

**Court No. - 32**

**Case :- WRIT - C No. - 16998 of 2020**

**Petitioner :- Shafeeq Ahmad**

**Respondent:- State Of U.P. And 3 Others**

**Counsel for Petitioner:- Vikrant Pandey, Vivek  
Chaturvedi**

**Counsel for Respondent:- C.S.C., A.S.G.I., Bhupendra  
Nath Singh, B.P. Singh**

**Hon'ble Shashi Kant Gupta,J.**

**Hon'ble Pankaj Bhatia,J.**

1. This writ petition has been filed, inter alia, for the following reliefs:

*“i. Issue a writ, order or direction in the nature of certiorari to call for record of the case and to quash the notification dated 29.09.2020 issued by the respondent no. 3 for filling 56 assembly constituencies of various*

*states included 7 constituencies of Uttar Pradesh but not notifying the constituency no. 34, Suar, Rampur, which has been fallen vacant since 16.12.2019 (Annexure No. 1 to the writ petition).*

*ii. Issue a writ, order or direction in the nature of mandamus directing the respondent authorities to immediately declare the bye-election of the Uttar Pradesh State Assembly Constituency No. 34, Suar, Rampur.”*

1.A. When the matter was taken up yesterday, as question of interpretation of Representation of Peoples Act was involved and there was no disputed questions of fact, we have directed the respondents to obtain instructions in the matter. The matter has been heard on the basis of the instructions so received by the counsel for the respondents. The matter is disposed of finally with the consent of the parties as no disputed questions of fact are

involved and the questions relate to interpretation of the statutory provisions.

2. Heard Shri Vikrant Pandey, learned counsel for the petitioner, Shri Devendra Pratap Singh, Advocate holding brief of Shri Virendra Singh, learned counsel for the respondent no. 3, Shri Neeraj Tripathi, Senior Advocate/ Additional Advocate General, Shri Manish Goyal, Senior Advocate/learned Additional Advocate General assisted by Shri V.P. Singh Kachhawah, learned Standing Counsel for the State respondent and perused the record.

3. At the very outset, the learned counsel for the Petitioner has stated that he is not pressing the first relief sought in the writ petition. The prayer so made by the learned counsel for the petitioner is allowed.

4. The whole controversy in the present writ petition is with regard to not holding bye-election of Uttar Pradesh

State Assembly Constituency, 'Suar', Rampur, despite the seat falling vacant on 16.12.2019 and issuance of notification by the State Assembly on 27.02.2020, after the election of Mohammad Abdulla Azam Khan from the aforesaid 'Suar' Assembly was declared void and consequently set aside on 16.12.2019, in an election petition, by this Court.

5. Brief facts of the case are as follows:

Mohd. Abdullah Azam Khan was elected as Member in the Uttar Pradesh State Legislative Assembly from Constituency 'Suar', District Rampur. Thereafter, Election Petition No. 8 of 2017 was filed before this Court by one Nawab Kazim Ali Khan challenging the election of the petitioner, alleging that Mohd. Abdullah Azam Khan was less than 25 years of age and therefore he was not qualified to contest the elections in terms of Article 173(b) of the Constitution of India. This Court after hearing the parties vide judgement and order dated

16.12.2019 allowed the election petition and the election of Mohd. Abdullah Azam Khan was declared void and consequently set aside and information in this regard was sent to the Registrar General of this Court, Election Commission and the Speaker of the Uttar Pradesh Legislative Assembly. The copy of the judgment dated 16.12.2019 has been annexed as Annexure No. 2 to the present writ petition.

6. . Thereafter a Notification dated 27.02.2020 was issued by the Principal Secretary, U.P. State Assembly. (The copy of the notification dated 27.02.2020 has been placed before us by the learned Additional Advocate General) indicating that after passing of the order by the High Court, a vacancy has occurred on the aforesaid constituency w.e.f. 16.12.2019.

7. A perusal of the record shows that being aggrieved by the order dated 16.12.2019 passed by this Court, Mohd

Abdullah Azam Khan filed a Civil Appeal No. 104 of 2020 wherein following order was passed by the Apex Court:

*“Issue notice.*

*Waive service on the respondent since Mr. Amarjeet Singh, learned counsel, is appearing on behalf of the sole respondent.*

*List the matter on 25.03.2020 (a non miscellaneous day) for final disposal.*

*In the meantime, as prayed for, the respondent may file counter affidavit.*

8. Learned counsel for the petitioner has categorically stated that till date no interim order has been passed by the Apex Court, staying the effect and operation of the order dated 16.12.2019, passed by this Court declaring the election of the petitioner void.

9. Learned counsels for the respondents has not disputed the aforesaid fact.

10. The contention of the petitioner is that once the election has been set aside by the High Court in the Election Petition and no interim order has been passed and a vacancy has been duly notified by the State Assembly, there cannot be any justification for the Election Commission not to hold the elections. By not holding the elections, the Election Commission has failed to perform its constitutional duty and suppressed the voice of the people who deserve to be represented through an elected representative. In support of his contention, he has referred to Section 151(A) of the Representation of the Peoples Act, 1950 (in short, the Act), which reads as follows:

*“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.”*

11. Perusal of the aforesaid section clearly indicates that a bye election for filling up any vacancy referred to in any of the sections mentioned therein shall be held within a

period of six months from the date of occurrence of the vacancy.

12. Learned counsel for the petitioner has stated that as per Section 151-A of the Act, the bye elections should have been held within six months from the date of occurrence of the vacancy. In the present case, vacancy has occurred w.e.f. 16.12.2019 and per the notification issued by the State Assembly, more than nine months have passed, however the Election Commission has failed to take any steps to hold the bye election for the aforesaid constituency. It has been further submitted that Election Commission has already issued notifications for holding bye elections of the several other constituencies but has deliberately not taken any steps to fill the aforesaid seat, through bye election.

13. Learned Counsels appearing on behalf of the State has categorically stated that after passing of the High Court's order, the State Assembly has already notified the vacancy vide notification dated 27.02.2020, and it is for the Election Commission to take decision to hold bye elections for the vacant seat.

14. Per contra, learned counsel appearing on behalf of the Election Commission has rebutted the contention so made by the learned counsel for the petitioner and has raised a preliminary objection for not impleading Mohd. Abdullah as the respondent in the present writ petition.

15. We do not find substance in the argument advanced in this regard. Since the election of the Mohd. Abdullah has already been declared void and no interim protection granted by the Apex Court, as such, Mohd. Abdullah is

neither a necessary nor a proper party in this petition, as the controversy is with regard to not holding of bye election for the aforesaid constituency within the period specified under section 151-A of the Act.

16. Learned counsel for the Election Commission has further raised an objection stating that the petitioner has filed the writ petition before this Court without approaching the Election Commission.

17. This argument is also devoid of merit and is misconceived. Needless to say, the petitioner is simply asking the Election Commission to carry out its obligation to hold the bye elections as per the mandate of Section 151 A of the Act. By not holding the bye elections, the Election Commission is violating the provisions of Section 151A of the Act, as such, Election Commission is hampering the democratic process. Thus,

the objection raised by the learned counsel for the Elections Commission is rejected. It is further noted that in paragraph 11 of the present writ petition, it has been categorically stated that Mohd. Abdullah has filed an appeal challenging the order of this Court under Section 116A of the Act but he has not been granted any interim order by the Apex Court under Section 116B of the Act.

18. Learned counsel for the Election Commission while referring to Section 116-C of the Act has contended that after deciding the appeal, the Supreme Court shall intimate the substance of the decision to the Election Commission and the Speaker or Chairman, as the case may be, of the House of Parliament or of the State Legislature concerned and as soon as may be thereafter shall send to the Election Commission an authenticated copy of the decision; and upon its receipt, the Election Commission shall forward copies thereof to the

authorities to which copies of the order of the High Court were forwarded under section 106 of the Act. In view of the aforesaid position it has sought to be submitted that no bye elections can be held during the pendency of the appeal before the Apex Court.

19. For the purpose of deciding the contention so raised by the petitioner, reference may be had to Sections 116-A, 116-B and 116 C of the Act, which are being quoted herein below:

***“116-A. Appeals to Supreme Court.— (1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie to the Supreme Court on any question (whether of law or fact) from every order made by a High Court under section 98 or section 99.***

*(2) Every appeal under this Chapter shall be preferred within a period of thirty days from the date of the order of the High Court under section 98 or section 99: Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within such period.]*

*116-B. Stay of operation of order of High Court.— (1) An application may be made to the High Court for stay of operation of an order made by the High Court under section 98 or section 99 before the expiration of the time allowed for appealing therefrom and the High Court may, on sufficient cause being shown and on such terms and conditions as it may think fit, stay the operation of the order; but no application for stay shall be made to the High Court after an appeal has been preferred to the Supreme Court.*

*(2) Where an appeal has been preferred against an order made under section 98 or section 99, the Supreme Court may, on sufficient cause being shown and on such terms and conditions as it may think fit, stay the operation of the order appealed from.*

*(3) When the operation of an order is stayed by the High Court or, as the case may be, the Supreme Court, the order shall be deemed never to have taken effect under sub-section (1) of section 107; and a copy of the stay order shall immediately be sent by the High Court or, as the case may be, the Supreme Court, to the Election Commission and the Speaker or Chairman, as the case may be, of the House of Parliament or of the State Legislature concerned.*

*116-C. Procedure in appeal.— (1) Subject to the provisions of this Act and of the rules, if any, made thereunder, every appeal shall be heard and determined by the Supreme Court as nearly as may be in accordance with the procedure applicable to the hearing and determination of an appeal from any final order passed by a High Court in the exercise of its original civil jurisdiction; and all the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and the Rules of the Court (including provisions as to the furnishing of security and the execution of any order of the Court) shall, so far as may be, apply in relation to such appeal.*

*(2) As soon as an appeal is decided, the Supreme Court shall intimate the substance of the decision to the Election Commission and the Speaker or Chairman, as the case may be, of the House of Parliament or of the State Legislature concerned and as soon as may be*

*thereafter shall send to the Election Commission an authenticated copy of the decision; and upon its receipt, the Election Commission shall—*

*(a) forward copies thereof to the authorities to which copies of the order of the High Court were forwarded under section 160; and*

*(b) cause the decision to be published in the Gazette or Gazettes in which that order was published under the said section.]]*

20. Section 116-A of the act inter alia provides that an appeal shall lie to the Supreme Court on any question (whether of law or fact) from every order made by a High Court under section 98 or section 99.

21. Section 116-B of the Act inter alia provides that An application may be made to the High Court for stay of operation of an order made by the High Court under section 98 or section 99, before the expiration of the time allowed for appealing therefrom and the High Court may, on sufficient cause being shown and on such terms and conditions as it may think fit, stay the operation of the order; but no application for stay shall be made to the High Court after an appeal has been preferred to the Supreme Court.

22. Section 116-C of the Act only provides the procedure in appeal before the Apex Court and further lays down the procedure to be followed after the appeal is decided. However, it does not in any way effect the operation and effect of section 151-A. Furthermore, there is no interim order which has been passed by the Hon'ble Apex Court, despite there being a specific provision contained in

Section 116-B of the Act. In the present case, it may be noted that the Apex Court has not stayed the operation and effect of the order dated 16.12.2019 passed in Election Petition No. 8 of 2017, by this Court, setting aside the election of Mohammad Abdulla Azam Khan. Therefore in our considered opinion the provisions of Section 116-C do not have any applicability to the facts and circumstances of the present petition.

23. The submission of the counsel for the Election Commission is also liable to be rejected in view of a clear mandate of the Act as clarified under Section 107 is as under:

***“107. Effect of orders of the High Court.—***

***(1) Subject to the provisions contained in Chapter IVA relating to the stay of operation of an order of the High Court under section 98 or section 99, every such order***

*shall take effect as soon as it is pronounced by the High Court.]*

*(2) Where by an order under section 98 the election of a returned candidate is declared to be void, acts and proceedings in which that returned candidate has, before the date thereof, participated as a member of Parliament or as a member of the Legislature of a State shall not be invalidated by reason of that order, nor shall such candidate be subjected to any liability or penalty on the ground of such participation.”*

Clause (1) of Section 107 is clear answer to the argument of counsel for the Election Commission inasmuch it categorically provides for the date and period from when the order of the Court shall take effect from and is only subject to any interim order by the Appellate Court.

24. Learned counsel for the Election Commission has placed reliance upon the decision of the Apex Court in the case of *Election Commission of India Versus Telangana Rastra Samithi and Another, 2011(1) SCC 370*. For ready reference paragraphs 33, 34 and 35 are quoted herein below:-

*“33. At this stage, it would be apposite to consider another aspect of the matter regarding the meaning of the expression "vacancy" for the purpose of Part IX of the aforesaid Act. In this behalf we are inclined to agree with the decision rendered in D.Sanjeevayya's (supra) case and the submissions of the learned Additional Solicitor General that in order to be filled up in a bye-election, a vacancy must be available for being filled up. In a situation such as that contemplated by the latter half of Section 84 and its consequences as reflected in Sections 98(c), 101(b) and 8A of the 1951*

*Act, it cannot be said that a vacancy in such a situation would be a vacancy available for being filled up by a bye- election, particularly in a situation where allegations of corrupt practices have been made which, if proved, provides for disqualification under [Section 8A](#) of he said Act. Simply by submitting his resignation, a successful candidate against whom allegations of corrupt practices are made, cannot escape the consequences of [Section 8A](#) of the Act, if the same are ultimately found to be proved.*

*34. The various decisions cited do not appear to have any relevance as far as the facts of this case are concerned. The object with which the 1951 Act was enacted is reflected in the Preamble which reads as follows :-*

*["The Act](#) to provide for the conduct of elections of the Houses of Parliament and to the House or Houses of*

*the legislature of each State, the qualifications and disqualifications, the membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections."*

*The Act is a complete Code for the conduct of elections by the Election Commission of India appointed under Article 324 of the Constitution which provides for superintendence, direction, control and conduct of elections to Parliament and to the legislature of every State and also of elections to the offices of President and Vice- President held under the Constitution. The provisions of Article 190(3)(b) of the Constitution have, therefore, to be read along with the provisions of the 1951 Act. Section 84 of the said Act cannot be rendered otiose by holding that all vacancies on account of the*

*aforesaid provision of the Constitution become immediately available for being filled up by way of a bye-election. The same reasoning applies in regard to [Section 151A](#) of the 1951 Act and its impact on the latter part of [Section 84](#) thereof. As has been mentioned hereinbefore, a proceeding under [Section 84](#) has to run its full course, particularly for the purposes of [Section 8A](#) of the said Act. The views expressed by the Division Bench of the High Court on this point cannot, therefore, be sustained.*

*35. We are, therefore, of the firm view that the introduction of [Section 151A](#) in the Constitution did not alter the position as far as the provisions of [Section 84](#) and consequently 98(c) and 101(b) of the 1951 Act are concerned, since although a casual vacancy may have occurred within the meaning of [Section 150](#) of the 1951 Act, those vacancies in which election petitions had*

*been filed and were pending cannot be held to have become available for the purposes of being filled up within the time prescribed under [Section 151A](#) of the 1951 Act. [Article 190\(3\)\(b\)](#) of the Constitution merely indicates that if a Member of a House of a Legislature of State resigns his seat by writing to the Speaker and such resignation is accepted, his seat shall become vacant. It does not introduce any element of compulsion on the Election Commission to hold a bye-election ignoring the provisions of [Section 84](#) of the Act. In such cases, we have little hesitation in holding that such casual vacancies are not available for being filled up and the Commission will have to wait for holding elections in such Constituencies until a decision is rendered in regard to the latter part of [Section 84](#) of the 1951 Act during the life of the House. The view expressed by the High Court that a case has to be decided in accordance with the laws as existing on the*

*date of adjudication, while salutary in principle, are not attracted to the facts of this case in view of the provisions of Section 84 of the 1951 Act. “*

25. That the reliance placed on the aforesaid judgment is also completely misconceived since the aforesaid judgment is clearly distinguishable and has no application to the facts and circumstances of the present case. It may be noted that in the aforesaid case the Apex Court has held that Section 151-A does not pertain to vacancy/seat in respect of which election petition is pending, where relief for declaration has been sought in terms of the latter part of Section 84 of the Act, to the effect that declaration is sought he (election petitioner) may himself or any other candidate be declared duly elected. For ready reference, Section 84 of the Act is being quoted herein below:

**84. Relief that may be claimed by the petitioner: A petitioner may, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected.**

26. That in the case of Election Commission of India (Supra), election petition was pending before the High Court, inter alia, claiming a declaration that the petitioner be declared elected. Further, the elected candidates against whom the petition was filed, rendered their resignations during the pendency of the election petition. It was in these circumstances that even though the vacancies were notified, the Election Commission refused to hold the bye elections on the ground of pendency of the Election Petition.

However, in the present case, the elections have been duly set aside by this Court after allowing the election petition. It is notable that in the election petition no relief was sought by the election petitioner for declaring himself or any other candidate, duly elected. Thus the ratio in the aforesaid judgment has no applicability to the facts of the present case.

27. Democracy is a system of government in which a country's political leaders are chosen by the people in regular, free, and fair elections. In a democracy, people have a choice between different candidates and parties who want the power to govern. The people are sovereign. They are the highest authority and government is based on the will of the people. The Will of people is supreme. It cannot be lightly interfered with. The Election Commission under no circumstance can frustrate the will of the people. This Court, which is a custodian of the Constitution cannot be a silent spectator in a case of this

nature where the Election Commission has failed to exercise its powers in a manner which has the effect of destroying or making erosion in to the democratic set up, which is a part of the basic structure of the Constitution.

28. The Election Commission of India has not been able to justify as to why and under what circumstances, bye election has not been held on the aforementioned constituency despite the vacancy having occurred on 26.12.2019 and duly notified long back by the State Assembly on 27.02.2020. Thus, the Election Commission has failed to perform its constitutional and statutory duty to hold the bye election for the aforementioned constituency within the time prescribed under Section 151A of the Act.

29. In view of the facts and circumstances of the case and discussions made herein-above, we direct the respondent no. 3-Election Commission of India to start the process

for holding the bye election on the Uttar Pradesh's State Assembly Constituency, "Suar" Rampur, forthwith.

30. In the result, the writ petition is allowed.

**Order Date :- 22.10.2020**

Arun