

17.02.2022
Sl. No.8
srm

W.P.A. No. 2760 of 2022

**Samar Hazra
Vs.
The State of West Bengal & Ors.**

Mr. Mrityunjoy Chatterjee,
Mr. Debapriya Majumder
...for the Petitioners.

Ms. Sonal Sinha
...for the West Bengal State
Election Commission.

Mr. Samrat Sen, learned AAAG
Mr. Nilotpal Chatterjee
...for the State-respondents.

The petitioner wanted to contest the election from Ward No.21 under the Berhampore Municipality. The petitioner submits that the nomination of the petitioner was accepted and scrutinised by the Returning Officer, Berhampore Municipality. Thereafter, the petitioner came to know that someone impersonating as the petitioner withdrew the nomination at around 4.15 p.m. on February 11, 2022. The petitioner points out to the apparent discrepancy in the order of the Returning Officer, Berhampore Municipality to the effect that on the one hand the Returning Officer stated that the application of withdrawal of the nomination paper had been accepted from the petitioner, but on the other hand stated that the receipt

was given to one Shib Shankar Rajak, the proposer of the petitioner. The petitioner submits that such statement itself would indicate that the entire action of the authority was *mala fide*, arbitrary and based on extraneous considerations. The application for withdrawal was either manufactured or forged and the petitioner did not ever submit his withdrawal form. It is urged that had the petitioner himself submitted the withdrawal form, then the receipt would have been given to the petitioner himself and not to some other person. Such statement of the Returning Officer itself indicated that the acceptance of the withdrawal of the nomination of the petitioner was done under doubtful and questionable circumstances.

The petitioner has prayed for a direction upon the West Bengal State Election Commission and the Municipal Returning Officer, State of West Bengal to accept the candidature of the petitioner and permit him to contest the election from Ward No.21 under the Berhampore Municipality. Prayer is that the order dated February 12, 2022 passed by the Returning Officer, Berhampore Municipality be set aside.

Ms. Sinha, learned Advocate appearing on behalf of the West Bengal State Election Commission, disputes the contention the petitioner and submits that the Returning

Officer is an independent authority and if the petitioner's nomination paper was scrutinised and accepted by the officer, there was no reason why the same officer would use underhand methods to create or manufacture a withdrawal form in the name of the petitioner and accept the same.

Heard the parties. There are disputed questions of facts which have to be decided on evidence and the writ Court cannot interfere and pass any order, especially when the election process is on. There is no challenge to any infraction of the law or legal provisions against the respondents.

It has been settled by judicial authorities, time and again, that no election shall be called in question except by the mode framed by the legislature.

In the matter of *N.P. Ponnuswami v. Returning Officer, Namakkal Constituency*, 1952 SCR 218 : AIR 1952 SC 64, the Hon'ble Apex Court held that, having regard to the important functions which the legislatures had to perform in democratic countries, it had always been recognized to be a matter of first importance that elections should be concluded as early as possible according to the time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the

elections were over, so that the election proceedings would not be unduly retarded or protracted.

The right to vote or stand as a candidate for election was not a civil right but was a creature of statute or special law and must be subject to the limitations imposed by it. Strictly speaking, the Hon'ble Apex Court held that it was the sole right of the legislature to examine and determine all matters relating to the election of its own members, and if the legislature took it out of its own hands and vested in a Special Tribunal an entirely new and unknown jurisdiction, that special jurisdiction would have to be exercised in accordance with the law which created it. Where a right or liability was created by a statute which gave a special remedy for enforcing it, the remedy provided by the statute, only, must be availed of. These were the specific conclusions of the Hon'ble Apex Court.

In the decision of *N.P. Ponnuswami (supra)* the Hon'ble Apex Court held that even if apparently the term 'election' could be interpreted as the final decision of returning a candidate, the process of selection or election of a candidate in this regard should be given a much wider meaning and should be taken as the entire process from the date of the notification till the candidate is returned.

The Apex Court held that the word “election” could be and had been appropriately used with reference to the entire process which consisted of several stages and embraced many steps, some of which may have an important bearing on the result of the process.

The question which arose before the Hon’ble Apex Court was whether the law of elections in this country contemplated that there should be two attacks on matters connected with election proceedings, one while they were going on, by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution and another after the elections were completed, by means of an election petition.

The Apex Court held that any matter which had the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a Special Tribunal and should not be brought up at an intermediate stage before any court.

The Apex Court held that before an election machinery could be brought into operation, there were three requisites which were required to be attended to, namely, (1) there should be a set of laws and rules making provisions with respect to all matters relating to, or in connection with, elections, and it should be decided as to how these laws and

rules were to be made; (2) there should be an executive charged with the duty of securing the due conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections.

The Hon'ble Apex Court further held that election being an integral part of a democratic process, there should not be any clog in the process of election by interference by a writ court. Thus, separate laws had been enacted for disposal of such disputes. The reason why the High Court should not interfere under Article 226 of the Constitution of India and allow elections to be conducted smoothly and uninterruptedly had been explained thus in paragraph 18 of *N.P. Ponnuswami (supra)*:

“(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.”

Although, the prayer of the petitioners is that the nomination papers may be directed to be accepted, the Court does not have the jurisdiction under Article 226 of the Constitution of India to pass such orders when the process is in progress, in view of the law discussed hereinbefore.

The West Bengal Municipal Election Act, 1994 prescribes the procedure by which any person aggrieved by any action touching the question of election may approach the appropriate forum, by filing an election petition. For proper appreciation, Sections 75 and 76(b) of the West Bengal Municipal Election Act, 1994 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 sub-section (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”

The Court is of the view that under the election laws, withdrawal of a nomination paper could be used as a ground to question the election and such ground could not be urged in any other manner, at any other stage and before any other court except before the Special Tribunal. If the grounds on which an election could be called in question could be raised at an earlier stage and errors, if any, were rectified, there would be no meaning in enacting a provision like Article 243-ZG(b).

The provision 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.”

Acceptance of the withdrawal of a nomination paper amounts to denial of the right of the petitioner to participate in the election and is an action undertaken during the process of the election. This is also a dispute covered by the special law and cannot be called in question by way of a writ

petition. The allegations have raised disputed questions of facts which have to be decided on evidence. The petitioner alleges that the application for withdrawal of the nomination paper was either manufactured or forged and the petitioner did not ever submit his withdrawal form. On the other hand, the commission disputes such contention. Without evidence, such dispute cannot be resolved.

These are issues which have to be proved in evidence. Filing a petition under Section 75 would be the only way, such dispute can be resolved.

In the matter of *Manda Jaganath v. K.S. Rathnam*, (2004) 7 SCC 492, 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."

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."

In the matter of *State of Goa v. Fouziya Imtiaz Shaikh*, (2021) 8 SCC 401 the Hon'ble Apex held that Under Article 243-ZG(b), no election to any municipality could be called in question except by an election petition presented to a Tribunal was 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 the result a judicial hands-off was mandated by the non obstante clause contained in Article 243-ZG, debarring the High Court under Articles 226 and 227 of the Constitution

from interfering, once the election process had begun and until it was over. Article 243-ZG(b) operates as a bar just like Article 329(b) of the Constitution and the same principles governing Article 329(b) of the Constitution shall be applied in this case.

In the matter of *The Chief Election Commissioner and ors. vs. Ujjwal Kumar and ors*, (MAT 366 of 2021 decided on 12.03.2021), the Division Bench of this Court held as follows:-

“5. Examining Section 36(4) and Section 100(1)(c) of the RP Act, we note that scrutiny of nomination papers is a stage in the election process and the result of such scrutiny would be available for adjudication in terms of Section 100(1)(c) of the RP Act which makes improper rejection of nomination as a ground to declare the election to be void; while clause 4 of Section 36 which relates to scrutiny of nomination provides that the Returning Officer shall not reject any nomination paper on the ground of any defect which is not of a “substantial character”. Trying to draw a line between the phrase ‘improperly rejected’ in Section 100(1)(c) of the RP Act and the rejection of 4 nomination paper on the ground of any defect which is not of a “substantial character” as occurring in Section 36(4) of the RP Act, it would be so thin that it always swings in favour of having that issue open for consideration in the Election Petition. This is also because, any rejection of the nomination paper by the returning officer on the ground of any defect and the question whether such defect is of a ‘substantial character’ or not, as well as the question whether such rejection amounts to improper rejection for the purpose of Section 100(1)(c) of the RP Act are essentially mixed questions of facts and law. In the trial of Election Petition in terms of Chapter III in Part VI of the RP Act, such issue could be gone into comprehensively. Such questions are not to be decided by the writ court merely as if it is a jurisdictional issue or an issue of law only. 6. Relying on the decision of the Hon’ble Supreme Court of India

referred in N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency, Namakkal, Salem Dist. & others reported as AIR 1952 SC 64, Their Lordships of the Apex Court, in Manda Jaganath Vs. K.S. Rathnam and others reported in (2004) 7 SCC 492, held that the possible erroneous actions of Returning Officer which could be considered as amenable to correction in the writ jurisdiction are only such errors which would have the effect of interfering in the free flow of the scheduled election or hinder the progress of the election. It was held that 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 Officer, remedy for which lies in an Election Petition only. The paramount consideration is and ought to be the progress of the election."

As a result of the decisions discussed hereinabove, especially the decision of the Hon'ble five Judges Bench in *Mohinder Singh Gill (supra)*, this Court comes to the conclusion that reliefs prayed for by the petitioner, if entertained, would amount to interference with the election process which commenced from the date of issuance of the notification and any order passed herein would be a direct interference with the election process.

It is also submitted from the bar that the scrutiny of the nomination papers have also been completed and list of the contesting candidates has been published for Ward No.21 under Berhampore Municipality. Thus the Court cannot pass any order for the reasons discussed above. Moreover, disputed questions of facts have been raised, which have to be decided on evidence.

Thus, the writ Court does not have any jurisdiction to deal with the issues raised in the writ petition in view of the special law enacted. Adjudication of these disputed questions of facts would be by a Special Tribunal constituted for such purpose.

Under the facts and circumstances of the case, the remedy of the petitioner shall be by way of an election petition and the same shall be considered in terms of Section 75 and Section 76(b) of the West Bengal Municipal Election Act, 1994. The Special Tribunal shall decide all issues independently.

This writ petition is, thus, disposed of.

There will be no order as to costs.

The parties are to act on the basis of the server copy of this order or the learned Advocates' communication.

(Shampa Sarkar, J.)