

(2013) 09 SC CK 0063

Supreme Court of India

Case No: Writ Petition (Civil) No. 161 of 2004 (Under Article 32 of the Constitution of India)

People's Union for Civil Liberties
and Another

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision: Sept. 27, 2013

Acts Referred:

- Conduct of Elections Rules, 1961 - Rule 38, 38(1), 38(2), 39, 39(1)
- Constitution of India, 1950 - Article 14, 19, 19(1), 21, 226
- Representation of the People Act, 1951 - Section 128, 2, 62, 62(1), 79

Citation: (2013) 6 ABR 910 : (2013) 4 AKR 566 : (2013) 5 ALD 173 : (2013) 101 ALR 476 :
(2014) 3 AWC 2652 : (2014) 1 BomCR 642 : (2013) 202 DLT 677 : (2013) 13 JT 133 : (2013) 5
KarLJ 545 : (2013) 4 KLT 104 : (2013) 7 MLJ 537 : (2013) 4 RCR(Civil) 669 : (2013) 12 S

Hon'ble Judges: P. Sathasivam, C.J.; Ranjana Prakash Desai, J; Ranjan Gogoi, J

Bench: Full Bench

Advocate: P.P. Malhotra, ASG, Rajinder Sachhar, Bushra Parveen, Mamta Saxena, A.N. Singh, Sanjay Parikh, S. Wasim A. Qadri, Yasir Rauf, Sushma Suri, B.V. Balram Das, D.S. Mahra, Meenakshi Arora, S.K. Mendiratta, Vasav Anantharamay, Kamini Jaiswal, Raghenh Basant, Arjun Singh Bhati, Hardeep Singh and Liz Mathew, for the Appellant;

Final Decision: Disposed Of

Judgement

P. Sathasivam, C.J.I.

1. The present writ petition, under Article 32 of the Constitution of India, has been filed by the Petitioners herein challenging the constitutional validity of Rules 41(2) and (3) and 49-O of the Conduct of Election Rules, 1961 (in short "the Rules") to the extent that these provisions violate the secrecy of voting which is fundamental to the free and fair elections and is required to be maintained as per Section 128 of the Representation of the People Act, 1951 (in short "the RP Act") and Rules 39 and 49-M of the Rules.

2. The Petitioners herein have preferred this petition for the issuance of a writ or direction(s) of like nature on the ground that though the above said Rules, viz., Rules 41(2) and (3) and 49-O, recognize the right of a voter not to vote but still the secrecy of his having not voted is not maintained in its implementation and thus the impugned rules, to the extent of such violation of the right to secrecy, are not only ultra vires to the said Rules but also violative of Articles 19(1)(a) and 21 of the Constitution of India besides International Covenants.

3. In the above backdrop, the Petitioners herein prayed for declaring Rules 41(2) and (3) and 49-O of the Rules ultra vires and unconstitutional and also prayed for a direction to the Election Commission of India-Respondent No. 2 herein, to provide necessary provision in the ballot papers as well as in the electronic voting machines for the protection of the right of not to vote in order to keep the exercise of such right a secret under the existing RP Act/the Rules or under Article 324 of the Constitution.

4. On 23.02.2009, a Division Bench of this Court, on an objection with regard to maintainability of the writ petition on the ground that right to vote is not a fundamental right but is a statutory right, after considering [Union of India vs. Association for Democratic Reforms and Anr. \(2002\) 5 SCC 294](#) and [People's Union for Civil Liberties vs. Union of India \(2003\) 4 SCC 399](#) held that even though the judgment in [Kuldip Nayar & Ors. vs. Union of India & Ors. \(2006\) 7 SCC 1](#) did not overrule or discard the ratio laid down in the judgments mentioned above, however, it creates a doubt in this regard, referred the matter to a larger Bench to arrive at a decision.

5. One Centre for Consumer Education and Association for Democratic Reforms have filed applications for impleadment in this Writ Petition. Impleadment applications are allowed.

6. Heard Mr. Rajinder Sachhar, learned senior Counsel for the Petitioners, Mr. P.P. Malhotra, learned Additional Solicitor General for the Union of India-Respondent No. 1 herein, Ms. Meenakshi Arora, learned Counsel for the Election Commission of India-Respondent No. 2 herein, Ms. Kamini Jaiswal and Mr. Raghenth Basant, learned Counsel for the impleading parties.

Contentions:

7. Mr. Rajinder Sachhar, learned senior Counsel for the Petitioners, by taking us through various provisions, particularly, Section 128 of the RP Act as well as Rules 39, 41, 49-M and 49-O of the Rules submitted that in terms of Rule 41(2) of the Rules, an elector has a right not to vote but still the secrecy of his having not voted is not maintained under Rules 41(2) and (3) thereof. He further pointed out that similarly according to Rule 49-O of the Rules, the right of a voter who decides not to vote has been accepted but the secrecy is not maintained. According to him, in case an elector decides not to record his vote, a remark to this effect shall be made against

the said entry in Form 17-A by the Presiding Officer and the signature or thumb impression of the elector shall be obtained against such remark. Hence, if a voter decides not to vote, his record will be maintained by the Presiding Officer which will thereby disclose that he has decided not to vote. The main substance of the arguments of learned senior Counsel for the Petitioners is that though right not to vote is recognized by Rules 41 and 49-O of the Rules and is also a part of the freedom of expression of a voter, if a voter chooses to exercise the said right, it has to be kept secret. Learned senior Counsel further submitted that both the above provisions, to the extent of such violation of the secrecy clause are not only ultra vires but also contrary to Section 128 of the RP Act, Rules 39 and 49-M of the Rules as well as Articles 19(1)(a) and 21 of the Constitution.

8. On the other hand, Mr. P.P. Malhotra, learned Additional Solicitor General appearing for the Union of India submitted that the right to vote is neither a fundamental right nor a constitutional right nor a common law right but is a pure and simple statutory right. He asserted that neither the RP Act nor the Constitution of India declares the right to vote as anything more than a statutory right and hence the present writ petition is not maintainable. He further pointed out that in view of the decision of the Constitution Bench in *Kuldip Nayar (supra)*, the reference for deciding the same by a larger Bench was unnecessary. He further pointed out that in view of the above decision, the earlier two decisions of this Court, viz., *Association for Democratic Reforms and Anr. (supra)* and *People's Union for Civil Liberties (supra)*, stood impliedly overruled, hence, on this ground also reference to a larger Bench was not required. He further pointed out that though the power of Election Commission under Article 324 of the Constitution is wide enough, but still the same can, in no manner, be construed as to cover those areas, which are already covered by the statutory provisions. He further pointed out that even from the existing provisions, it is clear that secrecy of ballot is a principle which has been formulated to ensure that in no case it shall be known to the candidates or their representatives that in whose favour a particular voter has voted so that he can exercise his right to vote freely and fearlessly. He also pointed out that the right of secrecy has been extended to only those voters who have exercised their right to vote and the same, in no manner, can be extended to those who have not voted at all. Finally, he submitted that since Section 2(d) of the RP Act specifically defines "election" to mean an election to fill a seat, it cannot be construed as an election not to fill a seat.

9. Ms. Meenakshi Arora, learned Counsel appearing for the Election Commission of India-Respondent No. 2 herein, by pointing out various provisions both from the RP Act and the Rules submitted that inasmuch as secrecy is an essential feature of "free and fair elections", Rules 41(2) and (3) and 49-O of the Rules violate the requirement of secrecy.

10. Ms. Kamini Jaiswal and Mr. Raghenth Basant, learned Counsel appearing for the impleading parties, while agreeing with the stand of the Petitioners as well as the

Election Commission of India, prayed that necessary directions may be issued for providing another button viz., "None of the Above" (NOTA) in the Electronic Voting Machines (EVMs) so that the voters who come to the polling booth and decide not to vote for any of the candidates, are able to exercise their right not to vote while maintaining their right of secrecy.

11. We have carefully considered the rival submissions and perused the relevant provisions of the RP Act and the Rules.

Discussion:

12. In order to answer the above contentions, it is vital to refer to the relevant provisions of the RP Act and the Rules. Sections 79(d) and 128 of the RP Act read as under:

79(d)--"electoral right" means the right of a person to stand or not to stand as, or to withdraw or not to withdraw from being, a candidate, or to vote or refrain from voting at an election.

128-Maintenance of secrecy of voting--(1) Every officer, clerk, agent or other person who performs any duty in connection with the recording or counting of votes at an election shall maintain, and aid in maintaining, the secrecy of the voting and shall not (except for some purpose authorized by or under any law) communicate to any person any information calculated to violate such secrecy:

Provided that the provisions of this Sub-section shall not apply to such officer, clerk, agent or other person who performs any such duty at an election to fill a seat or seats in the Council of States.

(2) Any person who contravenes the provisions of Sub-section (1) shall be punishable with imprisonment for a term which may extend to three months or with fine or with both.

Rules 39(1), 41, 49-M and 49-O of the Rules read as under:

39. Maintenance of secrecy of voting by electors within polling station and voting procedure.--(1) Every elector to whom a ballot paper has been issued under Rule 38 or under any other provision of these rules, shall maintain secrecy of voting within the polling station and for that purpose observe the voting procedure hereinafter laid down.

41. Spoilt and returned ballot papers.--(1) An elector who has inadvertently dealt with his ballot paper in such manner that it cannot be conveniently used as a ballot paper may, on returning it to the presiding officer and on satisfying him of the inadvertence, be given another ballot paper, and the ballot paper so returned and the counterfoil of such ballot paper shall be marked "Spoilt: cancelled" by the presiding officer.

(2) If an elector after obtaining a ballot paper decides not to use it, he shall return it to the presiding officer, and the ballot paper so returned and the counterfoil of such ballot paper shall be marked as "Returned: cancelled" by the presiding officer.

(3) All ballot papers cancelled under Sub-rule (1) or Sub-rule (2) shall be kept in a separate packet.

49M. Maintenance of secrecy of voting by electors within the polling station and voting procedures.--(1) Every elector who has been permitted to vote under Rule 49L shall maintain secrecy of voting within the polling station and for that purpose observe the voting procedure hereinafter laid down.

(2) Immediately on being permitted to vote the elector shall proceed to the presiding officer or the polling officer incharge of the control unit of the voting machine who shall, by pressing the appropriate button on the control unit, activate the balloting unit; for recording of elector's vote.

(3) The elector shall thereafter forthwith--

(a) proceed to the voting compartment;

(b) record his vote by pressing the button on the balloting unit against the name and symbol of the candidate for whom he intends to vote; and

(c) come out of the voting compartment and leave the polling station.

(4) Every elector shall vote without undue delay.

(5) No elector shall be allowed to enter the voting compartment when another elector is inside it.

(6) If an elector who has been permitted to vote under Rule 49L or Rule 49P refuses after warning given by the presiding officer to observe the procedure laid down in Sub-rule (3) of the said rules, the presiding officer or a polling officer under the direction of the presiding officer shall not allow such elector to vote.

(7) Where an elector is not allowed to vote under Sub-rule (6), a remark to the effect that voting procedure has been violated shall be made against the elector's name in the register of voters in Form 17A by the presiding officer under his signature.

49-O. Elector deciding not to vote.--If an elector, after his electoral roll number has been duly entered in the register of voters in Form 17A and has put his signature or thumb impression thereon as required under Sub-rule (1) of Rule 49L, decide not to record his vote, a remark to this effect shall be made against the said entry in Form 17A by the presiding officer and the signature or thumb impression of the elector shall be obtained against such remark.

13. Apart from the above provisions, it is also relevant to refer Article 21(3) of the Universal Declaration of Human Rights and Article 25(b) of the International

Covenant on Civil and Political Rights, which read as under:

21(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

25. Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(a) *** **;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;"

14. Articles 19(1)(a) and 21 of the Constitution, which are also pertinent for this matter, are as under:

19-Protection of certain rights regarding freedom of speech, etc.--(1) All citizens shall have the right-

(a) to freedom of speech and expression;

xxx

21-Protection of life and personal liberty--No person shall be deprived of his life or personal liberty except according to procedure established by law.

15. From the above provisions, it is clear that in case an elector decides not to record his vote, a remark to this effect shall be made in Form 17-A by the Presiding Officer and the signature or thumb impression of the elector shall be obtained against such remark. Form 17-A reads as under:

FORM 17A

[See Rule 49L)

REGISTER of VOTERS

Election to the House of the People/Legislative Assembly of the State/Union territory
....from....Constituency No. and Name of Polling Station....Part No. of Electoral Roll....

etc.

Signature of the Presiding Officer

16. Before elaborating the contentions relating to the above provisions with reference to the secrecy of voting, let us first consider the issue of maintainability of the Writ Petition as raised by the Union of India. In the present Writ Petition, which is of the year 2004, the Petitioners have prayed for the following reliefs:

(i) declaring that Rules 41(2) and (3) and 49-O of the Conduct of Election Rules, 1961 are ultra vires and unconstitutional to the extent they violate secrecy of vote;

(ii) direct the Election Commission under the existing Representation of People Act, 1951 and the Conduct of Election Rules, 1961 and/or under Article 324 to provide necessary provision in the ballot papers and the voting machines for protection of right not to vote and to keep the exercise of such right secret;

17. It is relevant to point out that initially the present Writ Petition came up for hearing before a Bench of two-Judges. During the course of hearing, an objection was raised with regard to the maintainability of the Writ Petition under Article 32 on the ground that the right claimed by the Petitioners is not a fundamental right as enshrined in Part III of the Constitution. It is the categorical objection of the Union of India that inasmuch as the writ petition under Article 32 would lie to this Court only for the violation of fundamental rights and since the right to vote is not a fundamental right, the present Writ Petition under Article 32 is not maintainable. It is the specific stand of the Union of India that right to vote is not a fundamental right but merely a statutory right. It is further pointed out that this Court, in Para 20 of the referral order dated 23.02.2009, reported in [\(2009\) 3 SCC 200](#) observed that since in *Kuldip Nayar (supra)*, the judgments of this Court in *Association for Democratic Reforms (supra)* and *People's Union for Civil Liberties (supra)* have not been specifically overruled which tend to create a doubt whether the right to vote is a fundamental right or not and referred the same to a larger Bench stating that the issue requires clarity. In view of the reference, we have to decide:

(i) Whether there is any doubt or confusion with regard to the right of a voter in *Kuldip Nayar (supra)*;

(ii) Whether earlier two judgments viz., *Association for Democratic Reforms (supra)* and *People's Union for Civil Liberties (supra)* referred to by the Constitution Bench in *Kuldip Nayar (supra)* stand impliedly overruled.

18. Though, Mr. Malhotra relied on a large number of decisions, we are of the view that there is no need to refer to those decisions except a reference to the decision of this Court in *Kuldip Nayar (supra)*, *Association for Democratic Reforms (supra)* and *People's Union for Civil Liberties (supra)*.

19. A three-Judge Bench of this Court comprising M.B. Shah, P. Venkatarama Reddi and D.M. Dharmadhikari, JJ. expressed separate but concurring opinions in the *People's Union for Civil Liberties (supra)*. In para 97, Reddi, J made an observation as to the right to vote being a Constitutional right if not a fundamental right which reads as under:

97. In [Jyoti Basu v. Debi Ghosal \[1982\] 3 SCR 318](#) this Court again pointed out in no uncertain terms that:

8 "a right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple a statutory right.

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, R.P. 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....

Similarly, in para 123, point No. 2 Reddi, J., held as under:

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

Except the above two paragraphs, this aspect has nowhere been discussed or elaborated wherein all the three Judges, in their separate but concurring judgments, have taken the pains to specifically distinguish between right to vote and freedom of voting as a species of freedom of expression. In succinct, the ratio of the judgment was that though the right to vote is a statutory right but the decision taken by a voter after verifying the credentials of the candidate either to vote or not is his right of expression under Article 19(1)(a) of the Constitution.

20. As a result, the judgments in Association for Democratic Reforms (supra) and People's Union for Civil Liberties (supra) have not disturbed the position that right to vote is a statutory right. Both the judgments have only added that the right to know the background of a candidate is a fundamental right of a voter so that he can take a rational decision of expressing himself while exercising the statutory right to vote. In People's Union for Civil Liberties (supra), Shah J., in para 78D, held as under:

...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 conferred by the Constitution....

P. Venkatarama Reddi, J., in Para 97, held as under:

...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....

Dharmadhikari, J., in para 127, held as under:

...This freedom of a citizen to participate and choose a candidate at an election is distinct from exercise of his right as a voter which is to be regulated by statutory law on the election like the RP Act....

In view of the above, Para 362 in Kuldeep Nayar (supra) does not hold to the contrary, which reads as under:

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.

21. After a careful perusal of the verdicts of this Court in *Kuldeep Nayar* (supra), *Association for Democratic Reforms* (supra) and *People's Union for Civil Liberties* (supra), we are of the considered view that *Kuldeep Nayar* (supra) does not overrule the other two decisions rather it only reaffirms what has already been said by the two aforesaid decisions. The said paragraphs recognize that right to vote is a statutory right and also in *People's Union for Civil Liberties* (supra) it was held that "a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression". Therefore, it cannot be said that *Kuldeep Nayar* (supra) has observed anything to the contrary. In view of the whole debate of whether these two decisions were overruled or discarded because of the opening line in Para 362 of *Kuldeep Nayar* (supra) i.e., "we do not agree with the above submissions..." we are of the opinion that this line must be read as a whole and not in isolation. The contention of the Petitioners in *Kuldeep Nayar* (supra) was that majority view in *People's Union for Civil Liberties* (supra) held that 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. It is this contention on which the Constitution Bench did not agree too in the opening line in para 362 and thereafter went on to clarify that in fact in *People's Union for Civil Liberties* (supra), a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression. Thus, there is no contradiction as to the fact that right to vote is neither

a fundamental right nor a Constitutional right but a pure and simple statutory right. The same has been settled in a catena of cases and it is clearly not an issue in dispute in the present case. With the above observation, we hold that there is no doubt or confusion persisting in the Constitution Bench judgment of this Court in *Kuldip Nayar (supra)* and the decisions in *Association for Democratic Reforms (supra)* and *People's Union for Civil Liberties (PUCL) (supra)* do not stand impliedly overruled.

Whether the present writ petition under Article 32 is maintainable:

22. In the earlier part of our judgment, we have quoted the reliefs prayed for by the Petitioners in the writ petition. Mr. Malhotra, learned Additional Solicitor General, by citing various decisions submitted that since right to vote is not a fundamental right but is merely a statutory right, hence, the present writ petition under Article 32 is not maintainable and is liable to be dismissed. He referred to the following decisions of this Court in [N.P. Ponnuswami vs. Returning officer, 1952 SCR 218](#) , [Jamuna Prasad Mukhariya vs. Lachhi Ram, 1955 \(1\) SCR 608](#) [University of Delhi vs. Anand Vardhan Chandal, \(2000\) 10 SCC 648](#) , *Kuldip Nayar (supra)* and [K. Krishna Murthy \(Dr.\) vs. Union of India, \(2010\) 7 SCC 202](#) wherein it has been held that the right to vote is not a fundamental right but is merely a statutory right.

23. In *Kochunni v. State of Madras 1959 (2) Supp. SCR 316*, this Court held that the right to move before this Court under Article 32, when a fundamental right has been breached, is a substantive fundamental right by itself. In a series of cases, this Court has held that it is the duty of this Court to enforce the guaranteed fundamental rights.[Vide [Daryo vs. State of U.P. 1962 \(1\) SCR 574](#)]

24. The decision taken by a voter after verifying the credentials of the candidate either to vote or not is a form of expression under Article 19(1)(a) of the Constitution. The fundamental right under Article 19(1)(a) read with statutory right u/s 79(d) of the RP Act is violated unreasonably if right not to vote effectively is denied and secrecy is breached. This is how Articles 14 and 19(1)(a) are required to be read for deciding the issue raised in this writ petition. The casting of the vote is a facet of the right of expression of an individual and the said right is provided under Article 19(1)(a) of the Constitution of India (Vide: *Association for Democratic Reforms (supra)* and *People's Union for Civil Liberties (supra)*). Therefore, any violation of the said rights gives the aggrieved person the right to approach this Court under Article 32 of the Constitution of India. In view of the above said decisions as well as the observations of the Constitution Bench in *Kuldip Nayar (supra)*, a prima facie case exists for the exercise of jurisdiction of this Court under Article 32.

25. Apart from the above, we would not be justified in asking the Petitioners to approach the High Court to vindicate their grievance by way of a writ petition under Article 226 of the Constitution of India at this juncture. Considering the reliefs prayed for which relate to the right of a voter and applicable to all eligible voters, it

may not be appropriate to direct the Petitioners to go to each and every High Court and seek appropriate relief. Accordingly, apart from our conclusion on legal issue, in view of the fact that the writ petition is pending before this Court for the last more than nine years, it may not be proper to reject the same on the ground, as pleaded by learned ASG. For the reasons mentioned above, we reject the said contention and hold that this Court is competent to hear the issues raised in this writ petition filed under Article 32 of the Constitution.

Discussion about the relief prayed for in the writ petition:

26. We have already quoted the relevant provisions, particularly, Section 128 of the RP Act, Rules 39, 41, 49M and 49-O of the Rules. It is clear from the above provisions that secrecy of casting vote is duly recognized and is necessary for strengthening democracy. We are of the opinion that paragraph Nos. 441, 442 and 452 to 454 of the decision of the Constitution Bench in *Kuldip Nayar (supra)*, are relevant for this purpose which are extracted hereinbelow:

441. Voting at elections to the Council of States cannot be compared with a general election. In a general election, the electors have to vote in a secret manner without fear that their votes would be disclosed to anyone or would result in victimisation. There is no party affiliation and hence the choice is entirely with the voter. This is not the case when elections are held to the Council of States as the electors are elected Members of the Legislative Assemblies who in turn have party affiliations.

442. The electoral systems world over contemplate variations. No one yardstick can be applied to an electoral system. The question whether election is direct or indirect and for which House members are to be chosen is a relevant aspect. All over the world in democracies, members of the House of Representatives are chosen directly by popular vote. Secrecy there is a must and insisted upon; in representative democracy, particularly to the upper chamber, indirect means of election adopted on party lines is well accepted practice.

452. Parliamentary democracy and multi-party system are an inherent part of the basic structure of the Indian Constitution. It is the political parties that set up candidates at an election who are predominantly elected as Members of the State Legislatures. The context in which general elections are held, secrecy of the vote is necessary in order to maintain the purity of the electoral system. Every voter has a right to vote in a free and fair manner and not disclose to any person how he has voted. But here we are concerned with a voter who is elected on the ticket of a political party. In this view, the context entirely changes.

453. That the concept of "constituency-based representation" is different from "proportional representation" has been eloquently brought out in *United Democratic Movement v. President of the Republic of South Africa* where the question before the Supreme Court was: whether "floor crossing" was fundamental to the Constitution of South Africa. In this judgment the concept of proportional

representation vis-à-vis constituency-based representation is highlighted...

454. The distinguishing feature between "constituency-based representation" and "proportional representation" in a representative democracy is that in the case of the list system of proportional representation, members are elected on party lines. They are subject to party discipline. They are liable to be expelled for breach of discipline. Therefore, to give effect to the concept of proportional representation, Parliament can suggest "open ballot". In such a case, it cannot be said that "free and fair elections" would stand defeated by "open ballot". As stated above, in a constituency-based election it is the people who vote whereas in proportional representation it is the elector who votes. This distinction is indicated also in the Australian judgment in *R. v. Jones*. In constituency-based representation, "secrecy" is the basis whereas in the case of proportional representation in a representative democracy the basis can be "open ballot" and it would not violate the concept of "free and fair elections", which concept is one of the pillars of democracy.

27. The above discussion in the cited paragraphs makes it clear that in direct elections to Lok Sabha or State Legislatures, maintenance of secrecy is a must and is insisted upon all over the world in democracies where direct elections are involved to ensure that a voter casts his vote without any fear of being victimized if his vote is disclosed.

28. After referring to Section 128 of the RP Act and Rule 39 of the Rules, this Court in *S. Raghubir Singh Gill v. S. Gurcharan Singh Tohra and Ors.* 1980 (Supp) SCC 53 held as under:

14...Secrecy of ballot can be appropriately styled as a postulate of constitutional democracy. It enshrines a vital principle of parliamentary institutions set up under the Constitution. It subserves a very vital public interest in that an elector or a voter should be absolutely free in exercise of his franchise untrammelled by any constraint, which includes constraint as to the disclosure. A remote or distinct possibility that at some point a voter may under a compulsion of law be forced to disclose for whom he has voted would act as a positive constraint and check on his freedom to exercise his franchise in the manner he freely chooses to exercise. Therefore, it can be said with confidence that this postulate of constitutional democracy rests on public policy.

29. In the earlier part of this judgment, we have referred to Article 21(3) of the Universal Declaration of Human Rights and Article 25(b) of the International Covenant on Civil and Political Rights, which also recognize the right of secrecy.

30. With regard to the first prayer of the Petitioners, viz., extension of principle of secrecy of ballot to those voters who decide not to vote, Mr. Malhotra, learned ASG submitted that principle of secrecy of ballot is extended only to those voters who have cast their votes in favour of one or the other candidates, but the same, in no manner, can be read as extended to even those voters who have not voted in the

election. He further pointed out that the principle of secrecy of ballot pre-supposes validly cast vote and the object of secrecy is to assure a voter to allow him to cast his vote without any fear and in no manner it will be disclosed that in whose favour he has voted or he will not be compelled to disclose in whose favour he voted. The pith and substance of his argument is that secrecy of ballot is a principle which has been formulated to ensure a voter (who has exercised his right to vote) that in no case it shall be known to the candidates or their representatives that in whose favour a particular voter has voted so that he can exercise his right to vote freely and fearlessly. The stand of the Union of India as projected by learned ASG is that the principle of secrecy of ballot is extended only to those voters who have cast their vote and the same in no manner can be extended to those who have not voted at all.

31. Right to vote as well as right not to vote have been statutorily recognized u/s 79(d) of the RP Act and Rules 41(2) and (3) and 49-O of the Rules respectively. Whether a voter decides to cast his vote or decides not to cast his vote, in both cases, secrecy has to be maintained. It cannot be said that if a voter decides to cast his vote, secrecy will be maintained u/s 128 of the RP Act read with Rules 39 and 49M of the Rules and if in case a voter decides not to cast his vote, secrecy will not be maintained. Therefore, a part of Rule 49-O read with Form 17-A, which treats a voter who decides not to cast his vote differently and allows the secrecy to be violated, is arbitrary, unreasonable and violative of Article 19 and is also ultra vires Sections 79(d) and 128 of the RP Act.

32. As regards the question as to whether the right of expression under Article 19 stands infringed when secrecy of the poll is not maintained, it is useful to refer S. Raghbir Singh (supra) wherein this Court deliberated on the interpretation of Section 94 of the RP Act which mandates that no elector can be compelled as a witness to disclose his vote. In that case, this Court found that the "secrecy of ballots constitutes a postulate of constitutional democracy...A remote or distinct possibility that the voter at some point of time may under a compulsion of law be forced to disclose for whom he has voted would act as a positive constraint and check on his freedom to exercise his franchise in the manner he freely chooses to exercise". Secrecy of ballot, thus, was held to be a privilege granted in public interest to an individual. It is pertinent to note that in the said case, the issue of the disclosure by an elector of his vote arose in the first place because there was an allegation that the postal ballot of an MLA was tampered with to secure the victory of one of the candidates to the Rajya Sabha. Therefore, seemingly there was a conflict between the "fair vote" and "secret ballot".

33. In Kuldip Nayar (supra), this Court held that though secrecy of ballots is a vital principle for ensuring free and fair elections, the higher principle is free and fair elections. However, in the same case, this Court made a copious distinction between "constituency based representation" and "proportional representation". It was held

that while in the former, secrecy is the basis, in the latter the system of open ballot and it would not be violative of "free and fair elections". In the said case, *R. v. Jones* (1972) 128 CLR 221 and *United Democratic Movement v. President of the Republic of South Africa* (2003) 1 SA 495 were also cited with approval.

34. Therefore, in view of the decisions of this Court in *S. Raghubir Singh Gill* (supra) and *Kuldip Nayar* (supra), the policy is clear that secrecy principle is integral to free and fair elections which can be removed only when it can be shown that there is any conflict between secrecy and the "higher principle" of free elections. The instant case concerns elections to Central and State Legislatures that are undoubtedly "constituency based". No discernible public interest shall be served by disclosing the elector's vote or his identity. Therefore, secrecy is an essential feature of the "free and fair elections" and Rule 49-O undoubtedly violates that requirement.

35. In [*Lily Thomas vs. Speaker, Lok Sabha*, \(1993\) 4 SCC 234](#) , this Court held that "voting is a formal expression of will or opinion by the person entitled to exercise the right on the subject or issue in question" and that "right to vote means right to exercise the right in favour of or against the motion or resolution. Such a right implies right to remain neutral as well".

36. In view of the same, this Court also referred to the Practice and Procedure of the Parliament for voting which provides for three buttons: viz., AYES, NOES and ABSTAIN whereby a member can abstain or refuse from expressing his opinion by casting vote in favour or against the motion. The constitutional interpretation given by this Court was based on inherent philosophy of parliamentary sovereignty.

37. A perusal of Section 79(d) of the RP Act, Rules 41(2) and (3) and Rule 49-O of the Rules make it clear that a right not to vote has been recognized both under the RP Act and the Rules. A positive "right not to vote" is a part of expression of a voter in a parliamentary democracy and it has to be recognized and given effect to in the same manner as "right to vote". A voter may refrain from voting at an election for several reasons including the reason that he does not consider any of the candidates in the field worthy of his vote. One of the ways of such expression may be to abstain from voting, which is not an ideal option for a conscientious and responsible citizen. Thus, the only way by which it can be made effectual is by providing a button in the EVMs to express that right. This is the basic requirement if the lasting values in a healthy democracy have to be sustained, which the Election Commission has not only recognized but has also asserted.

38. The Law Commission of India, in its 170th Report relating to Reform of the Electoral Laws recommended for implementation of the concept of negative vote and also pointed out its advantages.

39. In India, elections traditionally have been held with ballot papers. As explained by the Election Commission, from 1998 onwards, the Electronic Voting Machines (EVMs) were introduced on a large scale. Formerly, under the ballots paper system,

it was possible to secretly cast a neutral/negative vote by going to the polling booth, marking presence and dropping one's ballot in the ballot box without making any mark on the same. However, under the system of EVMs, such secret neutral voting is not possible, in view of the provision of Rule 49B of the Rules and the design of the EVM and other related voting procedures. Rule 49B of the Rules mandates that the names of the candidates shall be arranged on the balloting unit in the same order in which they appear in the list of contesting candidates and there is no provision for a neutral button.

40. It was further clarified by the Election Commission that EVM comprises of two units, i.e. control and balloting units, which are interconnected by a cable. While the balloting unit is placed in a screened enclosure where an elector may cast his vote in secrecy, the control unit remains under the charge of the Presiding Officer and so placed that all polling agents and others present have an unhindered view of all the operations. The balloting unit, placed inside the screened compartment at the polling station gets activated for recording votes only when the button marked "Ballot" on the control unit is pressed by the presiding officer/polling officer in charge. Once the ballot button is pressed, the Control unit emanates red light while the ballot unit which has been activated to receive the vote emanates green light. Once an elector casts his vote by pressing balloting button against the candidate of his choice, he can see a red light glow against the name and symbol of that candidate and a high-pitched beep sound emanates from the machine. Upon such casting of vote, the balloting unit is blocked, green light emanates on the control unit, which is in public gaze, and the high pitched beep sound is heard by one and all. Thereafter, the EVM has to re-activate for the next elector by pressing "ballot button". However, should an elector choose not to cast his vote in favour of any of the candidates labeled on the EVM, and consequently, not press any of the labeled button neither will the light on the control unit change from red to green nor will the beep sound emanate. Hence, all present in the poll booth at the relevant time will come to know that a vote has not been cast by the elector.

41. Rule 49-O of the Rules provides that if an elector, after his electoral roll number has been entered in the register of electors in Form 17-A, decides not to record his vote on the EVM, a remark to this effect shall be made against the said entry in Form 17-A by the Presiding Officer and signature/thumb impression of the elector shall be obtained against such remark. As is apparent, mechanism of casting vote through EVM and Rule 49-O compromise on the secrecy of the vote as the elector is not provided any privacy when the fact of the neutral/negative voting goes into record.

42. Rules 49A to 49X of the Rules come under Chapter II of Part IV of the Rules. Chapter II deals with voting by Electronic Voting Machines only. Therefore, Rule 49-O, which talks about Form 17-A, is applicable only in cases of voting by EVMs. The said Chapter was introduced in the Rules by way of an amendment dated 24.03.1992. Voting by ballot papers is governed by Chapter I of Part IV of the Rules.

Rule 39 talks about secrecy while voting by ballot and Rule 41 talks about ballot papers. However, as said earlier, in the case of voting by ballot paper, the candidate always had the option of not putting the cross mark against the names of any of the candidates and thereby record his disapproval for all the candidates in the fray. Even though such a ballot paper would be considered as an invalid vote, the voter still had the right not to vote for anybody without compromising on his/her right of secrecy. However, with the introduction of EVMs, the said option of not voting for anybody without compromising the right of secrecy is not available to the voter since the voting machines did not have "None of the Above" (NOTA) button.

43. It is also pointed out that in order to rectify this serious defect, on 10.12.2001, the Election Commission addressed a letter to the Secretary, Ministry of Law and Justice stating, inter alia, that the "electoral right" u/s 79(d) includes a right not to cast vote and sought to provide a panel in the EVMs so that an elector may indicate that he does not wish to vote for any of the aforementioned candidates. The letter also stated that such number of votes expressing dissatisfaction with all the candidates may be recorded in a result sheet. It is also brought to our notice that no action was taken on the said letter dated 10.12.2001.

44. The Election Commission further pointed out that in the larger interest of promoting democracy, a provision for "None of the Above" or "NOTA" button should be made in the EVMs/ballot papers. It is also highlighted that such an action, apart from promoting free and fair elections in a democracy, will provide an opportunity to the elector to express his dissent/disapproval against the contesting candidates and will have the benefit of reducing bogus voting.

45. Democracy and free elections are part of the basic structure of the Constitution. In *Indira Nehru Gandhi v. Raj Narain* 1975 Supp 1 SCC 198, Khanna, J., held that democracy postulates that there should be periodic elections where the people should be in a position to re-elect their old representatives or change the representatives or elect in their place new representatives. It was also held that democracy can function only when elections are free and fair and the people are free to vote for the candidates of their choice. In the said case, Article 19 was not in issue and the observations were in the context of basic structure of the Constitution. Thereafter, this Court reiterated that democracy is the basic structure of the Constitution in [Mohinder Singh Gill and Another vs. Chief Election Commissioner, New Delhi and Others, \(1978\) 1 SCC 405](#) and [Kihoto Hollohon vs. Zachillhu and Others, 1992 \(Supp\) 2 SCC 651](#)

46. In order to protect the right in terms of Section 79(d) and Rule 49-O, viz., "right not to vote", we are of the view that this Court is competent/well within its power to issue directions that secrecy of a voter who decides not to cast his vote has to be protected in the same manner as the Statute has protected the right of a voter who decides to cast his vote in favour of a candidate. This Court is also justified in giving such directions in order to give effect to the right of expression under Article 19(1)(a)

and to avoid any discrimination by directing the Election Commission to provide NOTA button in the EVMs.

47. With regard to the above, Mr. Malhotra, learned ASG, by drawing our attention to Section 62 of the RP Act, contended that this Section enables a person to cast a vote and it has no scope for negative voting. Section 62(1) of the RP Act reads as under:

62. Right to vote.(1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency.

48. Mr. Malhotra, learned ASG has also pointed out that elections are conducted to fill a seat by electing a person by a positive voting in his favour and there is no concept of negative voting under the RP Act. According to him, the Act does not envisage that a voter has any right to cast a negative vote if he does not like any of the candidates. Referring to Section 2(d) of the RP Act, he asserted that election is only a means of choice or election between various candidates to fill a seat. Finally, he concluded that negative voting (NOTA) has no legal consequence and there shall be no motivation for the voters to travel to the polling booth and reject all the candidates, which would have the same effect of not going to the polling station at all.

49. However, correspondingly, we should also appreciate that the election is a mechanism, which ultimately represents the will of the people. The essence of the electoral system should be to ensure freedom of voters to exercise their free choice. Article 19 guarantees all individuals the right to speak, criticize, and disagree on a particular issue. It stands on the spirit of tolerance and allows people to have diverse views, ideas and ideologies. Not allowing a person to cast vote negatively defeats the very freedom of expression and the right ensured in Article 21 i.e., the right to liberty.

50. Eventually, voters' participation explains the strength of the democracy. Lesser voter participation is the rejection of commitment to democracy slowly but definitely whereas larger participation is better for the democracy. But, there is no yardstick to determine what the correct and right voter participation is. If introducing a NOTA button can increase the participation of democracy then, in our cogent view, nothing should stop the same. The voters' participation in the election is indeed the participation in the democracy itself. Non-participation causes frustration and disinterest, which is not a healthy sign of a growing democracy like India.

Conclusion:

51. Democracy being the basic feature of our constitutional set up, there can be no two opinions that free and fair elections would alone guarantee the growth of a healthy democracy in the country. The "Fair" denotes equal opportunity to all

people. Universal adult suffrage conferred on the citizens of India by the Constitution has made it possible for these millions of individual voters to go to the polls and thus participate in the governance of our country. For democracy to survive, it is essential that the best available men should be chosen as people's representatives for proper governance of the country. This can be best achieved through men of high moral and ethical values, who win the elections on a positive vote. Thus in a vibrant democracy, the voter must be given an opportunity to choose none of the above (NOTA) button, which will indeed compel the political parties to nominate a sound candidate. This situation palpably tells us the dire need of negative voting.

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

53. Democracy is all about choice. This choice can be better expressed by giving the voters an opportunity to verbalize themselves unreservedly and by imposing least restrictions on their ability to make such a choice. By providing NOTA button in the EVMs, it will accelerate the effective political participation in the present state of democratic system and the voters in fact will be empowered. We are of the considered view that in bringing out this right to cast negative vote at a time when electioneering is in full swing, it will foster the purity of the electoral process and also fulfill one of its objective, namely, wide participation of people.

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

55. Giving right to a voter not to vote for any candidate while protecting his right of secrecy is extremely important in a democracy. Such an option gives the voter the right to express his disapproval with the kind of candidates that are being put up by the political parties. When the political parties will realize that a large number of people are expressing their disapproval with the candidates being put up by them, gradually there will be a systemic change and the political parties will be forced to accept the will of the people and field candidates who are known for their integrity.

56. The direction can also be supported by the fact that in the existing system a dissatisfied voter ordinarily does not turn up for voting which in turn provides a chance to unscrupulous elements to impersonate the dissatisfied voter and cast a vote, be it a negative one. Furthermore, a provision of negative voting would be in

the interest of promoting democracy as it would send clear signals to political parties and their candidates as to what the electorate think about them.

57. As mentioned above, the voting machines in the Parliament have three buttons, namely, AYES, NOES, and ABSTAIN. Therefore, it can be seen that an option has been given to the members to press the ABSTAIN button. Similarly, the NOTA button being sought for by the Petitioners is exactly similar to the ABSTAIN button since by pressing the NOTA button the voter is in effect saying that he is abstaining from voting since he does not find any of the candidates to be worthy of his vote.

58. The mechanism of negative voting, thus, serves a very fundamental and essential part of a vibrant democracy. The following countries have provided for neutral/protest/negative voting in their electoral systems:

59. The Election Commission also brought to the notice of this Court that the present electronic voting machines can be used in a constituency where the number of contesting candidates is up to 64. However, in the event of there being more than 64 candidates in the poll fray, the conventional system of ballot paper is resorted to. Learned Counsel appearing for the Election Commission also asserted through supplementary written submission that the Election Commission of India is presently exploring the possibility of developing balloting unit with 200 panels. Therefore, it was submitted that if in case this Court decides to uphold the prayers of the Petitioners herein, the additional panel on the balloting unit after the last panel containing the name and election symbol of the last contesting candidate can be utilized as the NOTA button. Further, it was explicitly asserted in the written submission that the provision for the above facility for a negative or neutral vote can be provided in the existing electronic voting machines without any additional cost or administrative effort or change in design or technology of the existing machines. For illustration, if there are 12 candidates contesting an election, the 13th panel on the balloting unit will contain the words like "None of the above" and the ballot button against this panel will be kept open and the elector who does not wish to vote for any of the abovementioned 12 contesting candidates, can press the button against the 13th panel and his vote will be accordingly recorded by the control unit. At the time of the counting, the votes recorded against serial number 13 will indicate as to how many electors have decided not to vote for any candidate.

60. Taking note of the submissions of Election Commission, we are of the view that the implementation of the NOTA button will not require much effort except for allotting the last panel in the EVM for the same.

61. In the light of the above discussion, we hold that Rules 41(2) and (3) and 49-O of the Rules are ultra vires Section 128 of the RP Act and Article 19(1)(a) of the Constitution to the extent they violate secrecy of voting. In view of our conclusion, we direct the Election Commission to provide necessary provision in the ballot papers/EVMs and another button called "None of the Above" (NOTA) may be

provided in EVMs so that the voters, who come to the polling booth and decide not to vote for any of the candidates in the fray, are able to exercise their right not to vote while maintaining their right of secrecy. Inasmuch as the Election Commission itself is in favour of the provision for NOTA in EVMs, we direct the Election Commission to implement the same either in a phased manner or at a time with the assistance of the Government of India. We also direct the Government of India to provide necessary help for implementation of the above direction. Besides, we also direct the Election Commission to undertake awareness programmes to educate the masses.

62. The writ petition is disposed of with the aforesaid directions.

* Write-in"-The "write-in" form of negative voting allows a voter to cast a vote in favour of any fictional name/candidate.