

(2016) 03 DEL CK 0245
In the Delhi High Court
Case No : W.P. (C) 8523/2011

Milan Gupta

APPELLANT

Vs

State Election Commission and Others

RESPONDENT

Date of Decision : 18-03-2016

Acts Referred:

Constitution of India, 1950 — Article 19(c)
Delhi Municipal Corporation Act, 1957 — Section 10, Section 11, Section 14, Section 15, Section 16, Section 17, Section 18, Section 19, Section 22, Section 23, Section 24, Section 25, Section 26, Sec

Citation : (2016) 9 ADDelhi 464 : (2016) 229 DLT 341

Hon'ble Judges : Rajiv Sahai Endlaw, J.

Bench : Single Bench

Advocate : Meenakshi Midha, Siddhartha Nagpal and Jyoti Nagpal, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—1. This petition was filed seeking (i) mandamus to the then sole respondent State Election Commission (SEC), National Capital Territory (NCT) of Delhi to allot a free symbol with immediate effect to the petitioner for contesting the Municipal Corporation of Delhi (MCD) elections in 2012; (ii) declaration that election symbol opted for by more than one independent candidate shall be allotted to the candidate who has already contested the previous election on that election symbol from that same ward; and, (iii) direction to the respondent SEC to, make such amendments in the Delhi Election Symbols (Reservation and Allotment) Order, 2007 as may be necessary for registration of political parties that intend to contest ward elections to MCD.

2. This petition came up first before this Court on 5th December, 2011 when it was felt that the Election Commission of India (ECI) is a necessary party for examination of the issues raised in the petition. Accordingly, ECI was impleaded as respondent no.2 and notice of the petition issued.

3. Counter affidavit has been filed only by the respondent no.1 SEC; the counsel for the respondent no.2 ECI stated that no reply is required to be filed.

4. Since the petitioner was appearing in person, Mr. Aly Mirza, Advocate was appointed as an Amicus Curiae and though he appeared for some dates but has neither filed any written submissions as directed nor appeared when arguments were heard on 20th July, 2015 and judgment reserved.

5. It was the case of the petitioner (i) that he intended to contest the ward elections to MCD due in the year 2012 as an independent candidate; (ii) that all the political parties had already begun to prepare for the said elections and the political parties as the BJP and the Congress had already begun to display their election symbols in ward areas and had begun to put up posters with election symbols at various places in Municipal wards; (iii) it is a bare minimum requirement of even the best political candidates to have an electoral symbol; without spreading and campaigning with such an election symbol, not even the best candidates holding affection of the voters can ever win an election because the ballot papers do not hold his name but have his election symbol; (iv) that the petitioner was utterly handicapped to campaign without an election symbol; (v) though the petitioner had represented to the respondent no.1 SEC in this regard but to no avail; (vi) that the petitioner is not desirous of a reserved symbol like the National Political Parties; the petitioner merely wants a symbol from the list of free symbols which are not part of the reserved symbols; (vii) the conduct of SEC of not allotting even a free symbol to the petitioner while at the same time allowing the large political parties to campaign with their reserved symbols is discriminatory; (viii) as per para 4(e) (iii) of the Delhi Election Symbols (Reservation and Allotment) Order, 2007 (Election Symbols Order 2007) upon more than one independent candidates choosing the same election symbol, the Returning Officer is to decide the allotment by a draw of lots; (ix) this drawing of lots compels even further expenditure for an independent candidate who is contesting the elections for the second time in a subsequent election in the same ward; in the same ward, where people have already begun to recognise such candidate with an election symbol in the previous election, the people have to be re-told that the candidate's election symbol has changed, requiring wasteful expenditure to be incurred and again placing large National Parties, having reserved symbols, at an advantage over the independent candidates; (x) para 4(e) (iii) supra does not allow the continuance of the election symbol to the candidate who has already contested the previous election on the symbol in the same ward and who has thus already invested heavily in terms of time, effort and expenditure into the symbol; (xi) the Rules also do not provide for an allotment of symbols to parties other than a National or State Party registered with the respondent no.2 ECI; on the other hand the respondent no.2 ECI does not allow registration of political parties if the parties are not contesting elections conducted by the respondent no.2 ECI - the petitioner thus does not have the option of allotment of any election symbol ever, if he were to contest MCD ward elections only; and, (xii) not providing for registration or recognition of political

parties that will contest ward elections is a violation of Article 19(c) of the Constitution of India guaranteeing the freedom of association.

6. The respondent no.1 SEC in its counter affidavit has stated (i) the term "political party" is defined in Section 2(1) (f) of the Representation of People's Act, 1951 (RP Act) as an association or a body of individual citizens of India registered with the Election Commission as a political party under Section 29A; hence, to enjoy the status of a political party, any such association has to be registered under Section 29A of the Act; (ii) the Election Symbols (Reservation and Allotment) Order, 1968 (Elections Symbol Orders 1968) specifies the symbols that may be chosen by the candidates at elections in Parliamentary or Assembly Constituencies and the restrictions to which their choice shall be subject; the said Order also lays down the criteria / conditions for recognition of a political party (registered under Section 29A of the Act) as a National Party or a State Party; (iii) that as per the scheme of the statute relating to Election Laws in India, the registration and recognition of political parties is the prerogative of the ECI and symbols are recognised for recognised parties only; (iv) the Delhi Municipal Corporation Act, 1957 (MCD Act) vests the superintendence, directions and control of the preparation of electoral rolls for, and the conduct of, all elections to the MCD in the respondent no.1 SEC; (v) the Delhi Municipal Corporation (Election of Councillors Rules) Rules are issued/notified under the provisions of Section 7 of the MCD Act; (vi) that as per the scheme of the MCD Act and said Rules and the Orders issued thereunder, there is no provision for registration of political parties and for all purposes, the National Parties and State Parties for the NCT of Delhi as are recognised by the ECI under Section 29A of the RP Act, are recognised as such by the respondent no.1 SEC; (vii) that as per the scheme of the MCD Act, the respondent no.1 SEC only recognises those parties which are registered and recognised with the respondent no.2 ECI; (viii) that it is for this reason that under the MCD Act and the Election of Councillors Rules, the symbols used by the parties recognised by the respondent no.2 ECI are reserved under the very same name and those very symbols, as reserved by the respondent no.2 ECI under the Election Symbols Order, 1968; (ix) accordingly a list of "free symbols" to be chosen by other candidates (independents) is issued by the respondent no.1 SEC; (x) the candidates belonging to unrecognised parties registered by the respondent no.1 ECI are also treated as independent candidates for all purposes including the number of proposers required and allotment of symbols and are not given any preference over any independent candidates in allotment of free symbols or allotted only one free symbol for all its candidates; (xi) without recognition, no reserved symbol can be allotted; (xii) reserving of a particular election symbol is privilege given only to recognised National and State Parties on fulfillment of certain conditions; (xiii) the case of unrecognised parties and independent candidates cannot be equated to that of recognised parties; (xiv) the MCD Act or the Election of Councillors Rules do not envisage recognition or de-recognition of the political parties and the said powers are concentrated in the respondent no.2

ECI; (xv) allotment of free symbol before the filing of nomination papers is contrary to the provisions of Election Symbols Order, 1968; and, (xvi) that on every occasion of General Election, there are approximately 2000 independent candidates contesting the said election and if symbols are reserved for every independent candidates for future elections also, there ought to be 2000 free symbols for every occasion.

7. The petitioner in rejoinder has pleaded (i) that the provisions making registration and recognition of political parties a sole prerogative of the respondent no.2 ECI have to be tested on the grounds of being constitutional, reasonable, legal, proper and valid; and, (ii) neither MCD Act nor any of the Rules or Orders bar the relief claimed by the petitioner.

8. The petitioner appearing in person, during the hearing, reiterated his case. The counsel for the respondent no.1 SEC besides taking me through the provisions cited in the counter affidavit, also drew attention to Rule 15 of the Delhi Municipal Corporation (Election of Councillors) Rules, 2012 requiring the SEC to recognise the parties and adopt the symbols subject to the conditions mentioned therein inter alia to the effect a) that the National Parties and the State Parties recognised by the ECI are to be recognised under the very same name by the SEC; b) the National Parties and the State Parties recognised by the ECI shall use only those very symbols which are reserved for them by the ECI and not any other symbol; and, c) the facsimiles of the symbols thus allowed shall not be different from the facsimiles prescribed and recognised by the ECI and the SEC shall also adopt free symbols as have been notified by the ECI for the time being in respect of elections to Lok Sabha and Legislative Assembly for the NCT of Delhi. It was further argued that as the ECI amends its Election Symbols Order from time to time, the SEC also issues an Election Symbols Order at the eve of every General Election to the MCD in consonance with the free symbols available; a copy of the order dated 6th March, 2012 issued by the SEC has been filed along with the written submissions. Attention was also invited to Rule 24 of the Election of Councillors Rules to contend that there is no provision to allot a reserved symbol or even a free symbol to other candidates including independents, in anticipation of the elections, to enable campaigning as recognised parties do. Reliance was placed on Subramanian Swamy Vs. Election Commission of India , (2008) 14 SCC 318 rejecting the contention that providing the symbols and reserving them for the recognised political parties alone amounted to an undemocratic act.

9. I have considered the controversy.

10. I am at the outset reminded of the basic premises relating to election law and which is often found escaping the attention in the context of challenge to the elections and/or to the procedure of the election, that, a right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right; it is pure and simple, a statutory right; so is the right to be elected; so is the right to dispute an election. It was

so held in *Jyoti Basu Vs. Debi Ghosal*, (1982) 1 SCC 691 where it was further held that outside of statute, there is no right to elect, no right to be elected and no right to dispute an election - statutory creations they are, and therefore, subject to statutory limitation. It was further reasoned that an election petition is not an action at Common Law, nor in equity; it is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. Concepts familiar to Common Law and Equity were held to be strangers to Election Law unless statutorily embodied. It was held that a Court has no right to resort to them on considerations of alleged policy because policy in such matters is what the statute lays down. The petitioner herein also, instead of citing any provision of law under which he has been wrongly denied the relief claimed by him and is entitled to the relief, is seeking the relief de hors the provisions if not contrary to the provisions and which he forgets, in the matter of elections he is not entitled to. Not only so, the petitioner in the petition has not even challenged the provisions of law which do not entitle him to the relief but entitle others similarly placed as him, as claimed by him, to the relief.

11. The MCD Act (i) vide Section 3A provides for division of the area of Corporation into number of zones and of each zone into a number of wards as specified in the 14th Schedule; (ii) vide Section 3 provides for the establishment of Municipal Corporations to be composed inter alia of councillors to be chosen by direct election on the basis of adult suffrage from various wards which the corporation comprises of; (iii) vide Section 4 provides that a Corporation, unless sooner dissolved under section 490, shall continue for five years from the date appointed for its first meeting and no longer and for an election to constitute a Corporation to be completed before the expiry of its duration or before the expiration of a period of six months from the date of its dissolution; (iv) vide Section 5 provides for delimitation of wards; (v) vide Section 7, vests the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Corporation in the Election Commission of the NCT of Delhi consisting of an Election Commissioner to be appointed by the Administrator; (vi) vide Section 8 prescribes the qualifications to be chosen as a councillor and vide Section 9 prescribes the disqualifications for membership of Corporation; (vii) vide Section 10 confers on every persons whose name is for the time being entered in the electoral roll for the ward to vote at the election of a councillor from that ward; (viii) vide Section 11 provides for holding of a general election of the councillors for constituting a Corporation by issuance of Notification(s) calling upon the wards to elect the councilors; (ix) vide Section 14 provides for publication of result of election; (x) vide Sections 15 to 19 provides for questioning the election of a councillor and in Sections 22 to 30 provides for corrupt practices and electoral offences and penalties therefor; and (xi) vide Section 31 empowers the Central Government to make rules to provide for or regulate all or any matters prescribed therein for the purpose of preparation, revision and maintenance of electoral rolls of wards and holding elections.

12. Nowhere in the MCD Act is there any reference to recognised political party or to allocation of symbols for contesting an election. MCD Act as aforesaid vests the conduct of the elections absolutely in the SEC, subject only to the other provisions mentioned hereinabove.

13. The Central Government in exercise of Rule making power under Section 31 of the Act enacted the Election of Councillors Rules, 1970 which were in force at the time of filing of the petition but which stand substituted by the Election of Councillors Rules, 2012 notified on 28th February, 2012. Rule 15 thereof under Chapter-I titled "Nomination of Candidates" in Part III thereof titled "Conduct of Elections" deals with symbols and is as under:-

"15. Symbols: (1) For the purpose of election to a Municipal Corporation of Delhi, the National Parties and State parties for the National Capital Territory of Delhi, as are recognized for the time being by the Election Commission of India in the National Capital Territory of Delhi, under section 29A of the Representation of the People Act, 1951 and the rules and procedure made thereunder, shall be recognized as such by the Commission. The Commission shall recognize the parties and adopt symbols subject to the following conditions, namely:-

(a) The National Parties and the State Parties recognized by the Election Commission of India shall be recognized under the very same name by the Commission.

(b) The National Parties and the State Parties recognized by the election Commission of India shall use only those very symbols which are reserved for them by the Election Commission of India and not any other symbol, and

(c) The facsimiles of the symbols thus allowed shall not be different from the facsimiles prescribed and recognized by the Election Commission of India.

(2) A candidate shall be deemed to have been set up by a political party only if the candidate has made a declaration to that effect in the nomination paper first filed by him and duly supported by all authorised to such effect by the party concerned.

(3) The Commission shall also adopt free symbols as have been notified by the Election Commission of India for the time being in respect of elections to Lok Sabha and Legislative Assembly for the National Capital Territory of Delhi.

(4) The Commission shall specify by notification in the official Gazette, the symbols that may be chosen by candidates and the restrictions to which their choice shall be subject.

(5) Where at any such election, more nomination papers than one are delivered by or on behalf of a candidates, the declaration as to symbols, made in the nomination paper first delivered, and no other declaration as to symbols, shall be taken into consideration under rule 24 even if that nomination paper has been rejected.

(6) A failure to complete, or a defect in completion the declaration as to symbols in a nomination paper shall not be deemed to be a defect of a substantial character within the meaning of sub-rule (4) of rule 22."

14. It would thus be seen that it is under Rule 15 supra that the National and the State Parties are recognised for the purpose of election to the Corporation and are restricted to the symbol reserved for them by the ECI. It is also as per the said Rule that the symbols notified by the ECI as free "for the time being" in respect of elections to Lok Sabha and Legislative Assembly for NCT of Delhi are notified. The position, in this respect, is not found to be any different under the Election of Councillors Rules, 1970.

15. Rule 15 supra requires the SEC to specify by Notification in the Official Gazette the symbols that may be chosen by candidates and the restrictions to which their choice is subject. This is necessary because a symbol which was free at the time of one election may not be free at the time of a subsequent election.

16. Supreme Court, in Subramanian Swamy supra, has negated the contention of discrimination in providing the symbols and reserving them for the recognized political parties and not for others. The petitioner thus cannot be heard to make any grievance with respect to being discriminated against or being at a disadvantage vis-A -vis recognised political parties on the said count. Once that is so, the other reliefs claimed by the petitioner also do not survive. What the petitioner is wanting is, to retain the symbol for the next election also and which as per the law is only for recognised political parties and which law has been held to be not discriminatory.

17. Once there is to be no reservation, no error is also found in the modus provided in the Orders issued from time to time for allotment of a free symbol by draw of lots in the event of more than one candidate desiring the same symbol. The reservation claimed by the petitioner is also contrary to the Election of Councillors Rules which provide only for the free symbols being notified at the time of each election.

18. I may add that the matter is also not res integra. I find that the Supreme Court, as far back as in Samyukta Socialist Party Vs. Election Commission of India , AIR 1967 SC 898, after noticing that when two or more candidates desire the same symbol, there is drawing of lots to determine who should get it and that a free symbol becomes free symbol again after it has been used in an election by a candidate, held that a notification of free symbols before each election is necessitated because circumstances change, parties may come into existence and parties may go out of existence; parties may unite or parties may separate- all this will require amendment of notification. Supreme Court, in Kanhiya Lal Omar vs. R.K. Trivedi , (1985) 4 SCC 628 held that Election Commission of India is empowered to issue Symbols Order in exercise of power of superintendence, direction and control of elections and has not issued the Symbols Order as a delegate of any other authority. It was also observed that

the provisions of Election Symbols Order, 1968 are Constitutionally valid. Recently also in *Desiya Murpokku Dravida Kazhagam vs. The Election Commission of India*, (2012) 7 SCC 340 it was held that Election Commission of India has been clothed with plenary powers in the matter of conducting of elections, which includes the power to allot symbols to candidates during elections; the challenge to the validity of reasonableness and validity of provisions of Symbols Order setting down poll performance criterion for gaining recognition as a political party was dismissed by the majority view though arguments as of the petitioner herein found favour to the minority view.

19. The petition is dismissed.

No costs.