

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/WRIT PETITION (PIL) (WRIT PETITION (PIL)) NO. 57 of  
2024**

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KAILASHBHAI GOBARBHAI SAVALIYA

Versus

ELECTION COMMISSION OF INDIA & ANR.

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**Appearance:**

MR PUNIT B JUNEJA(3972) for the Applicant(s) No. 1

MR PERCY KAVINA, SR. ADVOCATE with MR. AUM M  
KOTWAL(7320) for the Applicant(s) No. 1

MR.VISHAL J DAVE(6515) for the Applicant(s) No. 1

MS HETAL PATEL, AGP for the Opponent(s) No. 2

MR. SAHIL M SHAH(6318) for the Opponent(s) No. 1

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**CORAM:HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE  
SUNITA AGARWAL**

and

**HONOURABLE MR. JUSTICE PRANAV TRIVEDI**

**Date : 04/10/2024**

**ORAL ORDER**

**(PER : HONOURABLE THE CHIEF JUSTICE  
MRS. JUSTICE SUNITA AGARWAL)**

1. Heard Mr. Percy Kavina, learned Senior advocate assisted by Mr. Aum Kotwal, learned advocate for the petitioner who claims to be an elector of the constituency in question and perused the record.
2. The prayer made in the Writ petition filed in the nature of public interest litigation is to issue a direction to the Election Commission to notify the by-election of 87-Visavadar Legislative Assembly Constituency, on the ground that with the resignation given by the winning/elected candidate, a vacancy has occurred. The

said vacancy is required to be filled-up within the time limit provided in Section 151A of the Representation of the People Act, 1951. With reference to Article 190 of the Constitution of India, it was agitated that with the resignation of the winning candidate, accepted by the Speaker or the Chairman of the Legislative Assembly, the seat became vacant.

3. The submission is that in view of the statutory mandate under Section 151A, the remainder of the term of the elected member being more than one year, the Election Commission is required to declare the bye-elections. Reference has been made to the order dated 06.05.2024 passed by a Division Bench in Special Civil Application No. 5904 of 2024 wherein notice has been issued to the Election Commission to respond to the issue of not holding by-election of the 87-Visavadar Legislative Assembly Constituency, which fell vacant on 13.12.2023.
4. Dealing with this submission of the learned Senior counsel for the petitioner, pertinent is to note that it is an admitted fact of the matter that an election petition has been filed by the losing candidate against the election of the winning candidate with reference to the constituency in question, who had submitted resignation during the pendency of the election petition.
5. The consequence of pendency of the election petition would be that bye-elections cannot be held for the simple reason that the election petitioner is contesting his right for being declared as validly elected candidate,

in case the election of the winning candidate is set aside by the Election tribunal. It may also be noted that even in a case of death of winning candidate, election petitions are not rendered infructuous, inasmuch as, right to seek declaration as an elected candidate is accrued upon the election petitioner who challenges the election of the winning candidate.

6. The observation of the Apex Court in paragraph '46' in **Election Commission of India vs. Telangana Rastra Samithi [(2011) 1 SCC 370]** relied by the learned counsel for the Election Commission of India, be noted hereinunder :-

"46. We are, therefore, of the firm view that the introduction of Section 151-A in the Constitution did not alter the position as far as the provisions of Section 84 and consequently Sections 98(c) and 101(b) of the 1951 Act are concerned, since although a casual vacancy may have occurred within the meaning of Section 150 of the 1951 Act, those vacancies in which election petitions had been filed and were pending cannot be held to have become available for the purposes of being filled up within the time prescribed under Section 151-A of the 1951 Act. Article 190(3)(b) of the Constitution merely indicates that if a Member of a House of a Legislature of a State resigns his seat by writing to the Speaker and such resignation is accepted, his seat shall become vacant. It does not introduce any element of compulsion on the Election Commission to hold a bye-election ignoring the provisions of Section 84 of the Act. In such cases, we have little hesitation in holding that such casual vacancies are not available for being filled up and the Commission will have to wait for holding elections in such constituencies until a decision is rendered in regard to the latter part of Section 84 of the

1951 Act during the life of the House. The view expressed by the High Court that a case has to be decided in accordance with the laws as existing on the date of adjudication, while salutary in principle, are not attracted to the facts of this case in view of the provisions of Section 84 of the 1951 Act."

7. In this scenario, we find substance in the submission of Mr. Sahil Shah, learned advocate appearing for the Election Commission of India.
8. When this query was raised, learned Senior counsel appearing for the petitioner would submit that as per the statutory mandate in Section 86 of the Representation of the People Act, 1951, an election petition is to be decided within a period of six months. Pendency of the election petition beyond the period of six months, as against the statutory mandate under sub-section (7) of Section 86 will not give a right to the Election Commission of India to submit that bye-elections cannot be held. Moreover, pendency of the election petition is taken as a tool by the concerned party to avoid holding of bye-elections. Both these submissions of the learned Senior counsel are found to be misconceived, inasmuch as, neither the Election Commission of India nor the State Government has any control over the proceedings of the election petition.
9. Moreover, on the plea of the learned Senior counsel that the election petition is to be decided in a time bound manner, we can only observe that it would be open for the petitioner to persuade the election petitioner to

pursue the election petition pending before the Election tribunal.

10. In any case, no mandamus can be issued in the facts and circumstances of the present case brought before us. The petition is, thus, dismissed.

**(SUNITA AGARWAL, CJ )**

**(PRANAV TRIVEDI,J)**

BIJOY B. PILLAI