

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.01.2018

CORAM :

The Hon'ble Ms.INDIRA BANERJEE, CHIEF JUSTICE

AND

The Hon'ble Mr.JUSTICE ABDUL QUDDHOSE

W.P. No.372 of 2018
and W.M.P.No.429 of 2018

S.V.Ramamurthy ... Petitioner

-vs-

1.The State Election Commissioner of
Tamilnadu, Jawaharlal Nehru Road,
Koyambedu, Chennai.

2.The Chief Election Commissioner,
Election Commission of India,
Govt. of India, New Delhi.

3.T.T.V.Dinakaran, M.L.A. ... Respondents

Petition filed under Article 226 of the Constitution of India praying for issue of Writ of Mandamus to direct the first respondent to suspend the result declared by him on 27.12.2017 in the bye-election conducted at R.K.Nagar Constituency, Chennai District, by the first respondent due to the violation of Section 123 of the Representation of the People Act, 1951.

For Petitioner : Mr.S.V.Ramamurthy
Party-in-person

* * * * *

O R D E R

(Order of the Court was made by The Hon'ble Chief Justice)

This writ petition has been filed by way of public interest litigation seeking a writ in the nature of mandamus directing the first respondent, that is, State Election Commissioner of Tamil Nadu, to suspend the result declared by him on 27.12.2017 in the bye-election conducted at R.K.Nagar Constituency, Chennai District, on the ground of alleged violation of Section 123 of the Representation of the People Act, 1951.

2.The petitioner, an advocate of this Court, has in effect and substance alleged that the candidate declared as elected from R.K.Nagar Constituency in the City of Chennai resorted to corrupt practices within the meaning of Section 123 of the Representation of the People Act, 1951. The writ petitioner contends that 145 candidates had filed their nominations, but 78 of them were rejected and 13 candidates withdrew. Ultimately, only 59 nominations were accepted. The real contest was between the electoral party candidates and the third respondent.

3.The details in the writ petition with regard to allocation of symbol are not relevant to the issue of whether orders as prayed for by the petitioner can be passed by this Court and are thus not recorded to avoid prolixity. This Court is also not concerned with the calibre or competence of the respective candidates. It is for the voters to exercise their choice to elect candidates.

4.There can be no doubt, as contended by the petitioner, that any gift offered or promised by a candidate, or his agent, or any other person, with the consent of a candidate or his election agent, of any gratification, to any person whomsoever, with the object of directly or indirectly inducing the person to stand or not to stand as, or to withdraw or not to withdraw from being a candidate at an election, or an elector to vote or refrain from voting at an election constitutes corrupt practice and is hit by Section 123 of the Representation of the People Act, 1951. However, Article 329(b) of the Constitution of India imposes a complete bar to interference by Courts in electoral matters, except by an election petition in such manner as may be provided by law.

5. Article 329(b) of the Constitution of India is set out herein below for convenience:

"329. Bar to interference by courts in electoral matters -

Notwithstanding anything in this Constitution,

(a)

(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."

6. Section 80 of the Representation of the People Act, 1951, provides that "no election shall be called in question except by an election petition presented in accordance with the provisions of this Part".

7. In *N.P. Ponnuswami vs. Returning Officer, Namakkal*, reported in A.I.R. (39) 1952 SC 64, the Constitution Bench of the Supreme Court held as follows:

"16. The conclusions which I have arrived at may be summed up briefly as follows :--

(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted. (2) In conformity with this principle, the scheme the election law in this country as well as in England is that no significance should be attached to anything which does not affect the "election"; and if any irregularities are committed while it is in progress and they belong to the category or class

which, under the law by which elections are governed, would have the effect of vitiating the 'election' and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any court while the election is in progress.

8. In *Mohinder Singh Gill vs. Chief Election Commissioner*, reported in (1978) 1 SCC 405, the Constitution Bench of the Supreme Court held as under:

(Per Krishna Iyer, J.)

"Art. 329(b) is a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of the result.

(b) Election, in this context, has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate..

(2) (a) The Constitution, contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. This responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances.

(b) Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law, relating to or in connection with elections, the Commission shall act in conformity with, not in violation of such provisions but where such law is silent Art. 324 is a reservoir of power to, act for the avowed purpose of, not divorced from pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice

in so- far as conformance to such canons can reasonably and realistically be required of it as fairplay-in-action in a most important area of the constitutional order, viz., elections. Fairness does import an obligation to see that no wrong doer candidate benefits by his own-wrong. To put the matter beyond doubt, natural justice enlivens and applies to the specific case of order for total re-poll, although, not in full panoply but in flexible practicability. Whether it has been complied with is left open for the Tribunal's adjudication.

3. The conspectus of provisions bearing on the subject of elections clearly expresses the rule that there is a remedy for every wrong done during the election in progress although it is postponed to the post election stage and procedure as predicated in Art. 329(b) and the 1951 Act. The Election Tribunal has, under the various provisions of the Act, large enough powers to give relief to an injured candidates if he makes out a case and such processual amplitude of power extends to directions to the Election Commission or other appropriate agency to hold a poll, to bring up the ballots or do other thing necessary for fulfilment of the jurisdiction to undo illegality and injustice and do complete justice within the parameters set by the existing law.

Per Goswami and Shinghal, JJ. (concurring)

123. What do the appellants seek in the writ application ? One of their prayers is for declaration of the result on the basis of the Poll which has been cancelled. This is nothing short of seeking to establish the validity of a very important stage in the election process, namely, the poll which has taken place, and which was countermanded by the impugned order. If the appellants succeed, the result may, if possible, be declared on the basis of that poll, or some other suitable orders may be passed. If they fail, a fresh poll will take place and the election will be declared on the basis of the fresh poll. This is, in effect, a vital issue which relates to questioning of the election

since the election will be complete only after the fresh poll on the basis of which the declaration of the result will be made. In other words, there are no two elections as there is only one continuing process of election. If, therefore, during the process of election, at an intermediate or final stage, the entire poll has been wrongly cancelled and a fresh poll has been wrongly ordered, that is a matter which may be agitated after declaration of the result on the basis of the fresh poll, by questioning the election in the appropriate forum by means of an election petition in accordance with law. The appellants, then, will not be without a remedy to question every step in the electoral process and every order that has been passed in the process of the election including the countermanding of the earlier poll. In other words, when the appellants question the election after declaration of the result on the basis of the fresh poll, the election court will be able to entertain their objection with regard to the order of the Election Commission countermanding the earlier poll, and the whole matter will be at large. If, for example, the election court comes to the conclusion that the earlier poll has been wrongly cancelled, or the impugned order of the Election Commission is otherwise invalid, it will be entitled to set aside the election on the basis of the fresh Poll and will have power to breathe life into the countermanded poll and to make appropriate directions and orders in accordance with law. There is, therefore, no foundation for a grievance that the appellants will be without any remedy if their writ application is dismissed. It has in fact been fairly conceded by counsel for the other side that the election court will be able to grant all appropriate reliefs and that the dismissal of the writ petition will not prejudice the appellants.

..

126. The above being the legal position, Article 329(b) rules out the maintainability of the writ application. Article 329(b) provides that "notwithstanding anything in this Constitution..... no election to either House of

Parliament..... 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". It is undisputed that an election can be challenged only under the provisions of the Act. Indeed section 80 of the Act provides that "no election shall be called in question except by an election petition presented in accordance with the provisions of" Part VI of the Act. We find that all the substantial reliefs which the appellants seek in the writ application, including the declaration of the election to be void and the declaration of appellant No. 1 to be duly elected, can be claimed in the election petition. It will be within the power of the High Court, as the election court, to give all appropriate reliefs to do complete justice between the parties. In doing so it will be open to the High Court to pass any ancillary or consequential order to enable it to grant the necessary relief provided under the Act. The writ application is therefore barred under Article 329(b) of the Constitution and the High Court rightly dismissed it on that ground.

9. In *Jyoti Basu vs. Debi Ghosal*, reported in (1982) 1 SCC 691, the Supreme Court held 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 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 self contained code within which must be found any rights claimed in relation to an election or an election dispute. We are concerned with an election dispute.....

9. Section 81 prescribes who may present an election petition. It may be any candidate at such election; it may be any elector of the constituency; it may be none else."

10. Learned counsel appearing on behalf of the petitioner has cited a Constitution Bench judgment of the Supreme Court in A.K.M. Hassan Uzzaman vs. Union of India, reported in (1982) 2 SCC 218, to argue that the High Courts can entertain a writ petition questioning the validity of elections when there is rampant corrupt practice.

11. It is well settled that words, clauses, sentences and paragraphs in a judgment cannot be read in isolation divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that context, as held by the Supreme Court in *Madhav Rao Jivaji Rao Scindia Bahadur v. Union of India*, reported in (1971) 3 SCR 9. The proposition is

also reiterated in the judgment of the Supreme Court in *Prakash Amichand Shah v. State of Gujarat*, AIR 1986 SC 468.

12. In *A.K.M.Hassan Uzzaman*, supra, the Supreme Court was deciding the question of whether the High Court had acted within its jurisdiction in entertaining a writ petition which also questioned the vires of the laws of election. In the context of the aforesaid challenge, the Supreme Court observed that "*the High Courts must observe a self-imposed limitation on their power to act under Article 226, by refusing to pass orders or give directions which will inevitably result in an indefinite postponement of elections to legislative bodies, which are the very essence of the democratic foundation and functioning of our Constitution*".

13. The constitutional validity of a statute cannot obviously be challenged by way of election petition. Any law enacted in relation to elections might have to be challenged in proceedings under Article 226 of the Constitution of India. However, the High Courts would have to observe the limitations on its power to entertain and pass orders in such writ petitions, unless the legislative body lacked legislative competence or the law was patently contrary to the Constitution. Significantly, in *A.K.M.Hassan Uzzaman*, supra, the writ petition filed in the Calcutta High Court questioning the preparation and publication of electoral rolls as also the vires of the election laws, which had been transferred for disposal to the Supreme Court was dismissed by the Supreme Court.

14. In this case, the elections have already been conducted, counting has already been completed and the results declared. The interference of this Court under Article 226 of the Constitution of India cannot and does not arise.

The writ petition is, therefore, dismissed. No costs. Consequently, W.M.P.No.429 of 2018 is also dismissed.

Sd/-

ASST. REGISTRAR (CCC)

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SUB ASST. REGISTRAR

sra

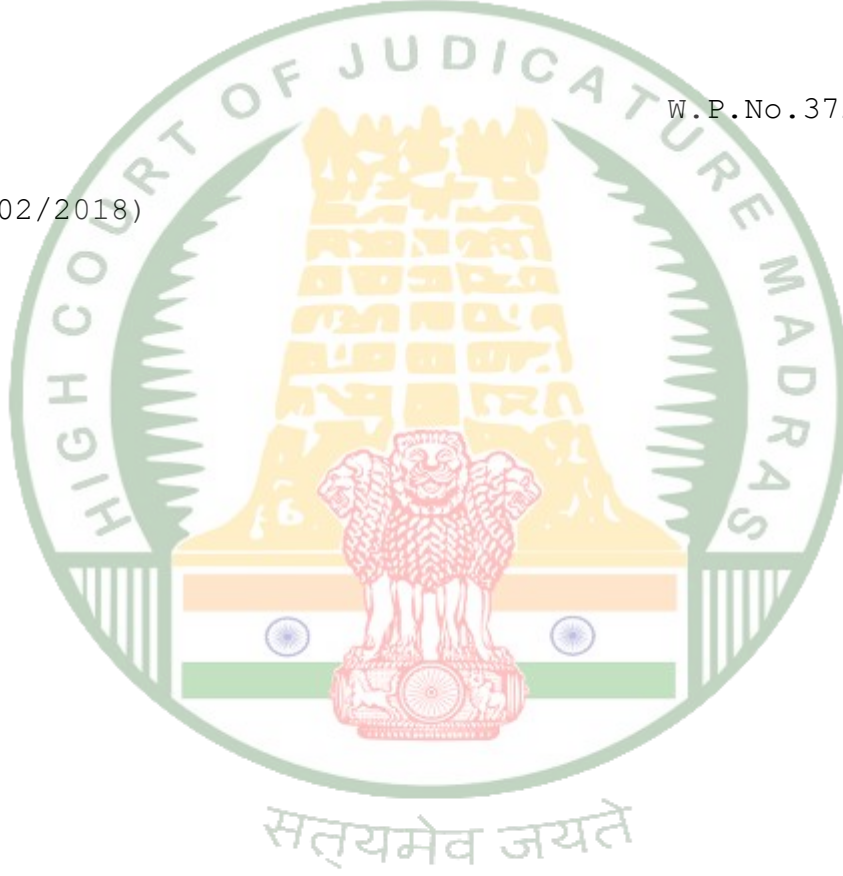
To

1.The State Election Commissioner of
Tamilnadu, Jawaharlal Nehru Road,
Koyambedu, Chennai.

2.The Chief Election Commissioner,
Election Commission of India,
Govt. of India, New Delhi.

W.P.No.372 of 2018

RJ (CO)
KAK(03/02/2018)



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