

(2011) 04 BOM CK 0120

In the Bombay High Court

Case No : Election Application (Lodging) No. 6 of 2011 in Election Petition No. 1 of 2010

Anil Dattatray Parah

APPELLANT

Vs

Election Commissioner and Others

RESPONDENT

Date of Decision : 13-04-2011

Acts Referred:

Constitution of India, 1950 — Article 164, 164(4), 190(3), 324
Representation of the People Act, 1951 — Section 101, 147, 149, 150, 151

Citation : (2011) 5 ALLMR 90 : (2011) 4 BomCR 151

Hon'ble Judges : Sondur Baldota R.P., J

Bench : Single Bench

Advocate : Pradeep Rajagopal, instructed by Rekha Rajagopal, P.M. Pradhan, Charul Abuwalla and Smita Sawant, instructed by Dave and Company, for the Appellant; Ujwala Sawant, instructed by R.V. Govilkar, for Respondent No. 3, Ravi Kadam, Gen., Hitesh Jain, instructed by Subhash Jadhav, for Respondent No. 4, P.B. Bhargude, instructed by S.B. Deshmukh, for Respondent No. 6, U.P. Warunjikar, for Respondent No. 12, S.S. Kanetkar, for Respondents No. 21 and 25, for the Respondent

Final Decision : Dismissed

Judgement

Sondur Baldota R.P., J.—Election Commissioner of India files this application seeking permission to declare election to the Maharashtra Legislative Council by the members of Maharashtra Legislative Assembly for the seat that has fallen vacant in view of resignation of Respondent No. 4, Shri Sanjay Satishchandra Dutt.

2. By the notification dated 11th March 2011, the Principal Secretary, Maharashtra Legislative Council declared that the seat of Shri Sanjay Satishchandra Dutt falling vacant w.e.f. 11th March 2011. on account of his resignation from the seat. Apparently, Shri Dutt has resigned to facilitate the election of Shri. Prithviraj Chavan, the Hon'ble Chief Minister of Maharashtra to Maharashtra Legislative Council in order to fulfill the requirement of Clause (4) of

Article 164 of the Constitution of India. On a query made by the Court about the requirement for Election Commissioner to seek permission of the Court for declaring election to the post falling vacant on account of resignation, Mr. Rajagopal, the learned Counsel for the Election Commissioner submits that this application has been filed only by way of abundant precaution.

3. The application, apart from setting out the urgent need to fulfil the mandate of Article 164(4) of the Constitution of India by the Hon''ble the Chief Minister, states that the election to the Seat vacated by Mr. Dutt does not prejudicially affect the Petitioner even in respect of the relief of declaration of his own election to Maharashtra Legislative Council. It has been contended that three of the candidates elected i.e. Chaudhari Dipti Ashok, Sanjay Satishchandra Dutt and Naik Nimbalkar Ramraje Pratapsinh i.e. Respondents No. 3, 4 and 6 to the petition would be completely unaffected by the outcome of the petition. Even if the Petitioner succeeds in getting all the reliefs sought in the petition, he cannot replace the above three persons.

4. Before advertng to the merits of the application, it is necessary to deal with the preliminary objection of maintainability of the application, raised by Mr. Pradhan, the learned Counsel for the Petitioner. For that purpose, a brief reference to the facts alleged in the election petition and the reliefs sought therein must be made. The Assembly elections of State of Maharashtra took place in October, 2009. Respondents No. 13 to 16 to the petition had been elected to the State Assembly. Later by the Resolution on 9th November, 2009, the House passed a resolution suspending the membership of the Lower House of these Respondents for a period of four years with effect from 9th November, 2009. It is alleged that despite their suspension, these Respondents had participated in the elections to the Maharashtra Legislative Council that had taken place on 12th July, 2010. The Petitioner is one of the unsuccessful candidates in the election to the Maharashtra Legislative Council. The successful candidates were Respondents No. 3 to 12. The Petitioner contends that once the membership of the Lower House of Respondent Nos. 13 to 16 was suspended, the rights that flow from the membership also stand suspended. Consequently, they had No. right to participate in the election or cast vote in election to Legislative Council. Since these persons were allowed to cast their votes, the election to the Maharashtra Legislative Council held on 12th July, 2010 stands vitiated and it deserves to be set aside. The second ground of challenge in the election petition is the alleged corrupt arrangement and agreement arrived at between the ruling party alliance and the members of Maharashtra Navnirman Sena. According to the Petitioner, Respondent No. 17, admitted in the press conference held after the Council elections that Respondents No. 13 to 16 and Respondents No. 18 to 26 had voted for the ruling party in consideration of the ruling party agreeing to revoke the suspension of Respondents No. 13 to 16. Such an arrangement being a corrupt practice, the entire process of election would stand vitiated. The third ground of challenge is the alleged improper counting of votes and in particular distribution of surplus votes.

5. On the above allegations, the Petitioner seeks in all five reliefs in the petition. The first relief is of the declaration that election of the returned candidates i.e. Respondents No. 3 to 12 to the Legislative Council in the elections held on 10th June, 2010, is illegal. The second relief is to quash and set aside election of the returned candidates. The third is to declare that the elections held to Legislative Council on 10th June, 2010 are in violation of the provisions of The Representations of Peoples Act and fourth to declare that Respondents No. 13 to 16 had No. right to vote during the subsistence of suspension of their membership and consequently the votes cast by them be declared illegal. The fifth prayer at Clause (e) seeks order for recount in accordance with law and the declaration that if the Petitioner is found elected on recount, he be declared to be duly elected.

6. Mr. Pradhan, the learned Counsel for the Petitioner relying upon the decision of the Apex Court in the case of (Election Commission of India v. Telangana Rostra Samithi and Anr.), reported in 2010 DGLS (soft) 2326: 2011 (1) S.C.J 13 submits that the application filed by the Election Commissioner seeking permission to hold election to the Seat vacated by Shri. Dutt is not maintainable and that grant of such permission has in fact been disapproved by the Apex Court in the decision cited. He also submits that perusal of the decision would show that the stand taken by the Election Commissioner in the present application, is completely contrary to the stand taken before the Apex Court in that decision. The facts of the case cited are that 12 members of Andhra Pradesh Legislative Assembly had submitted their resignations to the Speaker on 14th February, 2010. On receipt of the resignations, the Speaker ordered that the resultant vacancies be notified. The Election Commissioner of India on publishing the notification in the Andhra Pradesh Gazette, issued the Press Note, notifying his decision to hold bye-elections to fill up 10 clear vacancies according to the programme indicated therein. The Commissioner had not notified bye-elections to two of the Constituencies on account of the fact that election petitions were pending in which the Petitioners had sought to be declared elected. According to the Election Commissioner, those two vacancies were not clear vacancies and therefore he proposed not to hold bye elections to the two constituencies. This decision of the Election Commissioner to omit two of the Constituencies from holding bye-elections came to be challenged by the writ petition filed in the Andhra Pradesh High Court on the ground that Section 151A of the Representation of Peoples Act, 1951 (hereinafter referred to as the Act) made it mandatory upon the Election Commissioner to fill up the vacancies referred to in Sections 147, 149, 150 and 151 of the Act within a period of six months from the date of the occurrence of the vacancy. The High Court allowed the petitions and directed the Election Commissioner to hold elections to remaining Constituencies also. The Election Commissioner challenged the decision of the Andhra Pradesh High Court before the Apex Court, contending that if bye-election to the Constituencies was not stayed and if the candidate who filed an election petition eventually got a declaration that he has been duly elected and if a bye-election is

held, consequent upon resignation of a member, it could result in an impossible situation. According to the Election Commissioner, as there is apparent conflict between Section 151A of the Act and Sections 84, 98(c) and 101(b) of the Act, the provisions are required to be construed harmoniously. The Apex Court extensively considered the submissions and also its decision in the case of (D. Sanjeevayya v. Election Tribunal Andhra Pradesh and Ors.), reported in 1967 DGLS (soft) 2 : AIR 1967 S.C. 1211 to allow the challenge to the order of the Andhra Pradesh High Court.

7. Mr. Pradhan, submits that in view of the success of the challenge by the Election Commissioner, to the order of Andhra Pradesh High Court, the present application by the Election Commissioner apart from being contradictory to his own stand is not maintainable. Mr. Kadam, the learned Advocate General representing Respondent No. 4 and Mr. Rajgopal for the applicant, seek to distinguish the decision of the Apex Court on facts. Mr. Kadam, submits that, in the facts of the present case it cannot be said that there is conflict between Section 151A and Sections 84, 98(c) and 101(b) of the Act. Perusal of the judgment cited, would show that the anxiety expressed therein is about smooth running to it's full course of the proceeding u/s 84 of the Act. The relevant observations at paragraphs-26,34 and 35 of the judgment are as under:

26. According to the provisions of Section 84, in addition to claiming a declaration that the election of all or any of the returned candidates is void, an election Petitioner can claim a further declaration that he himself for any other candidate has been duly elected. It is this question which fell for consideration in D. Sanjeevayya's case (supra) giving rise to an apparent conflict between the provisions of Article 190(3)(b) of the Constitution and Section 84 of the 1951 Act. While Article 190(3)(b) provides that upon resignation of a seat by an elected member, if accepted, creates a vacancy, which, in turn, attracts the provisions of Part IX, a different note is struck by the latter part of Section 84 which cannot be lost sight of. In D. Sanjeevayya's case (supra.) although the provisions of Section 151A were not available, this Court felt that there was No. finality in the vacancy caused by the resignation of a member of the House where an election petition was pending. If the election of the member who resigns is unchallenged, there is No. difficulty in harmonizing the provisions of Section 151A with the rest of the sections included in Part IX and Section 8A of the 1951 Act. It is only when an election petition is filed u/s 84 of the Act that the latter part of the section comes into play and is, thereafter, reflected in Sections 98(c) and 101(b) of the said Act.

34. ...The Act is a complete Code for the conduct of elections by the Election Commission of India appointed under Article 324 of the Constitution which provides for superintendence, direction, control and conduct of elections to Parliament and to the legislature of every State and also of elections to the offices of President and Vice-President held under the Constitution. The provisions of Article 190(3)(b) of the Constitution have, therefore, to be read

along with the provisions of the 1951 Act. Section 84 of the said Act cannot be rendered otiose by holding that all vacancies on account of the aforesaid provision of the Constitution become immediately available for being filled up by way of a bye-election. The same reasoning applies in regard to Section 151A of the 1951 Act and its impact on the latter part of Section 84 thereof. As has been mentioned hereinbefore, a proceeding u/s 84 has to run its full course, particularly for the purposes of Section 8A of the said Act. The views expressed by the Division Bench of the High Court on this point cannot, therefore, be sustained.

35. We are, therefore, of the firm view that the introduction of Section 151A in the Constitution did not alter the position as far as the provisions of Section 84 and consequently 98(c) and 101(b) of the 1951 Act are concerned, since although a casual vacancy may, have occurred within the meaning of Section 150 of the 1951 Act, those vacancies in which election petitions had been filed and were pending cannot be held to have become available for the purposes of being filled up within the time prescribed u/s 151A of the 1951 Act. Article 190(3)(b) of the Constitution merely indicates that if a Member of a House of a Legislature of State resigns his seat by writing to the Speaker and such resignation is accepted, his seat shall become vacant. It does not introduce any element of compulsion on the Election Commission to hold a bye-election ignoring the provisions of Section 84 of the Act. In such cases, we have little hesitation in holding that such casual vacancies are not available for being filled up and the Commission will have to wait for holding elections in such Constituencies until a decision is rendered in regard to the latter part of Section 84 of the 1951 Act during the life of the House....

8. It would also be relevant to mention here the facts in D. Sanjeevayya's case, the decision wherein has been relied upon and quoted in the decision of the Apex Court. In Sanjeevayya's case, a returned candidate had sought to get rid of an election petition filed against him by resigning his seat from the Legislature, the Apex Court disapproved the action by observing that the returned candidate could not get rid of an election petition filed against him merely by resigning from the Seat from the Legislature whatever be the reason for his resignation. It was further held that in such cases, the Election Commissioner was not bound to hold a bye-election forthwith, but was entitled to suspend taking of action till the decision of the election petition u/s 84 was known.

9. Thus, we see that the main reason for disapproval by the Apex Court of holding bye-elections to the post falling vacant, was that the election petition or the relief of declaration of election sought in the election petition should not get frustrated on account of holding of the bye-election. This difficulty does not arise in the facts of the present case. Undoubtedly the Petitioner has sought, at prayer Clause (e) a further declaration falling under latter part of Section 84 that he has been duly elected. But this relief sought is destructive of the reliefs of declaration sought at prayers (a) to (d). By the initial prayers, the Petitioner seeks

declaration of election of all ten candidates i.e. Respondent Nos. 3 to 12 to be illegal and null and void on the ground that the entire election process for holding election to 10 seats, on 10th June, 2010 was violative of the provisions of Representation of Peoples Act and hit by corrupt practices. But the next prayer at Clause (e), is only for recounting of votes cast in the very election and if on recounting he is found to be elected, then declaration of election to the Seat. If at the final hearing of the petition, prayers (a) to (d) are granted, the further declaration at prayer (e) cannot be granted because the Petitioner will not be able to take the benefit of the votes cast in the election which is set aside in its entirety. If the Petitioner is to be granted the relief at prayer Clause (e), it has got to be given within the same election process by taking into consideration the votes cast in the election excluding 4 votes of the 4 suspended MLAs, Respondent Nos. 13 to 16. Grant of prayer (e) is possible only if the Petitioner gives up his challenge to the entire process of election and restricts the challenge to participation of Respondents No. 13 to 16 in the election and desires recounting of votes by deleting their four votes. The Petitioner, however, cannot be put to election of the prayers in the present application. Since the decision cited is relevant only for prayer Clause (e), this Court will have to proceed on the basis that the Petitioner desires to press for the prayer. In that case, election of all the returned candidates i.e. Respondents No. 3 to 12 will not be affected because even if the relief at prayer Clause (e) of the petition is granted, the Petitioner would be declared elected to only one of the Seats. In the circumstances, the Petitioner cannot oppose the application for declaration of election to 1 out of 10 Seats which has been resigned by Shri. Dutt.

9-A. I also find substance in the submissions advanced by the learned Advocate General and Mr. Rajagopal that it can be seen from the result sheet maintained for counting of votes that Shri. Dutt got 30 votes (value 3000) at the first count. This means, at the first count itself he had secured votes more than the number sufficient to secure the election of the candidate under Rules 1,84(1)(b), which was 2690. If the number of valid votes is to be reduced by four by discarding the votes of 4 suspended candidates, the number of votes sufficient to secure the election of a candidate gets reduced to 2582. With this reduced quota also Shri. Dutt gets elected on the very first count alongwith Chaudhari Dipti Ashok and Naik Nimbalkar Ramraje Pratpsinh. In that circumstance, even if the Petitioner is to be declared elected on the basis of recounting, the election result in respect of these three persons would remain completely unaffected. In fact the surplus votes received by these three persons have been distributed amongst the other candidates for the purpose of their election. The Petitioner himself desires to have benefit of the surplus. In these circumstances, even if the Petitioner is to finally succeed in getting relief at prayer (e), his prospect of being declared elected to the Maharashtra Legislative Council will remain unaffected by the proposed election. Therefore, there is No. substance in the opposition to the application. The application is allowed in terms of prayer Clause (A).

10. The learned Counsel for the Petitioner applies for stay of operation of this

order. The application is rejected.

Authorities to act on authenticated copy of this order.