

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

DISTRICT : AHMEDABAD

SPECIAL CIVIL APPLICATION NO. OF 2010

Himatsingh Patel & Anr. ... Petitioners.

V/s.

State of Gujarat & Ors ... Respondents.

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3	A	Copy of notification dated 10 th May, 2010 in respect of draft notification for amendment in the Bombay Provincial Municipal Corporation (Registration of Elector) Rules, 1994.	
4	B	Copy of notification dated 10 th May, 2010 in respect of draft notification for amendment in the Bombay Provincial Municipal Corporation (Conduct of Elections) Rules, 1994.	
5.	C	Copy of objections submitted by the leader of opposition.	
6.	D	Copy of notification dated 5 th June, 2010 amending the Bombay Provincial Municipal Corporation (Registration of Elector)	

		Rules, 1994	
7.	E	Copy of notification dated 5 th June, 2010 amending the Bombay Provincial Municipal Corporation (Conduct of Elections) Rules, 1994.	
8.	F	Copy of Rules.	
9.	G	Copy of B.P.M.C. (Conduct of Election) Rules, 1994.	
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AHMEDABAD

DATE : .7.2010

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Advocate for the Petitioners.

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LIST OF EVENTS

Date.	Particulars
10.5.2010	Draft Notification for amendment in Bombay Provincial Municipal Corporation (Registration of Voters) Rules, 1994. Draft Notification amending Bombay Provincial Municipal Corporation (Conduct of Elections) (Second Amendment) Rules, 2010 was published introducing e-voting or online voting.
15.6.2010	Shri Shaktisinh Gohil, Leader of the Opposition forwarded his objection to the introduction of online voting.
5.6.2010	The State Government overruled the objection and amended both, Bombay Provincial Municipal Corporation(Conduct of Elections)

and Bombay Provincial Municipal Corporation
(Registration of Voters) Rules, 1994.

The petitioners representing a large section of the voters challenging the introduction of online voting, inter alia, on the ground that internet voting system have its own deficiencies which have been presented before this Hon'ble Court in the petition and showing that it will lead to sacrificing the basic feature of democracy i.e. maintenance of purity of election.

Hence this petition.

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

DISTRICT: AHMEDABAD

SPECIAL CIVIL APPLICATION NO. OF 2010

In the matter under Articles 19
and 21 of the Constitution of
India

AND

In the matter under Article 226 of
the Constitution of India;

AND

In the matter under Articles 243R
and 243ZR of the Constitution of
India;

AND

In the matter under Rule-6A of
the Bombay Provincial Municipal
Corporation (Registration of
Voters) Rules, 1994;

AND

In the matter under the
provisions of the Bombay
Provincial Municipal Corporation
(Conduct of Elections) Rules,
1994;

AND

In the matter of challenging the
virus of amended Rule 52U
inserted by Bombay Provincial
Municipal Corporation(Conduct

of Elections) (Second
Amendment) Rules, 2010;

AND

In the matter of challenging the
virus of Rule-6A inserted by
Bombay Provincial Municipal
Corporation (Registration of
Elector) (Amendment) Rules,
2010;

AND

In the matter of Public Interest
and Social action for
maintenance of purity of the
election;

AND

In the matter between;

1. Himatsingh Patel,
Ex Mayor, Ahmedabad
Residing at "Suraj Bhuvan",
Opp. Navneet Prakashan,
Ahmedabad – 380 021.
2. Shailesh M. Parmar,
Member of Legislative Assembly
74-Shaher Kotda, residing at
Vir Arjun Society, Nava Wadaj,
Ahmedabad – 380 015..

..Petitioners

Versus

1. State of Gujarat,
Notice to be served through
The Chief Secretary,
Government of Gujarat,
New Sachivalaya,
Gandhinagar.

2. The Secretary,
Urban Development and Urban
Housing Department,
Government of Gujarat,
New Sachivalaya,
Gandhinagar.

3. The State Election Commission,
Notice to be served through
The Election Commissioner,
Government of Gujarat,
New Sachivalaya,
Gandhinagar.

... Respondents

TO

THE HON'BLE THE CHIEF JUSTICE AND
OTHER HON'BLE JUDGES OF THE HIGH
COURT OF GUJARAT AT AHMEDABAD.

The humble petition of the
Petitioners above named;

MOST RESPECTFULLY SHEWETH:

1. The Petitioners are nationals and citizens of India and are, therefore, entitled to all the rights including the fundamental rights enshrined in the Constitution of India.
2. The petitioner no.1 is a former Mayor of Ahmedabad Municipal Corporation. The petitioner no.1 is an elected Municipal Councilor of the Ahmedabad

Municipal Corporation from Ward Rajpur-Ahmedabad. The petitioner no.1 has been elected as a Municipal Councilor for last four terms and was also a leader of opposition in the Ahmedabad Municipal Corporation from 2005-2008. The petitioner no.1 is associated with several social organizations. The petitioner no.2 is a member of Legislative Assembly from Shaher Kotda Assembly constituency. The petitioner no.2 is a resident of Ahmedabad and has imparted contribution in social and economic field. The petitioner no.2 is a trustee President of Gujarat Harijan Vikas Parisad as well as Managing Trustee of Karturba Gandhi Vidya Mandir. The petitioners are directed concern with the elections of the Corporation since the petitioners are residents of Ahmedabad. The petitioners institute this petition to protect public interest in maintenance of free, fair and purity of election. The petition is instituted in public interest. The introduction of online election by the State Government through vote on internet and/or SMS (short message service) by inserting and amending Rule-52U in Bombay Provincial Municipal Corporation (Conduct of

Elections) (Second Amendment) Rules, 2010, Rule-6A of Bombay Provincial Municipal Corporation (Registration of Voters) Rules, 1994 is violative of basic concept of democracy enshrined through Constitution and the scheme provided under Article-243R and the provisions of B.P.M.C. Act and the Rules relating to the election framed by the State Government which provides for secrecy of vote. The introduction of non-traditional voting scheme introduces significant risks. The existence of the principle of secrecy of ballot is an indispensable adjunct of free and fair election. The act statutorily assures a voter that he would not be compelled by any authority to disclose as to for whom he has voted so that he may vote without fear or favour and free from apprehension of its disclosure. Secrecy of ballot was enshrined in law to subserve larger public interest i.e. purity of election for ensuring free and fair election. The principle of secrecy of vote cannot stand in isolation. It is submitted that it is settled position in our country that out of two competing principles i.e. secrecy of ballot and purity of election, the State Election Commission is required to protect

the purity of election to protect a fraud on the election process.

3. The petitioners, by way of the present petition under Article 226, beg to challenge the virus of Rule 52U of the Bombay Provincial Municipal Corporation (Conduct of Elections) Rules, 1994 inserted by Bombay Provincial Municipal Corporation (Conduct of Elections) (Second Amendment) Rules, 2010 as well as the virus of Rule-6A of the Bombay Provincial Municipal Corporation (Registration of Elector) Rules, 1994 as inserted by Bombay Provincial Municipal Corporation (Registration of Elector) (Amendment) Rules, 2010. The Petitioners submit that the aforesaid Rules are in gross violation of the mandate of the constitution regarding holding of free and fair elections.
4. The brief facts of the case giving rise to the present petition are as under:
 - 4.1 The petitioners submit that the department had also issued a notification dated 10th May, 2010 inviting objections or suggestions in respect of the draft

notification for amendment of the Bombay Provincial Municipal Corporation (Registration of Elector) Rules, 1994 whereby it was provided for insertion of Rule-6A after Rule-6 in the aforesaid Rule. A copy of the notification dated 10th May, 2010 in respect of draft notification for amendment in the Bombay Provincial Municipal Corporation (Registration of Elector) Rules, 1994 is hereto annexed and marked as **ANNEXURE-A** to this petition. Similarly, the department of Urban Development and Urban Housing Department, State of Gujarat had issued a notification dated 10th May, 2010 inviting objections or suggestions with respect to the draft notification in respect of amendment of the Bombay Provincial Municipal Corporation (Conduct of Elections) Rules, 1994 whereby Rule-52U is inserted after Rule-52T. A copy of the notification dated 10th May, 2010 is hereto annexed and marked as **ANNEXURE-B**

4.2 The Petitioners submit that the leader of opposition, Gujarat State Legislative Assembly within the time limit, raised objections to the draft notification vide letter dated 15.5.2010 and had requested to cancel

the draft notifications. It was pointed out in the objections raised by the Petitioners that the draft notification is against the basic fundamentals of the Constitution of India as well as against the provisions of the Representation of Peoples Act and illegal and unconstitutional. It was pointed out that Rule-7 of the amended Rule-52U providing for e-voting or on-line voting was illegal and unconstitutional inasmuch as it provides for an elector to cast vote on-line using internet or by Short Message Service through his or her own mobile. That there are no checks and balance at the time of voting if an elector is permitted e-voting through internet from his residence/office or by SMS from his or her mobile and that the elector can be influenced by anti-social elements and votes can be procured under undue influence, threat and coercion. That it also violates the basic adjunct of free and fair elections i.e. secrecy of ballot.

- 4.3 It was pointed out that the elector may be compelled directly or indirectly to disclose as to whom he has voted by retaining his e-mail or the SMS, as the case may be. It was also pointed out that the voter can be

compelled, directly or indirectly to vote under threat or coercion and under undue influence. It was also pointed out that the voter can be seduced to vote by purchasing votes and by offering money on showing the retained e-mail or SMS, as the case may be. A copy of the objections submitted by the leader of opposition, Legislative Assembly is hereto annexed and marked as **ANNEXURE-C**.

- 4.4 The petitioners submit that the State of Gujarat vide notification dated 5th June, 2010, inserted Rule-6A in the Bombay Provincial Municipal Corporation (Registration of Elector) Rules, 1994. A copy of the said notification dated 5th June, 2010 amending the Bombay Provincial Municipal Corporation (Registration of Elector) Rules, 1994 is hereto annexed and marked as **ANNEXURE-D**. Similarly, the State of Gujarat, vide a notification dated 5th June, 2010, inserted Rule-52U after Rule-52T in the Bombay Provincial Municipal Corporation (Conduct of Elections) Rules, 1994. A copy of the said notification dated 5th June, 2010 amending the Bombay Provincial Municipal Corporation (Conduct

of Elections) Rules, 1994 is hereto annexed and marked as **ANNEXURE-E**.

4.5 The Petitioners at this stage, would like to point out certain relevant provisions of the Constitution of India.

4.6 The Petitioners submit that Part-IX and IXA were inserted in the Constitution of India by way of 73rd and 74th Amending Act. That Part-IX containing Article 243 to 243O relates to Panchayats whereas, Part-IXA containing Articles 243P to 243ZG relates to the Municipalities. That the aforesaid amendments were carried out in the Constitution of India in order to ensure self governance and local autonomy in case of Panchayats in Rural areas or village areas and in urban areas incase of Municipalities. That by way of amendment the Constitution itself provides for the guidelines in order to enable the State Legislation to amend or enact Acts for Constitution of Panchayats and Municipalities.

4.7 That Article 243P(e) reads as under:

“Municipality” means an institution of self-Government constituted under Article 243Q.”

It is submitted that Municipality would also include a Municipal Corporation. That Article 243-Q(1)(c) provides for the Constitution of the Municipal Corporations for a larger urban area.

That Article-243-R provides for composition of Municipalities. Article 243-R reads as under:-

“243-R Composition of Municipalities;- (1) Save as provided in clause (2), all seats in a Municipality shall be filled by persons chosen by direct election from the territorial constituencies in the Municipal area and for this purpose each Municipal area shall be divided into territorial constituencies to be known as wards.”

That Article 243W provides for powers, authority and responsibilities of Municipalities. Article 243-W reads as under:

“243-W. Powers, authority and responsibilities of Municipalities, etc – Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow –

(a) the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-Government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to

- (i) the preparation of plans for economic development and social justice;
- (ii) the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule;

(b) the Committees with such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including

those in relation to the matters listed in the Twelfth Schedule.

Article 243-ZA provides that superintendence, direction and control of the preparation of electoral rolls for and conduct of, all elections to the Municipalities shall be vested in the State Election Commission.

That Article 243-ZA(2) provides that “Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with, elections to the Municipalities.

Article 243-ZA reads as under:

“243-ZA Election to the Municipalities: - (1) The Superintendence, direction and control of the preparation of electoral rolls for and conduct of, all elections to the Municipalities shall be vested in the State Election Commission.

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

4.8 The Petitioners submit that the Municipal Corporation and Municipalities are governed and regulated by the provisions of the Bombay Provincial Municipal Corporations Act, 1949. That some of the provisions of the aforesaid Act necessary for adjudication of this petition are as under:

4.9 That Section-5 provides for the Constitution of the Corporation. Section-5 reads as under :-

“5. Constitution of Corporation:- (1) Every Corporation shall, by name of “The Municipal Corporation of the City of”, be a body corporate and have perpetual succession and a common seal and by such name may sue and be sued.

(2) Each Corporation shall consist of councilors chosen by direct election.

It provides that every Corporation shall be a Body Corporate and have perpetual succession and a common seal. Sub-section (2) provides that each Corporation shall consist of councilors chosen by direct elections. That Section-6 provides for the duration of the Corporation; Section 8 provides for the list of voters; Section 14 provides for superintendence, direction and control for the preparation of the electoral roll and conduct of all the elections of the Corporation shall be vested in the State Election Commission. Sub-section (2) provides that State Election Commission shall hold the elections as per the rules made by the State Government. Section 403 provides for procedure in Election Inquiry. Section 456 confers powers on the State Government to make Rules.

4.10 The Petitioners submit that the State government in exercise of powers conferred under Section 456(2), had framed the Bombay Provincial Municipal Corporation (Registration of Voters) Rules, 1994. That Rule-4 provides for the preparation and publication of the draft list of voters. Rule-5 provides

for modification of draft list of voters; Rule-6 provides for “claim for inclusion” in the draft list of voters; Rule-7 provides for publication of final list of voters. A copy of the said Rules is hereto annexed and marked as **ANNEXURE-F**.

4.11 The State Government has also framed the Bombay Provincial Municipal Corporation (Conduct of Elections) Rules, 1994. That Rule-19 provides that in case of a contested election, a poll shall be taken on the board mentioned under Rule-5. Rule-21 provides that for appointment of Polling Agent; Rule-22 provides for polling station for the respective polling area; Rule-23 provides for Presiding Officer and Polling Officer; it provides that the returning officer shall appoint a Presiding Officer for each polling station and one or more polling officers to assist the Presiding Officer. Rule-24 provides that the Presiding Officer shall keep order at the polling station to see that the election is fairly conducted and regulate the number of electors to be admitted at any one time inside the polling station. Rule-27 provides for the preparation of ballot boxes for pole;

Rule-29 provides for form of ballot paper; Rule-30 provides for procedure for issuing a ballot paper to an elector; Rule-31 provides for voting; Rule 32 provides for procedure for voting and secrecy of voting; Rule-35 provides for identification of elector; Rule-45 provides for account of ballot papers; Rule-52A to 52T provides for voting by Electronic voting machine; Rule-52(3) provides for maintenance of secrecy of voting by electors within the polling station and the voting procedure. A copy of the said rules is hereto annexed and marked as **ANNEXURE-G**.

5. The Petitioners submit that the basic features of the Constitution of India , it is submitted that Article 324 confers superintendence, direction and control of the preparation of electoral rolls for and of the conduct of all the elections to Parliament and Legislatures of every State in the election commission. It is submitted that preamble of the Constitution provides for a sovereign, socialist, secular, democratic republic India. It is submitted that the goal of the constitutional horizon being of democracy republic, the free and fair election is a fountain spring and

corner stone of democracy is the basic feature of the Constitution. It is submitted that secrecy of ballot is undoubtedly and indispensable adjunct of free and fair elections.

6. The Petitioners submit that the various provisions of Bombay Provincial Municipal Corporation (Conduct of Election) Rules, 1994 provides for the secrecy of ballot. That sufficient safeguards have been incorporated so as to ensure free and fair election and secrecy of ballot. That Rule 18 provides for election by way of postal ballot in respect of special electors or service electors and the electors on election duty. It is submitted that they are special class of electors who are permitted to cast their vote by way of postal ballot after ensuring sufficient safeguards so as to ensure free and fair elections and secrecy of ballot. It is submitted that similarly, Rule 23 provides for appointment of Presiding Officers and Polling Officers for supervision of the polling station. Rule 30 provides for procedure for issue of ballot paper to an elector after verifying his identity and making necessary safeguards so as to prevent double or multiple voting. That Rule 31 provides that the

elector shall vote in person at the polling station and the vote shall be given in person and not through proxy. Rule 32 provides for procedure for voting and secrecy of voting. It provides that the elector on receiving the ballot paper shall proceed to one of the polling compartment, mark on the ballot paper and thereafter fold the ballot paper so as to conceal his voting. Sub-rule (4) provides that no elector shall enter in voting compartment when another elector is inside it. Rule 35 provides for identity of an elector.

7. The Petitioners submit that the State Government vide notification dated 05.06.2010 had amended the Bombay Provincial Municipal Corporations (Registration of Electors) Rules, 1994 and inserted Rule-6A and had also amended Bombay Provincial Municipal Corporations (Conduct of Election) Rules, 1994 and inserted Rule 52U.

The relevant Rule-6A and Rule-52U reads as under:-

“6A (1) Online voting (hereinafter referred to as “e-voting”) means using system in which a voter can cast his vote by using the electronic internet medium.

(2) A voter (herein after referred to as an “e-voter”) who intends to cast his vote through e-voting, shall have to register himself in Form A(i) by submitting an application form to the Electoral Registration Officer (ERO) which can be obtained by payment of rupees five.

(3) on registration of voters name, a unique Biometric as e-Voter ID Card in form A(2) and Personal Identification Number (PIN) and/or password in the manner as specified by the State Election Commission shall be issued to an e-voter by the officer designated by the State Election Commission. The State Election Commission may fix the price of Biometric Photo ID Card from time to time.

(4) If the name of an e-voter is included in the electoral roll, and that e-voter is migrated to other place then, the Electoral Registration Officer shall inform him as to the inclusion of his name in the electoral roll within reasonable time before the day of voting.

(5) (a) The name of e-voter shall be included in the electoral roll. Necessary entry regarding

e-voters shall be made in the electoral roll against his name with respect to his option of e-voting, or

(b) The State Election Commission shall direct the Electoral Registration Officer, to prepare option wise electoral roll, if deemed fit, in the cases of choices of options given by voters.

(6) With regard to online voting system the Electoral Registration Officer shall follow the norms decided by the State Election Commission.

(7) Once the voter is provided a unique identification as his Voter ID Card/PIN and/or a Password to vote online, his name would be marked in the Electoral Roll as an e-voter.

(8) An e-voter shall cast his e-vote as per his option for using technology as permitted by the State Election Commission.

(9) The State Election Commission shall set up e-voting under mobile polling booths at the places such as Bus Junctions, Colleges, Universities, Railway Stations, Air-Ports, etc. as

per requirement. Where only those voters who have given option for e-voting, shall be allowed to vote. For this, the Electoral Registration Officer shall inform e-voters well in advance.”

“52U E-voting or online voting:-

(1) Online voting (hereinafter referred to as “e-voting”) means using system in which a voter can cast his vote by using the electronic internet medium.

(2) For e-voting identification of the voter, thumb impression or finger print or Iris Retinal Scan, DNA or any Biometric as may be decided by the State Election Commission from time to time, of the voter shall be obtained for issuance of the Biometric Card before the Mamlatdar or Executive Magistrate.

(3) The designated officer appointed by the State Commission shall obtain such information from the voter for issuing the Biometric Photo voter ID card. The information obtained by the designated officer shall kept secret and shall not disclose such information.

(4) The State Election Commission shall declare the e-polling stations for e-voting.

(5) The names of contesting candidates and the symbols allotted to them with ballot paper shall be displayed on the electronic equipment or on the website, and the same shall be made available to the electronic equipment (server) of e-voting system set up by the State Election Commission or by such other Officer designated by the State Election Commission or by such other Officer designated by the State Election Commission in this regard.

(6) A voter (hereinafter referred to as an “e-voter”) who have given option for e-voting shall be permitted by the State Election Commission and he shall cast his vote only once in each election.

(7) (1) The e-voting shall be made either by:-

(i) Online using internet;

(ii) by Short Message Service, through his/or own mobile;

(iii) by calling call center IVR system;

(iv) by mobile booths;

(v) by any other electronic internet medium as may be decided by the State Election Commission from time to time.

(2) The State Election Commission shall decide any one or more than one of the above options referred to in sub-rule 7(1) for e-voting depending upon the availability of appropriate technology to be used in the conduct of elections. For effective implementation of e-voting the State Election Commission shall have such powers and prescribe such norms and manners for effective implementation of e-voting.

(8) The State Election Commission shall decide and declare the period and time limit within which an e-voter shall cast his e-vote.

(9) The State Election Commission shall make technical arrangements to maintain the secrecy of e-voting.

(10) An e-voter shall cast his vote himself and not by proxy.

(11) No vote shall be received from any person whose name is not enrolled in the ward roll as

an e-voter of the ward to which the election is being held.

(12) In case of failure of system for e-voting the State Election Commission shall allow voting at such election through Electronic voting machine or ballot paper as the case may be.

(13) The electronic equipment (server) in which the details of e-voting are stored shall remain under the control of the State Election Commission or the authorized officers of the State Election Commission in this behalf. The State Election Commission shall make adequate technical arrangement so as to ensure e-votes cast are properly stored in the said equipment till they are counted.

(14) The technical arrangements shall have to be made with regard to the counting of the votes cast through e-voting on the day of counting of the votes, by the Returning Officer.

(15) The Returning Officer shall count the cast votes through e-voting recorded in electronic equipment (server) and shall include them in the votes of the ward cast by other system.”

It is submitted that the aforesaid amendments have been carried out in the Rules in order to enable voter using e-Internet medium. That Rule-6A inserted by way of amendment to the Bombay Provincial Municipal Corporations (Registration of Electors) Rules, 1994 which provides for online voting referred to as e-voting whereby voter can cast his vote by using electronic internet medium. An e-voter who intends to cast his vote through e-voting shall have to register himself in Form-A(i) by submitting an application form to the Electoral Registration Officer. That on registration, a unique biometric e-voter ID card and Personal Identification Number (PIN) and/or password shall be issued to the e-voter. That sub-rule (5) provides for the inclusion of the name of e-voter in the electoral roll and necessary entry regarding the e-voter to be made in the electoral roll. Sub-rule (7) provides that once a unique ID number is provided, the e-voter shall be entitled to vote online. Sub-rule (8) provides that the e-voter as per his option shall use technology as permitted by the State Election Commission. It is submitted that similar amendments have been made in the Bombay

Provincial Municipal Corporations (Conduct of Elections) Rules, 1994 by inserting Rule-52U. That Rule-52U provides for online voting, that is, e-voting whereby, an elector can cast his vote by using electronic e-voting medium. Sub-rule (7) provides that e-voting shall be made either by (i) online using internet, (ii) short message service, (iii) by calling call centre IVR system, (iv) by mobile booths, (v) by any other electronic internet medium as may be decided by the State Election Commission from time to time.

8. The scheme of free and fair election and maintenance of purity of election is contemplated when provisions of the Constitution came to be amended by 73rd Amendment Act, 1992. Article-243R provides for direct election from the Municipal Area for composition of Municipality. Article 243(2)(a) provides for State Election Commission, which is under obligation to conduct and control the election. The State Election Commission is an independent body supervising the election conducted under the auspices of the State Government and local authorities.

- 8.1 The B.P.M.C. Act provides for election under Section-5 and, thereafter, entire process of election is provided for more or less following the Scheme of the Representation of the People Act for election to Parliament and Legislative Assembly of the State.
- 8.2. The State Government has framed the rules for holding of the election under Section 8(3) read with Section-456 (2) of the B.P.M.C. Act. The rules provide for registration of the voters and also for conduct of election. The Conduct of the Election Rules are framed under Sub Section (2) of Section-14 read with Section-456(1) of the Act.
9. Initially the conduct of the election as provided is voting by electors within the polling station and marking his ballot paper showing his preference. Rule-32 provides for secrecy of voting.
- 9.1 Voting by electronic voting machine came to be introduced both at the Parliamentary Election and Local Authority election. Part-3A was introduced in Conduct of Election Rules for B.P.M.C. Rule 52(j)

provides for maintenance for secrecy of voting by electronic machine within polling station.

9.2 The State Government has now amended Rules which are impugned in the present petition to facilitate the voting for elector at his residence or even if he is not in the town where polling is effected he can exercise his preference online or by SMS wherever he is within the country or outside the country.

9.3 Till date the elector was required to go to the polling booth and cast his vote on the ballot. With the advancement in technology and to facilitate the voter so as to avoid going to booth online voting is introduced by amending Rules. The Rules of Conduct of Election have been amended further and the State Government has inserted Rule 52(u) in B.P.M.C. Conduct of Election Rules and Rule 6(a) in B.P.M.C. Registration of Electors Rules,

9.4 2010. Sub Rule-7 of Rule-52(u) provides, inter alia, e-voting shall be made online using internet, by SMS,

by calling call center IVR system. Sub Rule-6 also provides for mobile booth.

9.5 Now if mobile booths were to be provided it serves no purpose, since the elector is in the same position as he was, viz. to go to booth or mobile booth.

10. By amending rules it is submitted that no attempt has been undertaken by the State Government to protect the basic objective of election i.e. secrecy and purity of election.

10.1 It is submitted that the attention of the State Government was drawn by Shri Shaktisinh Gohil, the Leader of the Opposition about the deficiency that may be faced in holding free and fair election if online procedure or SMS procedure is adopted by the State Government by amending the Rules.

10.2 As explained below e-voting subordinates the principle of secrecy. With advancement of technology the online messages and SMS messages can be impaired without the elector noticing it and remaining innocent about the manner and method of

hacking on online. In online voting and voting by SMS there are chances of unfair voting. Even if biometric facilities are available and password is to be offered as explained hereinbelow online voting can be manipulated while short messages are always recorded by the agency as also by the person who has voted.

11. It has been authoritatively held, time and again, by the Apex Court that democracy is a basic feature of the Constitution of India. The edifice of the democracy rests on a system of free and fair elections. These principles are discernible not only from the preamble, which has always been considered as part of the Constitution, but also from its various provisions.

11.1 It is submitted that Rule-52(u) of the B.P.M.C Conduct of Election Rules, 1994 inserted by the Conduct of Elections by second amendment Rules, 2010 and Rule-6A of the B.P.M.C. Conduct of Election Rules, 1994 inserted by B.P.M.C. Registration of Elector (Amendment) Rules, 2010

violates the principle of secrecy of the vote and the voter which is the essence of free and fair election under Article-19(1)(a), Article-21(a) and Article-243R of the Constitution, Section-5 and Section-14 of the B.P.M.C. Act in view of the following.

11.2 In Smt. Indira Nehru Gandhi, Vs. Shri Raj Narain, AIR 1975 SC 2299, Justice Khanna in his opinion paragraph-198;

(1) Democracy postulates that there should be periodical elections, so that people may be in a position either to re-elect the old representatives or, if they so choose to change the representatives and elect in their place other representatives.

(2) Democracy further contemplates that the elections should be free and fair, so that the voters may be in a position to vote for candidates of their choice.

(3) Democracy can indeed function only upon the faith that elections are free and fair and not rigged and manipulated, that they are effective instruments of ascertaining popular will both in reality and form and are not mere rituals calculated to generate illusion of deference to mass opinion.

(4) Free and fair elections require that the candidates and their agents should not resort to unfair means or malpractices as may impinge upon the process of free and fair elections.

Principles of election :-

11.3 It is submitted that the principles of election are;

(1) Correctness of the results,

(a) Only eligible users vote;

(b) They only vote once;

(c) All votes counted are valid votes, and all valid votes are counted.

(2) Verifiability of results by involved parties.

(3) Secrecy of votes;

(a) No one should be able to derive a relation between the vote cast and the involved voter (preventing forced voting);

(b) A voter should not be able to prove which vote he cast (preventing sale of votes).

(4) In paper voting, the conformation to these principles is achieved via voter identification, supervised voting and distributed counting procedures.

(5) People are admitted to the polling station only once, and they only get one opportunity to cast their vote.

(6) It is hard to add invalid ballots to or remove valid ballots from the ballot box unseen.

(7) Since voting is done under supervision of the Election Officials there is warranty for the secrecy of the vote.

Online voting procedure :-

11.4 In the online procedure voters are given password or a chip card so as to cast their vote. It is not assured that under pressure or in exchange of money a password can be sent electronically and chip card may be physically transferred.

11.5 The existing rules provide guarantee that, citizen is left alone during voting. Polling Stations are covered in such a way that the people vote in isolated corner. In internet people are free to choose the place where they want to vote. Probably most of the voting will be done at home or at work place. If people vote at home voting will be a private matter. In the atmosphere of

home absolute access is not guaranteed and if people vote at their home there is no guarantee that others do not look over their shoulders to make assure that they may make correct choice. Voting at home may allow both coercion and corruption. Complete secrecy is not possible while voting at home.

Annexed hereto and marked as **ANNEXURE-H** are copies of the comments as regards internet election offered by the institute for computing and information sciences Radboud University Nijmegen, Netherlands as also other literature on the subject.

12. It is submitted that in view of the following the General Election at the Municipal Corporation will be violating the basic right of the voter under Article 19(1)(a) and dictate of the Constitution and the Act and the Rules as reflected from provisions of Rule, Section-5, Rules 30, 32, 52(j) and Rule-57 to maintain secrecy so as to have free and fair election:-
 - (a) It is the submitted that when the elector exercises his right to vote on internet or by SMS it is not possible

to know whether he is independently exercising his right or that he is surrounded by the agents of the contestant. The elector is protected under the law not to disclose as to for whom he has voted. However, when such a right is exercised on online from wherever it is not possible to ensure that he will be able to show his preference independently without fear and favour.

- (b) There is no safeguard against abuse of the allotted PIN or password. It is submitted that it is a common phenomena faced by all internet users throughout the World regarding hacking of PIN/passwords. It is submitted that large scale internet frauds have been detected in respect of PIN or passwords being high jacked of the persons using internet banking services and using credit cards through internet. Similarly, PIN and passwords are even hacked in case of mail. It is submitted that the election results could be manipulated or maneuvered by hacking PIN/passwords.
- (c) That voting through online internet medium is not safe and reliable as experienced in some of the

developed countries. It is submitted that there is every possibility of phishing of website whereby an alternative similar website is created. That the voters would virtually feel that they have actually casted the vote online, but the same would not reach the database of the actual website.

(d) It is submitted that the virus threat or attack at the time of the election of entire election machinery through internet medium and thereby, the election procedure is required to be halted and postponed. It is further submitted that even the database collected by the official website can be interfered with, modified or changed which can result in large scale election fraud and manipulation.

(e) It is further submitted that voting through using online internet medium or by SMS would be in breach of the principles of secrecy of ballot and free and fair elections inasmuch as an e-voter can vote online through internet medium or by way of SMS through his or her mobile without the superintendence of the Election Officer. It is submitted that the voting can be

manipulated or maneuvered by exercising undue influence, coercion or threat of the e-voter by the candidate or his agents and followers. It is submitted that in case of e-voting, voting can even be influenced by way of electoral malpractices such as purchase of votes. It is submitted that a voting through online internet medium or by way of SMS would be retained in the database of the computer or mobile as the case may be and that the candidates can compel the e-voter to vote in a particular manner under undue influence, coercion or threat or by way of purchase of votes and can even influence the e-voter to actually reveal the ballot casted by him by furnishing the details stored in the computer or mobile of the e-voter. It is, therefore, submitted that e-voting would be contrary to the principles of secrecy of ballot and free and fair elections.

- (f) It is further submitted that there is no actual verification possible as to whether the e-voter voting through online internet medium or on his or her mobile is actually the person registered inasmuch as the candidate or his supporters can influence a group

of voters to vote as per their wishes in their presence and/or to obtain their PIN and mobile set and vote themselves.

- (g) It is submitted that in case of e-voting, there is no possibility of superintendence of an Election Officer or Polling Officer and there are no sufficient safeguards to ensure that the person voting online or through SMS is the person who is registered as e-voter. It is submitted that in absence of an e-voter, another person can vote through his or her mobile or internet medium using his/her PIN which would amount in violation of the adult suffrage inasmuch as there is no verification as to whether the person voting is actually above 21 years of age and the person voting is the person registered as e-voter.

- (h) It is, therefore, submitted that the system of online voting through internet medium or SMS by mobile would result in large scale electoral malpractices and thereby influence the result of the elections. It is submitted that it is against the principles of free and fair elections as envisaged under the Constitution of

India and secrecy of ballot which is an adjunct to free and fair elections. It is submitted that the amendment in the Rules providing for e-voting through online internet medium and SMS through mobile is violative of Articles 19(1)(a) and 243 of the Constitution and Sections-5 and 14 of the B.P.M.C. Act.

13. The Petitioners have no any other alternative efficacious remedy available save and except to approach this Hon'ble Court by way of the present petition.
14. The present petition is filed at the earliest without any delay or latches.
15. The Petitioners herein have not filed any other petition on the same subject matter either before this Hon'ble High Court or before the Hon'ble Supreme Court of India or before any other court of law except the present one.
16. Copies of annexures annexed with this petition are true copies of their respective originals.
17. The petitioners, therefore, pray that :

- (a) This Hon'ble Court will be pleased to admit/allow the present petition;
- (b) This Hon'ble Court will be pleased to issue appropriate writ, order or direction declaring Rule-6A of the Bombay Provincial Municipal Corporations (Registration of Electors) Rules, 1994 and Rule-52U of the Bombay Provincial Municipal Corporation (Conduct of Election) Rules, 1994 as ultra virus and Sections-5 and 14 of the B.P.M.C. Act in breach of Article 19(1)(a) and basic principle of maintenance of secrecy and free and fair election as ensures under the Constitution of India and under the B.P.M.C. Act.
- (c) This Hon'ble Court will be pleased to issue appropriate writ, order or direction quashing and setting aside Rule-6A of the Bombay Provincial Municipal Corporations (Registration of Electors) Rules, 1994 and Rule-52U of the Bombay Provincial Municipal Corporations (Conduct of Election) Rules, 1994 ;
- (d) Pending admission, hearing and final disposal of this petition, this Hon'ble Court will be pleased to

restrain the State Election Commission from implementing the amended Rule-6A of the Bombay Provincial Municipal Corporation (Registration of Electors) Rules, 1994 and Rule-52U of the Bombay Provincial Municipal Corporation (Conduct of Election) Rules, 1994;

- (e) That ex-parte ad interim relief in view of the above prayer clause be granted;
- (f) This Hon'ble Court will be pleased to grant any other and further relief which is deemed fit, just and expedient in the interest of justice.

AND FOR THIS ACT OF KINDNESS AND JUSTICE, THE PETITIONERS HEREIN SHALL FOR EVER PRAY AS IN DUTY BOUND.

Place: Ahmedabad ()
Date : Advocate for the Petitioner.

AFFIDAVIT

I, Himatsingh Patel, son of _____,
Adult, Occu-_____, residing at the address mentioned

in the cause title of this petition, the Petitioner no.1 herein,
do hereby solemnly affirm and state on oath as under:

That I am the Petitioner no.1 herein and I am conversant with the facts and circumstances of the present case and hence am competent to depose on oath that what is stated in Para Nos. ___ to ___ is true and correct to the best of my knowledge, information and belief and I believe the same to be true. Para No. ___ contains prayer clauses.

Solemnly affirmed at Ahmedabad on this ___ day of
June, 2010.

(Deponent)