

(2022) 12 DEL CK 0028

In the Delhi High Court

Case No : Civil Writ Petition No. 16512 Of 2022, Civil Miscellaneous Application
No. 51890 Of 2022

Nand Kishore

APPELLANT

Vs

State Election Commissioner & Ors.

RESPONDENT

Date of Decision : 02-12-2022

Acts Referred:

Constitution Of India, 1950 — Article 226, 329, 329(b)
Delhi Municipal Corporation (Election of Councillors) Rules, 2012 — Rule 1, 15
Delhi Municipal Corporation Act, 2022 — Section 17
Delhi Municipal Corporation Act, 1957 — Section 7

Citation : (2022) 12 DEL CK 0028

Hon'ble Judges : Vikas Mahajan, J

Bench : Single Bench

Advocate : Satya Prakash Gautam, Bharti Jain, Sachin Shukla, Nand Kishor,
Amit Sharma, Sameer Vashisht

Final Decision : Dismissed

Judgement

Vikas Mahajan, J

1. The petitioner is contesting as an independent candidate from Ward No.228 (Maujpur) in the ensuing MCD elections. The case of the petitioner is that after acceptance of his nomination papers, he chose his symbol 'Torch' as his first preference and symbol 'Camera' as his second preference. Another candidate i.e. respondent no.3, who is also contesting independently also chose the same symbol 'Torch'.

2. The Returning Officer to resolve the issue had tried mediation and conciliation by calling both the candidates, but since both the candidates were insisting for allotment of 'Torch' as their symbol, the Returning Officer held a draw through coupon/chits, in which the petitioner was successful and accordingly he was allotted 'Torch' as a symbol. According to the petitioner, the other candidate i.e. respondent no.3 did not protest at that point of time as she had chosen another

symbol i.e. 'Nagrik'. This process of allotting the 'Torch' as symbol, as per the petitioner, was videographed by the Returning Officer.

3. Pursuant to the allotment of symbol, the petitioner also ordered for publication of election material. Subsequently, on 22.11.2022 it transpired from the official website of the State Election Commission that symbol 'Torch' has been allotted to respondent no. 3 whereas symbol 'Camera' has been allotted to the petitioner. The objection was raised by the petitioner before the Returning Officer and later on a representation was also made by the petitioner to the respondents on 26.11.2022, but the same did not fetch any response.

4. In this factual backdrop, the present writ petition has been filed with the following prayers:-

"(i) Issue an order, direction and/or writ in the nature of certiorari thereby quash the action of the respondent No.2 in allotting the "Torch" Election Symbol to Ms. Babita Sharma;

(ii) Issue an order, direction and/or a writ in the nature of certiorari thereby cancel the Municipal Corporation of Delhi Election- 2022, in Ward No.228-Maujpur;

(iii) Issue an order, direction and/or a writ in the nature of mandamus thereby direct the respondents to re-schedule/reconduct the Elections of the said ward No.228-Maujpur by allotting symbol "Torch" to the petitioner;

(iv) To provide for the costs of the present Writ Petition to the petitioners; and/or

(v) Issue any other or further order, direction and/or a writ, as this Hon'ble Court may deemed fit and proper in view of the facts and circumstances of the case and in the interest of justice."

5. The learned counsel for the petitioner submits that the action of the respondent no.2 in allotting symbol 'Torch' to the respondent no.3 after the same had been allotted to the petitioner held on 16.11.2022 by way of draw of lots which was videographed, is illegal.

6. The learned counsel for the petitioner, drawing attention of the Court to Clause 4(d) of the order dated 02.11.2022 issued by the State Election Commission NCT of Delhi in exercise of the power conferred under Section 7 of the Delhi Municipal Corporation Act, 1957 and Rule 15 of Delhi Municipal Corporation (Election of Councillors) Rules, 2012, submits that all independent candidates are at par for the purpose of allotment of free symbols. Even the candidates belonging to unrecognised parties registered by Election Commission of India have to be treated as independent candidates for all purposes including for allotment of symbols. According to the learned counsel for the petitioner, no preferential treatment could have been given to the respondent no.3 and that too behind the back of the petitioner, when the symbol 'Torch' was allotted to the petitioner by way of lots held on 16.11.2022. He accordingly submits that the action of the

Returning Office is bad in law and should be so held and as a sequitur direction be given to the respondents to allot symbol 'Torch' to the petitioner and Elections of Ward No.228 be re-scheduled.

7. This Court notes that a press release dated 04.11.2022 was issued by the respondent no.1 for General Elections to the Municipal Corporation of Delhi Act, 2022 whereby the following schedule of election was notified:-

"ANNEXURE-2

The schedule of the above Election shall be as under:-

1

Issue of Notification calling upon the wards to elect councilors and commencement of filing of nominations

07.11.2022 (Monday)

2

Last date for filing nominations

14.11.2022 (Monday)

3

Scrutiny of nominations

16.11.2022 (Wednesday)

4

Last date for withdrawal of candidatures

19.11.2022 (Saturday)

5

Date of poll, if necessary

04.12.2022 (Sunday)

6

Counting of votes

07.12.2022 (Wednesday)

7

Completion of elections

15.12.2022 (Thursday)

8. It is the petitioner's own case that he acquired the knowledge of symbol 'Camera' having been allotted to him on 22.11.2022 but the present petition was

filed only on 28.11.2022 and same was listed for the first time before this Court on 01.12.2022. Evidently, the petitioner has not approached the Court with promptitude.

9. Be that as it may, the petition itself is not maintainable at this stage. The elections held under Municipal Acts can be called in question only by an Election Petition and not otherwise. At this stage it would be apt to make reference to the dicta of the Supreme Court in *S.T.Muthusami Vs. Natarajan & Ors.* (1988) 1 SCC. In *S.T.Muthusami* (supra), the question before the Supreme Court was whether the Division Bench of the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India before the declaration of the result of election, in view of the existence of a statutory remedy under the Rules framed under the Act which provides a machinery for settlement of the election disputes relating to Panchayat Council, could have quashed a notification allotting a particular symbol to a candidate.

10. The Supreme Court relying upon the earlier decisions in *N.P.Ponnuswami vs. Returning Officer*, AIR (1952) SCR 218; AIR 1952 SC; and *Nanhoo Mal Vs. Hira Mal*, (1976) 3 SSC 211 held as under:-

"4. The Government Order No. 1677 L.A. dated 8-10-1960 provides that for all the purposes of the Act, District Collector and the Division Development Officer in respect of panchayat constituted under the said Act under the area within their respective jurisdiction, the District Collector in respect of every panchayat union council constituted under the Act in the district under his charge and the Additional Development Commissioner, Madras in respect of every said panchayat union council under the said Act shall be the election authorities. The expression "election authority" is defined by Section 2(9) of the Act as such authority, not being the president or vice-president or a member of the panchayat or the chairman or vice-chairman or a member of the panchayat union council as may be prescribed. Rule 5 of the Rules provides that subject to the superintendent, direction and control of the election authority the Returning Officer shall be responsible for the proper conduct of the election under the rules. Instructions issued by the Election Authority to the Returning Officer regarding the allotment of the symbols cannot, therefore, be construed as interference with the election process by an authority unconnected with the process of election. Even if there is any mistake committed by either the election authority or the Returning Officer in the allotment of symbol to the appellant the said mistake can only amount to a non-compliance with the provisions of the Act or the Rules made thereunder. It is clear from clause (c) of Rule 11 of the Rules made for the purpose of providing a machinery for the decision of election disputes relating to panchayat union councils that every action amounting to such non-compliance with the provisions of the Act and the Rules made thereunder would not automatically vitiate an election. It is only when the election court on a consideration of the entire material placed before it at the trial of an election petition comes to the conclusion that the result of the election has been

materially affected by such non-compliance with any of the provisions of the Act or the Rules made thereunder the election of the returned candidate can be declared void. Rule 1 of the said Rules provides that an election held under the Act whether a member or chairman or vice-chairman of a panchayat union council can be called in question only by an election petition and not otherwise. In these circumstances it has to be seen whether the Division Bench of the High Court was justified in setting aside the Errata Notification issued by the Returning Officer with regard to the allotment of symbols.

5. It is no doubt true that Rule (1) of the Rules made for the settlement of election disputes which provides that an election can be questioned only by an election petition cannot have the effect of overriding the powers of the High Court under Article 226 of the Constitution of India. It may, however, be taken into consideration in determining whether it would be appropriate for the High Court to exercise its powers under Article 226 of the Constitution of India in a case of this nature.

6. In *N.P. Ponnuswami v. Returning Officer* [(1952) 1 SCC 94 : AIR 1952 SC 64 : 1952 SCR 218] , dealing with the question whether a writ petition was a proper remedy which can be availed of by a person aggrieved by any irregularity in the conduct of an election before the result of the election is declared, Fazl Ali, J. on a consideration of the nature of litigation in respect of elections observed thus at page 234:

"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 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 are over, so that the election proceedings may not be unduly retarded or protracted.

(2) In conformity with this principle, the scheme of 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."

7. Having laid down the above principles, the court further held that Article 329(b) of the Constitution of India had the effect of ousting the jurisdiction of the courts with regard to the matters arising between the commencement of the polling and the final selection. Repelling the argument that Article 329(b) of the Constitution ousted the jurisdiction of the courts only with regard to matters arising between the commencement of the polling and the final selection and

that questions relating to nominations could be agitated under Article 226 of the Constitution, this Court observed thus:

"The question which has to be asked is what conceivable reason the legislature could have had to leave only matters connected with nominations subject to the jurisdiction of the High Court under Article 226 of the Constitution. If Part XV of the Constitution is a code by itself, i.e., it creates rights and provides for their enforcement by a special tribunal to the exclusion of all courts including the High Court, there can be no reason for assuming that the Constitution left one small part of the election process to be made the subject matter of contest before the High Courts and thereby upset the time schedule of the elections. The more reasonable view seems to be that Article 329 covers all 'electoral matters'."

8. It is thus seen that in the above decision (which was rendered by the Full Court) this Court first laid down as a matter of general principle that interference with an election process between the commencement of such process and the stage of declaration of result by a court would not ordinarily be proper and next laid down that Article 329(b) of the Constitution had the effect of taking away the jurisdiction under Article 226 of the Constitution also in respect of the disputes arising out of election during the said period.

9. Following the above decision in N.P. Ponnuswami case [(1952) 1 SCC 94 : AIR 1952 SC 64 : 1952 SCR 218] in Nanhoo Mal v. Hira Mal [(1976) 3 SCC 211 : AIR 1976 SC 2140 : (1976) 1 SCR 809] this Court held that the right to vote or stand for election to the office of the President of a Municipal Board is a creature of the statute, that is the U.P. Municipalities Act and it must be subject to the limitations imposed by it. Accordingly, this Court held that the election to the office of the President of the Municipal Board could be challenged only according to the procedure prescribed by that Act and that is by means of an election petition presented in accordance with the provisions of that Act and in no other way. The court further held that the said Act provided only for one remedy, that remedy being an election petition to be presented after the election was over and there was no remedy provided at any intermediate stage. Referring to the decision in N.P. Ponnuswami case [(1952) 1 SCC 94 : AIR 1952 SC 64 : 1952 SCR 218] this Court observed in the above decision at p. 814 thus: (SCC p. 215, p. 5)

"These conclusions follow from the decision of this Court in Ponnuswami case [(1952) 1 SCC 94 : AIR 1952 SC 64 : 1952 SCR 218] in its application to the facts of this case. But the conclusions above stated were arrived at without taking the provisions of Article 329 into account. The provisions of Article 329 are relevant only to the extent that even the remedy under Article 226 of the Constitution is barred as a result of the provisions. But once the legal effect above set forth of the provision of law which we are concerned with is taken into account there is no room for the High Courts to interfere in exercise of their powers under Article 226 of the Constitution. Whether there can be any extraordinary circumstances in which the High Courts could exercise their power

under Article 226 of the Constitution in relation to elections it is not now necessary to consider. All the considerations applied in coming to the conclusion that elections to the legislatures should not be delayed or protracted by the interference of courts at any intermediate stage before the results of the election are over apply with equal force to elections to local bodies.”

11. Reference can also be profitably made to the decision of this Court in *Swaraj India Vs. State Election Commission & Ors.*, 2017 (4) AD (Delhi) 470, where the Division Bench of this Court had refused any interim order granting a common election symbol to all the candidates nominated by a registered unrecognized political party in the then ensuing municipal elections. The Division Bench refused to grant any interim order inter alia citing the practical and functional problems which would arise by granting relief to the appellant therein. The relevant paragraphs of *Swaraj India* (supra) are as under:

“17. In a similar situation, the Supreme Court in *Desiya Murpokku Dravida Kazhagam v. Election Commission of India*, (2009) 16 SCC 781 had stayed the order passed by the High Court directing the Election Commission to grant a common symbol to all candidates of the registered unrecognized party. In the said case, paragraph 12(3)(b) of the Election Symbols Order, 1968 was referred to observe that candidates of the political parties would submit in the prescribed form duly authorised. It was made clear that the three political parties would not be entitled to any preferential treatment in respect of the symbols and no equity would arise in future, when allotment of regular symbol would be considered. Thus, the interim direction issued by the High Court was stayed.

18. In the same appeal, and some writ petitions, another order was passed on 16th March, 2011 in the decision reported as *Desiya Murpokku Dravida Kazhagam (2) v. Election Commission of India*, (2011) 4 SCC 224. Paragraph 1 of the decision observes that on account of paucity of time as the election process had been set in motion in the State of Tamil Nadu, the Supreme Court had focused its attention to possibility of making a temporary arrangement till the Writ Petitions and Special Leave Petition were disposed of. Reference was made to the earlier order in *Desiya Murpokku Dravida Kazhagam* (supra) noted above. Interim arrangement was not found to be feasible and appropriate, for the notification issued and made subject matter of challenge, it was observed, was by of delegated legislation and till the same was stayed, no arrangement could be made. The Supreme Court, therefore, was not inclined to grant interim direction. The Supreme Court, conscious that three registered unrecognised parties were before them, observed that many others could join the band wagon. Grant of interim direction or arrangement would not be justified if prejudice could be caused to any of the stakeholders in the election process. Further, if all registered unrecognized parties were provided with the common election symbol, prima facie, the provision of the Election Symbols Order, 1968 would become completely unworkable.

19. We are conscious and aware of the difference in the factual matrix and issue

under challenge in *Desiya Murpokku Dravida Kazhagam (supra)* before the Supreme Court, and the present appeal. However, the ratio expounded is of relevance, for interim order or direction in such cases is not warranted. We cannot ignore the practical and functional problems which would arise. These would hinder and create obstacles in conduct of free and fair election in a smooth manner.

20. For the aforesaid reasons, we are not inclined to issue any interim order for award of a common election symbol to the appellant in the ensuing municipal elections. The application is dismissed. We clarify that the view expressed above is tentative and *prima facie* and would not be considered as expression of final opinion and would not affect the final outcome of the present appeal.”(emphasis supplied)

12. In view of the above settled law, at this stage, when the election is scheduled to be held day after tomorrow i.e. 04.12.2022, there is no reason to interfere in exercise of powers conferred under Article 226 of the Constitution of India at an intermediate stage of elections before the declaration of result. In any case, the remedy of the petitioner is to file an Election Petition under Section 17 of the Delhi Municipal Corporation Act, 2022 after declaration of results.

13. The learned counsel for the petitioner has also relied upon the judgment of the Supreme Court in *Harbans Lal Sahnia & Anr. Vs. Indian Oil Corpn. Ltd. & Ors.* (2003) 2 SCC 107 as well as a decision of this Court in *Subramanian Swamy Vs. Election Commission of India*, 2008 (100) DRJ 298. I have gone through the decisions minutely and find that the decisions relied upon by the petitioner are not applicable to the facts of this case. None of these decisions deal with the situation where the High Court has interfered at the intermediate stage of elections and has issued directions cancelling allotment of a particular symbol to a candidate and allotted the same to another candidate or has deferred the elections.

14. Another decision of the Supreme Court in *Deoraj Vs. State of Maharashtra & Ors*, (2004) AIR (SCW) 2134 relied upon by the counsel for the petitioner, is also not applicable to the facts of the present case as the same was rendered in the peculiar facts of that case.

15. In view of the above, the writ petition is not maintainable and the writ petition along with application for stay, is accordingly dismissed.

16. Nothing contained hereinabove shall be construed as an expression of opinion on the merits of the case.