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

Date of Decision: 06.02.2020

+ LPA 65/2020

KIRAN PAL SINGH TYAGI & ORS Appellants

Through: Mr. Viplav Sharma, Adv.

Versus

STATE OF NCT OF DELHI & ORS Respondents

Through: Mr. Sandeep Sethi, Sr. Adv. with

Mr. Sidhant Kumar, Adv. for R-3/Election

Commission of India

Mr. Anil Soni, Central Govt. Standing Counsel for
R-2/Union of India with Mr. Devesh Dubey, Adv.

Mr. P.R. Chopra, Adv. for R-4 and 5

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT

: **D.N. PATEL, Chief Justice (Oral)**

1. This appeal has been preferred by the original petitioners in W.P.(C)1032/2020 which was dismissed by the learned Single Judge *vide* judgment and order dated 28th January, 2020 (Annexure A-17 to the memo of this appeal). As the petition of the appellants was dismissed, the original petitioners have preferred this appeal challenging the rejection of the nomination papers of the appellants by order dated 22nd January, 2020 by Returning Officer (respondent No.5).

2. The learned Single Judge has mainly pointed out that the remedy available to the appellants is by way of Election Petition as prescribed under

Article 329 of the Constitution of India to be read with Sections 80 and 100 (1)(c) of the Representation of People Act, 1951 as well as in the light of the decisions rendered by the Hon'ble Supreme Court in *N.P. Ponnuswamy vs. Returning Officer, Namakkal Constituency, Namakkal, Salem Dist. & Ors.* reported in 1952 SCR 218 as well as in *Mohinder Singh Gill and Anr. vs. Chief Election Commissioner, New Delhi and Ors.* reported in AIR (1978) 1 SCC 851.

3. We have heard the learned counsel for appellants who has mainly submitted that the nomination paper of the appellants was wrongly rejected. The learned counsel further submits that the relief sought by the appellants is under Article 324 and not under Article 329 of the Constitution of India, therefore, Election Petition will not be a remedy for the appellants. It is further submitted by the learned counsel for appellants that the appellants are not in search of stay against the whole election process of Delhi Assembly Elections, 2020 but, in fact are concerned only with Assembly Seat No.40 (New Delhi) and, therefore, prayed that the rest of the elections be continued except Assembly Seat No.40 (New Delhi). It is also submitted by the learned counsel for appellants that it is a constitutional right of this appellants to contest the election. Learned Counsel for the appellants has also relied upon the aforesaid decisions reported in *N.P. Ponnuswamy vs. Returning Officer & Ors. (Supra)*, *Mohinder Singh Gill and Anr. (Supra)* as well as upon a decision reported in *Election Commission of India vs. Ashok Kumar & Ors., (2000) 8 SCC 216*. On the basis of the aforesaid decisions, it has been contended by the learned counsel for appellants that nomination paper of the appellants are wrongly/improperly rejected by the Returning

Officer and, therefore, petition under Article 226 is tenable at law. He further submits that this aspect of the matter has not been properly appreciated by the learned Single Judge. Moreover, original petitioners' constitutional right to contest the election has also not been properly appreciated by the learned Single Judge, while passing the impugned judgment. Hence, the judgment and order dated 28th January, 2020 delivered by the learned Single Judge in W.P.(C) 1032/2020 deserves to be quashed and set aside.

4. We have heard the learned Senior counsel appearing for the respondent No.3 who has mainly submitted that Delhi Assembly Elections, 2020 has already been commenced as per notification already issued for Delhi Assembly Elections, 2020. Various dates have already been published which are referred to at page 148 to the memo of this appeal. It is submitted by learned Senior counsel for respondent No.3 that looking to the provisions of Article 329(b) of the Constitution of India to be read with Section 80 as well as Section 100 (1)(c) of the Representation of People Act, 1951, the remedy available with the appellants are by way of Election Petition if their nomination papers have been wrongly/improperly rejected. It is also submitted by the learned Senior counsel for respondent No.3 that looking to decision rendered by the Hon'ble Supreme Court in ***N.P. Ponnuswamy vs. Returning Officer & Ors.*** reported in 1952 SCR 218, that Election Petition is the appropriate remedy available with the appellants and not a writ petition under Article 226 of the Constitution. To buttress his contentions, learned Senior counsel for the respondent No.3 has placed reliance upon para 28 of the aforesaid decision.

5. **Reasons:**

Having heard the learned counsel for both sides and looking to the facts and circumstances of the case and judicial pronouncements propounded by the Hon'ble Supreme Court, we see no reason to entertain this appeal mainly for the following facts, reasons and judicial pronouncements:-

- (i) The appellants are the original petitioners in W.P.(C)1032/2020. The main challenge in the writ petition was about improper rejection of nomination papers of the appellants by the respondent No.5 on 22nd January, 2020. The appellants want to contest the Assembly Election of Delhi for the Assembly Election Seat No.40 (New Delhi).
- (ii) Election notification has already been published as stated at page 148 of this appeal and the relevant dates as mentioned in para 2 of the said notification reads as under:

“2. Now, therefore, in pursuance of Sections 30 and 56 of the said Act, the Election Commission of India hereby-

(A) appoints, with respect to the said election in each of the constituencies,-

(a) the 21st January 2020 (Tuesday), as the last date for making nominations;

(b) the 22nd January 2020 (Wednesday), as the date for scrutiny of nominations;

(c) the 24th January 2020 (Friday), as the last date for withdrawal of candidatures;

(d) the 08th February 2020 (Saturday), as the date on which a poll shall, if necessary, be taken; and

(e) the 13th February 2020 (Thursday), as the date before which the election shall be completed;”

- (iii) The nomination paper of the candidates has already been scrutinised by the Returning Officer (Respondent No.5) and the nomination papers of the appellants have already been rejected by respondent no.5 on 22nd January, 2020.
- (iv) Learned Single Judge has mainly observed that the writ petition under Article 226 is not tenable at law. However, the appellants are not remediless, hence, ubi jus ibi remedium cannot be invoked. The appellants are already having appropriate remedy by way of Election Petition. For ready reference Article 329 of the Constitution of India reads as under:

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

[Notwithstanding anything in this Constitution]

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any court;

(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.”

(emphasis supplied)

- (v) Sections 80 and 100 of the Representation of People Act, 1951 read as under:

"80. Election petitions.—No election shall be called in question except by an election petition presented in accordance with the provisions of this Part.

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84. Relief that may be claimed by the petitioner.—A petitioner may, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected.

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100. Grounds for declaring election to be void.—

(1) Subject to the provisions of sub-section (2) if the High Court is of opinion—

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963 (20 of 1963); or

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or

*(c) that any nomination has been improperly rejected;
or*

*(d) that the result of the election, in so far as it concerns
a returned candidate, has been materially affected—*

(i) by the improper acceptance or any nomination, or

*(ii) by any corrupt practice committed in the interests of
the returned candidate by an agent other than his
election agent, or*

*(iii) by the improper reception, refusal or rejection of
any vote or the reception of any vote which is void, or*

*(iv) by any non-compliance with the provisions of the
Constitution or of this Act or of any rules or orders
made under this Act, the High Court shall declare the
election of the returned candidate to be void.*

*(2) If in the opinion of the High Court, a returned
candidate has been guilty by an agent other than his
election agent, of any corrupt practice but the High
Court is satisfied—*

*(a) that no such corrupt practice was committed at the
election by the candidate or his election agent, and
every such corrupt practice was committed contrary to
the orders, and without the consent, of the candidate or
his election agent;*

(b) (omitted)

*(c) that the candidate and his election agent took all
reasonable means for preventing the commission of
corrupt practices at the election; and*

*(d) that in all other respects the election was free from
any corrupt practice on the part of the candidate or any
of his agents, then the High Court may decide that the
election of the returned candidate is not void."*

(emphasis supplied)

The position that emerges, from a conjoint reading of Section 100(1) (c) of the Representation of People Act, 1951, and Sections 80 and 84 thereof, is clear and unmistakable. Section 100(1) (c) specifically envisages a challenge on the ground that any nomination is improperly rejected, and also provides for the order that the High Court, duly moved by such a challenger, may pass, which is a declaration that the election of the returned candidate is void. Such a relief, by virtue of a conjoint reading of Sections 80 and 84 has to be claimed in an election petition. Section 80 specifically proscribes ventilation of such a challenge, save and except by way of an election petition. No writ petition, therefore, be maintainable, on the ground that the nomination paper(s) of any aspiring contestant has been wrongly rejected.

- (vi) In view of the Article 329(b) of the Constitution of India to be read with Sections 80 and 100 (1)(c) of the Representation of People Act, 1951, no error has been committed by the learned Single Judge while deciding W.P.(C) 1032/2020 *vide* judgment and order dated 28th January, 2020 (Annexure A-17 to the memo of this writ petition). The appellants have remedy to file Election Petition, if they are aggrieved by improper/wrongful rejection of nomination paper by the Returning Officer.
- (vii) Learned counsel appearing for the appellants has submitted that nomination papers have been rejected arbitrarily and malafidely. We are not accepting this contention mainly for the

following reasons:

- (a) To establish malafideness and arbitrariness, cogent and convincing evidences are required to be laid and that can only be done in Election Petition but not in a writ petition under Article 226 of the Constitution of India;
- (b) On the basis of mere assertions in the writ petition and its annexures, we see no reason to come to a final conclusion about arbitrariness or malafide of the Returning Officer in rejecting the nomination papers of the appellants..
- (viii) It has been held by the Hon'ble Supreme Court in para 28 in *N.P. Ponnuswamy vs. Returning Officer & Ors.* (Supra) which reads as under:

“28. We are informed that besides the Madras High Court, seven other State High Courts have held that they have no jurisdiction under Article 226 of the Constitution to entertain petitions regarding improper rejection of nomination papers. This view is in my opinion correct and must be affirmed. The appeal must therefore fail and is dismissed. In view of the nature and importance of the points raised in this appeal, there should be no order to costs.”

(emphasis supplied)

- (ix) It has been held by the Hon'ble Supreme Court in *Mohinder Singh Gill & Anr. vs. Chief Commissioner* reported in (1978) 1 SCC 405 in paras 25, 30, 88 and 92 as under:

“25. Having thus explaining the raison d'etre of the provision, the Court proceeded to interpret the concept of election in the scheme of Part XV of the Constitution and the Representation of the People Act, 1951. Articles 327 and 328 take care of the set of laws and Rules making provisions with respect to all matters relating to or in connection with elections. Election disputes were also to be provided for by laws made under Article 327. The Court emphasised that Part XV of the Constitution was really a code in itself, providing the entire groundwork for enacting the appropriate laws and setting up suitable machinery for the conduct of elections. The scheme of the Act enacted by Parliament was also set out by Fazl Ali, J.:

“Part VI deals with disputes regarding elections and provides for the manner of presentation of election petitions, the constitution of Election Tribunals and the trial of election petitions. Part VII outlines the various corrupt and illegal practices which may affect the elections, and electoral offences. Obviously, the Act is a self-contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the Rules made thereunder. The provisions of the Act which are material to the present discussion are Sections 80, 100, 105 and 170, and the provisions of Chapter II of Part IV dealing with the form of election petitions, their contents and the reliefs which may be sought in them. Section 80 which is drafted in almost the

same language as Article 329(b) provides that 'no election shall be called in question except by an election petition presented in accordance with the provisions of this Part'. Section 100, as we have already seen, provides for the grounds on which an election may be called in question, one of which is the improper rejection of a nomination paper. Section 105 says that 'every order of the Tribunal made under this Act shall be final and conclusive'. Section 170 provides that 'no civil court shall have jurisdiction to question the legality of any action taken or of any decision given by the Returning Officer or by any other person appointed under this Act in connection with an election'."

There have been amendments to these provisions but the profile remains substantially the same. After pointing out that the Act, in Section 80, and the Constitution, in Article 329(b), speak substantially the same language and inhibit other remedies for election grievances except through the election tribunal, the Court observed:

"That being so, I think it will be a fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage."

There is a non obstante clause in Article 329 and, therefore, Article 226 stands pushed out where the dispute takes the form of calling in

question an election, except in special situations pointed at but left unexplored in Ponnuswami.

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30. The plenary bar of Article 329(b) rests on two principles: (1) The peremptory urgency of prompt engineering of the whole election process without intermediate interruptions by way of legal proceedings challenging the steps and stages in between the commencement and the conclusion. (2) The provision of a special jurisdiction which can be invoked by an aggrieved party at the end of the election excludes other form, the right and remedy being creatures of statutes and controlled by the Constitution. Durga Shankar Mehta has affirmed this position and supplemented it by holding that, once the Election Tribunal has decided, the prohibition is extinguished and the Supreme Court's overall power to interfere under Article 136 springs into action. In Hari Vishnu this Court upheld the rule in Ponnuswami excluding any proceeding, including one under Article 226, during the on-going process of election, understood in the comprehensive sense of notification down to declaration. Beyond the declaration comes the election petition, but beyond the decision of the Tribunal the ban of Article 329(b) does not bind.

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88. What is that controversy? Let us project it with special reference to the present case. Here the poll proceeded peacefully, the counting was almost complete, the ballots of most stations are available and postal votes plus the votes of one or two polling stations may alone be missing. Sri P.P. Rao asks and whenever counsel in court or

speaker on a podium asks rhetorical questions be sure he is ready with an answer in his favour: If the court holds that the cancellation by the Commissioner of the whole poll is illegal what relief can it give me since a fresh election based on that demolition has been already held? If the court holds that since most of the ballots are intact, re-poll at one or two places is enough how can even the court hold such limited re-poll? If the court wants to grant the appellant the relief that he is duly elected how can the intervening processes lying within the competence of the Commissioner be commanded by the court? The solution to this disturbing string of interrogations is simple, given a creative reading of implied powers writ invisibly, yet viably, into the larger jurisdiction under Section 98. Law transcends legalism when life is baffled by surprise situations. In this larger view and in accordance with the well-established doctrine of implied powers we think the court can — and if justified, shall — do by its command, all that is necessary to repair the injury and make the remedy realisable. Courts are not luminous angels beating their golden wings in the void but operational authority sanctioning everything to fulfil the trust of the rule of law. That the less is the inarticulate part of the larger is the jurisprudence of power. Both Sri Sorabjee and Sri Phadke agree to this proposition and Sri Rao, in the light of the election petition filed and pending, cannot but assent to it. By way of abundant caution or otherwise, the appellant has challenged, in his election petition, the declaration of the third respondent as the returned candidate. He has also prayed for his being declared the duly elected candidate. There is no dispute — there

cannot be — that the cornerstone of the second constituency-wide poll is the cancellation of the first. If that is set aside as invalid by the High Court for any good reason then the second poll falls and the third respondent too with it. This question of the soundness of the cancellation of the entire poll is within the court's power under Section 98 of the Act. All are agreed on this. In that eventuality, what are the follow-up steps? Everything necessary to resurrect, reconstruct and lead on to a consummation of the original process. Maybe, to give effective relief by way of completion of the broken election the Commissioner may have to be directed to hold fresh poll and report back together with the ballots. A recount of all or some may perhaps be required. Other steps suggested by other developments may be desired. If anything integrally linked up with and necessitated by the obligation to grant full relief has to be undertaken or ordered to be done by the election machinery, all that is within the orbit of the Election Court's power.

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92. Diffusion, even more elaborate discussion, tends to blur the precision of the conclusion in a judgment and so it is meet that we synopsise the formulations. Of course, the condensed statement we make is for convenience, not for exclusion of the relevance or attenuation of the binding impact of the detailed argumentation. For this limited purpose, we set down our holdings:

“(1)(a) Article 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.

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 Article 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 insofar 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 wrongdoer 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 Article 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 candidate 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."

(emphasis supplied)

- (x) In view of the aforesaid decisions of the Hon'ble Supreme Court, the writ petition of these appellants was not tenable at law. The Election Petition is the only remedy available with the appellants.
- (xi) Learned counsel appearing for the appellants has relied upon a decision rendered by the Hon'ble Supreme Court in *Election Commission of India vs. Ashok Kumar & Ors. (Supra)*. The Hon'ble Supreme Court has held in para 32 of the aforesaid decision which reads as under:

“32. For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:

(1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.

(2) Any decision sought and rendered will not amount to “calling in question an election” if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

(3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

(4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court has been

sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the court.

(5) The court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the court would act with reluctance and shall not act, except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material.

(emphasis supplied)

- (xii) We specifically queried, learned counsel for the appellant as to whether grant of the prayers, of his clients, would not effectively impede the progress of the election in the Constituency from which his clients desired to contest. Learned counsel answered in the negative, seeking to submit that he was

not praying for holding of the entire electoral process, but was concerned with only one constituency. He, however, was unable to deny that, if the elections in the said Constituency to take place, his prayer would be rendered infructuous and that, therefore, grant of his prayer would necessarily entail holding up of the elections in the said constituency. In the alternative, he submits, the Election Commission could be directed to postpone the said election for the said constituency alone.

(xiii) In our view, this would necessarily amount to interfering with the progress of the election which, as per the law laid down by the Supreme Court in the decisions cited hereinabove, could only be by way of an Election Petition, and not by way of a writ petition under Article 226 of the Constitution of India.

(xiv) In view of the aforesaid decision of the Hon'ble Supreme Court and looking to the facts of the case, the nomination paper of the appellants have been rejected by the respondent No.5 on 22nd January, 2020. If we interfere at this stage, it will tantamount to **interference with the progress of the election.** Hence, the present appeal of the appellants is not tenable at law as Election Petition is the appropriate remedy available to the appellants.

6. As a cumulative effect of the aforesaid facts and reasons and judicial pronouncements, there is no substance in this appeal and the same is therefore dismissed.

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7. In view of the final order passed in LPA 65/2020, the application stands disposed of as infructuous.

CHIEF JUSTICE

C.HARI SHANKAR, J

FEBRUARY 06, 2020

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