

(2011) 03 MAD CK 0017

In the Madras High Court

Case No : Suo Motu W. P. No. 8022 of 2011

In Re: The Chief Election Commissioner and Others

Date of Decision : 28-03-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 324, 329

Income Tax Act, 1961 — Section 132A

Representation of the People Act, 1951 — Section 2, 30, 80, 80A, 81

Citation : AIR 2011 Mad 103 : (2011) 6 CTC 129

Hon'ble Judges : M.Y. Eqbal, C.J;T.S. Sivagnanam, J

Bench : Division Bench

Advocate : G. Rajagopalan, SC for G.R. Associates for P.S. Raman, General assisted by J. Raja Kalifulla, Govt. Pleader and M. Ravindran, ASG, for the Appellant;

Final Decision : Dismissed

Judgement

1. By order dated 23rd March, 2011, a Bench of this Court took suo motu cognizance of the news item published in the newspaper, namely, ""The

Hindu"" dated 23rd March, 2011, wherein certain statements made by the Hon''ble Chief Minister of Tamil Nadu alleging excessive restrictions

imposed by the Election Commission. The Bench, therefore, formulated certain issues for consideration and directed the Registry to register it as

writ petition and again place it before that Bench on 28th March, 2011. Today, as per the direction of the Hon''ble Chief Justice, the matter has

been placed before this Bench (presided over by the Chief Justice).

2. Before going into the merits of the case, we would like to express our view with regard to the power of the Hon''ble Judges in initiating writ

proceeding suo motu. There is no dispute that initiation of writ proceeding suo motu, in public interest, is within the competence of every Hon''ble

Judge of this Court, which is the integral part of the constitutional scheme. But,

such power is required to be exercised and regulated in accordance with the rules made by the High Court and the norms set keeping in view the administrative instructions issued and roster of sitting prepared by the Chief Justice. While exercising suo motu power of exercising public interest litigation, self-restraint and judicious exercise is expected to be borne in mind. It would be appreciated that as and when any matter of public importance is sought to be brought to the notice of the Court, a reference may be made to the Chief Justice for initiation of action. After such reference is made by any Hon"ble Judge to the Chief Justice for initiation of action, the Chief Justice will examine the matter according to the guidelines formulated by the Supreme Court and after the matter is examined, the same can be placed before the appropriate Bench in accordance with the directive issued in that regard by the Chief Justice for further necessary action. While exercising power of initiating suo motu writ proceeding in public interest, great care and caution should be taken by the Hon"ble Judge, keeping in mind the directions and observations made by the Supreme Court in a catena of decisions. It would not be proper that as and when any news item is published in the newspaper, the Court will take notice of such news item and treat the same as writ petition suo motu in public interest without referring the matter to the Chief Justice.

3. Coming to the merits of the instant case, as noticed above, certain statements were made by the Hon"ble Chief Minister alleging that the Election

Commission has been imposing excessive restrictions and unilaterally transferring officials without consulting the State Government. Further

statements have been made that the Election Commission has not acceded to the request of the political parties for postponing the polling date, etc.

Further statements have been made that the monies carried by various individuals, traders, etc., for land transaction or any other legal and genuine

cases are being seized by the Election Commission in the name of implementing the model code of conduct without there being any substantive

satisfaction.

4. It appears that the Election Commission of India, by notification dated 1st March, 2011, announced the date of general election to the

Legislative Assembly of Tamil Nadu and a date for the general election has been fixed on 13th April, 2011. In such a scenario, when the election

has already been notified as on 1st March, 2011 and the election is scheduled to be held on 13th April, 2011, the question that falls for

consideration is as to whether this Court will examine and probe the activities of the Election Commission under Article 226 of the Constitution of

India.

5. The issue is fully covered by two Constitutional Bench judgments of the Supreme Court, and therefore, the question is no longer *res integra*. The

first Constitutional Bench judgment is in the case of *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others*, . In that case

the nomination paper of a candidate for the Madras Legislative Assembly from Namakkal Constituency was rejected by the Returning Officer after

scrutiny. The said rejection order was challenged by way writ petition under Article 226 of the Constitution. The High Court dismissed the writ

petition on the ground that it had no jurisdiction to interfere with the order of the Returning Officer by reason of the provisions contained under

Article 329(b) of the Constitution. In the SLP filed by the candidate it was argued that the jurisdiction of the High Court is not affected by Article

329(b) of the Constitution. It was argued that the word "election" as used in Article 329(b) means what is normally and etymologically means the

result of polling for the final selection of the candidate. Hence, the action of the Returning Officer in returning the nomination paper can be

questioned before the High Court under Article 226 of the Constitution. Negating the argument the Constitutional Bench firstly held:

7. These arguments appear at first sight to be quite impressive, but in my opinion there are weightier and basically more important arguments in

support of the view taken by the High Court. 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 *A.V. Srinivasalu Reddy and Another Vs. S.*

Kuppuswami Goundar, , 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*, AIR 1945 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's Laws of England in the following passage (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 paragraph 18 of the judgment the Constitutional Bench came to the following conclusions:

18. The conclusions which I have arrived at may be summed up briefly as follows:

(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a

matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all

disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

(2) In conformity with this principle, the scheme the election law in this country as well as in England is that no significance should be attached to

anything which does not affect the "election"; and if any irregularities are committed while it is in progress and they belong to the category or class

which, under the law by which elections are governed, would have the effect of vitiating the "election" and enable the person affected to call it in

question, they should be brought up before a Special Tribunal by means of an election petition and not be made the subject of a dispute before any

court while the election is in progress.

6. In another Constitutional Bench judgment in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*,

the law laid down by the Supreme Court, which is summarized in paragraph - 92 of the judgment, is quoted herein below:

92. Diffusion, even more elaborate discussion, tends to blur the precision of the conclusion in a judgment and so it is meet that we synopsise the

formulations. Of course, the condensed statement we make is for convenience, not for exclusion of the relevance or attenuation of the binding

impact of the detailed argumentation. For this limited purpose, we set down our holdings:

(1)(a) Article 329(b) is a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying

forward the process of election to its culmination in the formal declaration of the result.

(b) Election, in this context, has a very wide connotation commencing from the

Presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate.

(2)(a) The Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. This responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances.

(b) Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission, shall act in conformity with, not in violation of, such provisions but where such law is silent Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from, pushing forward a free and fair election with expedition. Secondly, the Commission shall be re-sponsible to the rule of law, act bona fide and be amenable to the norms of natural justice insofar as, conformance to such canons can reasonably and realistically be required of it as fairplay in action in a most important area of the constitutional order viz. elections. Fairness does import an obligation to see that no wrongdoer candidate benefits by his own wrong. To put the matter beyond doubt, natural justice enlivens, and applies to the specific case of order for total re-poll, although not in full panoply but in flexible practicability.

Whether it has been complied with is left open for the Tribunal's adjudication.

(3) The conspectus of provisions bearing on the subject of elections clearly expresses the rule that there is a remedy for every wrong done during the election in progress although it is postponed to the post-election stage and procedure as predicated in Article 329(b) and the 1951 Act. The Election Tribunal has, under the various provisions of the Act, large enough powers to give relief to an injured candidate if he makes- out a case and such processual amplitude of power extends to directions to the Election Commission or other appropriate agency to hold a poll, to bring up the ballots or do other thing necessary for fulfilment of the jurisdiction to undo illegality and injustice and do complete justice within the parameters set by the existing law.

7. In the case of Election Commission of India Vs. Shivaji and Others, the Supreme Court followed the earlier view while interpreting Article 329

of the Constitution and held as under:

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 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 80A 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. The word ""election"" 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 and it is

in this wide sense that the word is used in Part XV of the Constitution in which Article 329(b) occurs. In *N.P. Ponnuswami Vs. Returning Officer,*

Namakkal Constituency and Others, , this Court held that the scheme of Part XV of the Constitution and the Act seems to be that any matter

which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal

and should not be brought up at an intermediate stage before any court. Any other meaning ascribed to the words used in the article would lead to

anomalies, which the Constitution could not have contemplated, one of them being any dispute relating to the pre-polling stage. In the above

decision this Court ruled that having regard to the important functions which the legislatures have to perform in democratic countries, it had always

been recognised to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all

controversial matters and all disputes arising out of elections should be postponed till after the elections were over so that the election proceedings

might not be unduly retarded or protracted. Hence even if there was 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 elections 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 within

forty-five days from the date of election of the returned candidate but not earlier than the date of election. This view has been reaffirmed by this

Court in Lakshmi Charan Sen and Others Vs. A.K.M. Hassan Uzzaman and Others, and in Inderjit Barua and Others Vs. Election Commission of

India, . Realising the effect of Article 329(b) of the Constitution the High Court even though it had by oversight issued an interim order in Writ

Petition No. 1459 of 1987 on 26-9-1987 postponing the last date for withdrawal of candidatures to 1-10-1987 dismissed the petition by its

judgment dated 1-10-1987. The relevant part of its judgments reads as follows:

The challenge must fail mainly on two grounds. First on the ground that the stage has reached of withdrawals of nominations for the said election

which was in fact fixed on 30th but has been postponed because of our orders as on today. Article 329(b) bars every challenge to any election

including all the election process which commences from the date of notification in the Official Gazette, except by way of election petition under the

Representation of the People Act. Mr. Chapalgaonkar, appearing for the Respondent has relied upon a decision-reported in Inderjit Barua and

Others Vs. Election Commission of India, to support this plea that all election including every election process must be challenged only by way of

election petition under the Representation of the People Act.

Having thus dismissed the petition on 1-10-1987 the court committed a serious error in entertaining a review petition in the very same writ petition

on 16-10-1987 and passing an order staying election which had been earlier fixed for 18-10-1987 till further orders ""looking to the mandatory

provisions of Section 30 of the Representation of the People Act. The High Court

failed to recall to its mind that it was not its concern under

Article 226 of the Constitution to rectify any error even if there was an error committed in the process of election at any stage prior to the

declaration of the result of the election notwithstanding the fact that the error in question related to a mandatory provision of the statute relating to

the conduct of the election. If there was any such error committed in the course of the election process the Election Commission had the authority

to set it right by virtue of power vested in it under Article 324 of the Constitution as decided in *Mohinder Singh Gill and Another Vs. The Chief*

Election Commissioner, New Delhi and Others, and to see that the election process was completed in a fair manner.

8. The Constitution Bench decision rendered in *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others*, was considered by

the Supreme Court in the case of *Election Commission of India Through Secretary Vs. Ashok Kumar and Others*, . Their Lordships considered

the jurisdiction of the High Court to entertain petitions under Article 226 of the Constitution of India to issue interim direction after commencement

of electoral process. After taking into consideration of the decisions of the Constitution Bench in *N.P. Ponnuswami Vs. Returning Officer*,

Namakkal Constituency and Others, and *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, , the

Supreme Court held as hereunder:

32. For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already

said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:

(1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of

notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting,

obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of

proceedings in elections.

(2) Any decision sought and rendered will not amount to ""calling in question an election"" if it subserves the progress of the election and facilitates

the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

(3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters

which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

(4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court

has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital

piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking

the jurisdiction of the court.

(5) The court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but

brought to it during the pendency of election proceedings. The court must guard against any attempt at retarding, interrupting, protracting or stalling

of the election proceedings. Care has to be taken to see that there is no attempt to utilise the court's indulgence by filing a petition outwardly

innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the

court would act with reluctance and shall not act, except on a clear and strong case for its intervention having been made out by raising the pleas

with particulars and precision and supporting the same by necessary material.

9. Further, their Lordships, considering the facts of the case in Election Commission of India v. Ashok Kumar"(supra), wherein the ground alleged

was mala fide exercise of power, held as follows:

...Such a dispute could have been raised before and decided by the High Court if the dual test was satisfied:

(i) the order sought from the Court did not have the effect of retarding, interrupting, protracting or stalling the counting of votes and the declaration

of the results as only that much part of the election proceedings had remained to be completed at that stage,

(ii) a clear case of mala fides on the part of Election Commission inviting intervention of the Court was made out, that being the only ground taken in the petition.

10. In the light of the law laid down by the Constitution Bench of the Supreme Court and other decisions, we are of the definite opinion that no constitutional issue needs further adjudication by this Court in the instant writ petition. Once the election is notified, it is within the exclusive domain of the Election Commission to fix the date of election as also a suitable date for declaring the result of the election. This Court, under Article 226 of the Constitution, cannot interfere with such decision of the Election Commission except in the rarest of the rare case as pointed out by the Hon"ble Supreme Court.

11. So far as the activities of the Election Commission in making search and seizure in the name of implementing the model code of conduct is concerned, a Bench of this Court recently considered such question in a writ petition, being W.P. No. 7011 of 2011. In that case, the Petitioner challenged the seizure made by the Respondent which amount was stated to have been carried for the purpose of making payment to the workers. The learned Judge, by order dated 22nd March, 2011, disposed of the writ petition with certain directions, relevant portion of the order is quoted here in below:

4.3 According to him, the effect of the rules is being published in all newspapers, both Tamil and English, and also shown in various television channels, so as to enable the people to understand the implication and follow the same in such event of seizure. He would also submit that since the Respondents were not satisfied about the reason assigned for carrying huge quantity of amount the same was recovered by them and thereafter, the Deputy Director of Incomes Tax (Inv), Unit-IV(2), Chennai 600 034, by executing the warrant of authorisation u/s 132A of the Income Tax Act, 1961 has taken over the amount from the second Respondent. Therefore, according to him, if only the Petitioner justifies the purpose for which the amount was carried, the Deputy Director of Income Tax (Inv), Unit-IV(2), Chennai 600 034 would release the same.

5. Considering the above said facts and circumstances of the case, I am of the considered view that while it is the duty on the part of the

Respondents to see that the Election Code of Conduct is scrupulously followed, it must be ensured that under the guise of following the rules

strictly, the innocent people should not be targeted and therefore, it is desirable that the Election Commission makes publication in the language

known to the people of this State about the above said provisions. Moreover, as and when seizure is effected, it should be stated as to whom the

citizen has to approach and what all particulars have to be furnished. It is also expected that when a seizure order is made like the impugned notice,

it is the duty on the part of the Election Officer to indicate in the said order as to the next course of action, viz., as to which authority he has to

approach and so on, and these particulars are necessary not only to see that the Election Code of Conduct is properly implemented, but also to

make sure that it will not have adverse effect on the innocent and genuine persons.

6. On the facts of the present case, since it is stated that the amount has been taken over by the Deputy Director of Income Tax (Inv), Unit-IV(2),

Chennai - 600 034, the writ petition stands disposed of with a direction against the Petitioner to approach the Deputy Director of Income Tax

(Inv), Unit-IV(2), Chennai - 600 034 with all necessary records and the Deputy Director of Income Tax (Inv), Unit-IV(2), Chennai 600 034, on

being satisfied about the records produced by the Petitioner, shall pass appropriate orders within one week from the date when the Petitioner

approaches him with a copy of this order. No costs. Consequently, M.P. No. 1 of 2011 is closed.

12. Taking into consideration all these facts, we do not find any merit in this writ petition, which is accordingly closed.

13. It is, however, made clear that the question as to whether the transfer of officials of the State would amount to casting a stigma on the

credentials of such officials is to be considered in a separate writ petition, viz., W.P. No. 6936 of 20,11, which has been posted by this Court

tomorrow.