

IN THE HIGH COURT OF PATNA

C.W.J.C. No. 1265 of 1985

Decided On: 02.05.1985

Appellants:**Krishna Ballabh Prasad Singh**

Vs.

Respondent:**Sub-Divisional Officer, Hilsa-Cum-Returning Officer and Ors.**

Constitution of India- Art.226, Art.329(b)- Maintainability of writ application- court has no jurisdiction to entertain any application under Article 226 challenging the order of Returning Officer as per Article 329(b) & Section 80 of Representation of Peoples Act. (Para-8)

Constitution of India- Art.327, 328- Parliament and State Legislature has power to make provisions relating to election of Parliament and State Legislature- writ jurisdiction of High Court are taken by Article 226 itself. (Para-9)

Constitution of India- Art.324- word 'election' bears a wider meaning- conduct of election- read consistently into other provisions of Part XV including Art.329(b)- election commences with filing of nomination and ends only after the candidate is returned. (Para-16)

Writ application not maintainable- petitioner remedy to file election petition- writ court should not grant relief prayed for by the petitioner- writ application failed. (Para-19,22)

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Appellants: **Krishna Ballabh Prasad Singh**
Vs.Respondent: **Sub-Divisional Officer, Hilsa-Cum-Returning Officer and Ors.****Hon'ble Judges/Coram:***Udai Sinha , L.M. Sharma and H.L. Agarwal , JJ.***JUDGMENT****H.L. Agarwal, J.**

1. This writ application, which arises out of an election matter, has been placed before me on account of a difference between the learned Judges of the Division Bench before whom it was originally placed for hearing.

The difference has arisen on the question of maintainability of the writ application in view of the provisions contained in Article 329(b) of the Constitution of India.

2. The main question that falls for consideration is the stage at which the process of election of a candidate contesting an Assembly seat can be said to be complete within the meaning of Article 329(b) of the Constitution of India.

3. The facts which I shall briefly state just hereinafter, are not in controversy except a few.

The petitioner and respondent No. 4 (Ramswaroop Prasad), besides several others, were contesting for the Bihar Legislative Assembly seat from the Islampur Assembly Constituency (Constituency No. 197). This election was held in the month of March, 1985. The petitioner filed his nomination paper as a Communist Party candidate while respondent No. 4 as the Indian National Congress (1) party candidate. The polls in the above mentioned constituency took place on 2nd and 5th of March and the counting of votes was taken up on 6th March. After the counting it transpired that at 61 booths 90% votes had been cast. Allegations of booth capturing by the petitioner were made on the part of respondent No. 4. The Election Commission of India accordingly ordered repolling only in 60 stations. One of the booths, namely, Booth No. 60, was, however, not included in the repolling as the votes at this station were shared by the candidates in reasonable proportions.

4. Repoll was accordingly held on 12-3-85 and after counting, the petitioner was found to have secured the majority votes, namely, 54,352 i.e., 274 votes more than respondent No. 4. Respondent No. 4 filed an application for recounting of the ballot papers but the Returning Officer rejected the application and announced the petitioner as having been duly elected to the Assembly. A certificate of election in Form No. 22 (Annexure 1) was also delivered by the Returning Officer to him. The result was announced by the All India Radio in the evening of 13th March itself and

the newspapers flashed the news on 14th March. The facts are not in controversy so far.

The certificate in Form No. 21C, required to be issued by the returning Officer, was admittedly not sent to the authority concerned. On the other hand on 15-3-85 the Returning Officer issued a notice dated 13-3-85 (Annexure 8) cancelling the election of the petitioner and declaring respondent No. 4 as the successful candidate. The Returning Officer also issued the certificate in Form Nos. 21-C and 22 on 15-3-1985 bearing the date 13-3-1985. by antedating it, as alleged by the petitioner. The name of respondent no 4 was also published in the Official Gazette as the duly elected candidate.

5. The petitioner's grievance is that the order cancelling his election as well as the certificates issued in favour of the respondent No. 4 (including Annexure B to the counter-affidavit), apart from being without jurisdiction and wholly illegal, is also vitiated for infraction of the principles of natural justice.

6. It may be stated that the reason for this dramatic change and the passing of the impugned order is said to be due to a mistake committed by respondent No. 1 in omitting to count the ballot papers of Booth No. 60 (sic) in which the petitioner had secured only 77 and respondent No. 4, 780 votes. Thus respondent No. 4 is said to have secured 429 votes more than the petitioner.

7. In the counter-affidavit filed by respondent No. 1 he has alleged that the petitioner had pressurised him to give the certificate (Annexure 1) even before the completion of the filling up of Form Nos. 21 C and 21 E which were in process and the certificate given to the petitioner by him was due to mistake. The moment the mistake was detected on the report of the Assistant Returning Officers with respect to the omission in counting of the ballot papers of Booth No. 60, the votes were re-totaled and respondent No. 4 was found to have secured higher votes than the petitioner. And accordingly he corrected the mistake and cancelled the certificate given favour of the petitioner and declared respondent No. 4 as the duly elected candidate and issued necessary certificates in his favour. The petitioner has accordingly filed the present writ application for quashing the above orders.

8. The main stand of the respondents is that in view of the bar contained in Article 329(b) of the Constitution of India, this Court has no jurisdiction to entertain any application under Article 226 challenging the order of the Returning Officer. Article 329(b) reads as follows:

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.

Section 80 of the Representation of the People Act, 1951 (for short "the Act") also contains a similar provision, namely, that "no election shall be called in question except by an election petition."

Both the contesting parties have invoked Article 329(b) in support of their respective cases but the main difference between their stands is that whereas, according to the petitioner the election process came to an end immediately on the counting of the votes and announcing the petitioner as the successful candidates; according to the respondents, the election process continued until the certificates in Forms 21C and 22

were issued. According to the learned Counsel for the petitioner, the alleged mistakes said to be detected by the Returning Officer could not be corrected by him as he had become functus officio after the counting of the votes and announcing the result thereof, and the remedy of respondent No. 4 was to challenge the election of the petitioner only by a regular election petition. This controversy between the parties necessitates reference to certain provisions of the Act and the Rules framed there under.

9. Part XV of the Constitution contains provisions relating to elections. Article 327 gives to the Parliament the power to make provision by law with respect to all matters relating to, or in connection with elections to the Parliament or State Legislature. Article 328 empowers State Legislatures to make provision by law with respect to all matters relating to, or in connection with elections to State Legislatures in so far as provision in that behalf is not made by Parliament and subject to the provisions of the Constitution.

The object of enacting Article 329 of the Constitution is obviously to exclude the jurisdiction of the Courts with regard to the matters enumerated in that Article.

Sections 105 and 170 of the Act or any other provisions cannot by themselves in any way affect the jurisdiction of the High Court to issue writs under Article 226. This jurisdiction is, however, taken away not by the Act but by Article 226 itself.

Part V of the Act deals with conduct of election which, as is well known, begins with the first terminus of the election, namely, calling the constituency to election by issuing the notice by the President. This part has been subdivided into various chapters and Chapter V is the relevant chapter for the present case which begins with counting of votes (Section 64). Section 66 provides for declaration of results and that is the most relevant for our purpose. I would do better to quote it:

65. When the counting of the votes has been completed, the returning officer shall, in the absence of any direction by the Election Commission to the contrary, forthwith declare the result of the election in the manner provided by this Act or the rules made there under.

10. The entire argument of Mr. Garg, learned Counsel for the petitioner, was based upon the provisions of Section 66. His argument, as already indicated earlier, was that immediately after the completion of the counting of the votes the Returning Officer, in the absence of direction by the Election Commission to the contrary, has to forthwith declare the result of the election and in as much as the Returning Officer declared the result in favour of the petitioner, the process of election being complete, all subsequent actions of the Returning Officer in recounting or adding the votes of a polling station said to be left out, could not be acts related to the process of the election. The petitioner was, therefore, entitled to maintain the writ application for quashing those acts of the Returning Officer.

According to Section 67, after the result of an election is declared, the Returning Officer has to report the same to the appropriate authority and the Election Commission, and in the case of an election to the Legislature of a State also to the Secretary of that house who shall cause the result to be published in the Official Gazette the declarations containing the names of the elected candidates.

According to Mr. Garg, these acts of reporting the result of the election already declared by the Returning Officer to the various authorities and its subsequent

publication were merely ministerial acts and publication of the result in the Gazette was merely an evidence of the declaration. Learned Counsel posed the question as to whether failure of the publication could take away the right of the successful candidate to be a validly elected member?

There is an obvious fallacy in the argument of the learned Counsel in as much as Section 66 itself in unequivocal terms lays down the manner for declaring the result of the election and that manner is as "provided by this Act or the rules made there under". It is well known principle that if an official act is provided to be done in any prescribed manner then that must be done accordingly.

11. I may now refer to some of the rules of the Conduct of Elections Rules, 1961. Rule 56 is the rule dealing with the counting of votes. Sub-rule (7) thereof reads as follows:

After the counting of all ballot papers contained in all the ballot boxes used at a polling station has been completed--

(a) the counting supervisor shall fill in and sign part II-Result of Counting, in Form 16, which shall also be signed by the returning officer; and

(b) the returning officer shall make the entries in a result sheet in Form 20 and announce the particulars.

12. The Returning Officer had made an announcement in favour of the petitioner on 13-3-1985 as the successful candidate having secured the highest poll which, according to his learned Counsel, was the terminus quo of the process of election. This contention of Mr. Garg has also been accepted by Uday Sinha, J., where it has been said that the declaration cannot be de hors the announcement.

It is, no doubt, true that result of the counting of votes is the main criterion for determining the fate of the contesting candidates and the subsequent acts and formalities enjoined upon the Returning Officers must be in conformity with the said result. Question is whether in the field of law that would complete the process of election or the election process technically would continue till some further formalities are completed. In this connection Rule 64 appears to be relevant which reads as follows:

64. Declaration of result of election and return of election.--The returning officer shall, subject to the provisions of Section 65 if and so far as they apply to any particular case, then--

(a) declare in Form 21C or Form 21D, as may be appropriate, the candidate to whom the largest number of valid votes have been given, to be elected under Section 66 and send signed copies thereof to the appropriate authority, the Election Commission and the chief electoral officer and

(b) complete and certify the return of election in Form 21E and send signed copies thereof to the Election Commission and the chief electoral officer.

13. It was contended by the learned Advocate General as well as by Mr. Balbhadra

Prasad Singh, appearing for respondent No. 4, that the process of election continues till the declaration of the result is made and the manner of making the declaration must be as laid down under Rule 64, namely, in Form No. 21C in the case of an Assembly constituency and certifying the return in Form 21-E to the Election Commission and other officers; may even thereafter "grant of certificate of election to the returned candidate" in Form No. 22 as provided under Rule 66, which reads as follows, was also necessary:

66. Grant of certificate of election to returned candidate,--As soon as may be after a candidate has been declared by the returning officer under the provisions of Section 53, or Section 66, to be elected, the returning officer shall grant to such candidate a certificate of election in Form 22 and obtain from the candidate an acknowledgment of its receipt duly signed by him and immediately send the acknowledgment by registered post to the Secretary of the House of the People or, as the case may be, the Secretary of the Legislative Assembly.

It was on these provisions that it was contended that where a thing is required by statute to be done in a particular way, it shall be deemed to have prohibited that thing being done in any other way see *State of Bihar and Anr. v. J. A.C. Saldhana and Ors.* 1980 B.L.J.R. 18.

14. Some help can be taken from the definition of 'returned candidate' given in Section 79(f) of the Act according to which--

79. Definitions.

xx xx xx

(f) 'returned candidate' means a candidate whose name has been published under Section 67 as duly elected.

Mr. Braj Kishore Prasad who made the reply argument on behalf of the petitioner, however, submitted that no resort could be taken to this definition as it falls under a different part, namely, Part VI, dealing with the 'disputes regarding elections.'

It is no doubt true that this definition occurs in the next part when disputes are raised after completion of the election. Section 81 while dealing with presentation of an election petition calling in question any election, talks of 'election of the returned candidate.' The expression, therefore, has been used by the Parliament in the context of the candidate who has been declared elected under the previous part, and it makes obvious that publication of the name of the successful candidate in the Gazette makes him a 'returned candidate.'

We have already seen that Rules 64 and 66 have also used the expression 'return of election' and 'election to returned candidate'. The definition under Section 79, therefore, cannot be said to be unrelated with the process of election.

15. Mr. Garg had referred to certain passages from the case of *Smt. Indira Nehru Gandhi v. Shri Raj Narain* A.I.R. 1975 S.C. 2229 and paragraphs 320 to 326 in particular, to show that adjudicating power could not be exercised by the executive authority, namely, the Returning Officer in this case, in purported discharge of his function to complete the process of free and fair poll. According to Mr. Garg, if any mistake was committed by the Returning Officer while announcing the result of the

poll in favour of the petitioner, then he had no power or sanction of law to rectify his mistake and usurp the power of the Election Tribunal.

The submissions of Mr. Garg are co-related with his main submission that the process of election came to an end on the counting of the votes and finding out the result thereof.

According to the case of the Returning Officer, he had committed a crucial mistake and, therefore, until any of the candidates was returned according to the prescribed procedure, as submitted by the learned Advocate General on his behalf, he had the necessary authority to correct his mistake.

16. The bogey of arguments raised on behalf of the contesting parties is based on the crucial question as to whether a narrow meaning should be given to the word 'election' or it should be given a wider meaning. In the narrow sense it may mean the final selection of the candidate on the basis of the result of the poll; in the wide sense the word is used to connote the entire process culminating in a candidate declared elected. It is this wider sense in which the word 'election' has been used in part V of the Constitution. The use of the expression 'conduct of the election' in Article 324 also, in my view, specifically points to the wide meaning which can be read consistently into the other provisions occurring in part XV including Article 329(b). The election commences when a nomination paper is filed before a Returning Officer and must be deemed to end only after the candidate is returned. It is one whole continuous integral proceeding and every stage of it is a part of election.

I may also refer to paragraph 642 at page 347, 4th edition, from Volume 15 of the Halsbury's Laws of England dealing with "declaration of result in contested parliamentary election". It reads:

642. Declaration of result in contested parliamentary election.--In a contested parliamentary election, when the result of the poll has been ascertained, the returning officer must forthwith declare to be elected the candidate to whom the majority of votes have been given, return his name to the Clerk of the Crown and give public notice of his name and of the total number of votes for each candidate together with the number of rejected ballot papers under each head shown in the statement of rejected ballot papers.

Chagla, C.J. in *Shankar Nanasaheb Karpe v. Returning Officer, Colaba District and Anr.* MANU/MH/0080/1952 : AIR1952Bom277 observed as follows:

...The real and substantial question that arises for our determination is, what is the interpretation that we must place upon the expression 'election'- used in Article 329(b). Does 'election' mean the result of the election as a result of counting of votes, or has 'election' a wider connotation? In our opinion, reading the expression 'election' in its context, both in Article 329 and in juxtaposition with Articles 327 and 322 and in its setting in Part XV, 'election' must bear a wider meaning than the every limited restricted meaning of the result of an election or the counting of votes. 'Election' has the same meaning as the expression used in Articles 327 and 328, viz, matters relating to or in connection with election. 'Election' is not merely the ultimate decision or the ultimate result. 'Election' is every stage from the time the notification is issued till the result is declared, and even perhaps if there is an election petition, till the decision of the Election Tribunal.

17. I will now come to the two celebrated decisions of the Supreme Court which have been rightly described as the land marks on the subject, namely, N.P. Ponnuswami v. The Returning Officer MANU/SC/0049/1952 : [1952]1SCR218 and Mohinder Singh Gill v. The Chief Election Commissioner MANU/SC/0209/1977 : [1978]2SCR272 . In the former case Fazl Ali, J., speaking on behalf of the Court, observed that "the right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it and it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members and if the legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it". The learned Judge at page 68 observed further thus:

It seems to me that the word 'election' has been used in Part XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature. The use of the expression 'conduct of elections' in Article 324 specifically point to the wide meaning, and that meaning can also be read consistently into the other provisions which occur in Part XV including Article 329(b). That the word 'election' bears this wide meaning whenever we talk of elections in a democratic country, is borne out by the fact that in most of the books on the subject and in several cases dealing with the matter, one of the questions mooted is, when the election begins...the word 'election' can be and has been appropriately used with reference to the entire process which consists of several stages and embraces many steps some of which may have an important bearing on the result of the process.

Again at page 69 it was observed:

...I think it will be a fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage.

In Mohinder Singh Gill's case (supra) the Supreme Court referred to the various observations made in Ponnuswami's case and the most relevant of which, in my view, is the following observation made in paragraph 26 of the Report:

The rainbow of operations, covered by the compendious expression 'election' thus commences from the initial notification and culminates in the declaration of the return of a candidate.

And ultimately concluding in paragraph 93 it was said:

We conclude stating that the bar of Article 329(b) is as wide as the door of Section 100 read with Section 98.

18. From the above discussions I find it extremely difficult to agree with the view of Uday Sinha, J., that the Returning Officer had no jurisdiction to declare respondent No. 4 as the duly elected candidate and return his name in the prescribed forms for publication in the Official Gazette and the said publication in favour of respondent No. 4 is a nullity. I would, however, refrain from making any other observation as in case the petitioner may file an election petition, the observation may not embarrass the learned Judge hearing his case.

19. I agree with Sharma, J, that the writ application is not maintainable and that the petitioner's remedy was to file an election petition and that in any view of the matter, in view of the facts which have been brought on the record, this Court in its writ jurisdiction should not grant the relief prayed for by the petitioner. I, however, do not agree to his observation that "each of these candidates is entitled to maintain an election petition" and in my view it has been rightly submitted by Mr. Balbhadra Prasad Singh that his client, respondent No. 4, being the duly returned candidate, was not required to file any election petition.

20. Mr. Garg had also advanced an argument that cancelling the result of the petitioner (Annexure 8) and issuing the certificates in favour of respondent No. 4 were visited on account of the infraction of the principles of natural justice as the petitioner and his agents and supporters had all left the place after the result was announced.

This argument is fully met, as rightly submitted by the learned Advocate General, with the observations in paragraphs 81 to 91 in Mohindra Singh Gilt's case ; rather, the following observation makes the matter beyond controversy:

...To put the matter beyond doubt, natural justice enlivens and applies to the specific case or order for total re-poll, although not in full panoply but in flexible practicability. Whether it has been complied with is left open for the Tribunal's adjudication.

The Delhi High Court dealing with Mohinder Singh Gill's (supra) had also the occasion to deal with this question and the following observation is opposite to this question:

The scheme of holding elections to the Parliament and legislative assemblies is governed by prescribed time-table for expeditious conclusion of electoral process for purposes of issuing notification under Section 73 of the Act. In the election, apart from numerous candidates who may participate, all the eligible voters who have exercised their franchise are vitally interested in common with the candidates in its proper conclusion. Besides a deferred hearing is also provided by way of Election Petition and no vested or civil rights are involved till the declaration of the results. The principles of natural justice are not provided specifically but are in fact by necessary intendment totally excluded while passing the impugned order.

21. I have said enough and now I must conclude by borrowing the observations from Ponnuswami's case and hold that law of election in India does not contemplate that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution, and the other after they have been completed, by means of an election petition.

22. In the result, agreeing with the views of L.M. Sharma, J., I would hold that this application must fail. It is accordingly dismissed, but in the peculiar circumstances of the case, I will leave the parties to bear their own costs.