

LOK PRAHARI

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v.

UNION OF INDIA & ORS

(Writ Petition (Civil) No. 1141 of 2020)

MARCH 27, 2023

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**[DR. DHANANJAYA Y CHANDRACHUD, CJI,
PAMIDIGHANTAM SRI NARASIMHA AND
J. B. PARIWALA, JJ.]**

*Conduct of Election Rules, 1961 – Rule 39-AA – C
Representation of the People Act, 1951 – ss. 59, 94 and 128(1),
amended by Act of 2003 – Challenge to r. 39-AA – Petitioner has
challenged the constitutional validity of rule 39-AA on the ground
that the said rule violates Art. 80(4), Art.14 of the Constitution and
is also contrary to s.123 of the Representation of the People Act,
1951 – Held: The Constitution Bench in Kuldip Nayar v. Union of D
India held that after the amendment, voting to the Council of States
has undergone a material change and that the norm of voting by a
secret ballot has been replaced by open ballot – The Constitution
Bench held that it is only a voter at such an election who refuses to
show the ballot to the authorised agent of his political party, who
forfeits the right to vote – The Court then held that the open ballot
E system which has been put in position “does not mean open to one
and all” and it is only the authorised agent of the political party
who is allowed to see and verify the person for whom the elector
has cast a vote – The Court held that the underlying basis of the
F change in the norm, to an open ballot, was necessitated to prevent
cross-voting and the flouting of party discipline – Therefore, the
challenge must fail in view of the judgment of the Constitution Bench.*

*Representation of the People Act, 1951 – proviso to s.33 – G
Challenge to – Held: The proviso stipulates that a candidate who is
not set up by a recognized political party shall not be deemed to be
duly nominated for election unless the nomination paper is
subscribed by ten proposers who are electors of the constituency –
This lies purely in the realm of legislative policy – There is nothing
per se discriminatory in the provision – Parliament is entitled to
regulate the manner in which nomination papers should be presented
and the requirements for a valid nomination.*

- A **Dismissing the writ petition, the Court**
- HELD: Rule 39-AA of the Conduct of Election Rules 1961**
1. The rationale for the introduction of the provision for voting by open ballot in elections to the Council of States has been examined in a decision of the Constitution Bench in **Kuldip Nayar v Union of India**. The Constitution Bench held that after the amendment, voting to the Council of States has undergone a material change and that the norm of voting by a secret ballot has been replaced by open ballot. The Constitution Bench held that it is only a voter at such an election who refuses to show the ballot to the authorised agent of his political party, who forfeits the right to vote. The Court then held that the open ballot system which has been put in position “does not mean open to one and all” and it is only the authorised agent of the political party who is allowed to see and verify the person for whom the elector has cast a vote. The Court held that the underlying basis of the change in the norm, to an open ballot, was necessitated to prevent cross-voting and the flouting of party discipline. [Paras 11, 12][362-E-G; 363-B-C]
2. The Constitution Bench held that in a general election, secrecy of voting is required to maintain the purity of the electoral system. A voter is entitled to exercise the right to vote in a free and fair manner without disclosing how he has voted. However, the concept of “constituency-based representation” in a general election is distinct from “proportional representation”. In a case of “proportional representation”, voters are subject to party discipline, The Constitution Bench held that it is legitimately open to prescribe the methodology of an open ballot for conducting elections to the Council of States. The Court has held that the amendment does not take away the right to vote, but only regulates the right so as to eliminate the evil of cross-voting by an elector who has been elected to the Assembly of a particular State on the basis of a party nomination. [Para 13][363-E-G]

Proviso to Section 33 of the 1951 Act

3. The proviso stipulates that a candidate who is not set up by a recognized political party shall not be deemed to be duly

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nominated for election unless the nomination paper is subscribed by ten proposers who are electors of the constituency. This lies purely in the realm of legislative policy. There is nothing per se discriminatory in the provision. Parliament is entitled to regulate the manner in which nomination papers should be presented and the requirements for a valid nomination. [Paras 18 and 19][365-D-E]

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Kuldip Nayar v Union of India [2006] 5 Suppl. SCR 1 – relied on.

Case Law Reference

| [2006] 5 Suppl. SCR 1 | relied on | Para 11 | C |
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CIVIL ORIGINAL JURISDICTION: Writ Petition (Civil) No. 1141 of 2020.

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

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| S. N. Shukla, Petitioner-in-person | D |
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K M Nataraj, A.S.G., Ardhendumauli Kumar Prashad, A.A.G., Rajat Nair, Shailesh Madiyal, Ms. Shraddha Desmukh, Ms. Ruchi Gour Narula, Arvind Kumar Sharma, Amit Sharma, Dipesh Sinha, Ms. Pallavi Barua, Ms. Sakshi Upadhyaya, Ms. Aparna Singh, Adarsh Upadhyay, Ashish Madaan, Ms. Shreya Srivastava, Aman Pathak, Ms. Pallavi Kumari, Ms. Ananya Sahu, Advs. for the Respondents.

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The Judgment of the Court was delivered by

DR. DHANANJAYA Y CHANDRACHUD, CJI

1. The jurisdiction of this Court under Article 32 of the Constitution has been invoked by Lok Prahanri, a society registered under the Societies Registration Act 1860. The petitioner has been represented in these proceedings by Mr S N Shukla, who is the General Secretary. Two specific challenges have been set up to the vires of:

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- (i) Rule 39-AA of the Conduct of Election Rules 1961¹; and
- (ii) The proviso to Section 33 of the Representation of the People Act 1951².

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¹ “1961 Rules”

² “1951 Act”

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- A 2. Article 80 of the Constitution provides for the composition of the Council of States. Article 80(1)(b) envisages that the Council of States shall consist of “not more than two hundred and thirty eight representative of the States and of the Union Territories”. The allocation of seats in the Council of States to be filled by representatives of the States and Union Territories is in accordance with the provisions contained in the Fourth Schedule³. Clause (4) of Article 80 stipulates that the representatives of each State in the Council of States shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote. As regards the Legislative Councils, Article 171(3)(d) stipulates that one-third of the members shall be elected by the members of the Legislative Assembly of the State from amongst persons who are not members of the Assembly.
- B 3. According to the petitioner, for fifty years after the enactment of the 1951 Act, elections to both the Council of States and Legislative Councils were conducted by secret ballot. However, by Act 40 of 2003, Sections 59, 94 and 128(1) of the 1951 Act were amended so as to provide for an open ballot system for elections to the Rajya Sabha. The proviso to Section 59 stipulates that the votes at every election to fill a seat or seats in the Council of States shall be given by open ballot.
- C E Section 94 which protects the secrecy of voting contains a proviso to the effect that the Section shall not apply to a situation where the voting is by open ballot. A similar provision has been made in the proviso to Section 128(1).
- D 4. Rule 39-AA of the 1961 Rules was inserted by a notification dated 27 February 2004. Rule 39-AA reads as follows:
- E F “39AA. Information regarding casting of votes. -(1) Notwithstanding anything contained in rule 39A, the presiding officer shall, between the period when an elector being a member of a political party records his vote on a ballot paper and before such elector inserts that ballot paper into the ballot box, allow the authorised agent of that political party to verify as to whom such elector has cast his vote: Provided that if such elector refuses to show his marked ballot paper to the authorised agent, he shall be deemed to have cast his vote.”
- G H ³ clause (2) of Article 80

agent of his political party, the ballot paper issued to him shall be taken back by the presiding officer or a polling officer under the direction of the presiding officer and the ballot paper so taken back shall then be further dealt with in the manner specified in sub-rules (6) to (8) of rule 39A as if such ballot paper had been taken back under sub-rule (5) of that rule.

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(2) Every political party, whose member as an elector casts a vote at a polling station, shall, for the purposes of sub-rule (1), appoint, in Form 22A, two authorised agents.

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(3) An authorised agent appointed under sub-rule (2) shall be present throughout the polling hours at the polling station and the other shall relieve him when he goes out of the polling station or vice versa.”

5. The petitioner has sought to challenge the constitutional validity of Rule 39-AA on the ground that it is (i) ultra vires Article 80(4) of the Constitution; (ii) violative of Article 14; and (iii) contrary to the provisions of Section 123(2) of the 1951 Act.

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6. We have heard Mr S N Shukla, petitioner, who appears in person, Mr K M Nataraj, Additional Solicitor General for the Union of India and Mr Amit Sharma, counsel appearing on behalf of the Election Commission of India.

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7. Though in the petition, the entirety of Rule 39-AA is sought to be challenged, Mr S N Shukla, submits that the Rule should be read down in an appropriate manner.

8. In order to appreciate the submission, it would be necessary to advert to the salient provisions of Rule 39-AA. Rule 39-AA stipulates that when an elector who is a member of a political party records his vote on a ballot paper, they must allow the authorised agent of that party to verify as to whom such an elector has cast his vote before the ballot paper is inserted into the ballot box. If the elector refuses to show the marked ballot paper to the authorised agent of his political party, the ballot paper has to be taken back by the Presiding Officer or Polling Officer and is to be dealt with in the manner prescribed in sub-Rules (6) to (8) of Rule 39A, as if the ballot paper had been taken back under sub-Rule (5).

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- A 9. Sub-Rules (6) to (8) of Rule 39A are in the following terms:
- “(6) After the ballot paper has been taken back, the presiding officer shall record on its back the words “Cancelled: voting procedure violated” and put his signature below those words.
- B (7) All the ballot papers on which the words “Cancelled: voting procedure violated” are recorded, shall be kept in a separate cover which shall bear on its face the words “Ballot papers: voting procedure violated”.
- C (8) Without prejudice to any other penalty to which an elector, from whom a ballot paper has been taken back under sub-rule (5), may be liable, vote, if any, recorded on such ballot paper shall not be counted.”
- D Sub-Rules (6) to (8) of Rule 39A stipulate that after the ballot paper has been taken back, the Presiding Officer shall record an endorsement on it that it has been cancelled.
- E 10. The submission which has been urged is that, as a consequence of the above procedure, the elector would lose the right to vote under Article 80(4) of the Constitution.
- F 11. The rationale for the introduction of the provision for voting by open ballot in elections to the Council of States has been examined in a decision of the Constitution Bench in **Kuldip Nayar v Union of India⁴**. The Constitution Bench held that after the amendment, voting to the Council of States has undergone a material change and that the norm of voting by a secret ballot has been replaced by open ballot. The Constitution Bench held that it is only a voter at such an election who refuses to show the ballot to the authorised agent of his political party, who forfeits the right to vote. The Court observed:
- G “439. The effect of the amended Rules, thus, is that in elections to the Council of States, before the elector inserts the ballot paper into the ballot box, the authorized agent of the political party shall be allowed to verify as to whom such an elector casts his vote. In case such an elector refuses to show his marked ballot paper, the same shall be taken back and will

H ⁴(2006) 7 SCC 1

be cancelled by the Presiding Officer on the ground that the voting procedure had been violated. There is, therefore, a compulsion on the voter to show his vote.” A

12. The Court then held that the open ballot system which has been put in position “does not mean open to one and all” and it is only the authorised agent of the political party who is allowed to see and verify the person for whom the elector has cast a vote. The Court held that the underlying basis of the change in the norm, to an open ballot, was necessitated to prevent cross-voting and the flouting of party discipline. The Court held:

“451. It cannot be forgotten that the existence of political parties is an essential feature of our parliamentary democracy and that it can be a matter of concern for Parliament if it finds that electors were resorting to cross-voting under the garb of conscience voting, flouting party discipline in the name of secrecy of voting. This would weaken the party discipline over the errant legislators. Political parties are the *sine qua non* of parliamentary democracy in our country and the protection of party discipline can be introduced as an essential feature of the purity of elections in case of indirect elections.” C

13. The Constitution Bench held that in a general election, secrecy of voting is required to maintain the purity of the electoral system. A voter is entitled to exercise the right to vote in a free and fair manner without disclosing how he has voted. However, the concept of “constituency-based representation” in a general election is distinct from “proportional representation”. In a case of “proportional representation”, voters are subject to party discipline. The Constitution Bench held that it is legitimately open to prescribe the methodology of an open ballot for conducting elections to the Council of States. The Court has held that the amendment does not take away the right to vote, but only regulates the right so as to eliminate the evil of cross-voting by an elector who has been elected to the Assembly of a particular State on the basis of a party nomination. The Court held:

“461. By the amendment, the right to vote is not taken away. Each elected Member of the Legislative Assembly of the concerned State is fully entitled to vote in the election to H

- A the Council of States. The only change that has come owing to the impugned amendment is that he has to disclose the way he has cast the vote to the representative of his Party. Parliament would justify it as merely a regulatory method to stem corruption and to ensure free and fair elections and more importantly to maintain purity of elections. This Court has held that secrecy of ballot and purity of elections should normally co-exist. But in the case of the Council of States, the Parliament in its wisdom has deemed it proper that secrecy of ballot should be done away with in such an indirect election, to ensure purity of election.”
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- C 14. The challenge in the petition, as framed, is to the validity of Rule 39-AA. The challenge must fail in view of the judgment of the Constitution Bench. However, the petitioner, appearing through Mr S N Shukla, submits that the Rule should be read down. The manner in which he proposes that the Rule should be re-interpreted is by postulating that
- D in the event that the elector does not show the ballot to the agent of the political party, the Presiding Officer should disclose the ballot to the agent of the political party. In that event, it was urged, there would be no loss of the right to vote *per se*.
- E 15. Apart from the fact that this is not the canvas of the petition, as drafted, even on merits, we do not find any substance in the plea.
- F 16. The fact that an alternate means could subserve the same end would not make the Rule unconstitutional. As the Constitution Bench held, the Rule does not prevent or foreclose the exercise of the right to vote but only regulates it. The cancellation of the ballot is in a situation where the elector refuses to disclose it to the agent of his political party. The elector having evinced an intent not to disclose the vote to the agent of their political party, it would be far-fetched to still sustain the vote by casting the burden on the Presiding Officer to disclose the vote to the authorised representative of the political party. As the Constitution Bench also noted, this does not violate a free and fair election. The provision was inserted specifically to prevent cross-voting in elections to the Council of States. In this backdrop, there is no merit in the challenge.
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- H 17. The second challenge which has been addressed in the petition is to the proviso to Section 33 of the 1951 Act. Sub-section (1) of Section 33, in its substantive part, and the first proviso, are set out below:

“33. Presentation of nomination paper and requirements for a valid nomination.—

(1) On or before the date appointed under clause (a) of section 30 each candidate shall, either in person or by his proposer, between the hours of eleven o’clock in the forenoon and three o’clock in the afternoon deliver to the returning officer at the place specified in this behalf in the notice issued under section 31 a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer:

Provided that a candidate not set up by a recognised political party, shall not be deemed to be duly nominated for election from a constituency unless the nomination paper is subscribed by ten proposers being electors of the constituency.”

18. The proviso stipulates that a candidate who is not set up by a recognized political party shall not be deemed to be duly nominated for election unless the nomination paper is subscribed by ten proposers who are electors of the constituency.

19. This lies purely in the realm of legislative policy. There is nothing *per se* discriminatory in the provision. Parliament is entitled to regulate the manner in which nomination papers should be presented and the requirements for a valid nomination.

20. In view of the above discussion, we find no merit in the petition. The petition shall accordingly stand dismissed.

21. Pending application, if any, stands disposed of.