
**and**

**HONOURABLE MR.JUSTICE J.B.PARDIWALA****Date : 05/09/2014****CAV JUDGMENT  
(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)**

**1.** By this writ-application, in the nature of a public interest litigation, the petitioner, a practicing advocate, as prayed for the following reliefs:

*"12. ....*

*(a) To issue appropriate writ, order or direction and to quash and set aside the impugned orders at Annexure-D colly and be further pleased to hold and declare that the same are illegal, and continuation and implementation of the same violates Article 243 (K) of the Constitution of India;*

*(b) To hold and declare that under Article 243 K of the Constitution of India no powers of State Election Commission can be delegated to the State Authorities for holding election of village Panchayat except provided under section 20 (2) for preparation of electoral roll;*

*(c) Such other and further relief/s which may be deemed just and necessary in the facts of the case may be granted;"*

**2.** The case made out by the petitioner may be summed up thus:

**2.1** According to the petitioner, under the repealed Gujarat Panchayats Act, of 1961, the elections were being held by the officers of the revenue department not below the rank of the Deputy Collector. The District Collector of the respective districts was the election authority under the Act of 1961. Eventually, with a view to see that the panchayat elections are held impartially and transparently, free from influence of any political party in power, part IX was introduced in the 73<sup>rd</sup> Amendment to the Constitution of India with effect from 24<sup>th</sup> April 1993. Article 243 K was brought into force which provides for elections to the panchayats.

**2.2** Accordingly, the State Election Commissioner is appointed by

the Governor of the State and his conditions of service are also prescribed by the Governor. The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the panchayats are vested in State Election Commission consisting of the State Election Commissioner as provided in Article 243 K of the Constitution of India.

**2.3** Article 243 K, Clause (3) further provides that the Governor of a State shall, if requested by the State Election Commission, would make available to the State Election Commission such staff as may be necessary for the discharge of the functions conferred on the State Election Commission by Clause (1) to Article 243 K of the Constitution of India.

**2.4** In tune with the constitutional amendment, the Gujarat Panchayats Act, 1993 provides for a similar provision *vide* Section 15, Clause (3) under which the superintendence, direction and control of elections is vested with the State Election Commission.

**2.5** In view of the provisions of Section 15 of the Act 1993, the State Election Commission has been conferred with the powers under the Act and Election Rules.

**2.6** According to the petitioner, the general delegation of powers of the State Election Commission to any government officer has not been provided for in the Act 1993, so as to ensure transparency in the process of the conduct of election. For the limited purpose of preparation of electoral rolls and its maintenance, the State Election Commission is authorized to appoint the State government officers, as “specified officers” under Section 20 (2) of the Act 1993.

**2.7** According to the petitioner, Section 20 (2) of the Act is only an exception to the Rule that there is no delegation of power by the

State Election commission to any government officer other than the one provided under Section 20 (2) of the Act, 1993.

**2.8** Under Section 9 of the Act 1993, the power to reserve seats for the Scheduled Caste and the Scheduled Tribes in every village panchayat and also to fix the number of seats of panchayat has been conferred upon the State Government. Such powers have been delegated to the Collector under Section 271 of the Act, 1993. However, the powers to divide the panchayat area into the different wards i.e. the electoral divisions and alterations of its limits and to allot different type of reserved seats to various wards by rotation has been conferred upon the State Election Commission under the Act. The Rules also provide for such decision to be taken by the State Election Commission. Thus, according to the petitioner, there is no provision to delegate the powers to the State Government officers by the State Election Commission under the Act as well as the Rules framed thereunder.

**2.9** The grievance of the petitioner is that he has drawn the attention of the State Election Commission for number of times regarding the improper preparation of electoral rolls and illegal rotation of allotment of reserved seats, but unfortunately the State Election Commission has not paid any heed and would forward such representations of the petitioner to the respective Collector. The Collector has also failed to take cognizance of the illegality pointed out by the petitioner in his representations.

**2.10** According to the petitioner, from 1995 till 13<sup>th</sup> June 2011, the notifications which have been issued so far are directly in conflict with the Article 243 K of the Constitution of India. The petitioner, by relying on the orders issued from time to time has highlighted that the State Election Commission delegates all its powers in favour of the collectors of the districts to exercise the powers of the State Election Commission in terms of the various provisions of the Gujarat

Panchayats Act, 1993 and the Gujarat Panchayats Election Rules, 1994.

**2.11** Thus, according to the petitioner such delegation of power by the State Election Commission in favour of the Collector of the District is against the constitutional mandate as laid down in Article 243-K of the Constitution of India.

**2.12** Hence, this petition.

### **3. SUBMISSIONS ON BEHALF OF THE PETITIONER:-**

**3.1** Mr.Majmudar, the learned advocate appearing on behalf of the petitioner strenuously contended before us that the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats are vested in a State Election Commission consisting of State Election Commissioner appointed by the Governor. However, the State Election Commission has althroughout acted as a post-office by merely forwarding the complaints/representations to the District Collector. Mr.Majmudar submits that the delegation of powers of the State Election Commission to the Collector/ Deputy Collector is an act which is *ultra vires* the constitutional mandate of Article 243-K of the Constitution of India and Sections 9 (5), 15 (1), 15 (3), 15 (4), 16 (1) and 16 (4) of the Act, 1993 and the Rules, 1994.

**3.2** In such circumstances, referred to above, Mr.Majmudar submits that there being merit in the petition the same may be allowed and the reliefs prayed for may be granted.

**4.** Having heard the learned advocate appearing for the petitioner and having gone through the materials on record, the only question that falls for our consideration in this writ-application is whether there is any violation of Article 243 K (1) of the Constitution of India as

complained of by the petitioner.

**5.** Before adverting to the submissions canvassed by Mr.Majmudar, the learned advocate appearing on behalf of the petitioner, it will be profitable to look into the Article 243 K of the Constitution of India.

*“243K. Elections to the Panchayats.-(1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor.*

*(2) Subject to the provisions of any law made by the Legislature of a State, the conditions of service and tenure of office of the State Election Commissioner shall be such as the Governor may by rule determine:*

*Provided that the State Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of a High Court and the conditions of service of the State Election Commissioner shall not be varied to his disadvantage after his appointment.*

*(3) The Governor of a State shall, when so requested by the State Election Commission, make available to the State Election Commission such staff as may be necessary for the discharge of the functions conferred on the State Election Commission by clause (1).*

*(4) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with, elections to the Panchayats.”*

**6.** We may also look into few relevant provisions of the Gujarat Panchayats Act, 1993.

**6.1** Section 2 (23) defines “State Election Commission”.

*“2(23) "State Election Commission" means the State Election Commission referred to in clause (1) of article 243-K of the*

Constitution.”

**6.2** Section 9 is with respect to the constitution of village panchayats. Section 9 (5) reads as under:

*“Section 9 : Constitution of Village Panchayats*

*(1) .....*

*(5)(a)*

*(i) Seats shall be reserved by the State Government for the Scheduled Castes and the Scheduled Tribes in every village panchayat in the State and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats in that panchayat as the population of the Scheduled Castes in the village or as the case may be of the Scheduled Tribes in that village bears to the total population of that village, and such seats shall be allotted by the State Election Commission by rotation to different wards in that village in the prescribed manner.*

*(ii) Where in a village there is in the opinion of the State Government population of socially and educationally backward classes, there shall be reserved by the State Government for the socially and educationally backward classes one tenth of the total number of seats in a village panchayat and such seats shall be allotted by the State Election Commission by rotation to different wards in that village in the prescribed manner.*

*(ia) In the case of a village panchayat, the whole local area of which comprises of any of the Scheduled Areas, the number of seats reserved for the Scheduled Tribes under sub-clause (i) shall be increased to such number as is not less than one-half of the total number of seats in the village panchayat.”*

*(b) One third of the total number of seat reserved under clause (a), shall, be reserved by the State Government for women belonging to the Scheduled Castes, the Scheduled Tribes or, as the case may be, the socially and educationally, backward classes.*

*(c) One third (including the number of seats reserved for women belonging to the Scheduled Castes, the*

*Scheduled Tribes and the socially and educationally backward classes) of the total number of seats in a village panchayat shall be reserved by the State Government for women and such seats shall be allotted by the State Election Commission by rotation to different ward in the village in the prescribed manner.”*

**6.3** Section 15 (1) is with respect to election.

*“Section 15 : Election*

*(1) The election of members to a panchayat shall be held on such date as State Election Commission may appoint in this behalf: Provided that-*

*(i) in the case of reconstitution of a panchayat on account of the expiry of its duration of five years such date shall not be earlier than two months or later than fifteen days before the expiry of the duration.*

*(ii) in the case of reconstitution of a panchayat on account of dissolution of a panchayat where the remainder of the period for which the dissolved panchayat would have continued is six months or more than six months such date shall not be later than two months after the date of dissolution of the panchayat,*

*(iii) in the case of reconstitution of a panchayat 'on account of dissolution of a panchayat where the remainder of the period for which the dissolved panchayat would have continued is less than six months, such date shall not be earlier than two months or later than fifteen days before the expiry of such lesser period, except with the sanction of the State Government which may be given either prospectively or retrospectively.*

*(2) such election shall be conducted in the prescribed manner.*

*(3) The superintendence, direction and control of the conduct of such election shall be vested in the State Election Commission.*

*(4) The names of the elected members shall be published in the prescribed manner by the State Election Commission.”*

**6.4** Section 16 provides for electoral divisions.

*“Section 16 : Electoral divisions*

*(1) For the purpose of elections of members to a village panchayat, a village shall be divided by the State Election Commission into as many single member wards as the total*

*number of members specified in respect of the village panchayat of that village in sub-section (4) of section 9, and in such manner that as far as practicable the population of all the wards is the same; and one member shall be elected from each such ward.*

*(2) For the purposes of elections of members to a taluka panchayat, a taluka shall be divided by the State "Election Commission into as many single member territorial constituencies as the total number of elected members specified in respect of the taluka panchayat of that taluka in sub-section (4) of section 10 and in such manner that the population of all the territorial constituencies is, as far as practicable, the same and each territorial constituency is so delimited as to include therein as far as practicable whole wards of a village and one member shall be elected from each such constituency.*

*(3) For the purposes of elections of members to a district panchayat, a district shall be divided by the State Election Commission into as many single member territorial constituencies as the total number of elected members specified in respect of the district panchayat of that district in sub-section (4) of section 11 and in such manner that the population of all the territorial constituencies is as far as practicable the same and each territorial constituency is so delimited as to include therein as far as practicable whole territorial constituencies of a taluka; and one member shall be elected from each such constituency.*

*(4) At any time not later than two months before the date of the expiry of the duration of a panchayat under section 13 and in the case of a panchayat which is to be constituted or reconstituted under the provisions of this Act otherwise than on the expiry of its duration under section 13 , at any such time before it is to be constituted or, as the case may be reconstituted, it shall be lawful for State Election Commission-*

*(a) to alter, for reasons to be recorded in writing, the limits of any ward of the concerned village, for the purpose of general election in relation to a village panchayat.*

*(b) to alter, for reasons to be recorded in writing, the limits of any territorial constituency of the concerned taluka or district, for the purpose of general election in relation to a taluka or district panchayat.*

*(5) Each ward constituted under sub-section (1) and each territorial constituency constituted under sub-sections (2) and*

*(3) shall subject to alteration, if any, made under sub-section (4) be an electoral division.”*

**6.5** Section 20 is with respect to list of voters.

*“Section 20 : List of voters*

*(1) The electoral roll of the Gujarat Legislative Assembly prepared under the provisions of the Central Act, for the time being in force for such part of the constituency of the Assembly as is included in the relevant electoral division, shall, subject to any amendment, deletion or addition made under sub-section (3) or any inclusion of any name under sub-section (5), be the list of voters for that electoral division.*

*(2) Such officer of the State Government as the State Election Commission may specify in this behalf (hereinafter referred to as "the specified officer") shall, subject to superintendence, direction and control of the commission, maintain a list of voters for each electoral division, the list shall be published in the prescribed manner.*

*(3) If on an application made to him in this behalf or on his own motion the specified officer is satisfied that the list of voters is at variance with the relevant part of the electoral roll of the Gujarat Legislative Assembly on account of any mistake in the list, he shall amend the list so as to bring it in conformity With the said electoral roll and for that purpose may amend, delete or add any entry in that list.*

*(4) Any person who has become entitled to be registered in the relevant part of the electoral roll of the Gujarat Legislative Assembly under the Central Act, after the qualifying date may apply to the specified officer for inclusion of his name in the list.*

*(5) Where the specified officer after making such inquiry as he may consider necessary, is satisfied that the applicant is entitled to be registered in the relevant part of the electoral roll of the Gujarat Legislative Assembly under the Central Act, he shall direct the name of the applicant to be included in the list of voter:*

*Provided that no such direction shall be given if the applicant is disqualified to vote under this Act or any other law for the time being in force*

*(6) No amendment, deletion or addition of any entry in the list*

*of voters for an electoral division shall be made under sub-section (3) and no direction for inclusion of a name in that list shall be given under sub-section (5) during the period between such date as the State Election Commission may, by general or special order, notify in this behalf and the date of the completion of any concerned election in the electoral division.*

*Explanation:- In this section the expression "qualifying date" has the same meaning as in clause (b) of [section 14](#) of the Central Act,*

*(7) The list of voters shall after it is finally prepared under this section be published in the prescribed manner and shall come into operation immediately upon its final publication."*

**7.** We may now look into the one of the orders passed by the State Election Commission which, according to the petitioner, amounts to delegation of power not provided for in law.

***"Read:- Article 243 (K) of the Constitution of India.***

### **Order**

*Under Article 243 Clause (1) superintendence, direction and control of the preparation of Election Rolls for, and the conduct of all elections to the Panchayats has been vested in the State Election Commission. Under Clause (3) of the Article, the State Government has made available to the Commission, services of the collectors of all the districts including their staff under the collectors, for the discharge of the functions conferred on the State Election Commission.*

*In view of this, the Collectors and the Staff of the Collectors become the officers and staff of the State Election Commission.*

*Elections to various wards of village Panchayats and the offices of the Sarpanchs of village Panchayats have to be held by the State Election Commission, with a view to organizing the elections to these seats it is deemed expedient to enable the Collectors of the districts to exercise the powers of the State Election Commission in terms of various provisions of the Gujarat Panchayats Act of 1993 and Gujarat Panchayats Election Rules 1994 as specified in the Appendix to this order.*

*It is further directed that the orders, notices, notifications be issued by the collectors as the officers of the State Election*

*Commission, to dispel any doubt as regards the exercise of these powers, it is directed that the orders, notices, notifications will be issued by the Collectors as 'Collector and officer of the State Election Commission.'*

To, All Collectors Copy to: All District Development Officers Copy f.w.Cs. To: The Additional Chief Secretary, Commission Panchayat & RHD, Sachivalaya, Gandhinagar. The Development Commissioner, Gandhinagar. Select file.	By order Sd/- (Y.J.DIXIT) SECRETARY State Election
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## APPENDIX

### **1. Gujarat Panchayats Act, 1993:**

*Sec. 15 (1) : Appointment of date of election of members to Panchayats.*

*Sec. 15 (4) : Publication of names of the elected members.*

### **2. Gujarat Panchayat Election Rules, 1994 :**

*Rule 5 (1) : Designating/ Nominating of Returning Officer.*

*Rule 5 (2) : Appointment of Assistant Returning Officer.*

*Rule 8 : Approval of Polling Stations.*

*Rule 9 (1) : Fixation of various stages of election and publication thereof in the official gazette.*

*Rule 9 (2) : Fixation of various dates for stages of election including the date of completion of election.*

*Rule 18 (2) : Procuring a copy of the list of contested candidates and their symbols.*

*Rule 22 (2) : Procurement of copy of declaration of result in form 12.*

*Rule 23 : Countermanding Poll in the event of the death of a candidate.*

*Rule 34 (c) : Admission to polling stations.*

*Rule 35 (2) : Approval of design and colour of ballot box.*

*Rule 48 (2) : Appointing another day for commencement of polling in the event of adjournment of polls in emergency.*

*Rule 48 (3) : Direct R.O. To notify date, place and powers of polls fixed under rule 48 (2).*

*Rule 49 (1) (C) : Receipt of report from R.O. in the event of destruction etc. of ballot box.*

*Rule 49 (2) (1) : Consideration of the report of R.O. under 49 (1) (C) and to declare poll to be void and appoint day and fix the hours for taking fresh polls.*

*Rule 49 (2) (11) : Direction to R.O. in the event of satisfaction that the result of election will not be affected if error or irregularity in procedure is not material.*

*Rule 60 (1) : To give general or special directions regarding counting of votes.*

*Rule 63 (1) (3) : Declaration and publication of result.*

*Rule 63 (4) : Sending copy of the result to the authorities specified.*

Sd/-  
(Y.J.DIXIT)  
SECRETARY  
STATE ELECTION COMMISSION."

**7.1** What is discernible on a plain reading of the aforesaid order is thus:-

- (A) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of all elections to the panchayats is vested in the State Election Commission.
- (B) As provided by Article 243 K, Clause (3), the State Government has made available to the Commission, the services of the Collectors of the Districts including their staff, for the discharge of the functions conferred on the State Election Commission.
- (C) The Collectors and the staff automatically become the officers and staff of the State Election Commission.
- (D) The order, notices, notifications which the Collectors may issue will be as the officers of the State Election Commission and the order which the Collector may issue would be in his capacity as Collector and the officer of the State Election Commission.

**8.** An analysis of some of the above reproduced provisions shows that the superintendence, direction and control of preparation of the electoral rolls and conduct of elections to the "panchayats", which term means institution of self-government constituted by the State

Government at the village, intermediate and district level (Article 243B) vests with the State Commission. For discharge of the functions enumerated in Clause (1) of Article 243K, the State Commission can request the Governor of the State to provide necessary staff and the latter is required to make such staff available. Clause (4) of Article 243K empowers the State Legislature to enact law and make provisions with respect to the matters relating to, or in connection with, elections to the panchayats. Thus, power is subject to the other provisions contained in the Constitution, which necessarily include Clause (1) of Article 243K and 243N of the Constitution.

**9.** We are not impressed by the submission canvassed by Mr.Majmudar, the learned advocate appearing on behalf of the petitioner that there is substantial delegation of power by the Election Commission in favour of the Collectors of the respective district in the matter of preparation and publication of the electoral rolls or for making addition or deletion therein, more particularly, when the State Election Commission has the exclusive power of superintendence, direction and control of the preparation of electoral rolls and the conduct of elections to the panchayats.

**10.** Clause (4) of Article 243K of the Constitution of India begins with the expression “subject to the provisions of this Constitution” and lays down that the legislature of the State may by law, make provision with respect to all matters relating to, or in connection with, elections to the panchayats. Combined reading of Clauses (1) to (4) of Article 243K makes it clear that the State Commission is the repository of the power of superintendence, direction and control of preparation of the electoral rolls and conduct of all elections to the panchayats, but this power has to be exercised in consonance with the law enacted by the State legislature in matters relating to or in connection with elections to the panchayats.

**11.** In our opinion, considering the order which is impugned before us, any officer or staff employed in connection with preparation, revision and correction of the electoral rolls for and the conduct of elections shall be deemed to be on deputation to the State Election Commissioner for the period during which they are so employed and such officers and staff shall during that period be subject to control, superintendence and discipline of the State Election Commissioner.

**12.** The maxim '*delegatus non potest delegare*' deals with the extent to which a statutory authority may permit another to exercise a discretion entrusted by the statute to itself. It is true that the delegation in its general sense does not imply a parting with the statutory powers by the authority which grants the delegation, but points rather to the conferring of an authority to do things which otherwise that administrative authority would have to do for itself. If, however, the administrative authority named in the statute has and retains in its hands general control over the activities of the person to whom it has entrusted in part the exercise of its statutory power and the control exercised by the administrative authority is of a substantial degree, there is in the eye of law no "delegation" at all and the maxim "*delegates non potest delegare*" would not apply. In other words, if a statutory authority empowers a delegate to undertake any preparatory work and to take an initial decision in the matters entrusted to it but retains in its own hands the power to approve or disapprove the decision after it has been taken, the decision will be held to have been validly made if the degree of control maintained by the authority is close enough for the decision to be regarded as the authority's own.

**13.** In the aforesaid context, we may profitably refer to a Supreme Court decision in the case of **Pradyut Kumar Bose v. Hon'ble the Chief Justice of Calcutta High Court [AIR 1956 SC 285]**, the Court observed as under:

*“It is well recognized that a statutory functionary exercising such a power cannot be said to have delegated his functions merely by deputing a responsible and competent official to enquire and report. That is the ordinary mode of exercise of any administrative power. What cannot be delegated except where the law specifically so provides - is the ultimate responsibility for the exercise of such power.”*

**14.** We may also refer to a Constitution Bench decision of the Supreme Court in the case of **Barium Chemical Limited and Another v. Company Law Board and Others [AIR 1967 SC 295]**.

The observations made by the Supreme Court in paragraph 36 are as under:

*“36. But the maxim "delegatus non potest delegate" must not be pushed too far. The maxim does not embody a rule of law. It indicates a rule of construction of a statute or other instrument conferring an authority. Prima facie, a discretion conferred by a statute on any authority is intended to be exercised by that authority and by no other. But the intention may be negated by any contrary indications in the language, scope or object of the statute. The construction that would best achieve the purpose and object of the statute should be adopted.”*

**15.** For the aforementioned reasons, we do not find any merit in this writ-application in the nature of a public interest litigation and, therefore, this petition should fail. The petition is accordingly rejected. No costs.

Sd/-  
**(BHASKAR BHATTACHARYA, CJ.)**

Sd/-  
**(J.B.PARDIWALA, J.)**

\*malek