

(1994) 01 DEL CK 0055

In the Delhi High Court

Case No : Civil Writ Appeal No. 132 of 1994

A.K. Walia

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 14-01-1994

Acts Referred:

Conduct of Elections Rules, 1961 — Rule 76
Constitution of India, 1950 — Article 80

Citation : (1994) 1 AD 313 : (1994) 53 DLT 279 : (1994) 28 DRJ 269 : (1994) 2 ILR Delhi 237

Hon'ble Judges : V.K. Jain, J; P.K. Bahri, J

Bench : Division Bench

Advocate : R.K. Anand, Arun Birbal, L. Sahni, Manish Malhotra, Ashim Vachar, G. Ramaswamy, Sudhir Walia, Murlidhar, S.K. Mahajan, Arun Jaitley, Rajiv Nayar and Atul Batra, for the Appellant;

Final Decision : Dismissed

Judgement

Vijender Jain, J.

(1) The short question arising in writ petition is whether there should be one or different elections for filling up three seats of Rajya Sabha from the Electoral College comprising of members of the Legislative Assembly of Delhi. Only three seats of Rajya Sabha have been allocated to Delhi.

(2) The petitioner is a member of the Legislative Assembly of Delhi elected on Congress(I) ticket. The Legislative Assembly of Delhi has now 49 member belonging to Bhartiya Janta Party, 14 to Congress(I), four to Janta Dal and three independents. Keeping in view the present strength of different parties in the Assembly if one election is held in respect of three seats the possibility of result being different from the result which may be available if three different elections are held for the three seats cannot be ruled out.

(3) Article 80(2) of the Constitution of India lays down that the allocation of

seats in the Council of States to be filled by representatives of the States and all the Union Territories shall be in accordance with the provisions in that behalf contained in the fourth schedule. Earlier there used to be one seat allocated to Delhi but on account of Seventh Amendment to the Constitution in 1956, three seats have been allocated to Delhi. Clause 4 of Article 80 makes it clear that the election to the Council of States shall be in accordance with the system of proportional representation by means of the single transferable vote. Article 83 of the Constitution contemplates a permanent Council of States (Rajya Sabha) as it is not to be dissolved and as nearly as possible one-third of its members are to retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law. Section 27A(3) of the Representation of the People Act makes the Legislative Assembly of Delhi as the Electoral College for electing the members to the Council of States. Section 27H lays down that the seat or seats in the Council of States allotted to any Union Territory in the fourth schedule of the Constitution shall be filled by a person or persons elected by the members of the Electoral College for that Territory in accordance with the system of proportional representation by means of the single transferable vote.

(4) Section 154 of the Representation of the People Act lays down that subject to provisions of sub-section (2) and (2A), the term of office of a member of the Council of States, other than a member chosen to fill a casual vacancy, shall be six years. Sub-section (2) lays down that upon the first constitution of the Council of States the President shall, after consultation with the Election Commission, make by order such provision as he thinks fit for curtailing the term of office of some of the members then chosen in order that, as nearly as may be, one-third of the members holding seats of each class shall retire in every second year thereafter. The President by virtue of the aforesaid provision had issued such an order on September 26, 1952, which required that the members of Council of States shall be grouped, shown in the first column of the schedule to the said order and total number of members of each group shall be divided into three categories as shown in the second, third and fourth column of the said schedule. The Election Commissioner was authorised to determine the category of the members and the members falling in such different categories were to retire in April 1954, 1956 and 1958 i.e. after every two years one-third members of the Council of States were to retire in accordance with the mandate of the Constitution though all these members were elected initially for a period of six years in 1952. The schedule makes it clear that equal seats were divided into three equal portions as far as possible from each State whereas Union Territories which had perhaps four seats at that time in all, the categorisation was made one seat under one category of which member was to retire after two years and one seat in the other category of which member was to retire after another two years and two seats in the last category where members were to retire after six years.

(5) There was amendment of the Constitution in 1956 and sub-section 2A was

added to Section 154 which, inter alia, laid down that in order that as nearly as may be one-third of the members may retire on the second day of April 1958 and on the expiration of every second year thereafter the President shall as soon as may be after the commencement of the Constitution (Seventh Amendment) Act, 1956, after consultation with the Election Commission, make by order such provisions as he thinks fit in regard to the term of the office of the member elected under sub-section (2) of Section 147. Sub-section (2) of Section 147 lays down as nearly as may be after the date of commencement of the Constitution (Seventh Amendment) Act, 1956, by-election shall be held to fill the vacancies existing on that day for the seats allotted to the States of Assam, Orissa and Uttar Pradesh and Union Territories of Delhi, Himachal Pradesh and Manipur. In consonance with the provisions of sub-section (2A) of Section 154 of the Representation of the People Act, the President had issued the necessary order on November 1, 1956, making it clear that the term of one of the two members elected to fill the seats of Council of States allotted to Delhi shall expire on the second day of April 1958 and the Election Commissioner was again authorised to place the members to be elected to the seats in Delhi in three categories.

(6) The learned counsel for the petitioner has vehemently argued that as three seats have to be filled in the Council of States by the Electoral College comprising of the members of the Assembly of Delhi, there is no occasion for the respondents to hold any three separate elections and as the three seats are available one election should be held in consonance with Rule 76 of the Conduct of Election Rules 1961. He has argued that if election was to be held only for one seat then the conduct of the election has to be in consonance with Rule 75. These two rules appear in Part VII which pertains to counting of votes at elections by Assembly members or in Council constituencies. These rules do not contemplate as to whether one election should be held in respect of more than one seat or for each seat separate elections should be held.

(7) The learned counsel for the respondents has, on the other hand, contended that three well-known categorisations have been made from the inception of the Constitution after holding first election to the Rajya Sabha and when the Constitution was amended for increasing the number of seats of different States and Union Territories, again on the same lines categorisation was made in accordance with the provisions of the Representation of the People Act read with the Rules on the subject. He has argued that seats which have fallen in one category are filled in by one election and if seats fall in two categories then two elections are held separately for each category and similarly when the seats fall in three different categories then separate elections for each category are being held and this practice has been followed by the respondents from the very beginning and in the present case the three seats which have now become available fall in three different categories and thus, separate elections have to be held for these three seats.

(8) In case the contention of the petitioner is to be upheld it would leave much

scope for abuse of the process of election because in that case a seat falling vacant in a particular year may be kept in abeyance and when more seats fall vacant subsequently at different times then the respondents in its discretion can hold one election for all these seats combined bringing about different results whereas if he had held different elections for three different seats soon after they fall vacant, obviously the election results could be quite different.

(9) It is true that the object of having the system of proportional representation by the single transferable vote is to give representation to minority groups also but that is no ground to hold that seats falling in different categories should be clubbed together for holding one election for the same.

(10) Counsel for the petitioner has made reference to *Era Sezhiyan Vs. T.R. Balu and others*, . We have perused this judgment and find that nothing said in this judgment supports the proposition being canvassed before us by the learned counsel for the petitioner that respondent is legally bound to hold elections of these three seats simultaneously. This judgment only quotes various rules and has only held that the election has to be held in accordance with the rules. There is no dispute about this proposition of law.

(11) A similar question came up for consideration before a Single Bench of this Court in *Surendra Pal Ratawal Vs Shamirn Ahmad*, Air 1985 Delhi 22 and in this judgment it was clearly held that if seats fall in different categories then separate notifications can be issued for holding separate elections for the separate seats. A SLP was filed against the judgment but the same was dismissed by the Supreme Court as infructuous leaving the question open for decision in any future case.

(12) The learned counsel for the petitioner has urged that the Single Judge while deciding the said case had not noticed Rule 75 or Rule 76 of the Conduct of Election Rules 1961, as mentioned above, and thus, this judgment should not be held to lay down any correct proposition of law. We do not agree. The reasoning of this judgment appears to be sound that if the seats fall in the different categories then election for each category has to be separate. It is fortuitous circumstance that the elections could not be held as soon as the seats fall vacant and thus, more seats became available when the situation came about for holding the elections.

(13) In order to show that the practice has been always to issue separate notifications for holding elections for separate categories of seats, the learned counsel for the respondents has given the background in a written note which we have perused and indeed, it is not disputed before us by the learned counsel for the petitioner even that such practice has not been followed by the respondents from the very beginning but he has urged that this practice is not in consonance with law and as soon as election to more than one seat are to be held then there should be one election in accordance with Rule 76. He has tried to take support from some observations made by the Bombay High Court in *Shridhar Mahadeo*

Joshi Vs Rajbhoj Pandurang Nathoji, (1957) 13 Elr 430. The Bombay High Court was not considering the question which has arisen for decision before this court. The question which arose before the Bombay High Court was with regard to filling of casual vacancies occurring on account of death of candidate or seat falling vacant for some other reason which are termed as "casual vacancies". The Bombay High Court had held that for filling vacancies for the full term, general elections are to be held and for filling casual vacancies by-elections are required to be held. The Bombay High Court had not at all considered the various orders issued by the President of India under the provisions of the statute and the Constitution which required categorisation of the members of the Council of States in three different parts in order to see that one-third members retire after every two years.

(14) The learned counsel for the petitioner has argued that the members now to be elected for the three vacancies would not be retiring after every two years and thus, the categorisation of the members in three categories loses all importance. But this argument loses sight of Article 83 of the Constitution. He has pointed out that two seats have" fallen vacant on November 20, 1989 and the third seat had fallen vacant on April 2, 1990 and so there should be now only one election for filling up those three seats.

(15) We are of the view that once the seats have been divided into three categories from the very inception, the respondents were right in holding separate elections for each category. Now these three seats fall in three separate categories, so elections to these three seats have to be also separate. The learned counsel for the respondents has brought to our notice the order of the Chief Election Commissioner which appears in 1974 Elr 42 and there the Bhartiya Janta Party had set up the same contention which has been now raised by the petitioner who is elected on Congress(I) ticket and the Indian National Congress had taken up the stand before the Election Commission on the lines which now is being urged by the learned counsel for the respondents and also by Mr. Jaitley, who is counsel for the Intervener i.e. State Bhartiya Janta Party. The Election Commission has even at that time held that separate elections for the seats falling in three separate categories are to be held and are being held all along.

(16) The respondents are not having any discretion in the matter if the elections are held separately for three categories of the seats consistently but if the discretion is to be left to the respondents to hold elections for seats falling vacant at different times simultaneously after keeping the elections in abeyance for some periods then such discretion is liable to be abused for favoring one party or the other. Even Section 12 of the Representation of the People Act contemplates the issuance of one or more than one notifications for holding separate elections for different seats.

(17) Keeping in view the above discussion, we hold that the respondents are right in holding separate elections for the seats falling in separate categories. The petition is dismissed with no order as to costs.