

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION NO. 13552 of 2015**

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KHEMCHAND RAJARAM KOSHTI....Petitioner(s)

Versus

STATE OF GUJARAT & 1....Respondent(s)

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Appearance:

MR PS CHAMPANERI, ADVOCATE for the Petitioner(s) No. 1

ADVANCE COPY SERVED TO GP/PP for the Respondent(s) No. 1

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CORAM: **HONOURABLE THE ACTING CHIEF JUSTICE**
MR.JAYANT PATEL
and
HONOURABLE MR.JUSTICE N.V.ANJARIA

Date : 21/08/2015

ORAL ORDER

(PER : HONOURABLE THE ACTING CHIEF JUSTICE
MR.JAYANT PATEL)

1. We have heard Mr.Champaneri, learned counsel for the petitioner.

2. Section 79(d) of the Representation of the People Act, 1951 (hereinafter referred to as R.P. Act) reads as under.

"(d) "electoral right" means the right of a person to stand or not to stand as, or to withdraw or not to withdraw from being, a candidate, or to vote or refrain from voting at an election"

3. The aforesaid shows that for the election of Member of Parliament and Member of Legislative

Assembly which is governed by the provisions of the Representation of the People Act, electoral right of the voters expressly provides for right to vote or to refrain from voting at the election. Such concept expressly provided in the statute negates the obligation in the nature of compulsion to be read upon the voters to vote.

4. As per the provisions of Part IX and IXA of the Constitution of India, Panchayats and Municipalities are given constitutional status and further, the elections of the Panchayats as per Article 243-A and Article 243-ZA are to be conducted by the State Election Commission. As per the provisions of the respective statutes, namely Gujarat Panchayats Act, Gujarat Municipalities Act and Bombay Provincial Municipalities Act, voters list of the voters are to be the same as that of electoral roll of the Legislative Assembly prepared and revised under the provisions of the Representation of the People Act for the time being in force, subject to the modification under the Act. When the elections of the Municipal Corporations, Municipalities and Panchayats are to be conducted by the State Election Commission,

more particularly at par with the election of the Member of Legislative Assembly and Member of Parliament, it prima-facie appears that right to vote should have the same meaning as so expressly provided under Section 79(d) of the R.P. Act as referred hereinabove.

5. It is true that Panchayats and Municipalities is a subject of the State in List II of the Seventh Schedule of the Constitution of India, but any statute made by the State Legislative has to meet with the constitutional provisions and more particularly above-referred Part IX and IXA of the Constitution of India. Apart from above, duty which is otherwise not provided under the Representation of the People Act upon the voters for the election of Member of Parliament or election of Member of Legislative Assembly, prima-facie cannot be imposed in the elections of Municipal Corporations, Municipalities and Panchayats.

6. Right to vote is a statutory right conferred upon any voter. By virtue of statutory provisions it entitles voters to cast the vote. The moment such provision is accepted as that of entitlement to cast

the vote, compulsion or obligation created to cast the vote would negate the entitlement on right of any voter. Once the name of any person is included in the voters list, entitlement on right to cast the vote would accrue but thereafter obligation or compulsion cannot be read or provided upon the voter to cast the vote. It is hardly required to be stated that when any statute provides for a right to any citizen, such citizen is bound to have freedom not to opt for such right or exercise such right. Such freedom with any voter is in-built in the provisions of Article 19(1) (g) of the Constitution of India. The Representation of People Act expressly recognises such right to vote including the right to refrain from voting. But even otherwise also, whenever any right is conferred upon any person to do a particular act, it would always include right to refrain therefrom.

7. It further appears that the obligation so created by way of compulsion is not a mere obligation, but it further provides for penal consequences, therefore, the compulsion so imposed is with more gravity. The moment there is more gravity of the compulsion so created, it would further negate the

right to vote and right to refrain from voting.

8. In view of above, it prima-facie appears that obligation so created by Gujarat Act No.21 of 2014 bringing about the amendment under Bombay Provincial Municipal Corporation Act, Gujarat Municipalities Act and Gujarat Panchayats Act may run counter to the basic principles of entitlement on right of the voters to vote. At this stage, we may profitably refer to the observations made by the Apex Court in case of **People's Union for Civil Liberties Vs Union of India [2013(3) GLH 334 : (2013)10 SCC 1]** and more particularly paragraph 44 to 57.

"45. Democracy and free elections are part of the basic structure of the Constitution. In *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp 1 SCC 198 : (AIR 1975 SC 2299), Khanna, J., held that democracy postulates that there should be periodic elections where the people should be in a position to re-elect their old representatives or change the representatives or elect in their place new representatives. It was also held that democracy can function only when elections are free and fair and the people are free to vote for the candidates of their choice. In the said case, Article 19 was not in issue and the observations were in the context of basic structure of the Constitution. Thereafter, this Court reiterated that democracy is the basic structure of the Constitution in *Mohinder Singh Gill and Another v. Chief Election Commissioner, New Delhi and Others*, (1978) 1 SCC 405 : (AIR 1978 SC 851) and *Kihoto Hollohon v. Zachillhu and Others*,

1992 (Supp) 2 SCC 651 : (AIR 1993 SC 412).

46. In order to protect the right in terms of Section 79(d) and Rule 49-0, viz., "right not to vote", we are of the view that this Court is competent/well within its power to issue directions that secrecy of a voter who decides not to cast his vote has to be protected in the same manner as the Statute has protected the right of a voter who decides to cast his vote in favour of a candidate. This Court is also justified in giving such directions in order to give effect to the right of expression under Article 19(1)(a) and to avoid any discrimination by directing the Election Commission to provide NOTA button in the EVMs.

47. With regard to the above, Mr. Malhotra, learned ASG, by drawing our attention to Section 62 of the RP Act, contended that this Section enables a person to cast a vote and it has no scope for negative voting. Section 62(1) of the RP 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."

48. Mr. Malhotra, learned ASG has also pointed out that elections are conducted to fill a seat by electing a person by a positive voting in his favour and there is no concept of negative voting under the RP Act. According to him, the Act does not envisage that a voter has any right to cast a negative vote if he does not like any of the candidates. Referring to Section 2(d) of the RP Act, he asserted that election is only a means of choice or election between various candidates to fill a seat. Finally, he concluded that negative voting (NOTA) has no legal consequence and there shall be no motivation for the voters to travel to the polling booth and reject all the candidates, which would have the same effect of not going to the polling station at all.

49. However, correspondingly, we should also appreciate that the election is a mechanism, which ultimately represents the will of the people. The essence of the electoral system should be to ensure freedom of voters to exercise their free choice. Article 19 guarantees all individuals the right to speak, criticize, and disagree on a particular issue. It stands on the spirit of tolerance and allows people to have diverse views, ideas and ideologies. Not allowing a person to cast vote negatively defeats the very freedom of expression and the right ensured in Article 21 i.e., the right to liberty.

50. Eventually, voters' participation explains the strength of the democracy. Lesser voter participation is the rejection of commitment to democracy slowly but definitely whereas larger participation is better for the democracy. But, there is no yardstick to determine what the correct and right voter participation is. If introducing a NOTA button can increase the participation of democracy then, in our cogent view, nothing should stop the same. The voters' participation in the election is indeed the participation in the democracy itself. Non-participation causes frustration and disinterest, which is not a healthy sign of a growing democracy like India.

Conclusion:

51. Democracy being the basic feature of our constitutional set up, there can be no two opinions that free and fair elections would alone guarantee the growth of a healthy democracy in the country. The 'Fair' denotes equal opportunity to all people. Universal adult suffrage conferred on the citizens of India by the Constitution has made it possible for these millions of individual voters to go to the polls and thus participate in the governance of our country. For democracy to survive, it is essential that the best available men should be chosen as people's representatives for proper governance of the country. This can be best achieved through men of high moral and ethical values, who win the elections on a positive vote. Thus in a vibrant democracy, the voter must be given an opportunity to choose none of the above (NOTA) button, which will indeed compel the political parties to nominate a sound candidate. This situation palpably tells us the dire need of negative voting.

52. No doubt, the right to vote is a statutory right but it is equally vital to recollect that this statutory right is the essence of democracy. Without this, democracy will fail to thrive. Therefore, even if the right to vote is statutory, the significance attached with the right is massive. Thus, it is necessary to keep in mind these facets while deciding the issue at hand.

53. Democracy is all about choice. This choice can be better expressed by giving the voters an opportunity to verbalize themselves unreservedly and by imposing least restrictions on their ability to make such a choice. By providing NOTA button in the EVMs, it will accelerate the effective political participation in the present state of democratic system and the voters in fact will be empowered. We are of the considered view that in bringing out this right to cast negative vote at a time when electioneering is in full swing, it will foster the purity of the electoral process and also fulfill

one of its objective, namely, wide participation of people.

54. Free and fair election is a basic structure of the Constitution and necessarily includes within its ambit the right of an elector to cast his vote without fear of reprisal, duress or coercion. Protection of elector's identity and affording secrecy is therefore integral to free and fair elections and an arbitrary distinction between the voter who casts his vote and the voter who does not cast his vote is violative of Article 14. Thus, secrecy is required to be maintained for both categories of persons.

55. Giving right to a voter not to vote for any candidate while protecting his right of secrecy is extremely important in a democracy. Such an option gives the voter the right to express his disapproval with the kind of candidates that are being put up by the political parties. When the political parties will realize that a large number of people are expressing their disapproval with the candidates being put up by them, gradually there will be a systemic change and the political parties will be forced to accept the will of the people and field candidates who are known for their integrity.

56. The direction can also be supported by the fact that in the existing system a dissatisfied voter ordinarily does not turn up for voting which in turn provides a chance to unscrupulous elements to impersonate the dissatisfied voter and cast a vote, be it a negative one. Furthermore, a provision of negative voting would be in the interest of promoting democracy as it would send clear signals to political parties and their candidates as to what the electorate think about them.

57. As mentioned above, the voting machines in the Parliament have three buttons, namely, AYES, NOES, and ABSTAIN. Therefore, it can be seen that an option has been given to the members to press the ABSTAIN button. Similarly, the NOTA button being sought for by the petitioners is exactly similar to the ABSTAIN button since by pressing the NOTA button the voter is in effect saying that he is abstaining from voting since he does not find any of the candidates to be worthy of his vote."

9. If interim order is not passed, it may not only create complication of penal action at all ensuing elections, but validity of all such elections

may be questionable and vulnerable on the ground of freedom and fairness to be made available to the voters/citizens as guaranteed under the Constitution of India.

10. In view of above, following order is passed.

Rule, returnable on 24th September, 2015.

By way of interim order, there shall be interim relief in terms of paragraph 9(B).

Notice to the Advocate General.

Direct service is permitted. Additionally, the process shall also go through regular mode at the cost of the petitioner.

(JAYANT PATEL, ACJ.)

(N.V.ANJARIA, J.)

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