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HIGH COURT OF DELHI AT NEW DELHI

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F.A.O. No.146 of 2013 & C.M. No.4806/2013 (for stay)

Decided on : 31st May, 2013

DELHI & DISTRICT CRICKET ASSOCIATION Appellants

Through: Mr. Maninder Singh, Sr. Advocate with
Mr. P.D. Gupta & Ms. Sunita Tiwari,
Advocates.

Versus

RAJNISH AGGARWAL & ORS. Respondents

Through: Mr. N.N. Aggarwal, Mr. Rohit Gandhi &
Mr. Varun Garg, Advocates for R-1 & 2.
Mr. V.P. Singh, Senior Advocate with
Mr. Harikishan, Advocate for R-2 to 7.
Mr. Tanuj Khurana, Advocate for R-12.

WITH

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F.A.O. No.145 of 2013 & C.M. No.4803/2013 (for stay)

RAVINDER MANCHANDA & ORS. Appellants

Through: Mr. V.P. Singh, Senior Advocate with
Mr. Harikishan, Advocate.

Versus

RAJNISH AGGARWAL & ORS. Respondents

Through: Mr. N.N. Aggarwal, Mr. Rohit Gandhi &
Mr. Varun Garg, Advocates for R-1 & 2.
Ms. Ritika Godhwani, Advocate for R-5.
Mr. Tanuj Khurana, Advocate for R-7.
Mr. Maninder Singh, Sr. Advocate with
Mr. P.D. Gupta & Ms. Sunita Tiwari,
Advocates for R-16.

CORAM:
HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J.

1. This order shall dispose of two appeals bearing F.A.O. No.146/2013 titled *Delhi District & Cricket Association vs. Rajnish Aggarwal & Ors.* and F.A.O. No.145/2013 titled *Ravinder Manchanda & Ors. vs. Rajnish Aggarwal & Ors.*

2. In both these appeals, a common order dated 13.3.2013 is assailed which was passed by the learned Additional District & Sessions Judge Sh. Ramesh Kumar, Tis Hazari Courts, Delhi, on an application under Order 39 Rule 1 & 2 read with Section 151 CPC in favour of respondent Nos.1 & 2 and against the appellants as well as against respondent Nos.5 to 10. *

3. Before dealing with the submissions made by the respective sides, it would be pertinent here to give a brief background leading to the filing of the present appeals. Respondent Nos.1 & 2 filed a suit bearing No.8/2013 against the appellant and 18 others seeking a declaration and

** The numbers of the appellants and the respondent are given with reference to F.A.O. No.146/2013.*

permanent injunction. The reliefs of declaration and permanent injunction prayed for are, as under :-

- “(a) pass a decree of declaration, declaring the election of the defendant Nos.4 to 9 (respondent Nos.5 to 10 in F.A.O. No.146/2013) to the posts of Office Bearers/Members of the Executing Committee (as per Annexure ‘F’) of the Defendant No.1 (DDCA) held in the AGM of defendant No.1 Association on 21.12.2012 as null and void.*
- (b) pass a decree of permanent injunction restraining the defendant Nos.4 to 9 from acting or discharging in any manner any functions as members of the Executive Committee/Office Bearers of the defendant No.1 Association in pursuance to their alleged election in the AGM of the defendant No.1 held on 21.12.2012”*

4. The respondent Nos.1 & 2 had sought a declaration to the effect that result of the election of six posts of members of Executive Committee of DDCA which include four posts of Joint Secretary and two posts of Executive Member which was held on 21.12.2012 declared null and void. The case of the respondent Nos.1 & 2 was that respondent Nos.5 to 10 be restrained from acting or discharging functions as members of the Executive Committee of the DDCA in pursuance to the

elections held in the said Meeting. It was alleged by the respondent No.1 that he had 99 valid proxy votes which were duly deposited at the registered office of the DDCA/appellant as per the mandate of the election notice issued by respondent No.3 (B.L. Garg) and respondent No.4 [Mr. Justice (Retd.) R.C. Chopra, Chief Election Officer, since deleted from the array of the defendants in the suit], more than 48 hours before the Annual General Meeting in which the said election took place. Despite the fact that the respondent had entered into the arena of election hall along with 99 proxies duly mentioned with a list, he was not permitted to cast his vote as a consequence of which the respondent No.1 was deprived to have himself elected to the post of the Joint Secretary. It was alleged to have created an unfair advantage to the respondent Nos.5 to 10, who would not have got elected had the respondent Nos.1 & 2 been permitted to cast these votes.

5. It was the case of the respondent Nos.1 & 2 that the DDCA is a company licensed under Section 25 of the Indian Companies Act, 1956 and is covered by the memorandum of articles and associations of the companies and the provisions of the Indian Companies Act and since the

holding of the Annual General Meeting was not in consonance with the principles of fair play and impartial holding of elections, therefore, the respondent Nos.5 to 10 be restrained from acting or discharging any function and that the elections be declared as null and void. Along with the main plaint, the respondent Nos.1 & 2 had also filed an application under Order 39 Rule 1 & 2 CPC for an ad interim relief stating that he is likely to succeed on the merits. It was stated that the balance of convenience is in his favour and he shall suffer an irreparable loss because he apprehends that the respondent Nos.5 to 10 will manipulate the record, therefore, they be restrained from misutilizing funds and acting in a manner detrimental to the interest of the company. In order to support his submissions, the respondent Nos.1 & 2 had also placed reliance on the CCTV footage which was according to the respondent Nos.1 & 2 was installed by the DDCA itself in the hall where the polling had taken place. It was contended by the respondent Nos.1 & 2 that the CCTV footage completely supported the case of the respondent in order to show that holding of the elections was marred by pandemonium where they were deprived to cast their votes along with

votes of proxies and, therefore, the election of respondent Nos.5 to 10 be set aside.

6. The appellant/DDCA, the main contesting defendant, filed its written statement contesting the claim of the respondent Nos.1 & 2 that the elections held on 21.12.2012 were not free and fair. It was also denied that the respondent Nos.1 & 2 had been prevented from casting the proxy votes. It was the stand of the DDCA that the respondent Nos.1 & 2 had not entered into the hall within the stipulated period of time and consequently, they were not be permitted to cast the proxy votes. It also denied the correctness of the CCTV footage. The plea taken was that the Election Officer, Sh. B.L. Garg (respondent No.3) was called upon to file his written statement, who had stated that there was a free and fair election. Similarly, it was stated that the Chief Election Officer, Mr. Justice (Retd.) R.C. Chopra was also called upon by the court to file his report. He had submitted that the elections were held as per schedule except that the time for casting the vote by the proxies was extended by half an hour keeping in view the exigencies of work. It was also stated by the Chief Election Officer that so far as the recording of CCTV footage is

concerned, it was not synchronized with the actual time nor was any CCTV footage authorized to be recorded by the Returning Officer or the Chief Election Officer, therefore, no credence could be placed on the same. The DDCA had also relied upon the written statement filed by the Returning Officer as well as the report of the Chief Election Officer.

7. After hearing the arguments and perusing the CCTV footage, the learned trial court passed a restraint order against the DDCA and respondent Nos.5 to 10 by observing that the respondent Nos.1 & 2 have been able to prove a *prima facie* case to show that elections were not held in free and fair manner inasmuch as CCTV footage showed that they were in the voting arena, there was a chaos as a consequence of which the said respondents were not permitted to cast their 99 proxy votes which they were having with them and this materially impacted the election of respondent Nos.5 to 10. It was also observed by the learned Judge that irreparable loss would be caused to the respondent Nos.1 & 2 if the stay is not granted inasmuch as persons who could not have been elected on account of casting of these 99 proxies have been declared to have been elected. Accordingly, the trial court allowed the application of the

respondent Nos.1 & 2 under Order 39 Rule 1 & 2 CPC and restrained respondent Nos.5 to 10 from discharging any function as members of the Executive Committee/Office Bearers of the DDCA in pursuance to the elections held on 21.12.2012.

8. Feeling aggrieved by the aforesaid order restraining respondent Nos.5 to 10, the DDCA and both of them filed two separate appeals. The appeal filed by the DDCA is bearing F.A.O. No.146/2013 and the other appeal is bearing No.145/2013 filed by affected respondent Nos.5 to 10.

9. Both the appeals were heard together. I have heard Mr. Maninder Singh and Mr. V.P. Singh, the learned senior counsel in appeal Nos.146/2013 and 145/2013 respectively and Mr. N.N. Aggarwal, the learned counsel for the respondent Nos.1 & 2 on the application for stay as well as on the main appeal itself.

10. The first contention of Mr. Maninder Singh, the learned senior counsel was that the restraint order passed by the learned Additional District Judge is unsustainable in the eyes of law as he has failed to consider the written statement filed by the Returning Officer, Sh. B.L.

Garg, respondent No.3, as well as the report which was submitted by the Chief Election Officer, Mr. Justice (Retd.) R.C. Chopra. It has been stated by the learned senior counsel that although the submission in this regard has been noted by the learned Additional District Judge in the impugned order yet the report has not been referred to. It has been further stated that prior to this on 2.2.2013, the learned District Judge himself had called for the report from the Chief Election Officer, Mr. Justice (Retd.) R.C. Chopra. The report and the written statement of the Returning Officer Mr. B.L. Garg was on record which showed that the elections which were held for the 16 posts including the six posts to which the election has been challenged by the respondent Nos.1 & 2 were held in a free and fair manner except that the time for giving proxies was enhanced by half an hour because of the exigencies of polling yet the report has not at all been discussed or considered and the learned Additional District Judge and he has put reliance on the video coverage. It was contended by Mr. Maninder Singh, the learned senior counsel that so far as the CCTV footage is concerned, it could not override the report of the Chief Election Officer. Moreover, there was no proper synchronization of the timings reflected in the CCTV footage or that the

coverage was not permitted to be done by the Chief Election Officer and in the absence of this before putting reliance on the CCTV footage, the respondent has to prove that the CCTV footage is genuine and has not been tampered with before it can be safely relied by the respondent Nos.1 & 2 or the court.

11. The second submission made by the learned senior counsel Mr. Singh is that the respondent has laid a truncated challenge to the elections held on 21.12.2012. In this regard, the contention of Mr. Maninder Singh, learned senior counsel was that admittedly on 21.12.2012 elections to 16 posts which include four posts of Joint Secretaries and two posts of Executive Member to which the respondent Nos.5 to 10 got elected and various other posts of members of Executive Committee were held, out of this only challenge has been laid to six posts. It has been contended that the averments made in the plaint as well as the case of the respondent Nos.1 & 2 was that the entire process of election and the polling held on 21.12.2012 was vitiated on account of unfairness on the part of the Returning Officer as well as Chief Election Officer in conducting the polling inasmuch as there was a pandemonium

in the hall of polling because of which the respondent Nos.1 & 2 were not permitted to cast his proxy votes despite the fact that he was within the area of hall well before the closure time and, therefore, the election itself becomes bad.

12. It was contended by Mr. Maninder Singh that the respondent instead of challenging the election to all the 16 posts has laid the truncated challenge to only six posts which cannot be permitted to be done. In this regard, the learned senior counsel has sought to place reliance on case titled *Rajnish Sharma vs. Sushil Ahuja* judgment passed by Division Bench of this court in F.A.O. (OS) No.260-261/2010 decided on 5.5.2010. It has been further contended by Mr. Singh that this judgment was the subject matter of challenge by way of SLP before the Apex Court which was also dismissed and, therefore, the judgment of the Division Bench had become final to the effect that there cannot be truncated challenge to the election or the election process. It was urged that half of the election could not be challenged; either the entire election held on 21.12.2012 has to be challenged or part of the election could not be challenged.

13. The third submission of Mr. Maninder Singh was that after conducting the election, the Chief Election Officer, Mr. Justice (Retd.) Chopra had filed his report at the instance of the court and he being the master of ceremony had nowhere in his report stated that the election was not free and fair. Under such a contingency, no credence could be placed on the CCTV footage. In any case, it was contended by the learned counsel that at the stage of deciding an application under Order 39 Rule 1 & 2 CPC, the court has to see the *prima facie* case of the respondent Nos.1 & 2. It was contended by Mr. Singh, the learned senior counsel that so far as the *prima facie* case is concerned, the respondent Nos.1 & 2 could not be said to have a *prima facie* good case because admittedly, the respondent Nos.5 to 10 have got elected in a most democratic manner and nothing abnormal has been reported by the Chief Election Officer in a contingency of this nature where a person has got elected democratically, they cannot be restrained by an unelected person from acting in the discharge of his democratic duties. Moreover, it was said that the balance of convenience in such a case is in favour of the person who has got elected or that he will suffer irreparable loss in case he is restrained from

acting and discharging his duties. In this context, it has been contended that in the case of *Kalyan Kumar Gogoi vs. Ashutosh Agnihotri & Another*; JT 2011 (1) SC 249, it has been clearly laid down by the Apex Court that the court should be slow in setting aside the election of a democratically elected candidate and it is only in exceptional cases that too after a trial, when it comes to the conclusion that the candidate or the person or the person who got elected is guilty of unfair practice or corrupt practice or that the election process is vitiated being unfair or unreasonable that such a democratically elected persons ought to be prevented from so acting. Further, in such cases also, the quantum of proof which would be required is much higher than beyond reasonable doubt, therefore, in the absence of such a contingency, in the instant case, no stay ought to have been granted to the plaintiffs.

14. So far as F.A.O. No.145/2013 filed by Ravinder Manchanda and others is concerned, Mr. V.P. Singh, the learned senior counsel has adopted the arguments as advanced by Mr. Maninder Singh, the learned senior counsel. He has further supplemented the submissions by contending that the relief which has been claimed by the respondent

Nos.1 & 2 in the application under Order 39 Rule 1 & 2 CPC is the same which is contained in the main suit and it is a settled legal proposition that in case the interim relief and the final relief which is claimed by a party happen to be the same, the court should be slow in granting the interim relief to such a party. It was contended that the grant of interim relief to such a party would tantamount to decreeing the suit itself. Accordingly, it was stated that this would be an additional ground for denying the respondent Nos.1 & 2 from getting any ad interim relief in their favour.

15. Mr. Aggarwal, the learned counsel for the respondent Nos.1 & 2 has vehemently opposed the submissions made by the learned senior counsel for the appellants. He has tried to justify the order which has been passed by the learned trial court restraining the defendant Nos.4 to 9 as acting Office Bearers of the DDCA. It has been contended by him that the election admittedly in the instant case has been covered in the CCTV footage as not being fair and impartial. In this regard, it was stated by him that it was not necessary for him to challenge the election of all the 16 persons if he was able to show and get his relief dissected by confining it to only that relief where the absence of counting of these 99 proxies

which the appellant had produced would have resulted in material alteration in the result. It was the case of the respondents that had he been permitted to cast these 99 votes then there would have been a material change in the election results so far as respondent Nos.5 to 10 are concerned.

16. The first submission made by Mr. Aggarwal was that the DDCA is a company registered under Companies Act and, therefore, the principles of law laid down in election cases pertaining to Peoples' Representation Act would not be applicable. In this regard, it was also contended that the election of the respondent Nos.5 to 10 in the instant case is to be seen like an election to the post of a director which if is illegal and against the rules, the court would be justified in granting the interim injunction restraining the elected candidate from acting as such a director.

17. In this regard, the learned counsel for the respondent had referred to *Berar Trading Company Ltd. vs. Gajanan Gopalrao Dixit*; (1972) 42 Comp Cas 48 (Bom) and *Jaideep Halwasiya vs. Rasoi Ltd.*; (2009) 2 Calt. 449 (HC) (DB). I have gone through both the judgments. There is no dispute about the proposition of law laid down in both cases. In *Berar*

Trading Company's case (*supra*), the court has observed that if there is *prima facie* case that the election of the other person was against the legal rules and the statutory provisions, he has a right to complain. This right is, therefore, threatened and laid down because of the conduct of the proceedings in the Annual General Meeting then individual shareholder can seek observance of law. There is no dispute about the justiciability of the right of an aggrieved person of a director in the Annual General Meeting. But in the instant case, the position of holding elections to the governing counsel of the DDCA is slightly different than the election to the post of a director in the Annual General Meeting. In the case of DDCA, there is a rotational election to the various posts and the principles of election law though may be laid down under the Peoples' Representation Act but the broad principles are equally applicable to the elections held to the post of a governing council both under the Companies Act as well as under the Cooperative Societies Act. This principles, in my opinion, would be that the election should be free and fair, that the persons who are democratically elected, should be permitted to function till the time their elections are either *prima facie* shown to be grossly illegal or after a regular trial set aside. Therefore, the two

authorities which have been relied upon by Mr. Aggarwal are of not much help to the respondent.

18. One of the argument which was advanced by the learned counsel for the appellant was that the interim relief of injunction should not be granted in a case a person is elected even though alleged illegally as the same tantamounts to grant of final relief. In this regard, the learned counsel for the respondent contended that if it is *prima facie* shown that a person has been illegally elected then the court should not shy away from granting an interim relief. In this regard, the learned counsel has placed reliance on *Shaktisinh Gohil vs. Gurusevak Singh & Ors.*; (2010) 51 GLR 529. I have gone through the judgment cited by the learned counsel for the respondent. There is no abstract proposition of law laid down in any judgment that in case the interim relief which is claimed by a party happens to be the final relief also, the interim relief need not be given. The judgments are only that in case both the reliefs happen to be the same, the court should be loath to grant the interim relief as it tantamounts to granting of final relief. In a case of an election of a person, the grant of interim relief against the person who has been elected

democratically unless and until a gross illegality or violation of any statutory rule is shown, which will go to the root of the matter, I feel, the person so elected should not be restrained from acting from the post to which he has been elected.

19. In the present case also, the respondent Nos.5 to 10 have been elected to the various posts of the governing council of the DDCA. There is no allegation of corrupt practice or violation of any statutory rule or any fault attributed to the elected candidates. The only allegation which is made by the respondent is that elections were not free and fair inasmuch as he was not permitted to cast his 99 proxy votes which if taken into consideration would have changed the outcome of the elections. The question of being permitted or not to be permitted to cast these 99 votes is yet to be decided by the court which can be done only when the parties are permitted to adduce their respective evidence. At the stage of deciding an application under Order 39 Rule 1 & 2 CPC, the court could not have placed its reliance on the video coverage for which there was no permission to record or which was not synchronized so far as the timings recorded in the video footage is concerned or where it has

not been established by any credible evidence that there has been no tampering with the video coverage. The learned trial court ought not to have placed complete reliance on the same without taking into account the written statement of the Returning Officer and the report of Chief Election Officer and restrained respondent Nos.5 to 10. The learned trial court ought to have permitted the trial to take place and taken evidence of both the sides and then decided the issue as to whether the video coverage is more credible. Therefore, I feel, in the instant case, the learned trial judge has acted in a haste to reach to the *prima facie* conclusion regarding acceptability and the credibility of the video coverage. Without reference to the written statement of the Returning Officer, respondent No.3 and Chief Election Officer Mr. Justice R.C. Chopra, a retired judge of the High Court of Delhi who had given a report stating that the elections were free and fair and the petitioner was not denied to cast his 99 proxy votes as he was not within the polling arena before the closure time of 1.30 p.m. Accordingly, this contention of the learned counsel for the respondent also does not have any merit. The learned counsel Mr. Aggarwal relied upon the judgments passed in *Iris Park Leisures Pvt. Ltd. vs. State of Delhi & Others*; 2012 (1) JCC 317, *Aman Gaur vs. State*;

2012 (188) DLT 216 and *Ramlila Maidan Incident vs. Home Secretary, Union of India & Others*; 2012 (5) SCC 1 which were in a different factual background. In all these cases, there is no challenge to the election of a person and more importantly the averments made in the written statement of the Returning Officer and the report of the Chief Election Officer, denies the allegation made by the respondent/plaintiff at the stage of which the election is sought to be cancelled.

20. Mr. Aggarwal, the learned counsel next with regard to the submission of truncated challenge to the elections contended that the respondent Nos.1 and 2, who were the plaintiffs, were the *dominus litus* and, therefore, they had a free hand in couching their relief clause in a manner in which liked. It was contended that they had the full liberty to make any person as a party. Moreover, it was stated that the case of respondent Nos.1 & 2 was that though the respondent No.1 was not permitted to cast 99 proxy votes but non-casting of these 99 proxy votes had impacted only the election of six office bearers, who were made as respondents and, therefore, it was not necessary or incumbent on the respondent Nos.1 & 2 to have challenged the election of all the 16 posts

which were held on 21.12.2012. Reliance in this regard was placed on case titled *Lakshmi Ram vs. Hari Prasad*; (2003) 1 SCC 197 and *Kandasami Kandar vs. Subramania Goundar & Others*; 5 ELR 156.

21. I have gone through the judgment cited by the learned counsel for the respondent. I do not agree with the contention of the learned counsel for the respondent that under the garb to the respondents being *dominus litus*, the said respondents as plaintiffs could complain about the unfair and illegality in the entire polling held on 21.12.2012 and yet not challenge the entire process of election but only election of persons to the limited posts. In other words, once the respondent Nos.1 & 2 are complaining that there was gross illegality or irregularity in the entire process of holding elections by not permitting respondent Nos.1 & 2 to cast proxy votes or by not adhering to the time schedule fixed according to the election notice, the entire election process was vitiated but keeping in view the fact that the respondent No.1 had 99 proxy votes which if casted, that would have changed the election of only six persons. Such a proposition or in other words in *Saroj Bala's* case, truncated challenge to the election cannot be permitted to be done. No doubt in *Saroj Bala's*

case, this was a loud though expressed by the learned judge of this court while dealing with the challenge to the election to a particular office but this view has found approval by the Supreme Court as SLP against the Division Bench's order was also dismissed. There seems to be strong logic and reasons to this view. If the entire election process is fraught with illegalities and irregularities then the election of all the persons who have got elected in such a polling have to be necessarily challenged and set aside and it will not be open, in my view, for the appellant to challenge only half of the election of some of the posts. If this is permitted to be done, it would lead to a very absurd result. I feel that this aspect of the matter has not at all been considered by the trial court. I have been informed that the very maintainability of the suit filed by the respondent Nos.1 & 2 was assailed on the ground of truncated challenge and though the trial court has taken note of this submission but it has failed to dwell on the same and decide the issue. I feel that this issue was going to the root of the matter itself, ought to have been considered by the trial court before deciding the application under Order 39 Rule 1 & 2 CPC. I do not agree with the proposition sought to be canvassed before

this court that respondent Nos.1 & 2 being *dominus litus* were permitted to be given free not to challenge only a part of the election.

22. The next argument which was advanced by Mr. Aggarwal was that the appellate court cannot substitute its decision or the decision of the trial court which was reasonably possible and material. The contention of the learned counsel Mr. Aggarwal in this regard is that once the trial court has arrived at a finding that there is an irregularity in the holding of elections on the basis of the evidence which has been produced before it which is reflected in the CCTV coverage, the present appellate court ought not to upset that finding by substituting its own opinion.

23. I do not agree with this submission of Mr. Aggarwal. I have already dealt with flawed reasoning of the trial court in putting reliance on the CCTV footage. Therefore, if the CCTV footage could not have been taken to be a gospel truth at that stage it could not be said that respondents had *prima facie* case. *De hors* this, the appellate court's job is to reassess the entire *prima facie* evidence in the case of an application under Order 39 Rule 1 & 2 CPC and arrive at an independent conclusion and then see as to whether the conclusion which has been arrived at by

the learned trial court was reasonable and fair in the light of the evidence adduced by the parties. In this regard, the learned trial court has placed reliance on the CCTV footage. I have already observed hereinbefore that this is a case where the Returning Officer has been impleaded as respondent No.3, who has filed his written statement and contested the correctness of the CCTV footage. Similarly, report was called for from the Chief Election Officer twice by the learned trial judge who had also given his report. The Chief Election Officer happen to be a retired judge of this court who had given a report that the timings were adhered to except that it was extended to half an hour and that the elections were free and fair. It was also observed that the learned trial court without referring to these reports has given a precedence to the CCTV footage which, in my view, was totally erroneous as neither the CCTV footage was ordered to be recorded by the Returning Officer or by the Chief Election Officer nor was there any *prima facie* evidence that the timings in the footage were synchronized or that there was no tampering with the CCTV footage. Therefore, in the absence of *prima facie* evidence on all these parameters, it was totally improper on the part of the trial court to have discarded the report of the retired judge of the High Court and given

precedence to the CCTV footage. I, therefore, feel that the view taken by the learned trial court was not only erroneous but was totally improper or rather unsustainable in law. I, accordingly, discard this submission made by the learned trial court.

24. I fully agree with the contention of Mr. Aggarwal that there is no abstract proposition of law that if both the relief are same; the interim relief cannot be or ought not to be given in a situation. But these circumstances in which such interim relief has to be granted, has to be very rare and fair and more so when the plaintiff, namely, the respondent herein is able to establish by preponderance of probabilities at the *prima facie* stage itself that it has got all the three requisites, namely, *prima facie* a good case, balance of convenience in its favour and that it shall suffer an irreparable loss.

25. In the impugned order, there has been absolutely no discussion with regard to these aspects of the matter. The learned Judge does not seem to be cognizant or shown himself to be aware of this disability being suffered by the respondent Nos.1 & 2 that it was claiming the interim relief which was the same relief in the main suit and by passing

an interim relief in favour of the respondent, he has practically decreed the suit. The trial court has observed that if there is an irregularity or illegality in the election, interim injunction can be granted. On the application of a party who claims that it was not allowed to cast votes in a fair and reasonable manner or if legal rights of the plaintiff are infringed, then such an interim relief can be granted and the trial court has gone on to rely on CCTV footage for the purpose of justifying the grant of interim relief to the respondent Nos.1 & 2. It has assumed the credibility and the correctness of the CCTV footage with regard to the recording of process of election on 21.12.2012 and assumed that this is an authentic proof of the same, without adverting to either the written statement of defendant No.2, the Returning Officer or even to the report of the Chief Election Officer, who happen to be the retired Judge of our own High Court. Curiously, it was pointed out to this court that it was the learned Judge himself who had on two occasions called for the report of the Chief Election Officer and taken note of this report having been filed which was totally contrary to what was sought to be projected by the CCTV footage, yet the learned trial judge did not consider it necessary to advert to either

to the report of the retired High Court Judge, the Chief Election Officer or even to the written statement.

26. It may be pertinent here to reproduce the averments made in the written statement of the Returning Officer, defendant No.2, to the suit wherein it has been observed as under :-

“In this regard, it is submitted that the plaintiff no.1 had never approached the answering defendant and the Chief Election Officer before the closing of the doors of the polling room at 1.35 pm nor made any request to issue him a ballot paper to enable him to cast proxy votes before 1.35 pm. It is further submitted that after the election was over, the answering defendant and the Chief Election Officer had left the polling room for It is further submitted that all the voters who were present inside the polling room had cast their votes without any hindrance.”

27. Similarly, the Chief Election Officer has categorically observed that as per polling schedule, personal votes were started at 10 am and continued upto 12 pm. Since there was a 15-20 minutes spill over or so after 12 pm on the date of polling, accordingly, the proxy votes commenced at 12 pm as scheduled but the persons who had come to cast votes as proxies, started receiving their ballots which were being issued

by the staff after computing the proxies available with them. The calculation of proxies was taking time and accordingly, at 12:45 pm, it was realized that all those who had come to vote as proxies, may not get ballot paper by 1 pm because of the calculation of proxy votes, the staff was also consuming little time granted in consultation with the Returning Officer, the proxy votes were permitted to cast vote till 1.30 pm. It was also stated in the report of the Chief Election Officer that one or two voters entered into the voting area at about 1.40 pm and started insisting that they should also be allotted ballot paper but some persons started opposing them on the ground that they have come in the polling arena after 1.30 pm and, therefore, they could not vote. The Chief Election Officer had also observed in his report that he has not been able to watch CCTV footage or video but he confirmed the timings from his memory as the timings which were revealed by him in his report. He could also not certify with regard to the correctness of the CCTV footage.

28. In the light of these two contradictory versions, the one which is reflected in the CCTV footage and the other which is given by the Chief Election Officer, who happens to be a retired judge of this court and the

Returning Officer, who is also a former Additional District & Sessions Judge, the question which arises for consideration is whether the CCTV footage could have been given precedence over his report and the written statement having been furnished by the Returning Officer.

29. In my considered opinion, obviously this could not have been done. The report of the Chief Election Officer, who has been a retired judge of this court and a man of repute and integrity, his report could not have been brushed aside much less not adverted to by the learned Additional District Judge. The learned trial court straight away relied on the CCTV footage. The learned Additional District Judge seems to have fallen into a serious error by simply assuming the correctness of the recording in the CCTV footage more so with regard to the timings. The time in the CCTV footage was not at all synchronized by the Chief Election Officer or the Returning Officer nor was there any order passed by any of the competent authority or the court that the entire process of election will be video recorded, therefore, in the absence of such a direction, the CCTV footage, even though it is purported to be recorded in the cameras of the appellant, cannot be taken to be as a gospel truth

unless and until the veracity of this CCTV footage is proved during the course of trial by producing evidence in this regard, both with regard to the contents as well as with regard to the timings. In other words, it has to be proved by preponderance of probabilities by the respondents that the recording in the CCTV footage has not been tampered with and only then it could have been made as a basis of reliance by the learned Additional District Judge to assume that there was illegality or irregularity or unfairness in the process of election in not permitting the respondent to have cast 99 proxy votes in favour of the candidate. I, therefore, feel that on both these scores, firstly, non-adverting of the report of the Chief Election Officer or the averments made in the written statement or even without permitting the parties to adduce evidence with regard to the correctness of the CCTV footage, the learned Judge could not have placed reliance on the same and assumed that the respondent was able to establish a *prima facie* case of having been dealt with unreasonably so as to deprive him of casting 99 votes.

30. The next submission which is made by the learned senior counsel Mr. Singh was that the Apex Court in case titled *Kalyan Chandras's* case

has categorically observed that in an election matter, the person who has got elected democratically must be permitted to exercise his rights and duties in terms of the democratic process and he can be restrained only when the respondent is able to establish not by preponderance of probabilities but beyond reasonable doubt that there has been some illegality or irregularity which will vitiate the entire election process meaning thereby, the quantum of proof which is required to desist or pass a restraint order against an individual who has got elected in a democratically held election, must be of such a high standard that even such a proof is required normally in a criminal trial and not in a civil case. In the instant case, the learned Additional District Judge seems to have on a very meager alleged preponderance of probabilities that the election has been conducted unfairly, tried to stop the respondent Nos.5 to 10 from exercising their rights and duties in pursuance to the democratically held elections.

31. One of the arguments which was urged by Mr. Aggarwal, the learned counsel for the respondent Nos.1 and 2 was that the learned counsel has sought to place reliance on judgments where the elections to

the posts or offices is governed by Representation of People Act, 1950. It was contended that proposition of law laid down in such cases where Peoples' Representation Act cannot be applied to the elections held under the Companies Act or to the bodies whose elections are governed by the Co-operative Societies Act. Reliance in this regard was placed on *A. S. Gahlout Vs. Lt. Governor of Delhi & Ors.*; 1994 ILR 2 Delhi 1 and *Mehsana District Co-operative Purchase and Sales Union Ltd. Vs. Dhadhusan Beej Utpadak, Rupantar Ane Vechan Karnari Sahkari Mandali Ltd. & Others*; (1998) 2 GLR 1479 (DB).

32. I have carefully gone through the judgments relied upon by the learned counsel. There is no doubt that both these judgments lay down that the propositions of law laid down in a case governed by the Peoples' Representation Act may not be applicable to the elections held which are governed by the Co-operative Societies Act. But this is not an absolute proposition of law. The question which is to be considered is that the principles of law which are laid down for governing of a free and fair elections would be equally applicable to the elections held under any law or auspices. Board theme of all elections is that the will of people or the

electorate must be reflected in a free and fair manner in a level playing field and for this purpose the Chief Election Officer or the Returning Officer who was entrusted with such onerous duties and are considered to fair reasonable impartial can take the decisions to attain that larger goal.

33. In view of the aforesaid discussion, I feel that the order passed by the learned Additional District Judge on the application under Order 39 Rule 1 & 2 CPC against the appellants in both the cases and respondent Nos.5 to 10 in appeal No.146/2013 and in favour of respondent Nos.1 & 2 is not sustainable because of the reasons given below :-

- 1) The relief which has been claimed by the appellant in the application under Order 39 Rule 1 & 2 CPC happens to be the same relief which was claimed in the main petition and the learned trial court does not seem to be cognizant of the fact that while granting the interim relief to the respondent Nos.1 & 2, it has kept in view that it is practically decreeing the suit of the respondent Nos.1 & 2 and that too without permitting the parties to adduce evidence.
- 2) The respondent Nos.1 & 2 have laid a challenge to the very process of holding election on 21.12.2012 to the 16 posts by pointing out

allegedly various irregularities or illegalities at the time of polling yet it has prayed for striking of or setting aside the election of only six respondents, namely, respondent Nos.5 to 10 and thus led a truncated challenge which cannot be permitted to be done.

- 3) The plea of the respondent Nos.1 & 2 that the said respondents are *dominus litus* and, therefore, it was open to them to show that the non-casting of 99 proxy votes by the respondent No.1 would have tilted the election result of only respondent Nos.5 to 10 was neither a correct proposition of fact or a proposition of law.
- 4) The Apex Court has laid down that there cannot be truncated challenge and the trial court ought to have decided the issue of maintainability of the suit on this score as it goes to the root of the matter. The election of a person should not be interfered with when it has taken place according to the democratic traditions and more so when there is no fault attributable to the candidate himself. Further, it was not open to the respondent to contend that the whole election process was fraud and yet say that the casting of these 99 votes would have impacted only the election results of six of the

candidates as this is a contradiction in itself. It could hardly be said or visualized by the court in whose favour the votes would be cast.

- 5) The Supreme Court in *Kalyan Chandra's* case (*supra*) has laid down that while setting aside the election of a democratically elected candidate, the quantum of proof which is required to be established is beyond reasonable doubt, that is, certainly as high as in a criminal case if not higher but certainly more than preponderance of probabilities while as in the instant case while deciding the validity of the election of the respondent Nos.5 to 10, the learned trial court has on the basis of allegations and video recording only taken a *prima facie* view and restrained a democratically elected persons and thus, substituted the modus of proof to the surmises and conjectures which is yet to be established by any credible positive evidence.
- 6) The learned trial judge has grossly erred by ignoring the written statement filed by the Returning Officer as well as the report of the Chief Election Officer, who is a retired judge of the Delhi High Court and putting unflinching reliance on the video coverage purported to have been recorded in the polling hall on the date of polling without permitting the parties to adduce evidence to establish

regarding the authenticity of the recording and the timings so recorded in the video coverage. Further, the video coverage was not at all directed to be recorded by the Returning Officer or the Chief Election Officer and thereby, the learned trial court has substituted the oral ocular evidence by a video coverage without seeing and discussing the comparative merits and demerits of the evidence although it has taken note of the submissions made by the learned counsel for the appellants.

34. Accordingly, for the reasons mentioned above, I feel that the order passed by the learned trial court is not sustainable in the eyes of law and the same is set aside. Both the appeals are allowed. The matter is directed to be decided by the trial court on merits, after permitting the parties to adduce evidence with regard to the merits of the case. It may also be pertinent here to mention that expression of any opinion hereinbefore shall not be deemed to be an expression on the merits of the case and the learned trial court shall proceed further in the matter without being influenced by any of the observations passed hereinbefore.

35. The parties are directed to appear before the learned trial court on 30th July, 2013.

MAY 31, 2013
‘AA’

V.K. SHALI, J.