*   IN THE HIGH COURT OF DELHI AT NEW DELHI

+   FAO(OS) No.260-61/2010

Rajesh Sharma .....Appellant through Mr. A.K. Nigam, Sr. Adv. with Mr. T.V. Ganju & Mr. P. Sahu, Advs.

versus

Sushil Ahuja .....Respondent through Mr. V.K. Rao, Sr. Adv. with Mr. Saket Sikri & Mr. Sumer Khanna, Advs. for Respondent Nos. 1-6. Mr. Rajat Navet, Adv. for Respondent Nos.7-8.

WITH

FAO(OS) No.262-63/2010

SBI Officers' Association (Delhi Circle) .....Appellant through Mr. A.K. Nigam, Sr. Adv. with Mr. T.V. Ganju & Mr. P. Sahu, Advs.

versus

Sushil Ahuja .....Respondent through Mr. V.K. Rao, Sr. Adv. with Mr. Saket Sikri & Mr. Sumer Khanna, Advs. for Respondent Nos. 1-6. Mr. Rajat Navet, Adv. for Respondent Nos.7-8.

WITH

FAO(OS) No.264-65/2010

S.K. Mendiratta .....Appellant through Mr. A.K. Nigam, Sr. Adv. with Mr. T.V. Ganju & Mr. P. Sahu, Advs.

versus

Sushil Ahuja .....Respondent through
Mr. V.K. Rao, Sr. Adv. with
Mr. Saket Sikri & Mr. Sumer
Khanna, Advs. for
Respondent Nos. 1-6.
Mr. Rajat Navet, Adv. for
Respondent Nos.7-8.

% Date of Hearing: April 27, 2010

Date of Decision: May 05, 2010

CORAM:
* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE A.K. PATHAK

1. Whether reporters of local papers may be allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the Judgment should be reported in the Digest? Yes

VIKRAMAJIT SEN, J.

Caveat No.63/2010 in FAO(OS) No.262-63/2010

1. Caveat numbered as 63/2010 has been received from the Registry and the same is taken on record. As the Caveator is represented, Caveat stands discharged.

CM No.7215/2010 in FAO(OS) No.260-61/2010

2. As the Appeal itself has been heard in detail, the prayer for stay of the impugned Order is no longer relevant. Application is dismissed.

CM 7242/2010(Stay) in FAO(OS) No.262-63/2010

3. As the Appeal itself has been heard in detail, the prayer for stay of the impugned Order is no longer relevant. Application is dismissed.

CM 7244/2010(Stay) in FAO(OS) No.264-65/2010

4. As the Appeal itself has been heard in detail, the prayer for stay of the impugned Order is no longer relevant. Application is dismissed.

CM 7246/2010 in FAO(OS) 264-65/2010(permission to file the present Appeal)

5. The Application states that Appellants No.1-57 have already been declared elected (unopposed) even prior to the filing of the subject CS(OS) No.15/2010, but have not been impleaded by the Plaintiff. In ***Avtar Singh Hit*** *–vs- Delhi Sikh Gurudwara Management Committee*, (2006) 8 SCC 487 their Lordships declined to consider the important question of whether the absence of statutory notice vitiates the election, for the reason that the writ petition was found not to be competent as necessary parties had not been impleaded as Respondents. These parties were the successful candidates/office bearers in the elections which were sought to be countermanded. The prayers in the Suit with which we are presently concerned are imprecise inasmuch as they can lead to two interpretations – firstly that the election *vis-a-vis* the Plaintiffs had alone been

brought into adjudication before the Court, or secondly that the entire election process had been assailed. This, in turn, leads to a piquant situation. If the entire election had been called into question, the presence of the Appellants in FAO(OS) No.264-65/2010 was mandatory, resulting in the Suit itself being not maintainable. If only the posts to which the Plaintiffs were interested had been called into question, the Suit would also not be maintainable for the reason that it is impermissible to truncate the challenge to the elections by not challenging 101 posts already declared elected unopposed, but calling into question the declaration of the results in respect of other posts on the ground that the entire electoral process was illegal. We are, therefore, of the opinion that the application deserves to be allowed. Leave is, therefore, granted, as prayed for and the Appellants are permitted to assail in FAO(OS) No.264-265/2010 the impugned Order dated 26.3.2010.

<u>FAO(OS) Nos.260-65/2010</u>

10. These Appeals assails the Order of the learned Single Judge passed in IA Nos.150/2010 and 290/2010 in CS(OS) No.15/2010 which were filed on 7.1.2010 and 11.1.2010 respectively. In the first application, the Plaintiff had invoked Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (‘CPC’ for short) praying for an injunction which was granted on

the first date of hearing, ad interim and *ex parte,* on 8.1.2010. As is to be expected, the second application has been filed by Defendants No.1 and 2 seeking vacation of the said *ad interim ex parte* injunction which, while permitting Defendant No.3 to continue with the election process, had directed it to refrain from declaring the results thereof. The Order impugned before us was passed on 26.3.2010 with directions to the Registrar of Trade Union to convene a meeting of General Council within the shortest possible time for the purposes of calling for the elections. The effect of the impugned Order is to countermand the elections that had reached the stage of casting of the votes and would have gone to its natural culmination point, that is, declaration of results, had the *ex parte* Order dated 8.1.2010 not been passed. It is not contested either before us or before the learned Single Judge that elections to 101 posts stands concluded and favourably declared as those candidates had not been opposed. The controversy concerns, *inter alia*, the important posts of President, Vice-President, General Secretary, Joint General Secretary.

12. We think it necessary to recount some aspects of the annals of the dispute. Plaintiffs No.1 and 2 had previously filed, on 7.12.2009, CS(OS) No.2337/2009 praying that their removal from the membership of State Bank of India Officers'

Association (Delhi Circle) [for short 'SBIOA (Delhi Circle)'] may be struck down and that the Defendants be restrained from preventing the Plaintiff from contesting the elections of Defendant No.1 which were to be held as per Election Committee Circular EC/2009/01 dated 1.12.2009. Some of the allegations contained in the previous Suit were that the Plaintiff had remonstrated against failure to hold timely elections and as a consequence thereof they were removed from the membership of the SBIOA(Delhi Circle), that is, the Defendants. It is significant that it had been pleaded in the previous Suit that the term of the Executive Committee had already expired on 5.11.2008 and hence it was incompetent to remove the Plaintiff from membership. Furthermore, the previous Suit alludes to the subject Notification dated 1.12.2009 by which the assailed elections had been intimated. There is no scope for debate on the question that since the previous Plaint is dated 5.12.2009, the grievance pertaining to the lack of legal competence of the previous Central Committee [post amendment nomenclatured as Executive Committee] was available to the Plaintiffs. By Order dated 9.12.2009, the learned Single Judge had permitted the Plaintiffs to file their nominations, subject to the result of the Suit.

13. Plaintiffs No.1 and 2 were the only Plaintiffs in the previous Suit in which the SBOIA(Delhi Circle) was arrayed as Defendant No.1 and the Election Committee thereof was arrayed as Defendant No.2. In the present Suit, apart from these Plaintiffs, others have joined in as Plaintiffs. While the previous two Defendants have been impleaded, five other Defendants have been arrayed as Defendants. CS(OS) No.865/2009 has been filed in the Court of the Civil Judge (J.D.), Agra by two other persons in which, remarkably, neither the Election Committee nor the Association have been impleaded. It is a fundamental principle of law, based on the expediency of eradicating any possibility of conflicting judicial decisions, that every person likely to be directly affected by a Court order must be impleaded in the litigation. Assuming that the subject Suit is found to be legally competent, the principle of *res judicata* may not apply to persons who were not parties before the Court. They could then, after watching the outcome of the previous Suit, have filed a fresh suit claiming themselves not to be bound by the previous decision. In these circumstances, multiplicity of proceedings would be encouraged by not insisting that all parties directly and substantially involved in the cause of action should be impleaded. *Prima facie*, we are of the view that the Plaint is liable to be rejected on the ground of non-joinder of necessary

parties. The decision of the Apex Court in ***Avtar Singh Hit*** is applicable on all fours.

14. Learned counsel for the Appellants has contended that the grounds on which the present Suit is predicated were available to the Plaintiffs in the earlier Suit and hence the Suit was liable to be dismissed. We are of the view that the principles of Order II Rule 2 of the CPC are attracted to the facts of the present case. The entire Claim, and all Reliefs available to the Plaintiffs, must necessarily have been raised and prayed for, and on failure to do so, the Plaintiffs are precluded in the second Suit [the suit in question from which the present Appeals emanate] from raising those fresh grounds. Significantly, the Plaintiffs in the previous Suit had sought and received Order enabling them to file their nominations and participate in the very same elections which they now find opportune or necessary to legally castigate. In the said Order dated 9.12.2009 the Court was not petitioned to and did not restrain even the declaration of the results of the elections. The present/second Suit is liable for dismissal on this ground.

15. Plaintiffs No.1 and 2 had participated in the election process (which they are now assailing), pursuant to the Orders passed in the previous Suit. Mr. V.K. Rao, learned Senior

Counsel for the Plaintiffs [Respondents before us], has sought to place reliance on paragraph 11 of *Bar Council of India -vs- **Surjeet Singh**,* 1980 (4) SCC 211, the relevant passage whereof is reproduced for ease of reference:-

> 11**.** The contesting respondents could not be defeated in their writ petitions on the ground of estoppel or the principle that one cannot approbate and reprobate or that they were guilty of laches. In the first instance some of the contesting respondents were merely voters. Even Shri Surjeet Singh in his writ petition claimed to be both a candidate and a voter. As a voter he could challenge the election even assuming that as a candidate after being unsuccessful he was estopped from doing so. But to be precise, we are of the opinion that merely because he took part in the election by standing as a candidate or by exercise of his right of franchise he cannot be estopped from challenging the whole election when the election was glaringly illegal and void on the basis of the obnoxious proviso. There is no question of approbation and reprobation at the same time in such a case. A voter could come to the High Court even earlier before the election was held. But merely because he came to challenge the election after it was held it cannot be said that he was guilty of any laches and must be non-suited only on that account.

16. We are not persuaded by the argument of learned Senior Counsel for the Respondent. Firstly, because the challenge has been made by those very candidates who had initiated legal

proceedings to ensure their participation in the elections. Secondly, for the reason that the assault has been mounted post the conclusion of the elections results and finally the rigours of Order II Rule 2 of the CPC had not become relevant in ***Surjeet Singh***.

17. The impugned Order, in our opinion, cannot be sustained as it is diametrically and irreconcilably contrary to the exposition of election law by their Lordship for over half a century. *N.P.* ***Ponnuswamy*** *–vs- Returning Officer*, 1952 SCR 218 has been cited before the learned Single Judge. A decision of Division Bench of this Court in ***Narender Kumar Jain*** *–vs- Government of NCT of Delhi*, 2008 X AD (Delhi) 105 has also been relied upon. The learned Single Judge had no option but to apply these principles regardless of a contrary opinion being favoured by him. The wisdom and relevance of precedents in a common law system is to ensure the consistency and predictability of the law. The renowned poet, Yeates in 'The Second Coming' surely did not have the legal system in mind while reciting – "things fall apart; the centre cannot hold; mere anarchy looses upon the world" which is indeed apposite. The ***Ponnuswamy*** doctrine is that once the electoral process has been set in motion, jural interference or interdiction is legally inappropriate. The learned Single Judge has harboured

reservations similar to those expressed in *Sarvothama Rao –vs- Chairman Municipal Council, Saidapet*, (1924) ILR 47 Madras 585, which was extracted in ***Narendra Kumar Jain*** relied upon by the Appellants before him. Similar sentiments were before their Lordships while deciding ***Ponnuswamy***, but they palpably failed to convince the Court to hold to the contrary.

18. ***Ponnuswami*** has been favourably received in several subsequent decisions of the Supreme Court of India, including *Dr. Narayan Bhaskar Khare –vs- Election Commission of India*, AIR 1957 SC 694, *Mohinder Singh Gill –vs- Chief Election Commissioner*, (1978) 1 SCC 405, *The Election Commission of India –vs- Shivaji*, AIR 1988 SC 61, *Boddula Krishnaiah –vs- State Election Commission, A.P.*, (1996) 3 SCC 416, *Lakshmi Charan Sen –vs- A.K.M. Hassan Uzzaman*, AIR 1985 SC 1233, *Ram Phal Kundu –vs- Kamal Sharma*, (2004) 2 SCC 759 and *Manda Jaganath –vs- K.S. Rathnam*, (2004) 7 SCC 492. We have harboured some doubts as to whether this exposition of the law would apply to elections of societies and bodies other than Parliament and Legislatures for sundry reasons – (a) because the constitutional provision, such as Article 329, does not apply, (b) because the remedy is not legally circumscribed by a statute such as the Representation of the People Act, 1951 and (c) because the electoral rolls may not always have been finalised

before the Notification or Declaration of the Elections. Our study, however, discloses that neither of these points is relevant. The conclusions found in Paragraph 25 of ***Ponnuswami*** indicate that their Lordships have not found any distinction between elections to Parliament and Legislatures and other elections, and because it is their opinion that if a statute provides that a remedy shall be before a special Tribunal by means of an election petition, legal recourse should be taken to that remedy alone. The following passage is educative:-

> 25 (2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the "election:" and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the affect of vitiating the "election" and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any court while the election is in progress.

19. In the present case disputes, including those pertaining to elections, are to be resolved through arbitration.

20. In ***Lakshmi*** *Charan Sen –vs- A.K.M. Hassan Uzzaman*, AIR 1985 SC 1233 the Constitution Bench opined that – "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". What cannot be done in the exercise of extraordinary powers preserved by the Constitution would, *a fortiori*, not be permissible in the exercise of ordinary civil jurisdiction, especially where the suit has been filed before the culmination of the election process. Orders countermanding an election would certainly be available, but this is possible after the declaration of the results. The second reason why we find the impugned decision unsustainable is because the Division Bench in ***Narendra Kumar*** has taken the view that ***Ponnuswamy*** applies ubiquitously to all election matters. ***Surjeet Singh*** deals with a prayer seeking the setting aside of the elections of the Bar Council of Delhi, that is, obviously after the results had been declared. We do not think that the Supreme Court intended to alter the ***Ponnuswamy*** principle by merely stating that a voter could come to the High Court even earlier before the election was held. In any event, it is contrary to the opinion of the Constitution Bench in ***Lakshmi***.

21. The learned Single Judge has also not returned a finding on the maintainability of the Suit in view of the stipulation in the Bye-laws of the Association which envisages the resolution of

disputes pertaining to elections by arbitration. The said Bye-law has been reproduced by the Appellant in its application under Order VII Rule 11 of the CPC in the previous suit and is reproduced thus:-

> 27. If any dispute arises in regard to the interpretation of these bye-laws or any action of the Executive Committee or an officer bearer, it shall be referred to the Central Committee in writing at the next meeting which after hearing all the disputants shall decide the matter. If serious differences arise on the decision of the Central Committee on a matter of substantial importance or the disputants are not satisfied with the decision of Central Committee, the dispute shall be referred to Voluntary arbitrator, mutually agreed between the parties. In any case, no member shall resort to litigation against the Association, Office Bearers and/or Central Committee Members. All disputes/grievances involving the members, Officer Bearer, Executive Committee, Central Committee or the Association will necessarily be referred to a voluntary arbitrator first even if the Bank or any other outsider is/are also party to the dispute. No member will approach a court without first exhausting this remedy".

22. The wisdom in not interfering with the election process is founded on plain commonsense, viz. that a challenge to the elections is invariably initiated because the Plaintiff has realised that he has lost at the elections. We will indeed be surprised if

the Plaintiffs have succeeded at the hustings; if so, it will be sanguine to think that they will be willing to continue the challenge ventilated in the Suit.

23. On the most fundamental level, the impugned Order proceeds on the platform that the decision taken by the Executive Committee on 1.10.2009 was a legal impossibility because firstly the previous Committee had continued in Office beyond the period contemplated under the Bye-laws and/or secondly that consequent upon amendments carried out to the Bye-laws/Constitution in February 2009 the General Committee had ceased to exist. This is obviously why the learned Single Judge had ordered the Registrar of Cooperative Societies to convene a Meeting of the General Council so that a formal resolution could be passed, calling for elections. A similar situation had manifested itself in *I Nelson –vs- Kallayam Pastorate*, (2006) 11 SCC 624. The assault of the Plaintiff was that the concerned Society had become defunct and hence all decisions had been rendered incompetent. This argument was rejected by their Lordships who observed that "the society became defunct or other statutory requirements were complied with by the members of the society, penal measures could have been taken but in no situation the election of the officer-bearers could have been set aside. Right to contest an election of an

office-bearer of the society is a statutory right of the member thereof ".

24. The sequence of events which exist in the present case, already underscored by us above, is that the Plaintiffs have approached the Court during the election process praying, *inter alia*, that the results be now declared. In the first Suit, they could have ventilated their grievance that the election process which had been initiated by Resolution dated 1.10.2009 was illegal but they failed to do so. The challenge, if it has to be sustained, would have to be taken after the declaration of the electoral results and obviously by way of a fresh legal action. It seems plain to us that all the Members of the Association were more than satisfied with the calling of the election in the manner that occurred and the Plaintiffs are now disgruntled anticipating their defeat.

25. When a Civil Court is called upon to pass an ad interim injunction, three principles have to be kept in mind, namely, the existence of a *prima facie* case in favour of the Applicant. The balance of convenience should also lie in favour of the Applicant. It should also be evident that irreparable injury would be caused to the Applicant if the injunction prayed for is not granted. The learned Single Judge has not returned a finding favourable to the Plaintiffs with regard to these three

concomitants. It seems to us that a consideration of these three requirements should have persuaded the Court not to interdict the declaration of the results. A p*rima facie* case cannot exist in view of the principle that an injunction should not be given which has the effect of interdicting an election process. So far as the balance of convenience is concerned, it must lie in favour of the majority who have cast their votes in a particular manner; therefore, results should be declared. So far as irreparable injury is concerned, challenge to the elections is certainly possible, but after the results are declared.

26. We had called for the election results, which were available in the Sealed Cover. The seals have been opened in Court. We now declare the results as contained therein.

27. Appeals are allowed. The Election Results contained in the Sealed Cover are declared and are given effect to. Our decision shall, however, not foreclose any consideration of the legality of the elections after their declaration. Parties shall bear their respective costs.

(VIKRAMAJIT SEN)
JUDGE

(A.K. PATHAK)
JUDGE

May 05, 2010
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