

S/L 6
17.02.2022
Court. No. 19
GB

W.P.A. 2612 of 2022

Hema Harijan
VS
The West Bengal State Election Commission & Ors.

*Mr. Sabyasachi Chatterjee,
Mr. Sandipan Das,
Mr. Sayan Banerjee,
Mr. Ankur Sharma.*

...for the Petitioner.

Mr. Sonal Sinha.

...for the Election Commission.

The petitioner is aggrieved by the rejection of her nomination by the authorities of the West Bengal Election Commission. The petitioner wanted to contest from Ward No.4 of Rampurhat Municipality. The allegations are that the nomination of the petitioner was cancelled without any basis and on frivolous grounds.

Mr. Chatterjee, learned advocate for the petitioner vehemently urges before the Court that the officials of the Election Commission are statutory authorities whose actions are subject to judicial review. He further submits that there has been a mala fide attempt on the part of the authorities to suppress the voice of the people by indulging in such activities, which have ultimately resulted in cancellation of the nomination papers.

Although, it is urged by Mr. Chatterjee that the nomination was rejected on frivolous grounds, the writ petition does not disclose either the records or the decision

rejecting the nomination. Thus, the Court is unable to ascertain exactly what was the ground of rejection.

Mr. Chatterjee refers to Sections 75 and 76 of the West Bengal Municipal Election Act, 1994 (hereinafter referred to as the ‘said Act’) and submits that the provisions of law are not adequate to deal with cases of rejection of the nominations of the candidates. He submits that the jurisdiction of the writ court would not be a total bar and refers to the decision of ***State of Goa v. Fouziya Imtiaz Shaikh, (2021) 8 SCC 401.***

The Court is of the view that the principles laid down in the decision of ***N.P. Ponnuswami v. Returning Officer, Namakkal Constituency***, reported in ***1952 SCR 218 : AIR 1952 SC 64***, covers such a situation. What was challenged before the Hon’ble Apex Court in Ponnuswami (supra) was rejection of nomination papers. Similar arguments were advanced that the expression “election” would mean the action of returning a candidate and rejection of nomination papers on frivolous grounds or unjustified grounds, was subject to judicial review and would not be an election dispute. Their Lordships held that the term, election could not be given a restricted meaning and the entire process involved several stages from the notification till the candidates were returned.

In the matter of ***N.P. Ponnuswami v. Returning Officer, Namakkal Constituency, AIR 1952 SC 64***, the Hon’ble Apex Court held as follows:-

“(1) Having regard to the important functions which the legislatures have to perform in

democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

(2) In conformity with this principle, the scheme the election law in this country as well as in England is that no significance should be attached to anything which does not affect the 'election'; and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the 'election' and enable the person affected to call it in question, they should be brought up before a Special Tribunal by means of an election petition and not be made the subject of a dispute before any court while the election is in progress."

The Hon'ble Apex Court also gave the rationale behind its rejection of the writ petition, on the ground that there was a constitutional bar in questioning an election and the legislature in its wisdom had framed a special law for adjudication of such kinds of disputes, by a special tribunal.

In the matter of ***Mohinder Singh Gill v. Chief Election Commr., (1978) 1 SCC 405***, the Hon'ble Apex Court held as follows:-

"126. The above being the legal position, Article 329(b) rules out the maintainability of the writ application. Article 329(b) provides that "notwithstanding anything in this Constitution ... no election to either House of Parliament . . . 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". It is undisputed that an election can be challenged only under the provisions of the Act. Indeed Section 80 of the Act provides 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. We find that all the substantial reliefs which the appellants seek in the writ application, including the declaration of the election to be void and the declaration of Appellant 1 to be duly elected, can be claimed in the election petition. It will be within the power of the High Court, as the election Court, to give all appropriate reliefs to do complete justice between the parties. In doing so it will be open to the High Court to pass any ancillary or consequential order to enable it to grant the necessary relief provided under the Act. The writ application is therefore barred under Article 329(b) of the Constitution and the High Court rightly dismissed it on that ground.

127. In view of our conclusion that the High Court had no jurisdiction to entertain the writ application under Article 226 of the Constitution, it will not be correct for us, in an appeal against the order of the High Court in that proceeding, to enter into any other controversy, on the merits, either on law or on facts, and to pronounce finally on the same. *The pre-eminent position conferred by the Constitution on this Court under Article 141 of the Constitution does not envisage that this Court should lay down the law, in an appeal like this, on any matter which is required to be decided by the Election Court on a full trial of the election petition, without the benefit of the opinion of the Punjab and Haryana High Court which has the exclusive jurisdiction under Section 80-A of the Act to try the election petition. Moreover, a statutory right to appeal to this Court has been provided under Section 116-A, on any question, whether of law or fact, from every order made by the High Court in the dispute.*

128. So, in view of the scheme of Part VI of the Act, *the Delhi High Court could not have embarked upon an enquiry on any part of the merits of the dispute.* Thus it could not have examined the question whether the impugned order was made by the Election Commission in breach of a rule of natural justice. That is a matter relating to the merits of the controversy and it is appropriately for the Election Court to try and decide it after recording any evidence that may be led at the trial. It may be that if we pronounce on the question of the applicability of the rule of natural justice, the High Court will be relieved of its duty to that extent. *But it has to be remembered that even for the purpose of deciding that question, the parties may choose to produce evidence, oral or documentary, in the trial court. We*

therefore refrain from expressing any opinion in this appeal on the question of the violation of any rule of natural justice by the Election Commission in passing the impugned order.

129. At the same time we would like to make it quite clear that any observation, on a question of law or fact, made in the impugned judgment of the Delhi High Court, bearing on the trial of the election petition pending in the Punjab and Haryana High Court, will stand vacated and will not come in the way of that trial. That High Court will thus be free to decide the petition according to the law. We would also like to make it quite clear, with all respect to the learned Judges who have delivered a separate judgment, that we may not be taken to have agreed with the views expressed therein about the applicability of audi alteram partem or on the applicability of the guidelines in Sections 58 and 64-A to the facts and circumstances of this case, or the desirability of ordering a re-poll in the whole constituency, or the ordering of a re-poll of postal ballots etc. Election is a long elaborate and complicated process and, as far as we can see, the rule of audi alteram partem, which is in itself a fluid rule, cannot be placed in a strait-jacket for purposes of the instant case. It has also to be remembered that the impugned order of the Election Commission could not be said to be a final pronouncement on the rights of the parties as it was in the nature of an order covering an unforeseen eventuality which had arisen at one stage of the election. The aggrieved party had all along a statutory right to call the entire election in question, including the Commission's order, by an election petition under Section 80 of the Act, for the trial of which an elaborate procedure has been laid down in the Act. Then, as has been stated, there is also a right of appeal under Section 116-A. These and perhaps other relevant points may enter the scales in considering at the trial of the election petition whether there may not be sufficient justification to negative the existence of any implied duty on the part of the Commission, at that stage, to hear any party before taking its decision to order or not to order a re-poll. We do not therefore think it necessary or desirable to foreclose a controversy like this by any general observations and will leave any issue that may arise from it for trial and adjudication by the Election Court.

The same point was upheld in the matter of **Manda Jaganath v. K.S. Rathnam**, reported in **(2004) 7 SCC**

492. In this matter the Hon'ble Apex Court held as follows:-

"14. The word "election" has been judicially defined by various authorities of this Court to mean any and every act taken by the competent authority after the publication of the election notification.

15. In Ponnuswami [AIR 1952 SC 64] this Court held: (AIR p. 68, para 9)

The law of elections in India does not contemplate that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution (the ordinary jurisdiction of the courts having been expressly excluded), and another after they have been completed by means of an election petition.

16. The above view of this Court in Ponnuswami case [AIR 1952 SC 64] has been quoted with approval by the subsequent judgment in M.S. Gill [(1978) 1 SCC 405] wherein this Court after quoting the passages from the said judgment in Ponnuswami case [AIR 1952 SC 64] held that 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 out but left unexplored in Ponnuswami case [AIR 1952 SC 64]. It is while considering the above unexplored situations in Ponnuswami [AIR 1952 SC 64] that in M.S. Gill case [(1978) 1 SCC 405] this Court held thus: (SCC p. 429, para 34)

'34. This dilemma does not arise in the wider view we take of Section 100(1)(d)(iv) of the Act. Shri Rao's attack on the order impugned is in substance based on alleged non-compliance with a provision of the Constitution viz. Article 324 but is neatly covered by the widely-worded, residual catch-all clause of Section 100. Knowing the supreme significance of speedy elections in our system the framers of the Constitution have, by implication postponed all election disputes to election petitions and tribunals. In harmony with this scheme Section 100 of the Act has been designedly drafted to embrace all conceivable infirmities which may be urged. To make the project foolproof Section 100(1)(d)(iv) has been added to absolve everything left over. The Court has in earlier rulings pointed out that Section 100 is exhaustive of all grievances regarding an election.'

17. In the very same paragraph this Court, however, demarcated an area which is available for

interference by the High Court and the same is explained as follows: (SCC pp. 429-30, para 34)

'But what is banned is not anything whatsoever done or directed by the Commissioner but everything he does or directs in furtherance of the election, not contrarywise. For example, after the President notifies the nation on the holding of elections under Section 15 and the Commissioner publishes the calendar for the polls under Section 30, if the latter orders Returning Officers to accept only one nomination or only those which come from one party as distinguished from other parties or independents, is that order immune from immediate attack. We think not. Because the Commissioner is preventing an election, not promoting it and the Court's review of that order will facilitate the flow, not stop the stream. Election, wide or narrow be its connotation, means choice from a possible plurality, monolithic politics not being our genius or reality, and if that concept is crippled by the Commissioner's act, he holds no election at all.'

(emphasis in original)

18. Of course, what is stated by this Court hereinabove is not exhaustive of a Returning Officer's possible erroneous actions which are amenable to correction in the writ jurisdiction of the courts. But the fact remains that such errors should have the effect of interfering in the free flow of the scheduled election or hinder the progress of the election which is the paramount consideration. If by an erroneous order conduct of the election is not hindered then the courts under Article 226 of the Constitution should not interfere with the orders of the Returning Officers, remedy for which lies in an election petition only.

19. In *Election Commission of India v. Shivaji* [(1988) 1 SCC 277] this Court while considering a challenge to the election notification which included certain Zila Parishads within a notified constituency, held following the judgment in *Ponnuswami* [AIR 1952 SC 64] that even if there were any ground relating to the non-compliance with the provisions of the Act and the Constitution on which the validity of any election process could be questioned, the person interested in questioning the election has to wait till the election is over and institute a petition in accordance with Section 81 of the Act calling in question the election of the successful candidate.

20. Learned counsel for the writ petitioner before the High Court had relied upon a judgment of this Court in *S.T. Muthusami v. K. Natarajan* [(1988) 1 SCC 572] wherein this Court had held following the judgment in *Ponnuswami* case [AIR 1952 SC 64] that entertaining of a writ petition by the High Court

under Article 226 of the Constitution cannot be supported and consequently it set aside the judgment of the Division Bench of the High Court and dismissed the writ petition filed in the High Court. In that case the question involved was a dispute between two candidates claiming the official symbol of a political party. This judgment came to be distinguished by the High Court on the basis of facts though the law laid down there was squarely applicable against the maintainability of the writ petition.”

The issues before the Hon’ble Apex Court in all these matters were, rejection of nomination papers.

In the matter of **State of Goa v. Fouziya Imtiaz Shaikh**, reported in **(2021) 8 SCC 401**, the Hon’ble Supreme Court held that at least during the period from notification to the final result is declared, the Court should practice a judicial hands off. The Supreme Court has also observed that provisions of Section 243-ZG(b) would be an empty formality if writ courts entertained petitions except when entertaining a writ petition would result in subserving the progress of an election.

Article 243-ZG(b) is quoted below:-

“(b) no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State.”

Thus, the first point of Mr. Chatterjee that rejection of a nomination paper was not an election dispute, is rejected as per the discussions made hereinabove. The petitioner is entitled to raise such claims and challenge the election by

approaching the tribunal under Sections 75 and 76 of the said Act.

The Court is of the view that the provisions of Sections 75 and 76 of the West Bengal Municipal Election Act, 1994 (hereinafter referred to as the said Act) are sufficient to allow all disputes with regard to an election except as provided for. The term ‘election’ having been given a broader meaning, includes rejection of the nomination papers. The relevant portions are quoted below:-

“75. (1) If the validity of any election of a member is called in question by any person qualified to vote at such election, such person may, at any time within ten days immediately after the date of declaration, of the result of the election, file a petition before the District Judge of the district within which the election has been or should have been held and shall, at the same time, deposit two hundred rupees in the court as security for the cost likely to be incurred: Provided that the validity of such election shall not be called in question in any such petition—
 (a) on the ground that the name of any person qualified to vote has been omitted from the electoral roll, or
 (b) on the ground that the name of any person not qualified to vote has been inserted in the electoral roll: Provided further that if only two candidates contested such election, the petitioner may, in addition to calling in question the election of the returned candidate, claim that if the election of the returned candidate is set aside, the other candidate may be declared duly elected.
 (2) The provisions of the Code of Civil Procedure, 1908, shall apply, as far as may be, in the matter of adjudication of an election petition under subsection (1).

76. If the District Judge, after holding such inquiry as he deems fit in respect of an election petition, is satisfied that—

(a) xxx xxx xxx

(b) the result of the election has been materially affected by any act or omission in violation of the provisions of this Act or the rules made thereunder, or

(c) xxx xxx xxx”

This Court, in the matter of ***Maison and ors. vs. The State of West Bengal and ors.*** reported in ***MANU/WB/1039/2008***, also held that the said Act was a sufficient alternative remedy prescribed by the legislature in consonance with the mandate of the Constitution. The relevant portion of the judgment is quoted below:-

“10. Chapter-VI of the Act deals with conduct of election once a notification under Section 36 has been issued. Chapter-VII deals with poll and as has been noticed earlier, disputes regarding election are covered under Chapter-VIII.

* * *

12. 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.

13. 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 words 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 result of 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 therein can well be the subject-matter of decision in an election petition presented in accordance with law.

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16. This Court is therefore unable to entertain the writ petition not because it has no merit at all but the petitioners have a remedy under the Act. It stands dismissed. Dismissal of the writ petition shall not preclude the petitioners from availing the special remedy provided by the Act. There shall be no order for costs.

Urgent photostat copy of this judgment, if applied for, be furnished to the parties within 4 days from date of putting requisites therefor."

In *Election Commission of India v. Shivaji*, reported in (1988) 1 SCC 277, the Apex Court was considered 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 non obstante 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.”

In the decision of ***Karmaveer Tulshiram Autade and ors. vs. The State Election Commission and ors.*** ***[WP (ST) 26 of 2021 decided on January 13, 2021]***, a three Judges’ Bench of the Bombay High Court had held that the jurisdiction of the writ court would be barred in view of the constitutional ban to question such elections and as a proper law was in place, granting an opportunity to the aggrieved persons to question an election by filing an election petition.

Their Lordships held that the provision of the Constitution operated as a complete bar in entertaining a writ petition under Article 226 of the Constitution against an order passed by the Returning Officer rejecting nomination papers and such provisions of the Constitution would be

clearly attracted whenever a writ petition was presented before a Court for its consideration. Their Lordships held that granting a relief claimed, by setting aside the order of rejection would definitely not be a step to sub-serve the progress of the election and/or facilitate its completion in the sense enunciated in *Mohinder Singh Gill* (supra).

In the State of Goa (supra), the Hon'ble Apex Court held as follows:-

“68.1. Under Article 243-ZG(b), no election to any municipality can be called in question except by an election petition presented to a Tribunal as is provided by or under any law made by the legislature of a State. This would mean that from the date of notification of the election till the date of the declaration of result a judicial hands-off is mandated by the non obstante clause contained in Article 243-ZG debarring the writ court under Articles 226 and 227 from interfering once the election process has begun until it is over. The constitutional bar operates only during this period. It is therefore a matter of discretion exercisable by a writ court as to whether an interference is called for when the electoral process is “imminent” i.e the notification for elections is yet to be announced.

68.5. Judicial review of a State Election Commission's order is available on grounds of review of administrative orders. Here again, the writ court must adopt a hands-off policy while the election process is on and interfere either before the process commences or after such process is completed unless interfering with such order subserves and facilitates the progress of the election.

68.7. The bar contained in Article 243-ZG(a) mandates that there be a judicial hands-off of the writ court or any court in questioning the validity of any law relating to delimitation of constituency or allotment of seats to such constituency made or purporting to be made under Article 243-ZA. This is by virtue of the non obstante clause contained in Article 243-ZG. The statutory provisions dealing with delimitation and allotment of seats cannot therefore be questioned in any court. However, orders made under such statutory provisions can be questioned in courts provided the statute concerned does not give such orders the status of a statutory provision.”

Here again, the Hon'ble Apex Court held that during the process of election, there would be a judicial hands off and the writ court may exercise discretion thereafter, under very special circumstances. In this case no such blatant illegality would be pointed out which could compel the court to exercise powers of judicial review.

Thus, the prayer of Mr. Chatterjee for an intervention of the Court at this stage, when the list of the contesting candidates have already been published, cannot be allowed in view of the law already settled by numerous decisions. The petitioner is entitled to proceed under the special law in terms of Sections 75 and 76 of the said Act.

Accordingly, the writ petition is disposed of.

However, there will be no order as to costs.

All the parties are directed to act on the basis of the server copy of this order and/or learned advocates' communication.

(Shampa Sarkar, J.)