

IN THE HIGH COURT AT CALCUTTA
Circuit Bench at Jalpaiguri
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Apurba Sinha Ray

M.A.T. 136 of 2023
(CAN 1 of 2023)

West Bengal State Election Commission
-Vs-
Serajul Islam & Ors.

For the Appellant : Mr. Amales Roy, Adv.
Mr. Deborshi Dhar, Adv.
Ms. Oshmita Mukherjee, Adv.

For the respondent : Mr. Kunaljit Bhattacharya, Adv.
No.1 Mr. Haider Ali, Adv.
Mr. Alok Sah, Adv.
Mr. Satyam Sarkar, Adv.

Heard on : 04.12.2023 & 05.12.2023

Judgment on : 05.12.2023

Joymalya Bagchi, J. :-

1. Appellant-West Bengal State Election Commission has assailed order dated 14.08.2023 whereby the learned Single Judge held the constitutional bar under Article 243-O of the Constitution of India as well as Section 80 of the West Bengal Panchayat Elections Act, 2003

(hereinafter referred to as 'Act of 2003') do not apply and the writ petition is maintainable.

2. The factual matrix giving rise to the appeal is as follows :-

3. The writ petitioner/respondent no.1 herein is an unsuccessful candidate in the Panchayat election held in the year 2023. He has alleged there was widespread manipulation and tampering of ballot papers, removal of ballot papers and issuance of fake identity cards in favour of a political party viz. All India Trinamool Congress (AITC) enabling tampering of ballots in the strong room/counting centre. Alleging these facts the writ petitioner/respondent no.1 herein approached the writ court praying for the following reliefs :-

(a) A writ in the nature of mandamus directing the respondent authorities their men, agents and subordinates to conduct repolling in respect of the booth mentioned in Paragraph 2 of the instant writ application;

(b) A writ in the nature of mandamus directing the respondent authorities their men, agents and subordinates to preserve the CCTV footages and ballot papers with regard to the booth mentioned in Paragraph 2 of the instant writ application;

(c) A writ in the nature of mandamus directing the respondent authorities their men, agents and subordinates to provide protection to the petitioner and the election agents to ensure they can go back to their residence safely and further ensuring their lives are not in danger;

(d) A writ in the nature of certiorari directing the respondents to produce all relevant records before the Hon'ble Court for proper adjudication;

(e) Rule NISI in terms of prayers (a) to (c) above;

- (f) An ad-interim order to preserve the CCTV footages and ballot papers with regard to the booth mentioned in Paragraph 2 of the instant writ application within Mekhliganj Block, till the disposal of the instant writ application;
- (g) Such other or further order or orders as Your Lordships may deem fit and proper.

4. Respondents in the writ petition referring to Article 243-O of the Constitution of India and Section 80 of the Act of 2003 challenged the maintainability of the writ petition.

5. In the impugned order, the learned Single Judge, inter alia, held that no election had been called in question and therefore, the aforesaid embargo does not apply. By the selfsame order the learned Judge directed the Returning Officer to preserve the CCTV footages in the polling booths, strong rooms and counting centres and to produce the footages before the court.

6. Mr. Amales Roy, learned Advocate for the appellant-West Bengal State Election Commission submits the learned Judge misdirected himself in coming to the conclusion that the election process had not been challenged. Pointing to prayer (a) in the writ petition he strongly contended the unsuccessful candidates had sought for repoll which is in the nature of an election dispute amenable within the scope of Section 93 of the Act of 2003. He relied on various authorities of the Apex Court as well as this court in support of the proposition that the learned Single Judge ought not to have entertained the writ petition in view of the alternative statutory remedy.

7. Per contra, Mr. Kunaljit Bhattacharya, learned Advocate for the writ petitioner/respondent no.1 herein contends there was widespread manipulation, tampering of ballot papers, removal of ballot papers and pilferage of ballot papers in the strong room and counting centres which rendered the election a mockery. Free and fair election is a part of the basic structure of the Constitution and the learned Single Judge invoked his constitutional powers to uphold the rule of law. Existence of an alternative statutory remedy is not an absolute bar which would render the constitutional remedies otiose. In support of his contention, he relied on ***Union Territory of Ladakh & Ors. vs. Jammu and Kashmir National Conference & Anr.***¹.

8. The dispute raised in this appeal therefore revolves around the question whether the learned Single Judge was justified in entertaining the writ petition in the face of the constitutional bar under Article 243-O of the Constitution of India and Section 80 of the Act of 2003.

9. One of the directive principles of State policy viz. Article 40 of the Constitution of India enjoins upon the State to take steps to organize village Panchayats and to endow them with necessary powers of self-governance. To achieve this avowed constitutional vision Part IX was incorporated in the Constitution, inter alia, providing for regular elections to the Panchayats under the supervision of the State Election Commission.

¹ 2023 SCC OnLine SC 1140

10. Article 243-O of the Constitution bars interference by courts in electoral matters. It reads as follows :-

“243-O. 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 243K, shall not be called in question in any court;

(b) no election to any Panchayat 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.”

11. Election to the local bodies viz. Panchayats in the State of West Bengal is governed by the Act of 2003. Part VII of the said Act relates to disputes regarding elections. Chapter XI of the said Part provides the manner in which elections to the Panchayat may be called into question. Section 79 of the Act of 2003 states validity of an election under the Act may be assailed by filing a petition within 30 days after the declaration of results before a civil Judge having jurisdiction over the election. Section 93 of the Act lays down the grounds of challenge which, inter alia, include improper reception, refusal or rejection of any vote or the reception of any vote which is void or non-compliance of the provisions of the Act or Rules made therein. Section 80 of the Act states that no election to a Panchayat may be called into question except by an election petition in accordance with the provisions contained in the Act.

12. Learned Single Judge held the aforesaid constitutional or statutory embargo do not apply as the election had not been called into question. We are unable to agree with such conclusion for the following reasons.

13. Prayer (a) in the writ petition seeks a mandamus upon the respondents including the appellant-Commission to conduct repolling in the booths mentioned therein. The grounds for repolling are illegal manipulation, rejection of valid votes and receipt and counting of fake votes which were illegally introduced in the strong room. This prayer was made after the results were declared in the Panchayat election. The nature of the pleadings and the principal prayer in the writ petition leaves no doubt in one's mind that an election dispute as envisaged in Section 79 read with Section 93 of the Act of 2003 had been disclosed and prayer for repolling made on such pleading.

14. The other prayers in the writ petition viz. prayers (b), (c) & (d) relate to preservation of CCTV footages, ballot papers and production of such evidence before the court presumably for adjudication of the principal relief viz. repolling. By no stretch of imagination these prayers can be held to widen the scope and ambit of the writ petition beyond the constitutional bar envisaged under Article 243-O of the Constitution of India and Section 80 of the Act of 2003.

15. Mr. Bhattacharya strongly contends the aforesaid bar does not take away the powers of the constitutional court to ensure a free and fair election. Learned Single Judge took note of the widespread manipulation and illegalities in the election process and invoked the writ jurisdiction. In this regard he extensively referred to the observations in ***Union Territory of Ladakh*** (supra).

16. In the cited case the political party had sought for allotment of a symbol viz. ‘*plough*’ to contest the ‘Ladakh Autonomous Hill Development Council’ (*LAHDC for short*) election. The party was a registered political party in the State prior to the dissolution and had been allotted the same symbol. After creation of Union Territory it made a representation to the Election Commission of India for use of the same symbol in the LAHDC election. Representations going unheeded the political party approached the High Court on 29.07.2023. During the pendency of the writ petition, on 05.08.2023 an election notification was issued.

17. In this backdrop the High Court had directed the respondent authorities to notify the ‘*plough*’ symbol to the political party. In this factual background the Apex Court, inter alia, held as follows :-

“37. We would indicate that the restraint, self-imposed, by the Courts as a general principle, laid out in some detail in some of the decisions supra, in election matters to the extent that once a notification is issued and the election process starts, the Constitutional Courts, under normal circumstances are loath to interfere, is not a contentious issue. But where issues crop up, indicating unjust executive action or an attempt to disturb a level-playing field between candidates and/or political parties with no justifiable or intelligible basis, the Constitutional Courts are required, nay they are duty-bound, to step in. The reason that the Courts have usually maintained a hands-off approach is with the sole salutary objective of ensuring that the elections, which are a manifestation of the will of the people, are taken to their logical conclusion, without delay or dilution thereof...”

18. Referring to various prior pronouncements which emphasis principle of deference in the face of constitutional bar under Articles 243-O, 243-ZG and 249 of the Constitution of India, the Apex Court observed the judgments are to be interpreted in the facts and circumstances peculiar to the cases concerned.

19. In a prior judgment viz. **State of Goa & Anr. vs. Fouziya Imtiaz Shaikh & Anr.**², a three-Judge Bench of the Apex Court had interpreted the constitutional bar under Article 243-O in the following manner :-

“68. * ****

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.

68.2. If, however, the assistance of a writ court is required in subserving the progress of the election and facilitating its completion, the writ court may issue orders provided that the election process, once begun, cannot be postponed or protracted in any manner.

68.3. The non obstante clause contained in Article 243-ZG does not operate as a bar after the Election Tribunal decides an election dispute before it. Thus, the jurisdiction of the High Courts under Articles 226 and 227 and that of the Supreme Court under Article 136 of the Constitution of India is not affected as the non obstante clause in Article 243-ZG operates only during the process of election.”

20. A combined reading of the ratios in the aforesaid cases would show the ratios laid down therein may be harmoniously construed. In **Union Territory of Ladakh** (supra) the writ petitioners had approached the High Court seeking direction for allotment of party symbol even prior to the declaration of election notification. This is in consonance with the observation made in paragraph 68.1 of **State of Goa & Anr. vs.**

² (2021) 8 SCC 401

Fouziya Imtiaz Shaikh & Anr. (supra) that it is within the discretion of the writ court whether to interfere when the election process has not commenced but is imminent i.e. the election has not yet been announced. It may further be noted in ***Union Territory of Ladakh*** (supra) at paragraph 37 of the report the Bench noted that the Additional Solicitor General had not contested the powers of the High Court to issue the directions but had challenged its justification.

21. Ratio of a judgment cannot be read like an Euclidean axiom or the words of a statute. It is to be read in the light of its factual matrix and not in a vacuum. In the present case the unsuccessful candidate i.e. the writ petitioner had raised disputes relating to illegalities in the election process after the result was published. Nature of his grievances squarely fall within the grounds of challenge envisaged under Section 93 of the Act of 2003 and is an election dispute under Section 79 of the said Act. Its adjudication would involve appreciation of oral, documentary and electronic evidence and cannot be equated with an ex-facie inaction in allotting symbol to a political party which had already been allotted the said symbol in the erstwhile State. On the contrary, efficacious adjudication of the disputes raised in the present case involve questions of fact and would require appreciation of evidence tested on the anvil of cross-examination.

22. These factors persuade us to hold the decision of the learned Single Judge to entertain the writ petition seeking repoll notwithstanding

the constitutional bar under Article 243-O of the Constitution of India and Section 80 of the Act of 2003 was clearly unwarranted.

23. As noted earlier other reliefs are merely consequential and in aid of the principal relief which partakes the character of an election dispute.

24. Finally Mr. Bhattacharya argues he is willing to give up prayer (a) in the writ petition and submits that he may be permitted to pursue the writ petition against erring public servants who abused their position to render the election process a mockery.

25. Having scanned the averments as well as the prayers in the writ petition we do not see any such relief being sought before the first court. The writ petitioner/respondent no.1 herein cannot be permitted to make out a new case at the appellate stage. Hence, we are not inclined to accede to this prayer which would change the very nature and character of the proceeding itself.

26. For these reasons, we allow the appeal.

27. The impugned order dated 14.08.2023 and all consequential orders are set aside.

28. In view of the appeal being allowed, we hold that the writ petition ought not to have been entertained in view of the constitution bar under Article 243-O of the Constitution of India and Section 80 of the Act of 2003. As a consequence the writ petition being WPA 1824 of 2023 is dismissed.

29. In view of the disposal of the appeal, CAN 1 of 2023 is also disposed of.

30. There shall be, however, no order as to costs.

31. Urgent photostat certified copy of the judgment, if applied for, be given to the parties on usual undertaking.

I agree.

(Apurba Sinha Ray, J.)

(Joymalya Bagchi, J.)

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