

Delhi High Court

R.M. Bagai vs Union Of India And Ors. on 13 January, 1994

Equivalent citations: 53 (1994) DLT 273, 1994 (28) DRJ 274

Author: V Jain

Bench: P Bahri, V Jain

JUDGMENT Vijender Jain, J.

(1) This writ petition has been brought for issuance of writ of mandamus requiring the respondents to immediately and forthwith revise and up-to-date the electoral rolls of Delhi before the elections to the Municipal Corporation of Delhi are held in February 1994.

(2) This petition was filed on December 23, 1993 and on the following day the notice to show cause had been issued and the respondents were restrained from issuing any notification regarding holding of any elections for Municipal Corporation of Delhi till the next date of hearing i.e. January 5, 1994. Before that date the respondents moved an application C.M.9458/93 for vacation of the stay order and on December 31, 1993, the court directed for issuance of notice to the petitioner for 2 P.M. on the same day and then the learned Vacation Judge vide order dated December 31, 1993, permitted the respondents to issue the notifications for holding the elections but made it clear that issuance of such notifications would be subject to the result of the writ petition.

(3) On December 30, 1993, a notification had been issued by the Administrator of the National Capital Territory of Delhi by which he determined the number of wards 276 as 134 and also the extent of each of these wards as contained in table A annexed with the notification. On the same date another notification was issued by the Election Commissioner for the National Capital Territory of Delhi under sub-section (6) of Section 3 of the Delhi Municipal Corporation Act, 1957, as amended by Act 67 of 1993 (for short 'the Act') by which the seats reserved for scheduled castes and for scheduled castes women and for women in general category were detailed out.

(4) A notification under Section 11 of the Act was issued by the Election Commissioner for holding general elections to the Municipal Corporation of Delhi and another notification was issued on December 31, 1993, under proviso to sub-section (1) of Section 7E of the Act by which the Election Commissioner ordered that the electoral rolls of the Delhi Assembly Constituencies, for the time being in force, as related to the wards shall be the electoral rolls of the wards of. general elections to be held thereafter.

(5) A spate of writ petitions have been filed challenging the aforesaid notifications. For the present we have heard the arguments in this petition and have heard counsel who have raised similar challenges in other writ petitions as well. Following propositions have been urged on behalf of counsel for the petitioners in challenging the various notifications, firstly, that notification issued under proviso to sub-section (1) of Section 7E of the Act is not in consonance with the provisions of Law inasmuch as there has been complaints in large number regarding the veracity of the electoral rolls prepared for the holding of the Delhi Assembly Elections which were held in November 1993 and that this notification had been issued without application of mind and does not give any reasons for adopting such defective electoral rolls prepared for the Assembly Constituencies. The challenge

to the notification issued under Section 11 by which the General Elections had been called is two fold that no electoral rolls of the wards have been yet finalised and the law requires that such electoral rolls be in existence before any notification is issued for calling the general elections and the said notification also is bad inasmuch as no dates of elections have been incorporated in that notification which was the mandate of the provision of Section 11 itself. * (6) The first question to be decided in the present case is whether the respondents were legally right in issuing the notification under proviso to sub-section (1) of Section 7E of the Act for adopting the electoral rolls of the Assembly Constituencies for holding the general elections to the Municipal Corporation of Delhi.

(7) Our democratic system adopted in the Constitution of India contemplated grass-root democracy and it was the intention of the Constitution makers that democracy should not be only on the papers but should permeate in every sphere of life of the citizens of this country. With the passage of time there had occurred erosion of democratic institutions which were to work at the grass-root level i.e. Village Panchayats, local bodies in cities, particularly the local bodies in the cities like 277 municipalities and the municipal corporations became totally ineffective inasmuch as at the whim of the State Governments or State Legislatures such like bodies used to be superseded for years and elections to such local bodies would not take place for years together. In order to root out this evil and to revive the vibrant institutions at the grass-root democracy, the Parliament brought about a salutary constitutional amendment termed as the Constitution (Seventy-fourth Amendment) Act 1992. Article 243U inserted by this amendment in the Constitution require that every municipality unless sooner dissolved under any law for the time being in force shall continue for five years from the date appointed for its first meeting and no longer and that an election to constitute a municipality shall be constituted before the expiry of its duration or before the expiration of a period of six years from the date of its dissolution and no municipality was to be superseded or dissolved unless it was to be given reasonable opportunity of being heard. Article 243Z f made it clear that States have to amend their municipal laws and bring in consonance with the provisions of the Constitution within one year and if such amendments are not brought about by the State Legislatures the constitutional provisions would stand incorporated in existing municipal laws without any Act being passed by the Legislatures of the States.

(8) The Delhi Municipal Corporation Act was amended by Amendment Act 67 of 1993 and these constitutional provisions were incorporated in the Delhi Municipal Corporation Act with effect from 1st of October 1993. This being the mandate of the Constitution that the elections to the Municipal Corporation should take place within six months of the expiration of the term of the Corporation the respondents had taken steps for holding such general elections and had issued the aforesaid notifications for that purpose. It is urged on behalf of the respondents that in view of the time constraint the Election Commissioner was justified in issuing the notification under proviso to sub-section (1) of Section 7E of the Act for the purposes of adopting the existing electoral rolls of the Assembly Constituencies as elections to the Assembly of Delhi have only taken place recently.

(9) The petitioner in this writ petition and the learned counsel for the petitioners in the other writ petitions, on the other hand, urged that there is no mandatory direction given in the Constitution for holding the election within six months of the coming into force of the Constitutional Amendment and that the word 'shall' appearing in the Constitution in the said provision is at the most directory

in nature inasmuch as no penal consequences have been contemplated for non-compliance with such requirement. It is argued that in fact, for the already dissolved municipal bodies there is no direction at all given in the amended Constitution or in the Delhi Municipal Corporation Act that the general elections to such municipal corporation must take place within six months from the coming into force of the Constitution (Seventy-fourth Amendment) Act, 1992.

(10) It is true that the Constitution or the provisions of the Delhi Municipal Corporation And particularly Section 490 have not laid down any penal consequences for not holding the elections to the Municipal Corporation within six months or within 278 Delhi Reported Judgments 1994(28) reasonable time but it cannot be said that the court can ignore the mandate of the Constitution and hold that such direction given in the Constitution that the elections must be held within six months of the dissolution of the municipal corporation is merely directory. It is possible that due to certain circumstances beyond human control a particular mandate provision may not be capable of being complied yet for that reason alone it cannot be said that there is no such mandatory provision for holding election to the Municipality or Corporation within a particular period. In the present case the Municipal Corporation stood dissolved since many many years and the amended Constitution has made its intention very clear that election must take place within six months of the expiry of the dissolution. It is evident that in respect of already dissolved municipal bodies the election must take place within six months of the enforcement of the constitutional provision. A Constitution Bench of the Supreme Court in the matter of Presidential Election, Air 1974 Sc 1682, in para 13 had held that in determining the question whether a provision is mandatory or directory, the subject-matter, the importance of the provision, the relation of that provision to the general object intended to be secured by the Presidential and Vice Presidential Elections Act will decide whether the provision is directory or mandatory. It is the duty of the courts to get at the real intention of the legislature by . carefully attending to the whole scope of the provision to be construed. It was held in para 15 that the impossibility of the completion of the election to fill the vacancy in the office of the President before the expiration of the term of the office in the case of death of a candidate as may appear from Section 7 of the 1952 Act does not rob Article 62(1) of its mandatory character. It was laid down that the maxim of law *impotentia excusat legem* is intimately connected with another maxim of law *lex non cogit ad impossibilia*. *Impotentia excusat legem* is that when there is a necessary or invincible disability to perform the mandatory part of the law that *impotentia* excuses. The law does not compel one to do that which one cannot possibly perform. It was held that where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him.

(11) The Supreme Court in the case of Govind Lal Chaggan Lal Patel Vs The Agriculture Produce Market Committee & others, had laid down that plainly, "shall" must normally be construed to mean "shall" and not "may", for the distinction between the two is fundamental. So, it cannot be said that the Election Commissioner was not justified in exercising its discretion for taking resort to the electoral rolls of the Assembly Constituencies of Delhi by virtue of proviso to sub-section (1) of Section 7E of the Act. The reason for issuing such notification is self-evident because the elections to the Corporation under the mandate of the Constitution have to be completed as early as possible. However, the elections have to be held in a manner that the citizens who are residing in Delhi should be able to participate in the said elections and in case there had occurred large scale

omissions in enrolling the voters in the electoral rolls of the Assembly Constituencies the said omissions should not be allowed to continue to exist for holding the general elections for the Municipal Corporation. 279 (12) The petitioner has placed on record copies of the newspaper cuttings which show that there has been great criticism of the electoral rolls prepared for the Delhi Assembly Constituencies as there has been large complaints about omission of names of voters from such electoral rolls for the Delhi Assembly Constituencies. Realizing' such complaints, admittedly, the electoral authorities have issued public notices on December 11, 1993, requiring the citizens to give applications to the concerned authorities for getting their names enrolled in the electoral rolls. It is not disputed before us that large number of such applications have been received and Shri T.T. Joseph, Chief Electoral Officer in his letter dated December 27, 1993, had mentioned that more than four lakhs applications have been received from various persons for inclusion of names in the electoral rolls and he wanted the Electoral Registration Officers to complete the task of verification on or before January 12, 1994. It is quite clear from the statutory provisions that with the announcement of the elections and fixing of the schedule of elections such amendments in the electoral rolls are permissible only up to the last date of making nominations for elections (See 70(3) of the Act). By virtue of proviso to sub-section (1) of Section 7E the electoral rolls of the Assembly Constituencies have been adopted subject to any rules made for the purpose to be the electoral rolls of the wards for the general elections to the Municipal Corporation. It is evident that if those electoral rolls are amended by taking resort to the provisions of the Registration of Electors Rules, 1960. Such amended electoral rolls would be valid electoral rolls for holding the general elections to the Municipal Corporation but such amendment obviously can be made till the last date of receiving the nominations. In the present case, the last date for giving the nominations have been fixed as January 17, 1994. It is evident that till already pending four lakh applications are disposed of one way or the other, it was not fair to have announced the general elections and fix the schedule of the general elections. In the affidavit filed in Court by Sh. D.M.Khaneta, Deputy Election Commissioner of Delhi, it is mentioned that efforts are being made to dispose of the pending applications for amendment of the electoral rolls at the earliest. This affidavit is dated January 12, 1994. If that is so, it is not understood why it became necessary for the Election Commissioner to have issued the notifications under Section 11 for calling the general elections and for fixing the time schedule when this could be easily done after pending applications seeking amendment of the electoral rolls have been disposed of. By issuing the notifications under Section 11 for calling the general elections and fixing the time schedule the respondents in our view have acted in undue haste as the electoral rolls for the wards could not be completed till already pending applications which are large in number had been disposed of. It is made clear that even if some appeals are filed as contemplated under the statute or rules that would not debar the respondents from issuing fresh notifications under Section 11 of the Act. Section 11 of the Act reads as follows:- "11. General elections of councillors-(1) A general election of councillors shall be held for the purpose of constituting the Corporation under section 3. (2)..... 280 (3) For the aforesaid purpose the Election Commission shall, by one or more notifications published in the Official Gazette, call upon all the wards to elect councillors in accordance with the provisions of this Act and the rules and orders made there under before such date or dates as may be specified in the notification or notifications; Provided that where in any ward a seat has been reserved for the Scheduled Castes, such notification or notifications shall specify that the person to fill that seat shall belong to one of the said castes. Provided further that where in any ward a seat has been reserved for woman, such notification or notifications shall

specify that the person to fill that seat shall be a woman."

(13) It is quite clear that in the notification calling for the general elections the dates of elections have to be incorporated therein and the electoral rolls for the wards have to be ready.

(14) The learned counsel for the respondents has vehemently argued that this writ petition should not be entertained as the election process has already commenced. He has placed reliance on Mohinder Singh Gill & another Vs The Chief Election Commissioner, New Delhi and others, . This judgment is not applicable to the facts of the present case because the present petition has been filed even before the notifications were issued calling for the general elections to the Municipal Corporation of Delhi. There is still ample time available with the respondents to complete the elections to the Municipal Corporation of Delhi in accordance with the spirit of the Constitution.

(15) An apprehension was expressed by counsel for the respondents that if fresh notifications are to be issued for calling the general elections then difficulty might arise in holding such elections within the stipulated period as the persons who might attain the age of 18 years on January 1, 1994, may become eligible to be registered as voters. It is quite clear that the Election Commissioner has already adopted the Assembly Electoral Rolls, under proviso to sub-section (1) of Section 7E of the Act vide his order dated December 31, 1993, which order has been upheld and thus, it is not correct to say that the persons who would become eligible to be registered as voters on January 1, 1994, would be entitled to be included in the said electoral rolls.

(16) We allow this writ petition to the extent that we quash the notifications issued under Section 11 of the Act for calling the general elections and fixing the time schedule for the elections. The respondents are at liberty to issue fresh notifications keeping in view the observations made in this judgment.