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W.P.A. 10020 of 2021

(Through Video Conference)

HABIBUR RAHAMAN

VS.

THE STATE OF WEST BENGAL & ORS.

Ms. Sohini Chakraborty

Mr. Arijit Sarkar

Mr. Sagnik Chatterjee

...for the petitioner

Mr. T.M. Siddique

..for the State

Ms. Sonal Sinha

..for the Election Commission

Let the supplementary affidavit filed in Court today be taken on record.

This writ petition has been filed challenging publication of 'Form-B' in connection with reservation of seats in Jangipur Municipality, for Schedule Caste Candidates. It is the contention of the petitioner that as per Rule 3(2)(b) read with Note 2 of the First Schedule of the West Bengal Municipal Elections (Reservation of Seats) Rules, 1994, the reservation of Ward nos. 8,13 and 16 for schedule caste candidates was not in accordance with law. The petitioner raised an objection with regard to the reservation of seat in Ward no. 13. A hearing was held and the petitioner was heard on the objection. Thereafter, the prescribed authority published Form B keeping the reservation for the Ward No. 13 for Scheduled Caste

candidate.

Aggrieved, the petitioner moved this writ petition. The petitioner contends that although the prescribed authority heard the petitioner's objection, but he did not communicate any order to the petitioner. It is submitted that for the second term election, as in this case, serial nos. 2,5&8 in the table prepared under Rule 3(2)(b) of the First Schedule of the said rules of 1994, should be reserved for schedule caste candidates.

Ms. Sinha, learned Advocate appearing for the State Election Commission raised the point of maintainability. A judgment passed by another Co-ordinate Bench of this Court **in the matter of Sk. Maison & Ors. Vs. The State of West Bengal & Ors.** reported in **2009 (1) CLJ (Cal) 33**, is being relied upon. The relevant portions of the above judgement is quoted below:-

“8. In Shivaji (supra), the Apex Court was considering a dispute regarding election to a Legislative Council. The governing statute was the representation of the People Act, 1951. While reiterating the meaning given to the word ‘election’ in Ponnuswami(supra), on assumption of jurisdiction by the High Court in exercise of writ powers, it proceeded to observe as follows:—

“6. The disputes regarding the elections have to be settled in accordance with the provisions contained in Part-VI of the Act. Section 80 of the Act states 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. The expression ‘election’ is defined by Section 2(d) of the Act as an election to fill a seat or seats in either House of Parliament or in the House or either House of the legislature of a State other than the State of Jammu and Kashmir. Thus a dispute regarding election to the Legislative Council of a State can be raised only under the provisions contained in Part-

VI of the Act. Section 80-A of the Act provides that the Court having jurisdiction to try an election petition shall be the High Court. An election petition has to be presented in accordance with Section 81 of the Act. In view of the nonobstante clause contained in Article 329 of the Constitution the power of the High Court to entertain a petition questioning an election on whatever grounds under Article 226 of the Constitution is taken away.”

9.It would now be worthwhile to notice the scheme of the Act. It has been enacted to consolidate and amend the laws relating to the holding of elections to the Municipalities in West Bengal. Election has been defined in Section 2(e) to mean ‘election to fill a seat or seats in a Municipality’. Section 3 empowers the West Bengal State Election Commission to delimit areas into wards for the purpose of election of members of a Municipality. Chapter-III of the Act deals with electoral rolls for Municipality. Elections are covered by Chapter-V of the Act. Section 29 thereof, in so far as is relevant for a decision on the preliminary objection, reads as follows:—

“29. (1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes in every Municipality in such manner as may be prescribed and the number of seats so reserved shall bear as nearly as may be, the same proportion to the total number of seats to be filled by direct election to the Municipality as the population of the Scheduled Castes in the Municipal area or of the Scheduled Tribes in the Municipal area, as the case may be, bears to the total population of that Municipal area, and such seats may be allotted population of that Municipal area, and such seats may be allotted by rotation to different constituencies of that Municipality by the Commission in such manner as may be prescribed.

(2) Not less than one-third of the total number of seats reserved under sub-section (1) shall be reserved for women belonging to the Scheduled Castes, or as the case may be, the Scheduled Tribes.

(3) Not less than one-third of the total number of seats, including the seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes under sub-section (2), to be filled by direct election to a Municipality, shall be reserved for women, and such seats may be allotted by rotation to different constituencies of the Municipality by the Commission in such manner as may be prescribed.

(4)

13.From a conspectus of judicial decisions, it

appears to be clear that the word 'election' when construed narrowly, would mean the final selection of a candidate on contest if there be a poll, or a particular candidate being returned unopposed when there is no poll. However, construed in a wider sense, the word election would connote the entire process consisting of several stages by which a candidate is returned as an elected member, whether or not it is necessary to hold a poll. The word 'election' in Article 329(b) of the Constitution has been construed in the wider sense by the Apex Court. Article 243ZG is similarly worded, starting with a non-obstante clause. There is no reason to construe the word 'election' therein differently.

14. In the context of the Act, this Court is minded to hold that the process of election for constituting the Board of a Municipality, if it is a new Municipality, would commence with determination of wards upon division of the Municipal area. In the case of an existing Municipality the wards of which have been determined in accordance with Section 3 of the Act, the process through which a candidate is elected would essentially include preparation of electoral rolls for the constituencies comprised within the Municipality, reservation of seats for the specified sections, issuance of election notification, presentation of nomination papers, scrutiny thereof, the poll, and declaration of result. Having regard to the Apex Court's concurrence in Ponnuswami (supra) with the passage in Halsbury's Laws of England on 'Commencement of the Election', the stage from which the process of election begins must depend upon the statute governing it. The Act itself provides reservation of seats to be made in connection with election to a Municipality, which has an important bearing on the the process, in the manner prescribed prior to issuance of election notification announcing the election programme. This is so because the people including the voters' concerned and the prospective candidates must know which of the constituencies are reserved and which are not so as to enable them decide their next course of action. Reservation of seats therefore is an integral part of the election process and hence any action taken by the competent authority in erroneously reserving seats contrary to the roster appended to the Rules or not reserving a seat which ought to be reserved in accordance with such roster, as claimed by the petitioners, are not to be allowed to be called in question at an intermediary stage or else election for constituting the Board of a Municipality, which is a time-bound programme, would be disturbed.

However, having regard to provisions contained in Section 75 of the Act, a person aggrieved would not be without a remedy. The action of the Election Officer impugned herein can well be the subject-matter of decision in an election petition presented in accordance with law.

15. The decision in Manda Jaganath(supra) has been looked into by this Court. Contents of Paragraph-14 thereof support the stand taken by Mr. Sanyal that any act prior to publication of the election notification would not be embraced by the word 'election'. However, as held earlier, reservation of seats being an important step in the process of holding of election to a Municipality under the Act and being part of the entire process culminating in a candidate being declared elected, the view taken by the Apex Court in Paragraph-14 of Manda Jaganath(supra) may not apply here. In any event, the view expressed in Paragraph-14 of Manda Jaganath(supra) seems to be inconsistent with the view taken in Paragraph-7 of the decision in Ponnuswami(supra) and the other decisions of the Apex Court following it and, therefore, this Court being bound by both the decisions would prefer to be guided by the law laid down in Ponnuswami(supra) not because of the numerical supremacy of Judges constituting the Bench but, to this Court, it appears to be better in point of law."

A similar view was taken by another co-ordinate Bench of this Court in the matter of **Sri Manas Maiti Vs. State of West Bengal & Ors.** (In re: W.P. No. 7133 of 2013). In both the above cases, reservation of a constituency was under challenge prior to issuance of the election notification. Their Lordships held that the remedy of the petitioners would be under Section 75 of the West Bengal Municipal Election Act, 1994 and Section 79 of the West Bengal Panchayat Act, 1973, as the case may be.

The Election Commission relies upon a judgment of the Hon'ble Supreme Court in the case of

State of Uttar Pradesh & ors. v. P.S.S. Samity reported

in 1995 (Supp) 2 SCC 305 at paragraph 45. The Hon'ble Supreme Court has held in as follows:

“45.What is more objectionable in the approach of the High Court is that although clause (a) of Article 243-0 of the Constitution enacts a bar on the interference by the courts in electoral matters including the questioning of the validity of any law relating to the delimitation of the constituencies or the allotment of seats to such constituencies made or purported to be made under Article 243-K and the election to any panchayat, the High Court has gone into the question of the validity of the delimitation of the constituencies and also the allotment of seats to them. We may, in this connection, refer to a decision of this Court in *Meghraj Kothari v. Delimitation Commission & Ors.* [(1967) 1 SCR 400]. In that case, a notification of the Delimitation Commission whereby a city which had been a general constituency was notified as reserved for the Scheduled Castes. This was challenged on the ground that the petitioner had a right to be a candidate for Parliament from the said constituency which had been taken away. This Court held that the impugned notification was a law relating to the delimitation of the constituencies or the allotment of seats to such constituencies made under Article 327 of the Constitution, and that an examination of sections 8 and 9 of the Delimitation Commission Act showed that the matters therein dealt with were not subject to the scrutiny of any court of law. There was a very good reason for such a provision because if the orders made under sections 8 and 9 were not to be treated as final, the result would be that any voter, if he so wished, could hold up an election indefinitely by questioning the delimitation of the constituencies from court to court. Although an order under Section 8 or 9 of the Delimitation Commission Act and published under Section 10 [1] of that Act is not part of an Act of Parliament, its effect is the same. Section 10 [4] of that Act puts such an order in the same position as a law made by the Parliament itself which could only be made by it under Article 327. If we read Articles 243-C, 243-K and 243-0 in place of Article 327 and sections 2 [kk], 11-F and 12-BB of the Act in place of Sections 8 and 9 of the Delimitation Act, 1950, it will be obvious that neither the delimitation of the panchayat area nor of the constituencies in the said areas and the allotments of seats to the

constituencies could have been challenged nor the Court could have entertained such challenge except on the ground that before the delimitation, no objections were invited and no hearing was given. Even this challenge could not have been entertained after the notification for holding the elections was issued. The High Court not only entertained the challenge but has also gone into the merits of the alleged grievances although the challenge was made after the notification for the election was issued on 31st August, 1994.”

Considering the above decisions of the Hon’ble Supreme Court as also the lead case on the matter i.e. ***N.P Ponnuswami vs. The Returning Officer & Ors.*** reported in ***AIR 1952 SC 64***, this Court is of the view that the remedy of the petitioner would lie after the election process is completed before the District Judge of the district wherein the election has been held under the provisions of the West Bengal Municipal Elections Act, 1994.

Under such circumstances, in view of the order passed by co-ordinate Benches of this Court and the law discussed by the said learned Judges, I do not hold a different view and agree with the reasoning of Their Lordships. Upon consideration of the law discussed, I am not inclined to exercise any discretion. Interference at this stage when election is imminent is unwarranted. In the decision of ***State of Goa v. Fouziya Imtiaz Shaikh*** reported in ***2021 SCC Online SC 211***, it was once again reiterated that interference by way of judicial review is discretionary. However, rejection of the application on the ground of maintainability, shall not be construed as an

order on merits. The merits of the claim of the petitioner shall be adjudicated when the petitioner approaches the appropriate forum. The petitioner is at liberty to approach the appropriate forum in accordance with law.

This writ petition is dismissed.

There will be however no order as to costs.

All parties are directed to act on the server copy of this order.

(Shampa Sarkar, J.)