

## **THE GAUHATI HIGH COURT**

**(High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura,  
Mizoram & Arunachal Pradesh)**

**Civil Rule (PIL) Nos. 185/98, 253/98 & 254/98**

1. Sri H.R.A. Choudhury  
Guwahati, Assam
2. Smt. Sufia Khatun  
Nagaon, Assam ..... Petitioners  
in CR (PIL) 185/98
1. Sri Sadhan Chakravorty  
Guwahati
2. Sri Rajendra Prasad  
Guwahati
3. Mustt. Raushanara Begum (Islam)  
Dhubri, Assam ..... Petitioners  
in CR (PIL) 254/98
1. Md. Abdul Kayam  
Secretary  
Assam Pradesh Congress (I) Committee,  
G.S. Road, Guwahati ..... Petitioner  
in CR (PIL) 254/98

Versus

1. The Election Commission of India through  
the Secretary, Election Commission of India  
Nirvachan Sadan, Ashoka Road, New Delhi-1
2. The Chief Electoral Officer, Assam,  
Election Department, Dispur, Guwahati
3. The Additional Chief Electoral Officer, Assam,  
Election Department Dispur, Guwahati

4. The District Election Officer  
Kamrup, Guwahati
5. The District Election Officer,  
Dubri, Assam
6. The Electoral Registration Officer,  
54 No. West Guwahati LA Constituency,  
Guwahati
7. The Assistant Electoral Registration Officer,  
No. 54 West Guwahati LA Constituency, Guwahati
8. The Electoral Registration Officer,  
No. 21, Mankachar LA Constituency,  
DC's Office, Dhubri, Assam
9. The Assistant Electoral Registration Officer,  
No. 21, Mankachar LA Constituency,  
DC's Office, Dhubri
10. The Union of India through the Secretary to  
the Government of India, Ministry of Law, Justice  
and Company Affairs, Shastri Bhawan, New Delhi
11. The State of Assam through the Secretary  
to the Government of Assam, Election Department,  
Dispur, Guwahati ..... Respondents

Present :

The Hon'ble Mr. Justice J.N. Sarma  
The Hon'ble Mr. Justice A.K. Patnaik

For the Petitioners

Mr. B.K. Das  
Mr. S.N. Bhuyan, Sr. Advocates  
Mr. AFG Osmani  
Mr. S. Huda  
Mr. B.S. Sinha  
Mr. M.H. Rajbarbhuiya  
Mr. D. Mazumdar  
Ms. A. Begum

Mr. N.J. Sarkar  
Mr. K. Alam Mazumdar  
Mr. S.H. Saikia  
Mr. I.A. Hazarika  
Mr. A.K. Das  
Mr. U.C. Nath, Advocates

For the Respondents

Mr. P.K. Goswami, Sr. Advocate  
Mr. K.K. Mahanta  
Sr. Central Government  
Standing Counsel  
Mr. S. Muralidhar  
Mr. B.P. Katakya, Sr. Advocate  
Mr. B.D. Goswami  
Mr. M.R. Pathak, Advocates

**Date of Order : 11.1.2002**

### **SUMMARY OF THE CASE**

The common prayer of the petitioners in these writ petitions was for a direction on the respondents to delete the letter 'D' marked against the names of persons who had been included in the final electoral rolls and for directing the respondents not to interfere with the right of such persons to exercise their franchise in the election.

The Hon'ble High Court referred to and quoted as well the instructions issued from time to time by the Election Commission to the Chief Electoral Officer, Assam for intensive revision of the electoral rolls in Assam with reference to 1.1.1997 as the qualifying date and the order of the Commission dated 5.1.1998 in which the Commission under its plenary powers of superintendence, direction and control of preparation of electoral rolls and conduct of elections had directed that the persons whose names had been provisionally entered into the electoral rolls in the State of Assam and against whose names the letter 'D' had been indicated to denote that his citizenship status was doubtful/disputed should not be allowed

to cast their votes at the ensuing general elections to the House of the People and also at any election held thereafter, so long as the citizenship status of any such person is not determined in his favour by the appropriate Tribunal, to whom his case had been referred.

Challenging the instructions and order of the Commission, the Counsel for the petitioners submitted that the Commission had issued the direction in purported exercise of its plenary power of superintendence, direction and control of preparation of electoral rolls for, and conduct of elections under Article 324 of the Constitution, and argued that the Commission had no such plenary powers that as under Articles 326 and 327 of the Constitution, the Parliament was empowered to make a law, and it enacted the Representation of People Act, 1950 and Representation of People Act, 1951 which provided for preparation of electoral rolls and for conduct of elections. They also referred to the various provisions under the Registration of Electors Rules, 1960 regarding inclusion of names in the electoral rolls.

Referring to the observations of the Supreme Court in the case of Mohinder Singh Gill, the Hon'ble High Court held that the power of the Commission under 324 of the Constitution had to be exercised consistent with the constitutional scheme and the provisions of the R.P.Act, 1950 and the R.P.Act, 1951, but for a situation for which the legislature had not made any provision, the Commission can exercise the power and issue instructions, guidelines and orders regarding preparation of electoral rolls and conduct of elections.

Regarding the marking of letter 'D', against the names of the persons whose citizenship status was doubtful/disputed and who were not allowed to cast their votes, the Hon'ble High Court observed that as per the constitutional scheme a person who was not a citizen of India, was not entitled to be registered as a voter in any election. The Hon'ble High Court held that any law made by the Parliament under Article 327 cannot confer any right on a person who was not a citizen of India to vote at the elections. The Hon'ble Court further held that a person who

is not a citizen of India and who suffers from the disqualification mentioned in section 16 of the R.P.Act, 1950, is not an elector in relation to a constituency even though his name is entered in the electoral roll of that constituency.

Directing the Govt. of India and the Govt. of Assam, that they must ensure that sufficient number of Tribunals were constituted for deciding the citizenship status, the Hon'ble High Court dismissed all the three writ petitions. The Hon'ble High Court, however, showed serious concern on the influx of foreigners to Assam citing the references made in the CEOs' Conference held in 1978.

## **J U D G E M E N T & O R D E R**

**Patnaik, J.**

These three writ petitions are public interest litigations raising common questions of fact and law, and were heard analogously, and are being disposed of by this common judgment.

The petitioner No. 1 in Civil Rule (PIL) No. 185/98 is the Secretary General of the United Minorities Front, Assam, a registered political party of the State of Assam representing the religious, linguistic and ethnic minorities in the State of Assam. The petitioner No. 2 in the said writ petition is a person whose name appears in the electoral roll of polling centre No. 89(A) of 86 Nagaon Legislative Assembly Constituency, but against her name the letter 'D' has been marked on account of which she is not in a position to cast her vote. Names of 14 other persons similarly appear in the electoral roll of polling centre No. 89(A) of 86 Nagaon Legislative Assembly Constituency, but against their names the letter 'D' has been marked, as a result of which they are not in a position to cast their vote.

The names of three petitioners in Civil Rule (PIL) No. 253/98 have been included in the final electoral roll published on 9.12.1997, but against their names the letter 'D' has been indicated. By a communication dated 6.1.1998 of the Additional

Chief Electoral Officer, Assam & Officer on Special Duty, Election Department, the concerned authorities has been informed that as per the order of the Election Commission of India persons whose names have been provisionally entered in the electoral rolls in the State of Assam and against whose names the letter 'D' has been indicated to denote that their citizenship status as doubtful/disputed shall not be allowed to cast their votes at the ensuing general election to the House of the People and also at any election held thereafter either to the House of the People or to the Legislative Assembly of the State of Assam so long as the citizenship status of any such person is not determined in his favour by the appropriate Tribunal to whom his case has been referred.

The petitioner in Civil Rule (PIL) No. 254/98 is the Secretary of the Assam Pradesh Congress(I) Committee, Guwahati, and it has been stated in the writ petition that he has been instructed and authorised by the APCC(I), Guwahati, to challenge the aforesaid order of the Election Commission of India communicated by the Additional Chief Electoral Officer, Assam & Officer on Special Duty, Election Department by his Memo. dated 6.1.1998 to all concerned.

The common prayer of the petitioners in these three writ petitions is for a direction on the respondents to delete the letter 'D' marked against the names of persons who have been included in the final electoral rolls and for directing the respondents not to interfere with the right of such persons to exercise their franchise in the election.

It appears that the Election Commission of India, (hereinafter referred to as "the Commission"), has issued instructions from time to time to the Chief Electoral Officer, Assam, for intensive revision of the electoral rolls in Assam with reference to 1.1.1997 as the qualifying date. These instructions of the Commission are contained in the communications dated 7.10.1996, 4.2.1997 and 17.7.1997, copies of which have been annexed to the reply affidavit filed on behalf of the Commission. The instructions of the Commission which provide that the cases of persons whose citizenship is in doubt are to be referred to appropriate Tribunals for determination

of their citizenship are contained in paragraphs - 3.8, 3.9 and 3.10 of the guidelines annexed to the communication dated 17.7.1997 of the Commission to the Chief Electoral Officer, Assam. The said paragraphs 3.8, 3.9 and 3.10 of the guidelines are quoted hereinbelow :

3.8 The Electoral Registration Officer shall, on receipt of the verification reports from the Local Verification Officers, consider the same. Where he is satisfied, on such report and such other material/information as may be available to him, about the eligibility of the person, he shall allow his name to continue on the roll and include it in the final roll. Where, however, he is not so satisfied and has reasonable doubt about the citizenship of any person, he shall refer all such doubtful cases to the competent authority under the Illegal Migrants (Determination by Tribunals) Act, 1983 or the Foreigners Act, 1946, as the case may be. For the convenience of the Electoral Registration Officer, the Commission has devised a proforma (Annexure-'B') for making such reference which shall be adopted by all the Electoral Registration Officers. While making such a reference, the Electoral Registration Officer shall also furnish to the Competent authority all documentary evidence collected during the process of verification (including the local verification report) pertaining to the person concerned, and also inform the person concerned of his case having been referred by him to the competent authority.

3.9 After the case of a person has been referred by the Electoral Registration Officer to the competent authority as aforesaid, he shall wait for a decision of the relevant Tribunal in relation to that person and act according to such decision.

3.10 Where the relevant Tribunal decides that any such person is not a citizen of India, the Electoral Registration Officer shall proceed

under Rule 21A of the Registration of Electors Rules, 1960 to have the name of such person deleted from the electoral roll, before it is finally published. The Electoral Registration Officer shall issue notice as required under the proviso to the said Rule 21A of the Registration of Electors Rules, 1960 to the individual concerned in the prescribed format. (Please see Para-16 of Chapter V - Claims and Objections - of the Hand Book for Electoral Registration Officers).

It further appears that by an order dated 5.1.1998 of the Commission, copy of which has been annexed to the reply affidavit filed on behalf of the Commission, it has been directed that persons whose names have been provisionally entered in the electoral rolls in the State of Assam and against whose names the letter 'D' has been indicated to denote that their citizenship status as doubtful/disputed, shall not be allowed to cast their vote at the ensuing general election to the House of the People and also at any election held thereafter either to the House of the People or to the Legislative Assembly of the State of Assam so long as the citizenship status of any such person is not determined in his favour by the appropriate Tribunal to whom his case has been referred. For the aforesaid direction of the Commission, reasons have also been recorded by the commission in the said order dated 5.1.1998. Portions of the said order dated 5.1.1998 which contained the direction and the reasons and which are relevant for deciding these case are quoted hereunder:

“Whereas, the Commission has carefully examined that question and observed that under Article 326 of the Constitution, “The elections to the House of the People and to the Legislative Assemblies of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than eighteen years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and

is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election"; and

Whereas Section 16 of the Representation of the People Act, 1950 further provides that a person shall be disqualified for registration in an electoral roll, if, he, inter alia, is not a citizen of India; and

Whereas, Sections 62(1) and 62(2) of the RP Act, 1951 provide that no person shall, even if his name is for the time being entered in the electoral roll of any constituency, vote at any election in any constituency, if he is subject to any of the disqualifications referred to in Section 16 of the RP Act, 1950; and

Whereas, the conjoint reading of the above-referred Article 326 of the Constitution, Section 16 of the RP Act, 1950 and Section 62 of the RP Act, 1951, leaves no one in any manner of doubt that only a citizen of India alone, and no one else, is eligible to vote at elections to the House of the People and the State Legislative Assemblies; and

Whereas, in the light of the above unambiguous mandate of the Constitution of India and RP Acts, 1950 and 1951 that only the Indian citizens alone, and no one else, shall vote at the aforesaid elections, it logically follows that a person, whose citizenship status is in question and under consideration before a Foreigners Tribunal or an Illegal Migrants Determination Tribunal shall not be eligible to vote, unless such Tribunal decides in his favour that he is a citizen of India.

Now, therefore, the Election Commission of India, under its plenary powers of superintendence, direction and control of

preparation of electoral rolls for, and conduct of elections to, Parliament and Legislature of every State, hereby directs that the aforementioned persons, whose names have been provisionally entered into the electoral rolls in the State of Assam and against whose names the letter 'D' has been indicated to denote that his citizenship status is doubtful/disputed, shall not be allowed to cast their votes at the ensuing general election to the House of the People, and also at any election held thereafter, either to the House of the People or to the Legislative Assembly of the State of Assam (or to the Legislature of any other State), so long as the citizenship status of any such person is not determined in his favour by the appropriate Tribunal, to whom his case has been referred.

Challenging the instructions and the order of the Commission, quoted above, Mr. B.K. Das and Mr. S.N. Bhuyan, learned senior counsel appearing for the petitioners, submitted that it appears that the Commission has issued the aforesaid direction in purported exercise of its plenary powers of Superintendence, direction and control of preparation of electoral rolls for, and conduct of election to, Parliament and Legislature of every State vested in it under Article 324 of the Constitution of India. But, in fact the Commission has no such plenary powers under Article 324 of the Constitution. They argued that under Articles 326 and 327 of the Constitution, the Parliament is empowered to make a law for the elections to the House of the People and to the Legislative Assembly of every State on the basis of adult suffrage, and the Parliament has in fact enacted the Representation of the People Act, 1950, and the Representation of the People Act, 1951, (hereinafter referred to as "the RP Act, 1950, and "the RP Act, 1951") providing for, inter alia, preparation of electoral rolls and for conduct of elections to the House of Parliament and to the House or Houses of the Legislature of each State. Mr. Das and Mr. Bhuyan referred to the provisions of Section 21 of the RP Act, 1950, to show that preparation and revision of electoral rolls should be in the manner prescribed by the Registration of Electors Rules, 1960, (for short, "the Rules, 1960"), made under the RP Act,

1950. They also referred to the provisions of the Rules, 1960, and in particular rules 5, 10, 12, 13 and 21-A thereof to show that elaborate provisions have been made therein for inclusion of names in the electoral rolls, objections to such inclusion and for deletion of such names after giving due reasonable opportunity to persons concerned to show cause. They referred to the decision of the Supreme Court in *HM Trivedi vs. VB Raju*, AIR 1973 SC 2602, for their submission that the RP Act, 1950, provides a complete code in the matter of preparation and maintenance of electoral rolls. According to Mr. Das and Mr. Bhuyan, once an electoral roll is finally published in accordance with the said provisions of the RP Act, 1950, and the Rules, 1960, the Commission cannot exercise its plenary powers under Article 324 of the Constitution to make any amendment, transposition or deletion in such electoral roll. They referred to the provisions of sub-section (3) of section 23 of the RP Act, 1950, to show that no such amendment, transposition or deletion of any entry is permissible after the final publication of such electoral roll. According to Mr. Das and Mr. Bhuyan, the power of the Commission under Article 324 of the Constitution has to be exercised consistent with the law made by the Parliament under Article 326 and 327 of the Constitution, namely, the RP Act, 1950, and the RP Act, 1951, and that the impugned instructions of the Commission and the impugned order of the Commission, quoted above, are, therefore, ultra vires the powers of the Commission. In this context, Mr. Bhuyan pointed out that while the electoral roll was published on 9.12.1997, the impugned order of the Commission for not allowing the persons against whom the letter 'D' has been marked in the electoral rolls to cast their vote was passed by the Commission on 5.1.1998, i.e., after the publication of the final electoral roll.

It was next submitted by Mr. Das and Mr. Bhuyan that sub-section (1) of Section 62 of the RP Act, 1951, confers a right on every person who is for the time being entered in the electoral roll of any constituency to vote in that constituency. Thus, the impugned order dated 5.1.1998 of the Commission debarring persons whose names have been entered in the electoral roll finally published from exercising their statutory right to vote is violative of section 62 of the RP Act, 1951,

and is void. They cited the decision of the Supreme Court in the case of *Shyamdeo Pd. Singh vs. Nawal Kishore Yadav*, AIR 2000 SC 3000 for the proposition that once a person is entered in the electoral roll of any constituency, he is entitled to vote in that constituency under Section 62 of the RP Act, 1951. They also relied on the decision of the Supreme Court in *Lal Babu Hussein vs. Electoral Registration Officer*, (1995) 8 SCC 100, wherein some directions were issued by the Supreme Court relating to deletion of names of persons on the suspicion that they were not citizens of India. They submitted that as per the aid decision of the Supreme Court, it is the Electoral Registration Officer or any other officer empowered under the RP Act, 1950, and the Rules, 1960, who is to take the decision as to whether or not a person's name can be deleted on the ground that he is not a citizen of India after giving reasonable opportunity to such person and the Tribunals constituted under the Illegal Migrants (Determination by Tribunals) Act, 1983, and the Foreigners Act, 1946, are not the authorities to decide the question as to whether a person's name should be included in the electoral roll or not. Mr. Bhuyan further submitted that the three petitioners in Civil Rule (PIL) NO. 253/98 have not been given any opportunity whatsoever to show cause as to why the letter 'D' should not be marked against their names in the final electoral roll. Finally, Mr. Das contended that the instructions and the order of the Commission for indicating the letter 'D' against the names of various persons in the electoral rolls and for debarring such persons from exercising their right to vote in the elections to the House of the People and the Legislative Assembly of Assam are based on extraneous considerations.

In reply, Mr. P.K. Goswami, learned senior counsel appearing for the Commission, submitted that the fact that there are a large number of foreigners in the State of Assam has been taken note of both by the Parliament and the court. He referred to the statement of objects and reasons appended to the Illegal Migrants (Determination by Tribunals) Act, 1983, (hereinafter referred to as the "IMDT Act, 1983,") which states that the influx of foreigners who illegally migrated into India across the borders of the sensitive eastern and north-eastern region of the country and remained in the country poses a threat to the integrity and security of the said

region and that continuance of these persons in India has given rise to serious problems. He also referred to the decision of the Supreme Court in *All India Lawyers Forum for Civil Liberties vs. Union of India & Others*, (1999) 5 SCC 714, in which the Supreme Court has observed that the matter of infiltration from Bangladesh and the presence of the infiltrators in certain regions in this country is a matter of serious concern, and has expressed the hope that the Union of India and the States bordering Bangladesh will take effective steps to check infiltration and deport illegal infiltrators. He also cited the decision of this court in *Kamaluddin vs. State of Assam*, 2000 (2) GLT 79, in which this problem of influx of a good number of foreigners has been taken note of, and the court has expressed its displeasure with regard to the casual and cavalier manner in which voters' list is prepared in Assam. Mr. Goswami submitted that the Commission has considered this problem of presence of a large number of foreigners in the State of Assam, and has issued the instructions and guidelines in its communications dated 7.10.1996, 5.2.1997 and 17.7.1997 to the Chief Electoral Officer, Assam for intensive revision of the electoral rolls in Assam with reference to 1.1.1997 as the qualifying date with the object of ensuring that only citizens of India are enrolled in the electoral rolls. He referred to different paragraphs of the said instructions and guidelines to show that this object is sought to be achieved with minimum harassment to persons. He submitted that the said instructions and guidelines of the Commission provided sufficient procedural checks to ensure that genuine citizens are not excluded from enrolment in the electoral rolls, and that before deletion of the name of a person from the electoral roll a first opportunity is given to such person at the first stage of enumeration, a second opportunity is given to such person at the second stage of draft publication of electoral roll and a third opportunity is given after the appropriate Tribunal decided that a person is not a citizen of India. He further submitted that under the IMDT Act, 1983, the Foreigners Act, 1946, and the Rules made thereunder it is the Tribunal constituted under the said Acts and the Rules made thereunder which has the power to decide as to whether a person is a citizen of India or not and it is for this reason that the instructions and the guidelines of the Commission provided that where there is doubt with regard to citizenship status of a person his case is

to be referred to the appropriate Tribunal constituted under the said Act. He vehemently argued that there is nothing illegal or arbitrary in such guidelines and the instructions of the Commission to refer the cases of persons whose citizenship status is in doubt to an impartial Tribunal constituted under the said two Acts and the Rules made thereunder particularly when the Rules, as amended, provide for such reference. He pointed out that under Section 13 of the IMDT Act, 1983, the Tribunal has to enquire into a reference made to it as expeditiously as possible and make an endeavour to conclude the enquiry within a period of six months from the date of service, on the person concerned, of a copy of such reference or application. He further submitted that even though the citizenship status of several persons at the time of preparation of electoral rolls was in doubt, the Commission has been very fair in allowing the names of such persons to be entered in the electoral rolls provisionally with the letter 'D' marked against their names. He submitted that by the impugned order dated 5.1.1998, however, the Commission has directed that such persons who have been provisionally entered in the electoral rolls will not be allowed to cast their vote in the elections until they are held to be citizens. He pointed out that the impugned order dated 5.1.1998 of the Commission itself contained the reasons for its directions. The reasons given by the Commission in the said order dated 5.1.1998 are that under section 16 of the RP Act, 1950, a person who is not a citizen of India is disqualified for registration in the electoral roll and under sub-sections (1) and (2) of Section 62 of the RP Act, 1951, even if a person's name is for the time being entered in the electoral roll of any constituency, he cannot cast his vote at any election in that constituency if he is subject to any of the disqualifications referred to in section 16 of the RP Act, 1950 including the disqualification of not being a citizen of India. Mr. Goswami argued that this is a correct interpretation of the provisions of Section 16 of the RP Act, 1950, and sub-sections (1) and (2) of Section 62 of the RP Act, 1951 and relied on the decision of the Supreme Court in *Shyamdeo Pd. Singh vs. Nawal Kishore Yadav (supra)*. He further argued that even in the case of *Lal Babu Hussein vs. Electoral Registration Officer (supra)* cited by Mr. Das and Mr. Bhuyan, learned counsel for the petitioners, the Supreme Court made it clear in paragraph-6 of its

directions that before taking a final decision in the matter relating to citizenship of any person, the Electoral Registration Officer or any other person enquiring into the matter will bear in mind the provisions of the Constitution and the Citizenship Act and all related provisions bearing on the question of citizenship, and then pass appropriate speaking orders. Regarding the powers of the Commission under Article 324 of the Constitution, Mr. Goswami cited the decisions of the Supreme Court in *Mohinder Singh Gill vs. Chief Election Commissioner*, (1978) 1 SCC 405; and *Kanhaiya Lal Omar vs. R.K. Trivedi*, AIR 1986 SC 111, in which it has been held that Article 324 of the Constitution is a plenary provision vesting power in the broadest terms in the Commission in respect of superintendence, direction and control as well as conduct of elections, and the same operates in areas left unoccupied by legislation. He submitted that in fact Sections 21 and 22 of the RP Act, 1950, themselves recognize this power of the Commission to give general or special direction regarding preparation and correction of electoral rolls.

The first question to be decided in these cases is whether the Commission has exceeded its powers under Article 324 of the Constitution in issuing guidelines, quoted above, for provisionally registering the persons in the electoral rolls with the letter 'D' marked against their names pending determination of their citizenship by appropriate Tribunals under the IMDT Act, 1983, the Foreigners Act, 1946, and the Rules made thereunder. In *Mohinder Singh Gill vs. Chief Election Commissioner*. (*supra*), the Supreme Court had the occasion to deal with Article 324 of the Constitution vis-a-vis the RP Act, 1950, and the RP Act, 1951, made by the Parliament under Article 327 of the Constitution, and the Supreme Court held:

“Article 324, which we have set out earlier, is a plenary provision vesting the whole responsibility for national and State elections and, therefore, the necessary powers to discharge that function. It is true that Article 324 has to be read in the light of the constitutional scheme and the 1950 Act and 1951 Act. Sri Rao is right to the extent he insists that if competent legislation is enacted

as visualised in Article 327 the Commission cannot shake itself free from the enacted prescriptions.”

“Even so, situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it is that the Constitution has made comprehensive provision in Article 324 to take care of surprise situations. That power itself has to be exercised, not mindlessly nor mala fide, not arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation. More is not necessary to specify; less is insufficient to leave unsaid. Article 324, in our view, operates in areas left unoccupied by legislation and the words ‘superintendence’, direction and control, as well as ‘conduct of all elections’ are the broadest terms ...”

It will thus be clear from the aforesaid observations of the Supreme Court in the case of *Mohinder Singh Gill* that the power of the Commission under Article 324 of the Constitution has to be exercised consistent with the provisions of the RP Act, 1950 and the RP Act, 1951 made under Article 327 of the Constitution. But in the aforesaid decision, the Supreme Court made it further clear that in situations for which the enacted law has not provided for, the Commission has the power in the broadest terms under Article 324 of the Constitution to issue guidelines, instructions and pass orders. This power of the Commission under Article 324 of the Constitution to issue instructions and orders in areas left unoccupied by legislation, however, has to be exercised not in a malafide, arbitrary or partial manner or without any application of mind. This position of law has been reintegrated in *Kanhiya Lal Omar vs. R.K. Trivedi, (supra)*, in which the Symbols Order issued by the Commission had been challenged on the ground that the Symbols Order was not provided for in the RP Act, 1951, made by the Parliament under Article 327 of the Constitution. The Supreme Court held :

“Even if for any reason, it is held that any of the provisions contained in the Symbols Order are not traceable to the Act or the Rules, the power of the Commission under Article 324(1) of the Constitution which is plenary in character can encompass all such provisions. Article 324 of the Constitution operates in areas left unoccupied by legislation and the words ‘superintendence’, ‘direction’ and ‘control’ as well as ‘conduct of all elections’ are the broadest terms which would include the power to make all such provisions.”

Thus, the law is now well-settled by the Apex Court that the power of the Commission under Article 324 of the Constitution has to be exercised consistent with the constitutional scheme and the provisions of the RP Act, 1950, and the RP Act, 1951, but for a situation for which the legislature has not made any provision, the Commission can exercise the power and issue instructions, guidelines and orders regarding preparation of electoral rolls and conduct of elections. But such instructions, guidelines and orders should not be arbitrary or vitiated by malafide or partiality.

The next question to be decided in these cases is whether the impugned instructions, guidelines and orders, quoted above, of the Commission to the Electoral Registration Officer, Assam, for referring the cases of persons whose citizenship is in doubt to the competent authority under the IMDT Act, 1983 or the Foreigners Act, 1946, and for enrolling their names in the final electoral rolls with the letter ‘D’ marked against their names till the appropriate Tribunals decide the matter, and for not allowing such persons to cast their votes at any election to the House of the People or to the Legislative Assembly of the State of Assam are inconsistent with the Constitutional scheme, the provisions of the RP Act, 1950, or the provisions of the RP Act, 1951, or are arbitrary or vitiated by malafide. The Constitutional scheme for elections to the House of the People and to the Legislative Assembly of every State is given in Articles 326 and 327 of the Constitution. Article 326 of the

Constitution provides that the elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage, that is to say, every person who is a citizen of India and who is not less than eighteen years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under the Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election. It is thus clear that as per the Constitutional scheme a person who is not a citizen of India is not entitled to be registered as a voter in any election. Article 327 of the Constitution further provides that subject to the provisions of the Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses. Since the power of the Parliament under Article 327 of the Constitution to make provisions with respect to elections to Legislatures is subject to the provisions of the Constitution, such power has to be exercised consistent with the provisions of Article 326 of the Constitution. Hence, any law made by the Parliament under Article 327 of the Constitution cannot confer any right on a person who is not a citizen of India to vote at the elections.

In exercise of its powers under Article 327 of the Constitution, the Parliament has enacted the RP Act, 1950, and the RP Act, 1951. Section 16(1) of the RP Act, 1950, and Sections 2(e) and 62(1) and 62(2) of the RP Act, 1951 are quoted hereinbelow :

16. Disqualifications for registration in an electoral roll. - (1) A person shall be disqualified for registration in an electoral roll if he -

(a) is not a citizen of India; or

- (b) is of unsound mind and stands so declared by a competent court; or
- (c) is for the time being disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections,

2(e) "elector" in relation to a constituency means a person whose name is entered in the electoral roll of that constituency for the time being in force and who is not subject to any of the disqualifications mentioned in section 16 of the Representation of the People Act, 1950 (43 of 1950).

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).

Thus, section 16(1) of the RP Act, 1950, makes a provision consistent with Article 326 of the Constitution that a person who is not citizen of India shall be disqualified for registration in an electoral roll. Similarly, section 2(e) of the RP Act, 1951, defines an 'elector' in relation to a constituency to mean a person whose name is entered in the electoral roll in that constituency for the time being in force and who is not subject to any of the disqualifications mentioned in Section 16 of the RP Act, 1950. Thus, a person who is not a citizen of India and who suffers from this disqualification mentioned in section 16 of the RP Act, 1950, is not an elector in relation to a constituency even though his name is entered in the electoral roll of that constituency. This definition of elector in section 2(e) of the RP Act, 1951,

is also consistent with the Constitutional scheme in Article 326 of the Constitution that only a citizen of India is entitled to be registered as a voter at the elections. Sub-section (1) of section 62 of the RP Act, 1951, provides that a person who for the time being is entered in the electoral roll of any constituency shall be entitled to vote in that constituency. But sub-section (2) of section 62 of the RP Act, 1951, provides that 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 RP Act, 1950. Sub-sections (1) and (2) of section 62 of the RP Act, 1951 read together make it clear that a person who is not a citizen of India and suffers from this disqualification mentioned in section 16 of the RP Act, 1950, will have no right to vote under section 62 of the RP Act, 1951, even though he is for the time being entered in the electoral roll of a constituency.

In the case of *Shyamdeo Pd. Singh vs. Nawal Kishore Yadav (supra)*, the Supreme Court discussed at length the aforesaid scheme in Articles 326 and 327 of the Constitution as well as section 16 of the RP Act, 1950, and section 62 of the RP Act, 1951, and held that even if the name of a person is entered in the electoral roll for the time being, but such person is disqualified under any of the provisions of section 16 of the RP Act, 1950, he has no right to vote at the elections by virtue of sub-section (2) of section 62 of the RP Act, 1951. Paragraph-13 of the said decision of the Supreme Court as reported in AIR 2000 SC 3000 is quoted hereunder :

A perusal of the abovesaid provisions leads to certain irresistible inferences. Article 326 of the Constitution having recognised the doctrine of adult suffrage has laid down constitutional parameters determinative of the qualifications and disqualifications relating to registration as a voter at any election. The two Articles, i.e. Article 326 and Article 327 contemplate such qualifications and disqualifications being provided for, amongst other things, by the appropriate Legislature. The fountain source of the 1950 Act and

1951 Act enacting provisions on such subject are the said two Articles of the Constitution. The provisions of section 16 of the 1950 Act and section 62 of the 1951 Act read in juxtaposition go to show that while Section 16 of the 1950 Act provides for 'disqualifications for registration' in an electoral roll, (qualifications having been prescribed by section 27 thereof). Section 62 of the 1951 Act speaks of 'right to vote' which right is to be determined by reference to the electoral roll of the constituency prepared under the 1950 Act. The eligibility for registration of those enrolled having been tested by reference to section 16 of section 27 of the Act, as the case may be, and the electoral roll having been prepared, under the 1950 Act if a person is or becomes subject to any of the disqualifications provided in clauses (a), (b) and (c) of sub-section (1) of section 16, two consequences may follow. His name may forthwith be struck off the electoral roll, in which the name is included, under sub-section (2) of section 16 of the 1950 Act. Even if the name is not so struck off yet the person is disqualified from exercising right to vote at the election by virtue of sub-section (2) of section 62 of the 1951 Act. The qualifications prescribed for enrolment in the electoral roll as provided by the 1950 Act are : (1) ordinary residence in a teachers' constituency, (ii) being engaged in the relevant educational institution for a total period of at least three years within the six years immediately before the qualifying date. The enquiry into availability of these eligibility qualifications, under the scheme of the 1950 Act is to be made at the time of preparation of the electoral roll or while entering or striking out a name in or from the electoral roll shall not be entitled to vote at the election. To put it briefly a disqualification under section 16 of the 1950 Act has a relevance for and a bearing on the right to vote under section 62 of the 1951 Act but being not qualified for enrolment in the electoral roll under section 27 of the 1950 Act has no relevance for or bearing on the right to vote at an

election under section 62 of the 1951 Act. That is the distinction between a 'disqualification' and 'not being qualified.'"

Thus, the submission of Mr. Das and Mr. Bhuyan, learned counsel for the petitioners, that once the name of a person is entered in the final electoral roll, he cannot be disallowed from exercising his right to vote under Article 326 of the Constitution and section 62 of the RP Act, 1951, is misconceived. In our considered opinion, if such a person whose name has been included in the final electoral roll suffers from the disqualification of not being a citizen of India mentioned in section 16 of the RP Act, 1950, he cannot be allowed to vote in view of the specific provisions in Article 326 of the Constitution, section 16 of the RP Act, 1950, and sections 2(e) and 62(2) of the RP Act, 1951. Thus, the instructions, guidelines and orders of the Commission are consistent with the Constitutional scheme and the provisions of the RP Act, 1950, and the RP Act, 1951.

Further, the provisions of the RP Act, 1950, and the RP Act, 1951, are general provisions meant for the entire country and the Parliament while enacting the said provisions has not provided for the peculiar situation relating to influx and presence of a large number of foreigners in Assam. For such situation of presence of a large number of persons who are not the citizens of India and who are not entitled to register themselves in the electoral rolls under Article 326 of the Constitution and section 16 of the RP Act, 1950, and have no right to vote under section 2(e) and section 62(2) of the RP Act, 1951, the Commission could issue instructions, guidelines and orders in exercise of its plenary power under Article 324 of the Constitution. Such instructions, guidelines and orders, however, should not be arbitrary or affected by malafide or partiality as has been held by the Apex Court in the case of Mohinder Singh Gill (supra). In the case of Lal Babu Hussein (supra), the Supreme Court issued some directions to be followed in case of any person's citizenship was in doubt. Paragraphs 3, 4, 5 and 6 of the said directions of the Supreme Court in Lal Babu Hussein's case are quoted hereinbelow :

3. If any person whose citizenship is suspected is shown to have been included in the immediately preceding electoral roll, the Electoral Registration Officer or any other officer inquiring into the matter shall bear in mind that the entire gamut for inclusion of the name in the electoral roll must have been undertaken and hence adequate probative value be attached to that factum before issuance of notice and in subsequent proceedings;
4. The Officer holding the enquiry shall bear in mind that the enquiry being of quasi-judicial nature, he must entertain all such evidence, documentary or otherwise, the affected person concerned may like to tender in evidence and disclose all such material on which he proposes to place reliance, so that the person concerned has had a reasonable opportunity of rebutting such evidence. The person concerned, it must always be remembered, must have a reasonable opportunity of being heard;
5. Needless to state that the Officer, inquiring into the matter must apply his mind independently to the material placed before him and without being influenced by extraneous consideration or instructions;
6. Before taking a final decision in the matter, the Officer concerned will bear in mind the provisions of the Constitution and the Citizenship Act extracted hereinbefore and all related provisions bearing on the question of citizenship and then pass an appropriate speaking order (since an appeal is provided).

Thus, as per the aforesaid directions of the Supreme Court in Lal Babu Hussein's case, in case of a person whose citizenship is suspected, the Electoral Registration Office or any other officer inquiring into the matter before taking any final decision in the matter has to bear in mind the provisions of the Constitution

and the Citizenship Act extracted in the judgment and all related provisions bearing on the question of citizenship and is also required to give all reasonable opportunity to the person likely to be affected by the order that he proposes to pass. Since the provisions of the IMDT Act, 1983 or the Foreigners Act, 1946, have bearing on the question of citizenship of a person, the Electoral Registration Officer cannot ignore the said provision which, inter alia, provide for decision by the Tribunals constituted under the said two Acts relating to citizenship status of a person. Moreover, paragraph 3.10 of the guidelines in the instructions of the commission dated 17.7.1997 provided that where the relevant Tribunal decides that any person is not a citizen of India, the Electoral Registration Officer shall issue a notice as required under the proviso to rule 21A of the Rules, 1960, to the individual concerned in the prescribed format and proceed for deletion of his name from the electoral roll in accordance with rule 21A. The proviso to rule 21A of the Rules, 1960, stipulates that before taking any action for deletion of name of a person from the electoral roll under rule 21A, the Electoral Registration Officer shall make every endeavour to give him a reasonable opportunity to show cause why the action proposed should not be taken in relation to him. Thus, the impugned guidelines of the commission also provides for reasonable opportunity to a person whose name is proposed to be deleted from the electoral roll and is in consonance with the Rule of law and the directions of the Supreme Court in Lal Babu Hussein's case, and cannot be held to be arbitrary or vitiated by malafide or partiality.

Considering, however, the gradual manner in which references are being decided in the State of Assam by Tribunals, such persons whose cases are referred to Tribunals constituted under the IMDT Act, 1983, and the Foreigners Act, 1946, may suffer great prejudice if the said Tribunals take years to decide the references made to them. Section 13 of the IMDT Act, 1983, provides for expeditious enquiry by Tribunals and casts an obligation on the Tribunals to make all endeavour to conclude the enquiry within a period of six months from the date of service, on the person concerned, of a copy of reference or application. We are of the view that the Tribunals constituted under the IMDT Act, 1983, and the Foreigners Act, 1946,

functioning within the jurisdiction of this court must expeditiously enquire into and decide the reference made to them, and the Government of India and the Government of Assam must ensure that sufficient number of Tribunals are constituted so that all references made to the Tribunals pursuant to the impugned instructions and guidelines of the Commission are concluded well in advance before the next elections to the House of the People of Union Parliament or the Legislative Assembly of Assam. The Registry of this court will send authenticated copies of this judgment to the Cabinet Secretary, Government of India, the Chief Secretary, Government of Assam and all the Tribunals under the IMDT Act, 1983, and the Foreigners Act, 1946, functioning within the jurisdiction of this Court for compliance of our aforesaid directions.

Subject to the aforesaid directions, the writ petitions are dismissed. Considering however the entire facts and circumstances of the case, we make no order as to costs.

Sd/-  
(A. K. PATNAIK)  
Judge

**J. N. Sarma, J.**

I agree with the judgment, but I add the following few lines. The influx of foreigners to Assam is a burning issue. On this issue there was lot of blood-bath in Assam, there was a long drawn agitation on this. What was achieved by that is a different question, but there is no justification to keep the issue below the carpet. If the authority makes an attempt to fight the issue in a democratic and legal manner, that should receive due recognition in the hand of the Court, instead of trying to shoot it down in a trigger happy manner. This question received attention in the hand of Chief Election Commissioner in the Conference of C.E.Os held on October 25 & 26 of 1978. I quote below the extract of the speech of C.E.O.:

**“Special Problems regarding large scale inclusion of foreign nationals, particularly in North-Eastern region :**

I would like to refer to the alarming situation in some States, especially, in the North-Eastern region, wherefrom disturbing reports are coming regarding large scale inclusion of foreign nationals in the electoral rolls. In one case, the population in 1971 census recorded an increase as high as 34.98 per cent over the 1961 census figures, and this increase was attributed to the influx of a very large number of persons from the neighbouring countries. This influx has become a regular feature. I think that it may not be a wrong assessment to make that, on the basis of increase of 34.98 per cent between two census, the increase that is likely to be recorded in the 1991-census would be more than 100 per cent over the 1961-census. In other words, a stage would be reached when that State may have to reckon with the foreign nationals who may, in all probability, constitute a sizeable percentage, if not the majority of the population in that State. Another disturbing factor in this regard is the demand made by the political parties for the inclusion in the electoral rolls of the names of such migrants who are not Indian citizens, without even questioning and properly determining their citizenship status. This is a serious state of affairs. The gravity of the situation, therefore, calls for drastic and effective measures. After ascertaining your views in the matter, I propose to address a communication to the Union Home Ministry stressing the immediate need for the necessary administrative set up at the lowest possible level for the purpose of identifying each foreign national in the country and for the expeditious grant of certificates of citizenship under the Citizenship Act to all eligible persons by adopting an effective and uniform procedures.”

The matter received the attention of the Parliament. I quote below the objects and reasons of Illegal Migrants (Determination by Tribunals) Act, 1983 :

“The influx of foreigners who illegally migrated into India across the borders of the sensitive eastern and north-eastern regions of the country and remained in the country poses a threat to the integrity and security of the said regions. A substantial number of such foreigners who migrated into India after the 25th day of March, 1971, have, by taking advantage of the circumstances of such migration and their ethnic similarities and other connections with the people of India, illegally remained in India without having in their possession lawful authority so to do. The continuance of these persons in India has given rise to serious problems. The clandestine manner in which these persons have been trying to pass off as citizens of India has rendered their detection difficult. After taking into account the need for their speedy detection the need for protection of genuine citizens of India and the interests of the general public, the President promulgated, on the 15th October, 1983, the Illegal Migrants (Determination by Tribunals) Ordinance, 1983, to provide for the establishment of Tribunals.”

The matter also received attention of the Supreme Court in 1999 (5) SCC 714 which has been referred to in the main judgment. Sri Goswami further drew our attention to a reported decision of this court where because of lack of proper caution and attention in preparing the voter’s list a Pakistani national by getting his name inserted in the voter’s list even contested the Assembly Election in Assam.

On this background and factual matrix, we have decided the matter with anxiety not to cause injustice to genuine Indian citizens, but to stop/prevent foreigners being included in Voters’ List.

Sd/-  
(J. N. SARMA)  
Judge