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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 29th August, 2023

+ **W.P.(C) 11437/2023 & CM. APPL. 44513/2023**

SHRI ANIL KUMAR

..... Petitioner

Through: Mr. Salman Khurshid and Mr. Narendera Hooda, Senior Advocates with Mr. Aljo K. Joseph, Mr. Prashant Jhajariya, Mr. Sunil Kumar and Ms. Sommya Chaturvedi, Advocates.

versus

ELECTION COMMISSION OF INDIA AND ORS. Respondents

Through: Mr. Ankit Agarwal, Standing Counsel for R-1.
Mr. Sukumar Pattjoshi, Senior Advocate with Ms. Suruchi Suri, Standing Counsel and Mr. Aakash Gupta, Mr. Ram Krishna Rao, Advocates for R-2 to 13.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

SANJEEV NARULA, J. (Oral):

1. Mr. Anil Kumar, in his capacity as the President of the Delhi Pradesh Congress Committee [“DPCC”], a unit of the Indian National Congress, has voiced concerns regarding the approach and procedure adopted by



Respondent No. 2 – the Chief Electoral Officer, during the preparations and conduct of First-Level Checking [“FLC”] of Electronic Voting Machines [“EVMs”] and Voter-Verified Paper Audit Trails [“VVPATs”], intended for use in the upcoming General Elections to the Lok Sabha, scheduled to be held in 2024.

2. By invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, 1950, the Petitioner, through this Public Interest Litigation [“PIL”], delineates his grievance as follows:

2.1. On the 11th and 12th of July, 2023, the Offices of concerned District Election Officers [“DEOs”] issued communications detailing the FLC schedule in various districts for EVMs and VVPATs to be utilised in the 2024 General Elections. As per these notices, the FLC was to take place daily between the 15th and 30th of July, 2023, from 09:00 AM to 07:00 PM at the designated venues. All national and state level parties were requested to nominate their authorized representatives to oversee the said process.

2.2 According to the guidelines issued by Respondent No. 1 – Election Commission of India [“ECI”],¹ the FLC typically starts 180 days prior to the General Elections to Lok Sabha or as otherwise directed by ECI. Thus, FLC should have begun in the second week of September 2023. This would have ensured adherence to the guidelines set forth by ECI, both in intent and in execution. Instead, the FLC process was advanced by three months.

2.3. The communication intimating the schedule for FLC process was woefully inadequate. As per the prevalent mandate, the political parties ought to be intimated of the FLC at least one week prior to its

¹ Titled “Instruction on First Level Checking of EVMs and VVPATs (FLC)” dated 30th August, 2017 and 13th September, 2022 [Annexures P-2 and P-3, respectively].



commencement. A mere two-day notice prior to the commencement of FLC did not afford the political parties sufficient opportunity to instruct Booth Level Agents or engage individuals with the requisite training in order to effectively participate in the process.

2.4. Addressing the lack of specific details of the EVMs and VVPATs that were being subjected to FLC, the Petitioner, on 15th July, 2023, wrote to the DEOs seeking pertinent information. However, despite opportunity, the DEOs remained unresponsive to the issues highlighted by the Petitioner/ DPCC.

2.5. The approach of Respondents appears to be covert and lacks transparency. Absent the crucial details concerning the EVMs and VVPATs which were being tested, the role of political stakeholders was reduced to being mere observers of the process, thereby casting doubts over the integrity of the entire electoral process. In the spirit of transparency, it is essential that all stakeholders are informed of the particulars of EVMs and VVPATs so that they can effectively monitor and verify the machines during the FLC.

2.6. Highlighting the discrepancy in the entire FLC process, Petitioner approached Respondent No. 2 *vide* communication dated 03rd August, 2023, requesting them to terminate the ongoing FLC. In response, Respondent No. 2 disagreed with Petitioner's allegations and refused to entertain his request.

2.7. The afore-noted deviation from the stipulated procedure warrants this Court's intervention. Invoking its powers under Article 226 of the Constitution, the Court must direct the ECI to re-initiate the FLC for EVMs and VVPATs, which are currently in the custody of Respondents No. 3 to



13 [Sub-Divisional Magistrates]. Further directions ought to be issued to ensure that adequate notice is provided to all political parties, thus enabling them to designate their representatives for meaningful participation in the FLC. It is also crucial for the Respondents to adhere to the guidelines set by the ECI in its afore-mentioned notices dated 30th August, 2017 and 13th September, 2022. Such adherence is pivotal in upholding the integrity, transparency, and sanctity of our democratic process.

3. Contrarily, Mr. Sukumar Pattjoshi, Senior Counsel representing the Respondents No. 2 to 13, firstly points out that petition's averments directed towards the State Election Commission are misconceived as the said Commission has no role to play in the Lok Sabha General Elections. Nonetheless, he argues that the FLC process strictly adhered to the extant norms, including the ECI's Instructions on FLC, as revised from time to time. The Petitioner as well as other eligible stakeholders were given adequate notice for participation in the FLC process. However, for reasons best known to the Petitioner's side, they opted not to delegate their representatives. That apart, he emphasises that FLC process for EVMs and VVPATs has been finalized in three states of Kerala, Jharkhand and Delhi, and the procedure is in progress for another five states. In Delhi alone, a total of 42,000 ballot machines and 23,000 VVPATs have been checked. The directions proposed by the Petitioner, if granted, could potentially derail the pre-fixed election schedule.

Analysis and findings:

4. The arguments presented by both sides call for a thorough scrutiny and meticulous deliberation. Conscious of the overarching importance of



the election process, the bedrock upon which our democratic nation stands, we acknowledge that any concern regarding the transparency or efficacy of this process demands our utmost attention.

5. The first-level checking of EVMs and VVPATs operates under the ambit of directives periodically issued by the ECI. The guidelines/instructions dated 13th September, 2022, elucidate the following procedure for conducting FLCs:

“3. FLC when to be done:

- (a) *FLC of EVMs and VVPATs shall be done before every General/Bye-election to Assembly and Parliamentary Constituency or in any elections where EVMs and VVPATs are used.*
- (b) *FLC of EVMs and VVPATs shall commence:*
 - (i) *within one month of occurrence of vacancy in case of bye-election.*
 - (ii) *at least P-120 days in case of General Election to State Legislative Assembly.*
 - (iii) *at least P-180 days in case of General Election to Lok Sabha or as instructed by the Commission.*
(P-may be estimated based on the last General Election).
- (c) *FLC is to be done sufficiently in advance so that all checks are carried out without any undue haste in the presence of representatives of National and State Recognised Political Parties.*
- (d) **FLC of EVMs and VVPATs shall be completed, as far as possible, three months before tentative announcement of election.** *The same may be calculated considering the last time announcement of election.”*

4. Schedule of FLC:

- (a) *Depending on the number of EVMs and VVPATs to be checked in FLC, the CEO/DEO shall prepare a schedule for the FLC of EVMs in consultation with EVM manufacturers (BEL & ECIL).*
- (b) *Ensure timings of FLC from 9 am to 7 pm on all days including holidays. For any exemption request for timing or OFF on a particular day due to any valid reason, prior approval of the CEO concerned is required.”*

[Emphasis Supplied]

6. One of the quintessential aspects of the FLC process is the active involvement of political parties’ representatives. To this effect, the guidelines state:

“5. FLC to be done in the presence of representatives of National and State Recognised Political Parties:

- (a) *The schedule for FLC shall be communicated to every National and State Recognised Political Party at the district headquarters with proper*



acknowledgement and copy endorsed to the parties at State headquarters, in writing by the DEO at least 2 days before the beginning of the FLC in the district.

(b) On the day of the FLC, representatives of all National and State Recognised Political Parties authorised by the District President of the party shall be encouraged to be present.

(c) A register shall be kept at FIC hall by the DEO in Annexure-1 in which signatures of the representatives of National and State Recognised Political Parties shall be taken every day as token of their presence.”

[Emphasis Supplied]

7. The FLC is a meticulous procedure, designed to uphold transparency, integrity, and security of the electronic voting system. The process is executed by certified engineers from Bharat Electronics Limited [“BEL”] and Electronics Corporation of India Limited [“ECIL”] and encompasses several vital steps: (a) the initial clearance of the machines by officials designated by the DEO, (b) a comprehensive visual inspection conducted by authorized engineers from BEL/ECIL, (c) rigorous functionality tests using the pre-first level checking unit by field engineers, and (d) symbol uploading in VVPATs through the symbol loading unit by BEL/ECIL’s authorized engineers, for mock polling.

8. Beyond the above-outlined rigorous steps for functionality checks, we note that for ensuring integrity of FLC process, the guidelines provide for sealing of the cabinet of the control units using a modified pink paper seal provided by the Nasik Security Press. This sealing is done in the presence of representatives of all the national and state recognized political parties, as per the following method:

“9. Sealing of plastic cabinet of Control Unit of EVMs with modified Pink Paper Seal

(a) In order to ensure that the Control Unit of EVM cannot be opened after First Level Checking of the EVMs, the cabinet of the Control Units shall be sealed with the modified Pink Paper Seal supplied by the Nasik Security Press, in the presence of the representatives of the National and State Recognised Political Parties present at the time of FLC, as per the following procedure:



- (i) *Modified Pink Paper Seal has two portion/part of same Unique Serial Number. First, split the seal into two separate Pink Paper Seals.*
- (ii) *Remove the gummed paper from Pink Paper Seal carefully.*
- (iii) *These two Pink Paper Seals shall be pasted on two sides of the Cabinet of the Control Unit as shown in the figures:*



Control Unit sealed with Modified Pink Paper Seal

- (iv) *For proper fixing of the seals, the BEL and ECIL shall emphasise the following:*
 - *Proper handling of seals.*
 - *The surface on which seal need to be applied should be clean and free from dust, dirt, water, chemical and oil.*
 - *The peeling off/removal of seal from the release liner surface with clean finger nails.*
 - *The application to the applicable surface should be done gently with thumb pressure of finger (4-5 times) to avoid possibility of air pocket, crease.*
 - *The seal applied on the EVM surface should not be partially stuck and removed and re-used.*
- (v) *While marking FLC-OK in EVM Management System (EMS) using Mobile App. the Unique Serial Number of Pink Paper Seal shall be entered by scanning QR-Code.*
- (b) *Take signatures of the Engineer and the representatives of the National and State Recognised Political Parties present along with the party name in abbreviations below their signatures. Allow them to note down the serial number of the pink paper seal.*
- (c) *Marking of FLC-OK and FLC-Reject of machines in EMS should be done on daily basis.*
- (d) *Maintain a register in **Annexure-9** for mentioning the unique number of CU and serial number of pink paper seal and take their signature and provide photocopy to the National and State Recognised Political Parties.*
- (e) *Provide photocopy of list of FLC-OK Ballot Units, Control Units and VVPATs to the National and State Recognised Political Parties after completion of FLC and also to all the contesting candidates as soon as last date of withdrawal of candidature is over and take their acknowledgement.*
- (f) *Ensure the availability of photocopy of the register at the time of Commissioning of EVMs/VVPATs.”*

9. As evident from the detailed procedures noted above, the FLC



process not only involves the active participation of engineers from BEL and ECIL, but it also encourages involvement of representatives from national and state recognized political parties. This inclusive approach guarantees transparency and ensures that the process remains beyond reproach. The representatives are not mere spectators; they are involved at multiple levels, including the sealing mechanism, which acts as an added layer of security to ensure the sanctity of the EVMs, post-check. Their signatures accentuate the rigor and transparency of the process. Additionally, the DEO's close supervision, coupled with technological measures such as webcasting, ensures further layers of oversight.

10. The involvement of political parties, down to the acknowledgment of the FLC "OK" machines, underlines the democratic spirit and the inclusivity of the process. However, DPCC notably chose to stay away. Petitioner's contention that DEO's notice informing the FLC schedule was inadequate, does not find favour with the Court. As per paragraph 5 of ECI's Instructions dated 13th September, 2022, the DEO is required to intimate the dates of the process at least two days prior to the commencement of FLC. Considering the time sensitivity and the mandate to conclude the process three months prior to the tentative announcement of election,² despite their absence, FLC was conducted and has since culminated with the issuance of FLC-OK ballot units, control units, and VVPATs lists to all the national and state recognized political parties.

11. The Petitioner's reservations regarding the process stem from a perceived lack of prior information regarding the list of EVMs and VVPATs scheduled for checks. The Court, upon perusal of the stipulated



instructions and procedures, does not find any such directive demanding prior notification. There are sufficient robust procedures (as delineated above) which exude complete transparency. The sealing process – a crucial part of FLC – is not just demonstrative in nature but also participative, allowing political representatives to mark their approval through signatures. The provisions for recording and distributing details like the unique number of control units and pink paper seal serial numbers enhance the process' credibility, leaving little room for scepticism. Thus, given the rigorous and transparent procedure, Petitioner's contentions questioning the reliability or security of the FLC process, are unfounded.

12. The insistence by Mr. Salman Khurshid, Senior Counsel for Petitioner, on pre-providing serial numbers does not stand as a legitimate premise for the relief of re-initiating the entire FLC process. The Court's specific inquiry into DPCC's non-participation during FLC yielded no substantial justification, apart from the repetitive claim of lack of serial numbers and a non-responsive stance from Respondents regarding their representation dated 15th July, 2023. Given the gravity of the electoral process, the Petitioner's focus should have been on active participation, rather than on abstaining due to procedural apprehensions. Moreover, in our view, when a procedure as significant as the FLC offers opportunities for representation and observation from political entities, it becomes the duty of these representatives to participate actively and ensure the process' credibility. Abstaining from participation and later questioning the integrity of the same process does not reflect well on the Petitioner.

13. Furthermore, Petitioner's notion that re-convening the FLC would

² Paragraph 3(d) of the ECI's aforesaid Instructions.



not lead to any time loss is a perspective that the Court finds hard to accept. The ECI operates on strict timelines. Delays can potentially jeopardize the entire electoral process. Given the specificity of the afore-discussed timelines mentioned in ECI's Instructions and advanced stages of the General Elections process, as highlighted by Mr. Pattjoshi, any alterations, such as re-initiation of the process, would be a significant regression. Ultimately, the aim of the FLC and the entire electoral process is to serve the public and ensure their trust in the democratic process. The safeguards and checks embedded in the guidelines are sufficient to ensure the integrity of FLC process. The inclusion of political representatives in sealing the EVMs is a significant step towards mutual accountability. Every recognized political party was given an equal opportunity to be a part of the process. Thus, their participation in this democratic process plays a pivotal role in ensuring its sanctity. The petition, in our considered view, lacks substantive ground. Consequently, the Court is not inclined to accede to the relief sought by the Petitioner.

14. For the foregoing reasons, the present petition is dismissed along with other pending applications.

SANJEEV NARULA, J

SATISH CHANDRA SHARMA, CJ

AUGUST 29, 2023

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