

April 26, 2022
Supple. List
Item No. 1
Court No.1
PA(SS)

WPA(P) 91 of 2022
Soumendu Adhikari

Vs.

The State of West Bengal and Ors.
(Through Video Conference)

Mr. Paramjit Singh Patwalia, Ld. Sr. Adv.
Mr. Rajdeep Majumdar,
Mr. Srijib Chakraborty,
Ms. Harshika Varma,
Mr. Sayak Chakraborti,
Mr. Moyukh Mukherjee,
Mr. Anish Kumar Mukherjee,
Mr. Suryaneel Das,
Mr. Kaushal Agarwal,
Mr. Amrit Sinha,
Mr. Surojit Saha, Advocates
... for the petitioner

Mr. S.N. Mookherjee, Ld. AG
Mr. S. Sen, Ld. AAAG
Mr. A. Ray,
Md. T.M. Siddiqui,
Mr. R. Saha,
Mr. D. Ghosh,
Mr. N. Chatterjee, Advocates
... for the State

Mr. Jayanta Kr. Mitra, Ld. Sr. Adv.
Mr. Jishnu Saha, Ld. Sr. Adv.
Ms. Sonal Sinha,
Ms. Jaweria Rubana,
Mr. Subhankar Nag, Advocates
... for the State Election Commission

Mr. Dhiraj Kumar Tribedi, Ld. ASG
Mr. Tarunjyoti Tewari, Advocates
... for C.B.I

Mr. Anirban Mitra, Advocate
... for the respondent No. 8

Mr. Vipul Kundalia,
Mr. Somnath Adhikari, Advocates
... for Union of India

Counsel for the parties have been heard on
interim prayer for forensic audit of CCTV footage of

Contai Municipal election.

This writ petition relates to the allegations of malpractices such as booth capturing, forged voting, violence etc. during the Contai municipal elections held on 27.02.2022. The prayer in the petition is to hold fresh polls to the Contai Municipality by deployment of central paramilitary forces.

Earlier orders were passed by this Court and directions were issued for holding the polling in free, fair and fearless manner because since beginning petitioner was apprehending various malpractices and violence during election. By earlier order dated 23.02.2022 in WPA(P) 271 of 2021 in the case of Mousumi Roy vs. West Bengal State Election Commission and Others, this Court instead of accepting the prayer for deployment of paramilitary forces, had issued several directions to ensure holding of fair election in the Municipalities, including the direction to the State Election Commission to install CCTV cameras at conspicuous spot in all main and ancillary booths across the State and to preserve the footage. After the election, a serious issue has been raised that in spite of direction of this Court and even after holding the State Election Commission personally responsible, no free and fair elections have been held in the State specially in Contai Municipality.

At this stage, pressing for interlocutory order, submission of Counsel for the petitioner is that forensic audit of CCTV footage, preserved on the direction of this Court, is necessary to bring this fact to light that large scale violence and illegal polling has taken place during the Contai Municipal Election. Learned Counsel for the petitioner by referring to the earlier orders of this Court has submitted that CCTV footage has been preserved on the direction of this Court to carry out its forensic audit and to ensure if free and fair elections took place. He has submitted that this Court has reposed confidence on the State Election Commission which has been belied and the directions of this Court have not been complied with, therefore, only option is to direct forensic audit of CCTV footage. He has further submitted that the State Election Commission cannot change its stand now and deny the forensic audit. In support of his submission, he has placed reliance upon the order of the Hon'ble Supreme Court in the matter of **Digvijay Mote vs. Union of India and Others** reported in **(1993) 4 SCC 175**, **Election Commission of India vs. State Bank of India, Patna and Others** reported in **AIR 1995 SC 1078**, **Laxmibai vs. Collector, Nanded and Others** reported in **(2020) 12 SCC 186** and **L. Chandra Kumar vs. Union of India and Others** reported in **(1997) 3 SCC 261**. He has further submitted that the forensic audit should be done

from any of the CFSL at Hyderabad, Delhi etc.

Learned Counsel for the State Election Commission opposing the prayer for interlocutory order, has submitted that the main prayer in the petition to cancel the election cannot be granted in writ jurisdiction, therefore, the interim prayer also cannot be granted and that there is a constitutional bar contained in Article 243-ZG(b) of the Constitution. In support of this submission he has placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Jaspal Singh Arora vs. State of M.P. and Others** reported in **(1998) 9 SCC 594**, **Gurdeep Singh Dhillon vs. Satpal and Others** reported in **(2006) 10 SCC 616** and **State of Goa and Another vs. Fouziya Imtiaz Shaikh and Another** reported in **(2021) 8 SCC 401**. He has also placed reliance upon Sections 75 and 78 of West Bengal Municipal Elections Act, 1994 and has submitted that the only remedy available is to file an election petition.

Learned Advocate General has also supported the submission of the State Election Commission and has submitted that when this Court does not have jurisdiction to grant final relief then interim relief cannot be granted. He has also placed reliance upon Article 243-ZG(b) of the Constitution and Sections 74 to 78 of the West Bengal Municipal Elections Act, 1994. In support of

his submission, he has placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **The State of Orissa vs. Madan Gopal Rungta** reported in **(1952) SCR 28**, **Cotton Corporation of India Limited vs. United Industrial Bank Limited and Others** reported in **(1983) 4 SCC 625** and **Fouziya Imtiaz Shaikh and Another (supra)**. He has also submitted that by consent jurisdiction cannot be conferred.

We have heard the learned Counsel for the parties and perused the record.

There is no dispute to the proposition that election of a municipality cannot be called in question except by way of an election petition. Article 243-ZG(b) of the Constitution as also the judicial pronouncements on this point are very clear but the scope of the present matter is different. At this stage, this Court is not considering the prayer for setting aside the election but only intending to ascertain if the assurance given to this Court by the State Election Commissioner while opposing the prayer for deployment of the paramilitary forces has been fulfilled and free and fair elections have been held.

Initially writ petitions were filed before this Court, before the date of polling, expressing

apprehension of violence and unfair practices in polling, with a prayer to deploy paramilitary forces. The prayer was opposed by the State Election Commission and the State of West Bengal. This Court at the stage of elections of Kolkata Municipal Corporation and at the stage of Bidhannagar, Asansol, Siliguri and Chandernagore Municipal Corporations by order dated 10.02.2022 instead of directing deployment of paramilitary forces, this Court had issued certain directions to the State Election Commission and left it at the discretion of the Commissioner, State Election Commission to form an opinion about deployment of paramilitary forces by observing if he reaches to a decision otherwise, he will be personally liable to ensure that no violence takes place and free, fearless and peaceful elections are held. In WPA(P) 271 of 2021, this Court on 23rd February, 2022 had directed as under:

“11. At this juncture it would be worth mentioning that by the order dated 10th of February, 2022 this Court had directed the State Election Commissioner to hold a meeting and ascertain if deployment of paramilitary forces is necessary during elections in Bidhannagar Municipal Corporation. The minutes of the meeting dated 10th of February, 2022 have been placed before us but those minutes only reflect certain discussions based on oral information submitted by the State authorities. The Election Commission is

required to ascertain the ground situation after calling the reports and also gathering the information from relevant sources about the conditions prevailing in the concerned Municipality where election is scheduled.

12. Hence, we direct that the Commissioner, State Election Commission will collect information in respect of the conditions prevailing in each of the Municipalities where the elections are scheduled and will hold the joint meeting with the Home Secretary of the State and the Director General and Inspector General of the Police within 24 hours and will examine the ground situation of each of the 108 Municipalities and take a decision in writing in respect of deployment of paramilitary forces by mentioning the relevant circumstances in support of his decision to deploy/not to deploy the paramilitary forces. If the Commissioner, State Election Commission takes the decision not to deploy the paramilitary forces, then he will be personally liable to ensure no violence takes place and free, fair and fearless elections take place in the municipality where paramilitary forces are not deployed.”

By the order dated 23.12.2021 passed in MAT 1354 of 2021, this Court had also issued direction to take various steps during polling including installation of CCTV cameras and preservation of CCTV footages as under:

“(i) The respondent State Election Commission

is directed to preserve CCTV footage of all polling stations of Kolkata Municipal Corporation Elections held on 19th December, 2021.

(ii) The State Election Commission is also directed to preserve the diaries of the presiding officer and register containing the thumb impression/signature of voters of all the polling booths in a sealed cover with immediate effect.

(iii) The State Election Commission is directed to preserve the control unit of EVM machines in terms of Rules 61N of the Rules of 1995 without any delay.

(iv) State Election Commission is also directed to preserve voting record prepared from the EVM in terms of Rules 61N until further orders.

(v) For the forthcoming elections of the remaining Municipal Corporations/Municipal Councils, local bodies, in order to maintain the transparency and fairness, we direct that the State Election Commission shall take steps to install CCTV cameras at conspicuous spots in all main and ancillary booths across the State and will preserve the CCTV footages so that in case of need it can be sent for audit.”

In WPA(P) 271 of 2021 in the case of Mousumi Roy vs. West Bengal State Election Commission and Others, this Court by order dated 23.02.2022 had directed that above directions will apply mutatis

mutandis in the remaining 108 Municipality elections.

At this stage, the submission of the learned Counsel for the petitioner is that incidents of violence and malpractices in polling during the Contai Municipal election on 27.02.2022 have been recorded in the CCTV cameras. It has been alleged that though 97 CCTV cameras were installed but as per the information received about 91 CCTV cameras were destroyed and made non-functional. There is also an allegation that booth capturing took place during the polling and even candidates were beaten.

On 11.03.2022, when this petition was taken up, the prayer made by the learned Counsel for the petitioner for forensic audit of video footage of CCTV cameras installed in the polling booth was not objected by the learned Counsel for the State Election Commission. In the order-sheet dated 11th March, 2022, the stand of learned Counsel for the parties was recorded as under:

“Learned counsel for the petitioner, referring to the affidavit-in-opposition filed by the respondent nos.3 and 4, has submitted that the correct position has not been placed by the said respondents before this Court and in spite of the material available the incidents have been denied. He submits that in such circumstances, it is necessary that the forensic

audit of the video footage of the CCTV cameras installed in the polling booth should be done so that correct position will come on record.

Learned counsel for the State Election Commission has no objection to the same as the stand of the learned counsel is that every step should be taken to find out that transparent and fair election were held.

Learned counsel appearing for the Election Commission of India has sought adjournment to obtain instruction if it can get the forensic audit of the video footage done through an independent agency.

State Election Commission in terms of the earlier direction of this Court is directed to ensure preservation of the CCTV footages as well as CCTV cameras and other record and to keep them in safe custody without any tampering until further order.”

The State Election Commission in the earlier proceeding had clearly recorded their no objection for forensic audit, therefore, now the State Election Commissioner is not justified in changing the stand and opposing the prayer. The changed stand of the State Election Commission runs counter to its object of holding and ensuring free and fair election. This Court fails to understand as to why the State Election Commission does not want to ascertain if free and fair elections were held or if the allegation of large scale

booth capturing, forged voting, etc. is correct.

In the detailed orders passed earlier, this Court had reposed confidence in the Commissioner, State Election Commission while declining the prayer to deploy paramilitary forces and had issued directions to install CCTV cameras and preserve the footage. Now, there are allegations of serious malpractices and violence in the elections during the polling of Municipal Council, Contai.

So far as the objection of respondents that when main relief in the petition itself cannot be granted then the direction to hold the forensic audit also should not be issued, we are of the opinion that at this stage, this Court has the responsibility to ascertain if the direction issued by this Court earlier has been complied with by the State Election Commissioner as the earlier direction to preserve CCTV footage of polling was not an empty formality.

At this stage, this Court is only considering the limited prayer of conducting forensic audit of preserved CCTV footage. Such a direction, instead of interfering in the election process, is in fact in furtherance to the object of the State Election Commission to hold free and fair election.

This Court is conscious of the bar contained in Article 243-ZG(b) of the Constitution, provisions of the

Municipalities Act and various judicial pronouncements on limited scope of judicial intervention in such matters. After the forensic audit report is received, it will be open to the parties to raise all legally permissible objections and this Court will pass suitable order in accordance with law, keeping in view the constitutional provisions and democratic principles but at this stage, there is no constitutional bar to get the forensic audit done.

It is worth noting that in the present case the election of any particular member of the Contai Municipal Corporation has not been challenged but prayer is to cancel the entire election and to conduct fresh polls by deployment of paramilitary forces. Such a general prayer in an election petition cannot be made.

The judgment of the Hon'ble Supreme Court in the matter of **Jaspal Singh Arora (supra)** and in the matter of **Fouziya Imtiaz Shaikh and Another (supra)** relating to constitutional bar are concerned, the same may not be attracted at this stage because presently the prayer before this Court is only to have the forensic audit of the CCTV footage which may be used for other purposes, also even for the benefit of the State Election Commission. These judgments may be relevant at the stage, when the prayer for cancellation of the election in the writ petition is pressed.

In the matter of **Laxmibai (supra)** in paragraph 42 of the judgment the Hon'ble Supreme Court has taken note of the earlier judgment in the case of **Harnek Singh vs. Charanjit Singh and Others** reported in **(2005) 8 SCC 383** wherein it was held that though under Article 243-O of the Constitution all election disputes must be determined by way of an election petition but this by itself may not per se bar judicial review which is the basic structure of the Constitution.

In the matter of **L. Chandra Kumar (supra)** the seven Judges Bench of the Hon'ble Supreme Court has held that the power of judicial review over legislative action vested in the High Courts under Article 226 and in the Hon'ble Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution and that such power vested even in the High Court under Articles 226 and 227 of the Constitution cannot be wholly excluded.

Thus, from the above judicial pronouncements it is clear that in such matters judicial review under Article 226 of the Constitution is ordinarily excluded but it is not wholly excluded.

Counsel for the respondent has relied upon the judgment in the matter of **Jaspal Singh Arora (supra)**, the election of a candidate as President of Municipal

Council was challenged in the writ petition under Article 226, hence in that background the Hon'ble Supreme Court had held that mode of challenge to the election being prescribed in the Act through election petition, therefore, it cannot be called in question except by the election petition.

In the matter of **Gurdeep Singh Dhillon (supra)** also there was a challenge to the election of one of the candidate by way of election petition. Hence, it was held that only remedy available to challenge the election was by raising an election dispute under the local statute.

The Hon'ble Supreme Court in the matter of **Digvijay Mote (supra)** has taken note of the power of the Election Commission to postpone the elections having regard to the disturbed condition of the State or part thereof to ensure free and fair elections and has held that these powers are not unbridled but subject to judicial review and that the exercise of power under Article 324 is not altogether unreviewable.

In the matter of **State Bank of India, Patna and Others (supra)**, the Hon'ble Supreme Court has held that Article 324 of the Constitution does not enable the Election Commissioner to exercise untrammelled powers. The Election Commission must trace its power

either to the Constitution or the law otherwise it would become an imperium in imperio which no one is under our constitutional power.

Reliance has been placed in the matter of **Cotton Corporation of India Limited (supra)** and in the matter of **Madan Gopal Rungta (supra)** in support of the plea that when final relief cannot be granted, there does not arise any question to grant the interim relief but this Court at this stage is considering the issue of compliance of the earlier directions of this Court to install CCTV cameras and preserve the footage as also direction to ensure free and fair elections.

It has not been disputed before this Court that CFSL, Delhi can do the forensic audit of CCTV footage.

Having regard to the above analysis, we are of the opinion that not only to ascertain the compliance of earlier orders of this Court but in the larger public interest and to uphold democratic principles, it is necessary to get forensic audit of CCTV footage of Contai Municipal Election done. Hence, at this stage, we direct as under:

- a) that respondent State Election Commission will send the CCTV footage of Contai Municipal Election, preserved by earlier order of this Court, for forensic audit to CFSL,

Delhi within 10 days;

b) while sending the CCTV footage as above, the State Election Commission will duly mark the concerned polling booth number to which each footage relates to;

c) the CFSL will carry out the forensic audit of CCTV footage and ascertain if booth capturing, EVM tampering, forged voting (*chhapa voting*), violence, etc. had taken place in the respective polling booth;

d) CFSL will be free to take the help of any other independent agency in the process or seek other documents from State Election Commission which have been preserved by the order of this Court, if required, with the permission of this Court;

e) After the forensic audit, CFSL, Delhi will safely return back the CCTV footage to Commissioner, West Bengal Election Commission in sealed cover;

f) The CFSL, Delhi will submit the forensic audit report to this Court in sealed cover.

Let the above exercise be completed within a period of 6 weeks from today.

List on 13.06.2022.

(Prakash Shrivastava, C.J.)

(Rajarshi Bharadwaj, J.)