

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Application in EP No. 045 of 2019
(In Election Petition No. 010 of 2019)

District : Latur

The Returning Officer,
41-Latur Parliamentary Constituency,
Latur, Dist. Latur
& 02 others.

.. Applicants.

versus

Ramrao Narsing Garkar,
Age : 59 years,
Occupation : Retired,
R/o. at post Gour,
Taluka Nilanga,
Dist. Latur
& 09 others.

.. Non-applicants.

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Mr. Alok M. Sharma, Advocate, for the applicants.

*Mr. N.V. Gaware, Advocate, holding for
Mr. G.K. Sontakke and Mrs. P.G. Sontakke,
Advocates, for non-applicant no.01.*

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And

Application in EP No. 048 of 2019
(In Election Petition No. 009 of 2019)

District : Latur

The Returning Officer,
17-Parbhani Parliamentary Constituency,
Parbhani, Dist. Parbhani
& 02 others.

.. Applicants.

versus

Alamgir Mohd. Khan,
Age : 38 years,
Occupation : Business,
R/o. House no. 16-4-85-F,
Chanchalguda, Hyderabad
500 024 (Telangana State)
& 16 others.

.. Non-applicants.

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Mr. Alok M. Sharma, Advocate, for the applicants.

*Mr. N.V. Gaware, Advocate, holding for
Mr. G.K. Sontakke and Mrs. P.G. Sontakke,
Advocates, for non-applicant no.01.*

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 26TH SEPTEMBER 2019

ORDER :

01. These applications have been filed by the Returning Officer, District Election Officer and on behalf of Chief Election Commission of India, who are the respective respondents in both the Election Petitions, with a request to permit them to use the Electronic Voting Machines [For short, hereinafter referred to as "EVMs"].

02. The applicants are contending that as per Section 82 of the Representation of the People Act, 1951, parties to the petition are prescribed. Further, Section 83 of the said Act prescribes for the contents of the petition. Section 84 of the Act

provides that a petitioner may, in addition to claiming a declaration that the election of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected. Section 86 of the Act deals with the trial of election petitions. It is therefore stated, that taking into consideration various provisions of the Act, the applicants are not necessary party to the election petitions. There are no allegations against the malfunction of EVMs. So also, the Apex Court has held that even if functioning of EVMs are being challenged, the Election Commission and Returning Officer are not necessary parties. It is then claimed by the applicants, that the State Assembly Elections may be held in October-November 2019. Therefore, the Election Commission is required to keep those EVMs in working position which they have now kept in strong room and on that count, they went to remove the EVMs from the strong room and use them in coming assembly elections.

03. The applications have been opposed by filing affidavit in reply by both the original petitioners. They have contended that the applications have been filed by suppressing facts; the prayers in the applications are vague; the reason is false, imaginary and baseless. The petitioners are challenging the elections of returned candidates

mainly on the point that the total number of votes polled and the declaration that was given by Returning Officer are at variance. The difference, it is stated, is on account of tampering of EVMs. It can be revealed only after full fledged trial. The said EVMs are primary evidence and therefore, the said evidence cannot be allowed to be destroyed. It is stated, that the Election Commission has made contrary statement to the statement that has been made in the applications, that they have kept EVMs ready for the coming elections. They have stated that as per "FLC OK" machine status as on 19th September 2019 shows that total number of ballot units is 1,80,289 and controlling units is 1,26,107 with 1,29,527 VVPAT. The said data with regard to the EVMs to be installed in 36 districts of State of Maharashtra has been provided. It is therefore, submitted that there is absolutely no necessity to allow the applicants to remove the EVMs from strong room and use them in the assembly elections.

04. Heard learned Advocate Mr. A.M. Sharma appearing for the applicants. So also, heard Mr. N.V. Gaware h/f. learned Advocate Mr. G.K. Sontakke appearing for non-applicants no.01 - original petitioners.

05. Learned Advocate for the applicants in his written notes of arguments, which have been submitted

in addition to his oral submissions, has given the entire procedure during election process as to how the machines / VVPAT are used; they function; what is the process of sealing EVMs before actual voting, especially after the mock poll is held for testing; then sealing of strong room in presence of contesting candidates / their agents; how voting is done on the machines; what precautions they take on the counting day, etc. He submitted that contents of the petition, if considered would show that the petitioners have not taken into consideration "*None of the above*" (hereinafter referred to as "NOTA"). If those votes are considered, then there would be any hardly difference which might have occurred due to manual incorporation of the data in the chart. There is absolutely no scope for tampering in the EVMs those have been used in the elections those were held for respective Parliamentary Constituencies. Though there is no order of protecting those EVMs passed in these cases, yet, the applicants have preserved the EVMs in the strong room; but since state assembly elections have been declared, those machines are required.

06. Per contra, learned Advocate appearing for non-applicants no.01 - original petitioners, submitted that the data collected by the petitioners and which has been produced along with the affidavit in reply would show that there are sufficient machines available with the Election Commission.

Further, there is absolutely no reason as to why the same machines, the Election Commission wants to use in this assembly elections when other machines are available. The petitioners have challenged the election on one of the ground, that there was tampering with the machines and under such circumstance, the data is required to be preserved. The said electronic evidence is in fact, primary evidence and therefore, till the adjudication is made, those machines are required to be preserved in the same state. He tried to rely on the decision by Kerala High Court in *K.M. Karim Vs. V.K. Shanavas & others* [OP(C) No.1644 of 2016 (O)] decided on 27th July 2016, wherein the Kerala High Court reversed the rejection of application for summoning EVMs before the Court and then proceeded to direct the District Election Officer, in whose custody the EVMs were kept, to produce the same and help the Court to decode the data available in those EVMs.

07. The limited question that is required to be considered in these applications is as to whether case is made out by the applicants to allow them to remove the EVMs from the strong room and allow them to use it in the coming assembly elections. It is to be noted that the applications have not been happily worded. The Election Commission has not given the data in respect of how many EVMs they have with them and why these EVMs which are subject matter of the

present election petitions, only are required for the coming assembly elections. When query was put to the learned Advocate for the applicants, he submitted that the exact data of EVMs is not available with him; however elections can be held in absence of these EVMs also. If this is the position, then straightway the applications deserve to be rejected. The applicants ought to have come with a case that they cannot hold assembly elections without these machines or there is in fact, shortage of EVMs with them. Note can be taken that at present, the State Assembly Elections have been scheduled only in Maharashtra as well as Haryana. When Election Commission can hold elections by using EVMs throughout the country, then note will have to be taken that they are having sufficient machines with them. The data which has been tried to be produced on record in affidavit in reply by the petitioners, at this stage, cannot be considered for the simple reason that it is not explained from where that data has been obtained by them.

08. Another fact is also required to be taken into consideration, that what is the challenge in the present petitions. Though at this stage, we cannot go into the merits and whether NOTA can be considered, or not, yet, the contents of the petitions would show that they are making allegations regarding tampering with the machines. Learned

Advocate appearing for the applicants has strongly stated that such tampering cannot be done. Since the petitioners have made that allegation, then definitely the burden would be on the petitioners to prove that there was tampering. But when they make that allegations, definitely, the evidence is required to be preserved as in the state it is. I am in agreement with the observation by Kerala High Court, that EVMs are "electronic record" as contemplated under the Evidence Act. Taking into consideration the contents of the applications, even a query was put to the learned Advocate for the applicants, that whether it is possible for the applicants to collect the data from the machines, in presence of a court commissioner and then allow the Election Commission to use those machines. It was also asked that, by keeping the existing data as it is, in the machines, whether they can be put to use. The answer to the said query was that, for using those machines, data will have to be removed and transfer of that data in any other device may not be possible. Therefore, when the petition is based on the data in the machines and also the fact that when the Election Commission has ample EVMs with it, by use of which the State Assembly Elections can be smoothly held, there is absolutely no necessity to remove the EVMs in this case from the strong room and allowing them to be used by the applicants.

09. Hence, there is no merit in the applications and therefore, they are rejected.

(Smt. Vibha Kankanwadi)
JUDGE

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