

Gohel Sunil Devshi Vs. State Election Commission

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Court : Gujarat

Decided On : Dec-23-1999

Reported in : (2001)1GLR163

Judge : A.M. Kapadia, J.

Acts : [Constitution of India](#) - Articles 226, 243ZA, 243ZG, 324(1), 327 and 329; Gujarat Municipalities Act, 1963 - Sections 2, 14, 80, 80A, 81 and 178(2); Gujarat Municipalities (Conduct of Elections) Rules, 1994 - Rules 7, 8, 11 and 15; [Representation of the People Act, 1951](#) - Sections 30

Appeal No. : Special Civil Application Nos. 10037 and 10041 of 1999

Appellant : Gohel Sunil Devshi

Respondent : State Election Commission

Advocate for Def. : Prashant G. Desai, G.P.,; K.G. Vakharia, Senior Adv.,; S

Advocate for Pet/Ap. : Arun H. Mehta and; P.M. Thakkar, Senior Adv.,; Harin P.

Disposition : Petition dismissed

Judgement :

A.M. Kapadia, J.

1. What is challenged in these two petitions which are filed under An. 226 of the [Constitution of India](#) is the direction dated 8-12-1999 issued by the State Election Commission in view of the amendment made in Rule 7 of the Gujarat Municipalities (Conduct of Elections) Rules, 1994 (hereinafter referred to as 'the Rules' for short) whereby the authorized representatives of the recognized political parties are directed to give notice in form No. B (party mandate letter) indicating as to who is the official candidate and who is the dummy candidate before 3 p.m., on 13-12-1999.

2. As these petitions involve determination of common question of facts and law, I propose to dispose of them by this common judgment.

3. In order to appreciate the controversy between the parties, it would be advantageous to refer to the facts stated in Special Civil Application No. 10041 of 1999.

4. From the averments made in the petitions, it is manifest that election programme for the members of 52 Municipalities was published on 6-12-1999. The election programme is set out by the petitioners in detail in para 3.1 of the petition and it is not necessary to refer to the said programme in detail for deciding the issue involved in these petitions.

5. In Rajpipla Nagarpalika there are 9 wards and 27 candidates of the Bharatiya Janta Party ('B.J.P. for short hereinafter) have filed their nomination papers on the due date. As per the notification dated 6-12-1999, all the candidates were required to obtain a mandate letter from the authorized representatives of the party to which they belonged indicating as to who is the official candidate of the party and who is the dummy candidate, before 3 p.m., on 17-12-1999. However, in view of the amendment made in Rule 7 of the Rules, the State Election Commission, Gandhinagar had directed the candidates to obtain a mandate letter as mentioned above before 3 p.m., on 13-12-1999. The letter dated 8-12-1999 containing the above direction is the subject-matter of the challenge in these two petitions.

6. The petitions are hotly contested by the State Election Commission by filing affidavit-in-reply wherein the powers of the Election Commission, bar of

interference by Court in election matters as envisaged under Article 243ZG of the [Constitution of India](#) and once the election process starts, in view of catena of decisions of the Hon'ble Supreme Court this Court should not interfere, etc., have been narrated in details.

7. The petitions are also hotly contested by newly added respondents i.e., respondent Nos. 5 to 7 in S.C.A. No. 10037 of 1999 and respondent No. 6 in S.C.A. No. 10041 of 1999, who are contesting the elections on behalf of the opposition party and who have objected to the acceptance of the nominations of the petitioners, by filing a detailed affidavit-in-reply, wherein it has been categorically submitted that in view of the decisions of the Hon'ble Supreme Court and in view of the bar contained under Section 243ZG of the [Constitution of India](#), it is not within the powers and domain of this Court to grant interim relief of whatsoever nature as the same would amount to withholding election process.

8. It would be appropriate to mention that the State Government has also been added by the petitioners as party respondent and the State Government by filing affidavit-in-reply has taken the stand supporting the petitioners' case saying that the Election Commission has no power to issue the direction contained in the letter dated 8-12-1999 as it is beyond his competence and jurisdiction.

9. The newly added B.J.P., has also filed affidavit-in-reply supporting the case of the petitioners, however, admitting that the said letter dated 8-12-1999 containing the mandate was received by the B.J.P., by hand delivery.

10. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of L. Chandra Kwnar v. Union of India, AIR 1997 SC 1125 : 1997 (3) SCC 261, it was contended by learned senior Counsels Mr. Thakkar and Mr. Mehta for the petitioners and Mr. S. B. Vakil, learned Counsel for the B.J.P., as well that in spite of the provisions of Section 243ZG of the Constitution, the petitions are maintainable, and therefore, the petitions filed under Article 226 of the Constitution should be entertained.

11. In counter-submission, learned Counsel Mr. Anjaria for the State Election Commission and Mr. Vakhavia for the newly added party-respondents have

vehemently contended that in view of the provisions of Article 243ZG of the Constitution. High Court has no jurisdiction to entertain these petitions, and therefore, the petitions should be rejected.

12. I have considered the submissions advanced and the decisions cited at the Bar. Article 243ZG provides that notwithstanding anything provided in the Constitution, the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made, Article 243ZA shall not be called in question in any Court and no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State. In these two petitions neither the validity of any law relating to the delimitation of constituencies nor the allotment of seats to such constituencies or any election to any Municipality is challenged, and therefore, bar created by Article 243ZG would not apply to the facts of the present case. What is challenged in these petitions is the election process. Therefore, bar created by Article 243ZG would not apply and in view of this, I am of the opinion that the petitions which are filed under Article 226 of the [Constitution of India](#), are maintainable.

13. After having held that the petitions are maintainable under Article 226 of the [Constitution of India](#), now the next question falls for consideration of this Court is the validity of the mandate contained in letter dated 8-12-1999 issued by the State Election Commission. According to the learned senior Counsel for the petitioners, the said letter is ultra vires, null and void, arbitrary, capricious, unjust, against the principles of natural justice since it is contrary to Rule 8 and explanation to Rule 15 of the Rules, and therefore, the reliefs claimed in these petitions should be granted.

14. The aforesaid submission is seriously countered by learned Advocate Mr. Anjaria as well as learned Senior Counsel Mr. Vakharia contending that the mandate contained in the letter dated 8-12-1999 is neither ultra vires nor null and void, but it is legal, valid, just and proper and not contrary to Rule 8 and explanation to Rule 15 of the Rules. According to them, it is not beyond the

powers conferred on the Election Commission by the Rules since it is in consonance and tune with the amendment made in Rule 7 of the Rules. They further contended that since the process of election has already started, petitions under Article 226 of the [Constitution of India](#) should not be entertained because on the ground of invalidity of the direction contained in the impugned letter dated 8-12-1999 as the election can subsequently be called in question in an election petition as is provided for under Section 14 of the Gujarat Municipalities Act, 1963 ('the Act' for short hereinafter).

15. On considering all the rival submissions, I am of the opinion that the word 'election' has by long usage in connection with the process of selection of proper representatives in democratic institutions acquired wide meaning. In the wide meaning, the word is used to connote the entire process culminating in a candidate being declared elected. The Hon'ble Supreme Court in the case of N. P. Ponnuswami v. Returning Officer, AIR 1952 SC 64 has ruled that any matter which has the effect of vitiating 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.

16. The view expressed by the Hon'ble Supreme Court in the above judgment has been reaffirmed by the Supreme Court in following decisions :

(i) Lakshmi Charan Sen v. A.K.M. Hassan Uuaman, AIR 1985 SC 1233,

and

(ii) Inderjit Barua v. Election Commission of India, AIR 1984 SC 1911.

17. At this stage, it would be relevant to refer to the decision of the Supreme Court in the case of Election Commission of India v. Shivaji, AIR 1988 SC 61.. In that case, election was being held under the provisions of the [Representation of the People Act, 1951](#) to Legislative Council of Maharashtra State for Osmanabad-cum-Latur-cum-Beed Local Authorities Constituency. The Governor of Maharashtra by a notification called upon six local authorities constituencies to elect one member from each of the said constituencies. Notification under Section

30 of the [Representation of the People Act, 1951](#) was issued by Election Commission of India fixing the calendar of events for the purpose of holding the elections. Last date for making nominations was 25-9-1987 and the date for the scrutiny of nominations was 26-9-1987 whereas the last date for withdrawal of candidature was 28-9-1987 and the date on which the poll was to be taken was on 18-10-1987 and the election process had to be completed within 21-10-1987. Respondent Nos. 1 to 5 had filed writ petition under Article 226 of the [Constitution of India](#) challenging the validity of the notification issued by the Election Commission of India. Learned single Judge issued notice and passed interim order directing postponement of last date for withdrawal of candidature. Division Bench of the High Court dismissed the petition and while dismissing the petition the High Court did not make any observation as to the effect of the interim order passed by it earlier on the election programme. 18 candidates withdrew their candidatures by 1st October, 1987 which was the last date for withdrawal of candidatures as per the interim order passed by the High Court. The Election Commission considered it fair to postpone the date of poll from 18-10-1987 to some later date. Thereupon, the respondent Nos. 1 to 5 filed review petition seeking a direction to the effect that the election programme be renotified. The Division Bench which dismissed the petition issued notice and stayed elections which was fixed on 18-10-1987. Thereupon, appeal by Special Leave was filed by the Election Commission before the Supreme Court. Pertinent observations made by the Supreme Court while allowing the appeal are in paragraphs 5 and 6 which are as under :

'5. Part XV of the Constitution contains the provisions relating to the elections. Article 324(1) of the Constitution vests the superintendence, direction and control of the preparation of the electoral rolls for and the conduct of all elections to Parliament and to the Legislature of every State and of elections to the offices of the President and the Vice-President held under the Constitution in the Election Commission. Article 327 of the Constitution provides that subject to the provisions of the Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other

matters necessary for securing the due constitution of each House or Houses. In exercise of the power granted under Article 327 of the Constitution, Parliament has enacted the Act to provide for the conduct of elections to the either House of Parliament, to the House or either House of the Legislature of each State, qualifications and disqualifications for membership of those House, corrupt practices and other offences in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections. Article 329(b) of the Constitution provides that notwithstanding anything contained in the Constitution no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

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 or in the House or either House of Parliament or 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 v. Returning Officer, Namakkal Constituency*, 1952 SCR 218 : AIR 1952 SC 64 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 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 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 v. A.K.M. Hassan Umman*, 1985 Supp. (1) SCR 493 : AIR 1985 SC 1233 and in *Inderjit Barua v. Election Commission of India*, AIR 1984 SC 1911 (supra). 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 1st October, 1987 dismissed the petition by its judgment dated 1-10-1987, The relevant part of its judgment 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 AIR 1984 SC 1911 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 v. Chief Election Commissioner, New Delhi*, 1978 (2) SCR 262 : AIR 1978 SC 851 and to see that the election process was completed in a fair manner.'

18. Similar view is expressed by the Hon'ble Supreme Court in the case of *Anugrah Narain Singh v. State of U. P.*, 1996 (6) SCC 303 and in the case of *Umesh Shivappa Ambi v. Angadi Shekara Bosappa*, AIR 1999 SC 1566.

19. Applying the ratio laid down by the Supreme Court in the above referred two decisions, I find that the challenge to the mandate contained in the letter dated 8-12-1999 issued by the Gujarat State Election Commission cannot be examined in these petitions which are filed under Article 226 of the [Constitution of India](#) and the challenge to the said mandate can be made in the properly instituted election petition which may be filed under the provisions of Section 14 of the Act.

20. There is no manner of any doubt that interference with the mandate contained in the letter dated 8-12-1999 would amount interference with the election process

which is time and again decried and criticised by the Supreme Court in several reported judgments. In this connection, it would be appropriate to refer to the decisions of the Supreme Court in the case of S. T. Muthusami v, K. Natarajan, AIR 1988 SC 616 wherein the Supreme Court has held as under :

'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 framed under Section 178(2) of T. N. Act entitled 'Decisions of Election Disputes Relating to Panchayat Union Council', 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.'

21. For the reasons recorded hereinabove, both the petitions fail and they are rejected with no order as to costs. Notice in both the petitions is discharged. Ad-interim relief granted earlier which is in mandatory nature, was based on the order of the Division Bench of this Court in Letters Patent Appeal No. 1730 of 1999 as well as concession made by the learned Government Pleader at the bar, is hereby vacated by restoring status quo ante which was prevailing on the date of filing of the petitions.

22. At this stage, learned Counsel for the petitioners prays that ad-interim relief which was granted earlier may be continued at least for two days so as to enable the petitioners to approach higher forum. I have merely followed the law declared by the Hon'ble Supreme Court in reported decisions, continuance of interim relief would run contrary to the principles of law propounded by the highest Court of the land and hence the prayer to continue ad-interim relief to enable the petitioners to

approach higher forum cannot be entertained and the prayer is hereby rejected.²³. In the net result, both the petitions stand rejected with no order as to costs. Ad-interim relief recorded earlier stands vacated.

24. Petition dismissed.

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