

16.02.2022
Sl. No.1
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**In The High Court at Calcutta
Circuit Bench at Jalpaiguri
Constitutional Writ Jurisdiction
Appellate Side**

W.P.A. No. 392 of 2022

**Malay Banerjee
Vs.
West Bengal State Election Commission & Ors.**

Mr. Probal Kumar Mukherjee,
Mr. Kamalesh Jha,
Mr. Debasish Mukhopadhyay,
Ms. Jeenia Rudra,
Mr. Dilip Roy,
Ms. Madhushri Dutta,
Mr. Partha Choudhury

...for the Petitioner.

Ms. Sonal Sinha

...for the West Bengal State
Election Commission.

Mr. Anirban Ray,
Mr. T.M. Siddiqui,
Mr. Raja Saha,
Mr. Nilotpal Chatterjee

...for the State-Respondents.

The petitioner alleges that despite an order of this Court dated February 9, 2022 passed in WPA No.353 of 2022 directing the Municipal Returning Officer, Jalpaiguri Municipality to permit the petitioner to file his nomination, the Municipal Returning Officer, Jalpaiguri Municipality did not intentionally accept the nomination papers of the

petitioner. Consequently, contempt proceedings have been initiated.

The writ petition has been filed for a direction upon the West Bengal State Election Commission to accept the nomination papers by extending the last date for filing nominations which ended on February 9, 2022.

Mr. Mukherjee, learned Senior Advocate appearing on behalf of the petitioner, submits that the provisions of Sections 75 and 76 of the West Bengal Municipal Election Act, 1994 do not provide the remedy, which the petitioner seeks in this writ petition. He contends that non-acceptance of nomination papers by the Commission did not qualify as an election dispute. He further submits such action of the executive was subject to judicial review by this Court.

The State-respondents as also the West Bengal State Election Commission submit that the schedule of the contesting candidates have also been published post scrutiny and any order passed herein would amount to putting a clog on the election process. Such notification of the contesting candidates is produced before the Court by the State Election Commission and the same is taken on record.

Non-acceptance of nomination papers amounts to denial of the right of the petitioner to participate in the election and an implied rejection. Prima facie, in my opinion,

this is also a dispute covered by the special law and cannot be called in question by way of a writ petition. The allegations also raise disputed questions of facts which have to be decided on evidence. The petitioners allege refusal of the nomination papers although they were within time and the authorities have denied the same.

In my prima facie view, if the grounds on which an election could be called in question could be raised at an earlier stage and errors, if any, were rectified, there would be no meaning in enacting a provision like Article 243-ZG(b).

The provision is quoted below:-

“(b) no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State.”

Although, the election is scheduled to be held on February 27, 2022, this Court is of the opinion that in view of the decisions and the ratios laid down by the Hon’ble Apex Court in the matters of (1) *N.P. Ponnuswami v. Returning Officer, Namakkal Constituency*, 1952 SCR 218 : AIR 1952 SC 64, (2) *Manda Jaganath v. K.S. Rathnam*, (2004) 7 SCC 492 and (3) *Mohinder Singh Gill v. Chief Election Commr.*,

(1978) 1 SCC 405, the writ Court cannot interfere and pass any order when the election process is on.

In the matter of *N.P. Ponnuswami v. Returning Officer, Namakkal Constituency*, AIR 1952 SC 64 the Hon'ble Apex Court held as follows:-

"7. **** As we have seen, the most important question for determination is the meaning to be given to the word "election" in Article 329(b). That word has by long usage in connection with the process of selection of proper representatives in democratic institutions, acquired both a wide and a narrow meaning. In the narrow sense, it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling or a particular candidate being returned unopposed when there is no poll. In the wide sense, the word is used to connote the entire process culminating in a candidate being declared elected. In *Srinivasalu v. Kuppuswami* [(1928) AIR Mad 253 at 255], the learned Judges of the Madras High Court after examining the question, expressed the opinion that the term "election" may be taken to embrace the whole procedure whereby an "elected member" is returned, whether or not it be found necessary to take a poll. With this view, my brother, Mahajan, J. expressed his agreement in *Sat Narain v. Hanuman Prasad* [(1945) AIR Lah. 85]; and I also find myself in agreement with it. It seems to me that the word "election" has been used in Part XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature. The use of the expression "conduct of elections" in Article 324 specifically points to the wide meaning, and that meaning can also be read consistently into the other provisions which occur in Part XV including Article 329(b). That the word "election" bears this wide meaning whenever we talk of elections in a democratic country, is borne out by the fact that in most of the books on the subject and in several cases dealing with the matter, one of the questions mooted is, when the election begins. The subject is dealt with quite concisely in Halsbury Laws of England in the following passage [See page 237

of Halsbury's Laws of England, 2nd Edn. Vol. 12] under the heading Commencement of the Election”:

‘Although the first formal step in every election is the issue of the writ, the election is considered for some purposes to begin at an earlier date. It is a question of fact in each case when an election begins in such a way as to make the parties concerned responsible for breaches of election law, the test being whether the contest is ‘reasonably imminent’. Neither the issue of the writ nor the publication of the notice of election can be looked to as fixing the date when an election begins from this point of view. Nor, again, does the nomination day afford any criterion. The election will usually begin at least earlier than the issue of the writ. The question when the election begins must be carefully distinguished from that as to when ‘the conduct and management of’ an election may be said to begin. Again, the question as to when a particular person commences to be a candidate is a question to be considered in each case.’

The discussion in this passage makes it clear that the word “election” can be and has been appropriately used with reference to the entire process which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process.”

In the matter of *Election Commission of India v. Shivaji*, (1988) 1 SCC 277, the Apex Court was considering a dispute regarding election to a legislative council. The governing statute was the Representation of the People Act, 1951. While reiterating the meaning given to the word ‘election’ in Ponnuswami (supra), on assumption of jurisdiction by the High Court in exercise of writ powers, it proceeded to observe as follows:-

“6. The disputes regarding the elections have to be settled in accordance with the provisions contained

in Part VI of the Act. Section 80 of the Act states that no election shall be called in question except by an election petition presented in accordance with the provisions of Part VI of the Act. The expression “election” is defined by Section 2(d) of the Act as an election to fill a seat or seats in either House of Parliament or in the House or either House of the legislature of a State other than the State of Jammu and Kashmir. Thus a dispute regarding election to the Legislative Council of a State can be raised only under the provisions contained in Part VI of the Act. Section 80-A of the Act provides that the court having jurisdiction to try an election petition shall be the High Court. An election petition has to be presented in accordance with Section 81 of the Act. In view of the non obstante clause contained in Article 329 of the Constitution the power of the High Court to entertain a petition questioning an election on whatever grounds under Article 226 of the Constitution is taken away.”

In the matter of *Mohinder Singh Gill v. Chief Election*

Commr., (1978) 1 SCC 405, the Hon’ble Apex Court held as

follows:-

“126. The above being the legal position, Article 329(b) rules out the maintainability of the writ application. Article 329(b) provides that “notwithstanding anything in this Constitution ... no election to either House of Parliament . . . 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”. It is undisputed that an election can be challenged only under the provisions of the Act. Indeed Section 80 of the Act provides that “no election shall be called in question except by an Election petition presented in accordance with the provisions of” Part VI of the Act. We find that all the substantial reliefs which the appellants seek in the writ application, including the declaration of the election to be void and the declaration of Appellant 1 to be duly elected, can be claimed in the election petition. It will be within the power of the High Court, as the

election Court, to give all appropriate reliefs to do complete justice between the parties. In doing so it will be open to the High Court to pass any ancillary or consequential order to enable it to grant the necessary relief provided under the Act. The writ application is therefore barred under Article 329(b) of the Constitution and the High Court rightly dismissed it on that ground.

127. In view of our conclusion that the High Court had no jurisdiction to entertain the writ application under Article 226 of the Constitution, it will not be correct for us, in an appeal against the order of the High Court in that proceeding, to enter into any other controversy, on the merits, either on law or on facts, and to pronounce finally on the same. The pre-eminent position conferred by the Constitution on this Court under Article 141 of the Constitution does not envisage that this Court should lay down the law, in an appeal like this, on any matter which is required to be decided by the Election Court on a full trial of the election petition, without the benefit of the opinion of the Punjab and Haryana High Court which has the exclusive jurisdiction under Section 80-A of the Act to try the election petition. Moreover, a statutory right to appeal to this Court has been provided under Section 116-A, on any question, whether of law or fact, from every order made by the High Court in the dispute.

128. So, in view of the scheme of Part VI of the Act, the Delhi High Court could not have embarked upon an enquiry on any part of the merits of the dispute. Thus it could not have examined the question whether the impugned order was made by the Election Commission in breach of a rule of natural justice. That is a matter relating to the merits of the controversy and it is appropriately for the Election Court to try and decide it after recording any evidence that may be led at the trial. It may be that if we pronounce on the question of the applicability of the rule of natural justice, the High Court will be relieved of its duty to that extent. But it has to be remembered that even for the purpose of deciding that question, the parties may choose to produce evidence, oral or documentary, in the trial court. We therefore refrain from expressing any opinion in this appeal on the question of the violation of any rule of natural

justice by the Election Commission in passing the impugned order.

129. At the same time we would like to make it quite clear that any observation, on a question of law or fact, made in the impugned judgment of the Delhi High Court, bearing on the trial of the election petition pending in the Punjab and Haryana High Court, will stand vacated and will not come in the way of that trial. That High Court will thus be free to decide the petition according to the law. We would also like to make it quite clear, with all respect to the learned Judges who have delivered a separate judgment, that we may not be taken to have agreed with the views expressed therein about the applicability of audi alteram partem or on the applicability of the guidelines in Sections 58 and 64-A to the facts and circumstances of this case, or the desirability of ordering a re-poll in the whole constituency, or the ordering of a re-poll of postal ballots etc. Election is a long elaborate and complicated process and, as far as we can see, the rule of audi alteram partem, which is in itself a fluid rule, cannot be placed in a strait-jacket for purposes of the instant case. It has also to be remembered that the impugned order of the Election Commission could not be said to be a final pronouncement on the rights of the parties as it was in the nature of an order covering an unforeseen eventuality which had arisen at one stage of the election. The aggrieved party had all along a statutory right to call the entire election in question, including the Commission's order, by an election petition under Section 80 of the Act, for the trial of which an elaborate procedure has been laid down in the Act. Then, as has been stated, there is also a right of appeal under Section 116-A. These and perhaps other relevant points may enter the scales in considering at the trial of the election petition whether there may not be sufficient justification to negative the existence of any implied duty on the part of the Commission, at that stage, to hear any party before taking its decision to order or not to order a re-poll. We do not therefore think it necessary or desirable to foreclose a controversy like this by any general observations and will leave any issue that may arise from it for trial and adjudication by the Election Court."

In the matter of *Manda Jaganath v. K.S. Rathnam*,

(2004) 7 SCC 492, the Hon'ble Apex Court held as follows:-

"14. The word "election" has been judicially defined by various authorities of this Court to mean any and every act taken by the competent authority after the publication of the election notification.

15. In Ponnuswami [AIR 1952 SC 64] this Court held: (AIR p. 68, para 9)

The law of elections in India does not contemplate that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution (the ordinary jurisdiction of the courts having been expressly excluded), and another after they have been completed by means of an election petition.

16. The above view of this Court in Ponnuswami case [AIR 1952 SC 64] has been quoted with approval by the subsequent judgment in M.S. Gill [(1978) 1 SCC 405] wherein this Court after quoting the passages from the said judgment in Ponnuswami case [AIR 1952 SC 64] held that there is a non obstante clause in Article 329 and, therefore, Article 226 stands pushed out where the dispute takes the form of calling in question an election, except in special situations pointed out but left unexplored in Ponnuswami case [AIR 1952 SC 64] . It is while considering the above unexplored situations in Ponnuswami [AIR 1952 SC 64] that in M.S. Gill case [(1978) 1 SCC 405] this Court held thus: (SCC p. 429, para 34)

'34. This dilemma does not arise in the wider view we take of Section 100(1)(d)(iv) of the Act. Shri Rao's attack on the order impugned is in substance based on alleged non-compliance with a provision of the Constitution viz. Article 324 but is neatly covered by the widely-worded, residual catch-all clause of Section 100. Knowing the supreme significance of speedy elections in our system the framers of the Constitution have, by implication postponed all election disputes to election petitions and tribunals. In harmony with this scheme Section 100 of the Act has been designedly drafted to embrace all conceivable infirmities which may be

urged. To make the project foolproof Section 100(1)(d)(iv) has been added to absolve everything left over. The Court has in earlier rulings pointed out that Section 100 is exhaustive of all grievances regarding an election.'

17. In the very same paragraph this Court, however, demarcated an area which is available for interference by the High Court and the same is explained as follows: (SCC pp. 429-30, para 34)

'But what is banned is not anything whatsoever done or directed by the Commissioner but everything he does or directs in furtherance of the election, not contrarywise. For example, after the President notifies the nation on the holding of elections under Section 15 and the Commissioner publishes the calendar for the polls under Section 30, if the latter orders Returning Officers to accept only one nomination or only those which come from one party as distinguished from other parties or independents, is that order immune from immediate attack. We think not. Because the Commissioner is preventing an election, not promoting it and the Court's review of that order will facilitate the flow, not stop the stream. Election, wide or narrow be its connotation, means choice from a possible plurality, monolithic politics not being our genius or reality, and if that concept is crippled by the Commissioner's act, he holds no election at all.'

(emphasis in original)

18. Of course, what is stated by this Court hereinabove is not exhaustive of a Returning Officer's possible erroneous actions which are amenable to correction in the writ jurisdiction of the courts. But the fact remains that such errors should have the effect of interfering in the free flow of the scheduled election or hinder the progress of the election which is the paramount consideration. If by an erroneous order conduct of the election is not hindered then the courts under Article 226 of the Constitution should not interfere with the orders of the Returning Officers, remedy for which lies in an election petition only.

19. In *Election Commission of India v. Shivaji* [(1988) 1 SCC 277] this Court while considering a challenge to the election notification which included certain Zila Parishads within a notified constituency, held following the judgment in *Ponnuswami* [AIR 1952 SC

64] that even if there were any ground relating to the non-compliance with the provisions of the Act and the Constitution on which the validity of any election process could be questioned, the person interested in questioning the election has to wait till the election is over and institute a petition in accordance with Section 81 of the Act calling in question the election of the successful candidate.

20. Learned counsel for the writ petitioner before the High Court had relied upon a judgment of this Court in *S.T. Muthusami v. K. Natarajan* [(1988) 1 SCC 572] wherein this Court had held following the judgment in *Ponnuswami* case [AIR 1952 SC 64] that entertaining of a writ petition by the High Court under Article 226 of the Constitution cannot be supported and consequently it set aside the judgment of the Division Bench of the High Court and dismissed the writ petition filed in the High Court. In that case the question involved was a dispute between two candidates claiming the official symbol of a political party. This judgment came to be distinguished by the High Court on the basis of facts though the law laid down there was squarely applicable against the maintainability of the writ petition.”

The law provides for a Special Tribunal which shall decide all issues. In any event, in view of the decisions referred to hereinabove, as of now, the election process is on and the list of the contesting candidates has been published for Ward No.1 under Jalpaiguri Municipality, the Court cannot pass any interim order at this stage. Moreover, disputed questions of facts have been raised, which have to be decided on evidence.

The other prayer of Mr. Mukherjee directing the Commission to exercise powers under Section 84 of the West

Bengal Municipal Election Act, 1994 cannot be acceded to at this stage as the learned Advocate for the Commission submits on instructions that such a direction would amount to the writ court interfering with the election schedule and protraction thereof. The prayers in this writ petition in my, prima facie, view have not been made to subserve the process of election. This Court must practice a “hands-off” policy.

In the matter of **State of Goa v. Fouziya Imtiaz Shaikh, (2021) 8 SCC 401**, the Hon’ble Apex Court held as follows:-

“68.1. Under Article 243-ZG(b), no election to any municipality can be called in question except by an election petition presented to a Tribunal as is provided by or under any law made by the legislature of a State. This would mean that from the date of notification of the election till the date of the declaration of result a judicial hands-off is mandated by the non obstante clause contained in Article 243-ZG debarring the writ court under Articles 226 and 227 from interfering once the election process has begun until it is over. The constitutional bar operates only during this period. It is therefore a matter of discretion exercisable by a writ court as to whether an interference is called for when the electoral process is “imminent” i.e the notification for elections is yet to be announced.

68.5. Judicial review of a State Election Commission's order is available on grounds of review of administrative orders. Here again, the writ court must adopt a hands-off policy while the election process is on and interfere either before the process commences or after such process is completed unless

interfering with such order subserves and facilitates the progress of the election.

68.7. The bar contained in Article 243-ZG(a) mandates that there be a judicial hands-off of the writ court or any court in questioning the validity of any law relating to delimitation of constituency or allotment of seats to such constituency made or purporting to be made under Article 243-ZA. This is by virtue of the non obstante clause contained in Article 243-ZG. The statutory provisions dealing with delimitation and allotment of seats cannot therefore be questioned in any court. However, orders made under such statutory provisions can be questioned in courts provided the statute concerned does not give such orders the status of a statutory provision.”

Let affidavit-in-opposition be filed within a period of four weeks; reply thereto, if any, be filed within a period of two weeks.

Liberty is given to the parties to mention the matter before the appropriate Bench after expiry of the aforementioned period.

The point of maintainability of this writ petition is kept open.

The parties are to act on the basis of the server copy of this order or the learned Advocates’ communication.

(Shampa Sarkar, J.)