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

+ EL.PET. No.2/2017 & IA No.4816/2017 (for stay).

SAROJ GOPAL

..... Petitioner

Through: Mr. K.M.M. Khan with Mr. N.N.
Bains, Advs.

versus

THE STATE ELECTION COMMISSIONER & ORS ... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **21.04.2017**

1. This Election Petition impugns the order dated 5th April, 2017 of the respondent no.3 Shri R.C. Antil, Returning Officer, Ward No.18-S, Milap Nagar, South Delhi Municipal Corporation (SDMC), Delhi rejecting the nomination filed by the petitioner for SDMC General Election – 2017 for SDMC Ward 18-S, Milap Nagar, Delhi. Needless to state the Election Petition is accompanied with an application for interim relief of stay of operation of the order dated 5th April, 2017 and to direct the respondent no.3 to allow the petitioner to contest the election for the post of Councillor in Ward No.18-S, SDMC, Milap Nagar, Delhi due to be held on 23rd April, 2017.

2. I have enquired from the counsel for the petitioner as to under which provision he has preferred this petition.

3. The counsel for the petitioner states that the petition has been preferred under Section 81 of the Representation of People Act, 1951 (RP Act).

4. Upon the counsel for the petitioner being asked to show as to how the petition is maintainable under the said provision, the counsel states that he is not carrying the R.P. Act.
5. It is perhaps for this reason that the petition has been preferred.
6. Section 81 of the R.P. Act is as under:-

“81. Presentation of petitions.—(1) An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of section 100 and section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than, the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates.

Explanation.—In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

(3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition, and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.”

7. As would be evident from a mere reading thereof, the same permits an Election Petition to be filed within 45 days from, but not earlier than, the date of election of the returned candidate. There is thus an inbuilt bar in Section 81 from being invoked before the date of election of the returned candidate. What to talk of date of election of the returned candidate, the election even has not been held as of date and is to be held day after tomorrow i.e. 23rd April, 2017 as aforesaid.

8. Even otherwise, the petitioner though came to know of the order on 5th April, 2017 has preferred this petition on 18th April, 2017 which has come up before this Court today for the first time. The attempt of the petitioner evidently is only to stall the election scheduled for day after tomorrow i.e. 23rd April, 2017 and which is not permissible.

9. In the absence of the petitioner being able to show any provision in the R.P.Act under which he is entitled to, before the election challenge the order dated 5th April, 2017 of rejection of his nomination, no Election Petition lies.

10. The counsel for the petitioner is reminded of ***Jyoti Basu Vs. Debi Ghosal*** (1982) 1 SCC 691 as under:-

“8. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statutory (sic for statute) creating it. Concepts familiar to common law and equity must remain strangers to election law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of

election disputes, court is put in a straight-jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State legislature except as provided by the Representation of the People Act 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and selfcontained code within which must be found any rights claimed in relation to an election or an election dispute.....”

11. I have recently in **A. Meenakshi Chandela Vs. State Election Commissioner** 2017 SCC OnLine Del 7757 dealt with the subject.
12. The counsel for the petitioner has referred to para 18 of **Nandiesha Reddy Vs. Kavitha Mahesh** AIR 2011 SC 2639 to contend that the petitioner should have been granted an opportunity to rectify the deficiency owing where to her nomination has been rejected.
13. The aforesaid judgment has been cited without adverting to the facts thereof. The said judgment arises from an Election Petition filed to challenge the election of the returned candidate and after the said election and not before the election as the petitioner has done.
14. The fact that the petition is filed under some misconception is also evident from the para 12 the petition where the petitioner has mixed-up an an Election Petition with a Writ Petition.

15. Dismissed.
16. The counsel for the petitioner at this stage withdraws the petition with liberty to approach again in accordance with law.
17. Dismissed as withdrawn with liberty aforesaid.
Dasti under signature of Court Master.

RAJIV SAHAI ENDLAW, J

APRIL 21, 2017
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