Election Commission of India

Vs

State of Haryana

Civil Appeal No. 2182 (NCE) of 1984

(CJI Y. V. Chandrachud, V. D. Tulzapurkar, M. P. Thakkar, D. P. Madon, R. S. Pathak JJ)

25.04.1984

JUDGMENT

CHANDRACHUD C.J.

1. (On behalf of himself, Tulzapurkar, Pathak and Madon JJ.) - We had passed an interim order on April 18, suspending the operation of the order passed by the High Court of Punjab and Haryana on April 17, 1984. The High Court, by its aforesaid order, had stayed the issuance and Publication of the notification by the Election Commission of India under Sections 30, 56 and 150 of the Representation of the People Act, 1951. We had directed that the special leave petition should be listed before us the next day for considering whether the interim order should be confirmed.

2. On February 28, 1984, this Court gave a judgment in Civil Appeal No. 5501 of 1983, setting aside the election of the returned candidate from the 59-Taoru Assembly Constituency in Haryana. As a result of that judgment, a vacancy arose in the Legislative Assembly of the State of Haryana from that Constituency. On April 6, 1984, the Election Commission of India sent a message to the Chief Secretary, Haryana, who is the Chief Electoral Officer for the State of Haryana, informing him that the Commission had fixed a certain programme for holding the by-election to the Taoru Constituency. According to that programme, the notification under Section 150 of the Representation of the People Act, 1951, was to be issued on April 18, 1984, the last date for filing nominations is April 25, 1984, while the date of the poll is May 20, 1984. The Election Commissioner fixed an identical programme for filling 23 other vacancies in the Legislative Assemblies of Andhra Pradesh, Karnataka and West Bengal.

3. On April 7, 1984 the Election Commission received a telex massage from the Chief Secretary, Government of Haryana, conveying the request of the Haryana Government that the proposed by-election should be held along with the general elections to the Lok Sabha, which are due later this year. On April 11, 1984, the Chief Secretary wrote a letter to the Chief Election Commissioner renewing the aforesaid request for two reasons :

> (1) The next general election to the Haryana Vidhan Sabha is due in May, 1987 and since the Taoru vacancy had occurred recently on February 28, 1984, there was no immediate necessity to fill it; and
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> (2) deferring the by-election would save time, labour and expense.

On April 12, 1984, the Election Commission informed the Chief Electoral Officers by a telex message that it had decided to adhere to the programme of by-elections to 24 vacancies in their

respective jurisdictions. The telex message mentioned specifically that the Commission had taken into consideration the replies received by it from various State Governments and their Chief Electoral Officers on the question of holding the elections as proposed. On the same date i.e. April 12, 1984, copies of notifications to be published on April 18, 1984 in the Haryana Gazette were sent to the Chief Electoral Officer of Haryana. By a separate communication of the same date, the Commission informed all the political parties about the programme fixed by it for holding the by-elections. A press not was also issued to the same effect on the same date.

4. The Chief Secretary, Haryana, met the Chief Election Commissioner on April 14 and explained to him personally why it was neither advisable nor possible to hold the by-election to the Taoru seat as proposed by the latter. On April 16, the Chief Secretary wrote a letter to the Chief Election Commissioner reiterating the view of his Government. He added in that letter that it would not be possible to hold the election during the proposed period because, the neighbouring State of Punjab was going through a serious problem of law and order, that there was a dispute regarding territorial adjustment and division of waters between the State of Haryana and the Akali Party in Punjab, that the said dispute was used by the Akali Party for stepping up terrorist activities, that the terrorists had attacked persons occupying high public offices, that there was a serious threat to the lives of many important persons in Haryana, that public meetings had been banned by the District Magistrate under Section 144 of the Criminal Procedure Code and that the situation in the State was such that it would not be possible to hold public meetings for election purposes for a few months. On April 17, the Chief Election Commissioner replied to the Chief Secretary's letter of April 16 by saying that the Commission had taken the decision to hold the by-election after taking into consideration all factors, that it was not clear how the Constituency of Taoru in Gurgaon, which is about 35 kilometers from Delhi, and which is quite far away from Punjab would have any fall-out of the Punjab situation and that the political parties who were duly informed of the proposed election programme had not opposed the holding of the by-election at this point of time. On the same date that the Chief Election Commissioner wrote the aforesaid letter, the Government of Haryana filed a writ petition in the High Court of Punjab and Haryana and obtained an ex parte order, which is impugned in this special leave petition.

5. We passed the interim order on April 18 after hearing a fairly long and exhaustive argument from Shri Siddhartha Shanker Ray who appears on behalf of the appellant, the Election Commission of India, and the learned Additional Solicitor-General who appeared on behalf of the respondent, the State of Haryana. We heard further arguments of the parties on the nineteenth, Shri Asoke Sen appearing for the respondent. Since the matter raises questions of general public importance, we grant special leave to appeal to the petitioner.

6. We often express our disapproval of the widely prevalent practice of parties obtaining ex parte orders when they can give prior intimation of the proposed proceedings to the opposite side, without much inconvenience or prejudice. When the public authorities do so, it is all the more open to disapprobation. But here, the parties have taken a tooth for a tooth. The Government of Haryana obtained an ex parte order from the High Court when it could easily have given prior intimation of the intended proceedings to the Election Commission of India. The letter is constitutionally identifiable, conveniently accessible and easily available for being contacted on the most modern system of communication. The Election Commission of India, too, rushed to this Court on the eighteenth without informing the Government of Haryana that it proposed to challenge the order of the High Court and to ask for stay of that order. The Government of Haryana is also identifiable and accessible with the same amount of ease. We do hope that the smaller litigant will not form the belief that the bigger one can get away with such lapses. Were it not for the fact that this matter

brooked no delay, we would have hesitated to pass any interim order without the appellant giving prior intimation of its proposed action to the respondent.

7. As stated earlier, notifications setting the election process in motion were to be issued on April 18. One day before that, the State Government approached the High Court in a hurry, asking it to stay the election process, which the High Court has done. This Court held in the West Bengal poll case, A.K.M. Hassan Uzzaman v. Union of India ((1982) 2 SCC 218), that the imminence of the electoral process is an important factor which must guide and govern the passing of orders in the exercise of the High Court's writ jurisdiction and that, the more imminent such process, the greater ought to be the reluctance of the High Court to take any step which will result in the postponement of the elections. We regret to find that far from showing any reluctance to interfere with the programmer of the proposed election, the High Court has only too readily passed the interim order which would have had the effect of postponing the election indefinite. Considering that the election process was just round the corner, the High Court ought not to have interfered with it. The non-speaking order passed by it affords no assistance on the question whether there were exceptional circumstances to justify that order.

8. The fact that the election process was imminent is only one reason for our saying that the High Court should have refused its assistance in the matter. The other reason for the view which we are taking is provided by the very nature of the controversy which is involved herein. The difference between the Government of Haryana and the Chief Election Commission centers round the question as to whether the position of law and order in the State of Haryana is such as to make it inexpedient or undesirable to hold the proposed by-election at this point of time. The Government of Haryana is undoubtedly in the best position to assess the situation of law and order in areas within its jurisdiction and under its control. But the ultimate decision as to whether it is possible and expedient to hold the elections at any given point of time must rest with the Election Commission. It is not suggested that the Election Commission can exercise its discretion in an arbitrary or mala fide manner. Arbitrariness and mala fides destroy the validity and efficacy of all orders passed by public authorities. It is therefore necessary that on an issue like the present, which concerns a situation of law and order, the Election Commission must consider the views of the State Government and all other concerned bodies or authorities before coming to the conclusion that there is no object to the holding of the elections at this point of time. On this aspect of the matter, the correspondence between the Chief Secretary of Haryana and the Chief Election Commissioner shows that the latter had taken all the relevant facts and circumstances into account while taking the decision to hold the by-election to the Taoru Consistency in accordance with the proposed programme. The situation of law and order in Punjab and, to some extent, in Haryana is a fact so notorious that it would be naive to hold that the Election Commission is not aware of it. Apart from the means of the knowledge of the situation of law and order in Punjab and Haryana, which the Election Commission would have, the Chief Secretary of Haryana and personally apprised the Chief Election Commissioner as to why the State Government was of the view that the elections should be postpone until the Parliamentary elections. We see no doubt that the Election Commission came to its decision after bearing in mind the pros and cons of the whole situation. It had the date before it. It cannot be assumed that it turned a blind eye to it. In these circumstances, it was not in the power of the High Court to decide whether the law and order situation in the State of Punjab and Haryana is such as not to warrant or permit the holding of the by-election. It is precisely in a situation like this that the ratio of the West Bengal poll case ((1982) 2 SCC 218) would apply in its full rigour.

9. We must add that it would be open to the Chief Election Commissioner, as held in Mohd. Yunus Saleem v. Shiv Kumar Shastri ((1974) 3 SCR 738, 743-44 : (1974) 4 SCC 854, 859 : AIR 1974 SC

1218) to review his decision as to the expediency of holding the poll on the notified date. In fact, not only would it be open to him to reconsider his decision to hold the poll as notified, it is plainly his duty and obligation to keep the situation under constant scrutiny so as to adjust the decision to the realities of the situation. All the facts and circumstances, past and present, which bear upon the question of the advisibility of holding the poll on the notified date have to be taken into account and kept under vigil. That is a continuing process which can only cease after the poll is held. Until then, the Election Commission has the locus, for good reason, to alter its decision. The law and order situation in the State, or in any part of it, or in a neighbouring State, is a consideration of vital importance for deciding the question of expediency or possibility of holding an election at any particular point of time. We are confident that the Chief Election Commissioner, who is vested with important duties and obligations by the Constitution, will discharged those duties and obligations with a high sense of responsibility, worthy of the high officer which he holds. If he considers it necessary, he should hold further discussions with the Chief Electoral Officer of Haryana and consult, once again, leaders of the various political parties on the question whether it is feasible to hold the poll on the due date. On an important issue such as the holding of an election, which is of great and immediate concern to the entire political community, there can be no question of any public official standing on prestige, an apprehension which was faintly projected in the State's arguments. A sense of realism, objectivity and non-alignment must inform the decision of the Election Commission on that issue.

10. It was urged that the High Court of Punjab and Haryana would have a fair and clear understanding of the happenings in Punjab and their repercussions in Haryana, which would justify its interference with the decision of the Election Commission to hold the by-election now. The first part of this argument need not be disputed and may even be accepted as correct. Indeed, every citizen of this country who has some degree of political awareness, would have a fair idea of the situation in Punjab and its impact on the even flow of life in the neighbouring State of Haryana. But the second part of the argument is untenable. The circumstance that the High Court has the knowledge of a fact will not justify the substitution by it of its own opinion for that of an authority duly appointed for a specific purpose by the law and the Constitution. Different people hold different views on public issues, which are often widely divergent. Even the Judges. A Judge is entitled to his views on public issues but the question is whether he can project his personal views on the decision of a question like the situation of law and order in a particular area at a particular period of time and hold that the Election Commission is in error in its appraisal of that situation. We suppose not.

11. For these reasons, we confirm the interim order which was passed by us on April 18, allow this appeal and set aside the High Court's order of April 17. Unless otherwise directed by the Chief Election Commissioner, the election programme will have to go through as already notified.

12. There will be no order as to costs.

THAKKAR, J. (dissenting) &#65533;

Holding of a by-election to fill even a single vacancy at the earliest date is an extremely desirable end in a democratic framework. Even so if such circumstances exist, and a reasonable prognosis can be bona fide made, that holding the by-election for filling up that vacancy, is fraught with grave danger, not only to the lives of election officers, candidates as also political leaders addressing election meetings, as also of voters, and poses a grave danger which altogether outweighs the advantage of holding the election along with the by-elections in other States, should the matter not

engage very serious attention of the Election Commission ? Not even when it is shown that having regard to the sensitive and explosive situation it was likely to worsen a situation which was already worse ? More so when all that was to be gained by holding the by-election as proposed was to be able to hold it along with other by-elections on the same day as in other States which had by itself no significance or virtue. And if the Election Commission without due deliberation summarily turns down the request to defer the election programme for that by-election even by a few days in such circumstances, can the High Court be faulted for passing an ad interim order, which has the result of postponing the election, not for an indefinite period, but for a few days till the parties are heard ? Is the order passed by the High Court in such circumstances so gross that instead of allowing the High Court to confirm it or vacate it, upon the other side showing cause, this Court should invoke the jurisdiction under Article 136 of the Constitution of India to set it aside ? More particularly when the consequence would be no more serious than this, namely, that the by-election cannot be held (there is no virtue in doing so) on the same day along with the other by-elections.

14. That the High Court has the power to issue a direction or order which has the effect of postponing an election if the situation so demands would appear to be the law declared by a five-judge Constitution Bench presided over by the learned Chief Justice who presides over this Bench as well. In A.K.M. Hassan Uzzaman v. Union of India ((1982) 2 SCC 218) the conclusions are recorded in the operative order dated March 30, 1982, reading as under : (SCC pp. 219, 221 paras 1, 2)

The transferred case and the appeals connected with it raise important questions which require a careful and dispassionate consideration. The hearing of these matters was concluded four days ago, on Friday, the 26th. Since the judgment will take some time to prepare, we propose, by this Order to state our conclusions on some of the points involved in the controversy :

> (1) The High Court acted within its jurisdiction in entertaining the writ petition and in issuing a rule nisi upon it, since the petition questioned the vires of the laws of election. But, with respect, it was not justified in passing the interim orders dated February 12 and 19, 1982 and in confirming those orders by its judgment dated February 25, 1982. Firstly, the High Court had no material before it to warrant the passing of those orders. The allegations in the writ petition are of a vague and general nature, on the basis of which no relief could be granted. Secondly, though the High Court did not lack the jurisdiction to entertain the writ petition and to issue appropriate directions therein, no High Court in the exercise of its powers under Article 226 of the Constitution should pass any orders, interim or otherwise, which has the tendency or effect of postponing an election, which is reasonably imminent and in relation to which its writ jurisdiction is invoked. The imminence of the electoral process is a factor which must guide and govern the passing of orders in the exercise of the High Court's writ jurisdiction. The more imminent such process, the greater ought to be the reluctance of the High Court to do anything, or direct anything to be done, which will postpone that process indefinitely by creating a situation in which, the Government of a State cannot be carried on in accordance with the provisions of the Constitution. India is an oasis of democracy, a fact of contemporary history which demands of the courts the use of wise statesmanship in the exercise of their extraordinary powers under the Constitution. The High Courts must observe a self-imposed limitation on their power to act under Article 226, by refusing to pass orders or give directions which will inevitably result in an indefinite postponement of elections to legislative bodies, which are the very essence of the

> democratic foundation and functioning of our Constitution. That limitation ought to be observed irrespective of the fact whether the preparation and publication of electoral rolls are a part of the process of 'election' within the meaning of Article 329(b) of the Constitution. We will pronounce upon that question later in our judgment.
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For these reasons and those which we will give in our judgment later, we dismiss the writ petition filed in the Calcutta High Court which was transferred for disposal to this Court. All orders, including interim orders, passed by the Calcutta High Court are hereby set aside. Civil Appeals 739 to 742 of 1982 will stand disposed of in the light of the dismissal of the writ petition, out of which they arise.

Does Hassan case enjoin that no such interim order can ever be passed by the High Court ?

15. The relevant extract from the conclusion recorded in Hassan case ((1982) 2 SCC 218) has been reproduced hereinabove. Of course, the exact para-meters of the decision and the true ratio cannot be known till the judgment containing reasons is born. As on today no one can predict what exactly will be decided by the Court in Hassan case ((1982) 2 SCC 218) when the judgment eventually comes to be pronounced (who can make a guess about the colour or shade of the eyes of a child which is yet to be born ?). But it can be reasonably said that the following extract ((1982) 2 SCC 218) (SCC p. 219, para 1)

The imminence of the electoral process is a factor which must guide and govern the passing of orders in the exercise of the High Court's write jurisdiction. The more imminent such process, the greater ought to be the reluctance of the High Court to do anything, or direct anything to be done, which will postpone that process indefinitely by creating a situation in which, the Government of a State cannot be carried on in accordance with the provisions of the Constitution.

warrants the view that Hassan case ((1982) 2 SCC 218) does not enjoin that an interim order of such a nature can never be passed in any situation. If that were not so, the Court would not have said (1) that imminence of electoral process is a factor which must guide and govern the passing of orders (meaning thereby that while such orders can be passed this factor must be accorded due consideration) and (2) that "more imminent such process, the greater ought to be the reluctance of the High Court to do anything or direct anything to be done which will postpone the process indefinitely" (which means it must be done only with reluctance when elections are imminent). The aforesaid statement of law made in the context of "general elections" does not warrant the view that Hassan case ((1982) 2 SCC 218) enjoins that an election programme cannot be postponed even for a few days even in the case of a by-election, whatever be the situation, and whatever be the circumstances, in which the High Court is called upon to exercise its jurisdiction. It is therefore not unreasonable to proceed on the premise that even according to Hassan case ((1982) 2 SCC 218) the Court has the power to issue an interim order which has the effect of postponing an election but it must be exercised sparingly (with reluctance) particularly when the result of the order would be to postpone the installation of a democratically elected popular government. The portion extracted from the operative order in Hassan case ((1982) 2 SCC 218) brought into focus a short while ago which adverts to "imminence of election" and to "directions which will inevitably result in indefinite postponement of elections to legislative bodies which are the very essence of the democratic functions of our Constitution" leaves no room for doubt that the observations were being made in

the context of the expiry of the term of Legislature as envisioned by Article 172 of the Constitution of India and consequential general elections for such Legislature. This must be so because the Legislature would stand dissolved on the expiry of the term, and a new Legislature has to be elected. It is in this context (presumably) that a reference is made to "imminence of elections". For a by-election like the one we are concerned with, there can be no question of 'imminence' or "indefinite postponement of elections" which would stall the installation of a democratically elected government. It is nobody's case that the party position was such that the result of the election to this vacant seat would have tilted the majority one way or other. No oblique motive has even been hinted at. The High Court was therefore not unjustified in proceeding on the assumption that it had such a power.

Does the ad interim order passed by the High Court merit being upturned in exercise of the jurisdiction under Article 136 of the Constitution of India ?

16. The only question which arises is whether the present was a case where the High Court could not have granted the ad interim order. Be it realized that if the High Court had not granted the order and the Election Commission had not chosen to appear on or before April 18, 1984 the High Court would have perhaps become powerless to pass any order, whatever be the justification for it, as the "electoral-process" would have 'actually' commenced. Can the High Court then be faulted for passing the impugned order faced as it was by an unprecedented situation like the present ? On the one hand the Election Commission appeared to have been altogether oblivious to the dimension as regard the bona fide apprehension pertaining to the life and security of the national leaders who might address public meetings, the candidates, the officers engaged in election work, and the voters. The danger was further aggravated in the face of open threats held out to the lives of the national leaders of different political parties. What is more, the Election Commission has shown total unawareness of the circumstance that public meetings were prohibited under Section 144 of the Code of Criminal Procedure in the constituency going to the polls. On the other hand the only consequence of granting a stay would have been to postpone the election programme by a few days in the event of the Election Commission not choosing to appear in the Court (to show cause why the ad interim order should not be made absolute) on or before April 18, 1984 which was the scheduled date of issuance of the notification announcing the election programme. The Election Commission could have appeared before the High Court and got the stay vacated in time instead of approaching this Court by way of the present appeal by special leave. The Election Commission could not have failed to realise that no serious consequence would have flowed from the impugned order even if stay was vacated, not immediately, but a few days later, for, it was only a by-election to one single seat of no significance which would not have resulted in postponement of the installation of an elected government. Worse come to worse, the by-election could not have been held along with by-elections in other States on the 'same' day. The Election Commission has not been able to show what possible detriment would have been suffered if the by-election could not have been so held on that particular day. If the High Court was prima facie satisfied that the Election Commission had failed to take into account vital matters and appeared to have acted on non-consequential considerations, and had acted arbitrarily in turning down the request of the State Government as also the Chief Election Officer of Haryana, why could the High Court not grant a stay ? And should this Court interfere in such a fact-situation ? Learned counsel for the Election Commission, though repeatedly requested, is unable to point out either from the affidavit filed on eighteenth, or from the additional affidavit filed on the nineteenth, that the aforesaid factors were taken into reckoning by the Commission. It is not stated that these factors do not exist or have been invented by the State Government with any oblique motive. The contents of the affidavits filed by the Election Commission reveal that it was altogether oblivious to all the relevant factors recounted earlier.

There is nothing to show that a single factor was present on its mental screen. The Election Commission has not apprised the Court as to how and why any or all of these factors were considered to be immaterial. No inkling is given as to how the Election Commission thought that the problems could be overcome. By what process of self-hypnotism did the Election Commission convince itself that free and fair elections could be held even when public meetings were banned in the constituency ? How, and by what process of ratiocination did the Election Commission convince itself that free elections could be held in a situation where the candidates would consider it hazardous to contest or to indulge in election propaganda, and even voters would be afraid to vote ? If the Election Commission had any idea as to how the hurdles could be crossed and problem resolved, it has chosen not to reveal its perception of the matter. The Election Commission perhaps had good answers. But silence is the only answer which has been given by the Commission as also its counsel on this aspect. "I know my-job-and-it-is-none-of-the-business-of-the-Courts" seems to be the attitude. All that has been stated by the learned counsel for the Commission is that everything was considered (without even disclosing the content of the expression 'everything'). Counsel has to course set up an alibi by saying that affidavits had to be prepared by burning midnight oil. But in that case the concentration would have been on everything of importance and what was the essence of the matter could not have been overlooked or forgotten. And if it has escaped attention, the conclusion is inevitable that the Election Commission had not attached due importance and weightage to the basic problem and had not applied itself seriously to a serious problem.

17. The fact is established that the Chief Secretary and the Chief Election Officer of Haryana, had personally apprised the Chief Election Commissioner of the prevailing situation sometime before April 14, 1984. The Election Commission has not even disclosed this fact in the petition or in the additional affidavit. Nor has the Election Commission apprised us as to what transpired at the meeting. The Election Commission has been less than candid to this Court. No doubt the Chief Election Commissioner is holding a responsible post. But that does not make him infallible or render his decision or act any the less arbitrary if he has failed to inform himself of all the relevant factors and has failed to direct his attention to the core problem. It is no doubt true that theoretically the Election Commission can still postpone the polling, if it is so minded. But should the Court remain a passive spectator in this extraordinary situation and leave the Nation to the mercy of an individual, however high be his office, when it is evident that he has secluded himself in his ivory tower and has shut his eyes to the realities of the situation and closed his mind to the prognosis of the matter. The Court can certainly satisfy itself whether the Election Commissioner had kept his eyes, ears and mind open, and whether he was able to show that all relevant factors including the consideration as to what advantage was to be secured as against the risk to be faced, entered into his reckoning. If this is not shown to have been done, as in the present case, his decision is vitiated and the Court need not feel helpless. The High Court was therefore fully justified in passing the impugned order. Appeal is accordingly dismissed.

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