

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on: 25/09/2018****Judgment Delivered on : 06/02/2019****Writ Appeal No. 650 of 2018***{Arising out of Order dated 18.05.2018 passed in Writ Petition (C) No. 1254 of 2018 by the learned Single Judge}*

Rakesh Choubey son of Late Shri G.P Choubey, aged about 50 years,
Resident of Recreation Marg, Choubey Colony, Raipur, Chhattisgarh.

---- Appellants**Versus**

1. Election Commission of India, Through the Chief Election Commissioner, Nirvachan Sadan, Ashok Road, New Delhi.
2. Chief Election Officer, Chhattisgarh State, Purana Mantralaya Parisar, Shastri Chowk, Raipur.

---- Respondents

For Appellants	: Shri Sanjay Hegde, Senior Advocate with Shri K. Rohan, Advocate
For Respondent No. 1	: Shri B. Gopa Kumar, Assistant Solicitor General
For Respondent / State	Shri J.K.Gilda, Advocate General with Shri Gary Mukhopadhyay, Government Advocate

Hon'ble Shri Ajay Kumar Tripathi, Chief Justice**Hon'ble Shri Parth Prateem Sahu, Judge****C.A.V. Judgment****Per Ajay Kumar Tripathi, Chief Justice**

1. Writ application was filed by the Appellant before a learned Single Judge making the Election Commission of India as well as the Chief Election Officer, Chhattisgarh as Respondents.

2. The dispute arose out of a by-election which was held on 13.09.2014 in Constituency No. 79 known as Antagarh for the Chhattisgarh State Legislative Assembly. One Bhoj Raj Nag was returned unopposed.
3. An Election Petition No. 16 of 2014 under Section 80 and 80A read with Section 81 of the Representation of People Act, 1951 was filed challenging the election on the ground that certain corrupt practice had been adopted in the election. The election petition was tried and vide judgment dated 08.12.2017, the Election Tribunal dismissed the election petition being devoid of merit.
4. The Indian National Congress filed Writ Petition (Cr) No. 53 of 2017 under Article 226/227 of the Constitution of India seeking a direction from the Court to register an FIR and investigate the conspiracy which was hatched by certain private persons which led to withdrawal of the nomination paper of one Mantu Ram Pawar, a congress candidate, in the said by-election. The writ petition of the Indian National Congress was dismissed by the Court on 28.04.2017, primarily on the ground that the material brought on record does not suffice to constitute an offence in which a direction could be issued, to register an FIR.
5. The order dated 28.04.2017 passed by the learned Single Judge was questioned in Writ Appeal No. 200 of 2017. The Division Bench disposed off the appeal with certain directions and liberty. Not being satisfied with the said order of Division Bench, SLA (CrI) No. 8552 of 2017 was preferred which stood disposed off by the Apex Court on 10.11.2017 with a request to

the Chief Justice of this Court to ensure disposal of the Election Petition which was still pending when the direction of the Apex Court was issued.

6. A fresh writ application then came to be filed by the Appellant who claims himself to be resident of State of Chhattisgarh and a voter, for a direction to investigate the alleged manipulation in the by-election. It was stated that right to free and fair election was the bedrock of democracy and it was the basic structure of the Constitution of India. It is also noticed for record that a similar writ being Writ Petition (C) No. 1344/2018 was filed before Delhi High Court and withdrawn on 13.02.2018.
7. It was argued before the learned Single Judge that the reliefs which were sought by the Appellant-Petitioner did not fall within the ambit of the election petition. Prayer primarily was for a direction upon the Election Commission of India to institute and hold an investigation in the matter of so-called illegal or criminal activity indulged in during the conduct of the by-election. Stand of the counsel before the learned Single Judge was that the Election Commission of India was competent to carry out the enquiry under Article 324 of the Constitution of India.
8. On behalf of the Respondents, especially the Advocate General representing the Chief Election Officer, Chhattisgarh took a plea that such writ application was not entertainable and was unwarranted keeping in mind that the result of the by-election was subject matter of an election petition and the same stood dismissed after due trial and enquiry. A similar issue raised by the Indian National Congress was also dismissed and such roving

and fishing kind of writ applications cannot be entertained on behalf of yet another person, whatever be his claim to fame.

9. The learned Single Judge took note of the fact that in the election petition, the returned candidate had taken pleas that undue influence was exercised, threat and pressure was mounted to tilt the balance of the election which amounted to corrupt practice. All these allegations though made was not established in the election petition, therefore the petition stood dismissed.
10. The learned Single Judge took note of certain relevant portion of the order passed by the Single Judge in the earlier writ application of the Indian National Congress as also what the Division Bench had had to say in the appeal, as under:

“6. It is not in dispute that the election petition questioning the election of returned candidate has already been adjudicated by this Court by order dated 8-12-2017, that was brought under the provisions of Sections 80 and 80-A read with Section 81 of the Representation of the People Act, 1951 in which the question whether the returned candidate exercised undue influence, threat and pressure amounting to corrupt practice, has been answered in negative. The writ petition filed by the INC claiming similar relief has been dismissed by this Court on 28-4-2017 by holding as under: -

“17. Further following the principles laid down in AIR 1992 SCC 604, State of Haryana vs. Bhajan Lal when the prepositions are applied in the set of given facts and material, the conversation of CD and paper clippings on the face value do not prima facie constitute any offence and the complaint which is made Kiranmai Naik and one Vikas Upadhyay on 08.01.2016 and 6.01.2016 only levels the allegations, the same is also not made by the petitioner and reading of such complaints would show that it is so absurd and inherently vague and on the basis of that,

no cognizance could have been taken for proceeding against the respondents.

18. Therefore, taking into totality of the facts and circumstances, the materials in question are not good enough to constitute the offence and to direct the registration of FIR and investigation therein. The material should qualify to the test of admissibility which is completely hearsay in this case and vague allegations have been levelled by a self-created evidence. In the given facts of this case, the Court is of the opinion that it is not proper and legally justified to direct investigation in view of the principles laid down in AIR 2017 S.C. 540 –Common Cause (A registered Society) Vs. Union of India.”

7. The Division Bench of this Court in the writ appeal filed by the INC partly modified that order of the writ court by observing as under: -

“14. In the result :-

(i) The parties to this litigation including the Appellant/Petitioner and the private respondents will not be bound by any of the inferences and observations on facts, made in the impugned judgment. All such observations and inferences in the impugned judgment are vacated.

(ii) Any authority with the jurisdiction under the criminal laws or any other law for the time being in force will deal with any complaint of the Appellant in relation to the matter in hand untrammelled by anything stated in the impugned judgment. This judgment as well as judgment of the learned Single Judge will not stand in the way of any jurisdictional police taking cognizance, in accordance with law, of any complaint which is lawfully pending before any such authority.

(iii) This judgment does not preclude the Appellant from moving any authority including Election Commission by seeking appropriate relief, if any, that could be sought for within the power of superintendence by the Election Commission in conformity with Article 324 of the Constitution.

(iv) Subject to the aforegranted reliefs, this writ appeal is dismissed.”

8. In the considered opinion of this Court, the issue raised by the writ petitioner with regard to illegal / criminal activity during by-election that too by an independent investigating agency has also been considered by this Court by

the writ court and that has been modified by the Division Bench of this Court in writ appeal and furthermore, the INC has taken-up the matter up to the Supreme Court in SLP in which Their Lordships on 10-11-2017 issued following directions:

“Heard Mr. Vivek Tankha, learned senior counsel for the petitioner.

Keeping in view the anxiety expressed by the petitioner, we think it appropriate that Election Petition No. 16 of 2014, pending before the High Court of Chhattisgarh at Bilaspur, should be disposed of within the time frame provided by the statute i.e. six months. We request the learned Chief Justice of the High Court of Chhattisgarh at Bilaspur, to allot the case, if not yet assigned, to a learned Judge, who shall take steps to dispose of the aforementioned election petition within the time frame provided.

Let the matter be listed after twelve weeks.”

9. In view of the above, the election petition has also been disposed of by the designated election tribunal.”

11. In the impugned order dated 18.05.2018, the learned Single Judge came to a considered opinion that he would not be inclined to entertain the writ petition primarily on the ground that the issues sought to be raised in the writ application before him have already been thrashed out first in an election petition and then in another writ application filed by the Indian National Congress. Dismissal of the writ application became the cause of action for preferring the present appeal.
12. Learned senior counsel Mr. Sanjay R. Hegde representing the Appellant submits that the learned Single Judge committed error by dismissing the writ petition because the orders which came to be passed earlier in different proceedings in no manner creates an embargo and that there was a leeway given to the Appellants therein to approach appropriate forum.

13. It was also urged that even though the learned Single Judge took note of the power of the Election Commission, but failed to pass any direction or order upon the Election Commission because it was their duty to go into the allegation of horse trading, rigging etc.
14. It was also argued that the Division Bench order passed in Writ Appeal No. 200 of 2017 was not understood in the true spirit. The issue raised before him was entirely different and therefore, the writ should not have been dismissed.
15. Reliance was placed on behalf of the learned senior counsel on a much celebrated judgment of ***Mohinder Singh Gill & another v. The Chief Election Commissioner & Others*** {AIR 1978 SC 851} with emphasis on paragraph 39 of the said decision, which reads as under:

“39. Even so, situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it is that the Constitution has made comprehensive provision in Article 324 to take care of surprise situations. That power itself has to be exercised, not mindlessly nor mala fide, nor arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation. More is not necessary to specify; less is insufficient to leave unsaid. Article 324, in our view operates in areas left unoccupied by legislation and the words 'superintendence, direction and control' as well as 'conduct of all elections' are the broadest terms. Myriad may be to mystic to be precisely presaged, may call for prompt action to reach the goal of free and fair election. It has been argued that this will create a constitutional despot beyond the pale of accountability; a Frankenstein's monster who may manipulate the system into elected despotism – instances of such phenomena are the tears of history. To that the retort may be that the judicial branch, at the appropriate stage, with the potency of its benignant power and within the leading strings of legal guidelines, can call the bluff, quash the action and bring order into the process. Whether we make a triumph or travesty of democracy depends on the men as much as on

the Great National Parchment. Secondly, when a high functionary like the Commissioner is vested with wide powers the law expects him to act fairly and legally. Article 324 is geared to the accomplishment of free and fair elections expeditiously. Moreover; as held in *Virendra* (1958) SCR 308 : (AIR) 1957 SC 896) and *Harishankar* (1955) 1 SCR 380 : (AIR 1954 SC 465) discretion vested in a high functionary may be reasonably trusted to be used properly not perversely. If it is misused, certainly the Court has power to strike down the act. This is well established and law does not need further case law confirmation. Moreover, it is useful to remember the warning of Chandrachud J. (at p. 2465 of AIR 1975 SC):

“But the electorate lives in the hope that a sacred power will not so flagrantly be abused and the moving finger of history warns of the consequences that inevitably flow when absolutely. The fear of perversion is no test of power.”

16. To the contrary, the learned Advocate General places reliance on a decision of the Apex Court rendered in the case of ***A.C. Jose v. Sivan Pillai & Others*** {(1984) 2 SCC 656}. The Court's attention was drawn to the following paragraphs:

“18. The observations, extracted above, furnish a complete answer to the arguments of Mr. Jethmalani and Mr. Asoke Sen as it has been clearly held that Art. 324 would operate only in areas left unoccupied by legislation, even if the widest possible connotation is given to the language of Art. 324. While summarizing the propositions, the Court made the following observations: (SCC p. 452, para 92).

"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 provision 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....

(Emphasis supplied)

19. This is actually the main spirit and gist of the decision which appears to have been relied upon by the appellant but which does not at all support his stand. In the aforesaid case, there did not appear to be any conflict between the order passed by the Commission and the Act or the Rules. The question at issue in the instant case did not really arise in the form and shape as has been presented before us. On the other hand, the matter seems to have been fully settled by an earlier decision of this Court in *N.P.Ponnuswami v. Returning officer, Namakkal Constituency* {1952 SCR 218, 229 : AIR 1952 SC 64} where Fazal Ali, J. (as he then was) while making a very pointed and crisp approach, scientifically analysed the position thus:

Broadly speaking, before an election machinery can be brought into operation, there are three requisites which require to be attended to, namely, (1) there should be a set of laws and rules making provisions with respect to all matters relating to, or in connection with, elections, and it should be decided as to how these laws and rules are to be made; (2) there should be an executive charged with the duty of securing the due conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections. Articles 327 and 328 deal with the first of these requisites, Art. 324 with the second and article 329 with the third requisite. The other two articles in Part XV, viz., articles 325 and 326, deal with two matters of principle to which the Constitution-framers have attached much importance. They are:-(1) prohibition against discrimination in the preparation of, or eligibility for inclusion in, the electoral rolls, on grounds of religion race, caste, sex or any of them; and (2) adult suffrage. Part XV of the Constitution is really a code in itself providing the entire ground-work for enacting appropriate laws and setting up suitable machinery for the conduct of elections."

20. We fully endorse and follow the above observations of the Constitution Bench which lay down the correct law on the subject and we have nothing further to add to the approach made by this Court in the case referred to above. On the other hand, our view that Arts. 324 to 329 have to be

construed harmoniously flows as a logical corollary from the ratio in *Ponnuswami's case*.

21. The pointed and pungent observations extracted above, really amount to a Bible of the election law as culled out from an interpretation of the provisions of Arts. 324 to 329 of the Constitution, and were referred to with approval even in *Mohinder Singh Gill's case* {1978 2 SCR 272 : (1978) 1 SCC 405}. During the last three decades this case has neither been distinguished nor dissented from and still holds the field and with due respect, very rightly. No other case ever made such a dynamic and clear approach to the problem, perhaps due to the fact that no such occasion arose because the Commission has always been following the provisions of the Act and the Rules and had never attempted to arrogate to itself powers which were not meant to belong to it. Indeed, if we were to accept the contention of the respondents it would convert the Commission into an absolute despot in the field of election so as to give directions regarding the mode and manner of elections by passing the provisions of the Act, and the Rules purporting to exercise powers under cover of Art, 324. If the Commission is armed with such unlimited and arbitrary powers and if it ever happens that the persons manning the commission shares or is wedded to a particular ideology, he could by giving odd directions cause a political havoc or bring about a constitutional crisis, setting at naught the integrity and independence of electoral process, so important and indispensable to the democratic system.

22. Further, such an absolute and uncanalised power given to the Commission without providing any guidelines would itself destroy the basic structure of the Rule of Law. It is manifest that such a disastrous consequence could never have been contemplated by the Constitution makers, for such an interpretation, as suggested by the counsel for the respondent, would be far from attaining the goal of purity and sanctity of the electoral process. Hence, we must construe Arts. 324 to 329 as an integral part of the same scheme collaborating rather than colliding with one another. Moreover, a perusal of Arts. 324 to 329 would reveal that the legislative powers in respect of matters relating to Parliament or the State Legislatures vests in Parliament and in no other body. The Commission would come into the picture only if no provision has been made by Parliament in regard to the elections to the Parliament or State Legislatures. Furthermore, the power under Art. 324 relating to superintendence, direction and control was actually vesting of merely all the executive powers and not the legislative powers. In other words, the legislative power of Parliament or

of the legislature of a State being made subject to Art. 324 only means that no law made by Parliament under Art. 327 or by a State legislature under Art. 328 can take away or deprive the Commission of the executive power in regard to matters entrusted to it, viz. superintendence, direction and control of elections. The right to file an election petition directly flows from Art. 329 and cannot be affected in any manner by the exercise of executive power by the Commission under Art. 324.”

17. A Constitution Bench decision on which reliance has been placed in opposition to the present appeal is the case of ***Kuldip Nayar & Others v. Union of India & Others*** {(2006) 7 SCC 1}. Reliance has been placed on paragraphs 426, 427 and 462 of the said decision in relation to the ambit and scope of the powers which is required to be exercised by the Election Commission in the conduct of a free and fair election, which reads as under:

“426. It has been argued by the petitioners that the Election Commission of India, which under the Constitution has been given the plenary powers to supervise the elections freely and fairly, had opposed the impugned amendment of changing the secret ballot system. Its view has, therefore, to be given proper weightage.

427. In this context, we would say that where the law on the subject is silent, Article 324 is a reservoir of power for the Election Commission to act for the avowed purpose of pursuing the goal of a free and fair election, and in this view it also assumes the role of an adviser. But the power to make law under Article 327 vests in the Parliament, which is supreme and so, not bound by such advice. We would reject the argument by referring to what this Court has already said in *Mohinder Singh Gill* {(1978) 1 SCC 405} and what bears reiteration here is that the limitations on the exercise of "plenary character" of the Election Commission include one to the effect that "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".

462. The procedure by which an election has to be held should further the object of a free and fair election. It has been noted by the Parliament that in elections to the Council of States, members elected on behalf of the political parties

misuse the secret ballot and cross vote. It was reported that some members indulge in cross voting for consideration. It is the duty of the Parliament to take cognizance of such misbehaviour and misconduct and legislate remedial measures for the same. Breach of Discipline of political parties for collateral and corrupt considerations removes the faith of the people in a multi party democracy. The Parliament, therefore, necessarily legislated to provide for an open ballot. A multi party democracy is a necessary part of the basic structure of the Constitution. An amendment to law intended to restore popular faith in parliamentary democracy and in the multi party system cannot be faulted.”

18. It is also the stand of the Respondents that the present Appellant who is not even a voter of the said constituency, cannot use the extraordinary jurisdiction of the writ Court as a PIL to unsettle certain settled things in relation to the result of the said by-election and what the Election Tribunal has had to observe in its order while dismissing the election petition being devoid of merit.
19. Having given a detailed hearing to the parties as well as keeping in mind the previous litigations in relation to the said by-election, the view taken by the learned Single Judge cannot be said to be an erroneous view to take because *prima facie*, the aggrieved person who happened to be the petitioner in election petition had raised all issues and levelled allegations which were held to be not proved on the basis of evidence and materials which came before the Election Tribunal. The law gives ample opportunity and a platform to question the validity of an election on the diverse grounds which have been envisaged under the Representation of People Act, 1951 and the Court should not encourage certain vested interests to by-pass or circumvent the findings which have emerged in the election petition by trying

to raise issues which primarily related to the by-election which was held for the said Constituency. Such a leeway or indulgence by using the extraordinary jurisdiction of a writ Court will have a far reaching implications as the sanctity or validity of a finding of an Election Tribunal can never reach a finality. It will become an unending story if such leeway is granted to vested interests by entertaining such issues under Article 226 of the Constitution of India. Writ Courts can not be used to overcome or undermine findings of the Election Tribunal.

20. We are not, therefore, convinced that any interference would be warranted with the impugned order dated 18.05.2018 passed by the learned Single Judge in this appeal. The time has come when curtains must be drawn on the issue as enough judicial time of various Courts have already been used without much substance or success.

21. The appeal has no merit. It is dismissed.

Sd/-
(Ajay Kumar Tripathi)
CHIEF JUSTICE

Sd/-
(Parth Prateem Sahu)
JUDGE