
(1993) 04 DEL CK 0013
In the Delhi High Court
Case No : C.W.P. No. 1976 of 1991

Amar Pal Singh

APPELLANT

Vs

Election Commission of India

RESPONDENT

Date of Decision : 02-04-1993

Acts Referred:

Citation : AIR 1993 Delhi 316 : (1993) 50 DLT 643 : (1993) 26 DRJ 393

Hon'ble Judges : C.L. Choudhary, J

Bench : Single Bench

Advocate : Mr. R.P. Bansal, Mr. S.P. Pandey and Mr. Sanjay, for the Appellant;
Mr. G. Ramasway, Attorney General, Mr. Ashish Wad, Mr. S. Muralidharan and Mr.
W.C. Chopra, for the Respondent

Judgement

1. The petitioner filed this petition, seeking a writ for quashing the order dated 21-5-1991, passed by the Chief Election Commissioner, countermanding the election in 80 Meerut Parliamentary Constituency and also for quashing the order dated 10-6-1991, passed by the respondent refusing to review its earlier order dated 21-5-1991. A direction was also sought, directing the respondent and authorities concerned with the elections, to hold an adjourned poll or a re-poll in the affected polling stations of 80 Meerut Parliamentary Constituency as per the procedure, prescribed under the Representation of the People Act, 1951.

2. This writ petition, along with other numbers of writ petitions, involving same question of law were heard by a Division Bench of this Court, composing of Mahinder Narain and P. N.Nag.JJ. During the hearing of the writ petition, the learned Attorney General raised a preliminary objection on behalf of the Chief Election Commissioner, the respondent that the writ petition was not maintainable. The preliminary objection is based upon Article 329 of the Constitution of India, which provides that an election cannot be called in question except by an election petition.

3. Mahinder Narain, J., by a separate independent judgment dated 27th March, 1992 held that the writ petition was maintainable. It was also held that Secs.

58A and 58A of the Representation of the People Act were ultra virus the Constitution. The writ petition was allowed and the orders of the Chief Election Commissioner dated 21-5-1991 and dated 10-6-1991 were quashed, and the following directions were given:

(i) The Election Commission shall, within 15 days of the order, decide whether repoll is to be ordered in respect of the polling booth, where poll is recommended by the Returning Officers, and will give an opportunity to be heard to the parties affected by the repoll order, if desired, by them.

(ii) The Election Commission shall order the holding of the repoll within 21 days of the date of the order, directing re polling in the constituencies, in which repoll is to be held.

(iii) The votes called and repelled be counted, and the results declared in accordance with law.

4. P. N. Jog, J. by a separate independent judgment of the same date held that the writ petition was not maintainable and dismissed the writ petition. In the judgment, it was observed by P. N. Jog, J.:

"..... In view of this authoritative pronouncement of the Supreme Court, it would not be appropriate and proper for this Court to embark upon the enquiry on the merits of the dispute. At this stage, the proper course for this Court is to decide first the jurisdictional issue whether this Court has jurisdiction to entertain and try the petition under Article 226 of the Constitution in view of the blanket ban in view of Article 32(b) of the Constitution of India

Next submission was that the impugned order had been passed in violation of the principles of natural justice. Such an order, Therefore, is null and void. This order is also bad in the eyes of law as that the same has been passed without the report of the returning officer, which is a condition precedent for passing of such an order and also without taking into consideration the material circumstances into account. These arguments are based on merits of the case. The petition is not maintainable. It is neither necessary nor permissible to decide these questions in these writ petitions. These questions can be raised in the election petition in case it is filed and the order of the Election Commission can be challenged u/s 100 of the Act, i.e., non-compliance with the provisions of the Act and the Rules."

5-6. It is obvious that Nag, J. did not enter into merits of the case. The judgments were pronounced on 27th March, 1992. On that date, the following order was passed by the Bench:

"In view of the difference of opinion between us, we direct that the papers be laid before the Hon'ble the Chief Justice and who may designate a third Judge to hear the matter."

7. Since there was a difference of opinion between the two Judges, Hon'ble the

Chief Justice has referred the matter to me under clause 26 of the Letters Patent as applicable to Delhi High Court for decision.

8. An application being C.M. 4692/1992 under Rule 10 of Chapter 4F(b) of Part II of Delhi High Court Rules read with clause 26 of the Letters Patent as applicable to Delhi High Court, has been filed on behalf of the Chief Election Commissioner for direction/clarification that the only question that has been referred to the third Judge is confined to the maintainability of the writ petition. The application has been filed on the basis that Mahinder Narain, J. rejected the preliminary objection of the Attorney General and proceeded to decide the case on merits as well, whereas P. N. Nag, J. upheld the contention of the Attorney General and held that the writ petition was not maintainable. Consequently there was no occasion for Nag, J. to decide the case on merits. It is stated that in terms of Rule 10 of Chapter 4F read with Clause 26 of the Letters Patent as applicable to Delhi High Court, it is only the point of difference that shall be referred to a third Judge for his decision. The difference of opinion between the learned Judges Constituting the Division Bench which heard the writ petition is on the question of maintainability of the writ petition and only the question of the maintainability of the writ petition ought to be referred to the third Judge for his decision. The only question that the third Judge is required to decide is whether the writ petition is maintainable or no(. It will not be proper to refer the entire matter to a third Judge. The case was not argued on merits on behalf of Chief Election Commissioner before P. N. Nag, J. In these premises clarification is sought that the only question that has been referred to the third Judge of this Court is confined to the maintainability of the writ petition.

9. Mr. Ramaswamy, appearing for the Chief Election Commissioner contended that in terms of clause 26 of the Letters Patent if the Judges are equally divided they are required to state the point upon which they differ and then the case is to be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case, including those who first heard it. It was stressed that the Judges had not stated the point upon which they had differed and as such the reference was not in accordance with law. In support of his contention reliance was placed on a recent judgment of the Allahabad High Court in the case of Birendra Kumar Rai Vs. Union of India and others, ,, where in similar circumstances it was held that when a division of opinion occurs between the Judges and the decision is yet to be given, then that is the stage when the Judges may formulate points of difference and lay them before the Chief Justice for being referred to one or more of the other Judges so nominated. Then only those points will be decided by the Judge or Judges so nominated. On the points referred, the decision would be by majority, between the Judges who differed and the Judge or Judges to whom the matter was referred.

10. On the other hand the contention of Mr. Bansal is that the entire matter has been referred to a third Judge in terms of the reference by the Division Bench.

The Third Judge is required to give his opinion on the entire matter and not on the question of maintainability alone. The entire matter was argued on behalf of the petitioners before the Division Bench i.e. on merits as well as on the question of maintainability. Mahinder Narain, J. decided the entire matter, whereas P. N. Nag, J. decided the question of maintainability only and did not proceed further to decide the case on merits. It is also contended by Mr. Bansal that, assuming this Bench returns the finding that the writ petition is maintainable, even then the entire case cannot be finally decided. In view of this position it is expedient that this Bench should also decide the case on merits as well so that the matter may attain finality. It is further stressed by Mr. Bansal that the respondents may be directed to argue the case on merits as well so as to enable this Bench to render opinion on the merits of the case also. In support of his contention Mr. Bansal relied upon a judgment of the Punjab and Haryana High Court reported as Mahant Swaran Dass Vs. Shiromani Gurudwara Parbandhak Committee, Amritsar, . I have gone through this judgment very carefully. But it is not applicable to the facts of this case. In that case the question involved was whether an appeal preferred u/s 34 of the Sikh Gurdwaras Act, 1925 in the event of difference of opinion between the learned Judges hearing the same could be referred to a third Judge under clause 26 of the Letters Patent. The contention of the counsel for the appellant was that in view of the difference of opinion, the matter ought to be heard by a Full Bench of at least three Judges or more and could not be disposed of by a single Judge. After discussing clauses 26 and 37 of the Letters Patent and Section 98 of the CPC it was held that hearing of the appeal by a single Judge on the point of difference between the learned members of the Division Bench composing the same was perfectly in accordance with law.

11. I have heard the learned Counsel for the parties and have given my thoughtful consideration to the entire matter. In my opinion the order of reference dated 27-3-1993 does not conform to clause 26 of the Letters Patent. Rule 10 of Chapter 4-F of Delhi High Court Rules provides that in case of difference of opinion between the Judges composing the Division Court, the point of difference shall be decided in accordance with the procedure referred to in clause 26 of the Letters Patent. Clause 26 of the Letters Patent is reproduced as under for the sake of convenience :--

POWER OF SINGLE JUDGES AND

DIVISION COURTS

26. And we do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Lahore, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court, thereof, appointed or constituted for such purpose in pursuance of Section 108 of the Government of India Act, 1915; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there be a majority, but if the Judges be

equally divided, they shall state the point upon which they differ and the case shall then be heard upon the point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case, including those who first heard it.

The mandate of law is that in case the Division Court is composed of two Judges and the Judges are equally divided in opinion as to the decision to be given on any point, they should specifically state the point upon which they differ and the case should be heard on that point only by a third Judge and the point should be decided according to the opinion of the majority of Judges.

12. In this case the Judges were equally divided. They should have specifically stated the point upon which they had differed and the case could be heard on that point only by another Judge. It is obvious that hearing by another Judge is confined to the specific points stated and cannot cover the whole case again. But the order of reference in this case states that the papers may be laid before Hon^{ble} the Chief Justice and he may designate a third Judge to hear the matter. The learned Judges ought to have stated explicitly as to what was to be decided by a third Judge. The expression "matter" used in the reference has not been clarified as to the points to be decided by the third Judge; especially in the facts and circumstances of this case and in view of the stand taken by Mr. Bansal. In the absence of the clarification it is not possible to answer the reference.

13. In view of my above reasoning, this Bench must return the reference unanswered and without any finding. The papers may be laid before Hon^{ble} the Chief Justice for appropriate orders.

14. Order accordingly.