

Indrajit Barua and Others

Vs

Election Commission of India and Others

Transferred Cases Nos. 364 to 382 of 1984

(CJI P. N. Bhagwati, A. N. Sen, V. B. Eradi, Ranganath Misra, V. Khalid JJ)

30.09.1985

JUDGMENT

RANGANATH MISRA, J. –

1. At the conclusion of the hearing, in view of the urgency of the matter as also the importance of the issues involved, we made an order on September 28, 1984, setting out briefly our conclusions and had indicated that detailed reasons would be given in the judgment to be delivered later.
2. On January 12, 1983, election to all the 126 seats of the Assam Legislative Assembly was notified to be held in February 1983. Very disturbed conditions had been prevailing in Assam for a few years prior to this period and one of the issues leading to the agitation was the electoral rolls of 1979 prepared under the Representation of the People Act, 1950 ("1950 Act" for short). When general election was notified, a set of writ petitions were filed in the Gauhati High Court being Civil Rules 87 and 228-246 of 1983. The first application asked for a mandamus to the Election Commission and the State Government then under President's rule not to hold elections on the basis of the defective electoral rolls and to defer holding of elections on account of the prevailing disturbed situation in the State. In the second group of writ petitions the Court was asked to issue a mandamus for preparation of fresh electoral rolls according to law before election could be held and to restrain the Commission and the State Government from holding elections on the basis of defective and void electoral rolls. The High Court did not grant interim order of stay of election though the writ petitions were entertained. Constitutently, elections were held to the State Legislature and by notification of February 27, 1983, the results of the election were duly notified. A number of writ petitions were then filed in the Gauhati High Court more or less making similar allegations and substantially challenging the electoral rolls of 1979 and questioning the validity of all the elections to the Legislative Assembly and praying for dissolution of the House. In some of these applications relief of quo warrant was also asked for against named returned candidates. These writ petitions were numbered as Civil Rules 524, 691-693, 695-699, 706-707, 694 and 525 of 1983 and were in due course transferred to this Court at the instance of the Election Commission for disposal. They have, therefore, been assigned new members as transferred cases. We have thus two sets of cases, transferred from the Gauhati High Court - the first set challenging the electoral rolls of 1979 and the notification for holding of the elections asking for staying of the elections and the second set challenging the elections after they were held and notified on the ground that the holding of elections on the basis of the void electoral rolls of 1979 was contrary to law and vitiated the elections.
3. Our order of September 28, 1984 (Inderjit Barua v. Election Commission of India, (1985) 1 SCC 21), not only indicated the conclusions but also provided brief reasons for the same. We, therefore,

propose to the relevant portion thereof on each issue arising for consideration. Dealing with the challenge to the validity of elections to Assam Legislative Assembly, we had said : (SCC pp. 23-24. paras 1 to 3)

The principal ground on which the validity of the elections has been challenged is that the electoral rolls were not revised before the elections in contravention of the provisions of Section 21, sub-section (2)(a) of the Representation of the People Act, 1950 and the elections were held on the basis of the electoral rolls of 1979. Now it is undoubtedly true that the electoral rolls were not revised before the impugned elections were held but the Election Commission dispensed with the revision of the electoral rolls by an order January 7, 1983 made under the opening part of Section 21, sub-section (2) and this order has not been challenged in any of the writ petitions. Hence the impugned elections cannot be challenged on the ground that they were held on the basis of the electoral rolls of 1979 without revision of the electoral rolls. The petitioners also attacked the validity of the electoral rolls of 1979 on the ground that the Election Commission had, by the Press Note dated September 18, 1979, erroneously directed the electoral authorities in charge of revision the electoral rolls on the ground of lack of qualification of citizenship, since the question of citizenship was not one which could be decided by the electoral authorities and the electoral rolls of 1979 were therefore invalid and the impugned elections held on the basis of the electoral rolls of 1979 were void. We do not think there is any substance in this contention.

In the first place, Article 329(b) of the Constitution bars any challenge to the impugned elections by a writ petition under Article 226 as also on the ground that the electoral rolls on the basis of which the impugned elections were held were invalid. The petitioners sought to escape from the ban of Article 329(b) by contending that they are challenging the impugned elections as a whole and not any individual election and that the ban of Article 329(b) therefore does not stand in the way of the writ petitions filed by them challenging the impugned elections. But, we do not think this escape route is open to the petitioners. There is in the Representation of the People Act, 1951 no concept of elections as a whole. What that Act contemplates is election from each constituency and it is that election which is liable to be challenged by filing an election petition. It may be that there is a common ground which may vitiate the elections from all the constituencies, but even so it is the election from each constituency which has to be challenged though the ground of challenge may be identical. Even where in form the challenge is to the elections as a whole, in effect and substance what is challenged is election from each constituency and Article 329(b) must therefore be held to be attracted.

We are of the view that once the final electoral rolls are published and elections are held on the basis of such electoral rolls, it is not open to anyone to challenge the election from any constituency or constituencies on the ground that the electoral rolls were defective. That is not a ground available for challenging an election under Section 100 of the Representation of the People Act 1951. The finality of the electoral rolls cannot be assailed in a proceeding challenging the validity of an election held on the basis of such electoral rolls vide *Kabul Singh v. Kundan Singh* ((1970) 1 SCR 845 : (1969) 2 SCC 452 : 42 ELR 325). Article 329(b) in our opinion clearly bars any writ petition challenging the impugned elections on the ground that the electoral rolls of 1979 on the basis of which the impugned elections were held were invalid.

Article 329(b) of the Constitution provides :

Notwithstanding anything in this Constitution -

#(a) * * *##

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

4. Therefore, an election can be challenged only by filing of an election petition in the manner prescribed by the Representation of the People Act, 1951. A Constitution Bench of this Court in *Jagan Nath v. Jaswant Singh* (1954 SCR 892 : AIR 1954 SC 210 : (1953-54) 9 ELR 231), has said :

The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power.

In *Hari Vishnu Kamath v. Syed Ahmad Ishaque* ((1955) 1 SCR 1104, 1111 : AIR 1955 SC 233 : (1954-55) 10 ELR 216), Venkatarama Ayyar, J. speaking for the Court, said :

These are instances of original proceedings calling in question an election, and would be within the prohibition enacted in Article 329(b). But when once proceedings have been instituted in accordance with Article 329(b) by presentation of an election petition, the requirements of that article are fully satisfied. Thereafter when the election petition is in due course heard by a Tribunal (now the High Court) and decided, whether its decision is open to attack, and if so, where and to what extent, must be determined by the general law applicable to decisions of Tribunals

The view that Article 329(b) is limited in its operation to initiation of proceedings for setting aside an election and not to the further stages following on the decision of the Tribunal is considerably reinforced, when the question is considered with reference to a candidate, whose election has been set aside by the Tribunal.

5. To the same effect are the observations of another Constitution Bench in the case of *Durga Shankar Mehta v. Thakur Raghuraj Singh* ((1955) 1 SCR 267 : AIR 1954 SC 520 : (1953-54) 9 ELR 494). Mukherjee, J. (as he then was) spoke for the Court thus :

The non obstante clause with which Article 329 of the Constitution begins and upon which the respondent's counsel lays so much stress debars us, as it debars any other court in the land, to entertain a suit or a proceeding calling in question any election to the Parliament or the State Legislature. It is the Election Tribunal (now the High Court) alone that can decide such disputes, and the proceeding has to be initiated by an election petition and in such manner as may be provided by a statute.

6. These are clear authorities - and the position has never been assailed - in support of the position that an election can be challenged only in the manner prescribed by the Act. In this view of the matter, we had concluded that writ petitions under Article 226 challenging the election to the State Legislature were not maintainable and election petitions under Section 81 of the Act had to be filed in the High Court. The Act does not contemplated a challenge to the election to the Legislature as a

whole and the scheme of the Act is clear. Election of each of the returned candidates has to be challenged by filing of a separate election petition. The proceedings under the Act are quite strict and clear provisions have been made as to how an election petition has to be filed and who should be parties to such election petition. As we have already observed, when election to a Legislature is held it is not one election but there are as many elections as the Legislature has members. The challenge to the elections to the Assam Legislative Assembly by filing petitions under Article 226 of the Constitution was, therefore, not tenable in law.

7. It is the admitted case of parties before us that the electoral rolls of the constituencies excepting one in the State of Assam were last revised intensively during the year 1979 with reference to January 1, 1979, as the qualifying date. In the case of No. 114 - Jonai (S.T.) Assembly Constituency only summary revision was undertaken as intensive revision was not possible for the reason that these areas were submerged heavily by flood water at the relevant time. The general election to the House of Parliament was held in 1980 on the basis of the said electoral rolls. An annual revision of the electoral rolls as per requirement of the law as also the practice obtaining in the rest of the country could not be undertaken in 1980-81, or 1982 mainly on account of adverse law and order situation prevailing in the State.

8. The Legislative Assembly of the State of Assam had been dissolved by the President acting under Article 356 of the Constitution by proclamation dated March 19, 1982, and the extended period was due to expire on March 18, 1983. The Election Commission was intimated by the Union Government on January 6, 1983, that the Presidential proclamation would be revoked by end of February 1983. Holding of election in Assam for constituting the Legislative Assembly well before the end of that period, therefore, became an immediate necessity. The Election Commission had hardly eight week's time in its hand to complete the process. Without loss of further time the Commission issued the notification announcing the election programme on January 12, 1983, and the election was proposed to be held on the basis of the existing electoral rolls of 1979.

9. According to the petitioners the electoral rolls of 1979 without being appropriately revised as required by law were not the proper rolls on the basis of which election could have been conducted. It has been pointed out that the process of revision had been undertaken but the Election Commission suddenly stopped it and decided that the unrevised and out of date rolls would provide the basis for holding of the elections. It is the submission of the petitioners on the basis of a decision of this Court in Chief Commissioner, Ajmer v. Radhey Shyam Dani (1957 SCR 68 : AIR 1957 SC 304 : (1956) 12 ELR 443), that it is essential for democratic elections that proper electoral rolls should be maintained and in order that the same may be available, it is necessary that after the preparation of the electoral rolls opportunity should be given to the parties concerned to scrutinise whether the persons enrolled as electors possess the requisite qualifications. Opportunity should also be given for the revision of the electoral rolls and for the adjudication of the claims for being enrolled. Unless these are done the obligation cast upon those holding the elections is not discharged and the elections held on such imperfect electoral rolls would acquire no sanctity and would be liable to be challenged at the instance of the parties concerned. In the case referred to above, validity of municipal elections was under consideration. Obviously provisions of Article 329(b) of the Constitution had no application to such election and this Court was dealing with the statutory requirements for holding of the elections.

10. Challenge to the 1979 electoral rolls is on the basis that persons who are not citizens of India have been included in the electoral rolls. Infiltration of people from outside India into Assam and inclusion of their names in the electoral rolls constituted one of the main grounds for the agitation in

Assam. Section 16 of the 1950 Act clearly provides that a person shall be disqualified for registration in an electoral roll if he is not a citizen of India. Detailed provision has been made in the Registration of Electors Rules to raise objection to the inclusion of the name of a disqualified person. Part III of the 1950 Act makes provision for electoral rolls for Assembly Constituencies. Section 21 deals with preparation and revision of electoral rolls; Section 22 provides for correction of entries in electoral rolls while Section 23 authorises inclusion of names in electoral rolls. Section 24 provides for an appeal to the Chief Electoral Officer from any order made by the Electoral Registration Officer under Sections 22 and 23. Section 21 making provision for preparation and revision of electoral rolls runs thus :

(1) The electoral roll for each constituency shall be prepared in the prescribed manner by reference to the qualifying date and shall come into force immediately upon its final publication in accordance with the rules made under this Act.

(2) The said electoral roll -

(a) shall, unless otherwise directed by the Election Commission for reasons to be recorded in writing, be revised in the prescribed manner by reference to the qualifying date -

(i) before each general election to the House of the People or to the Legislative Assembly of State; and

(ii) before each bye-election to fill a casual vacancy in a seat allotted to the constituency; and

(b) shall be revised in any year in the prescribed manner by reference to the qualifying date if such revision has been directed by the Election Commission :

Provision that if the electoral roll is not revised as aforesaid, the validity or continued operation of the said electoral roll shall not hereby be affected.

#(3) * * *##

The proviso, therefore, makes the position clear beyond doubt that if for some reason an electoral roll is not revised as required by sub-section (2), the unrevised roll is not affected in any way and continues to be the electoral roll holding the field.

11. Dealing with the aspect about the validity of electoral rolls of 1979, we have indicated : (SCC pp. 24-25, para 4)

We may also point out that in our opinion the electoral rolls of 1979 cannot be condemned as invalid. The counter affidavits of Shri Ganesan, Secretary to the Election Commission and Shri Ashok Kumar Arora, Additional Chief Electoral Officer, Assam clearly show that the procedure prescribed by the Representation of the People Act, 1950 for revision of the electoral rolls was followed. The Press Note dated September 18, 1979 on which considerable reliance was placed on behalf of the petitioners must be read along with the correspondence exchanged between the Chief Electoral Officer, Assam and the Secretary to the Election Commission prior to the issue of the Press Note and if all these documents are read as a whole, it is clear that no instructions were issued by the Election Commission to the Chief Electoral Officer not to decide the question of citizenship,

if any objection to a particular entry in the draft electoral rolls was raised on the ground of lack of qualification of citizenship. All that the Election Commission directed the Chief Electoral Officer to do was to proceed on the basis that those whose names were already included in the previous electoral rolls - and we may point out that the electoral rolls of 1977 on the basis of which the elections to the Assam Legislative Assembly were held in 1978 were not any time challenged by any of the petitioners - should be prima facie regarded as satisfying the qualification of citizenship and if any specific objection to the inclusion of any particular person on the ground of lack of qualification of citizenship was raised, it should be decided by the appropriate electoral authorities and the burden of showing that such person was not a citizen should be on the objector. We are informed and the affidavits also go to show that in fact a large number of objection based on the ground of lack of qualification of citizenship were disposed of by the appropriate electoral authorities after the publication of the draft electoral rolls. So far as the inclusion of any new names in the draft electoral rolls was concerned, the Election Commission directed that the utmost care should be taken to ensure that only citizens were enrolled as electors. We do not think that these directions given by the Election Commission were in any way in defiance of the provision of the Representation of the People Act, 1950 and the Electoral Registration Rules, 1960 made under that Act. The electoral rolls of 1979 must therefore be regarded as not suffering from any legal infirmity, though we any reiterate once again that even if the electoral rolls of 1979 were invalid, that would not affect the validity of the impinged elections nor would a writ petition under Article 226 of the Constitution be maintainable for Challenging the impugned election.

12. From the materials placed by the parties and the Election Commission, we have come to the conclusion that the Election Commission did not give directions contrary to the requirements of Section 16 of the Act and the revision of the 1979 electoral rolls could not be undertaken for reasons beyond the control of the Election Commission. As pointed out by us in our order of September 28, 1984 there was no dispute to the electoral roll of 1977 nor was any challenge advanced against the election of 1978 to the State Legislature held on the basis of such rolls. Admittedly, the 1979 rolls were the outcome of intensive revision of the revision of the rolls of 1977. That being the position and in view of the proviso to sub-section (2) of Section 21 which we have extracted above the electoral rolls of 1979 were validity in existence and remained effective even though the process contemplated in sub-section (2) for revision had not either been undertaken or completed. It has been indicated by a Constitution Bench decision of this Court in Lakshmi Charan Sen v. A. K. M. Hassan Uzzaman ((1985) 4 SCC 689), that preparation and revision of electoral rolls is a continuous process not connected with any particular election but when an election is to be held, the electoral roll which exists at the time when election is notified would form the foundation for holding of such election. That is why sub-section (3) of Section 23 provides for suspension of any modification to the electoral roll after that last date of making of nominations for an election and until completion of the election. We had, therefore, come to the conclusion that the electoral rolls of 1979 were not invalid and could provide the basis for holding of the elections in 1983. Whether preparation and publication of the electoral rolls are a part of the process of election within the meaning of Article 329(b) of the Constitution is the next aspect to be considered. In N. P. Ponnuswami v. Returning Officer, Namakkal Constituency (1952 SCR 218 : AIR 1952 SC 64 : (1951-52) 1 ELR 133), this Court had to decide the amplitude of the 'election'. Fazal Ali, J. speaking for the constitution Bench indicated :

It seems to me that the word 'election' has been used in Part XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the Legislature. The use of the expression "conduct of elections" in Article 324 specifically points to the wide meaning, and that meaning can also be

read consistently into the other provisions which occur in Part XV including Article 329(b). That the word 'election' bears this wide meaning whenever we talk of elections in a democratic country, is borne out by the fact that in most of the books on the subject and in several cases dealing with the matter, one of the questions mooted is, when the election begins. The subject is dealt with quite concisely in Halsbury's Laws of England in the following passage under the heading "Commencement of the Election" :

Although the first formal step in every election is the issue of the writ, the election is considered for some purposes to begin at an earlier date. It is a question of fact in each case when an election begins in such a way as to make the parties concerned responsible for breaches of election law, the test being whether the contest is "reasonably imminent". Neither the issue of the writ nor the publication of the notice of election can be looked to as fixing the date when an election begins from this point of view. Nor, again, does the nomination day afford any criterion. The election will usually begin at least earlier than the issue of the writ. The question when the election begins must be carefully distinguished from that as to when "the conduct and management of" an election may be said to begin. Again, the question as to when a particular person commences to be a candidate is a question to be considered in each case.

The discussion in this passage makes it clear that the word 'election' can be and has been appropriately used with reference to the entire process which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process.

We are not prepared to make the view that preparation of electoral rolls is also a process of election. We find support for our view from the observations of Chandrachud, C.J. in *Lakshmi Charan Sen case* (1957 SCR 68 : AIR 1957 SC 304 : (1956) 12 ELR 443) that "it may be difficult, consistently with that view, to hold that preparation and revision of electoral roll, is a part of 'election' within the meaning of Article 329(b)". In a suitable case challenge to the electoral roll for not complying with the requirements of the law may be entertained subject to the rule indicated in *Ponnuswami case* ((1985) 4 SCC 689). But the election of a candidate is not open to challenge on the score of the electoral roll being defective. Holding the election to the Legislature and holding them according to law are both matters of paramount importance. Such elections have to be held also in accordance with a time bound programme contemplated in the Constitution and the Act. The proviso added in Section 22(2) of the Act of 1950 is intended to extend cover to the electoral rolls in eventualities which otherwise might have interfered with the smooth working of the programme. These are the reasons for which we came to the conclusion that the electoral roll of 1979 had not been vitiated and was not open to be attacked as invalid.

13. Two other brief contentions may now be noticed. In Transferred case 364 of 1984 there was a prayer that the electoral rolls on the basis of which election from Assam would be held should be revised before the holding of such election as required by Section 21(2)(a) of the Act of 1950. This meant an intensive revision. Counsel appearing for the Election Commission made a statement before the Court to the following effect :

The Commission will carry out revision of the electoral rolls for all constituencies in Assam in accordance with the Act and the Rules and such revision shall, as far as practicable, be intensive revision and wherever it is not practicable to carry out intensive revision in any constituency or constituencies, the revision shall be summary or special revision.

We indicated in our order of September 28, 1984, that the statement made on behalf of the Election Commission must allay the apprehension of all the petitioners in the case since it made it clear that before elections are held in Assam, there would be revision of the electoral rolls in the manner indicated in the statement. Considerable argument was advanced with reference to the electoral card. As it appears the Election Commission had introduced a form different from the one prescribed in Form 4 read with Rule 8 of the Electors' Registration Rules. Here again, a statement was made on behalf of the commission to the following effect :

For the sake of greater clarity and keeping in view the provisions of Section 2(c) of the Representation of the People Act, 1951 and Form 4 of the Registration of Electors Rules, 1960, the word 'citizen' shall be substituted for the word 'elector' wherever it occurs in the electoral card by issuance of a direction by the Election Commission.

With the adoption of the basis indicated in the statement, the objection on that score must be taken to have vanished.

14. Considerable argument had also been advanced regarding the carrying out of revision of electoral rolls. Petitioners wanted that the Election Commission should do so suo motu while the Election Commission pleaded its inability keeping in view the ambit and stupendous proportion of the task and pleaded that claim or objection should be the foundation of the revision. Dealing with this question, after hearing counsel at great length we had stated :

The only direction which we can give to the Election Commission is to carry out revision of the electoral rolls in accordance with the procedure prescribed in the Representation of the People Act, 1950 and the Electors' Registration Rules, 1960. But since the Election Commission has stated before us that it will carry out revision of the electoral rolls and that such revision shall, as practicable, be intensive revision and where it is not so practicable, it will be summary or special, we do not think it necessary to give any further directions to the Election Commission. When the draft electoral rolls are ready as a result of such revision carried out by the Election Commission, it will be open to anyone whose name is not included in the draft electoral rolls to lodge a claim for inclusion of his name on the ground that he is an eligible elector and if the name of any person is erroneously included in the draft electoral rolls even though he is not a citizen, it will be equally open to anyone entitled to object to challenge the inclusion of the name of such person in the draft electoral rolls by filing an objection in accordance with the Electors' Registration Rules, 1960. Such claims and objections will have to be disposed of by the Election Commission in accordance with the provisions of the Representation of the People Act, 1950 and the Electors' Registration Rules, 1960. It is neither desirable nor proper for us to lay down as to what quantum of proof should be required for the purpose of substantiating any such claims or objections lodged before the Election Commission. It would be for the appropriate electoral officer to consider and decide, in the light of such material as may be produced before him by the objector as also by the person whose name is sought to be deleted from the electoral rolls and such further materials as may be available to him including the electoral rolls of the earlier years, whether such person is a citizen or not. We may point out that the appropriate electoral officer may also on his own, if he has on the material available to him including the electoral rolls of the earlier years, reason to entertain any doubt, take

steps to satisfy himself in regard to the citizenship of a person whose name is sought to be included or has been included in the electoral rolls.

15. We take note of the position - and with a sense of satisfaction - that with the accord reached about Assam the agitation seems to have ended. The Election Commission is at work and in compliance with the provisions of the Act and the Rules, the electoral rolls are being revised. We hope and trust that elections which are indispensable to the democratic process would be held in accordance with law as expediently as possible and on the basis of a revised electoral roll in terms of the statement made to the Court by the election commission.

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