

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
(Appellate Side)

Reserved on: 10.12.2021
Pronounced on: 15.12.2021

WPA (P) 299 of 2021

(Through Video Conference)

Pratap Banerjee

...Petitioner

-Vs-

State of West Bengal and Others

...Respondents

AND

WPA (P) 271 of 2021

(Through Video Conference)

Mousumi Roy

...Petitioner

-Vs-

West Bengal State Election Commission and Others

...Respondents

Present:-

Ms. Pinky Anand, Senior Advocate
Mr. Joydip Kar, Senior Advocate
Mr. Billwadal Bhattacharyya,
Mr. Rajdeep Majumdar,
Mr. Dhiraj Trivedi,
Mr. Debanik Banerjee,
Mr. Lokenath Chatterjee,
Mr. Sayak Chakraborti,
Mr. Moyukh Mukherjee,
Mr. Anish Kumar Mukherjee,
Mr. Amrit Sinha, Advocates

..for the Petitioner in
WPA(P) 299 of 2021

Mr. Sabyasachi Chatterjee,
 Mr. Imtiaz Ahmed,
 Mr. Sandipan Das,
 Mr. Pintu Karar,
 Mr. Akashdeep Mukherjee,
 Ms. Debolina Sarkar,
 Mr. Ankur Sharma,
 Ms. Sreejita Biswas,
 Ms. Senjuti Mukherjee, Advocates
 ..for the Petitioner in
 WPA(P) 271 of 2021

Mr. S.N. Mookherjee, learned Advocate General
 Mr. A. Ray, learned Govt. Pleader
 Mr. Md. T.M. Siddiqui,
 Mr. D. Ghosh, Advocates
 ..for the State in
 WPA(P) 299 of 2021

Mr. S.N. Mookherjee, learned Advocate General,
 Mr. A. Ray, learned Govt. Pleader
 Mr. Md. T.M. Siddiqui,
 Mr. N. Chatterjee, Advocates
 ..for the State in
 WPA(P) 271 of 2021

Mr. Anuran Samanta, Advocate
 ..for ECI in WPA(P) 271 of 2021

Mr. Jayanta Mitra, Senior Advocate
 Mr. Abratosh Majumdar, Senior Advocate
 Mr. Subhankar Nag,
 Ms. Sonal Sinha, Advocates
 ..for the West Bengal State
 Election Commission

**Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA,
 CHIEF JUSTICE
 THE HON'BLE JUSTICE RAJARSHI BHARADWAJ,
 JUDGE**

Prakash Shrivastava, CJ:

1. This Court by order dated 1st December, 2021 had issued following directions:

“i. The State as well as the State Election Commission, on or before the next date of hearing, give the plan disclosing the tentative time schedule for conducting the election of all the Municipal

Corporations/Municipalities in the State in the phase manner.

ii. The State Election Commission is also directed to explore the possibility and feasibility of doing counting of votes of the Municipal Corporations/Municipal Elections after the polling is completed in all the Municipalities of the Municipal Corporation in the State.

iii. The State Election Commission is expected not to declare the election of the Municipal bodies in the State in such a manner which will give benefit to one particular party.”

2. Submission of the learned Counsel for the petitioner is that the above directions have not been complied with and no clear time schedule to hold elections of all Municipal Corporations/Municipalities in the State has been disclosed. She has further submitted that no possibility and feasibility of holding the simultaneous elections of all the Municipalities/Municipal Corporations has been explored by the respondent Nos. 2 and 3. Referring to the notification dated 18.03.2015 filed by the petitioner along with the affidavit dated 8th December, 2021, she has submitted that in April, 2015 simultaneous elections of 91 Municipalities/Municipal Corporations/notified area were held, therefore, the same can be held now also. She has further submitted that the elections for Kolkata Municipal Corporation are going to be held by using EVMs which are not VVPAT EVMs. Placing reliance upon the judgment in the matter of **Subramanian Swamy vs. Election Commission of India, (2013) 10 SCC 500; N. Chandrababu Naidu and Others vs. Union of India and Another, (2019) 15 SCC 377** and **Reshma Vithalbhai Patel vs. Union of**

India, (2018) 18 SCC 675, she has submitted that the use of VVPATs EVMs is mandatory, therefore, without it the Kolkata Municipal Corporation Elections cannot be allowed to be held. She has also submitted that in respect of Kolkata Municipal Corporation Elections, there is a procedural error in respect of the non-compliance of Section 38 of West Bengal Municipal Elections Act, 1994 inasmuch as no public notice in terms of the said Section has been given. She has submitted that this Court should issue a direction to postpone the elections of the Kolkata Municipal Corporation or stay it and in this regard she has placed reliance upon the judgment of the Supreme Court reported in **Digvijay Mote vs. Union of India and Others, (1993) 4 SCC 175**.

3. Learned Counsel appearing for the respondent No. 3 Municipal Corporation has submitted that petitioner cannot be permitted to expand the scope of the writ petitioner by raising the new issue of use of VVPATs which was not raised in the writ petition. He has further submitted that in view of constitutional bar, the election of the Kolkata Municipal Corporation cannot be stayed and earlier such a prayer has already been rejected. He has submitted that the consultative process with the State Government is going on and has referred to the communication of the State Government dated 4th December, 2021 proposing to hold the Municipal Elections in the State in 6 to 8 phases by May 2022 and declaring the time schedule on the basis of the circumstances disclosed in the affidavit dated 6th of December, 2021. He has also submitted that the sufficient number of EVMs are not available and the request to provide more EVMs has been turned down by the Election Commission of India and by the

other States. He also submitted that VVPATs are to be used in the Parliamentary and Legislative Elections and not in the local body elections and has submitted that the cases relied upon by the Counsel for the petitioner are distinguishable. He has also submitted that Section 8 of the West Bengal State Election Commission Act, 1994 and Section 36 of the West Bengal Municipal Elections Act, 1994 contain the provision in respect of multiple dates of elections of local bodies.

4. Learned Advocate General appearing for the State has also submitted that the consultation with the State Election Commission is in progress to prepare a time schedule for holding the elections of local bodies/Municipalities/Municipal Corporations/notified areas all over the State of West Bengal and these elections will be held within the outer limit of May, 2022. Opposing the prayer for stay of Kolkata Municipal Corporation Elections, he has submitted that the VVPATs are not available and the same are also not mandatory for local bodies elections. He has also submitted that in no Municipal Elections VVPATs (M3) have been used so far and Election Commission of India also only lands M2 EVM. He has submitted that Election Commission and other States have refused to provide for the additional EVMs. He has also submitted that the form 1 was duly issued in terms of Section 38 of the Act, therefore, nominations have been filled up by the candidates for Kolkata Municipal Elections and that time schedule to hold the election in other municipalities will be declared after 19th of December, i.e. after holding the elections of Kolkata Municipal Corporation.

5. Learned Counsel for the petitioner appearing in connected writ petition has referred to the chart filed as annexure P1 and has submitted that in some places elections are due for last 3 years. He has submitted that the elections of local bodies are deliberately delayed because the State has appointed its own persons of choice as administrators in these local bodies.

6. Having heard the learned Counsel for the parties and on the perusal of the records, we have noticed that the first issue raised by the petitioner is in respect of non-disclosure of time schedule for holding the elections of other municipal councils.

7. By a detailed order dated 01.12.2021 the above quoted directions were issued by this Court. Though there was a clear direction of this Court to the State as well as the State Election Commission to give the plan disclosing the tentative time schedule for conducting the elections of all the Municipal Corporations/Municipalities in the State in the phase manner on or before the next date of hearing i.e. 6th of December, 2021, but so far no such time schedule has been disclosed.

8. The annexure P1 filed along with the WPA (P) 271 of 2021 reveals that in Mekhliganj, Haldibari, Alipurduar, Dalkhola, Habra, Panihati, Medinipur, Jhargram, Burdwan, Guskara and Dubrajpur Municipalities election had become due in September, 2018, thereafter more than 3 years have passed but the elections have not been held till now.

9. It is worth noting that the elections in these Municipalities fell due much before the onset of Covid 19 Pandemic, therefore, the State and Election Commission are not justified in taking shelter of

Covid Pandemic for not holding the elections in these Municipalities within time.

10. Clause (3) of Article 243-U of the Constitution in clear terms provides that:

“(3) An election to constitute a Municipality shall be completed,—

(a) before the expiry of its duration specified in clause (1);

(b) before the expiration of a period of six months from the date of its dissolution.”

11. The Constitution bench of the Hon’ble Supreme Court in the case of **Kishansing Tomar vs. Municipal Corporation of the City of Ahmedabad and Others**, reported in **(2006) 8 SCC 352** has clearly held that under Article 243-U the constitutional mandate is to complete the election to constitute a Municipality before the expiry of 5 years period stipulated in clause (1) of Article 243-U and in case of dissolution, to constitute new Municipality before the expiration of 6 months. It has further been held that the period of 5 years fixed under Article 243-U to constitute the Municipality is mandatory in nature and has to be followed in all respect. The constitutional provision as well as the Constitution bench judgment of Hon’ble Supreme Court are binding upon the respondent No. 2 and 3, therefore, they are expected to follow the same in letter and spirit.

12. Instead of disclosing the time schedule for holding the elections in the Municipalities/Municipal Corporations in the State, a vague plea has been raised in para 6 of the affidavit dated 6th of December, 2021 by the respondent No. 3 and para 4 of the affidavit dated 6th of December by the respondent No. 2 that depending upon

the various factors like Covid situation, school examination, festivals such as Makar Sankranti, Ganga Sagar Mela, introduction of Omicron etc., the time schedule will be decided. Once the decision has been taken by the respondent Nos. 2 and 3 to hold the elections for Kolkata Municipal Corporation on 19th of December, 2021 prevailing the same factors then elections of other Municipalities should not be unnecessarily deferred. In this regard, the plea of the petitioners that the respondent Nos. 2 and 3 are unnecessarily delaying the other Municipal/Municipal Corporations elections in the State cannot be ignored. The direction of this Court in the order dated 01.12.2021 to declare the time schedule is clear, therefore, respondent Nos. 2 and 3 are again directed to comply with the same.

13. Another issue raised by the petitioner is in respect of simultaneous holding of elections of all the Municipal Corporations/Municipal bodies. The plea of the respondent Nos. 2 and 3 is that sufficient number of EVMs are not available and in view of the Covid Pandemic certain precautionary measures are required to be taken, hence simultaneous elections are not possible and elections will be held in 6-8 phases.

14. Having examined the records, it is noticed that the respondent No. 3 in the affidavit dated 6th of December, 2021 has stated on oath that about 15687 EVMs are available for use. In the Kolkata Municipal Corporation Elections going to be held on 19th December, 2021, 7210 EVMs would be used. Hence, the respondent No. 3 is left with 8477 EVMs for use in Elections to other Municipalities/Municipal Corporations. In the affidavit dated 9th of December, 2021, respondent No. 3 has stated that in 111

Municipalities of the State, there are about total 15354 polling stations for which there will be requirement of 21849 EVMs. The correspondence with the Election Commission of India and the other States has been placed on record by the respondent No. 3 in support of the plea that the Election Commission of India and other States except the State of Arunachal Pradesh, are not ready to loan the EVMs to the State of West Bengal. Even if such a plea is correct then also sufficient EVMs are available to hold elections of remaining Municipalities in 2 phases.

15. The plea of the respondent Nos. 2 and 3 proposing to hold the elections in 6 to 8 phases is not supported by any cogent material. The notification dated 18.03.2015 for holding elections of 91 Municipalities/Municipal Corporations on one date has already been placed on record which cannot be ignored. Hence, the respondent Nos. 2 and 3 are expected to disclose the time schedule containing earliest dates for holding these elections expeditiously so that democratic process of holding elections can be completed without any further delay.

16. An issue has also been raised by the petitioner for holding the simultaneous elections in all the Municipal Corporations but now the elections for the Municipal Corporation of Kolkata have already been declared for 19th of December. Learned Counsel for the respondent has drawn the attention of this Court to Section 8 of the West Bengal State Election Commission Act, 1994 which provides for “date or dates which can be notified for the poll”, similarly he has referred to Section 36(3) of the West Bengal Municipal Elections Act, 1994 which again provides for notifying “date or dates calling upon

the Municipalities to elect its members”. Since with the declaration of the elections for the Municipal Corporation of Kolkata, the circumstances have changed, therefore, prayer for holding the simultaneous elections of all the Municipalities/Municipal Corporations in entire State does not survive.

17. Learned Counsel for the petitioner has also made a prayer for stay of election of Kolkata Municipal Corporation by submitting that the respondent No. 3 is not using VVPATs in this election which is mandatory for fair and transparent election and which is also required as per the judgment of the Supreme Court relied upon by her and further that the notice in terms of Section 38 of the Municipal Elections Act has not been issued, therefore, the elections of Kolkata Municipal Corporation should be stayed.

18. The notification dated 25.11.2021 has already been issued for holding the elections of Kolkata Municipal Corporation on 19th of November, 2019. Article 243-ZG (b) of the Constitution clearly put a bar in interfering in electoral matter by providing that:

“243-ZG. Bar to interference by courts in electoral matters.—

Notwithstanding anything in this Constitution,—

(a) x x x x x

(b) no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State.”

19. So far as the issue of use of VVPATs in the election of local bodies is concerned, the stand of the respondent Nos. 2 and 3 that

VVPATs are used in the Parliamentary or State Legislative Members Elections and that no State is using VVPATs in the local bodies elections, has remained unrebutted. Hon'ble Supreme Court in the matter of **Subramanian Swamy (supra)** considering the issue of use of Voter Verifiable Paper Audit Trail (VVPATs) along with Electronic Voting Machine (EVMs) has expressed that paper trail is an indispensable requirement for free and fair elections and that the confidence of the voters in the EVMs can be achieved only with the introduction of paper trail. In that judgment Hon'ble Supreme Court had permitted the Election Commission of India to introduce the VVPATs in gradual stages or geographical wise in the ensuing General Elections. In the matter of **Reshma Vithalbhai Patel (supra)**, the Hon'ble Supreme Court had taken into the fact that the Government of India had sanctioned funds for purchase of VVPATs and had expressed that it leaves no room for any doubt that all future elections will be held by using VVPATs. The said observation was also in a matter relating to Parliamentary and State Assembly Elections. In the case of **N. Chandrababu Naidu and Others (supra)**, the Hon'ble Supreme Court had held that:

“9. At the very outset the Court would like to observe that neither the satisfaction of the Election Commission nor the system in vogue today, as stated above, is being doubted by the Court insofar as fairness and integrity is concerned. It is possible and we are certain that the system ensures accurate electoral results. But that is not all. If the number of machines which are subjected to verification of paper trail can be increased to a reasonable number, it would lead to greater satisfaction amongst not only the political parties but the entire electorate of the country. This is what the

Court should endeavour and the exercise, therefore, should be to find a viable number of machines that should be subjected to the verification of VVPAT paper trails keeping in mind the infrastructure and the manpower difficulties pointed out by the Deputy Election Commissioner. In this regard, the proximity to the election schedule announced by the ECI must be kept in mind.”

20. The Hon’ble Supreme Court had clearly observes that the existing system is not doubted by the Court so far as fairness and integrity is concerned but had observed about increasing the machines which are subjected to verification of paper trail to reasonable number. These judgments are not relating to the local bodies elections and in none of these judgments it has been held that the elections should not be held if the VVPATs are not used.

21. So far as the allegation of non-compliance of Section 38 of the West Bengal Municipal Elections Act, 1994 is concerned, it has been categorically stated by the Advocate General that the notification prescribed therein was duly issued.

22. The Counsel for the petitioner has placed reliance upon the judgment of the Hon’ble Supreme Court in the matter of **Digvijay Mote (supra)** and had submitted that the State Election Commission has the power to postpone elections. We are of the opinion in the facts of the present case no such direction is required.

23. Having regard to the aforesaid and considering the fact that by the earlier order dated 1st of December, 2021 CAN 1 of 2021 with similar prayer has already been rejected, we are of the opinion that the prayer made by the Counsel for the petitioner for staying the Kolkata

Municipal Corporation Elections cannot be accepted and is hereby declined.

24. Keeping in view the observations made above, respondent Nos. 2 and 3 are directed to disclose to this Court, without any further delay, minimum phases in which the elections for the remaining Municipal Corporations/Municipalities in the State will be held and the tentative time schedule giving earliest dates for holding such elections. We expect that respondent Nos. 2 and 3 will take a decision in this regard keeping in mind their responsibility to uphold democratic principles and to carry out the mandate of the Constitution.

In the order dated 01.12.2021 on page 5 due to typographical error Article 243-2(d) is mentioned instead of Article 243-ZG(b). The error accordingly stands corrected.

25. List on 23rd December, 2021.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

(RAJARSHI BHARADWAJ)
JUDGE

Kolkata
15.12.2021

PA(SS)