

IN THE HIGH COURT OF KARNATAKA, DHARWAD

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DATED THIS THE 29TH DAY OF JULY, 2022

PRESENT

THE HON'BLE MR. JUSTICE KRISHNA S.DIXIT

AND

THE HON'BLE MR. JUSTICE P. KRISHNA BHAT

OSA No.100001 OF 2022

BETWEEN:

ELECTION COMMISSION OF INDIA,
NIRVACHANASADAN, ASHOK ROAD,
NEW DELHI - 110 001.
REPRESENTED BY ITS SECRETARY.

...APPELLANT

(BY SRI. SHARATH DODWAD, ADVOCATE FOR
SRI.MRUTUNJAY HALLIKERI, ADVOCATE)

AND:

1. SHRI.RAVISHIVAPPA PADASALAGI @ SAVADI,

2. MAHESH

3. SRI.GAJANAN,

4. DR.NAGANATH V YADGIR,

5. VINAYAK,

6. IMRAN

7. RAJU PARASHURAM DAWARI,

8. SHRISHAIL

...RESPONDENTS

(BY SRI. BALAKRISHNA SHASTRY, ADVOCATE AND
SRI.CHETAN MUNNOLI, ADVOCATE FOR R2;
SRI.SHIVARAJ BELLAKKI, ADVOCATE FOR R1;
R3 & R7 ARE SERVED)

THIS ORIGINAL SIDE APPEAL IS FILED UNDER SECTION 4 OF THE KARNATAKA HIGH COURT ACT, 1961, PRAYING TO QUASH THE IMPUGNED PORTION OF THE ORDER DATED 17.06.2022 PASSED BY THE LEARNED SINGLE JUDGE OF THIS HONBLE HIGH COURT, DHARWAD BENCH IN ELECTION PETITION NO.100001/2020, IN ISSUING SUMMONS TO EX-CHIEF ELECTION COMMISSIONER OF INDIA.

THIS ORIGINAL SIDE APPEAL HAVING BEEN HEARD AND RESERVED FOR ORDERS THIS DAY, **KRISHNA S. DIXIT J.**, DELIVERED THE FOLLOWING:-

ORDER

This intra-court appeal seeks to lay a challenge to the order dated 17.06.2022 made in Election Petition No.100001/2020 pending on the file of a learned single Judge of this Court whereby *subpoena* has been issued to one Sri Sunil Arora, the Ex-Chief Election Commissioner of India. The operative portion of the order reads as under:

"Issue summons to Shri Sunil Arora, the Ex-Chief Election Commissioner of India, as prayed for.

A copy of this order shall be furnished to Shri S.R.Dodawad, learned Standing Counsel for

the Election Commission to co-ordinate in service of summons and appearance of the witness.

Shri.S.R.Dodawad, learned counsel submits that personal appearance of the witness causes hardship to him and avoidable expenses. In that event he can make his appearance virtually and depose.

The registry may also serve the summons through e-mail."

2. This Court had directed emergent notice to the respondents vide order dated 22.06.2022 and had issued stay of *subpoena* in terms of subject application in I.A. No.2. After service of notice the contesting respondents have entered appearance through their counsel and opposed this appeal making submission in justification of the impugned order. Other respondents have chosen to remain unrepresented, despite service of notice.

3. BRIEF FACTS OF THE CASE:

(a) The general elections to constitute 15th Karnataka Legislative Assembly were held in May 2018. However the Speaker had disqualified 17 members of Legislative Assembly vide Orders dated 25.07.2019 & 28.07.2019. This was put in challenge before the Hon'ble Supreme Court in W.P. (C) No.922/2019 & connected cases. To fill the vacancies accruing because of aforesaid disqualification, the appellant ECI vide Press Note dated 21.09.2019 had announced the schedule for Bye-Elections in respect of 15 Constituencies.

This was followed by the Election Notification dated 23.09.2019.

(b) The Apex Court whilst examining the legality of the Disqualification Orders is said to have orally observed that the postponement of the Bye-Elections was desirable till after the final orders are passed on the pending challenge. This was on 26.09.2019. On 27.09.2019, the extension Notification was issued by the appellant-ECI by rescheduling the time lines prescribed under the aforesaid Election Notification dated 23.09.2019. The Apex Court vide Order dated 13.11.2019 dismissed W.P.No.992/2019 & connected matters and thereby upheld Speaker's Orders that had disqualified 17 MLAs, however curtailing the duration of their disqualification.

(c) The appellant-ECI conducted the elections on 09.12.2019 in terms of amended notification dated 27.09.2019. The 2nd respondent herein was elected to the Legislative Assembly from 03-Athani Assembly Constituency. His election has been challenged by the 1st respondent in the subject Election Petition. One of the issues framed in the E.P. relates to power of the ECI to postpone the elections, once the same were notified.

(d) In order to prove the invalidity of postponement of elections in terms of additional issue framed in the Election

Petition, an Interlocutory Application was moved before the Election Court for summoning '*Sri Sunil Arora Ex-Chief Election Commissioner of India*' as a witness '*to depose with regard to the circumstances and sufficient cause under which the notification dated 27.09.2019 was issued for extending time for filing the nomination...*'. The said application having been favoured by the impugned order, the appellant-ECI is before this Court, with a request for leave to prosecute the Appeal.

4. Having heard the learned counsel for the parties and having perused the appeal papers, we are inclined to grant indulgence in the matter for the following reasons:

A. AS TO MAINTAINABILITY OF INTRA-COURT APPEAL:

(i) The entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. Concepts familiar to common law and equity must remain strangers to Election Law unless statutorily embodied. An election petition is a strict statutory proceeding. The legal position emerging from a catena of decisions of the Apex

Court is that outside the statutory provisions, there is no right to dispute an election.

(ii) Section 80 of the 1951 Act provides that an election *inter alia* to the State Legislature can be called in question only by filing an election petition in accordance with its provisions. Such a petition has to be presented to the High Court on one or more of the grounds specified in sub-section (1) of Sec.100 & Sec.101 of the said Act within 45 days reckoned from the date of election of the Returned Candidate. In HARI SHANKER JAIN vs. SONIA GANDHI, (2001) 8 SCC 233, the Apex Court observed that the designated Election Judge functions as a High Court and not as a Special Tribunal or as a Special Court or as *persona designata*. When power to hear a dispute under a statute is conferred on the High Court then the dispute has to be determined according to rules of practice and procedure of this Court and in accordance with the provisions of the Charter under which that Court is constituted and which confers on it power in respect to the method and manner of exercising that jurisdiction vide NATIONAL SEWING THREAD CO. LTD. Vs. JAMES CHADWICK AND BROS LTD., AIR 1953 SC 357.

(iii) The vehement contention of respondents that no intra-court appeal lies in the absence of such a right being granted by the RP Act 1951, is bit difficult to countenance. Reason is not far to seek: Section 4 of the Karnataka High Court Act, 1961 which provides for intra-court appeal has the following text:

"4. Appeals from decisions of a single Judge of the High Court - An appeal from a judgment, decree order or sentence passed by a single Judge in the exercise of the original jurisdiction of the High Court under this Act or under any law for the time being in force, shall lie to and be heard by a Bench consisting of two other Judges of the High Court".

The impugned order made by the learned single judge directs *subpoena* to the Ex-Chief Election Commissioner. Apparently, it is made in exercise of civil court's power availing under the provisions of CPC 1908, for summoning of witnesses. Section 87(1) of the 1951 Act provides that every election petition shall be tried as nearly as may be in accordance with the procedure applicable under the CPC 1908 to the trial of suits. Sub-section 2 of Section 87 makes the provisions of Indian Evidence Act 1872 applicable in all aspects. The proviso to Section 87(1) gives discretion to the Court trying an election dispute to refuse (for reasons to be recorded) to examine any witness, if his evidence is not material for the decision of the petition. Section 116A of the 1951 Act which provides for

appeal to the Apex Court apparently has parties to the Election Petition in its contemplation and the appellant herein admittedly is not a party. Therefore, the right availing under Section 4 of 1961 Act is not diluted by the appeal provision in 1951 Act the non-obstinate clause enacted therein notwithstanding. It hardly needs to be stated that this remedy of intra-court appeal does not avail to the parties to the Election Petition.

(iv) The person *subpoenaed* has no discretion to disobey the requisition. Whether *subpoena* of the kind falls within the term 'order' employed in Section 4 of the 1961 Act, needs to be examined, from that view of the matter. In Ramanatha Aiyar's Law Lexicon II Edition, 2010 reprint Lexis Nexis at page 1373 it is printed as under:

"The term 'order' is general and is comprehensive enough to include all kinds of orders including a formal order... The term 'order' would indicate some expression of opinion which is to be carried out or enforced. It is the conclusion of a body... The Terms 'Judgment' 'Decree', 'Decision,' and 'order' are more or less cognate as applied in legal proceedings, and closely allied in meaning. The term 'order' is not infrequently used in a more restricted sense than the word 'judgment'. It may be defined to be a command, direction, or decision of the Court of Judge on some immediate point or issue in the case, but without finally disposing of the main issue or issues in the case. Then it is merely interlocutory. But the term is sometimes given a more extensive signification, even in legal controversies..."

In matters like this, the word 'order' employed in the above provision has to be liberally construed consistent with the requirement of doing justice to the aggrieved. An argument to the contrary, would defeat the very object of such a provision the same proving to be only a dead letter of law in black print and therefore, cannot be countenanced.

B. AS TO LEAVE TO APPEAL:

(i) The appellant happens to be the Election Commission of India which is a creature of the Constitution vide Article 324. The Apex Court in *JYOTI BASU vs. DEBI GOSHAL* (1982) 1 SCC 691 has held that the election disputes are not cases at common law or equity and the proceedings are conducted in a special jurisdiction created by statute and therefore, persons other than who are contemplated under Section 82 of the 1951 Act cannot be joined as parties. There is a catena of decisions wherein arraying of the Election Commission as a party to the election disputes is deprecated by the Apex Court. Therefore, the Commission has justifiably sought for leave to file this appeal, it being not a party to the E.P. Denial of leave would cause a great injustice to the Commission and enormous hardship to the Ex-Chief Election Commissioner i.e., against whom subpoena has been issued. Therefore, leave needs to be and accordingly, is granted in terms of subject application accompanying the appeal.

C. AS TO WHETHER CHIEF ELECTION COMMISSIONER OR EX-CHIEF ELECTION COMMISSIONER CAN BE CALLED AS WITNESS:

(i) As already mentioned above, an election petition is tried by the High Courts substantially in accordance with the provisions of CPC, 1908 vide Section 87(1) and the provisions of the Indian Evidence Act, 1872 are deemed to apply to these proceedings vide 87(2) of the 1951 Act. After pleadings are completed, issues have been framed in the EP; additional issue relating to validity of postponement of the election is also there. Section 5 of the 1872 Act deals with the right to produce evidence, in any suit or proceedings, relating to the existence of non-existence of every fact in issue, and also to prove such other facts which may be declared relevant to the fact in issue, by virtue of the provisions contained in sections 6 to 55. The object of this section is to restrict the investigation made by Courts within the bounds prescribed by general convenience. Of no fact can evidence be given unless it be either a fact in issue or one declared under other sections. Thus, evidence of all collateral facts, which are incapable of affording any reasonable presumption as to the principal matters in dispute, is precluded from production to save public time.

(ii) The subject application for *subpoena* has been moved by the contesting respondent herein in the light of

additional issue. What were the facts & circumstances that lead to issuance of the notification postponing the elections cannot be the subject matter of oral evidence of the Commissioners of the Election Commission of India which is a multi-member body, and which takes institutional decisions *inter alia* under the provisions of the Constitution, the RP Act, 1950 & RP Act, 1951. Its decisions are not the decisions of the individuals. What the Apex Court observed in *T.N.SESHAN vs. UNION OF INDIA*, (1995) 4 SCC 611, supports this view:

"By clause (1) of Article 324, the Constitution-makers entrusted the task of conducting all elections in the country to a Commission referred to as the Election Commission and not to an individual. It may be that if it is a single-member body the decisions may have to be taken by the CEC but still they will be the decisions of the Election Commission. They will go down as precedents of the Election Commission and not the individual. It would be wrong to project the individual and eclipse the Election Commission. Nobody can be above the institution which he is supposed to serve. He is merely the creature of the institution, he can exist only if the institution exists... The Constitution-makers preferred to remain silent as to the manner in which the Election Commission will transact its business, presumably because they thought it unnecessary and perhaps even improper to provide for the same having regard to the level of personnel it had in mind to man the Commission. They must have depended on the sagacity and wisdom of the CEC and his colleagues. By virtue of sub-sections (1) and (2) of Section 10 the Commission will be able to take decisions with one voice. But just in case that hope is belied the rule of majority must come into play."

(iii) Ordinarily, in civilized jurisdictions functionaries of the constitutional bodies are not subjected to *subpoena*. Since they have to act and take significant decisions in the discharge of duties fearlessly. Otherwise, they run the fear of being called as witnesses and that may push them to defensive mode affecting public interest. The circumstances that resulted into issuance of the subject notification has to be gathered from the official records of the Commission. A very strong case has to be made out for summoning the members or ex-members of constitutional bodies. The reason as to why the Election Commission of India cannot be made a party to the election petitions gives sufficient indication as to why its members or ex-members cannot be summoned as witnesses. As already mentioned above, the proviso to Section 87 of the 1951 Act has vested discretion in the High Court hearing the election petitions in this respect. A perusal of the records drives us to a conclusion that there is absolutely no justification for the contesting respondent herein for seeking *subpoena* against the Ex-Chief Election Commissioner.

(iv) It hardly needs to be stated that subpoenaing an official as witness is one thing and summoning of official records, is another. In the former, the exercise of power is circumscribed depending upon the constitutional status and

function of the person concerned and in the latter, it is not. It is all a matter of discretion and prudence of the Court. Of course, any discretion has to be exercised in accordance with the rules of reason & justice, said Lord Halsbury more than a century ago vide *SHARP v. WAKEFIELD* (1891 AC 173). Constitutional functionaries or ex-functionaries cannot be summoned as witnesses just for askance. The contention that these functionaries do not figure in the "Exemption Class" earmarked by CPC is too feeble a ground for issuing *subpoena* to them. Ordinarily the provisions of law that carve out an "*Exempted Class of Subpoena*" do not intend to make such class exhaustive in the sense that all those *de hors* the class can be summoned as witness at askance. In matters like these a host of factors figure for consideration.

(v) The above having been said, we hasten to add that it is always open to parties to the election petition to seek an order at the hands of learned judge trying the election dispute to summon the records or copies thereof even from the Election Commission of India, by making out a case therefor.

In the above circumstances, this appeal succeeds; the impugned order of *subpoena qua* the Ex-Chief Election

Commissioner, i.e., Sri Sunil Arora is set at naught, costs having been made easy.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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