

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 1st March, 2016

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W.P.(C) 7472/2009 & CM No.3469/2009 (for stay)

ANNAPURNA MISHRA

..... Petitioner

Through: Mr. Neeraj Gupta, Adv.

Versus

KAVITA RANI & ORS.

..... Respondents

Through: Proxy counsel for Mr. Santosh Kumar
Tripathi, Adv. for GNCTD.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petition impugns the order dated 16th February, 2009 of the Court of Dr. Kamini Lau, learned Additional District Judge (ADJ) in Election Petitions bearing No.33/2007 and 39/2007, both challenging the result of election held on 5th April, 2007 of a Councillor of Ward No.272 (Sonia Vihar) of the Municipal Corporation of Delhi (MCD) and declaring the election of the petitioner therefrom as void.
2. Notice of the petition was issued and vide ad-interim order dated 16th March, 2009 though the petitioner was permitted to attend the proceedings of the MCD and to participate in the proceedings but without being entitled to vote or draw any allowance.

3. Owing to a large number of parties impleaded as respondents, the service of notice on all the respondents and completion of pleadings took considerable time. Counter affidavits have been filed on behalf of the respondents No.1 to 6 and respondent No.9 State Election Commission (SEC) only. Counsels for some of the private respondents have been appearing in these proceedings earlier but now, for long, only the counsel for Govt. of NCT of Delhi (GNCTD) / SEC appears and the private respondents have stopped appearing. The reason therefor is obvious. Since 2007, an election has already been held in 2012 and the private respondents have now lost interest in the outcome of the petition.

4. For this reason, it has been enquired from the counsel for the petitioner as to why the petitioner is still pursuing the petition.

5. The counsel for the petitioner states that the petitioner also, inspite of the impugned order being stigmatic to her, is now no longer interested and did not contest the election in the year 2012, but is pursuing this petition for the release of her dues i.e. the allowances as a Councillor from MCD (since succeeded by East Delhi Municipal Corporation (EDMC)) and that in the event of the petition being allowed, the petitioner would become entitled thereto.

6. In this view of the matter, the counsel for the petitioner has been heard. The counsel for the respondent GNCTD / SEC states that he has lost his file and has been unable to prepare. He also states that the respondent GNCTD / SEC is not a contesting party. The record has been perused.

7. Though the challenge being to the common order passed in two different election petitions, two separate petitions should have been filed but since no objection in this regard has been taken for the last over six years, since when this petition is pending in this Court, it is now not deemed expedient to non-suit the petitioner on the said ground.

8. The impugned order of the learned ADJ runs into as many as 69 pages. However, the controversy is in a narrow compass. The election of the petitioner from Ward No.272 (Sonia Vihar) has been held to be void for the reason of the Villages of Sabhapur Delhi and Sabhapur Shahadara, though as per the Notification dated 20th January, 2007 of the Delimitation Committee a part of Ward No.272, in the election process having been included in Ward No.271; thus the votes of the electors of the said two villages which were to be counted in election held qua Ward No.272, remained to be counted.

9. The counsel for the petitioner does not controvert the aforesaid factual aspect. His challenge is limited to the ground that the aforesaid does not constitute a ground (for declaring the election to be void) as prescribed in Section 17 of the Delhi Municipal Corporation Act, 1957 (MCD Act), which is as under:

“17. Grounds for declaring elections to be void—(1) Subject to the provisions of sub-section (2) if the court of the district judge is of opinion—

(a) that on the date of his election a returned candidate was not qualified or was disqualified, to be chosen as a councillor under this Act, or

(b) that any corrupt practice has been committed by a returned candidate or his agent or by any other person with the consent of a returned candidate or his agent, or

(c) that any nomination paper has been improperly rejected, or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—

(i) by the improper acceptance of any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate by a person other than that candidate or his agent or a person acting with the consent of such candidate or agent, or

(iii) by the improper acceptance or refusal of any vote or reception of any vote which is void, or

(iv) by the non-compliance with the provisions of this Act or of any rules or orders made thereunder,

the court shall declare the election of the return candidate to be void.

(2) If in the opinion of the court, a returned candidate has been guilty by an agent of any corrupt practice, but the court is satisfied—

(a) that no such corrupt practice was committed at the election by the candidate, and every such corrupt practice was committed contrary to the orders, and without the consent of the candidate;

(b) that the candidate took all reasonable means for preventing the commission of corrupt practices at the election; and

(c) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents,

then, the court may decide that the election of the returned candidate is not void.”

10. The learned ADJ has invoked the ground under Section 17(1)(d)(iv) of the MCD Act for holding the election of the petitioner to be void, reasoning (i) that it is not disputed that the de-limitation of Wards was done under the provisions of Sections 5 & 6 of the MCD Act and in terms of which Notification dated 7th February, 2007 was issued; (ii) that as per the said Notification, the Villages of Sabhapur Delhi and Sabhapur Shahadara having population of 4385 as per the Census of 2001 were part of Ward No.272; (iii) that it had been proved that it was on account of a computer

error that the said villages were assigned to Ward No.271 in the “EB details” and the electors thereof though should have been put in Ward No.272 were shown in Ward No.271 and have cast their votes in Ward No.271; (iv) that the SEC had also fairly conceded that there has been a serious error in placing the voters of Ward No.272 of villages Sabhapur Shahadara and Sabhapur Delhi in Ward No.271 but had explained the same to be owing to an unintentional mistake committed by the Returning Officer due to error in computer; (v) that there had thus been non-compliance of orders and directions within the meaning of Section 17(1)(d)(iv); (vi) that though the Secretary, SEC had vide letter dated 16th March, 2007 to the Returning Officer clarified that villages Sabhapur Shahadara and Sabhapur Delhi are required to be shown in Ward No.272 but in violation thereof, the same were shown in Ward No.271; (vi) that thereby about 3120 voters belonging to Sabhapur Shahadara and Sabhapur Delhi and of which as many as 1731 persons had actually cast their votes in Ward No.271 remained to cast their votes in Ward No.272; (vii) that the petitioner in one of the election petitions namely Kavita Rani had as against 4657 votes polled by the petitioner herein had polled 4192 votes.

11. The counsel for the petitioner has argued that the election of the petitioner could not have been set aside for the error aforesaid of electoral officer and in which no role of the petitioner has been found. Reliance is placed on (A) ***Kabul Singh Vs. Kundan Singh*** AIR 1970 SC 340 laying down that in the context of Representation of People Act, 1950, the provisions thereof form a complete Code in the matter of preparation and maintenance of electoral rolls and that the entries in the electoral roll are final and not open to challenge either before a Civil Court or before a Tribunal which considers the validity of an election; (B) ***Indrajit Barua Vs. Election Commission of India*** AIR 1986 SC 103 laying down that preparation of electoral roll is not a process of election; and, (C) ***Samant N. Balakrishna Vs. George Fernandez*** AIR 1969 SC 1201 laying down that a challenge to an election cannot be considered on a possibility and proof is required thereof and there is no room for a reasonable judicial guess—on the basis thereof, it has been argued that the learned ADJ erred in presuming that if the votes of Sabhapur Shahadara and Sabhapur Delhi had been included in the election of Ward No.272, the petitioner would not have been declared as a successful candidate.

12. I have considered the controversy. Grounds for declaring election to be void under Clauses (a)&(b) of sub-section (1) of Section 17 of the Act are default grounds i.e. where the elected candidate was not qualified or disqualified or has won the election by a corrupt practice. The ground under Clause (c) is though not a default ground of the returned / elected candidate but is a ground of anyone else having been wrongfully not allowed to contest the election. Thereafter is Clause (d) which allows the result of the election insofar as it concerns a returned candidate to be set aside, if the same is materially affected by the grounds mentioned thereunder; the grounds mentioned in Clauses (i) to (iii) thereunder are, improper acceptance of nomination, corrupt practice though, in the interest of the returned candidate but not by the candidate himself or his agent or improper acceptance or refusal of any vote; however the ground mentioned in Clause (iv) thereunder is an omnibus ground—thereunder an election can be set aside if, there is non-compliance with ‘any of the’ provisions of the MCD Act or any rules made or orders issued thereunder. Sub-section (2) of Section 17 empowers the Court to refuse to set aside the election notwithstanding the returned candidate being guilty of corrupt practice, if

the same is attributable to an agent of the returned candidate and if the conditions specified therein are met.

13. The counsel for the petitioner has argued that for election to be set aside on the ground of non-compliance with the provisions of the MCD Act or any Rules or orders made / issued thereunder, the same has to be attributable to the returned candidate. It is argued that in the present case, there is no allegation against the petitioner in this regard.

14. With respect to the law of election, it has been famously stated by the Supreme Court in *Jyoti Basu Vs. Debi Ghosal* (1982) 1 SCC 691 that i) the law of election is a special law; ii) a right to elect or to be elected, fundamental though it is to democracy, is anomalously enough neither a fundamental right nor a Common Law Right and is purely and simply, a statutory right; iii) so is the right to dispute an election; iv) outside of statute, there is no right to elect, no right to be elected and no right to dispute an election; v) statutory creations they are, and therefore, subject to statutory limitation; vi) an election dispute is a special jurisdiction and has always to be exercised in accordance with the statute creating it; vii) concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied; and, viii) the court has no right to resort to the

principles of common law and equity on consideration of alleged policy because policy in such matters is what the statute lays down.

15. The aforesaid principle, though laid down in relation to parliamentary and municipal elections, has in *K.K. Shrivastava Vs. Bhupendra Kumar Jain* (1977) 2 SCC 494 been extended to Bar Council Elections and in *Avtar Singh Hit Vs. Delhi Sikh Gurudwara Management Committee* (2006) 8 SCC 487 to Delhi Sikh Gurudwara Management Committee elections.

16. I have perused the provisions of the MCD Act to gauge whether exclusion of the electors of any area can be said to be non-compliance with the provisions of the MCD Act or of any Rules made or orders issued thereunder. Prior to 13th January, 2012 when MCD was bifurcated, Chapter-II titled “The Corporation” of the MCD Act provided for “constitution of the corporation”. Section 3 thereunder provided that with effect from such date as the Central Government may by notification appoint, there shall be a corporation charged with the municipal Government of Delhi to be known as the Municipal Corporation of Delhi and to be composed of Councillors. Sub-Section (4) thereof provided that Councillors shall be chosen by direct election on the basis of adult suffrage from various wards into which Delhi shall be divided in accordance with the provisions of the Act. Section 5

titled 'Delimitation of wards' provided that for the purpose of election of Councillors, Delhi shall be divided into single-member wards in such manner that the population of each of the wards shall, so far as practicable, be the same throughout Delhi. The same further provides for the Central Government to by order in the Official Gazette determine the number of wards and the extent of each ward. Thus the extent of each ward is to be determined by order made by the Central Government under Section 5 of the Act.

17. From the facts of the present case, it is borne that the Central Government by such an order and while declaring the extent of Ward No.272 included the villages of Sabhapur Delhi and Sabhapur Shahadara therein. Section 3(4) as aforesaid provides for Councillors to be chosen by direct election on the basis of adult suffrage from the wards in which the Delhi is divided. The election of the year 2007 of Ward No.272 for choosing the Councillor not from the entire Ward was thus in violation of the order of the Central Government under Section 5 including the said villages in Ward No.272 and in violation of Section 3(4) of holding adult suffrage from the entire ward No.272. It is thus not in dispute that the

election was in non-compliance of the provisions of the Act and / or the orders made thereunder.

18. However Section 17 does not make mere non-compliance a ground for setting aside of the election. For election to be declared as void, it is further required to be shown that the result of the election has been “materially affected” by such non-compliance.

19. However before I deal with the same, the contention of the counsel for the petitioner that non-compliance has to be attributable to the returned candidate is required to be dealt with.

20. A plain reading of Section 17(1)(d)(iv) contains no indication that the non-compliance has to be attributable to the returned candidate whose election is sought to be set aside on that ground. Of course some of the other grounds mentioned in Section 17(1) for the election of the returned candidate to be declared void are default grounds i.e. which are attributable to the returned candidate i.e. either that he was not qualified or was disqualified or committed a corrupt practice. However the grounds in Section 17(1)(c) and Section 17(1)(d)(i) and (iii) are not attributable to the returned candidate but either to the returning officer (under Sections 17(1)(c)

and 17(1)(d)(i) in improperly rejecting a nomination paper or improperly accepting any nomination of candidates other than the returned candidate) or to the officials manning the various election booths (under Section 17(1)(d)(iii) in improperly accepting or refusing any vote). It is thus not as if all the grounds provided for declaration of an election as void are attributable to the returned candidate only.

21. Moreover, as aforesaid, the principle which the counsel for the petitioner is seeking to invoke, of the election of a returned candidate being not liable to be declared void unless the returned candidate is to blame therefor is a principle of common law and / or of equity and which as I have already observed hereinabove, is not applicable to Election Law.

22. That brings me to the question, whether from the exclusion of the aforesaid two villages and from which as many as 1731 persons cast their votes in the ward in which they were wrongly included, it can be said that the result of the election insofar as it concerns the petitioner as a returned candidate has been materially affected. Though the counsel for the petitioner is correct in contending that it cannot be said with certainty that if the votes of Sabhapur Delhi and Sabhapur Shahadara had been included, the petitioner as the returned candidate would not have been declared a

successful candidate and in fact it is also doubtful whether the same number of persons from the said villages who cast their votes in the wrong ward if had been included in the correct Ward i.e. Ward No.272 would have casted their votes (or more or less) because people are known to cast their votes not as a matter of duty but to support or defeat a particular candidate but I am of the view that considering the total number of votes which were polled in Ward No.272 and the margin with which the petitioner was elected does cast a suspicion on the result of the election.

23. However, I find Supreme Court, in ***Santosh Yadav Vs. Narender Singh*** (2002) 1 SCC 160 to have in relation to a petition for setting aside of an election on the ground that the nomination of a candidate had been improperly accepted held (i) that the Parliament has drawn a clear distinction between an improper rejection of any nomination and the improper acceptance of any nomination; (ii) in the former case, to avoid an election, it is not necessary to further prove that the result of the election has been materially affected; (iii) there is a presumption in the case of improper rejection of a nomination paper that it has materially affected the result of the election; (iv) the fact that one of several candidates for an election was kept out of the arena is by itself a very material consideration; (v) on the

other hand, in the case of an improper acceptance of a nomination paper, proof is required by way of evidence demonstrating that the coming into the arena of an additional candidate has had the effect on the election in such a manner that the best choice of the electorate was excluded; (vi) the success of a winning candidate at an election should not be lightly interfered with; (vii) this is all the more so when the election of a successful candidate is sought to be set aside for no fault of his but of someone else; (viii) voting and abstention from voting, as also the pattern of voting, depend upon a complex variety of factors, which may defy reasoning and logic; (ix) it cannot be held that merely because the number of wasted votes bears a high degree of proportion to the margin of votes between the winning candidate and the next highest candidate, an inference must always be drawn that the result of the election was materially affected in so far as the returned candidate is concerned; (x) there must be definite evidence available before the Court enabling an inference being drawn as to how the wasted votes would have been distributed amongst the contesting candidates; (xi) the Court cannot conjecturise or return findings on surmises; (xii) a civil trial, more so when it relates to an election dispute, where the fate not only of the parties arrayed before the Court but also of the entire constituency is at a

stake, the game has to be played with open cards and not like a game of chess or hide and seek; (xiii) an election petition must set out all material facts wherefrom inferences vital to the success of the election petitioner and enabling the Court to grant the relief prayed for by the petitioner can be drawn subject to the averments being substantiated by cogent evidence; (xiv) an election petition, if allowed, results in avoiding an election and nullifying the success of a returned candidate; (xv) it is a serious remedy and therefore, an election petition seeking relief on the ground of the result of the election having been materially affected must precisely allege all material facts; (xvi) that the said burden is to be discharged by the election petitioner by adducing positive, satisfactory and cogent evidence and in the absence thereof, the election must stand; (xvii) this rule may operate harshly upon the petitioner seeking to set aside the election but the Court is not concerned with the inconvenience resulting from the operation of the law; (xviii) difficulty of proof cannot obviate the need of strict proof or relax the rigour of required proof; and, (xix) that there is no room for any guesswork, speculation, surmises or conjectures i.e. acting on a mere possibility.

24. I further find the Supreme Court, in *Kalyan Kumar Gogoi Vs. Ashutosh Agnihotri* (2011) 2 SCC 532, concerned with a challenge to the

election on the ground of 200-300 voters having gone away without casting vote on finding that no arrangement was made for casting vote at the notified place and the same materially affected the result of the election, to have held (a) that mere non-compliance with the provisions of the Act and the Rules without it being established that the same had materially affected the result of the election is not sufficient for setting aside of the election; (b) no presumption or inference of fact can be raised that the result of the election of the returned candidate must have been materially affected; (c) the fact that such infraction had materially affected the result of the election, must be proved by adducing cogent and reliable evidence; (d) if it is not proved to the satisfaction of the Court that the result of the election insofar as it concerns a returned candidate has been materially affected, the election of the returned candidate would not be liable to be declared void notwithstanding non-compliance with the provisions of the Act or of any Rules or orders made thereunder; (e) the election of a returned candidate should not normally be set aside unless there are cogent and convincing reasons; (f) the success of a winning candidate at an election cannot be lightly interfered with; (g) this is all the more so when the election of a successful candidate is sought to be set aside for no fault of his but of

someone else; (h) the volume of opinion expressed in judicial pronouncements, preponderates in favour of the view that the burden of proving that the votes not cast would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned candidate lies upon one who objects to the validity of the election; (i) the standard of proof to be adopted, while judging the question whether the result of the election insofar as it concerns a returned candidate is materially affected, would be proof beyond reasonable doubt or beyond pale of doubt; and, (j) that it will not do merely to say that all or a majority of the wasted votes might have gone to the next highest candidate. Reliance was placed on *Paokai Haokip Vs. Rishang* AIR 1969 SC 663 and on *Vashisht Narain Sharma Vs. Dev Chandra* AIR 1954 SC 513.

25. I am bound by the aforesaid judgments.

26. The learned ADJ, I am compelled to say, has decided the matter without regard to law. There is no mention whatsoever in the impugned order / judgment of any evidence having been led of the result of the election qua the returned candidate i.e. the petitioner herein having been materially affected by the exclusion of the Villages of Sabhapur Delhi and Sabhapur Shahadara from Ward No.272. All that has been observed is, the number of

votes polled by the contesting candidates in Ward No.272. Even in the body of the judgment there is no discussion of any evidence having been led by the election petitioner in this respect.

27. It has thus but to be held that it has not been proved that the result of the election insofar as it concerns the returned candidate i.e. the petitioner herein has been materially affected by the non-compliance with the provisions of the MCD Act and the Rules i.e. Delhi Municipal Corporation (Elections of Councillors) Rules, 1958 and / or the orders issued thereunder. The order of the learned ADJ is thus clearly erroneous.

28. However the question still remains whether it is appropriate to interfere with the order and which will necessarily result in the election petition being dismissed and as a corollary thereof, the petitioner would claim allowances from the respondents.

29. It is a settled principle of law that this Court in exercise of jurisdiction under Article 226 of the Constitution is empowered to refuse the relief, even where the petitioner is found entitled thereto, if the grant of the relief is not found to be appropriate. Reference in this regard can be made to ***Chandra Singh Vs. State of Rajasthan*** (2003) 6 SCC 545 and ***Taherakhaton Vs. Salambin Mohammad*** (1999) 2 SCC 635.

30. I, in the facts aforesaid, do not deem it appropriate to allow the petition and which will result in the petitioner having a claim for allowances against EDMC, when the petitioner has not even effectively, as the electors of the said Ward expected the petitioner to, represented them in the MCD and when MCD has since been trifurcated and when EDMC is facing a financial crunch to the extent of not being able to pay its employees also. The petitioner had been elected to improve the civic life and to govern the officers and employees of the Corporation of which she was a part. Mahatma Gandhi in March 28, 1929 issue of the Weekly Journal 'Young India' and in the capacity of Editor thereof observed that, it is a rare privilege for a person to find himself in the position of a Municipal Councillor and that Municipal Councillor must approach their sacred task in a spirit of service. Following the said spirit, it is not apposite to allow any allowances to the petitioner. For this reason, notwithstanding having found the order / judgment of the learned ADJ allowing the election petition to be erroneous and not in accordance with law, the writ petition is dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

MARCH 01, 2016/bs/gsr
(corrected & released on 22nd June, 2016)