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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 5th September, 2019

+ **CM (M) 1295/2019 & CM APPL. 39291/2019**

DELHI HIGH COURT BAR ASSOCIATION
THR. ITS HONY. SECRETARY SHERSHAH
SURI MARG NEW DELHI

..... Petitioner

Through: Mr. Abhijat, Hony. Secretary in person.

Mr. Arpit Kumar Singh, Mr. Kajal Chandra and Mr. Viren Kapur, Advocates. (M: 9971867057)

versus

RAJIV KHOSLA & ORS.

..... Respondents

Through: Mr. Rajiv Khosla, R-1 in person.

Mr. J. P. Sengh, Senior Advocate with Ms. Manisha Mehta, Mr. Shashi Pratap Singh, Mr. R. L. Sinha and Mr. Vapika Malik, Advocates for R-2. (M:9810034286)

Ms. Anu Bagai, Advocate for R-3. (M:9810096764)

Mr. Amit Saxena, Advocate for R-4 to 11. (M:9811360525)

Mr. Mohinder J. S. Rupal, Mr. Hardik Rupal, Mr. Prang Newmai, Mr. Koushik Ghosh, Mr. Naman Garg, Ms. Aditi Shashtri and Mr. G. K. Pathak, Advocates for Delhi University. (M:9811151216)

Mr. A.D.N. Rao (M:9818397711), Mr. Venkatesh Rao (M:9818997711), Mr. Rahul Mishra (M:9990997711) and Ms. Avni Sharma (M:8800369502), Advocates for ECIL with Mr. Sukamal Banerjee, Senior DGM for ECIL. (M:9441358814)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The challenge in the present petition is to the order dated 31st May, 2019 passed by the Id. Trial Court in an application under Order XXXIX Rules 1 & 2 CPC wherein the Trial Court granted an interim order in the following terms:

“... ”

Arguments heard and gone through the record.

In view of the submissions made, plaintiff has a prima facie case in his favour, and if the documents are destroyed or tampered with, it would cause irreparable loss to the plaintiff. Further balance of convenience is also in favour of the plaintiff and none of the defendants are going to be adversely affected by the present order.

In the circumstances, defendants no.1 Delhi High Court Bar Association, defendant no.2 Election Commission, defendant no.3 Registrar General, Delhi High Court and defendant no.12 Registrar, Delhi University are hereby directed to preserve the entire election record in their respective custody till further orders of this Court, including EVM, polling slips, electoral slips, unused and used polling slips and videography of the entry of the polling area and exit of the polling area beside other videography. Application accordingly disposed off.”

2. The background of the present petition is that the Respondent No.1/Plaintiff – Mr. Rajiv Khosla (*hereinafter*, ‘Plaintiff’) filed a suit challenging the elections held to the Executive Committee of the Delhi High Court Bar Association (*hereinafter* ‘DHCBA’) on 17th May, 2019. The said suit raises various allegations, which are being considered in the pending

proceedings before the Id. Trial Court. For the purpose of conducting the elections, Delhi University had provided Electronic Voting Machines (*hereinafter* 'EVMs') for which charges were borne by the DHCBA. The Plaintiff had moved an application under Order XXXIX Rules 1 & 2 CPC in the said suit seeking preservation of the documentary evidence in the form of videography, EVMs, polling slips, electoral slips, etc. The above order came to be passed in the said application.

3. Subsequent to the above order, the Delhi University filed an application before the Id. Trial Court seeking release of the EVMs on the ground that the elections to the Delhi University Students Union (*hereinafter* 'DUSU') are scheduled for 12th September, 2019 and the EVMs are required for the purposes of conducting the DUSU elections. In the said application, the Court issued notice and the matter was listed on 3rd September, 2019. Considering the proximity of the elections, the DHCBA has filed the present petition seeking permission for release of the EVMs to Delhi University.

4. On 2nd September, 2019, the present petition was listed before this Court and an intimation was given to the Plaintiff and other Respondents for appearance on 3rd September, 2019. On 3rd September, 2019, after hearing parties, the following order was passed:

"1. The present petition challenges the impugned order dated 31st May 2019 by which the trial court has directed as under:

"In the circumstances, defendants no.1 Delhi High Court Bar Association, defendant no.2 Election Commission, defendant no.3 Registrar General, Delhi High Court and defendant nno.12 Registrar, Delhi University are hereby directed to preserve the entire election in their respective custody till further orders of this Court, including

EVM, polling slips, electoral slips, unused and used polling slips and videography of the entry of the polling area and exit of the polling area beside other videography.”

2. The petition was listed yesterday and the Petitioner was directed to intimate the Respondent no.1 of the filing of present petition.

3. Mr. Rajiv Khosla – Respondent No.1, who has appeared in person, has raised the following objections.

a) That the Delhi High Court Bar Association has no locus standi to challenge the order dated 31st May, 2019 (hereinafter ‘impugned order’).

b) That the said challenge filed before this Court is highly belated. If they were aggrieved by the impugned order and the elections were scheduled for 12th September, 2019 in the Delhi University, they ought to have approached the Court earlier.

c) That there are allegations of tampering and also the need for proper maintenance of all the records is required, in order to check the data for the purpose of adjudication of the suit including the number of Votes, numbers of persons who voted, votes polled by the various candidates, NOTA votes etc., all of which is maintained in the said EVMs.

d) That the Delhi University has already moved an application before the Trial Court and notice has been issued in the said application and the ld. Trial Court is ceased of the matter today, hence, they should approach the Trial Court.

4. Mr. Sudhir Nandrajog, ld. Senior Counsel appearing on behalf of the Delhi University (DU), however, submits that the Delhi University is also seriously aggrieved by the order dated 31st May, 2019 since as per the said order, the Delhi University has been directed to maintain the EVMs and thus they cannot be put to use. The operative portion of the impugned order requires that the EVMs, polling slips,

electoral slips, videography etc. has to be preserved/maintained. He further submits that during the period from May to August, 2019, the Delhi University administration was busy with the new admissions for the next academic year and so, at the earliest opportunity, they have moved the application before the Trial Court. This submission is disputed by Mr. Khosla.

5. Mr. J. P. Sengh, ld. Senior Counsel accepts notice on behalf of Election Committee, constituted to conduct the elections of Delhi High Court Bar Association (DHCBA), which were held on 17th May, 2019.

6. After hearing the parties, this Court is of the opinion that the elections in Delhi University are scheduled on 12th September, 2019 and the EVMs would be needed for the same. According to ld. Senior Counsel for the Delhi University, there are more than 52 colleges and 250 polling booths that have to be manned by the staff and the EVMs would be required for conducting of the said elections. On a query from the Court, the counsels have consulted the personnel of the Delhi University, who are present today, who submit that the EVMs are manufactured by Electronics Corporation of India Limited ('ECIL'), which is a government undertaking.

7. Under these circumstances, this Court is of the opinion that if the data, which is stored in the EVMs, can be copied with the help of technical experts and retained in electronic form then the purpose of both sides would be served. The same can be then filed before the Trial Court in either in the form of a Pen Drive or CD-ROM. Notice be issued to ECIL for appearing through counsel along with a technical expert. The technical expert of ECIL to also be prepared to inform the Court as to whether the data from the EVMs can be copied and preserved and if so, in what manner.

8. Mr. Khosla further submits that three EVMs can be preserved on a random basis in order for the

verification to be done. Ld. Counsel for Delhi University has no objection for preserving three random EVMs.

9. Insofar as the retaining of three random EVMs is concerned, let the Plaintiff/his representatives, the representatives of the Election Committee which conducted the Delhi High Court Bar Association's elections, remain present in Delhi University where the EVMs are kept, for identification of three random EVMs today. Identification of three random EVMs be done in the Delhi University premises at 6:00 pm in the presence of officials of Delhi University today itself. After identification, the said three EVMs shall be preserved by the Registrar, Delhi University in safe custody until further orders of this Court.

10. Ld. counsel for the Delhi University as well as Petitioner shall serve the ECIL for appearance on the next date. List on 5th September, 2019 at top of board as the first item in the supplementary list.

11. Copy of the order be given dasti under signature of Court Master."

5. Pursuant to the above order, the Electronics Corporation of India Limited (*hereinafter 'ECIL'*) has appeared today. It is also reported that the identification of three sample EVMs was conducted on 3rd September, 2019. A report was prepared wherein three EVMs bearing serial numbers 042, 94 and CH No.16566 were sealed in the presence of the Plaintiff and other relevant parties. The said one-page report prepared by a Section Officer of the Delhi University, has been shown to the Court today, which reads as under:

*"Spot proceeding on 03-9-19 at 6.30 pm
In pursuance of order dated 03-9-2019 in CM No.(m)
1295/2019 Delhi High Court Bar Association v. Sh.
Rajiv Khosla. The identification of three random*

EVMs was done in the Delhi University premises today i.e. 3-9-19 at 6.30 pm in the presence of below mentioned persons. The EVMs were selected by Sh. Rajiv Khosla. The order of the Hon'ble High Court has been read over by all the persons present. The said three EVMs were sealed in presence of the persons and with their satisfaction.

EVS Serial No.042, 94 and CH No. 16566.

1. The EVSs Machine taken from Room was unlocked in presence of all and the tin box which Mr. Khosla choosed the same was already unlocked and the EVS taken out from there were also unsealed. The ballet unit of the Delhi High Court Bar Association was not found."

The report has been signed by the following persons:

1. Mr. Rajiv Khosla – Plaintiff
2. Ashok Chauhan
3. Mohinder Rupal – Ld. counsel for Delhi University.
4. Puneet Sharma on behalf of Election Commission
5. Shashi Bhushan Sharma - Section Officer of D.U.

6. Mr. A.D.N. Rao, ld. counsel appearing for ECIL, under instructions from Mr. Sukumal Banerjee, Senior Deputy General Manager of ECIL, submits that the data, which is contained in the EVMs, can be preserved so that the issues can be adjudicated by the ld. Trial Court at the appropriate stage.

7. On a query from the Court, Mr. Banerjee submits that an EVM has two units i.e., the control unit and the ballot unit. The ballot unit, which is where the voters press the relevant button, does not contain any memory. However, the primary and secondary memory is located in the control unit. Considering the fact that the elections were held in May, 2019 and final

adjudication of the suit can take some time, this Court is of the opinion that the data can be retrieved from the EVMs in the next three to four days so that no further issues are raised in respect of preservation of the data contained in the EVMs during the pendency of the suit. This would also ensure that the EVMs are made available for the DUSU elections.

8. The Plaintiff submits that at the time of inspection on 3rd September, 2019, the EVMs at the Delhi University were not sealed, even though they were kept in a room which was locked. The allegations in respect of the EVMs and ballot units, if any, are to be raised in the suit and shall be adjudicated in the suit itself. The same are not the subject matter of the present petition. At the present moment, this Court is only concerned with preserving the integrity of the data residing in the EVMs in order to ensure that the issues raised in the suit can be adjudicated in accordance with law.

9. Accordingly, the following directions are passed in the present petition:

- 1) The data in the EVMs, both in the primary and secondary memory, shall be retrieved and a report shall be prepared on the following aspects:
 - (i) The total number of votes polled for each of the posts.
 - (ii) The total number of votes polled by each of the candidates for each of the posts.
 - (iii) The total number of NOTA votes polled for each of the posts.
- 2) Ld. counsel for Delhi University, submits that there are a total 44 EVMs which were used in the DHCBA elections. The above data shall be retrieved from each of the EVMs. A table

shall be prepared consisting of the above data, along with the specific EVM number.

- 3) The retrieval of the data from the EVMs shall be done by two technical experts from ECIL in the presence of **Mr. Sarsij Kumar (M: 9650006723)** and **Mr. Zameem Ahmad Khan (M: 09650006732)** from the IT Department of the Delhi High Court, who will be present as Local Commissioners.
- 4) The status and condition of the EVMs prior to the opening of the same and the retrieval of the data shall also be mentioned in the report. Even the process in which the data was retrieved shall also be mentioned in the report.
- 5) After retrieval of the entire data, the memory of the EVMs shall be erased and the EVMs shall be released to the Delhi University for the purposes of conducting the DUSU elections on 12th September, 2019.
- 6) The process of retrieval of data from the EVMs shall commence at 9:00 am from tomorrow i.e., 6th September, 2019 and all attempts shall be made to conclude the task as soon as possible, latest by 9th September, 2019.
- 7) Retrieval of the data shall be done by two technical experts of ECIL in the presence of the following persons:
 - (i) Two Local Commissioners appointed by the Court from the IT department of the Delhi High Court viz., Mr. Sarsij Kumar and Mr. Zameem Ahmad Khan;
 - (ii) The Plaintiff - Mr. Rajiv Khosla shall be represented by Mr. Gulshan Kumar, as requested by Mr. Khosla or any

other technical expert. Mr Khosla may also be present himself;

- (iii) Any two members from the Executive Committee of the DHCBA;
- (iv) Any two members of the Election Committee of the DHCBA who are involved in conduct of elections on 17th May, 2019.
- (v) Two representatives from Delhi University.

10. Except the two technical experts, none of the other persons shall be entitled to handle the EVMs. The Local Commissioners, who also have technical knowledge, may assist the ECIL experts, if requested. However, retrieval of the data shall take place in the presence of the persons mentioned above. The said persons shall not interfere or create any commotion at the time of retrieval of the data. The entire process of retrieval of data shall be videographed. Photographs are also permitted to be taken. Expenses, if any, shall be borne by DHCBA. The videographer and photographer shall be identified by the Local Commissioners and shall report to them directly. The Local Commissioners shall prepare and file a report. The videography and photographs, if any, shall be appended to the reports in a pen drive. Any relevant photographs shall also be printed and attached to the report. The said report shall be counter signed by the two experts from ECIL. Ld. counsel(s) representing ECIL shall assist the Local Commissioners in preparing the report.

11. The fee of the Local Commissioners is fixed at Rs.1 lakh each, to be borne by the DHCBA at this stage. The same shall be considered as costs of the suit at the final stage.

12. It is made clear that none of the allegations raised in the suit have been gone into in the present petition and the merits of the suit has not been considered. All issues and objections in respect of the merits of the disputes are left open.

13. Ld. counsel for the Delhi University confirms that unimpeded access to the room, where the EVMs are locked, shall be given by the Delhi University.

14. The petition and all pending applications are disposed of in the above terms.

15. Copy of the order be given *dasti* under signature of the Court Master.

PRATHIBA M. SINGH
JUDGE

SEPTEMBER 05, 2019/dk