

Amol

REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 14242 OF 2023**

SUGHOSH JOSHI,
Age: 25 Years, Occ: Professional,
An adult Indian Inhabitant, Residing at, Flat
No. 14, Madhuban A, Samarth Path
Karvenagar, Pune 411 052.

... PETITIONER

~ VERSUS ~

- 1. THE ELECTION COMMISSION OF INDIA,**
Through the Election Commissioner of
India, Nirvachan Bhavan, Ashoka Road,
New Delhi 110 001.
- 2. THE UNION OF INDIA,**
Through the Ministry of Law & Justice,
Government of India, Shastri Bhawan,
New Delhi 110 001

... RESPONDENTS

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APPEARANCES

FOR THE PETITIONER **Mr Kushal Mor, with Shraddha
Swarup, Dayaar Singla, i/b
Pravin Singh.**

FOR RESPONDENT NO. 1 **Mr Pradeep Rajagopal, with Drishti
Shah, i/b Rekha Rajagopal.**

**CORAM : G.S.Patel &
Kamal Khata, JJ.**

DATED : 13th December 2023

ORAL JUDGMENT (Per GS Patel J):-

1. **Rule.** Rule returnable forthwith in view of the instructions received by Mr Rajagopal.
2. The facts are not contentious.
3. The Petitioner, Sughosh Joshi, a registered voter in the Pune parliamentary constituency and Kothrud Legislative Assembly constituency. He is on the electoral roll for both the constituencies. In this Petition, he challenges a “certificate” dated 23rd August 2023 issued by the Election Commission of India (“ECI”), the 1st Respondent, said to be under Section 151A(b) of the Representation of People Act, 1951 (“RoPA”).
4. Shortly stated, this “certificate” says that the Election Commission has “difficulty” in holding a bye-election to the Parliamentary Constituency-34 Pune.
5. This constituency is unrepresented and the parliamentary seat for this constituency is vacant since 29th March 2023 on account of the demise of the then elected Member of Parliament for Pune, the late Shri Girish Bhalchandra Bapat. This is undisputed.

6. The submission by Mr Mor on behalf of the Petitioner is that once a seat falls vacant for any reason, a bye-election must be notified and held. In the present case, a Lok Sabha Secretariat notification has admittedly been issued notifying the Pune Parliamentary Constituency seat to be vacant with effect from 29th March 2023.

7. The first submission is based on Section 149 of RoPA. The Section reads as follows:

“149. Casual vacancies in the House of the People. —

(1) When the seat of a member elected to the House of the People becomes vacant or is declared vacant or his election to the House of the People is declared void, **the Election Commission shall, subject to the provisions of sub-section (2), by a notification in the Gazette of India, call upon the parliamentary constituency concerned to elect a person for the purpose of filling the vacancy so caused before such date as may be specified in the notification**, and the provisions of this Act and of the rules and orders made thereunder shall apply, as far as may be, in relation to the election of a member to fill such vacancy.

(2) If the vacancy so caused be a vacancy in a seat reserved in any such constituency for the Scheduled Castes or for any Scheduled Tribes, the notification issued under sub-section (1) shall specify that the person to fill that seat shall belong to the Scheduled Castes or to such Scheduled Tribes, as the case may be.”

(Emphasis added)

... contd/-

8. Section 151A was added by a 1996 amendment. It reads thus:

“151A. Time limit for filling vacancies referred to in sections 147, 149, 150 and 151.—

Notwithstanding anything contained in section 147, section 149, section 150 and section 151, a bye-election for filling any vacancy referred to in any of the said sections shall be held within a period of six months from the date of the occurrence of the vacancy:

Provided that nothing contained in this section shall apply if—

- (a) the remainder of the term of a member in relation to a vacancy is less than one year; or
- (b) the Election Commission in consultation with the Central Government certifies that it is difficult to hold the bye-election within the said period.”

9. Section 151A has a non obstante clause which inter alia specifically references Section 149. As Mr Mor correctly points out, Section 151A therefore specifies a time limit within which the bye-election *must* be held, subject to two exceptions in the proviso. The first exception is that if the remaining term of the member in relation to a vacancy is less than a year, an election need not be held. This means that if between the occurrence or onset of a casual vacancy and the end of the term for that particular parliament, the period is less than a year, then a bye-election need not be called. But no defence is taken under this sub-clause at all.

10. The second exception is if the Election Commission “in consultation” with the Central Government certifies that it is “difficult” to hold the bye-elections within that period.

11. *It is not disputed before us that if the bye-election had been held immediately, the person elected (the returned candidate) would have had a little over a year in office as a Member of Parliament.*

12. Some of the submissions before us have turned on the words “consultation”, “difficulty” and “certification”.

13. As to the question of locus, we do not believe this need detain us once it is undisputed that Joshi is a voter in that constituency.¹

14. Further, it is settled law that constituencies cannot remain unrepresented beyond a defined period. The reason is plain. In any parliamentary democracy, governance is by elected representatives. Those elected to Parliament are the voice of the people. If the representative is no more, another must be elected in his place. The people choose their representatives. A constituency cannot go unrepresented beyond the time prescribed in the statute. An indefinite period of an entire constituency remaining unrepresented is wholly unconstitutional and is fundamentally anathema to our constitutional structure. This is the reason why the Supreme Court in *Pramod Laxman Gudadhe v Election Commission of India & Ors*² *inter alia* held that the provisions of RoPA *inter alia* obliged the authority under it to ensure that no constituency remains unrepresented beyond a definite period. The elected representatives are expected to echo the concerns of the electorate in its entirety.

¹ See: *Rahul Gandhi v Purnesh Ishwarbhai Modi & Anr*, 2023 SCC OnLine SC 929.

² (2018) 7 SCC 550.

Voters cannot be denied this right. It is a protection conferred by statute.

15. As we have noted above, Clause 'a' of the proviso to Section 151A will not apply. The term of the 17th Lok Sabha ends on 16th June 2024. The Pune Parliamentary Constituency seat has been vacant since 29th March 2023. Its vacancy cannot continue for a period of more than a year. The only relevant date is the date on which the vacancy actually arises. Any other date would necessarily be either random or subject to some level of adhocism, which is unacceptable. One can never predict with certainty, for instance, the date on which Code of Conduct will begin to operate or when the results of an election will finally be announced. But the date of occurrence of a casual vacancy is virtually written in stone and there can be no ambiguity about it.

16. In paragraph 18 of the decision in *Gudadhe's* case, the Supreme Court held that the command of Section 151A is to hold the election within a period of six month from the date the casual vacancy occurs (if the remainder of the term is not less than one year counted from the date the vacancy occurred). The legislative intent, the Supreme Court held, is not keep a constituency unrepresented.

17. The ECI is not only vested but charged with the duty to conduct elections. It is a constitutional requirement. The exercise of powers of the ECI have never been held to be exempted from judicial review. The power of the ECI is not, in the words of the

Supreme Court in *Digvijay Mote v Union of India & Ors*,³ unbridled. Judicial review is always permissible especially when the statutory body's acts affect public law rights and remedies. Wednesbury reasonableness might well be one of the factors to be taken into account. The Supreme Court has echoed this approach in *Election Commission of India v Ashok Kumar*.⁴

18. The “certificate” impugned in this case is decidedly peculiar. It says two things. First, it says that a returned candidate would have a short tenure. That is not a valid consideration in view of the time limits that had been set out by the statute itself. It is not for the ECI to adopt a sliding scale. We find it unthinkable that several months should be allowed to pass after a casual vacancy occurs, and then an entire constituency should be told that *now* not much time remains and therefore there is little point in holding an election; or in other words, that the constituency might as well wait for the next general elections. That is a complete abdication of statutory and constitutional duties which we cannot possibly accept or contemplate. Correspondingly, the duty of the ECI is to ensure that an election is held and that the seat is filled. The ECI is not concerned with whether the returned candidate will or will not be ‘effective’ in the term that remains. That is for the people to decide when the next election comes around. The ECI can no more ensure the effectiveness of a candidate in the remaining term than it can do so in the whole of a five-year term.

3 (1993) 4 SCC 175.

4 (2008) 8 SCC 216.

19. The fundamental and only principle under which the ECI must function is the right to representation. It simply cannot let a constituency remain unrepresented beyond the prescribed period.

20. The second ground for not holding the election is, in our considered view, one that borders on the bizarre. We are solemnly told that the ECI — that is to say, the whole of the machinery of the ECI — is far too busy and has been busy since March 2023 in preparation for the general elections to the Lok Sabha in May and June 2024 to be bothered with a bye-election for the Pune parliamentary constituency. This, we are told, is a genuine “difficulty”.

21. It is not.

22. The word “difficulty” in Section 151A proviso sub-clause (b) is not to be read in this manner to mean some administrative inconvenience. No amount of administrative inconvenience can undermine a statutory and constitutional obligation to hold an election. The preoccupation of ECI personnel and staff cannot result in citizens going unrepresented. That is simply unthinkable. It would amount to sabotaging the entire constitutional democratic framework. We trust this is not at all what the ECI wanted to convey to us.

23. We understand that a genuine “difficulty” might be one where there is such a severe law and order situation prevalent in that constituency that it is not practicable or feasible to conduct an

election in a safe, orderly and reasonable fashion at that moment in time. Such things do happen — examples abound — and the statute and court always make allowance for those. But such a use of “difficulty”, i.e., asking a writ court to accept that a preoccupation with a general election is a valid reason to let a parliamentary constituency remain vacant is wholly unacceptable.

24. It is also, as Mr Mor points out, inconsistent with what the ECI itself has done. Mr Mor showed us some data and we asked him to put it on Affidavit. He has done so. This is from pages 65 to 66.

25. Bye-elections were notified on 10th August 2023 to seven legislative assemblies in Jharkhand, Tripura, Kerala, West Bangal, Uttar Pradesh and Uttarakhand. Even after the “certificate” challenge in this matter, bye-elections were notified and held to the legislative assembly in Nagaland. The notification for that was of 13th October 2023 and the election was held on 7th November 2023. General elections to over 650 assembly constituencies in five states have been held between October and November 2023. On 13th April 2023, i.e., after the vacancy arose in this case, the ECI notified a bye-election to a *parliamentary* constituency in Jalandhar. For none of these was the ECI too ‘busy’ with the 2024 general elections.

26. Neither ‘administrative preoccupation’ nor even a ‘burden on the exchequer’ are reasons to refuse to conduct a bye-election.

27. Mr Mor also challenges the certificate's validity. There are two grounds for this separate challenge. The first is that there was no "consultation" with the Central Government within any rational interpretation of that word. The ECI claims in the certificate itself that it "consulted" the Central Government. That so called "consultation" was on 11th August 2023. The answer from the Central Government through the Ministry of Law and Justice followed the very same day, 11th August 2023. We have not known governments to be able to consult, deliberate, and act with such extraordinary despatch. This correspondence reveals no underlying material. We are not suggesting here (as indeed we cannot) that "consultation" here means "concurrence". That is a different branch of law with which we are not concerned. But "consultation" must certainly show at least two things: not just the reporting of a well established fact, but at least the consideration of relevant material and some level of deliberation. For instance, in the present case, given that this correspondence was of 11th August 2023, "consultation" would necessarily involve at least a discussion on why nothing had been done since 29th March 2023, and, if that was the effective date, how a bye-election could possibly be refused given the state of the law as laid down by the Supreme Court. We find none of this.

28. The other objection by Mr Mor, in which we find substance as well, is that this question of "certification" is not a matter of an internal communication between the ECI and the Central Government. A "certification" of the kind contemplated in sub-Clause (b) of the proviso to Section 151A is a certification to the people, viz., the electorate. It is an intimation to them that there

exist reasons within the frame of the statute why they must continue to go unrepresented. This is important. An electorate cannot be left in a sense of wonderment as to whether an election is going to be held, not going to be held, or, if it is not going to be held, *why* it is not going to be held when there is an established right to vote for an elected representative.

29. The reason that this needs to be communicated as a certification to public is *inter alia* evident from Section 149 which speaks of the occurrence of casual vacancies. This requires a notification in the Official Gazette, meaning that it is a public intimation of an occurrence of a casual vacancy and it is followed with a call upon the Parliamentary Constituency concerned to elect a person to fill that vacancy.

30. Let us consider what is being attempted. Section 149 requires an Official Gazette notification of the occurrence of a casual vacancy. Section 151A gives six months' time to fill that vacancy. Sub-clause (b) of the proviso says that the six-month period will not apply if there is "difficulty" but it is now being solemnly suggested that the "difficulty" in not holding the elections can be kept as an internal document and need not be communicated to the electorate. This submission in our view has only to be stated to be rejected.

31. The prayers in this Petition are these:

"(a) That this Hon'ble Court be pleased to declare that Certificate No. 464/Bye-election/2023/EPS dated 23 August, 2023 issued by the Respondent No. 1 under clause (b) of the proviso to Section 151A of the Representation of

People Act, 1951 to not hold bye-election in the Constituency being *non est* in the eyes of law being arbitrary, substantively illegal and irrational and violative of the rights of the Petitioner is ultra vires, unconstitutional and void ab-initio;

(b) that this Hon'ble Court be pleased to declare that the grounds taken by the Respondent No. 1 in the in its Letter No. 464/Bye-election/2023/EPS dated 11 August 2023 to the Central Government and the Certificate No. 464/Bye-election/2023/EPS dated 23 August 2023 under clause (b) of the proviso to Section 151A of the Representation of People Act, 1951 to not hold bye-election in the Constituency being *non est* in the eyes of law in light of the due process having not been followed in terms of the said provision;

(c) that this Hon'ble court be pleased to issue a Writ of mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, order and/or direction commanding Respondent No. 1 as this Hon'ble Court deems fit and proper, to immediately conduct the bye-election in the said Constituency in compliance with Section 151A of the Act;

(d) that this Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, order and/or direction commanding the Respondent No. 1 as this Hon'ble court deems fit and proper to forthwith refrain from acting upon and/or in pursuant of the impugned actions in any manner whatsoever."

32. Rule is accordingly made absolute in terms of prayer clauses (a), (b), (c) and (d) set out above. The ECI will proceed to take all

necessary steps immediately to call the election for the Pune Parliamentary Constituency-34 in accordance with law.

33. In the facts and circumstances of the case, there will be no order as to costs.

(Kamal Khata, J)

(G. S. Patel, J)

Note: This judgment is modified by an order dated 15th December 2023 passed on a praecipe. Corrections are shown in bold and italics.