IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.1787 OF 2022

Mohammad Nawab Mohammad Islam
Malik @ Nawab Malik
Age 62 years, Indian Inhabitant,
Residing at, Noor Manzil, Kurla (W),
Mumbai (currently in judicial custody) … Applicant

versus

1. The Directorate of Enforcement
(through Asstt. Director, Zonal Office
Kaiser I Hind Building, Ballard Estate,
Fort, Mumbai – 400 001

2. State of Maharashtra … Respondents

WITH
INTERIM APPLICATION NO.1734 OF 2022
IN
BAIL APPLICATION NO.1021 OF 2022

Anil Vasantrao Deshmukh
Aged more than 73 years,
Resident of Dnyaneshwar Bungalow,
Malabar Hills, Mumbai – 400 006.
(currently in judicial custody) … Applicant

versus

1. The Directorate of Enforcement
(through Asstt. Director, Zonal
Office Kaiser – I – Hind Building,
Ballard Estate, Fort, Mumbai – 400 001

2. State of Maharashtra … Respondents

Mr. Amit Desai, Senior Advocate with Mr. Kushal Mor, Mr. Gopalkrishna Shenoy, Mr. Taraq Sayyed, Mr. Rohan Dakshini, Ms. Pooja Kothari, Mr. Tejas Popat, Ms. Neha Sonawane i/by Rashmikant and Partners, for Applicant in BA 1787 of 2022.

Mr. Vikram Choudhary, Senior Advocate with Mr. Inderpal Singh, Mr. Aniket Nikam, Mr. Hargun Sandhu, Mr. M.B.Shirsat, Ms. Devyani Chemburkar, Ms. Swati Acharya, for Applicant in IA 1734 of 2022 in BA 1021 of 2022.

Mr. Anil C. Singh, Addl. Solicitor General with Mr. Aditya Thakkar, Mr. Shriram Shirsat, Mr. D.P.Singh, Mr. Pranav Thakur, Ms. Smita Thakur, Mr. Amandeep Singh Sra and Mr. Amar Qureshi, for Respondent – ED.

Mr. Pandurang H.Gaikwad, APP, for State.

CORAM: N.J.JAMADAR, J.

RESERVED ON : 16th JUNE, 2022
PRONOUNCED ON : 17th JUNE, 2022

JUDGMENT :

1. The Applicants who are the members of the Maharashtra Legislative Assembly, have preferred these Applications seeking, inter alia, the following reliefs :

> "(a) That this Hon'ble Court be pleased to grant relief to the Applicant to enable him to vote in the Maharashtra Legislative Council Election being conducted on 20th June, 2022 from 9 am to 4 pm by releasing him on personal bond with sureties or on such other terms and conditions as this Hon'ble Court may deem fit;
> (b) Alternatively, this Hon'ble Court be pleased to permit the Applicant to go to Vidhan Bhavan under medical escort, the charges of which will be borne by the Applicant to enable him to vote in the Elections for Maharashtra Legislative Council being conducted on 20th June, 2022 from 9 am to 4 pm on such terms and conditions as this Hon'ble Court may deem fit;"

2. The background facts necessary for determination of these Applications are few :

2.1 The Applicant – Nawab Malik is in custody since 23rd February, 2022 in connection with ECIR/MBZO-I/10/2022 for the offence punishable under Section 3 of the Prevention of Money Laundering Act, 2002 ('PMLA).

2.2 The Applicant – Anil Vasantrao Deshmukh is in custody in connection C.R.No.ECIR/MBZO-I/66 of 2021 for the offence punishable under Section 3 of the PMLA since 2nd November, 2021.

2.3 The Applicants, with a view to exercise the right of vote in Rajya Sabha Biennial Elections in the capacity of the members of the Maharashtra Legislative Assembly, had preferred Applications for release on bail. The learned Special Judge, PMLA, by an order dated 9th June, 2022 rejected the Applications.

2.4 A notification to call upon the members of the Legislative Assembly of the State to fill in the seats of the members of the Legislative Council has been issued by the Governor and the election is scheduled to be held on 20th June, 2022.

2.5 The Applicants claim they have a constitutional duty to cast vote in the said election. The fact that the Applicants are incarcerated in connection with the aforesaid offence, cannot preclude them from discharging their constitutional duty. Since the learned Judge, PMLA, has negatived the plea of the Applicants qua the Rajya Sabha Election, recording a view on the construct of Section 62(5) of the

Representation of the People Act, 1951, the Applicants are constrained to directly approach this Court by way of these Applications.

3. A limited Affidavit in Reply is filed by the Directorate of Enforcement – Respondent No.1. The tenability of the Applications is assailed on the ground that the Applicants have not availed efficacious remedy of approaching the learned Judge, PMLA. Since the Applicants have prayed for bail, the interdict contained in Section 45 of the PMLA comes into play. Even otherwise, in view of the settled position in law that a right to vote is nothing more than a statutory right, and the Applicants are precluded from exercising the said right by a statute itself, the prayer of the Applicants does not deserve to be entertained.

4. At the outset, it is imperative to note that during the course of the hearing, the Applicants made an endeavour to persuade the Court to grant the alternative prayer to allow the Applicants to cast the vote by facilitating their presence at the Vidhan Bhavan, under escort.

5. In the aforesaid backdrop, I have heard Mr. Amit Desai, learned Senior Advocate, appearing for the Applicant in BA No.1787 of 2022, Mr. Vikram Choudhary, learned Senior Advocate, appearing for the Applicant in IA 1734 of 2022 in BA 1021 of 2022 and the Mr. Anil C. Singh, learned Additional Solicitor General appearing for the Respondent No.1, at length.

6. Since by and large, there is no controversy on facts, the learned Senior

Advocates have canvassed the submissions on legal propositions, especially the nature of the prohibition against the exercise of the right to vote under Section 62(5) of the Representation of the People Act, 1951 ('R.P.Act, 1951').

7. Before adverting to the submissions canvassed across the bar, it may be apposite to extract the relevant provisions of the R.P.Act, 1951, as they would assist the Court in appreciating the submissions in a better perspective :

> Section 2(d) defines "election" as under :
> "election" means an election to fill a seat or seats in either House of Parliament or in the House or either House of the Legislative of a State other than the State of Jammu and Kashmir;

Section 16 of the R.P.Act, 1951 provides for issue of notification for biennial election to a State Legislative Council. It reads as under :

> "16. For the purpose of filling the seats of the Legislative Council of a State retiring on the expiration of their term of office, the Governor shall, by one or more notifications published in the Official Gazette of the State on such date or dates as may be recommended by the Election Commission, call upon the members of the Legislative Assembly of the State and all the Council constituencies concerned to elect members in accordance with the provisions of this Act and of the rules and orders made thereunder :
> Provided that no notification under this section shall be issued more than three months prior to the date on which the term of office of the retiring members is due to expire."

Section 62 of the R.P. Act, 1951, which is at the hub of the controversy, 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.
>
> (2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in Section 16 of the Representation of the People Act, 1950 (43 of 1950).
>
> (3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void.
>
> (4) No person shall at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for the constituency more than once, and if he does so vote, all his votes in that constituency shall be void.
>
> **(5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police:**
>
> **Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force :**
>
> **Provided further that by reason of the prohibition to vote under this sub-section, a person whose name has been entered in the electoral roll shall not cease to be an elector)**
>
> (6) Nothing contained in sub-sections (3) and (4) shall apply to a person who has been authorized to vote as proxy for an elector under this Act in so far as he votes as a proxy for such elector.”

8. In the light of the aforesaid provisions, Mr. Desai, learned Senior Advocate, submitted that sub-section (5) of Section 62, which declares that no person shall vote at any election if he is confined in prison, does not provide an absolute bar. Comparing

and contrasting the provisions in sub-section (2) to (4) of Section 62 with sub-section (5), an endeavour was made by Mr. Desai to draw home the point that, in contradistinction to sub-section (2) to (4), the embargo in sub-section (5) is not absolute.

9. As a second limb of this submission, Mr. Desai strenuously urged that the person in custody may be prevented from exercising the right to vote, but the Court is not precluded from exercising the discretion to remove the embargo by permitting the person in custody to cast the vote.

10. Laying emphasis on the second proviso to sub-section (5) of Section 62, Mr. Desai submitted that there is no prohibition for contesting the election while a person is incarcerated which, in a sense, is a relatively higher right than that of casting vote. But a person is prevented from exercising the right to vote for the reason that he is in custody. This dichotomy is required to be resolved by a harmonious construction. Mr. Desai submitted that the Court ought to lean in favour of an interpretation, which strengthens the democracy than one which runs counter to democratic spirit.

11. He further submitted that though the constitutional validity of Section 62(5) of the Representation of the People Act, 1951 is upheld by the Supreme Court in the case of *Anukul Chandra Pradhan V/s. Union of India and Ors.*[1] and the subsequent decisions which have followed the said pronouncement, yet it would not imply that the

1 (1997) 1 SCC 1

Supreme Court has held that the Courts are denuded of the power to exercise the discretion having regard to the nature of the election, the composition of the electoral college and the circumstances of the case. It was further submitted that since the Applicants are yet to be tried and are very much entitled to the presumption of innocence, which is a cardinal principle of our criminal jurisprudence, they cannot be prevented from performing their constitutional duty. The term "otherwise" which appears in sub-section (5) of Section 62 is, thus, required to be construed *ejusdem generis*. Therefore, the Applicants deserve the relief of being escorted to the Vidhan Bhavan for casting the vote in the Maharashtra Legislative Council Election, as it would advance the cause of promoting the democratic values submitted Mr. Desai.

12. Mr. Vikram Choudhary, learned Senior Advocate, appearing for the Applicant in IA No.1734 of 2022, supplemented the submissions of Mr. Desai by more forcefully canvassing the submission that the matter is clearly in the realm of discretion of the Court. The embargo contained in sub-section (5) of Section 62 does not impinge upon the exercise of the said discretion. Any other view, according to Mr. Chaudhary, would militate against the fundamental principles of democratic polity.

13. In opposition to this, Mr. Anil Singh, learned Additional Solicitor General appearing for Respondent No.1, stoutly submitted that the submissions which are sought to be canvassed on behalf of the Applicants, have all be repelled by the Courts,

while upholding the validity of sub-Section (5) of Section 62. Laying emphasis on the object of the R.P.Act, 1951, and the constitutional bodies, election to which is regulated by the R.P.Act, 1951, Mr. Singh would urge that when the Parliament has consciously made no distinction between the election to various constitutional bodies, it is not open for the Applicants to urge that the Courts still would be justified in exercising the discretion, which is in teeth of express statutory provisions. Since the R.P.Act, 1951 is a complete Code in itself, there is no element of discretion left in the Courts, submitted Mr. Singh. Even the alternative relief of permitting the Applicants to cast vote, under escort, is unworthy of countenance as it would amount to permitting the Applicants to achieve the result indirectly, which they cannot do directly.

14. Mr. Singh laid stress on the proposition that the right to vote is a statutory right. If the statute can provide such right, the same can be legitimately taken away by the statute. Disqualification incurred by the Applicants is brought about by their own acts and conduct. Therefore, the Applicants cannot be heard to say that in order to advance the democratic principles, they be permitted to cast the vote which they are otherwise prohibited by law.

15. I have given my anxious consideration to the aforesaid submissions. From the phraseology of the definition of 'election', extracted above, indisputably the election to State Legislative Council is regulated by the provisions of the R.P.Act, 1951.

Sub-Section (5) of Section 62 contains an interdict against the exercise of right to vote at any election by a person who is confined in prison. Indubitably, the Parliament has not made any distinction, in the matter of prescribing the aforesaid disqualification on account of being in custody on the basis of the bodies, to which election is held. The proviso, however, excludes a person who has been detained in custody as a preventive detention measure from the said bar.

16. The constitutionality of sub-section (5) of Section 62 was assailed in the case of *Anukul Chandra Pradhan (supra),* wherein the Supreme Court upheld its validity. It is necessary to extract the observations in Paragraphs 5 to 8 of the said judgment, as the learned Senior Advocates sought to rely upon a particular portion thereof, to lend support to their respective submissions.

> "5. There are provisions made in the election law which exclude persons with criminal background of the kind specified therein, from the election scene as candidates and voters. The object is to prevent criminalisation of politics and maintain probity in elections. Any provision enacted with a view to promote this object must be welcome and upheld as subsisting the constitutional purpose. The elbow room available to the legislature in classification depends on the context and the object for enactment of the provision. The existing conditions in which the law has to be applied cannot be ignored in adjudging its validity because it is relatable to the object sought to be achieved by the legislation. Criminalisation of politics is the bane of society and negation a of democracy. It is subversive of free and fair elections which is a basic feature of the Constitution. Thus, a provision made in the election law to promote the object of fight and fair elections and facilitate

maintenance of law and order which are the essence of democracy must, therefore, be so viewed. More elbow room to the legislature for classification has to be available to achieve the professed object.

6. The effect of sub-section (5) of Section 62 of the Act is that any person who is confined in prison while serving a sentence of imprisonment on his conviction for any offence or is under lawful confinement in a prison or in a police custody for any reason is not entitled to vote in an election, but this restriction does not apply to a person subjected to any kind of preventive detention.

7. The learned counsel, Shri Sachar argues that persons in preventive detention cannot be classified separately. That by itself would not result in the invalidity of whole of sub-section. (5), but can affect the validity only of the proviso therein. The challenge in the present case is not merely to the proviso, but to the whole of sub-section (5). This argument does not, therefore, advance the petitioner's case. However, for the purpose of the present challenge, it is sufficient to say that preventive detention differs from imprisonment on conviction or during investigation of the crime of an accused which permits separate classification of the detenus under preventive detention. Preventive detention is to prevent breach of law while imprisonment on conviction or during investigation is subsequent to the commission of the crime. This distinction permits separate classification of a person subjected to preventive detention.

8. There are other reasons justifying this classification. It is well known that for the conduct of free, fair and orderly elections, there is need to deploy considerable police force. Permitting every person in prison also to vote would require the deployment of a much larger police force and much greater security arrangement in the conduct of elections. A part from the resource crunch, the other constraints relating to availability of more police forces and infrastructure facilities are additional factors to justify the restrictions imposed by sub-section (5) of Section 62. A person who is in prison as a result of his own conduct and is, therefore, deprived of his liberty during the

> period of his imprisonment cannot claim equal freedom of movement, speech and expression with the other who are not in prison. The classification of persons in and out of prison separately is reasonable. Restriction on voting of a person in prison result automatically from his confinement as a logical consequence of imprisonment. A person not subjected to such a restriction is free to vote or not to vote depending on whether he wants to go to vote or not; even he may choose not to go and cast his vote. In view of the restriction on movement of a prisoner, he cannot claim that he should be provided the facility to go and vote. Moreover, if the object is to keep persons with criminal background away from the election scene, a provision imposing a restriction on a prisoner to vote cannot be called unreasonable."

17. The validity of sub-section (5) of Section 62 was again sought to be questioned in the case of *S. Radhakrishnan V/s. Union of India and Ors.*[2] Reiterating the view in the case of *Anukul Chandra Pradhan (supra)*, the Supreme Court again declined to entertain the challenge. Para No.2 of the order reads thus :

> "2. The issue raised in this petition is no longer res-integra. In Anukul Chandra Pradhan V. Union of India and Ors. (supra), a three Judge Bench of this Court speaking through Verma, CJI (as His Lordship then was) examined the ambit and scope of Section 62(5) of the Representation of the People Act, 1950 and after observing that criminalisation of politics is the bane of society and negation of democracy, rejected the challenge to the validity of the said Section. It was opined that the objection of Section 62(5) is to prevent criminalisation of politics and maintain probity in elections and that any provision which furthers that aim and promotes the object has to be welcomed, as sub-serving a great constitutional purpose. We are in respectful agreement with the view expressed by the three Judge Bench in Anukul Chandra Pradhan's case (supra) and are not persuaded to take a different

2 W.P.(C) 1028 of 1990

view. This writ petition, therefore, fails and is dismissed. No costs."

18. The issue was again sought to be raised before the Division Bench of the Delhi High Court in the case of *Praveen Kumar Chaudhary & Ors. V/s. Election Commission of India and Ors.*[3]. Following the pronouncements in the cases of *Anukul Chandra Pradhan (supra)*, and *S. Radhakrishnan (supra)*, and a Division Bench decision of the Delhi High Court in the case of *Manohar Lal Sharma V/s. Union of India*[4], the Delhi High Court reiterated that sub-section (5) of Section 62 is constitutionally valid. The conclusion in paragraph No.13 reads as under :

> 13. In view of the aforesaid discussion, we hold that Section 62(5) is constitutionally valid. The classification of the persons who are in jail and who are out of jail is a valid classification and it has a reasonable nexus with the objects sought to be achieved as stated hereinabove."

19. Mr. Desai and Mr. Choudhary, learned Senior Advocates, appearing for the Applicants, would urge that the reasons which weighed with the Supreme Court in upholding the constitutional validity in the case of *Anukul Chandra Pradhan (supra)* are required to be considered. The Supreme Court, inter alia, adverted to logistical and security perspective in prohibiting a person in custody from exercising the right to vote. From this standpoint, the learned Senior Advocates urged, the observations of the Supreme Court to the effect that "a person who is in prison as a result of his own

3 W.P.(C) 2336 of 2019 dt. 11th Feb. 2020
4 (2014) SCC Online Del. 570

conduct and is therefore, deprived of his liberty during the period of his imprisonment cannot claim equal freedom of movement, speech and expression with the others who are not in prison", do not apply with equal force to a person who is yet not charged, much less, convicted. It was further submitted that having regard to the composition of the electoral college, the aforesaid justification may not hold good in case of election to Legislative Council.

20. I find it rather difficult to accede to this submission. The Supreme Court has categorically held that the classification between the persons who are in custody and those who are not in custody, is a reasonable classification based on an intelligible differentia. The fact that the Supreme Court adverted to consequences which may ensue in the event every person who is incarcerated is permitted to exercise the right to vote, does not erode the worth of the principle on which the validity of sub-section (5) of Section 62 is upheld.

21. Mr. Desai then urged that there has been a development in electoral jurisprudence after the pronouncement in the case of *Anukul Chandra Pradhan (supra)*. A right to vote is now not merely a statutory right, but has been elevated to the level of a constitutional right, though certainly not a fundamental right. According to Mr. Desai, this further development makes a significant difference in the approach to be adopted in considering the prayer of the present nature. Mr. Desai relied upon the following observations of the Supreme Court in the case of *Rajbala & Ors. V/s. State of*

Haryana and Ors.[5] :

> "94. While examining the question of constitutionality of the impugned amendment made under Section 175(1) of the Haryana Panchayati Raj Act (for Short "the Act") which are under attack in this writ petition, the question arose regarding the true nature of the two rights of the citizen - "right to vote" and "right to contest" viz. Whether they are statutory right or constitutional right ?
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> 95. A three-judge Bench in *People's Union for Civil Liberties V/s. Unionof India*[6] examined the question regarding nature of "right to vote". The learned Judge P.V.Reddi, in his separate opinion, which was concurred by D.M.Dharmadhikari, J. examined this question in great detail and in express terms, answered it holding that the "right to note" is a constitutional right but not merely a statutory right. We are bound by this view taken by a three-judge Bench while deciding this question in this writ petition."

21. The aforesaid submission, in my considered view, does not advance the cause of the Applicants. Indisputably, the Applicants profess to exercise their right to vote in the capacity of the Members of the Legislative Assembly, which constitutes the electoral college for electing the Members of the Legislative Council under Article 171(3)(d) of the Constitution of India. The claim to exercise of this constitutional right can, by no stretch of imagination, be said to be absolute. The Parliament, by law, has regulated the elections to the Legislative Councils as well, under the R.P.Act, 1951. Section 16 of the Representation of the People Act, 1951, extracted above, thus provides that the Governor shall call upon the members of the Legislative Assembly of

5 (2016) 2 SCC 445
6 (2003) 4 SCC 399

the State to elect members in accordance with the provisions of this Act, and all the rules and orders made thereunder.

22. The situation which thus obtains is that even on the premise that the Applicants have constitutional right to exercise and duty to discharge in the capacity of the members of the Maharashtra Legislative Assembly, the same are regulated by statutory prescriptions. If the Parliament has declared that a person who is incarcerated, otherwise than as a detenue under the preventive detention law, is not entitled to vote at an election, the said prescription would govern the rights and duties of the Members of the Legislative Assembly as electors.

23. This propels me to the thrust of the submission on behalf of the Applicants that the Court is required to adopt an approach which advances the cause of democracy. According to the Applicants the Court ought to choose the alternative, which strengthens the democratic values and constitutional norms.

24. To bolster up this submission, Mr. Desai cited orders passed by the Supreme Court in the cases of *Kalyan Chandra Sarkar V/s. Rajesh Ranjan @ Pappu Yadav and Anr.*[7], *Mohd. Shahabuddin V/s. State of Bihar & Ors.*[8], *Mr. Nalin Soren V/s. State of Jharkhand*[9] and the orders passed by this Court in the cases of *Ramesh Nagnath Kadam V/s. The State of Maharashtra and Ors.*[10] and *Ramesh Nagnath Kadam V/s. The*

7 (2005) 3 SCC 311
8 (2007) 10 SCC 28
9 Special Leae to Appeal (Cri.) No.5859 of 2012.
10 Cri. W.P.No.2638 of 2017 Dt. 14th July, 2017

State of Maharashtra and Ors.[11]

25. These orders were passed in a variety of matters like permitting the elected representatives to participate in the Presidential Election, cast vote in 'no confidence motions', and file nomination papers for being elected to Legislative Assembly etc. In none of these cases, the issue like the one of interdict contained in Section 62(5) of the Representation of the People Act, 1951 was required to be delved into.

26. There are few judgments which directly deal with the provisions contained in Section 62(5) of the Representation of the People Act, 1951. The first one is of Orissa High Court in the case of *Sri Ramesh Chandera Jena @ Ramesh Jena V/s. State of Orissa and Ors.*[12]. In the said case, the Division Bench of the Orissa High Court observed that it was of the opinion that since the Petitioner is a member of the Orissa Legislative Assembly, it would be proper to allow him to exercise his franchise by way of participating in the voting process for election to the Council of States. The learned Single Judge of the Jharkhand High Court in the case of *Dhullu Mahto V/s. State of Jharkhand & Ors.*[13] declined to interfere with an order passed by the learned SDJM, Dhanbad whereby the Petitioner therein was allowed to cast vote in the Rajya Sabha elections under the police escort.

27. A learned Single Judge of the Rajasthan High Court in the case of *Banwari*

11 Cri.W.P. 4792 of 2019 dt. 1st October, 2019
12 2010 SCC Online Ori 304
13 W.P.(Cr.) No.72 of 2020

Lal Kushwaha V/s. State of Rajasthan and Ors.[14] struck a discordant note and observed that in the face of the mandatory provision, a person in custody cannot be allowed to exercise the right to vote. It was further held that the judgment of the Orissa High Court in the case of *Ramesh Chandra Jena (supra)* was *per incurium*. Paragraphs 12 and 13 of the said judgment read thus :

> "12. Section 62 of the Act 1951, deals with the Right to Vote. It refers to constituency and not any particular election. Therefor, the provision should be taken to be general and regulating 'Right to Vote' at all elections whether they are to the House of People or for the Council of States or a Legislative Assembly or a Legislative Council. As such the provisions of Sub Section (5) of Section 62 of the Act 1951 are equally applicable to an eligible voter who wishes to cast vote at an election to the Council of State. Therefore, a person who is confined in prison, whether under a sentence of imprisonment or transportation or otherwise, or is in lawful custody of the police cannot be allowed to vote at an election to the Council of States. However, this restriction is not applicable to a detenue under any law relating to preventative detention. Sub-Section (5) of Section 62 of the Act 1951 uses the word 'shall' and therefor, is a mandatory proposition of law which this court is bound to follow, being the express exposition of law by the legislature. The Judgment of the Hon'ble the High Court of Orrisa in the case of Shri Ramesh Chandra Jena (supra), to the extent it allows a person subject to restriction of Sub-section (5) of Section 62 of the Act 1952 to vote, appears to be in per incurium and this court, in the backdrop of the express provision of law, feels unable to subscribe to the findings of the said judgment.
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> 13. Applying Section 62(5) of the Representation of People Act to the factual matrix of the present case, it is clear that the petitioner cannot be allowed to cast his vote at the election to the Rajya Sabha since, he is in prison and in

14 2016 SCC Online Raj 3359,

> the lawful custody of the police. Further the proviso to the Section will not apply since he is not in preventive detention. Furthermore, right to cast vote at an election is a statutory right as observed by the Supreme Court in Anukul Chandra Pradhan's case (supra)."

28. On the first principles of statutory interpretation as the text of sub-section (5) of Section 62 is explicitly clear and unambiguous, it is required to be construed in accordance with its plain and grammatical meaning. Thus construed, the proscription against the right to vote by a person who is in custody, otherwise than by way of preventive detention, is plain and direct. The Parliament has, in its wisdom, not carved out any exception for election to constitutional bodies, which are to be elected by indirect method of election. The insertion of second proviso to sub-section (5) of Section 62 is of some significance, in appreciating the legislative intent. The learned Additional Solicitor General was justified in canvassing a submission that the use of the expression "by reason of prohibition to vote under this sub-section" indicates that the Parliament was fully alive to the fact that the prohibition to vote operated even for election to Rajya Sabha and certain seats in the Legislative Council, for which indirect method of election was followed, and yet the Parliament carved out a limited exception that, despite such prohibition, a person whose name has been entered in the electoral roll shall not cease to be an elector.

29. In the aforesaid view of the matter, the submission on behalf of the

Applicants that the prohibition to vote under the main part of sub-section (5) of Section 62, is only with a view not to permit a large body of persons, who might be incarcerated at a given point of time, does not apply with equal force to a restricted electoral college, like the one for election to the members of the Legislative Council, does not merit countenance. If a full play is given to the provisions contained in sub-section (2)(d) and Section 62(5) of the R.P.Act, 1951, an inference becomes inescapable that a person in custody, either post conviction or during the course of investigation or trial, is prohibited from casting vote in any election.

30. The moot question that ventures to the fore, in these Applications, is whether the Court would be justified in removing the embargo by either directing the release of the Applicants on temporary bail or permitting the Applicants to cast vote, under escort. The submission on behalf of the Applicants that the embargo is only on account of the factum incarceration and the moment the Court orders the release of the person or permits the casting of vote by coming out of prison, the embargo is lifted, appears attractive at the first blush. However, on a close scrutiny, the premise of the submission falls through. What the Applicants want the Court to do is to order release of the Applicants to cast vote in the face of an express prohibition. To this end, the Applicants appeal to the judicial discretion of the Court. The edifice of this appeal is rested on the proposition that participating in voting by the Applicants would strengthen the democracy.

31. It would be suffice to note that the concept of 'democracy' transcends 'electoral democracy'. Purity of electoral process and probity of the participants therein, are also of equal significance in strengthening the democratic principles. One of the objects of the prohibition envisaged by sub-section (5) of Section 62 is stated to be arresting the criminalization of politics. I am, therefore, not inclined to accede to the broad proposition that permitting the persons (who are otherwise not qualified to vote in the election) strengthens the democracy.

32. The submission that the Court can remove the embargo created by sub-section (5) of Section 62, is also fraught with infirmities. First and foremost, the release of the Applicants is sought only for the purpose of overriding the interdict contained in Section 62(5). Secondly, the exercise of discretion is again sought in such a fashion that the net result would be permitting a person to exercise the franchise, who is otherwise prohibited by law. It is trite, discretion has to be exercised within the bounds of law. Conversely, there is no unfettered discretion, even in the Courts, to validate a course of action, which the law proscribes.

33. The observations of the Supreme Court in the case of *Anurag Kumar Singh V/s. State of Uttarakhand and Ors.*[15] delineate the approach to be adopted when the Court is called upon to exercise the discretion against the statutory prescription, when no such discretion is vested in the Court. The following observations are

15 Civil Appeal No.8334 of 2013

instructive :

> 32….. In view of there being no fault on the part of the Appellants, we examined whether we could exercise our judicial discretion to direct their appointments. We realize that any such direction given by us for their appointments would be contrary to the Rules. Judicial discretion can be exercised by a court only when there are two or more possible lawful solutions. In any event, Courts cannot give any direction contrary to the Statute or Rules made thereunder in exercise of judicial discretion. It will be useful to reproduce Judicial Discretion (1989) by Aharon Barak which is as follows :
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> *"Discretion assumes the freedom to choose among several lawful alternatives. Therefore, discretion does not exist when there is but one lawful option. In this situation, the judge is required to select that option and has no freedom of choice. No discretion is involved in the choice between a lawful act and an unlawful act. The judge must choose the lawful act, and he is precluded from choosing the unlawful act. Discretion, on the other hand, assumes the lack of an obligation to choose one particular possibility among several."*

34. I am mindful of the fact that the Court may be confronted with a situation, where despite the rigors of law, to uphold the constitutional norms and democratic values, the Court may be required to summon the inherent powers to remedy the malady. The Court cannot be said to be completely denuded of the authority to exercise such jurisdiction. An illustrative case would be, where on the eve of the election, a number of members of the electoral college are put behind the bars with a view to deprive them of the opportunity to vote in the election so as to achieve a desired result. In such a situation, though the "Section" would be

unassailable, yet the "Action" thereunder, is susceptible to challenge and correction in exercise of appropriate jurisdiction. In such an exceptional situation, the Court may be justified in issuing directions so that the 'custody' of the members of the electoral college does not become a subterfuge for divesting them of their right to vote. In the case at hand, the Applicants have been in custody since long. No such motive of putting the Applicants behind the bar so as to prevent them from participating in the election process can be attributed, at least, at this length of time.

35. For the foregoing reasons, in my considered view, even the alternative prayer to exercise the discretion so as to remove the embargo and allow the Applicants to cast vote, whilst being in custody, does not merit acceptance. Hence, the following order :

ORDER

The Applications stand rejected.

(N.J.JAMADAR, J.)