

(2002) 02 AHC CK 0020

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No"s. 2518, 2638, 4093 and 4485 of 2002

Manoj Dubey

APPELLANT

Vs

Election Commission of India and Others

RESPONDENT

Date of Decision : 11-02-2002

Acts Referred:

Conduct of Elections Rules, 1961 — Rule 35
Constitution of India, 1950 — Article 226, 324
Registration of Electors Rules, 1960 — Rule 28
Representation of the People Act, 1951 — Section 62
Representation of the People Act, 1951 — Section 62
Conduct of Elections Rules, 1961 — Rule 35
Constitution of India, 1950 — Article 226, 324
Registration of Electors Rules, 1960 — Rule 28
Representation of the People Act, 1951 — Section 62
Conduct of Elections Rules, 1961 — Rule 35
Constitution of India, 1950 — Article 226, 324
Registration of Electors Rules, 1960 — Rule 28

Citation : AIR 2002 All 167

Hon'ble Judges : Shyamal Kumar Sen, C.J.;S.R. Alam, J

Bench : Division Bench

Advocate : Ravikant, S.M.A. Qazmi, U.N. Sharma, D.R. Sharma, H.N. Sharma, H.N. Srivasatava, A.K. Srivastava and J.P. Singh, for the Appellant; S.P. Gupta S.N. Srivastava, learned Chief S.C., R.V. Singh and Subodh Kumar, for the Respondent

Judgement

S.K. Sen, C.J.—In all these four aforementioned writ petitions, since similar questions are involved, with the consent of the parties, they are taken up together and are being disposed of by a common judgment and order.

2. The short controversy involved in these petitions is whether the Election Commission is entitled to prescribe alternative mode of identification for the electors apart from that provided under the Registration of Electors Rules, 1960 and Conduct of Elections Rules, 1961. Rule 28 of the Registration of Electors

Rules, 1960 reads as under:

"28. Identity cards for electors in notified constituencies-

(1) The Election Commission may, with a view to preventing impersonation of electors and facilitating their identification at the time of poll, by notification in the Official Gazette of the State, direct that the provision of this rule shall apply to (any such constituency or part thereof) as may be specified in the notification:"

(2) The registration officer for such notified constituency shall, as soon as may be. after the issue of the notification under Sub-rule (1) arrange for the issue to every elector of an identity card prepared in accordance with the provisions of this rule.

(3) The identity card shall-

(a) be prepared in duplicate:

(b) Contain the name, age, residence and such other particulars of the elector as may be specified by the Election Commission;

(c) have affixed to it a photograph of the elector which shall be taken at the expense of the Government: and

(d) bear the facsimile signature of the registration officer;

Provided that if the elector refuses or evades to have his photograph taken, or cannot be found at his residence by the official photographer in spite of repeated attempts, no such identity card shall be prepared for the elector and a note of such refusal or evasion or that the elector could not be found at his residence in spite of repeated attempts shall be made in the copy of the roll maintained by the registration officer.

(4) One copy of the identity card prepared under Sub-rule (3) shall be retained by the registration officer and the other copy shall be delivered to the elector to be kept by him for production at the time of poll."

3. The said Rule is intended to prevent impersonation of electors and facilitating their identification at the time of poll. The proviso of said rule also mentions that in the event the elector refuses or evades to have his photograph taken, or cannot be found at his residence by the official photographer in spite of repeated attempts, in that event a note of such refusal or evasion or that the elector could not be found at his residence in spite of repeated attempts, the same shall be made in the copy of the roll maintained by the Registration Officer and a note to that effect shall also be made in the electoral roll.

4. Rule 35 of the Conduct of Elections Rules, 1961 provides the procedure for identification of electors which reads as follows:

"35. Identification of electors: (I) The presiding officer may employ at the polling station such persons as he thinks fit to help in the identification of the electors or

to assist him otherwise in taking the poll.

(2) As each elector enters the polling station, the presiding officer or the polling officer authorised by him in this behalf shall check the elector's name and other particulars with the relevant entry in the electoral roll and then call out the serial number, name and other particulars of the elector.

(3) Where the polling station is situated in a constituency, electors of which have been supplied with identity cards under the provisions of the Registration of Electors Rules, 1960, the elector shall produce his identity card before the presiding officer or the polling officer authorised by him in this behalf,

(4) In deciding the right of a person to obtain a ballot paper the presiding officer or the polling officer, as the case may be, shall overlook merely clerical or printing errors in an entry in the electoral roll, if he is satisfied that such person is identical with the elector to whom such entry relates.

5. From perusal of the aforementioned Rules, it appears that Statutory Rules are exhaustive and provide exhaustive way out for the purpose to prevent impersonation of electors, malpractice and to check falsification. In the said Rules no further such mode has been contemplated.

6. Learned Advocates for the writ petitioners have challenged the validity of the notification dated 23rd January, 2002 on the ground that the said notification is an alternative procedure and is contrary to the provisions, not authorised under the Statute or Statutory Rules and therefore, cannot have any binding force. Learned Advocates for the writ petitioners have further submitted that the Election Commission has no power to supplant any Statute and Statutory Rule. The Statute and Statutory Rules, which are exhaustive in nature, cannot be changed by notification without making any amendment in the Statutory Rules. It is also pointed out to us that photo identity card is provided under the Statutory Rules to prevent impersonation of electors.

7. Mr. S. N. Srivastava, on behalf of the respondents taking the question of maintainability of the writ petition, contended that the writ petition is not maintainable since notification for election has been issued and there is no scope for entertaining the writ petition at this stage. He has referred to Articles 324 and 329 of the Constitution. He has further submitted that the Election Commission has power of superintendence, direction and control of elections under Article 324 of the Constitution. He has also referred to Article 329 of the Constitution and submitted to us that the same is barred from Court's interference.

8. Mr. S. P. Gupta, learned Senior Advocate subsequently argued on behalf of the Election Commission and urged that the Election Commission has been vested with wide and plenary power under Article 324 of the Constitution read with Section 61 of the Representation of People Act, 1951 to Issue Instructions or guidelines to prevent Impersonation of electors. He has however, submitted that

he already advised the Election Commission of India that alternative mode provided in the issued notification is not exhaustive in nature and it is expected to bring out another fresh notification prescribing some more details by way of the precaution so that the electors shall not be deprived to their statutory voting rights. He has further submitted that under Article 324 of the Constitution the power of superintendence, direction and control of elections lies with the Election Commission in the interest of fair election and the Election Commission of India has exercised such power by Issuing notification and the same cannot be challenged. Mr. S. P. Gupta is however fair enough to submit that right to vote to specifically provided u/s 62 of the Representation of People Act, 1951 and that can never be curtailed by any other procedure. The procedure prescribed by notification is only for the purpose of preventing Impersonation in voting and is not intended in any way to take away the voting rights of the petitioners or any of the electors. He has further submitted before us that voting right cannot be denied only on the basis of non-production of any of the document, mentioned in the impugned notification and this however shall be taken into account for the purpose of identification.

9. We have taken note of the submissions made by the respective Advocates for the parties and we are of view that so far as the question of maintainability of the writ petitions is concerned. It is well settled proposition of law that after notification for election is issued, the election process shall not be stopped or stalled. In the instant case, however, it is not the prayer of the writ petitioners to stop or stall the election. On the contrary writ petitioners claim that their right to franchise may not be denied in the absence of identity card which admittedly has not been issued to many of the electors.

10. It appears to us that every elector has a statutory right to cast his vote and that cannot be denied. Rule 28 of the Registration of Electors Rules. 1960 has to be read along with Rule 35 of the Conduct of Elections Rules. 1961. In our view the Rules prescribe a check with regard to impersonation of the voting and have nothing to do with taking away the right to cast vote by the true and genuine voter.

11. Section 62 of the Representation of the People Act. 1951 reads as under:

"62. Right to vote.-- (1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency.

(2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in Section 16 of the Representation of the People Act, 1950 (43 of 1950).

(3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void.

(4) No person shall at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for that constituency more than once, and if he does so vote, all his votes in that constituency shall be void.

(5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police :

Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force.

12. Under these circumstances, in our view, specific mode of Identification has been provided under the Statute. Rule 28 of Registration of Electors Rules 1961, which has already been set out hereinbefore, has clearly specified the mode of Identification. Since the manner and mode of preventing the misuse of voting right or impersonation have been specifically provided under the Statutory Rules, the same is required to be followed strictly. It is well settled that if the Statute specifies a particular procedure or mode to be followed the same is to be followed in that way and in no other way.

13. The Supreme Court in the case of Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others, has held as follows :

"If a statute requires a thing to be done in a particular manner, it should be done in that manner or not at all. This principle was approved and accepted in well-known cases of Taylor v. Taylor (1875) 1 Ch D 426 and AIR 1936 253 (Privy Council) This Court has also expressed the same view in respect of procedural requirement of the Bombay Tenancy and Agricultural Lands Act in the case of Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others, ."

14. Both the parties have placed reliance on the judgment of Supreme Court rendered in the case of Mohinder Singh Gill v. The Chief Election Commission, Delhi, reported in AIR 1978 SC 881.

15. The scope of Article 324 of the Constitution of India has been Interpreted elaborately by the Constitution Bench of the Supreme Court in the aforesaid decision. While it was held that the plenary power has been provided under Article 324 of the Constitution of India vesting whole responsibility for holding National and State elections and also necessary powers have been conferred to discharge such functions to the Election Commission. However, the Supreme Court also held following the decision in His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala, that the rule of law is basic structure of the Constitution apart from democracy and the same postulates the pervasiveness of the spirit of law throughout the whole range of Government in the sense of excluding arbitrary official action in any sphere and as such the Commission also is bound by the rule of law. In this connection the Supreme Court in the

aforesaid decision of Bharati's case, in paragraph 38 of the said judgment at page 869 inter alia held and observed as follows :

"And the supremacy of valid law over the Commission argues itself. No one is an imperium in imperio in our constitutional order. It is reasonable to hold that the Commissioner cannot defy the law armed by Article 324. Likewise, his functions are subject to the norms of fairness and he cannot act arbitrarily. Unchecked power is alien to our system."

In paragraph 39 of the said Judgment at page 869, the Supreme Court observed as under :

"Even so, situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it is that the Constitution has made comprehensive provision in Article 324 to take care of surprise situations. That power itself has to be exercised, not mindlessly nor mala fide, not arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation. More is not necessary to specify, less is insufficient to leave unsaid. Article 324, in our view, operates in areas left unoccupied by legislation and the words "superintendence, direction and control" as well as "conduct of all elections" are the broadest terms. Myriad may be too mystic to be precisely presaged, may call for prompt action to reach the goal of free and fair election. It has been argued that this will create a constitutional despot beyond the pale of accountability, a Frankenstein's monster who may manipulate the system into elected despotism-instances of such phenomena are the tears of history, To that the retort may be that the Judicial branch, at the appropriate stage, with the potency of its benignant power and within the leading strings of legal guidelines, can call the bluff, quash the action and bring order into the process. Whether we make a triumph or travesty of democracy depends on the men as much as on the Great National Parchment. Secondly, when a high functionary like the Commissioner is vested with wide powers the law expects him to act fairly and legally. Article 324 is geared to the accomplishment of free and fair elections expeditiously. Moreover, as held in Virendra Vs. The State of Punjab and Another, and Harishankar Bagla and Another Vs. The State of Madhya Pradesh, discretion vested in a high functionary may be reasonably trusted to be used properly, not perversely. If it is misused, certainly the Court has power to strike down the act, This is well established and does not need further case law confirmation. Moreover, it is useful to remember the warning of Chandrachud J. (at p. 2465 of AIR 1975 SC):

"But the electorate lives in the hope that a sacred power will not so flagrantly be abused and the moving finger of history warns of the consequences that inevitably flow when absolute power has corrupted absolutely. The fear of perversion is no test of power."

16. The power of the Election Commission under Article 324 of the Constitution of India was also considered by the Supreme Court in the case of A.C. Jose Vs.

Sivan Pillai and Others, wherein Mohinder Singh Gill's case supra was considered and the Supreme Court struck down the election to the Kerala Legislative in which voting machines were utilised under the directives of the Election Commission, on the ground that those directives were contrary to the specific Rule which excludes the mechanical process and held that the directives of the Election Commission for casting of ballot by machines in some of the polling stations was without jurisdiction and could not have been resorted to.

17. In the aforesaid decision while dealing with the ambit of power of the Election Commission under Article 324 of the Constitution of India, the Supreme Court inter alia held in paragraph 5 of the said judgment at page 922 as follows :

"This is a very attractive argument but on a closer scrutiny and deeper deliberation on this aspect of the matter, it is not possible to read into Article 324 such a wide and uncanalised power, which is entrusted to the Commission as Mr. Jethmalani would have us believe. Part XV of the Constitution contains Articles 324 to 328 which relate to the manner in which elections are to be held, the rights of persons who are entitled to vote, preparation of electoral rolls, delimitation of constituencies, etc., but this is merely the storehouse of the powers and the actual exercise of these powers is left to Parliament under Articles 325 to 329. In other words, Art. 324 has to be read in harmony with, and not in isolation of Articles 326 to 329. . ."

18. The supremacy of valid law over the Election Commission has been again reiterated by the Supreme Court in the aforesaid decision and the observation in the case of Mohinder Singh Gill supra to the effect "No one is an imperium in imperio in our Constitutional order." It was also observed quoting from the judgments of the case of Mohinder Singh Gill supra: "Likewise, his functions are subject to the norms of fairness and he cannot act arbitrarily. Unchecked power is alien to our system."

19. In paragraph 18 of the said judgment in the case of A. C. Jose supra the Supreme Court also reiterated the two limitations already laid down by it in Mohinder Singh Gill's case supra in the aforesaid decision:

20. The Supreme Court in the aforesaid decision in the case of A. C. Jose supra in paragraph 25 of the said judgment at page 927 of the report summed up the legal and constitutional position as follows at Page 927-928 :

(a) When there is no parliamentary legislation or rule made under the said legislation, the Commission is free to pass any orders in respect of the conduct of elections.

(b) where there is an Act and express Rules made thereunder, it is not open to the Commission to override the Act or the Rules and pass orders in direct disobedience to the mandate contained in the Act or the Rules. In other words, the powers of the Commission are meant to supplement rather than supplant the law (both statute and Rules) in the matter of superintendence, direction and

control as provided by Article 324.

(c) where the Act or Rules are silent, the Commission has no doubt plenary powers under Article 324 to give any direction in respect of the conduct of election, and

(d) where a particular direction by the Commission is submitted to the Government for approval, as required by the Rules, it is not open to the Commission to go ahead with implementation of it at its own sweet will even if approval of the Government is not given."

While holding that voting by mechanical process is not permissible under the Rules which were discussed at length in the aforesaid decision, the Supreme Court in the last sentence of paragraph 28 of the aforesaid judgment observed as under ;

"As we have already indicated, these Rules are binding on the Commission and it cannot by an executive fiat either override them or act contrary to the statutory provisions of the Rules."

The Supreme Court further held in paragraph 29 of the said judgment as follows :

"On a proper and detailed analysis of these Rules it is clear that the Act by framing the Rules completely excluded the mechanical process which if resorted to, would defeat in a large measure the mandatory requirements of the Rules."

The Supreme Court having wide discussions on all aspects of the matter held in paragraph 35 of the said judgment as follows :

"Having regard to these circumstances, therefore, we are clearly of the opinion that according to the law as it stands at present, the Order of the Commission directing casting of ballot by machines in some of the polling stations, as indicated above, was without Jurisdiction and could not have been resorted to."

21. We may also take note of the Judgment and decision in the case of Election Commission of India Through Secretary Vs. Ashok Kumar and Others, . While reiterating the earlier views taken by the Supreme Court in the case of N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, summed up its conclusion in paragraph 32 Including different sub-paragraphs of which sub-paragraphs 2 and 3 appear to us relevant for the purpose of deciding the controversy involved in this case, are as follows :

"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.

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."

22. Taking into consideration that in the I Instant writ petitions, the petitioners by challenging the impugned notification pre- scribing alternative procedure to that which is provided under the statutory Rules to check impersonation, does not in fact at-tempt or seek to stall the election rather have come forward to facilitate the process of election so that the genuine voter or elector may not be deprived of his valuable right as provided under the Statute which, in effect shall only be taken as an aid to the process of facilitation for the purpose of proper holding of election in terms of the procedure prescribed under the Statutes and Rules framed thereunder to which the Election Commission is also bound.

23. In view of the settled law as already noted hereinbefore, we are of view that the writ petitions are maintainable.

24. We also take note of the very fair submission made by Sri S. P. Gupta, Senior Advocate which we have noted earlier. We are also of view that it cannot be disputed that the Election Commission is empowered to superintendence of election process and part of the election but the same is circumscribed by the Rules and Statute and by any valid piece of legislation that the Election Commission is bound to act in a reasonable and fair manner. We have also taken note of the fact that the statute in the instant case as provided for the particular procedure to check impersonation of the voting and that statutory rule is required to be followed. The Election Commission has no power to supplant the procedure provided under the Rules, since it is settled law as we have already indicated referring to the decisions of the Supreme Court that the mode and manner in which that procedure has to be exercised, has to be followed in that manner or not at all.

25. Learned Counsel for the respondent Commission during course of argument referred an order of the Hon''ble Supreme Court passed in Ram Deo Bhandari, J. William John alias Gandeewan, T.N. Seshan, Gautam Sagar Rana, State of Orissa, Arjun, Manmohan Narisinghdasji, Samata Party, State of West Bengal and others Vs. Election Commissioner, Chief Election Commissioner, State of West Bengal, Election Commission of India, Union of India, State of Maharashtra and others, , R. D. Bhandari v. Election Commission of India a copy of which is annexed as Annexure R-I to the counter-affidavit, A perusal of the aforesaid order of the Supreme Court it is apparent that the matter was not decided on merit rather the writ petition was disposed of in view of the averment made in paragraph 6 of the

affidavit filed on behalf of the Election Commission of India and on the basis of the suggestions of the parties and no law or ratio has been laid down in the aforesaid decision.

26. Reliance has also been placed on be-half of the respondents In the two unreported Division Bench decisions. (1st) of the High Court of Judicature at P. Gajapathi Vs. Election Commission of India, High Court of Judicature. Andhra Pradesh at Hyderabad dated 16-2-2001 in W. P, Nos. 2598, reported in K. Narasimha Naidu and another Vs. Election Commissioner of India, New Delhi and others, . In view of the fact that several points raised and argued before us and exhaustively dealt with including several Supreme Court decisions in these cases, have not been considered In the aforesaid decisions, we feel that the said decisions are in the nature of per incurium and cannot come to the aid of the respondents.

27. Considering all the aspects of the matter, we are of view that the photo identity card is only intended to facilitate the process of election in case of a challenge to the Identity of an elector or voter as provided under the statutory Rules. In case photo identity card has not been provided the procedure prescribed under Rule 28 of the Registration of Electors Rules, 1960 and Rule 35 of the Conduct of Elections Rules, 1961 shall be followed by the Presiding Officer. The alternative modes provided in the impugned notification may only be taken collaterally for the purpose in case of any challenge of identity of an elector but it cannot be substitute of photo Identity card. An elector who figures in the electoral roll cannot be denied his statutory right to vote merely on the ground that he does not possess any of the documents mentioned in the impugned notification.

28. It is made clear that it will be open to the Presiding Officer, in the event a challenge is made with regard to the identity of an elector, this shall be accepted or rejected by the Presiding Officer, after taking into consideration the evidence thereof before him in accordance with law but no voter will be deprived of his vote only on this ground if his genuineness is not challenged or other wise proved.

29. In the result, with the above observations/directions, the writ petitions are disposed of.