

07. 15.01.2024
Court No.6
(Tanmoy)

MAT 2447 of 2023

**Asraful Alam
-Versus-
Aashraful & Ors.**

**With
IA No: CAN/2/2023**

Mr. Sankar Nath Mukherjee, Adv.,
Mr. Anupam Das, Adv.,
Mr. Soupal Chatterjee, Adv.,
Ms. Sucheta Banerjee, Adv.

...for the appellant.

Mr. Sutirtha Das, Adv.

...for the respondents/
writ petitioners.

Ms. Rama Halder, Adv.,
Mr. Amartya Pal, Adv.

...for the State.

Mr. Joydip Kar, Ld. Sr. Adv.,
Ms. Sonal Sinha, Adv.

...for the West Bengal
State Election Commission/
respondent no.8.

By consent of the parties, the appeal and the connected application are taken up together for hearing.

This appeal is directed against a judgment and order dated September 26, 2023, whereby the writ petition of the private respondents herein being WPA 16935 of 2023 was disposed of by a learned Judge of this Court.

The appellant was not a party to the writ petition. Since we were of the opinion that the appellant would be vitally affected by the order that is impugned in this appeal, we had allowed the appellant's application for leave to prefer appeal. On December 21, 2023, we had recorded our *prima facie* opinion which was in agreement with the submissions made on behalf of the State, the State Election Commission and the appellant, that the writ petition should not have been entertained by the learned Judge in view of availability of an alternative efficacious remedy under the Election Laws. Today, we have heard learned Counsel for the parties at length.

The private respondents herein had approached the learned Single Judge alleging gross irregularity in the conduct of *Panchayat* General Elections, 2023 at Chanchal-II Block under Chanchal *Gram Panchayat*, Booth No. 103, Kajipara Primary School, Seat No.17. The appellant herein was not made a party to the writ petition although he was the winning candidate. It was alleged, *inter alia*, that after a few rounds of voting, the concerned booth was vandalized at the instance of the appellant herein. Ballot boxes were seized and thrown into a pond from where they were later retrieved. The writ petitioners wanted re-polling in the concerned booth.

The learned Judge rejected the contention of the State respondents that the issue involved in the writ petition should be decided only by way of an election petition. The learned Judge went on to dispose of the writ petition with the following observations and directions:-

“In view of the above, the Election Commission is directed to peruse the CCTV footages and verify the documents filed before this Court by way of a report and thereafter take a decision with regard to conducting a re-poll upon hearing the submissions of all the respective candidates.

The Commission is duty bound to ensure that the election is conducted in a free and fair manner. Improper recording in the Presiding Officer’s diary will not stand in the way of the Election Commission to arrive at a fresh decision upon perusal of the materials on record and upon viewing the CCTV footages.

A decision shall be taken by the Commission at the earliest, but positively within a period of eight weeks from the date of communication of this order.

The original voter’s slips are lying in the custody of the Learned Registrar General of this Court. Learned advocate appearing for the petitioners is directed to collect the original voter’s slips from the office of the Learned Registrar General and without any delay deposit the same before the Officer-in-Charge, Chachal Police Station who, on receipt of the original voter’s slips, shall issue a receipt to the person depositing the same.

The Officer-in-Charge, Chachal Police Station shall immediately forward the original voter’s slips to the office of the State Election Commission who shall consider the same at the time of taking a decision in the matter.”

Being aggrieved, the successful candidate has come up by way of this appeal.

Learned Advocates for the appellant, the State and the State Election Commission in unison challenged the maintainability of the writ petition.

Learned Advocate for the respondents/writ petitioners argued that the subject-matter of the writ petition cannot be said to be an “election dispute”. As such, the bar under Article 243-O of the Constitution of India or under the provisions of the West Bengal *Panchayat* Elections Act, 2003 (hereinafter referred to as the ‘2003 Act’) and the Rules framed thereunder, would not be attracted in the present case. He submitted that the present case is covered by Section 67 of the 2003 Act, which pertains to holding of fresh poll in the case of destruction, etc., of ballot boxes. Section 67 of the 2003 Act reads as follows:-

“67. Fresh poll in the case of destruction, etc., of ballot boxes. – (1) if at any election –

- a) any ballot box or any ballot paper used or intended to be used at a polling station at any time before or after the commencement of poll or during counting is unlawfully taken out of the custody of the Presiding Officer, or is accidentally or intentionally destroyed or is lost, or is damaged or tampered with, to such an extent, that the result of the poll at that polling station cannot be ascertained, or
- b) any voting machine develops a mechanical failure during the course of the recording of votes; or
- c) any such error or irregularity in procedure as is likely to vitiate the poll is committed at a polling station,

the Presiding Officer shall forthwith report the matter to the Panchayat Returning Officer and the Panchayat Returning Officer shall forthwith report to the District Panchayat Officer.

(2) Thereupon, the District Panchayat Election Officer shall, after taking all material circumstances into account, either –

- a) *Declare the poll at that polling station to be void; or*
- b) *If satisfied that the result of a fresh poll at that polling station will not in any way, affect the result of the election or that the error or irregularity in procedure is not material, issue such directions to the Panchayat Returning Officer as he may deem proper for further conduct and completion of the election:*

Provided that on any such occasion referred to in clause (a) or (b), the District Panchayat Election Officer shall send a complete report to the Commission.

(3) The Commission may, -

- a) *on receipt of any of the reports referred to in sub-section (2) –*
 - (i) accept the report and proceed in terms of sub-section (4) or allow completion of the election; or*
 - (ii) modify in any manner, as it deems fit, the order or the directions referred to in sub-section (2) by an order specifying its decision and the action thereon;*
- b) *in consideration of the report of the material circumstances obtained from or through the District Panchayat Election Officer, its own machinery or any other agency, may issue any order in terms of sub-section (2) and upon issue of such order, the poll at a polling station may be void and provisions of sub-section (4) shall apply mutatis mutandis.*

(4) Where a poll at a polling station is declared to be void under clause (a) of sub-section (2), the District Panchayat Election Officer shall immediately report the matter to the Commission and also to the State Government. The Commission shall, by notification, fix a date and time for taking the fresh poll and thereupon the District Panchayat Election Officer shall fix the polling station at which poll shall be taken.”

Learned Advocate submitted that complaint was lodged with the concerned BDO and the PRO. At the stage when the complaint was under consideration, the writ petitioners approached the learned Single Judge. The order passed by the learned Single Judge is not

based on the allegations made in the writ petition but on the reports filed by the State Election Commission as well as on behalf of the State. He further submitted that election disputes as contemplated in Section 79 of the 2003 Act, read with Sections 93 and 94 of thereof, would not cover the subject-matter of the writ petition. Hence, the learned Judge did not commit any irregularity by entertaining the writ petition and passing the order impugned which really does not affect the appellant herein. If the State Election Commission does not find any irregularity in the conduct of the election at the concerned booth, the appellant will not be prejudiced. If irregularity is found, fresh election must be held and the appellant will be at liberty to contest such election.

Learned Advocate for the respondents/writ petitioners also urged that the point of maintainability of the writ petition has not been taken in the memorandum of appeal. Hence, that point cannot be allowed to be argued before us. We are unable to agree. Firstly, it is a pure point of law which any Court can allow a party to agitate even without pleadings being there in respect thereof. Secondly, we had indicated on the very first day our *prima facie* view regarding maintainability of the writ petition and we allowed sufficient time to learned Advocate for the writ petitioners to get prepared on that point. Today, we have heard him at length on that point. Hence, no injustice can be said to have been caused to

the writ petitioners by allowing the appellant, the State and the State Election Commission to argue the point of maintainability of the writ petition.

Having given our anxious consideration to the rival contentions of the parties, we are of the view that the objection of the appellant, the State and the State Election Commission to the maintainability of the writ petition must be upheld. Article 243-O(b) of the Constitution provides that notwithstanding anything in the Constitution, 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. It is a constitutional bar. The West Bengal State Legislature has promulgated the 2003 Act. Sections 79 and 80 of the 2003 Act in essence provide that any dispute arising as regards the validity of an election under that Act shall be called in question only by way of an election petition presented in accordance with the provisions of the Act. Section 93 of the 2003 Act enumerates the grounds for declaring an election to be void. Learned Advocate for the writ petitioners submitted that none of the grounds mentioned in Section 93 of the 2003 Act exists in the present case and hence election petition is not the remedy. We are unable to agree. Section 93(b) of the 2003 Act stipulates as a ground “*that any corrupt practice has been committed by a*

returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent.” In any event, it will be preposterous to hold that the allegations in the writ petition to the effect that there was gross irregularity in the conduct of the concerned election do not amount to an election dispute. A special procedure has been provided by the law for deciding election disputes. Almost always such disputes involve disputed questions of fact which cannot be conveniently decided by a Writ Court. Recording of evidence is necessary for adjudicating such disputes. Therefore, the Constitution of India and the State Legislatures provide a special forum for adjudication of such disputes in the form of an election petition.

We have no manner of doubt in our mind that the subject-matter of the writ petition constitutes an election dispute. Accordingly, in view of the legal provisions referred to above, the writ petition ought not to have been entertained by the learned Judge.

We accordingly set aside the order under appeal and dismiss the writ petition on the ground that it is not maintainable. This will not prevent the writ petitioners from taking recourse to any other remedy that they may have under the law of the land.

The appeal being MAT 2447 of 2023 and the connected application being IA No: CAN/2/2023, are disposed of.

Urgent photostat certified copy of this order, if applied for, be made available to the parties upon compliance with all requisite formalities.

(Arijit Banerjee, J.)

(Apurba Sinha Ray, J.)