

THE HON'BLE THE CHIEF JUSTICE SRI KALYAN JYOTI SENGUPTA

AND

THE HON'BLE SRI JUSTICE SANJAY KUMAR

WRIT PETITION Nos.14303, 14305 & 24287 of 2014

Dated:16.02.2015

In W.P.No.14303 of 2014:

B. Harshavardhan Reddy ...

Petitioner

Vs.

1. Election Commission of India, rep. by its Secretary,

Nirvachan Sadan, Ashoka Road, New Delhi-110001,

and two others.

Respondents

In W.P.No.14305 of 2014:

Janga Vinod Kumar Reddy ...

Petitioner

Vs.

1. Election Commission of India, rep. by its Secretary,

Nirvachan Sadan, Ashoka Road, New Delhi-110001,

and two others.

Respondents

In W.P.No.24287 of 2014:

Yuvajana Sramika Rythu Congress Party,

Road No.35, Jubilee Hills, Hyderabad. ...

Petitioner

Vs.

1. Election Commission of India, rep. by its Secretary,

Nirvachan Sadan, Ashoka Road, New Delhi-110001,

and another.

Respondents

THE HON'BLE THE CHIEF JUSTICE SRI KALYAN JYOTI SENGUPTA
AND
THE HON'BLE SRI JUSTICE SANJAY KUMAR

-
WRIT PETITION Nos.14303, 14305 & 24287 of 2014
-

COMMON ORDER: (Per the Hon'ble The Chief Justice Sri Kalyan Jyoti Sengupta)

In terms of the order dated 25.9.2014 all the aforesaid three matters were heard analogously since the core issue involved therein is almost identically same.

2. The first writ petition (W.P.No.14303 of 2014) was filed on 29.4.2014 to challenge the decision of the 1st respondent – Election Commission of India, dated 26.4.2014. The above mentioned second writ petition (W.P.No.14305 of 2014) was filed on 29.4.2014 to challenge the stand taken by 1st respondent in the letter dated 28.4.2014. Thereafter third writ petition (W.P. No. 24287 of 2014) was filed on 21.8.2014 seeking direction upon the 1st respondent to conduct by-election of Allagadda Assembly Constituency No.253 of Allagadda, Kurnool District in the State of Andhra Pradesh as the seat of the aforesaid Assembly Constituency has not been filled up and lying vacant.

3. The facts in all the writ petitions are summarized hereunder:

The 1st respondent announced election for all the seats of the Legislative Assembly of the then State of Andhra Pradesh scheduling 19.4.2014 for receiving nominations from the candidates seeking to contest election; 21.04.2014 for scrutiny of nominations; and 23.4.2014 as the last date of withdrawal of nominations. One Smt. Bhuma Shoba Nagi Reddy since deceased (hereinafter referred to as 'deceased') filed her nomination being fielded by Yuvajana Sramika Rythu Congress Party

(hereinafter referred to as 'YSR Congress Party'), an unrecognized political party registered with the 1st respondent to contest election in Allagadda Assembly segment. However, the said deceased died in a road accident on 24.04.2014 at about 11.00 a.m. without withdrawing her nomination on or before 23rd April, 2014. Since YSR Congress Party is unrecognized registered political party, election cannot be adjourned under the present provisions of Section 52 of the Representation of the People Act, 1951 (hereinafter referred to as 'the said Act') on account of death as above. At the same time, election ought not to have been allowed to be held with the dead candidate and the name of the deceased should have been deleted from the list of contesting parties as from the date of death and to that of poll there was a clear gap of 14 days.

4. The object of Election Law in Indian Democracy is to choose the living candidate, not the dead one. Therefore, the direction given by the 1st respondent in Communication dated 26.4.2014 to proceed with the election process with the name of dead candidate in the list of contesting candidates in Form-7A is unconstitutional, illegal and contrary to the provisions of the said Act.

5. As per the aforesaid time schedule, election was duly held and the votes were received basing on the list of contesting candidates as per the decision of the 1st respondent as stated hereinabove. On counting of votes, it was found that the said deceased was declared elected.

6. Now in the second writ petition (W.P.No.14305 of 2014) it has been alleged amongst others that the declaration of result of the election taking into account of the votes polled in favour of the deceased candidate is wholly illegal as votes polled in the name of the dead candidate cannot be said to be valid ones, therefore decision of 1st

respondent to that effect under Rule 64 of the Conduct of Election Rules, 1961 (hereinafter referred to as 'the said Rules') is undemocratic and encouraging the voters to vote for a deceased candidate. As the elected candidate was found to be dead, the said Assembly seat could not be filled up, consequently declared to be vacant one, decision taken by letter dated 28.4.2014 by the 1st respondent to hold by-election does not find support of law. It was therefore urged that votes received by the deceased should be declared invalid and be rejected, votes received by the living candidates be counted and result accordingly be declared. In spite of such decision, no by-election was held and as such the third writ petition (W.P.No.24287 of 2014) was filed for the direction of holding by-election.

7. Counter-affidavits have been filed by the respondents taking common stand that at the time of filing nomination of the deceased candidate was found to be valid and it was accepted upon scrutiny. Since this nomination was not withdrawn on the last date, it had to be accepted and published under law. On intimation of death thereafter, law does not enable the respondent to delete the name of deceased candidate from ballot paper or from Electronic Voting Machine. On the contrary, on reading legal provision it would be plain that ballot paper and EVM with the name of the deceased candidate has to be maintained after publication under Section 38 of the Act for casting votes. If any deletion is made on any ground thereafter, in absence of legal provision as such, it will lead to encouragement of rampant manipulation. Indisputably, the deceased candidate was fielded by registered, but unrecognized, political party, so the question of postponing election under Section 52 of the Act did not and could not arise. Once the election is held and votes are allowed to be cast, declaration of result is automatic legal process. It is the choice of the electors how and to whom they will cast their votes. The Act and the Rules framed thereunder provides for procedure for

scrutiny for declaring the invalid and valid votes. Observing all the laws, it was found that the deceased candidate secured highest number of votes as such she was declared elected. Since she could not be found for filling up the seat despite being elected the said seat has to be declared as casually vacant, as such by-election under Sections 150 & 151 of the said Act is inevitable course of action. In the counter, it is also stated that in view of Article 329 of the Constitution of India first two writ petitions are not maintainable as they involve election disputes, a separate and special tribunal has to be approached for resolution thereof. The first two writ petitions are liable to be dismissed.

8. Sri M.S. Prasad, the learned Senior counsel for the petitioner in one of the writ petitions contends that —

- (a) The Constitution of India particularly Article 173 does not permit the election of dead person as M.L.A.
- (b) Section 5 of the Representation of the People Act, 1951, Rule 2 (d) and Rule 64 read with Rule 66 of Conduct of Election Rules, 1961 if read harmoniously and purposively, will not permit a candidate who died much before the polling be declared elected as a returned candidate/elected candidate.
- (c) The prohibition under Article 329 for entertaining writ petition under Article 226 is not absolute and the issues raised in this writ petition can be adjudicated by this Hon'ble Court under Article 226 of the Constitution of India and it does not question election, rather decision for holding fresh election is questioned.
- (d) As a matter of fact, the 2nd respondent has announced on 24th and 25th of April, 2014 that if votes are polled in favour of dead person the same are invalid. This averment has not been denied by the 2nd respondent Authority or by any person.
- (e) The 1st respondent failed to produce record to show who passed the impugned order and what was the basis for the same and

also failed to produce the letter alleged to have been written by one Mr. Krishna Mohan Reddy which was the basis for the impugned order. This conduct throws doubt on the *bona fides* of 1st respondent and/or on the Principal Secretary who issued the impugned order without jurisdiction.

- (f) A survey of all the judgments of this Hon'ble Court, other Hon'ble High Courts and the Hon'ble Supreme Court has shown that no Court has so far ever held that a dead person can be declared elected when such person died long before the actual polling day and/or the votes polled in favour of dead person can be treated as valid ones in terms of Representation of the People Act, 1951 and Conduct of Election Rules, 1961 and under the provisions of Constitution of India.

9. In support of his submissions, he placed reliance on the following judgments:

- (i) *A.V. Venkateswaran Vs. R.S. Wadhvani* - AIR 1961 SC 1506
- (ii) *Hassan Uzzaman Vs. Union of India* - (1982) 2 SCC 218
- (iii) *Madan Gopal Vs. Nek Ram Sharma* - 25 ELR 61 (DB) (All)
- (iv) *K. Venkatachalam Vs. A. Swamickan* - (1999) 4 SCC 526

10. The learned counsel for the respondent Nos. 1 & 2 contends that writ petition is not maintainable as the same relates to election and it is barred under Article 329 of the Constitution of India. He, on the other hand, submits that after finalization and publication of list of the contesting candidates under the law, names chosen have to be placed in the ballot paper or electronic voting machine. Hence, writ petition is liable to be dismissed.

11. After hearing the learned counsel for the parties and taking note of the fact, issues required to be decided in these matters are as follows:

- (i) Whether on the facts and circumstances of the case on receipt of intimation of death of one of contesting candidate, his/her name should have been deleted from the list of contesting parties after publication thereof under Section 38 of the Act?
- (ii) Whether the votes polled in favour of the deceased candidate should be declared invalid and consequently the results should be re-declared taking into consideration the votes polled in favour of living contesting candidates?

12. Before deciding the aforesaid issues, it is incumbent on us to decide the preliminary objection raised by the respondents namely 'maintainability of the writ petition'.

13. With regard to maintainability, it is to be examined looking at the prayers, attendant fact pleaded and that of subsequent development provision of Article 329 operates as bar or not. We appropriately set out Article 329 of the Constitution of India.

“329. Bar to interference by courts in electoral matters.

—Notwithstanding anything in this Constitution—

(a) the validity of any law relating to the delimitation of constituencies, or the allotment of seats to such constituencies, made or purporting to be made under article 327 or article 328, shall not be called in any question in any court,

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.”

14. According to us, on plain reading of this Article in its present form brought about by amendment of Constitution (39th Amendment) Act, 1975, it takes away power of all Courts including this Court in respect of subjects mentioned in clause (a) herein above. In other words, subjects mentioned therein are not justiciable at all. Of course, we are not

expressing any opinion whether amendment of this portion hits the basic structure of the Constitution with regard to power of High Court under Article 226 and 227 of the Constitution, since it is not issue here. It may be or may not enjoy total immunity from justiciability like Articles 122, 212 of the Constitution of India. This possible debate is left open for future. However subject mentioned in clause (b) of the said Article has been made justiciable before Special Court.

15. Keeping in view of the above discussion, we now examine this matter. Looking at prayers of the two writ petition (W.P.Nos.14303 & 14305 of 2014) it does not appear that the election was called in question at that time nor subject thereof touches any subject mentioned in clause (b). At that time, the decision of declaring dead person being elected was not challenged simply it could not be done so. Therefore the issue raised in both the writ petitions as it stand on the date of filing could not be said to be unamenable to the writ jurisdiction, as these issues are not required to be adjudicated by the special forum as provided in the Article 329 clause (b) read with Section 80 of the Representation of the People Act, 1951. However, the issue raised at the time of arguments and also vaguely stated in the second writ petition (W.P.No.14305 of 2014) that the votes polled in favour of the deceased candidate should be declared to be invalid and the votes polled in favour of the remaining candidates should be counted and results should be declared are concerned, the same do not relate to any challenge to the election in real sense. Rather both the writ petitioners seek for conducting election in accordance with the provision of the said Act by reason of the fact that at that time election was not held, it was really asked for as measure in the event election is held with deceased as contesting candidate. Writ Petition is non-maintainable, in the event reliefs sought for touching the subjects as mentioned in the Article 329 of the Constitution of India. In any event jurisdiction of the Writ Court is not

absolutely alien to even election dispute in certain situation as it will appear from decision of the Supreme Court in case of **K.**

Venkatachalam Vs. A. Swamickan^[1]. The Apex Court after discussing all the earlier decisions of the same Court on the question of maintainability of writ petition under Article 226 of the Constitution of India vis-à-vis Article 329(b) thereof concluded as statement of law in paragraph 27 amongst other as follows:

“... Various decisions of this Court, which have been referred to by the appellant that jurisdiction of the High Court under Article 226 is barred challenging the election of a returned candidate and which we have noted above, do not appear to apply to the case of the appellant now before us. Article 226 of the Constitution is couched in the widest possible terms and unless there is a clear bar to jurisdiction of the High Court its powers under Article 226 of the Constitution can be exercised when there is any act which is against any provision of law or violative of constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. In circumstances like the present one the bar of Article 329(b) will not come into play when the case falls under Articles 191 and 193 and the whole of the election process is over. Consider the case where the person elected is not a citizen of India. Would the court allow a foreign citizen to sit and vote in the Legislative Assembly and not exercise jurisdiction under Article 226 of the Constitution?

16. Hence, we are of the view that the first writ petition (W.P.No.14303 of 2014) and the second one (W.P. No.14305 of 2014) should not be non-suited at present. Moreover, taking note of subsequent event that election of deceased candidate does not survive by reason of decision of fresh election, therefore questioning election as interdicted by Article 329 (b) of Constitution of India does not and cannot arise. If second writ petition is dismissed, the writ petitioner would be remediless because of limitation prescribed for presentation of election petition under statute. As far as the third writ petition (W.P.No.24287 of 2014) is concerned, it did not question the election nor tend to obstruct interfere with the election process rather expedite the same. Therefore, the legal bar as mentioned in Article 329 in this case is not applicable.

17. Now, the question is whether the name of the deceased should have been deleted from the list of contesting candidates of ballot paper.

18. In the case on hand, indisputably on account of death of the aforesaid deceased, election could not be postponed, although before insertion of the present Section 52 of the said Act, in such a situation election could be countermanded as the deceased belonged to unrecognized political party. In this case, nomination paper of the deceased was accepted upon scrutiny and then finalized since it was not withdrawn.

19. In this connection, the learned counsel for the 1st respondent has rightly drawn our attention to the provisions of Sections 36, 37 & 38 of the Representation of the People Act, 1951. The same are set out hereunder for the sake of convenience.

36. Scrutiny of nominations:-

(1) On the date fixed for the scrutiny of nominations under section 30, the candidates, their election agents, one proposer of each candidate, and one other person duly authorized in writing by each candidate but no other person, may attend at such time and place as the returning officer may appoint; and the returning officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in section 33.

(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:-

(a) that on the date fixed for the scrutiny of nominations the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely:-
Articles 84, 102, 173 and 191,
Part II of this Act, and sections 4 and 14 of the Government of Union Territories Act, 1963 (20 of 1963);
or

(b) that there has been a failure to comply with any of

the provisions of section 33 or section 34; or

(c) that the signature of the candidate or the proposer on the nomination paper is not genuine.

(3) Nothing contained in clause (b) or clause (c) of sub-section (2) shall be deemed to authorize the rejection of the nomination of any candidate on the ground of any irregularity in respect of a nomination paper, if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularity has been committed.

(4) The returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character.

(5) The returning officer shall hold the scrutiny on the date appointed in this behalf under clause (b) of section 30 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or open violence or by causes beyond his control:

Provided that in case an objection is raised by the returning officer or is made by any other person the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

(6) The returning officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is rejected shall record in writing a brief statement of his reasons for such rejection.

(7) For the purposes of this section, a certified copy of an entry in the electoral roll for the time being in force of a constituency shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency, unless it is proved that he is subject to a disqualification mentioned in section 16 of the Representation of the People Act, 1950 (43 of 1950).

(8) Immediately after all the nomination papers have been scrutinized and decisions accepting or rejecting the same have been recorded, the returning officer shall prepare a list of validly nominated candidates, that is to say, candidates whose nominations have been found valid, and affix it to his notice board.

37. Withdrawal of candidature:-

(1) Any candidate may withdraw his candidature by a notice in writing which shall contain such particulars as may be prescribed and shall be subscribed by him and delivered before three O'clock in the afternoon on the day fixed under clause (c) of section 30 to the returning officer either by such candidate in person or by his proposer, or election agent who has been authorized in this behalf in writing by such candidate.

(2) No person who has given a notice of withdrawal of his candidature under sub-section (1) shall be allowed to

cancel the notice.

(3) The returning officer shall, on being satisfied as to the genuineness of a notice or withdrawal and the identity of the person delivering it under sub-section (1), cause the notice to be affixed in some conspicuous place in his office.

38. Publication of list of contesting candidates:- (I)

Immediately after the expiry of the period within which candidatures may be withdrawn under sub-section (I) of section 37, the returning officer shall prepare and publish in such form and manner as may be prescribed a list of contesting candidates, that is to say, candidates who were included in the list of validly nominated candidates and who have not withdrawn their candidature within the said period.

(2) For the purpose of listing the names under sub-section (1), the candidates shall be classified as follows, namely :-

- (i) candidates of recognised political parties;
- (ii) candidates of registered political parties other than those mentioned in clause (i);
- (iii) other candidates.

(3) The categories mentioned in sub-section (2) shall be arranged in the order specified therein and the names of candidates in which category shall be arranged in alphabetical order and the addresses of the contesting candidates as given in the nomination papers together with such other particulars as may be prescribed.

20. It would appear from Section 36 of the Act mechanism for decision making process for reception, rejection of nomination papers, preparation and publication of the list of the candidates having filed valid nomination is provided. After the publication of the list by way of affixation, one can withdraw from such contest under Section 37 within the time mentioned therein, and if any one withdraws on or before expiry of date of withdrawal, Returning Officer is duty-bound to prepare and publish the prescribed list of contesting candidates under Section 38 of the Act in Form-7A taking note of withdrawal. According to us, while rejecting the argument of Sri M.S. Prasad, after publication of list containing contesting candidates, it is not legally possible to delete the name of any candidate (here 'deceased candidate') from the list. As the language of Section 38 is mandatory in nature and once the date of withdrawal of nomination expires and the list is published election has to

be held with this list, the Election Officer has no power to delete the name under any circumstances from the list of contesting candidates.

21. It is firmly settled that statutory authority cannot do what is not provided in the statute expressly. In other words, he cannot exercise inherent power like civil court to meet and mitigate thorny situation to reach logical conclusion. If such a power is imagined it will lead to giving charter of taking arbitrary and capricious action inviting violence of Article 14 of the Constitution of India.

22. What is observed and discussed as above is supported by the decision of the Supreme Court in the case of **Jitu Patnaik Vs. Sanatan Mohakud**^[2]. In paragraph-25 of the report, Justice R.M. Lodha (as His Lordship then was) while examining Section 38 of the said Act has observed as follows:

25. There is no doubt that only living persons can offer themselves or be offered as candidates for membership of Parliament or State Legislatures. However, once nomination has been filed by a candidate and on scrutiny his candidature is found proper and before the expiry of the period of the withdrawal, he has not withdrawn his candidature and his name is included in the list of validly nominated candidates prepared under Section 38 of the 1951 Act and Rule 11 of the 1961 Rules, if death of a contesting candidate as defined in Section 38 takes place, the consequences following the death of such contesting candidate have to be found from electoral law contained in the 1951 Act or the Rules framed thereunder.

23. It is true that after finalization of list of contesting candidates and before the votes polled, there is no provision for deletion of name of candidate, whose name has been accepted as one of the contesting candidates. As on today, in the absence thereof, election had to be held with the name of the deceased candidate. Let us think a situation, if the deceased would not have secured the highest number of votes and if some other living contesting candidates would have got highest votes, could the petitioners question election with name of the deceased

candidate. Answer is simply, in negative. The decision cited by Sri M.S. Prasad of Allahabad High Court in the case of **Madan Gopal Vs. Nek Ram Sharma**^[3] does not help to decide the issue involved herein as this judgment was rendered under old provision of Section 52 which was substantially different from present one. Present Section 52 of the said Act is enforceable in case of death of candidate of recognized political party before poll, whereas old one was applicable in case of death of any contesting candidate whether fielded by any political (recognized or unrecognized) party. Present Section 52 does not speak of unlike previous one, word “contesting”. Going by the previous provision of Section 52 the Court held that the poll ought not to have been countermanded and election should have been proceeded and Election Commission did so rightly. Legal position at present thus emerges that unless deceased candidate belonged to recognized political party election cannot be adjourned. In that case, it was held by the Court that countermanding of the election would be done in case of death of contesting candidate’s nomination is not withdrawn before expiry of date of withdrawal. In that case, it was further held that at the time of drawing up of the list of contesting candidates under Section 38 of the Act if any person having filed nomination, was found to be dead then the Returning Officer had the authority to exclude the name of the deceased person as he/she would not be able to contest in election. But it is not possible after finalization of the list of contesting candidates under Section 38 as it has been observed in the Supreme Court decision in case of **Jitu Patnaik** (2 supra).

24. Therefore, we are of the view that the decision to proceed with the election with the name of the deceased contesting candidate aforesaid is not unlawful going by the present provision of law.

25. The next issue is whether the votes polled in favour of the

deceased candidate can be said to be invalid or not under the law.

26. The learned counsel for the respondents has appropriately drawn our attention to the Rules 56 and 66-A of the Conduct of Election Rules, 1961 relating to the procedure for deciding the valid and invalid votes polled. In case of ballot paper, Rule 56 is the mechanism on what ground ballot papers after poll at the time of counting, will be rejected by the Returning Officer. We set out Rule 56 for this purpose.

56. Counting of votes:- (1) The ballot papers taken out of each ballot box shall be arranged in convenient bundles and scrutinized.

(2) The returning officer shall reject a ballot paper-

- (a) if it bears any mark or writing by which the elector can be identified, or
- (b) if it bears no mark at all or, to indicate the vote, it bears a mark elsewhere than on or near the symbol of one of the candidates on the face of the ballot paper or, it bears a mark made otherwise than with the instrument supplied for the purpose, or
- (c) if votes are given on it in favour of more than one candidates, or
- (d) if the mark indicating the vote thereon is placed in such manner as to make it doubtful to which candidate the vote has been given, or
- (e) if it is a spurious ballot paper, or
- (f) if it is so damaged or mutilated that its identity as a genuine ballot paper cannot be established, or
- (g) if it bears a serial number, or is of a design, different from the serial numbers, or, as the case may be, design, of the ballot papers authorised for use at the particular polling station, or
- (h) if it does not bear both the mark and the signature which it should have borne under the provisions of sub-rule (1) of rule 38:

Provided that where the returning officer is satisfied that any such defect as is mentioned in clause (g) or clause (h) has been caused by any mistake or failure on the part of a presiding officer or polling officer, the ballot paper shall not be rejected merely on the ground of such defect:

Provided further that a ballot paper shall not be rejected merely on the ground that the mark indicating the vote is indistinct or made more than once, if the intention that the vote shall be for a particular candidate clearly appears from the way the paper is marked.

(3) Before rejecting any ballot paper under sub-rule (2), the returning officer shall allow each counting agent present a reasonable opportunity to inspect the ballot paper but shall not allow him to handle it or any other ballot paper.

(4) The returning officer shall endorse on every ballot paper which he rejects the word "Rejected" and the grounds of rejection in abbreviated form either in his own hand or by means of a rubber stamp and shall initial such endorsement.

(5) All ballot papers rejected under this rule shall be bundled together.

(6) Every ballot paper which is not rejected under this rule shall be counted as one valid vote:

Provided that no cover containing tendered ballot papers shall be opened and no such paper shall be counted.

(7) After the counting of all ballot papers contained in all the ballot boxes used at a polling station has been completed,-

(a) the counting supervisor shall fill in and sign Part II- Result of Counting, in Form 16, which shall also be signed by the returning officer; and

(b) the returning officer shall make the entries in a result sheet in Form 20 and announce the particulars.

27. The sub-rule (2) of Rule 56 provides grounds for rejection of ballot papers and it does not appear therefrom that the death of any contesting candidate at the time of poll is a ground for rejection. We are unable to accept the argument of Sri M.S. Prasad that having regard to the reality we should read down the said sub-rule that votes cast in favour of dead person at the time of election is to be declared invalid; the Returning Officer being statutory authority cannot act what is not provided expressly in the rule, howsoever stark and ground reality is. It is for the Legislature to deal with such situation, the Court cannot supply additional ground suiting to the situation not contemplated by the Legislature, even following concept of *casus omissus*. According to us, as law stands today in the given situation stated above the dead person should be treated notionally, being a contesting candidate, and the result has to be declared, as it would appear from sub-rule (6) of Rule 56 after discounting the rejected ballot papers, rest of the valid ballot papers have to be counted, and by virtue of sub-rule (7) of Rule 56 the result has to be declared in Form-16. Thereafter it shall be signed by the Returning Officer followed by the entries in the result in Form-20 and announcement thereof. These are sequentially automatic process in an

election, and cannot be halted by any act or omission of any person not even court contrary to the aforesaid provision.

28. Rule 66-A provides for mechanism of counting of votes where electronic voting machines have been used. We, therefore, set out Rule 66-A hereunder:

66A. Counting of votes where electronic voting machines have been used:- In relation to the counting of votes at a polling station, where voting machine has been used,-

(i) the provisions of rules 50 to 54 and in lieu of rules 55, 56 and 57, the following rules shall respectively apply, namely:-

"55-C. Scrutiny and inspection of voting machines.-(1) The returning officer may have the control units of the voting machines used at more than one polling station taken up for scrutiny and inspection and votes recorded in such units counted simultaneously.

(2) Before the votes recorded in any control unit of a voting machine are counted under sub-rule (1), the candidate or his election agent or his counting agent present at the counting table shall be allowed to inspect the paper seal and such other vital seals as might have been affixed on the unit and to satisfy themselves that the seals are intact.

(3) The returning officer shall satisfy himself that none of the voting machines has in fact been tampered with.

(4) If the returning officer is satisfied that any voting machine has in fact been tampered with he shall not count the votes recorded in that machine and shall follow the procedure laid down in Section 58, or Section 58A or Section 64A, as may be applicable in respect of the polling station or stations where that machine was used.

56-C. Counting of votes.-(1) After the returning officer is satisfied that a voting machine has in fact not been tampered with, he shall have the votes recorded therein counted by pressing the appropriate button marked "Result" provided in the control unit whereby the total votes polled and votes polled by each candidate shall be displayed in respect of each such candidate on the display panel provided for the purpose in the unit.

(2) As the votes polled by each candidate are displayed on the control unit, the returning officer shall have,-

(a) the number of such votes recorded separately in respect of each candidate in Part II of Form 17C ;

Provided that the test vote recorded, if any, for a candidate, as per item 5, in Part I of Form 17C, shall be subtracted from the number of votes recorded for such candidates as displayed on the control unit.

(b) Part II of Form 17C completed in other respects and

signed by the counting supervisor and also by the candidates or their election agents or their counting agents present; and

(c) corresponding entries made in a result sheet in Form 20 and the particulars so entered in the result sheet announced.

56-D. Scrutiny of paper trail.-(1) Where printer for paper trail is used, after the entries made in the result sheet are announced, any candidate, or in his absence, his election agent or any of his counting agents may apply in writing to the returning officer to count the printed paper slips in the drop box of the printer in respect of any polling station or polling stations.

(2) On such application being made, the returning officer shall, subject to such general or special guidelines, as may be issued by the Election Commission, decide the matter and may allow the application in whole or in part or may reject in whole, if it appears to him to be frivolous or unreasonable.

(3) Every decision of the returning officer under sub-rule (2) shall be in writing and shall contain the reasons therefor.

(4) If the returning officer decides under sub-rule (2) to allow counting of the paper slips either wholly or in part or parts, he shall-

(a) do the counting in the manner as may be directed by the Election Commission;

(b) if there is discrepancy between the votes displayed on the control unit and the counting of paper slips, amend the result sheet in Form 20 as per the paper slips count;

(c) announce the amendments so made by him; and

(d) complete and sign the result sheet.

57-C. Sealing of voting machines.-(1) After the result of voting recorded in a control unit has been ascertained candidate-wise and entered in Part II of Form 17C and Form 20 under Rule 56C, the returning officer shall reseal the unit with his seal and the seals of such of the candidates or their election agents present who may desire to affix their seals thereon so however that the result of voting recorded in the unit is not obliterated and the unit retains the memory of such result and where printer for in such manner, as may be directed by the Election Commission.

(2) The control unit and the paper slips so sealed shall be kept in specially prepared boxes on which the returning officer shall record the following particulars, namely:-

(a) the name of the constituency ;

(b) the particulars of polling station or stations where the control unit has been used ;

(c) serial number of the control unit and printer wherever used;

(d) date of poll ; and

(e) date of counting" ;

(ii) the provisions of rules 60 to 66 shall, so far as may be, apply in relation to voting by voting machines and any reference

in those rules to,-

- (a) ballot paper shall be construed as including a reference to such voting machine ;
- (b) any rule shall be construed as a reference to the corresponding rule in Chapter II of Part IV or, as the case may be, to rule 55C or rule 56C or rule 57C.

29. It would appear from sub-rule (2) of Rule 56-C that by mechanized process the result of election automatically surfaces in the machine itself if the button is pushed. In this mechanised system, the valid and invalid votes are automatically segregated and no manual interference is either required or possible. We are, therefore, of the view that neither in the Act nor in the said Rules provide any scope either expressly or by necessary implication for rejection of votes cast in favour of deceased candidate on account of her death occurred after finalization of the list of contesting candidates and on or before date of election. Technically and officially, the deceased person if he secures highest valid votes under the provision of law, has to be declared to have been elected, but the result would be a notional one. After declaration of the result, the next step to be taken by virtue of Rule 66 by the Returning Officer is to grant a certificate of election in Form-22 and obtain an acknowledgment of receipt thereof from the candidate duly signed by him and to immediately send the acknowledgment by registered post to the Secretary of the House of People or as the case may be, to the Secretary of the Legislative Assembly. Unless this certificate is issued following above method, election of candidate is not complete. Logically in case of death of contesting candidate the certificate cannot be issued nor the same can be acknowledged. Naturally the Return has to be submitted to the Secretary that the candidate died at this stage. Thus at this stage her election has to be declared as void on account of her death, as it is rightly argued by the learned counsel for the respondents – Election Commission that by-election has to be held in accordance with the provisions of Section 150

of the Representation of the People Act, 1951.

30. Therefore, we dismiss W.P. Nos.14303 & 14305 of 2014 and we pass order in W.P.No.24287 of 2014 directing all the respondents to act in accordance with law as part of election programme schedule. There will be no order as to costs.

Consequently, pending miscellaneous petitions, if any, shall also stand closed.

Kalyan Jyoti Sengupta, CJ

Sanjay Kumar, J

COMMON ORDER

(*Per* Hon'ble Shri Justice Sanjay Kumar)

I have perused the erudite opinion of the Hon'ble The Chief Justice and I am in respectful agreement with his decision as to the ultimate fate of these three writ petitions. However, with due respect, I am unable to subscribe to his views as to the maintainability of Writ Petition Nos.14303 and 14305 of 2014. The Hon'ble The Chief Justice has held these two writ petitions to be maintainable and dismissed them on merits while I am of the considered opinion that they are liable to be dismissed *in limine*, being barred by Article 329(b) of the Constitution of India. I therefore venture to record my dissent on this singular aspect of the matter.

The notification for holding an election to Allagadda Assembly Constituency was issued on 05.03.2014. The last date for withdrawal of nominations was 23.04.2014. The election to this constituency was slated to be held on 07.05.2014 and the result was to be declared on 16.05.2014. Writ Petition Nos.14303 and 14305 of 2014 were instituted before this Court on 29.04.2014. The cause for the filing of these two writ petitions was that one of the contesting candidates, Smt.Bhuma Shoba Nagi Reddy of Yuvajana Sramika Rythu Congress Party, a registered but unrecognized political party, expired in a road accident on 24.04.2014.

The prayers in these cases demonstrate that the petitioner in Writ Petition No.14303 of 2014, a voter of Allagadda Constituency, not only sought a declaration as regards a communication received from the Election Commission of India but also asked for a consequential direction to conduct the election to Allagadda Assembly Constituency by deleting the name of the deceased candidate, Smt.Bhuma Shoba Nagi Reddy, from the list of contesting candidates while in Writ Petition No.14305 of 2014, the petitioner therein, another voter from the same constituency, in addition to seeking declaratory relief as to a communication dated 28.04.2014 from the Election Commission of India, sought a consequential direction to treat the votes polled in favour of the deceased candidate, Smt.Bhuma Shoba Nagi Reddy, as invalid and to declare the results among the living candidates in accordance with Rule 64 of the Conduct of Election Rules, 1961.

The issue is whether these two writ petitions would be proscribed by the constitutional embargo stipulated under Article 329(b) to the effect that an election of this nature cannot be called in question except through an election petition.

This issue is no longer *res integra*.

As long back as in the year 1952, a Constitution Bench of six Judges in ***N.P.PONNUSWAMY V/s. THE RETURNING OFFICER, NAMAKKAL CONSTITUENCY, NAMAKKAL, SALEM DISTRICT***^[4] observed that the word 'election' has been used in Part-XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate. In ***HARI VISHNU KAMATH V/s. SYED AHMAD ISHAQUE***^[5], the Supreme Court observed that the word 'election' in Article 329(b) was used in a comprehensive sense including the entire process of the election commencing with the issuance of a notification and terminating with the declaration of election of a candidate, and that a petition under Article 226 challenging the validity of any of the acts forming part of that process would be barred. In ***ELECTION COMMISSION OF INDIA V/s. ASHOK KUMAR***^[6], the Supreme Court again affirmed that the term 'election' occurring in Article 329 means and includes the entire process from

the issuance of the notification up to the declaration of the results. In **MOHINDER SINGH GILL V/s. CHIEF ELECTION COMMISSIONER, NEW DELHI**^[7], the Supreme Court reiterated that the term 'election' has a very wide connotation and every step from start to finish of the total process constitutes the 'election', not merely the conclusion or culmination, and the rainbow of operations covered by the compendious expression 'election' commences from the initial notification and culminates in the declaration of the returned candidate.

The consistent view expressed by the Supreme Court over the years is that the jurisdiction of this Court under Article 226 of the Constitution would be barred in the context of any matter which may arise while the election is in progress and Article 329(b) constitutes a blanket ban on litigative challenges to electoral steps carrying forward the process of the election to its culmination in the formal declaration of the result. High Courts were held to be barred from entertaining writ petitions after issuance of the election notification in the light of *non obstante* clause in Article 329 of the Constitution. The only exception carved out was where the electoral steps under challenge had the effect of interfering in the free flow of the election or hindering the progress thereof [**ASHOK KUMAR**⁶, **MOHINDER SINGH GILL**⁷, **MANDA JAGANATH V/s. K.S.RATHNAM**^[8]]. This was the view affirmed by a Division Bench of this Court in **POLOJI VEERAI AH V/s. RETURNING OFFICER, KHAMMAM DISTRICT**^[9], of which I was a member.

It is relevant to note that the decision of the Supreme Court in **K.VENKATACHALAM V/s. A.SWAMICKAN**^[10] was in the context of a post-election writ petition. This decision therefore does not advance the contention that recourse to Article 226 is permissible during the election process. In **ASHOK KUMAR**⁶, the Supreme Court observed that if the petition presented to the Court 'calls in question an election', the bar of Article 329(b) is attracted. The conclusions recorded in para 32 of the judgment are apposite and are extracted hereunder:

“32. For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:

(1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.

(2) Any decision sought and rendered will not amount to “calling in question an election” if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

(3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of malafide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

(4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the court.

(5) The court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the court’s indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the court would act with reluctance and shall not act, except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material.”

This Court would therefore not entertain or act upon a writ petition which is outwardly innocuous but is essentially a subterfuge or pretext for achieving an ulterior or hidden end. The consequential prayers of the

petitioners in both the subject cases manifest that they sought to obstruct the natural flow of the ongoing election process. One wanted deletion of the name of the deceased candidate from the list of contesting candidates before the election while the other wanted the votes polled by the deceased candidate to be treated as invalid and the election to be decided on the basis of the votes polled by the remaining candidates. In fact, the first prayer as to deletion of the deceased candidate's name from the list of contesting candidates is opposed to the *ratio* laid down by the Supreme Court in **JITU PATNAIK V/s. SANATAN MOHAKUD**^[11]. In any event, both the prayers sought to impact the election process and interfere with it. No doubt, this Court did not pass interim orders in either of these writ petitions interdicting the ongoing election process as sought by the petitioners. However, the inescapable fact remains that the writ petitions were instituted during the 'election process' and the prayers made therein attempted to obstruct and interfere with the same. The mere fact that the election was permitted to go on and these writ petitions are being taken up after the election would not endow them with maintainability as their very institution was barred by Article 329(b) of the Constitution. The contention of Sri M.S.Prasad, learned senior counsel, that the petitioner in W.P.No.14303 of 2014 is not pressing his prayer as to deletion of the deceased candidate's name from the list of contesting candidates now that the election is over, is therefore of no avail. The case law cited by the learned senior counsel also does not further his case. The two writ petitions therefore do not warrant examination on merits and they are liable to be dismissed at the threshold on the ground of maintainability. I accordingly hold so.

K.J. SENGUPTA, CJ

SANJAY KUMAR, J

16th FEBRUARY, 2015
GBS/PGS
Reportable

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- [\[1\]](#) (1999) 4 SCC 526
- [\[2\]](#) (2012) 4 SCC 194
- [\[3\]](#) 25 ELR 61 (All)
- [\[4\]](#) AIR 1952 SC 64
- [\[5\]](#) AIR 1959 SC 233
- [\[6\]](#) (2000) 8 SCC 216
- [\[7\]](#) (1978) 1 SCC 405
- [\[8\]](#) (2004) 7 SCC 492
- [\[9\]](#) 2009 (3) ALD 822
- [\[10\]](#) AIR 1999 SC 1723
- [\[11\]](#) (2012) 4 SCC 194