

SUPREME COURT OF INDIA

Dr.Subramanian Swamy

Vs.

Election Commission of India

C.A.No.9093 of 2013

(P.Sathasivam CJI. and Ranjan Gogoi JJ.)

08.10.2013

JUDGMENT

P. SATHASIVAM, CJI.

1. Leave granted.

Civil Appeal @ SLP (C) No. 13735 of 2012

2. This appeal is directed against the judgment and order dated 17.01.2012 passed by the Division Bench of the High Court of Delhi at New Delhi in W.P.(C) No. 11879 of 2009 whereby the High Court disposed of the petition by disallowing the prayer made by the appellant herein for issuance of a writ of mandamus directing the Election Commission of India (ECI)-Respondent herein to incorporate a system of “paper trail/paper receipt” in the Electronic Voting Machines (EVMs) as a convincing proof that the EVM has rightly registered the vote cast by a voter in favour of a particular candidate.

3. Being aggrieved of the above, the present appeal has been filed by way of special leave.

Writ Petition (Civil) No. 406 of 2012

4. One Rajendra Satyanarayan Gilda has filed this Writ Petition, under Article 32 of the Constitution of India, praying for issuance of a writ of mandamus/direction(s) directing the Union of India, the Chief Election Commissioner and the Technical Experts Committee-Respondent Nos. 1-3 herein

respectively to effect the necessary modifications in the EVMs so as to allow the voters to verify their respective votes and to attach the printers to the EVMs with a facility to print the running record of the votes for the purpose of verification by the voters in the process of voting. He also prayed for a direction to frame guidelines and to effect necessary amendments in the Conduct of Election Rules, 1961.

5. In view of the pendency of the appeal filed by Dr. Subramanian Swamy, this Court issued notice in the writ petition and tagged with the said appeal.

6. Heard Dr. Subramanian Swamy, appellant-in-person in the appeal, Dr. R.R. Deshpande, learned counsel for the writ petitioner, Mr. Ashok Desai and Ms. Meenakshi Arora, learned senior counsel for the ECI. Contentions:

7. Dr. Subramanian Swamy, the appellant herein contended before this Court that the present system of EVMs, as utilized in the last few general elections in India, does not meet all the requirements of the international standards and though the ECI maintains that the EVMs cannot be tampered with, but the fact is that EVMs, like all electronic equipments, are open to hacking.

8. The appellant has further highlighted that the instant matter arises out of the refusal of the ECI to incorporate a certain obvious safeguard in the EVMs called “paper backup”, “paper receipt” or “paper trail”, presently in use and mandated in some countries like USA, which would easily and cheaply meet the requirement of proof that the EVM has rightly registered the vote cast by a voter. The appellant has further highlighted that the “paper trail” system is to supplement the procedure of voting as in this procedure, after recording a vote in the EVM, a print out will come out which will appraise the voter that his vote has been rightly registered and the same will be deposited in a box which can only be used by the ECI in case of election dispute.

9. It is the categorical stand of the appellant that the above said system will bring more accuracy in the present system and if a particular election is challenged on the ground that some particular identified voter’s voter or the votes of a group of voters have been suppressed/have not been correctly assigned by the EVMs, the accepted current procedure is for a re-run of the same EVMs for a re-count, however, under the new procedure, a re-count will be of the receipts in the ballot box containing the printouts the EVMs had issued to the voter thereby ensuring more transparency in the process.

10. The writ petitioner has also raised similar contentions as those of Dr. Swamy. According to the petitioner, in the present system of voting through EVMs, there is no such facility by which a voter can verify and confirm his own voting. At present, a voter presses a button only but cannot ascertain the actual voting. He is not sure whether his vote is recorded or not, if recorded, whether it is recorded in favour of the person to whom it was intended or not. Whether it is valid or invalid and whether it is counted or not. It is submitted by the petitioner that unless and until answers to these questions are personally seen by the voter, it cannot be said that voting is made by him because “pressing a button of choice and getting flashed the red-light” is not actual voting in real sense unless the voter knows well that what has happened in consequence of pressing a button of his choice from the EVMs. Stand of the Election Commission of India:

11. Mr. Ashok Desai, learned senior counsel for the ECI submitted that the apprehension that EVMs could be tampered with is baseless. It was also informed to this Court that the ECI has been exploring the possibility of incorporating a viable Voter Verifiable Paper Audit Trail (VVPAT) system as a part of the presently used EVMs to make the election system more transparent. Further, it was brought to our notice that the ECI conducted field trials for VVPAT system earlier also but the same had not been successful and were discontinued. The ECI also filed a counter affidavit stating that the EVMs provided by the Commission are of such a high end technology that it cannot be hacked.

12. Referring to Section 61A of the Representation of the People Act, 1951, it is submitted that the Statute itself provides for recording of votes by EVMs and the ECI has been given the discretion to prescribe recording of votes by such EVMs as it may deem fit. This discretion has to be exercised in a manner to preserve the sanctity of the election process and ensure that the election is conducted in a free and fair manner. The ECI has exercised due diligence to ensure that EVMs so used are “tamper proof” and it is also in the process of exploring to incorporate VVPAT system which is compatible with the present EVMs used by it. It is asserted that there is no instance of tampering with EVMs so far by anyone. 13) It is further submitted that the EVMs used in India are unique and unlike the ones used in the elections in USA and other countries, which are personal computer based. EVMs deployed by the ECI have been lauded not only in India but also abroad. EVM’s Control Unit retains in the memory each vote recorded elector-wise. The information stored in the memory of the Control Unit can be retrieved by using a device called the “decoder” which, when attached to the Control Unit of EVM, can print out the statement of voting data showing the order in which each voter has voted and to whom he has voted.

14. Insofar as the transparency of the election process as well as the right of a voter to know whether his vote has actually been recorded for the candidate for whom it was cast is concerned, it is submitted that as soon as a vote is recorded by a voter by pressing the “candidate’s” button on the Ballot Unit, a light glows against the name and symbol of the candidate, which the voter can see for himself/ herself. This is a visual (electronic) assurance to the voter that the candidate for whom he has cast his vote has actually got that vote. Thereafter, the light goes off to protect the secrecy of voting.

15. It is further submitted that the feasibility of VVPAT system was sought to be explored to by various political parties and they were explained the technical and administrative safeguards. The ECI also constituted a Technical Experts Committee to examine the viability of the VVPAT system. On 27.05.2011, the Technical Experts Committee, after discussion with political parties and civil society members and also after seeing the demonstration of the prototype VVPAT system developed by M/s. Bharat Electronics Ltd. (BEL) and M/s. Electronics Corporation of India Ltd. (ECIL), recommended that a field test of the prototype VVPAT system should be carried out in a simulated election under different environmental conditions in Jaisalmer, Thiruvananthapuram, Delhi, Leh and Cherapunji. The ECI also held further meetings with the manufacturers of EVMs on various dates to fine tune the system and expedite the follow up action required. Several meetings were also held with the Expert Committee on VVPAT system.

16. In wider fulfillment of the objectives of the field trial, the ECI has requested the National and State parties to extend necessary cooperation by getting involved in the trial process actively and also witness the trial in order to have a first hand experience of the system. The ECI has also requested the individuals including the appellant – Dr. Subramanian Swamy and the groups, who have been engaged with the ECI on the issue of EVM-VVPAT, to witness the trial.

17. We have carefully perused the relevant materials and considered the rival contentions.

Discussion

18. When the matter was listed before this Court for hearing on 27.09.2012, Mr. Ashok Desai had brought to our notice that the ECI is contemplating foolproof method in EVMs for which they are taking various steps in consultation with the Technical Experts Committee and the views of all recognized political parties. Mr.

Desai also promised to appraise this Court about the deliberations and the ultimate decision to be taken by them in this regard. Accordingly, this Court granted sufficient time to the ECI to file Status Report regarding introduction of VVPAT system in EVMs to be used in the elections.

19. Pursuant to the directions of this Court, the ECI filed a Status Report on the developments of VVPAT system. In the said report, the ECI, citing various technicalities, prayed for further time to make the system more robust for the field conditions.

20. On 15.12.2012, M/s BEL, Bangalore filed a report showing the status of development of VVPAT system which contains changes that have been carried out in VVPAT from September to December, 2012 and also furnished chronological changes made in VVPAT system after the field trial of the VVPAT system held in July and August, 2012.

21. Pursuant to the directions of this Court, the Secretary, ECI, filed an affidavit highlighting the following steps/ information:

“(i) That vide its Affidavit dated 14.01.2013, the Commission had filed the status report regarding introduction of the VVPAT system in the Electronic Voting Machines (EVMs).

(ii) That subsequently, in the Technical Expert Committee meeting held on 04.02.2013, the Committee approved the design of the VVPAT and decided that software fine tuning will be done and completed by the end of February, 2013, and modified design specifications will be submitted to the Technical Expert Committee for approval.

The Committee also recommended that the Commission may for using the VVPAT and that the VVPAT should be tried in a bye-election.

(iii) That in the Technical Expert Committee meeting held on 19.02.2013, the Committee finalized the VVPAT design. The manufacturers, namely, M/s. Bharat Electronics Limited and M/s. Electronics Corporation of India Limited have quoted Rs. 16,200/- (excluding duties, taxes and transport charges) per VVPAT system.

The Commission has decided to purchase sufficient units of VVPAT for trials in a Bye-election, at an approximate cost of Rs.72,90,000/- (Rupees seventy two lakh ninety thousand) approximately.

(iv) It is submitted that the Commission will require approximately 13 lakh VVPAT units to be manufactures for 13 lakh EVMs presently available and roughly about Rs. 1690 crores (One Thousand Six Hundred Ninety Crores)(i.e. 13 lakh units x Rs.13,000 per unit) are required for the purpose of implementation of the VVPAT system taking into account the possible reduction in the cost per unit when produced in bulk.

(v) It is further submitted that in order to implement the new system the Conduct of Election Rules, 1961 will require certain amendments.

In this connection, vide letter No. 3/1/2013/Vol.II/SDR/86 dated 28.03.2013, the Commission has informed the Legislative Department of the Ministry of Law and Justice inter alia the various amendments required to the relevant parts of Rules 49A to 49X, 66A, 55C, 56C, 57C and Form 17C of the Conduct of Elections Rules, 1961, as well as introduction of Rules 49MA and 56D in the said Rules...

(vi) That the Commission has called for a meeting of all the recognized National and State Parties on 10th May, 2013 for the purpose of demonstration of VVPAT unit to them and for discussion with them for eliciting their views regarding use of VVPAT system in the elections. The petitioner herein and others interested in the matter would also be invited at the meeting.”

22. It is seen from the records that after various deliberations with the experts and persons concerned with the technology, the Technical Experts Committee approved the final design of VVPAT units in its meeting held on 19.01.2013. In order to meet the directions of this Court and for proper execution of VVPAT system, as noticed above, the ECI in its letter dated 28.03.2013, addressed to the Secretary to the Government of India, Ministry of Law and Justice stated that necessary ground work for amendment to the Conduct of Election Rules, 1961 (in relevant parts in Rules 49A to 49X, 66A, 55C, 56C, 57C and Form 17C) may be made so that the amendment to the Rules can be notified immediately which will enable the ECI to use the VVPAT system in bye-elections in consultation with the political parties. By placing all those materials, the ECI requested the Ministry of Law and Justice for drafting and notifying amendment Rules expeditiously.

23. From the materials placed by the ECI, it is noted that the purchase order has been placed with M/s BEL and M/s ECIL for supplying 150 and 300 VVPAT units respectively at Rs. 16,200/- per unit excluding excise duty, sales tax and transportation etc. costing Rs. 72,90,000/- (approx.). The ECI has also highlighted that if the VVPAT systems are ultimately to be used with all the 13 lakh EVMs available, the total cost in the purchase of VVPAT units may come to about Rs. 1,690 crores, taking into account the possible reduction in the cost per unit due to bulk production the cost may come to Rs. 13,000/- per unit approximately.

24. The affidavit dated 21.08.2013, filed on behalf of the ECI, shows that the Ministry of Law and Justice, on 24.07.2013, referred the draft notification to amend the Conduct of Election Rules, 1961 to provide for use of VVPAT system of elections to the ECI for its views and comments. The ECI suggested certain minor modifications in the draft notification and sent the same back to the Ministry of Law and Justice on 02.08.2013 with a request to notify the amendment Rules at the earliest. Accordingly, the Ministry of Law and Justice notified the amendments to the Conduct of Election Rules, 1961 in the Gazette of India vide notification No. S.O. 2470(E) dated 14.08.2013 to enable use of VVPAT with EVMs.

25. The aforesaid affidavit of the ECI also shows that the ECI had also convened a meeting of all the recognized National and State political parties on 10.05.2013 and demonstrated before their representatives the working of VVPAT system. Separately, on the same day, the ECI also held a meeting with individuals including the appellant herein who had been engaged with the ECI over the past several years regarding the functioning of EVMs. VVPAT system was demonstrated before them as well. Representatives of political parties and other individuals expressed their satisfaction over the VVPAT system. Thereafter, the ECI had decided to use the VVPAT system in the bye-election from 51-Noksen (ST) Assembly Constituency in the State of Nagaland. Instructions were issued to hold special meetings with the contesting candidates in that constituency to brief them about the use of VVPAT system. The ECI also organized special training sessions for poll officers for the use of VVPAT and steps were taken to educate the electors for the same.

26. After various hearings, when the matter was heard on 4.10.2013, an affidavit dated 01.10.2013 filed on behalf of the ECI was placed before this Court. The said affidavit was filed to place on record the performance/result of the introduction of the VVPAT system in the bye- election from 51-Noksen (ST) Assembly Constituency of Nagaland for which the poll was conducted on 04.09.2013

indicating the future course of action to be decided by the ECI on the basis of said performance. By this affidavit, it was brought to our notice that since VVPAT system was being used for the first time, the ECI has decided that intensive training shall be given to the polling officers. Members of the Technical Experts Committee of the ECI also went to supervise training and the actual use of VVPAT in the bye-election. It is further stated that the ECI also wrote letters to all the recognized political parties and other persons, including the appellant herein, engaged with the ECI on this subject inviting them to witness the use of VVPAT. It is also brought to our notice that VVPAT was successfully used in all the 21 polling stations of 51-Noksen (ST) Assembly Constituency of Nagaland. It was also stated that as per the Rules, the paper slips of VVPAT shall not be counted normally except in case the Returning Officer decides to count them on an application submitted by any of the candidates. However, since VVPAT system was being used for the first time in any election, the ECI decided on its own to count paper slips of VVPAT in respect of all polling stations. According to the ECI, no discrepancy was found between the electronic and paper count.

27. In the said affidavit, it is finally stated that the ECI has decided to increase the use of VVPAT units in a phased manner and for this purpose the ECI has already written to the Government of India, Ministry of Law and Justice to issue administrative and financial sanction for procurement of 20,000 units of VVPAT (10,000 each from M/s BEL and M/s ECIL) costing about Rs. 38.01 crore.

28. Though initially the ECI was little reluctant in introducing “paper trail” by use of VVPAT, taking note of the advantage in the system as demonstrated by Dr. Subramanian Swamy, we issued several directions to the ECI . Pursuant to the same, the ECI contacted several expert bodies, technical advisers, etc. They also had various meetings with National and State level political parties, demonstrations were conducted at various places and finally after a thorough examination and full discussion, VVPAT was used successfully in all the 21 polling stations of 51-Noksen (ST) Assembly Constituency of Nagaland. The information furnished by the ECI, through the affidavit dated 01.10.2013, clearly shows that VVPAT system is a successful one. We have already highlighted that VVPAT is a system of printing paper trail when the voter casts his vote, in addition to the electronic record of the ballot, for the purpose of verification of his choice of candidate and also for manual counting of votes in case of dispute.

29. From the materials placed by both the sides, we are satisfied that the “paper trail” is an indispensable requirement of free and fair elections. The confidence of the voters in the EVMs can be achieved only with the introduction of the “paper

trail”. EVMs with VVPAT system ensure the accuracy of the voting system. With an intent to have fullest transparency in the system and to restore the confidence of the voters, it is necessary to set up EVMs with VVPAT system because vote is nothing but an act of expression which has immense importance in democratic system.

30. In the light of the above discussion and taking notice of the pragmatic and reasonable approach of the ECI and considering the fact that in general elections all over India, the ECI has to handle one million (ten lakhs) polling booths, we permit the ECI to introduce the same in gradual stages or geographical-wise in the ensuing general elections. The area, State or actual booth(s) are to be decided by the ECI and the ECI is free to implement the same in a phased manner. We appreciate the efforts and good gesture made by the ECI in introducing the same.

31. For implementation of such a system (VVPAT) in a phased manner, the Government of India is directed to provide required financial assistance for procurement of units of VVPAT.

32. Before parting with the case, we record our appreciation for the efforts made by Dr. Subramanian Swamy as well as the ECI, in particular Mr. Ashok Desai and Ms. Meenakshi Arora, learned senior counsel for the ECI.

33. With the above directions, the appeal and the writ petition are disposed of. No separate order is required in the applications for intervention. Both sides are permitted to approach this Court for further direction(s), if need arises.