

**THE HON'BLE SRI JUSTICE JOYMALYA BAGCHI
AND
THE HON'BLE SRI JUSTICE M.GANGA RAO**

WRIT PETITION Nos.8866 & 9250 of 2021

(Taken up through video conferencing)

COMMON ORDER: (Per Hon'ble Sri Justice Joymalya Bagchi)

Both the writ petitions involve similar questions of fact and law and therefore were heard analogously and are being disposed of by a common order.

In W.P.No.8866 of 2021 Smt K. Ratna Prabha has prayed for countermanding the polling conducted on 17.04.2021 in the Tirupati by election on the ground of large scale incidents of fraudulent polling and booth capturing and a direction upon 1st respondent - Election Commission to consider her representation dated 17.04.2021 in that regard.

During the pendency of the writ petition, the representation had been considered by the 1st respondent - Election Commission *vide* order dated 22.04.2021 and the prayer for re-poll was turned down.

Therefore, IA.No.4 of 2021 has been filed praying for amendment of the aforesaid prayer and seeking a direction to quash the said order passed by the 1st respondent.

Gist of the allegations in the writ petition is that a large number of people had been transported into the parliamentary constituency and were stationed in lodges and Kalyana Mandapams. They were utilized to indulge in large scale fake voting which is akin to booth capturing. It is further contended these proxy voters had

been supplied with fake voter identity cards and when they were confronted by officers of the 1st respondent and election agents of the petitioner, they became afraid and hurriedly left the spot without casting their votes. The administrative machinery of the State acted in a partisan manner and inspite of FIRs lodged against members of the ruling party, instead of arresting the fake voters they allowed them to escape from the spot. There is ample evidence that the ruling party had forged identity proofs and transported thousands of people to cast fake votes in 322 polling booths. Representation was made to the 1st respondent - Election Commission to countermand the election under Section 58A(2) (b) of the Representation of People Act, 1951 [for short, 'the Act of 1951'] but the same was turned down without considering the relevant materials.

In W.P.No.9250 of 2021, writ petitioner - Smt Panabaka Lakshmi, who is another contesting candidate has raised similar allegations of fake voting in the course of the by election. In her representation to the 1st respondent made on 17.04.2021, it is contended more than fifteen thousand men and women were brought in private buses on the day prior to the election for the purpose of casting proxy votes. Thousands of fake voter identity cards and slips were printed with a view to get additional thirty thousand votes in favour of the ruling political party. In spite of complaints made to police, no action was taken and none of the miscreants were arrested. Hence, prayer was made to hold re-poll in the said parliamentary constituency. However, such prayer was turned down in a cryptic and non speaking manner by the 1st respondent - Election Commission.

Sri Adinarayana Rao, learned senior counsel, appearing for the writ petitioner in W.P.No.8866 of 2021 submits free and fair election is a basic structure of the Constitution. 1st respondent - Election Commission is the authority under the Constitution who is assigned the solemn duty to ensure holding of free and fair elections in the Country. Although overwhelming evidence with regard to rampant fake voting which is akin to booth capturing was placed on record before the 1st respondent - Election Commission, it failed to discharge its constitutional duty and declare re-poll in terms of Section 58 A (2) (b) of the Act of 1951. It is argued such decision of the Election Commission being wholly contrary to law and affecting the smooth progress of the election process the writ petition may be admitted and the Election Commission be directed to reconsider its decision in the light of the materials placed before the Court.

Mr. Kamat, learned senior counsel appearing for the writ petitioner in W.P.No.9250 of 2021 took us through various complaints lodged by the writ petitioner as well as other senior political leaders expressing serious apprehension with regard to the fairness of the election process on the ground of alleged rampant false voting by using fake voter identity cards. He submitted bar under Article 329 (b) of the Constitution of India is not an absolute one and in exceptional cases where the election process has degenerated into a travesty of democracy due to use of high handed muscle power and inaction of the respondent authorities, this Court is not powerless to intervene and issue appropriate directions to activate the authorities concerned and salvage the election process. In support of such contention he relies on a decision of the Apex

Court in **Digvijay Mote v. Union of India**¹ and **All India Anna Dravida Munnetra Kazhagam v. The State Election Commissioner**².

Mr. Avinash Desai, learned counsel appearing for the 1st respondent - Election Commission, submits all steps were taken to ensure free, fair and impartial election in Tirupathi parliamentary constituency. Election process is nearing completion with the publication of results scheduled on 02.05.2021. He further submits concerns of the petitioners were duly addressed and upon an objective assessment of all materials on record decision was taken not to hold a re-poll. He contends as the election process is continuing the writ petitions are not maintainable in view of the constitutional bar under Article 329 (b) of the Constitution read with Section 80 of the Act of 1951. He submits grievances, if any, with regard to the election including decision of the 1st respondent may be agitated upon conclusion of the election process by instituting an election petition under the provisions of the Act of 1951.

Mr. Siva Prasad Reddy, learned counsel appearing for respondent No.20 in W.P.No.9250 of 2021 supports the contention of the 1st respondent - Election Commission. He submits no objections had been raised by the election agents of the writ petitioners with regard to alleged fake voting. Belated complaints have been motivatedly made in order to scuttle the election process. Hence, the writ petitions are not maintainable and liable to be dismissed.

Democracy is a basic feature of the Constitution and elections conducted at regular prescribed intervals is essential to the

¹ ((1993) 4 SCC 175

² 2007 1 CTC 705

democratic system envisaged in the Constitution. Superintendence, direction and control of elections are vested in the Election Commission constituted under Article 324 of the Constitution of India. Article 329 of the Constitution of India bars interference by Courts in election matters. The said Article reads as follows:

“329. Bar to interference by courts in electoral matters: --

(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 327 or article 328, shall not be called in question in any Court:

(b) No election to either House of Parliament or to the House or either House of the Legislature of a State 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.”

Clause (b) of Article 329 of the Constitution of India unequivocally declares no election to either House of Parliament or to the House or either House of the Legislature of a State 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.

Part VI of the Act of 1951 deals with disputes relating to elections. Chapter II of the said Part provides for presentation of election petitions to the High Court. Section 80 of the said Act provides no election shall be called in question except by an election petition presented in accordance with the provisions of this Part.

The aforesaid constitutional scheme read with the provisions of the Act of 1951 makes it amply clear that any dispute relating to election would be amenable to adjudication by way of an Election Petition instituted under the provisions of the Act of 1951 and not otherwise. The aforesaid constitutional scheme has been repeatedly interpreted by the Apex Court as a 'lakshmana rekha' which the High Courts even under the prerogative writ jurisdiction would be loathe to cross. In fact in **Mohindar Singh Gill v. The Chief Election Commissioner, New Delhi**³, V.R. Krishna Iyer, J, in his inimitable style described the constitutional provision as the "Great Wall of China" which no Court would ordinarily breach.

Mr. Kamat, learned senior counsel, has sought to overcome this Himalayan hurdle by arguing no authority far less the Election Commission is above the law and is amenable to judicial review. He has relied on **Digvijay Mote** (1 supra) in support of such proposition.

We have no doubt in that matter. However, if the Election Commission fails to discharge its duty in the course of an election process, what would be the recourse available to a contesting candidate is the moot question. In the face of electoral malpractices would the High Court by a presumptive superiority of Article 226 of the Constitution of India be justified to ignore the constitutional bar under Article 329 (b) and jump into the fray or would it be prudent for the Court to permit the election process to be concluded and leave the allegations of booth capturing/tampering/fake voting open to be decided in a properly instituted Election Petition? We are of the

³ (1978) 2 SCR 272

view, the latter would be a prudent course to adopt in the factual matrix of the case.

Mr. Adinaryana Rao and Mr. Kamat, learned senior counsel, would argue strenuously that the decision of the Election Commission not to go for re-poll is subject to judicial review and such exercise is not hindered by the bar under Article 329 (b) of the Constitution of India. Such argument is fallacious as the decision of the Election Commission not to hold a re-poll is clearly a part of its superintendence of the election process and falls within the expression 'election' under Article 329 of the Constitution of India. Interpreting the expression in **Mohinder Singh Gill** (3 supra), the Apex Court held as follows:

“The rainbow of operations, covered by the compendious expression ‘election’, thus commences from the initial notification and culminates in the declaration of the return of a candidate.”

In view of the said ratio, we have no doubt the decision of the Election Commission not to hold re-poll under Section 58A(2)(b) of the Act of 1951 is a part of the election process as defined under Article 329 (b) of the Constitution and can be assailed only upon the conclusion of the election process in the manner as contemplated by the procedure established by law.

More than 70 years ago the Apex Court in **N.P. Ponnuswami and others v. Returning Officer, Nammakkal Constituency**⁴ while underscoring the necessity of deference by judicial authorities

⁴ AIR 1952 SC 64

to the election process in order to ensure effective and smooth conclusion of elections observed as follows:

“16.

(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 of 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.

This view has been consistently followed by the Apex Court in **Mohinder Singh Gill** (3 supra), **Lakshmi Charan Sen v. A.K.M Hassan Uzzaman**⁵ and **West Bengal State Election Commission v. Communist Party of India (Marxist)**⁶.

⁵ MANU/SC/0567/1983

⁶ AIR 2018 SC 3964

We have also considered the ratio of the Madras High Court in **AIDMK** (2 supra). In the said report, allegations of corrupt practices and booth capturing had been made in the course of a local election. In fact, the Commission accepted the allegations of booth capturing and directed re-poll in some of the wards while refusing to do so in other wards. A public interest litigation was filed whereupon one of the Hon'ble Judges, S.J. Mukhopadhaya, J (as his Lordship then was) declined to interfere in view of the alternative remedy by way of an Election Petition. The other Hon'ble Judge, F.M. Ibrahim Kalifulla, J (as his Lordship then was) held in extraordinary conditions, the writ Court may make timely interdictions to ensure free and fair elections. In view of the difference of opinion matter was referred to a third Hon'ble Judge, P.K. Misra, J (as His Lordship then was) who held that in the special circumstances of the case interference under Article 226 of the Constitution was justified.

Although the aforesaid report is not a binding precedent, we have given due respect to the opinion of the ratio therein as of persuasive value. We note that there are distinct factually distinguishing features in the present case. In the reported decision, the allegations of booth capturing and malpractices had been accepted by the Election Commission which is not the case before us. Whether the Election Commission was justified in declining to act on the representations of the writ petitioners, in our considered opinion, would fall within the domain of an election dispute amenable to adjudication in an Election Petition and not otherwise. Bar for entertaining an election dispute under Article 226 of the Constitution of India is not a self imposed restriction like existence of alternate statutory remedy. It is a constitutional bar engrafted under Article 329(b) of the Constitution which is prefaced with a non

obstante clause. Hence, Article 329(b) of the Constitution prevails over the powers of the High Court under Article 226 of the Constitution of India. It is only in exceptional cases, the Court may entertain petition under Article 226 of the Constitution of India after commencement of the election process provided the Court's intervention does not interrupt, obstruct or protract the election proceedings and the judicial scrutiny cannot await the conclusion of the election process.

In **Election Commission of India v. Ashok Kumar**⁷, the Apex Court refused to interfere with the notification of the Election Commission to mix ballot papers instead of counting them polling station wise during the election process.

Similarly, in **Manda Jagannadham v. K.S.Ratnam**⁸, decision of the Election Commission not to award official symbol to a candidate was held not amenable to writ jurisdiction as election process had already begun. In the said judgment, the Court clarified the word 'election' in Article 329 of the Constitution would mean every act taken by the competent authority after publication of the election notification. In the light of the aforesaid decisions of the apex Court, we are of the view in the present case, where election process is on, refusal to hold re-poll by the 1st respondent Election Commission falls within the expression 'election' exempted from judicial scrutiny under Article 226 by the Constitutional bar and the ratio of **AIDMK** (supra) is of no assistance to the petitioners as it was decided in the exceptional factual matrix of that case and in the light of the unequivocal declaration of law by the Apex Court in the aforesaid decisions.

⁷ (2000) 8 SCC 216

⁸ (2004) 7 SCC 492

The other aspect of the matter is that the adjudication of an election dispute as the present one namely of alleged booth capturing and fake voting involves various disputed factual issues requiring reception and assessment of a plethora of oral and documentary evidence including electronic evidence. In fact, some materials have been annexed to the writ petition to press the cause of the writ petitioners to countermand the election. Admission, appreciation, evaluation and adjudication of such evidence would best be left to a full-fledged trial on evidence in the course of an election petition and ought not to be decided by exchange of affidavits in this writ petition. Efficacy of the procedure contemplated under the Act of 1951 and the Rules framed thereunder for trial in an election case persuades us to hold that such procedure is better suited to decide disputes of such nature rather than entertain them in a writ petition during the pendency of an election process. That apart, unlike local body elections, the High Court itself is the authority to adjudicate election disputes arising from parliamentary elections. Hence, in our view, relegating the writ petitioners to the constitutionally approved procedure of election petition before the High Court is wholly efficacious and does not in any way prejudice them in canvassing their grievances with regard to the election process including the decision of the Election Commission not to go for a re-poll in the factual matrix of the case.

In the light of the aforesaid discussion, we are of the opinion the writ petitions instituted seeking re-poll including a challenge to the decision of the 1st respondent - Election Commission refusing such prayer are not maintainable in view of the constitutional bar under Article 329(b) of the Constitution of India.

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Hence, the writ petitions are dismissed as not maintainable. We hasten to add we have not gone into the truthfulness or otherwise with regard to the allegations of booth capturing or fake voting in the course of the election which has been canvassed as justification for countermanding the election and hold a re-poll. It shall be open to the writ petitioners to canvass such issues in an appropriate proceeding in accordance with law, if so advised.

There shall be no order as to costs.

As a sequel, Miscellaneous Petitions, if any, pending shall stand closed.

JUSTICE JOYMALYA BAGCHI

JUSTICE M.GANGA RAO

30.04.2021

Note:- L.R copy to be marked
(B/o)
VJL

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HON'BLE SRI JUSTICE JOYMALYA BAGCHI
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THE HON'BLE SRI JUSTICE M.GANGA RAO

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(per JB,J)

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