

Frequently Asked Questions (FAQ) on Elections to Council of States and Legislative Councils

- (1) Whether an elected member of the legislative assembly of a State or a member of the electoral college of a Union Territory is entitled to participate as an elector at an election to the Council of States or State Legislative Council, even before he has assumed his seat in the legislative assembly and has yet to make and subscribe the requisite oath or affirmation as a member of the assembly under the Constitution?**

Ans: Yes.

This question arose in *Pashupati Nath Sukul Vs Nem Chand Jain* (AIR 1984 SC 399). The Supreme Court held that the members of the newly elected legislative assembly became members of that assembly as soon as the assembly was constituted by the Election Commission by its notification under Section 73 of the RP Act 1951, and such members could participate in all non-legislative activities, including the election to the Council of States, even before taking their seats in the assembly.

This view was reaffirmed by the Supreme Court by its order of 6 January, 1997 [*Madhukar Jetly Vs Union of India* and Ors-1997(II)SCC III].

- (2) Whether the provisions of the Tenth Schedule to the Constitution relating to disqualifications on the ground of defection are applicable to open voting at elections to Council of States?**

Ans: No.

The Supreme Court in its judgment dated 22 August 2006 in the matter of *Kuldip Nayar Vs Union of India* and Ors (AIR 2006 SC3127) observed that *'The contention that the right of expression of the voter at an election for the Council of States is affected by open ballot is not tenable, as an elected MLA would not face any disqualification from the Membership of the House for voting in a particular manner. He may at the most attract action from the political party to which he belongs.'*

- (3) Whether an elected member of a state legislative assembly, whose election has been set aside by the State High Court on an election petition, but in whose favour a conditional stay has been granted by the Supreme Court during the pendency of his appeal, permitting the member concerned to sign the assembly's attendance register but not permitting him to take part in the proceedings of the House, can vote at the elections to the Council of States or the State Legislative Council?**

Ans: No.

The Supreme Court, clarified their order of 27 October 1967 (*Satyanarayana Mitra Vs Bireswar Ghose* Appeal No. 1408 (NCE) of 1967) that the member concerned should not be allowed to participate in the election to the Council of States. Thereafter as a rule, no such member of any State Legislative Assembly has been permitted to either propose the name of any candidate or to vote at any election to the Council of States or State Legislative Council.

- (4) Whether an elected member of a state legislative assembly, whose election has been set aside by High Court on an election petition, but the Supreme Court grants an absolute stay of the High Court's order, can vote at the elections to the Council of States or State Legislative Council?**

Ans: Yes. In such case the order of the High Court shall be deemed never to have taken effect under Section 116B(3) of the RP Act, 1951, and the member concerned shall continue to enjoy all rights and privileges of a member of the legislative assembly without any fetters, including his right to participate in election to the Council of States or State Legislative Council.

(5) If a biennial election is not held in due time due to non-existence of the state legislative assembly concerned at the relevant time and the resultant vacancies remain unfilled for a long time during which some other regular vacancies also arise, can the vacancies so arising be combined for a common election or the vacancies arising on each separate occasion (categories) have to be filled by separate elections, even if a common time table for such elections is adopted on the constitution of the assembly concerned?

Ans: The regular vacancies that arose from different categories/cycles (determined at the time of initial constitution of the Councils) cannot be combined and vacancies arising on separate occasion have to be filled by separate elections, even if a common time table for such elections is adopted. Further, separate election has to be held on the next occasion to fill the seats falling in different categories, even if they were being filled at the same time on the last occasion.

[Surinder Pal Ratawal Vs Shamim Ahmed AIR 1985 Del 22 & A K Walia Vs Union of India and Ors Civil Writ No. 132 of 1994 before Delhi High Court]

(6) When is the electorate of a local authorities' constituency said to be available for the purpose of holding election to a State Legislative Council from Local Authorities' Constituencies?

Ans: The Election Commission has laid down the guideline that if atleast 75 percent of the local authorities in a local authorities' constituency are functioning, and in addition at least 75% of the electors out of the total electorate of the constituency are available, then electorate is treated as available for electing representative to the legislative council. This guideline of the Election Commission got the approval of Supreme Court of India in Election Commission of India Vs Shivaji and Ors (AIR 1988 SC 61).

(7) Whether the members of state legislative assembly who have not yet made and subscribed the oath under art 188 before taking a seat in the Assembly can also act as proposers for the nomination of a candidate at an election to the Council of States or to a state legislative council by members of the state legislative assembly?

Ans: Yes. The Supreme Court held in Pashupati Nath Sukul Vs Nem Chand Jain and Ors AIR 1968 SC 1064 that the members of state legislative assembly who have not yet made and subscribed the oath under art 188 before taking a seat in the Assembly can also act as proposers for the nomination of a candidate at an election to the Council of States or to a state legislative council by members of the state legislative assembly

(8) Whether same proposer can propose the nomination of more than one candidate?

Ans: Yes. There is no bar under the law against an elector proposing the nomination of more than one candidate. Thus, an elector subscribing as proposer for the nomination of one candidate may so subscribe the nominations of one or more other candidates also (Amolak Chand Vs Raghuveer Singh AIR 1968 SC 1203).

Even a candidate himself may propose the nomination of another candidate for the same election.

(9) Who can present the nomination paper of a candidate?

Ans: A nomination paper shall be presented to the returning officer or the authorised assistant returning officer either by the candidate himself in person or by any of his proposers [s 33(1) read with Section 39(2), 1951 Act]. It cannot be presented by any other person, even if authorised in writing by the candidate or the proposer.

(10) Whether nomination paper can be sent by post or through any other means of communication, like fax or e-mail?

Ans: No. Nomination cannot be sent by post or through any other means of communication, like fax or e-mail [see Hari Vishnu Kamath Vs Gopal Swarup Pathak 48 ELR 1]

(11) Whether the notice of withdrawal of candidature can be revoked?

Ans: No. Once a candidate has given notice of withdrawal of candidature in the prescribed manner, he has no option or discretion thereafter to withdraw or cancel his said notice [s 37(2) read with Section 39(2) of RP Act 1951].

(12) The term of certain elected members whose names have been included in the electoral rolls pertaining to the Local Authorities Constituencies, end before the last date of filing nominations. Should their names be removed from the final rolls as their term is going to end before the last date of filing nominations?

Ans: The Hon'ble Supreme Court of India held in Baidyanath Panjiar Vs Sitaram Mahato (AIR 1970 SC 314) and Narendra Madivalapa Kheni Vs Manikrao Patil and Ors (AIR 1977 SC 2171) that no deletion or inclusion is permissible after 3.00 P.M. on the last date for making nomination in a constituency where election is being held and the electoral roll becomes final at that hour for the purpose of that election.

The name of such elected members whose term will end before the publication of the Final Roll pertaining to the Local Authorities Constituencies, shall be removed before **3.00 P.M. on the last date for making nomination**, as such deletion is not permissible **after 3.00 P.M. on the last date for making nomination**.

(13) The term of certain elected members of the Local Authorities will end after the last date of filing nominations pertaining to the Local Authorities' Constituencies, but before the poll date. In such cases, though their names appear in the final roll, whether we can disallow them from casting their vote on the poll day as they have ceased to be members of the Local bodies on the day of poll?

Ans: In this case, although the names were in the rolls, since they are not members of local authority on the day of poll, they are not eligible to vote in the election. They should not be permitted to vote, as only members of local authorities can vote under Article 171(3)(a) of the Constitution.

(14) In some cases new members have come after the last date of filing nominations. Can such names be added in the electoral rolls, who did not exist in either draft roll or the final roll, but who are members as on the day of Poll?

Ans: The Hon'ble Supreme Court of India held in Baidyanath Panjiar Vs Sitaram Mahato (AIR 1970 SC 314) and Narendra Madivalapa Kheni Vs Manikrao Patil and Ors (AIR 1977 SC 2171) that no deletion or inclusion is permissible after 3.00 P.M. on the last date for making nomination in a constituency where election is being held and the electoral roll becomes final at that hour for the purpose of that election.

The name of such new members shall not be included in the electoral rolls, who come after the final roll publication, as no such inclusion is permissible after **3.00 P.M. on the last date for making nomination**.

(15) How many affidavits, a candidate has to file with his nomination papers?

Ans. Only one in Form 26.

(16) Whether the nomination paper is valid, if any of the columns of Affidavit (Form 26) is left unfilled?

Ans: The Hon'ble Supreme Court in its judgment dated 13/9/2013 in WP(C) No. 121 of 2008 (Resurgence India Vs. Election Commission of India and Ors) held that in the affidavits filed by candidates along with their nomination paper, the candidates are required to fill up all columns therein and no column can be left blank. Therefore, at the time of filing of affidavit, RO has to check whether all columns of the affidavit filed with the nomination paper are filled up. If not, the RO shall give a reminder to the candidate to furnish information against blank columns. The Hon'ble Court has held that if there is no information to be furnished against any item, appropriate remarks such as 'NIL' or 'Not Applicable' etc as may be applicable shall be indicated in such column. They should not leave any column blank. If a candidate fails to fill the blanks even after reminder, the nomination paper will be liable to be rejected by the RO at the time of scrutiny of nomination papers.

(17) What is the outer time limit for filing the various documents required to be filed in connection with nomination paper?

Ans: (a) The affidavit in Form 26 and Forms AA & BB have to be filed latest by 3.00 P.M. on the last date of filing nomination. Revised affidavit in Form 26 may be filed upto the time fixed for scrutiny of nominations, if he had left any column blank in the original affidavit and was reminded by the Returning Officer to furnish missing information.

(b) Oath has to be taken after filing nomination paper and before the date fixed for scrutiny.

(c) Certified extract of electoral roll can be filled up to the time of scrutiny.

(18) Whether an authorised agent of a party at elections to Council of States can be the authorised agent of another party simultaneously?

Ans: No. The spirit behind Rule 39AA of the Conduct of Elections Rules 1961 is that MLAs belonging to a political party show their ballot papers (after marking their vote) to the authorized agent of that party only and not to the authorised agent of other parties. As such, the same person cannot be appointed as the authorized agent of more than one party.

(19) Whether Form AA and Form BB can be sent by Fax or photocopy of the same can be submitted?

Ans: No.

(20) Whether Form AA and Form BB can be submitted after 3.00 pm on the last date of filing nominations?

Ans: No.

(21) Whether an MLA or Minister can be appointed as authorised agents of the party at the election to the Council of States and State Legislative Councils by MLAs?

Ans: There is no such restriction imposed by the Commission in elections to the Council of States and State Legislative Council by MLAs.

(22) In case any voter changes his/her choice by cutting the earlier choice, will such ballot paper be liable for rejection?

Ans: If any voter changes his/her choice by cutting the earlier choice, which disclose his identity or he can be identified by such mark or writing, rule 73(2)(d) of the Conduct of Elections Rules, 1961 will be applicable rendering such ballot paper liable for rejection.

(23) Whether the list of electors to be maintained under section 152 of the Representation of the People Act, 1951 can be amended to include the name of newly elected member of state legislative assembly after the date of notification of election to the Council of States or even after the last date of filing of nomination?

Ans: In case when a member gets elected to the Legislative Assembly at a bye-election, result of which is declared after the date of notification of election to the Council of States or even after the last date of filing nomination, the name of newly elected MLA should be included in the list of members maintained under Section 152 of the RP Act, 1951. Further, he shall then be entitled to vote at the election to the Council of States if the poll is taken after the date of his election as MLA.

This instruction is also applicable in the case of elections to Legislative Council by MLAs.

(24) Whether a person can vote at any election if he is confined in a prison, whether under a sentence of imprisonment of transportation or otherwise, or is in the lawful custody of the police?

Ans: No. The provisions of Section 62(5) of the Representation of the People Act, 1951 provide that no person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment of transportation or otherwise, or is in the lawful custody of the police.

(25) What action is required to be taken by Presiding Officer/Returning Officer in election to Council of States, in case an elector belonging to a political party refuse to/does not show his/her marked ballot paper to the authorised agent of his party or shows his/her marked ballot paper to the authorised agent of other political party?

Ans: In such case the ballot paper issued to the elector shall be taken back by the presiding officer or a polling officer under the direction of the presiding officer and the ballot paper and keep it in a separate envelope after recording on the reverse side of the ballot paper "Cancelled-voting procedure violates". Provision in sub-rules (6) to (8) of rule 39A of the Conduct of Elections Rules, 1961, shall apply in such case.

In case before taking back such ballot paper the elector dropped the ballot paper into ballot box, at the time of counting such ballot paper, RO should first separate this concerned ballot paper and it shall not be counted.