

MANU/JH/0104/2008

Equivalent Citation: [2008(2)JCR100(Jhr)]

IN THE HIGH COURT OF JHARKHAND

Decided On: 29.02.2008

Appellants: **State Election Commission**
Vs.

Respondent: **State of Jharkhand and Ors.**

Hon'ble Judges/Coram:

M.Y. Eqbal and Dilip Kumar Sinha, JJ.

Case Note:

Election - Deputation of officers to conduct elections - Writ petition filed praying for issuance of appropriate writ for quashing order as contained in letter No. 2 issued by Personnel Administration Reforms & Raj Bhasha Department Government under direction of State Government, whereby demand of Commission for deputing 35 officers of rank of Joint Secretary as observers had been turned down - Held, restrictions and prohibitions were not warranted inasmuch as admittedly election of municipalities were not being held on party basis and there was no involvement of political parties - However, if these restrictions came into force, entire functioning of Government would come to a standstill - Since, Respondents State had objection only to restriction and prohibitions contained under Clauses 2, 3, 4 and 7 of the Model Code of Conduct, rest of the provisions contained in Model Code of Conduct should be implemented by Commission - Writ petition allowed.

JUDGMENT

M.Y. Eqbal, J.

1. By the instant writ petition, the petitioner-Jharkhand State Election Commission, made a prayer for issuance of appropriate writ for quashing the order as contained in letter No. 2/vividh dated 18.2.2008 issued by the Personnel Administration Reforms & Raj Bhasha Deptt. Government of Jharkhand, Ranchi under the direction of the State Government, whereby demand of the Commission for deputing 35 officers of the rank of Joint Secretary as observers has been turned down. A further prayer has been made for issuance of appropriate direction upon the State Government to implement the Model Code of Conduct issued by the State Election Commission (in short "the Commission").

2. The facts of the case lie in a narrow compass:

As per the constitutional mandate and the direction of Courts the Commission decided to hold elections to the Municipalities which was long due and request and recommendation were made to the Governor of the State. The petitioner-Commission, to ensure free and fair election brought out a Model Code of Conduct from the date the election programme was published.

3. The State Government issued notification giving out election programme for the Ranchi Municipal Corporation, 11 Nagar Parishad and 17 Nagar Panchayat. Petitioner-Commission made a request and recommendation to the Governor of Jharkhand to notify the election programme in the Jharkhand gazette. The Commission then requested the State Government to depute 35 Officers to the commission as observers to ensure free & fair election categorically mentioning therein that such request has already been made to the Governor to notify the election programme and delay in deputing Officers shall adversely affect the election. To the utmost surprise of the petitioner-Commission, the said request has been turned down by the State Government for deputing 35 observers and further informed that there was no provision for enforcing Code of Conduct as promulgated by the Commission.

4. A counter-affidavit has been filed by the respondent-State wherein it is stated that the State of Jharkhand is willing to provide all assistance/cooperation to the petitioner-Commission for conducting fair and peaceful election in the State of Jharkhand. Further it is stated that since the election relates to municipalities including Nagar Panchayats, Municipal Councils, and Municipal Corporations is a party-less election, question of enforcement of Model Code of Conduct does not arise.

5. Mr. Delip Jerath, learned Counsel to the petitioner, firstly drew our attention to Articles 243ZA and 243K and submitted that the State Election Commission is an independent body having important constitution obligation to ensure free & fair election and for that the State Government is bound to give full assistance and cooperation. Learned Counsel submitted that Sections 19-A and 19-B of the Jharkhand Municipal Act clearly confers power to the Commission to ask for deputation of officers to conduct the elections apart from the constitutional provisions. Lastly, learned Counsel submitted that the State Government is bound to depute 35 Officers as demanded by the Commission.

6. Mr. Ram Balak Mahto, learned senior counsel appearing for the respondents-State of Jharkhand, firstly submitted that Articles 324 and 243ZA are pari materia. There is no concept of observer under the Municipal Corporation Act or Rules made thereunder. According to the learned Counsel, the concept of observer finds place in the Representation of Peoples Act. According to learned Counsel, unless there is a law to that effect, the observer cannot exercise power as provided under Section 20B of the Representation of Peoples Act. Learned Counsel lastly submitted that it is a party-less election and, therefore, there is no need of observer. On the Model Code of Conduct, learned Counsel submitted that enforcement of Model Code of Conduct by the Election Commission is wholly misconceived.

7. For better appreciation of the submissions made by the learned Counsels, we would first like to refer Article 243K of the Constitution of India which reads as under:

-K, Election to the Panchayats:-The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested to a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor.

(2) Subject to the provisions of any law made by the Legislature of a State the conditions of service and tenure of office of the State Election Commissioner shall be such as the Governor may by rule determine:

Provided that the State Election Commissioner shall not be

removed from his office except in like manner and on the like ground as a Judge of a High Court and the conditions of service of the State Election Commissioner shall not be varied to his disadvantage after his appointment.

(3) The Governor of a State shall, when so requested by the State Election Commission, made available to the State Election Commission such staff as may be necessary for the discharge of the functions conferred on the State Election Commission by Clause (1).

(4) Subject to the provisions of this Constitution, the Legislature of a State may, by law make provision with respect to all matters relating to, or in connection with elections to the Panchayats.

8. From bare reading of the aforesaid constitutional provisions, it is manifestly clear that it is bounded duty of the State to make available to the State Election Commission such staffs as may be necessary for discharging the function conferred upon the State Election Commission. Article 243ZA of the Constitution confers power upon the State Election Commission for the superintendence and conduct of all elections to the municipalities. Article 243ZA reads as under:

ZA. Elections to the Municipalities.--(1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Municipalities shall be vested in the State Election Commission referred to in Article 243K.

(2) Subject to provisions of this Constitution, the Legislature of a State may, by law make provision with respect to all matters relating to, or in connection with, elections to the Municipalities.

9. Rule 23 of Jharkhand State Municipal Election Petition Rules, 2006 categorically provides that State Government on requisition or demand made by the Election Commission shall make available Officers and Staffs for conducting elections. Similarly, Rule 89 of the said rules also confers power upon the Election Commission to issue necessary direction time-to-time for conducting free & fair election.

10. The question with regard to power of the State Election Commission in the matter of conducting election of municipalities is no longer res Integra. In the case of Kishansing Tomar v. Municipal Corporation of the City of Ahmedabad and Ors. MANU/SC/8563/2006 : AIR2007SC269 , the Supreme Court has discussed relevant provisions of the Constitution and the duty of the Election Commission vis-a-vis the State Government for holding free & fair election. In that case, a writ petition was filed by the appellant before the Gujarat High Court seeking writ of mandamus or any other appropriate writ or direction to the respondents, namely, Municipal Corporation of the City of Ahmedabad, the State of Gujarat and the Gujarat Election Commission to take all steps necessary for the purpose of holding election for constituting Municipal Corporation of the City of Ahmedabad before the expiry of the duration of the municipal corporation. The appellant apprehended that the authority may delay the process of election to constitute the new municipal body and therefore filed writ application. The Supreme Court after discussing constitutional provisions of Articles 243K 243ZA and 324 and other provisions held that the State Government is bound to abide by the direction of the State Election Commission in the same manner in which it follows the directions of the Election Commission of India during the elections of

Parliament and the State Assembly elections. Their Lordships further held that the State Government shall have to render full assistance and cooperation to the State Election Commission in order to ensure that free & fair elections are conducted. In paragraphs 19, 22 to 27, their Lordships observed:

19. From the opinion thus expressed by this Court, it is clear that the State Election Commission shall not put forward any excuse based on unreasonable grounds that the election could not be completed in time. The Election Commission shall try to complete the election before the expiration of the duration of five years' period as stipulated in Clause (5). Any revision of electoral rolls shall be carried out in time and if it cannot be carried out within, reasonable time, the election has to be conducted on the basis of the then existing electoral rolls. In other words, the Election Commission shall complete the election before the expiration of the duration of five years' period as stipulated in Clause (5) and not yield to situations that may be created by vested interests to postpone elections from being held within the stipulated time.

22. In our opinion, the entire provision in the Constitution was inserted to see that there should not be any delay in the constitution of the new municipality every five years and in order to avoid the mischief of denying the process of election and allowing the nominated bodies to continue, the provisions have been suitably added to the Constitution. In this direction, it is necessary for all the State Governments to recognise the significance of the State Election Commission, which is a constitutional body and it shall abide by the directions of the Commission in the same manner in which it follows the directions of the Election Commission of India during the elections for Parliament and the State Legislatures. In fact, in the domain of elections to the panchayats and the municipal bodies under Part IX and Part IX-A for the conduct of the elections to these bodies they enjoy the same status as the Election Commission of India.

23. In terms of Article 243K and Article 243ZA(I) the same powers are vested in the State Election Commission as the Election Commission of India under Article 324. The words in the former provisions are in pari materia with the latter provision.

24. The words, "superintendence, direction and control" as well as "conduct of elections" have been held in the "broadest of terms" by this Court in several decisions including Special Reference No. 1 of 2002. In re and Mohinder Singh Gill case and the question is whether this equally relevant in respect of the powers of the State Election Commission as well.

25. From a reading of the said provisions it is clear that the powers of the State Election Commission in respect of conduct of elections is no less than that of the Election Commission of India in their respective domains. These powers are, of course, subject to the law made by parliament or by the State Legislatures, provided the some do not encroach upon the plenary powers of the said Election Commissions.

26. The State Election Commissions are to function independent of the State Governments concerned in the matter of their powers of superintendence, direction and control of all elections and preparation of

electoral rolls for, and the conduct of, all elections to the panchayats and municipalities.

27. Article 243K(3) also recognises the independent status of the State Election Commission. It states that upon a request made in that behalf the Governor shall make available to the State Election Commission "such staff as may be necessary for the discharge of the functions conferred on the State Election Commission by Clause (I)". It is accordingly to be noted that in the matter of the conduct of elections, the Government concerned shall have to render full assistance and cooperation to the State Election Commission and respect the latter's assessment of the needs in order to ensure that free and fair elections are conducted.

In the aforesaid decision, their Lordships observed that for the independent and effective functioning of the State Election Commission where Commission feels that it is not receiving the cooperation of the State Government concerned in discharging its constitutional obligation of holding the municipal or Panchayat elections within the time mandated in the constitution, it will be open to the State Election Commission to approach the High Court in the first instance and thereafter the Supreme Court for a writ of mandamus or such other appropriate writ directing the State Government concerned to provide all necessary cooperation and assistance to the State Election Commission tenable the latter to fulfill the constitutional mandate.

11. In the rejoinder to the counter-affidavit, the petitioner has brought to the notice of this Court that similar request for deputing observers was made by the Commission when the process of holding of panchayat election was going on and as many as 25 Officers were deputed for discharging the duty of observer. This fact has not been disputed by the respondents-State. We are therefore, of the view that the respondents-State should, at least, depute 25 officers as observers for the purpose of holding free and fair elections of municipalities and municipal corporations.

12. So far implementation of Model Code of Conduct is concerned, respondents-State raised serious objection under Clauses 2, 3, 4 and 7 of the Model Code of Conduct. Clause 2 prohibits transfer and posting of even those officers and employees who are not connected with election work without its prior permission. It further provides that those employees who are posted in their home district or are posted at their place of posting for more than three years should be transferred before the election. It further provides that officers come back after long leave or after being relieved from suspension may be posted after the permission of the Commission. Clause 3 of the Model Code of Conduct puts a ban on appointment of officer and employees in all the Departments, Bodies, and Institution. It further prohibits reemployment of retired employees. Even the process of appointment will have to await the declaration of election result. Clause 4 puts complete ban on tenders, auction of liquor shops, hat, bazaar, mela animal fare, auction of forest produce and execution of lease of new mines. Clause 7 of Model Code of Conduct prohibits distribution of artificial limbs to any handicapped person by non-governmental organizations.

13. So far the restrictions provided in the Model Code of Conduct are concerned, we are of the view that these restrictions and prohibitions are not warranted inasmuch as admittedly the election of municipalities are not being held on party basis and there is no involvement of political parties. However, if these restrictions come into force, the entire functioning of the Government would come to a standstill. Since the respondents State has objection only to the restriction and prohibitions contained under Clauses 2, 3, 4 and 7 of the Model Code of Conduct, rest of the provisions contained in the Model

Code of Conduct shall be implemented by the Commission.

14. In the facts and circumstances of the case and having regard to the discussions made herein above we, therefore, allow this writ application in part and direct the respondents-State to render full assistance and cooperation to the petitioner-State Election Commission in order to ensure that free and fair elections are conducted. Respondents-State shall also make available all the officers and staffs for conducting elections. The State shall also depute at least 25 observers for holding elections to the Ranchi Municipal Corporations, Nagar Parishads and Nagar Panchayats. We further direct that the Model Code of Conduct issued by the State Election Commission except restrictions put under Clauses 2, 3, 4 and 7 shall be implemented.

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