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

% *Decided on: 11th February, 2020.*

+ W.P.(C) 2336/2019

PRAVEEN KUMAR CHAUDHARY & ORS. Petitioners

Through: Petitioners in person.

Versus

ELECTION COMMISSION OF INDIA & ORS. ...Respondents

Through: Mr.Sidhant Kumar, Adv. for
Respondents No.1 & 3/ECI.

Mr.Ajay Dignpaul, CGSC with Mr.Soumaya
Karmakar, Adv. for R-2,5/UOI.

Ms.Sukriti Ghai, Adv. for Mr.Devesh Singh,
ASC for R-4/GNCTD.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT

: **D.N.PATEL, Chief Justice (Oral)**

C.M.No.29164/2019 (by R-1 & 3 for delay in filing counter affidavit)

1. This is an application filed by respondents No.1 & 3/Election Commission of India for condonation of 28 days in filing the counter affidavit.

2. For the reasons stated in the application, delay in filing the counter affidavit is condoned and the counter affidavit is taken on record.

3. The application is disposed of.

W.P.(C) No.2336/2019.

4. This public interest litigation has been preferred with the following prayers:-

“(A) Issue a writ of mandamus or any other writ quashing Section 62(5) of Representation of the People Act, 1951 as violative of the basic structure of the Constitution;

(B) Issue a writ of mandamus or any other writ staying operation of Section 62(5) of Representation of the People Act, 1951 pending the hearing and disposal of the present Writ Petition;

(C) Issue a writ of mandamus or any other writ directing the respondents to ensure that they should provide facilities and amenities to prisoners to cast their vote from jail premises pending the hearing and disposal of the present Writ Petition;

(D) Pass any such directions or order which this Hon'ble Court deems fit and proper in the facts and circumstances of the above mentioned case.”

5. Having heard the learned counsel for the parties and looking to the facts and circumstances, it appears that several grievances have been ventilated by the petitioners about Section 62(5) of the Representation of the People Act, 1951 (hereinafter referred to as ‘the Act’) and submitted that the said provision of the Act is violative of the basic structure of the Constitution. For ready reference, Section 62 (5) of the Act reads as under:-

“62. Right to vote.—

(1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency.

(2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in section 16 of the Representation of the People Act, 1950 (43 of 1950).

(3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void.

(4) No person shall at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for the constituency more than once, and if he does so vote, all his votes in that constituency shall be void.

(5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police:

Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force.

Provided further that by reason of prohibition to vote under this sub-section, a person whose name has not been entered in the electoral roll shall not cease to be an elector.

6) Nothing contained in sub-sections (3) and (4) shall apply to a person who has been authorised to vote as proxy for an elector under this Act in so far as he votes as a proxy for such elector.”

(emphasis supplied)

6. The petitioner who appear in person submitted that as per sub-Section (5) of Section 62 of the Act, there is no valid classification between the persons who are in jail and the persons who are on bail or out of jail. He has also pointed out that as per second proviso to sub-Section (5) of Section 62 of the Act, by reason of prohibition to vote under this sub-section, a person whose name has not been entered in the electoral roll shall not cease to be an elector meaning thereby that such person can contest the election but he/she cannot cast his/her vote

if he/she is in jail. It is, therefore, submitted by the petitioners that this type of classification is not valid in the eyes of law and is violative of Article 14 and basic structure of the Constitution of India.

7. Learned counsel appearing for the respondent/Election Commission of India submitted that this issue has already been raised before the Supreme Court in *Anukul Chandra Pradhan, Advocate Supreme Court vs. Union of India & Ors*, (1997) 6 SCC 1, paragraphs 3 to 6, 8 and 12 thereof reads as under:-

“3. The argument of Shri Rajinder Sachar, the learned counsel for the petitioner, is that sub-section (5) of Section 62 of the Act violates Articles 14 and 21 of the Constitution. The submission is that the expression “or otherwise” in sub-section (5) of Section 62 has a very wide connotation and denies voting rights even to undertrials and other persons detained in a prison for any reason, including the reason of inability to furnish bail. He submitted that the restriction applies to a person in lawful custody of the police which would include a person detained during investigation before a charge-sheet has been filed against him. On the other hand, a person convicted and sentenced to imprisonment but released on bail is permitted to vote. The learned counsel contended that this is discrimination and violates Article 14 of the Constitution. It was further contended by the learned counsel that there is violation also of Article 21 inasmuch as the restriction placed on the prisoner's right to vote by sub-section (5) of Section 62 of the Act denies dignity of life. In substance, the challenge to the constitutional validity of sub-section (5) of Section 62 is based primarily on Article 14 of the Constitution.

4. It is settled that Article 14 permits reasonable classification which has a rational nexus with the object of classification. The question is whether the classification made by sub-section (5) of Section 62 is reasonable or not.

5. There are provisions made in the election law which exclude persons with criminal background of the kind specified therein, from the election scene as candidates and voters. The object is to prevent criminalisation of politics and maintain probity in elections. Any provision enacted with a view to promote this object must be welcomed and upheld as subserving the constitutional purpose. The elbow room available to the legislature in classification depends on the context and the object for enactment of the provision. The existing conditions in which the law has to be applied cannot be ignored in adjudging its validity because it is relatable to the object sought to be achieved by the legislation. Criminalisation of politics is the bane of society and negation of democracy. It is subversive of free and fair elections which is a basic feature of the Constitution. Thus, a provision made in the election law to promote the object of free and fair elections and facilitate maintenance of law and order which are the essence of democracy must, therefore, be so viewed. More elbow room to the legislature for classification has to be available to achieve the professed object.

6. The effect of sub-section (5) of Section 62 of the Act is that any person who is confined in prison while serving a sentence of imprisonment on his conviction for any offence or is under lawful confinement in a prison or in a police custody for any reason is not entitled to vote in an election, but this restriction does not apply to a person subjected to any kind of preventive detention.

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8. There are other reasons justifying this classification. It is well known that for the conduct of free, fair and orderly elections, there is need to deploy considerable police force. Permitting every person in prison also to vote would require the deployment of a much larger police force and much greater security arrangements in

the conduct of elections. Apart from the resource crunch, the other constraints relating to availability of more police force and infrastructure facilities are additional factors to justify the restrictions imposed by sub-section (5) of Section 62. A person who is in prison as a result of his own conduct and is, therefore, deprived of his liberty during the period of his imprisonment cannot claim equal freedom of movement, speech and expression with the others who are not in prison. The classification of persons in and out of prison separately is reasonable. Restriction on voting of a person in prison results automatically from his confinement as a logical consequence of imprisonment. A person not subjected to such a restriction is free to vote or not to vote depending on whether he wants to go to vote or not; even he may choose not to go and cast his vote. In view of the restriction on movement of a prisoner, he cannot claim that he should be provided the facility to go and vote. Moreover, if the object is to keep persons with criminal background away from the election scene, a provision imposing a restriction on a prisoner to vote cannot be called unreasonable.

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12. In view of the settled law on the point, it must be held that the right to vote is subject to the limitations imposed by the statute which can be exercised only in the manner provided by the statute; and that the challenge to any provision in the statute prescribing the nature of right to elect cannot be made with reference to a fundamental right in the Constitution. The very basis of challenge to the validity of sub-section (5) of Section 62 of the Act is, therefore, not available and this petition must fail.”

8. In view of the aforesaid decision of Hon’ble Supreme Court, right to vote is neither a fundamental right nor a constitutional right.

Right to vote is not one of the common law rights but it is a right

conferred by a statute. The right to vote is subject to limitation imposed by the statute. The right to vote is the statutory right, the law gives it and the law can take it away. Thus, the classification has already been held as valid classification by the Hon'ble Supreme Court between persons who are out of jail and persons who are in jail. They are class by themselves.

9. In **W.P.(C) No.1028/1990** titled ***S. Radhakrishnan vs. Union of India & Ors.*** judgment dated 17th August, 1999, the Supreme Court in paragraph 2 has held as under:-

“2. The issue raised in this petition is no longer res-integra. In Anukul Chadra Pradhan v. Union of India & Ors. MANU/SC/0752/1997 : AIR 1997 SC 2814, a three Judge Bench of this Court speaking through Verma, CJI (as His Lordship then was) examined the ambit and scope of Section 62(5) of the Representation of the People Act, 1950 and after observing that criminalisation of politics is the bane of society and negation of democracy, rejected the challenge to the validity of the said Section. It was opined that the object of Section 62(5) is to prevent criminalisation of politics and maintain probity in elections and that any provision which furthers that aim and promotes the object has to be welcomed, as subserving a great constitutional purpose. We are in respectful agreement with the view expressed by the three Judge Bench in Anukul Chandra Pradhan's case (supra) and are not persuaded to take a different view. This writ petition, therefore, fails and is dismissed. No costs.”

10. In view of the aforesaid decision also Section 62(5) of the Act is constitutionally valid and right to vote is not a fundamental right but it is a statutory right and it can be made limited by the statute.

11. The Hon'ble Supreme Court in *Mahendra Kumar Shastri vs. Union of India & Anr.*, (1984) 2 SCC 442 held as under:-

“We do not find any merit in the contentions urged by the petitioner in the writ petition. The disability which is imposed under Section 62(5) of the Representation of the People Act is equally applicable to all persons similarly situate mentioned therein and they are even prevented from contesting the election or offering themselves as candidates for such election. The provision is reasonable and in public interest to maintain purity in electing peoples' representatives and there is no arbitrariness or discrimination involved. Rule is discharged and the writ Petition is dismissed.”

12. A Division Bench of this Court in a judgment reported in *Manohar Lal Sharma vs. Union of India*, 2014 (141) DRJ 157 in paragraph 25 and 26 held as under:-

“25.It is trite that ‘right to vote’ is not a fundamental right or constitutional right, but is only a statutory right. The Legislature can determine the terms on which the right to vote is enjoyed by the people of India. Section 62(5) of the RP Act of 1951 explicitly states, —No person shall vote at any election, if he is confined in a prison ... or is in the lawful custody of the police. The constitutional validity of said Section was upheld by the Supreme Court in **Ankul Chandra Pradhan, Advocate, Supreme Court v. Union of India and Ors.**, (1997) 6 SCC 1, by holding as under:

“9. It may also be mentioned that the nature of right to vote has been held to be a statutory right and not a common law right because of which it depends on the nature of right conferred by the statute. [In N.P. Ponnuswami v. Returning Officer, Namakkal Constituency](#) (1952 SCR 218) (SCC at p.

236), the Constitution Bench held -

“The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it.

10. In *Jamuna Prasad Mukhariya v. Lachi Ram* (SCC at p. 610), the Constitution Bench reiterated its earlier decisions by holding that -

“The right to stand as a candidate and contest an election is not a common law right. It is a special right created by statute and can only be exercised on the conditions laid down by the statute. The Fundamental Rights Chapter has no bearing on a right like this created by statute.

11. In *Jyoti Basu v. Debi Ghosal* (SCC at p. 696), the Hon'ble Apex Court held that -

“7. The nature of the right to elect, the right to be elected and the right to dispute an election and the scheme of the constitutional and statutory provisions in relation to these rights have been explained by the Court in **N.P. Ponnuswami v. Returning Officer, Namakkal Constituency, 1952 SCR 218** and **Jagan Nath v. Jaswant Singh, 1954 SCR 892 = AIR 1954 SC 210**. We proceed to state what we have gleaned from what has been said, so much as necessary for this case.

8. The right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation.

26. The right to vote is subject to the limitations imposed by the statute, which can be exercised only in the manner provided by the statute and that challenge to any

provision in the statute prescribing the nature of right to elect cannot be made with reference to a fundamental right in the Constitution. The very basis of challenge to the validity of sub- Section (5) of Section 62 of the RP Act of 1951 was, therefore, held to be not available. ”

13. In view of the aforesaid discussion, we hold that Section 62(5) is constitutionally valid. The classification of the persons who are in jail and who are out of jail is a valid classification and it has a reasonable nexus with the objects sought to be achieved as stated hereinabove.

14. In view of the above, there is no substance in this writ petition and the same is, accordingly, dismissed.

CHIEF JUSTICE

C.HARI SHANKAR, J

FEBRUARY 11, 2020

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