

MANU/DE/0714/1996

Equivalent Citation: 63(1996)DLT682

IN THE HIGH COURT OF DELHI

Civil Writ Petition Nos. 593 and 1633 of 1994

Decided On: 17.08.1996

Appellants: **Rajinder Kumar Sharma and Anr.**
Vs.

Respondent: **Lt. Governor, Delhi and Ors.**

Hon'ble Judges/Coram:

D.K. Jain and Y.K. Sabharwal, JJ.

Counsel:

R.K. Anand, Arun Bhardwaj, Lokesh Sawhney, Manish Malhotra, Arun Jaitley, Rajinder Aggarwal, A. Ahlawat and Naveen Chawla, Advs

Case Note:

a) It was adjudged that unless the directions of the election commissioner were arbitrary or manifestly perverse or against the principles of natural justice, interference with the direction was not to be called for.

b) The case debated over the scope of the powers of the election commission under Articles 226 of the Constitution of India in context with the enforcement of model code conduct - There were complaints against violation of model code of conduct - It was held that the election commission was competent to entertain the complaints.

c) The case debated over the considerations for cancellation of nomination of board under Sections 5 (1) (b), 5(5) & 5 (7) of the Delhi Agricultural Produce Marketing (Regulation) Act, 1976 - The complaints were pending before election commission against the members of the board - The cancellation of nomination was merely on the basis of communication by election commission calling for factual report about the complainants - Also, no finding of election commission arrived at regarding violation of model code of conduct - It was held that the removal of members on the basis of such communication was illegal

JUDGMENT

D.K. Jain, J.

(1) In these two writ petitions under Article 226 of the Constitution the issues involved and the prayers are common and as such are being disposed of by this common judgment.

(2) The petitioners, who claim themselves to be traders and commission agents have filed these writ petitions assailing Notification No. F. 1 (1) / 81-DAM, dated 10/ 12 November, 1993, issued by the Government of Nct of Delhi (Development Department), Directorate of Agricultural Marketing, Delhi, rescinding its earlier Notification No. F.I/7/81-DAM, dated 6 October, 1993, whereunder the petitioners were nominated as non-official members of the Delhi Agricultural Marketing Board (for short the Board) under Section 5(I)(b) of the Delhi Agricultural Produce Marketing (Regulation) Act, 1976

(hereinafter referred to as the Act), for a period of three years. The effect of the impugned notification was that the petitioners stood removed from the membership of the Board with immediate effect.

(3) Initially in Cwp No. 593/94 there were only two respondents viz. the Lt. Governor of Delhi-respondent No. I and the Special Secretary (Development), Government of Nct of Delhi (Development Department), Directorate of Agricultural Marketing as respondent No. 2. Subsequently an amended writ petition was filed and the Election Commission of India was impleaded as the third respondent. In Cwp No. 1633 /94 the said Authorities have been impleaded as respondents No. I to 3 respectively.

(4) The material facts lie in a very narrow compass and to appreciate the controversy these may briefly be stated as follows : The Act came into force on 5 November, 1976 with the object to provide for the better regulation of the purchase, sale, storage and processing of the agricultural produce and the establishment of markets for the agricultural produce in the Union Territory of Delhi and for matters connected therewith or incidental thereto. To achieve this object. Section 5 of the Act provided that the Administrator shall establish a Board to be known as Delhi Agricultural Marketing Board consisting of a Chairman and 12 other members of whom 4 shall be official and 8 shall be non-official members. The Chairman and all the members are to be nominated by the Administrator as provided in the said Section.

(5) As noted above, the petitioners were nominated by the Administrator under Clause (b) of Section 5(1) of the Act to be non-official members of the Board vide Notification issued on 6 October, 1993 for a period of three years to fill up the vacancies, which had occurred in June/July 1993. By sheer co-incidence the notification for holding the election for Delhi Legislative Assembly was also published on 6 October, 1993. It appears that against the said nominations, a complaint was made to the Election Commission of India objecting to the said nominations on the ground that announcement torn holding the election for the Delhi Legislative Assembly having been made on 21 September, 1993, by making petitioners' nominations, on 6 October, 1993, the Government of Nct of Delhi had violated the Model Code of Conduct issued by the Election Commission of India. According to the petitioners, taking cognizance of the complaint, the Election Commission directed the Government of Nct of Delhi to withdraw its notification dated 6 October 1993. The Government of Nct of Delhi promptly complied with the said directions and rescinded the said Notification dated 6 October, 1993.

(6) The action of respondent No. I, in rescinding its earlier notification dated 6 October, 1993, is challenged as arbitrary, illegal and mala fide primarily on the ground that : (i) a non-official member cannot be removed without affording a reasonable opportunity of showing cause against the proposed action, as contemplated in Section 5(7) of the Act and thus not only the principles of natural justice have been violated even the mandatory provision in the Act has been given a go- bye; (ii) On the facts in hand there is no breach of the Model Code of Conduct issued by the Election Commission of India because : (a) the process of nominating the petitioners to the Board was started much prior to even the date when Assembly elections were announced in September 1993 let alone the date of notification for the elections and it was only a coincidence that both the notifications came to be issued on 6 October, 1993, and (b) the Model Code of Conduct only deals with ad hoc appointments in Government and public undertakings, which have the effect of influencing the voters in favor of the parties, which was not the case here.

(7) The petitions are resisted by the respondents. In the counter-affidavit filed on behalf

of respondents No. 1 and 2 it is stated that after the issue of notification about the nomination of the petitioners as non-official members to the Board, a communication was received from the Election Commission of India objecting to the issue of the said notification as being violative of the Model Code of Conduct for elections, with a direction to cancel the same and Therefore, the Government having no other alternative, rescinded it. It is also stated that since the petitioners had not assumed their office by 11 October, 1993, when, on the directions of Election Commission of India, notification dated 6 October, 1993 was cancelled, there was no question of complying with the procedure laid down for removal of a nonofficial member under Section 5(7) of the Act. It is asserted that it was on account of the directions issued by the Election Commission of India that the notification dated 6 October, 1993 had to be cancelled.

(8) In the counter-affidavit filed on behalf of respondent No. 3 - Election Commission of India, while indicating the relevant clauses of Model Code of Conduct, it is stated that on receipt of a complaint, dated 26 October, 1993, from one M/s. Mars Advertising Pvt. Ltd on 28 October, 1993 about the constitution of the Board revealing violation of Model Code of Conduct, as the Board had been constituted on 6 October, 1993 after announcement of the elections by the Election Commission of India on 21 September, 1993, the Election Commission was constrained to call for a report from the Government of Nct of Delhi in this regard; and accordingly it issued a letter, dated 30 October, 1993, requiring the Government of Nct of Delhi to submit a report on the said complaint; reminder was sent on 5 November, 1993 and on 19 November, 1993 an intimation was received from the Delhi Administration informing the Election Commission that notification dated 6 October, 1993 had been rescinded by issuing the impugned notification.

(9) When Cwp No. 593/94 came up for motion hearing, while issuing show cause notice to the respondents, operation of the impugned notification was stayed but subsequently vide order dated 18 April, 1994 it was clarified that though the notification dated 6 October, 1993 has been rescinded under the orders of the Lt. Governor the fact remained that the Board, already constituted prior to the issue of the said notification, would continue to function. The effect of this order was that the non-official members whose term had expired in June, 1993 continue to be on the Board till date.

(10) We have heard learned Counsel for the parties and have perused the original records made available by learned Counsel for the Government of Nct of Delhi and the Election Commission of India.

(11) Mr. R.K. Anand, Senior Counsel for the petitioners submits that the impugned notification is illegal not only because it has been issued in violation of the principles of natural justice inasmuch as neither respondent No. 1 nor respondent No. 3 has granted any hearing to the petitioners before taking the impugned action; it is also unsustainable because it reflects non-application of mind on their part because both the authorities have failed to examine whether in the nominations of the petitioners any of the instructions enumerated in the Model Code of Conduct is violated. Elaborating on the later part of the argument, learned Counsel contends that the constitution of the Board under Section 5 of the Act is a continuous process, and Therefore, petitioners' nominations to the Board could not, by any stretch of imagination, be said to be an an hoc appointment, prohibited in Clause VII(vi)(d) of the Model Code of Conduct, apart from the fact that these nominations were not made in any Government/public undertaking, which could have the effect of influencing the voters in favor of party in power. He has also urged that respondent No. 3 should have ignored the complaint because it was vague and did not specify as to how the nominations of the petitioners

would influence the voters in favor of party in power, which was a condition precedent to invoke the relevant clause in the Code of Conduct. In any case, respondent No. 1 should have ignored the letter from Respondent No. 3 because the Code of Conduct does not have statutory force.

(12) On the other hand, Mr. W.C.Chopra, learned Counsel for the Election Commission, while supporting the action of respondent No. 1, submitted that the letter of the Election Commission dated 30 October, 1993 was issued to the said respondent only to obtain a report on the complaint and it could not be construed as a final order, directing respondent No. 1 to rescind the notification dated 6 October, 1993. Learned Counsel, however, candidly admitted that no final order was passed by any authority competent to do so after 30 October, 1993. This lapse, he attributed to the rush of work during the election time.

(13) Mr. Arun Jaitley, Senior Advocate, appearing for respondent No. 1- Government of Nct of Delhi contended that the stand now taken by the Election Commission in its counter-affidavit that by communication dated 30 October, 1993 it had only called for a report from respondent No. 1 is not correct inasmuch as the letter itself contained a specific direction to cancel the nominations and, Therefore, in view of such a direction, binding on respondent No. 1, there was no question of complying with the provisions of Section 5(7) of the Act. According to him the powers' of the Administrator under Section 15(7) got eclipsed on account of direction issued by the Election Commission under Article 324 of the Constitution because it could not question the decision of the Election Commission. In support reliance was placed on Mohinder Singh Gill v. Chief Election Commissioner, MANU/SC/0209/1977 : [1978]2SCR272 and A.C. Jose v. Sivan Pillai, MANU/SC/0341/1984 : [1984]3SCR74 . He thus submitted that no fault could be found with the action of respondent No. 1 in rescinding the notification without affording opportunity to the petitioners to show cause against the proposed action, as contemplated in the Proviso to Section 5(7) of the Act. In the passing, taking a clue from the judgment of the Supreme Court in State of U.P. v. U.P. State Law Officers Assn. MANU/SC/1583/1994 : [1994]1SCR348 , Mr. Jaitley urged that in the absence of any guidelines, the petitioners having been nominated purely on political considerations, they cannot now complain of arbitrariness in their removal. In fact he suggested that the Court may lay down certain guidelines which could be observed in making such nominations in future. We reject the last argument at this stage itself because nowhere in the counter-affidavit, filed on behalf of Respondent No. 1, it is stated that the nominations were for political considerations.

(14) In the light of categorical stand of respondent No. 1 that it took letter dated 30 October, 1993 of respondent No. 3, as an order from the Election Commission to cancel the nominations and acted thereon and for the view we are taking in the matter, we feel that it is unnecessary to refer to and discuss in greater detail the provisions of the Act except to mention that Section 5(1)(b) clothes the Administrator with the authority to nominate 8 non-official members from various walks of life to the Board and Sub-section (7) thereof confers power on him to remove from office any non-official member of the Board who has either become subject to any dis-qualification specified in Sub-section (5) or who in his opinion, is remiss in the discharge of his duties or has ceased to represent the interest in which he was nominated. Proviso to the said sub-section provides that no non-official member shall be removed from office except after giving him a reasonable opportunity of showing cause against the proposed action.

(15) It would, however, be necessary to notice some relevant provisions of The Representation of the People Act, 1951 and clauses of the Model Code of Conduct, set out in the counter-affidavit on behalf of respondent No. 3.

(16) Section 19A of the Representation of the People Act, 1951 deals with the delegation of functions of Election Commission and it reads as follows:

"19A. Delegation of functions of Election Commission : The functions of the Election Commission under the Constitution, the Representation of the People Act, 1950 (43 of 1950) and this Act or under the rules made there under may, subject to such general or special directions, if any, as may be given by the Election Commission in this behalf, be performed also by a Deputy Election Commissioner or by the Secretary to the Election Commission."

Thus the Section provides that subject to such general or special directions, as may be given by the Election Commission, its functions may be performed also by a Dy. Election Commissioner or by the Secretary to the Election Commission.

(17) Clause Vii of the Model Code of Conduct, in so far as it is relevant for the present case, reads as under :

"THE party in power whether at the Centre or in the State or States concerned, shall ensure that no cause is given for any complaint that it has used its official position for the purposes of its election campaign, and in particular: (vi) From the time the elections are announced by the Commission, Ministers and other authorities shall not : (a) (d) make any ad hoc appointments in Government and public undertakings etc. which may have the effect of influencing the voters in favor of the party in power"

From the afore noted sub-clause (d) under which the impugned action is taken, it is evident that what is prohibited under it is : (i) an ad hoc appointment in Government and public undertakings and (ii) such an appointment should have the effect of influencing the voters in favor of the party in power.

(18) Article 324(1) of the Constitution of India, inter alia, vests in the Election Commission the power of superintendence, direction and control of the conduct of elections to Parliament and to the Legislature for every State. As observed by the Supreme Court in the case of Mohinder Singh Gill's case (supra) the comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances, to ensure free and fair election, as contemplated in the Constitution but atleast the following two limitations are laid on its plenary character in the exercise thereof:

" FIRSTLY, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission, shall act in conformity with, not in violation of, such provisions but where such law is silent Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from, pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice in so far as conformance to such canone can reasonably and realistically be required of it as fairplay-in-action in a most important area of the constitutional order, viz., elections."

(19) In the counter-affidavit filed on behalf of the Election Commission it is stated that

the Model Code of Conduct is a document arrived at by consensus of all political parties with the aim and object of ensuring the conduct of free and fair election in an independent manner. It is designed to counter the misuse of official power by the Government and the ruling party during election period putting other parties and candidates to disadvantage. Election Commission being charged with the sacred responsibility under Article 324 of the Constitution of conducting free and fair election is duty bound to ensure the strict observance of the Model Code of Conduct by all concerned. It further states that on any information being received by the Election Commission regarding violation of Model Code of Conduct after the announcement of elections, it calls for a report from the Government and decides about the necessary corrective action, "if the violation complained of has or had the effect of influencing the minds of voters infavour of the party and vitiated the purity of election process after it has been announced by the Commission".

(20) Strictly speaking the Model Code of Conduct may not have statutory force, as contended by learned Counsel for the petitioners, but in the light of Article 324(1) of the Constitution and in view of the law laid down by the Supreme Court in Mohinder Singh Gill's case, where The Representation of the People Act, 1951 or the Rules made there under are silent in regard to a particular point relating to the conduct of election, the Election Commission is fully competent to lay down any guidelines or issue appropriate directions for the purpose of accomplishing the paramount object of free and fair election, as contemplated in the Constitution of India, and all concerned are bound to follow them in letter and spirit. This is the pith and substance of Article 324. We are, Therefore, of the view that the Election Commission was within its jurisdiction to take cognizance of the complaint made against the nominations.

(21) The next question which falls for determination is whether the procedure followed by the Election Commission in processing the complaint, which ultimately culminated in the rescission of notification dated 6 October 1993 was fair and just and not arbitrary, as alleged by the petitioners because the Election Commission is equally governed by the Rule of law and clearly bound to work within the framework of statutory Rules or instructions / directions/orders which it may itself make in exercise of powers conferred under Article 324 of the Constitution.

(22) It is well settled that unless the directions or orders issued by the Election Commission are manifestly perverse or arbitrary in nature or against the principles of natural justice, this Court should not normally interfere with the decision of the Election Commission. But if the Election Commission acts in a manner which is contrary to its own instructions/guidelines these would be per se illegal and this Court can definitely interfere.

(23) Before we deal with the question it will be necessary and appropriate at this stage to refer to the official record produced before us by learned Counsel for the Election Commission to ascertain what, if any, decision had been taken by the Commission after receipt of the complaint.

(24) On receipt of the complaint on 29 October, 1993 the Secretary to the Election Commission recorded the following note :

"THE Board was set up on 6.10.90. The term of the 5 members mentioned in the notification is due to expire on 6.10.93 and in their place five non-official members are appointed. No violation of the Code. No action."

(25) The file was put up to the Deputy Election Commissioner, who passed the following

order:

"PLEASE put up factual report"

Accordingly, letter dated 30 October, 1993 was issued by the Secretary to the Commission - respondent No. 3, to the Chief Secretary, Government of Nct of Delhi. Copy of the letter on the record is a cyclostyled proforma wherein the gist of the complaint has been recorded by hand. The letter reads as follows :

"I am directed to state that it has been reported to the Commission that Government of Nct of Delhi has formed Delhi State Agriculture Marketing Board and issued a notification on 6th October, 93 nominating members. If the allegation is true this amounts to violation of Model Code of Conduct. The relevant notification regarding nomination of members may be cancelled. Your report in this respect should reach the Commission latest by 1st Nov' 93. "

The underlined portion is also in hand. Thereafter, as noticed above, a reminder, dated 5 November, 1993, relevant portion extracted below, was issued to the Chief Secretary, Government of Nct of Delhi :

"I am directed to invite your attention to Commission letters of even number dated 30.1.1993, wherein you were asked to submit your report regarding the allegation that the Government of Nctd, has formed the Delhi State Agriculture Marketing Board and issued notifications on 6th October, 1993. Your report is yet to be received. Your report should be sent immediately."

Vide letter dated 19 November, 1993, Director (A..M.) informed the Election Commission about the rescission of the Notification dated 6 October, 1993. The letter reads as follows :

"KINDLY refer to your office letter Nos. 437(6)/DL/93/1537 and No. 437/6/DL/93/PS-11/2023 dated 30.10.93 and 5.11.93 respectively, on the above referred subject. In this context, it is mentioned that the names of the non-official members of Delhi Agricultural Marketing Board were finalised before 21st Sept., 93 when the date for Delhi Election were announced. However the notification in this effect was issued on 6th October, 93. As advised by the Election Commission, the notification issued on 6th October 93, has been rescinded by notification issued on 10th November, 93. A copy of the notification is enclosed."

(26) As noted above, the stand of learned Counsel for the Delhi Government is that the latter part of the Commission's letter dated 30 October, 1993, underlined above, amounts to a direction to cancel the nominations, acting on which cancellation notification was issued, but the stand of Counsel for the Election Commission is to the contrary. According to Counsel for the Election Commission by its letter the Delhi Government was only asked to submit a report on the complaint to enable the Election Commission to take appropriate further action in the matter. This stand is sought to be fortified by making a reference to the letter of Election Commission dated 5 November, 1993 whereby the Delhi Government was asked to send its report immediately.

(27) Without going into the controversy as to whether letter dated 30 October, 1993 was in the nature of a direction to cancel the nominations or not, what clearly emerges from the aforementioned nothings/orders in the file of the Election Commission is that the

above underlined portion of letter dated 30 October, 1993 was not in conformity with but inspire of the orders made in the file by the Deputy Election Commissioner, merely calling for the factual report. On the day the said letter was issued, the Election Commission had not taken any decision as to whether there was any merit in the complaint and the nominations in question deserved to be cancelled or not. We do not find any other order in the file either by the Election Commissioner or the Deputy Election Commissioner, or even the Secretary, assuming, though nothing is shown on record to support it, that the Deputy Election Commissioner or the Secretary had been delegated the power under Section 19A of The Representation of People Act to decide such a matter. Thus the stand in the counter-affidavit, dated 25 July, 1994, of Shri S.K. Mehndiratta, Secretary, Election Commission of India that " in the instant case the Election Commission of India was of the view that there was unmistakably violation of the Model Code of Conduct" is not borne, out, from the record produced before us. Rather it is to the contrary and only a report had been called. In this view of the matter we have no hesitation in coming to the, conclusion that the latter part of letter dated 30 October, 1993 (underlined by us) which was construed as a direction by the Government of Nct of Delhi, was issuer not only without application of mind by the Election Commission but also in excess of the jurisdiction of the Secretary to issue such a letter when no decision regarding cancellation of nominations had been taken or order passed either by the Election Commissioner or Deputy Election Commissioner, who in fact, as his noting reproduced above, suggests, was seized of the matter.

(28) Under these circumstances we are constrained to hold that letter dated 30 October, 1993, was issued by the Secretary arbitrarily, without application of mind by the Commission in utter disregard to Deputy Election Commissioner's direction, dated 29 October, 1993 and thus, the removal of the petitioners from the membership of the Board on the basis of said letter is per se illegal.

(29) For the foregoing reasons Notification No. F.1/81-DAM dated 10/12 November, 1993 is set aside. Consequently Notification No. F.1 /7/81-DAM. dated 6 October, 1993 shall stand revived. Interim orders dated 18 April, 1994 are hereby vacated. The Rule is made absolute. The petitioners will be entitled to costs which we quantify at Rs. 2,500.00 in each of the petitions.

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