

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

WPA(P) 245 of 2021

Pronounced on: 28.09.2021

Sayan Banejee

...Petitioner

-Vs-

The Election Commission of India and Ors.

...Respondents

Present:-

Mr. Bikash Ranjan Bhattacharya, Senior Advocate
(Through V.C.)

Mr. Sabyasachi Chatterjee, Advocate

Mr. Bikram Banerjee, Advocate

Mr. Sudipta Dasgupta, Advocate

Mr. Arkadeb Biswas, Advocate

Ms. Sayanti Sengupta, Advocate

Mr. Ankur Sharma, Advocate

... for the Petitioner present in Court.

Mr. S.N. Mookherjee, Advocate General (through V.C.)

Mr. Debanjan Mandal, Advocate

Mr. Anirban Ray, Government Pleader

Mr. Sandip Dasgupta, Advocate

Mr. Lalit Mohan Mahata, Advocate

Mr. Raja Saha, Advocate

Mr. Sayak Chakraborty, Advocate

Mr. Supratim Dhar, Advocate

... for the Respondent No.4 present in
Court.

Mr. Sidhant Kumar, Advocate

Mr. Manyan Chandok, Advocate

Mr. Dipayan Choudhury, Advocate

Mr. Suvradal Choudhury, Advocate

... for the E.C.I. present on virtual
mode.

Mr. Ajay Chaubey, Advocate

Ms. Sakshi Rathi, Advocate

... for the Respondent No. 3 present on
virtual mode.

Mr. Sanjay Basu, Advocate
Mr. Piyush Agrawal, Advocate
Ms. Utsha Dasgupta, Advocate
... for the Respondent No. 5 present on
virtual mode.

**Coram: THE HON'BLE JUSTICE RAJESH BINDAL,
CHIEF JUSTICE (ACTING)
THE HON'BLE JUSTICE RAJARSHI BHARADWAJ,
JUDGE**

Rajesh Bindal, CJ(A):

1. The Present petition has been filed in public interest by an advocate. The prayer is to quash the memo dated September 04, 2021 vide which decision was taken by the Election Commission of India for election to 159-Bhawanipur Assembly Constituency in the State. As an interim measure, prayer was made for stay of paras 6 and 7 of the aforesaid communication.

2. Mr. Bikash Ranjan Bhattacharya, learned Senior Counsel appearing for the petitioner submitted that the very basis on which the election to only one Constituency was notified, is erroneous. It is based on a communication from the Chief Secretary of the State that the COVID-19 situation in the State is fully under control and so is the flood situation. While referring to Article 164(4) of the Constitution of India, the Chief Secretary further informed the Election Commission that there would be constitutional crisis in the State, in case there is vacuum in the top executive as the respondent No. 5 is to contest election from that constituency. It was on the basis thereof that election to the aforesaid constituency was notified by the Election Commission. The State Assembly consists of 293 members. The Ruling party won 213 seats. One member is not that important. The

respondent No. 5 had lost election from Nandigram Assembly Constituency for which she had filed Election Petition in this Court, which is pending. Despite the fact that she lost in the election, she was elected as leader of the party and sworn in as the Chief Minister of the State. Merely because one person is not elected as of now will not create any constitutional crisis as any other elected member of the Assembly can be sworn in as leader of the party and consequently, the Chief Minister. No doubt Section 151A of the Representation of Peoples Act, 1951 (for short, 'the Act') provides for filling up of any vacancy within a period of six months from the date of its occurrence but this period is extendable in consultation with the Central Government in case it is found that it is difficult to hold election within the said period. Individual interest is not relevant as independent decision has to be taken by the Election Commission.

3. He further submitted that on the one hand, the State is extending the lockdown restrictions time and again. Even now the same stand extended upto September 30, 2021. Further the flood situation in the city of Kolkata specially in the constituency area is also very grim but still the Election Commission was misled in the communication by the Chief Secretary, who did not have any jurisdiction to communicate with the Election Commission for holding the elections. He was behaving like a political party spokesman and not a public servant, who has to work above party lines. How the Chief Secretary can state that the Chief Minister wants to contest from any Assembly Constituency. It is for the candidate to decide. It becomes known to the public only when the nominations are filed or the party declares a candidate. The Chief Secretary may be working

not as an independent officer of the State but on the dictates. There is no material as such on record to show that there was any constitutional crisis or could be created.

4. He further argued that in the facts of the present case, the candidate who won from Bhabanipur Constituency resigned without there being any good reason or disqualification to make way for the respondent No. 5 to contest the election. It will incur substantial cost to the State exchequer. If in the Election Petition filed by the respondent No. 5, she succeeds, again she will be representing two constituencies in case she wins in the Assembly By-election of Bhabanipur Constituency. She will have to resign from one of these constituencies. The political leaders cannot be allowed to treat this as a game at the expense of the State. She should have waited till such time the Election Petition filed by her was decided. This is one of the factors to be considered by the Election Commission for holding election to any Assembly Constituency. In support, reliance was placed in the judgment of Karnataka High Court in **Thomasmates Gudio v. The Election Commission of India and Others, ILR (2002) Kar 3078.**

5. Mr. Bhattacharya, learned Senior Counsel further submitted that he does not object to holding of by-election as such, however, the reasons as assigned in the public notice issued by the Election Commission regarding there being constitutional crisis or constitutional exigency need to be struck down. The same are being misused by the candidates to mislead the voters.

6. On the other hand, Mr. Sidhant Kumar, learned Counsel appearing for the Election Commission of India submitted that if the

prayer for interim relief made by the petitioner is considered, it has reference to only paras 6 and 7 of the public notice issued by the Election Commission on September 04, 2021 for holding elections to various Assembly Constituencies including the Bhabanipur Constituent Assembly. There is a complete bar under Article 329 of the Constitution of India to entertain any petition once the process of election had started as the only remedy at that stage is an election petition. Section 100(1)(d)(iv) of the Act enables filing of the Election Petition.

7. Referring to the judgment of Supreme Court in **Election Commission of India v. Ashok Kumar and Others, (2000) 8 SCC 216** it was submitted that the Courts should not stay the process of election, once started. The writ petition in this case was filed after the election had been notified. The argument that a by-election can be stayed is misconceived. Judgment of Karnataka High Court in **Thomasmates Gudio's** case (supra) is distinguishable. It has been the consistent practice followed by the Election Commission since 1990 to grant opportunity to any Minister, who is not a Member of the Legislative Assembly or the Parliament, to contest election within a period of six months. The same has been followed in the case in hand. No case is made out for stay of election process for which the polling has to be held on September 30, 2021.

8 In response, learned Senior Counsel for the petitioner submitted that the core issue raised in the petition regarding conduct of the Chief Secretary and the action taken by the Election Commission thereon has not been answered. What is under challenge is the decision making process and not the decision to hold election.

No Election Petition will be maintainable in the facts of the case as the petitioner does not allege violation of the Constitution or any law. The words used in the order 'constitutional crisis' need to be set aside. It cannot be said to be a case of constitutional exigency. Elections for other constituency have not been declared simultaneously.

9. Heard the learned Counsel for the parties and perused the relevant referred records.

10. The undisputed facts on record are that the elections to the State Assembly were held in April, 2021. The result thereof was declared on May 02, 2021. The respondent No. 5, leader of the political party which came in power, lost election. Still she was elected as the leader and was sworn in as the Chief Minister of the State. To challenge her defeat in the election she filed Election Petition in this Court, which is still pending consideration. To continue as Chief Minister she has to be elected to the State Assembly within a period of six months. A winning candidate from Bhabanipur Constituency was made to resign, apparently to enable the respondent No. 5 to contest election from that constituency.

11. Section 151A of the Act provides that a by-election for filling up any vacancy has to be held within a period of six months from the date of occurrence of the vacancy. However, no elections are to be held in case the remainder term of a Member in relation to a vacancy is less than one year. The period of six months is extendable, in case the Election Commission in consultation with the Central Government certifies that it is difficult to hold by-election within the said period. As is pleaded in the case in hand, Sovandeb Chattopadhyay was elected from Bhabanipur Assembly Constituency.

He resigned on May 21, 2021 to make way for respondent No. 5 to contest election from that constituency.

12. The grievance raised by the petitioner is that in the press note dated September 04, 2021 issued by the Election Commission schedule to fill up vacancies was notified to the general public. It notes that there are three deferred polls (two in the State of West Bengal and one in the State of Odisha), three in Parliamentary constituencies and 32 vacancies in Legislative Assemblies of various States/U.T. Input were taken from various stakeholders in the State. Para 4 of the aforesaid press note indicates that the Chief Secretaries of the States of Andhra Pradesh, Assam, Bihar, Haryana, Himachal Pradesh, Madhya Pradesh, Meghalaya, Rajasthan, Telangana, Uttarakhand, Uttar Pradesh and Adviser of UT of Dadra and Nagar Haveli and Daman & Diu, brought to the notice of the Commission the constraints related to flood situations, festivals and pandemic. They suggested that it would be advisable to have by-elections after the festival season. The Election Commission also noticed the prediction of possibility of the third wave of COVID-19 in October onwards.

13. The grievance raised by the petitioner is to the contents of the paras 6-7 of the aforesaid press note. The same read as under.

“6. The Chief Secretary, Odisha also informed that COVID situation is under control and poll can be held. The Chief Secretary West Bengal informed that COVID-19 situation is fully under control. He also brought to the notice that the flood situation in the state has not affected the poll bound Assembly Constituencies and the State is fully geared up to hold the elections. He also cited that under Article 164(4) of the Constitution of India, a

Minister who is not a member of the Legislature of the State for a period of six consecutive months shall at the expiration of that period cease to be to a Minister and there will be a constitutional crisis and vacuum in the top executive posts in the Government unless elections are held immediately. He has also informed that in view of the administrative exigencies and public interest and to avoid vacuum in the state, bye-elections for 159- Bhabanipur, Kolkata from where Ms. Mamata Banerjee, Chief Minister intends to contest elections may be conducted.

7. After taking into consideration the inputs and views of the Chief Secretaries of the concerned States and respective Chief Electoral Officers, while the Commission has decided not to hold bye-elections in other 31 Assembly Constituencies and 3 Parliamentary Constituencies and considering the constitutional exigency and special request from State of West Bengal, it has decided to hold bye-election in 159- Bhabanipur AC. Much stricter norms have been kept by the Commission as an abundant caution to safeguard from COVID-19 pandemic.”

14. A perusal of the aforesaid para 6 shows that the information furnished by the Chief Secretary of the State to the Election Commission was contrary to the facts as in the State restrictions on account of COVID-19 pandemic had been extended up to September 30, 2021 vide order No. 753/IX-ISS/2M-22/2020 dated September 15, 2021. Further the Election Commission was also misled regarding flood situation. It is known to all that there had been excessive rains in the State. Be that as it may, the most offensive part is the conduct of the Chief Secretary, who projected himself to be more as a servant of the political party in power than a public servant, whereby he stated that there would be constitutional crisis in case

election to Bhabanipur Constituency is not held from where respondent No. 5 wants to contest election. What constitutional crisis the Government could face with one person losing or winning election, was not explained. How the Chief Secretary knew that the respondent No. 5 was to contest election from Bhabanipur Assembly Constituency? He was not a party spokesman or a returning officer. The Election Commission in its wisdom decided to hold election to Bhabanipur Assembly Constituency for which the schedule was declared. It was decided not to hold by-elections to other 31 Assembly Constituencies and 3 Parliamentary Constituencies. Only the request of the Chief Secretary of the State of West Bengal for holding election in the Bhabanipur Assembly Constituency was accepted. The Commission further decided to hold elections in two other Assembly Constituencies in West Bengal and one in Odisha, which were earlier deferred.

15. As the process of election was initiated with the issuance of press note dated September 04, 2021 and the polling has to be held on September 30, 2021 we do not find it appropriate to interfere with the decision of the Commission to hold by-election to Bhabanipur Assembly Constituency at this stage. However, we record our strong reservation about the conduct of the Chief Secretary in writing a letter to the Election Commission stating that there would be 'constitutional crisis' in case by-election to the Bhabanipur Constituency is not held. He is a public servant, who is to discharge his duties in terms of provisions of law, whosoever may be in power. He is not to ensure that any particular person should come in power and in the absence there would be 'constitutional crisis'.

16. We also do not record any finding on the issue that an Election Petition may or may not be maintainable after the result of the Assembly is declared. Any of the losing party shall have the right to avail of his/her appropriate remedy to challenge the election on the grounds available in law.

17. The writ petition shall now be listed for hearing on November 17, 2021 for consideration of the issues as noticed in the order dated September 24, 2021.

(RAJESH BINDAL)
CHIEF JUSTICE (ACTING)

(RAJARSHI BHARADWAJ)
JUDGE

Kolkata
28/09/2021

PA(RB/SS)