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

+ **W.P.(C) 3345/2017**

Decided on 21st April, 2017

MOHD TAHIR HUSSAIN AND ANR

..... Petitioners

Through : Ms. Nitya Ramakrishnan,
Mr. Siddharth and Mr. Irshad, Advs.

versus

STATE ELECTION COMMISSION AND ORS Respondents

Through : Mr. Sumeet Pushkarna, Adv. for R-1
with Mr. Girish Pandey, Deputy Secy.
(SEC).

Ms. Anjana Gosain, Adv. for R-2.

Mr. Sanjeev Sabharwal, Standing
Counsel for SDMC.

Mr. G. D. Mishra, Standing Counsel
for R-5.

Ms. Monika Arora, Adv. for NDMC.

CORAM:

HON'BLE MR. JUSTICE A.K. PATHAK

A.K. PATHAK, J. (ORAL)

1. During the course of hearing, learned counsel for the petitioners has pressed prayer 'c' only, which reads as under:-

“c. Issue a writ of mandamus or any other appropriate writ, order or direction to the respondent no.1 State Election Commission to conduct the 2017 MCD Elections using VVPAT enabled Generation-2 or Generation-3 EVMs only”

2. By placing reliance on Dr. Subramanian Swamy Vs. Election Commission of India, (2013) 10 SCC 500, learned counsel for the petitioners submits that for free and fair elections, use of EVMs with VVPAT system is indispensable. Thus, Respondent no.1 has to use only the EVMs with VVPAT system in the 2017 elections of Municipal Corporation of Delhi. However, respondent no.1 is using old M-1 make EVMs which, otherwise, are obsolete and are susceptible to tampering. Even Supreme Court, in Dr. Subramanian Swamy (Supra), has made an observation in this regard. It is further submitted that, by way of writ of mandamus, respondent no.1 be directed to use the M-2 make EVMs with VVPAT system only in the upcoming elections.

3. Respondent no.1 State Election Commission is the competent authority to conduct the elections of Municipal Corporation of Delhi, in view of Article 243ZA of the Constitution of India. Respondent no.1 has

filed a short affidavit, which has been perused. No affidavit has been filed by the respondent no.2/Election Commission of India (ECI).

4. Learned counsel for the respondent no.1 has contended that present petition is not maintainable as the same has been filed at the eleventh hour only to stall the elections, which is not permissible in view of the settled law, as laid down by the Constitutional Bench of the Supreme Court in N. P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Ors., AIR 1952 SC 64 and Mohinder Singh Gill & Anr. Vs. Chief Election Commissioner, New Delhi & Ors., (1978) 1 SCC 405. No material has been placed on record to indicate that M-1 make EVMs, which are going to be used by the respondent no.1 in the forthcoming MCD Elections, are amenable to tampering. Only on the imaginary suspicions and apprehensions of the petitioners, no mandate can be issued to use only the M-2 make EVMs with VVPAT system. It is further submitted that respondent no.1 had approached the respondent no.2 for providing the EVMs and was advised to borrow the same from Rajasthan as the other State Election Commissions had also been using the EVMs on loan basis for conducting the elections. It is further submitted that Supreme Court has ordered for using the EVMs with VVPAT system in a phased manner in the next general elections,

inasmuch as the Government of India has been directed to provide the required financial assistance to respondent no. 2 for the procurement of units of VVPAT system. Huge expenditure is required for procuring the EVMs with VVPAT system and the matter is still pending consideration before the Central Government. Respondent no. 2 has already procured some EVMs with VVPAT system but the same are not sufficient. Efforts are being made to procure more EVMs with VVPAT system and it will take some time. The matter regarding the acquisition and use of the EVMs with VVPAT system is still pending before the Supreme Court and is to be listed on 8th May, 2017.

5. Learned counsel has further submitted that in terms of section 4 of the Delhi Municipal Corporation Act, 1957, term of the earlier house is over and a new house is to be put in place on 30th April, 2017. Elections are scheduled to be held on 23rd April, 2017, that is, day after tomorrow. Results have to be announced on 26th April, 2017. Therefore, it is not possible to procure about 13,000 EVMs with VVPAT system in such a short duration and in case, any such direction is passed, the same would amount to stalling of the elections, which otherwise, is not permissible in view of the law laid down in *N. P. Ponnuswami and Mohinder Singh Gill (Supra)*.

6. In Dr. Subramanian Swamy (Supra), Supreme Court has held as under:-

“29. From the materials placed by both the sides, we are satisfied that the "paper trail" is an indispensable requirement of free and fair elections. The confidence of the voters in the EVMs can be achieved only with the introduction of the "paper trail". EVMs with VVPAT system ensure the accuracy of the voting system. With an intent to have fullest transparency in the system and to restore the confidence of the voters, it is necessary to set up EVMs with VVPAT system because vote is nothing but an act of expression which has immense importance in democratic system.

30. In the light of the above discussion and taking notice of the pragmatic and reasonable approach of the ECI and considering the fact that in general elections all over India, the ECI has to handle one million (ten lakhs) polling booths, we permit the ECI to introduce the same in gradual stages or geographical-wise in the ensuing general elections. The area, State or actual booth(s) are to be decided by the ECI and the ECI is free to implement the same in a phased manner. We appreciate the efforts and good gesture made by the ECI in introducing the same.

31. For implementation of such a system (VVPAT) in a phased manner, the Government of India is directed to provide required financial assistance for procurement of units of VVPAT.”

7. In N. P. Ponnuswami (Supra), a Constitution Bench of six judges has held as under:-

“14. It was argued that since the Representation of the People Act was enacted subject to the provisions of the Constitution, it cannot bar the jurisdiction of the High Court to issue writ under article [226](#) of the Constitution. This argument however is completely shut out by reading the Act along with article [329\(b\)](#). It will be noticed that the language used in that article and in section [80](#) of the Act is almost identical, with this difference only that the article is preceded by the words 'notwithstanding anything in this Constitution.' I think that those words are quite apt to exclude the jurisdiction of the High Court to deal with any matter which may arise while the elections are in the progress.”

8. Elections are in progress and the election process cannot be interfered with by the courts. Only remedy available to a candidate is to file Election Petition after the elections are over. In my view, I need not to discuss in detail the rival contentions of the parties, since, at the eleventh hour it will not be justifiable, feasible and possible to mandate the use of EVMs with VVPAT system as the same would amount to impeding the election process. Respondent no.1 has taken on loan the EVMs from the respondent no.2 and it will not be feasible to procure the EVMs with VVPAT system and use the

same in such a short notice, moreso when it is not known whether sufficient number of such machines are readily available with the respondent no.2, that too in Delhi.

9. For the foregoing reasons, petition is dismissed.

A.K. PATHAK, J.

APRIL 21, 2017/dk