

CASE NO.:
Appeal (civil) 5659 of 2007

PETITIONER:
Election Commission of India

RESPONDENT:
St. Mary's School and Others

DATE OF JUDGMENT: 06/12/2007

BENCH:
S.B. Sinha & Harjit Singh Bedi

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 5659 OF 2007
[Arising out of S.L.P. (Civil) No. 21963 of 2004]

S.B. SINHA, J :

1. Leave granted.

2. A short but interesting question, as to how conflict in two constitutional rights should be balanced, is involved in this appeal which arises out of a judgment and order dated 11.08.2004 passed by a Division Bench of the Delhi High Court in Writ Petition (Civil) No. 1076 of 2003.

3. Respondent No.1 is an unaided school. It is governed by the provisions of the Delhi School Education Act, 1973 (for short, 'the Act') and the rules framed thereunder. It filed a writ petition in public interest, questioning the action of the appellant and the respondents Nos. 2 to 5 herein as regards utilizing the services of the teachers of the Government schools for various purposes during school timings, as a result whereof the students reading in the said schools are deprived of obtaining instructions from their teachers during such period. In the writ petition it was pointed out that the absence of teachers occur due to their deployment for non-educational purposes; and as the teaching and administrative staff of these schools have been used by the State agencies as well as the appellant herein for various other duties outside school during school hours including:

- ? Polling duties to general election to Lok Sabha
- ? Polling duties to general election to Delhi Legislative Assembly
- ? Polling duties to MCD elections
- ? Gurudwara election
- ? Revision of polling lists
- ? Pulse polio drive
- ? Preparation of census lists
- ? Surveys on malaria, pollution etc.

4. The Act and the Rules framed thereunder which govern the field mandate that all the schools in Delhi have to function for a minimum of 210 days in a year. It was pointed out that although the extent of the period differed, the teachers were asked to perform polling duties for a few months

and also for census duties for considerable period. The writ petition highlighted that absence of teachers from the school for a long time resulted in unfinished courses, high drop out rates, poor results and inability to compete in open examinations, such as medicine, engineering etc. and/or to get admission in other prestigious or professional colleges. It was contended that an informal survey conducted by the petitioner therein demonstrated that about 9,00,000 students had enrolled themselves in class 1 of the schools run by the Municipal Corporation of Delhi, but only 50,000 of them appeared in the secondary examination.

5. The Municipal Corporation of Delhi (MCD) in its counter affidavit contended that absence of the teachers and other administrative staff of schools for performing duties allocated by the officers of the Election Commission is in national interest. In the counter affidavit, it was, stated:

"3. That the main work assigned to teachers is in relation to teaching work. However, in the larger national interest, some of the teachers are called upon to do some other Government work relating to public interests like polio vaccination, preparation of voter list, etc.

4. That only during the work of census in the year 2001, a slightly large number of teachers were required for the purpose. Even for this purpose, to take care that the teaching activities are not hampered in any manner, letter No. F-4/12/2000 dated 04.02.01, referring to the Order of Lt. Governor of the NCT of Delhi having been passed, whereby the enumerators were directed to perform their census enumeration duties before/after their normal school hours. The census work is conducted only once in a decade."

5. That it is reiterated that it is seen that the government work relating to public interest done by the teachers does not hamper the teaching activities. The additional government public work is some time assigned to some of the teachers in national interest."

6. The New Delhi Municipal Committee (NDMC) in its additional affidavit filed before the High Court, stated :

"2. That the total number of sanctioned posts of teachers in NDMC Schools are about 1200. For polling duty, almost 90% of the teaching staff is deployed on duty. For census work in the year 2000 and enumeration work in the year 2001, 90% of the staff were assigned duty. For Revision of electoral rolls, almost 50% of the teaching staff is put on duty.

3. For polling duties, the Election Commission deploys the teachers of the NDMC Schools for the purposes of holding Parliamentary Elections, Delhi Assembly Elections and even Municipal Corporation Elections. Generally the elections are held on Sundays, but before the actual polling takes places, the teaching staff is called for three working days for the purposes of training, collection of election material etc. In the year 1998-99, all the elections were held i.e.

Parliamentary, Delhi Assembly and Corporation Elections and hence the teachers were not on duty for 9 working days.

4. That in the year 2001, when the work of Special Revision of Electoral Roll was required to be conducted, the then Chief Electoral Officer informed the Respondent NDMC that the said work shall be conducted by the teachers between 13.9.2001 to 12.10.2001 by the teachers. Initially it was supposed to be a part time job, however, it was later on converted into a full time work so as to complete the assignment within the prescribed time."

7. During the pendency of the writ petition before the High Court, the Government of NCT of Delhi issued a circular letter, relevant portion whereof is as under :

"This duty binds the State-Governments to provide the requisite number of staff to the Election Commission for conducting elections and taking into consideration the insufficient number of staff available in generalist cadre, the government proposes to utilize the services of teaching staff for the following duties :

- (a) Election Duty
- (b) Revision of Electoral Rolls

(b) Revision of Electoral Rolls : For the intensive revision of electoral rolls, we require approximately 55,000 employees whereas the Cadre strength of the General cadre of the Govt. of NCT of Delhi is only around 9000. In view of this, the services of teachers are indispensable for intensive Revision of Election Rolls. This intensive revision of electoral rolls is not a regular process and this takes place with a periodicity of 4 to 5 years as per instructions of the Election Commission of India.

The Summary/Special Revision of Electoral Rolls takes place once in a year and the services of teachers are normally not utilized and this is managed within the cadre strength. However, in some of the institutions that are declared as designated locations, the services of the Head of the Institution are taken to receive the Form and they are declared as Designated Officers. Normally, these officials are not engaged in teaching and handle the work in addition to their administrative duties. They are assisted by non-teaching staff.

The Staff thus deployed function under the superintendence and control of the Chief Electoral Officer and remain under the administrative control of Chief Electoral Officer during this period.

Elections being a sovereign function of the State, the work of conduct of elections cannot be delegated to persons who are not employees of government or to any non-governmental agency, parastatal organizations etc.

The Government draws staff from every govt. department and it is not true that only teachers are deployed for election work. Staff from other categories

from almost every department is engaged for election duty.

However, with a view to ensure that election work does not come in conflict with the interest of education, the respondent Government would like to take the following steps to ensure that teaching work is least affected :

(i) As far as possible the revision of Electoral roll shall be taken up during holidays or teachers would be deployed to perform the work on holidays.

(ii) The teachers who are on non-teaching posts i.e. Physical Education Teachers, Drawing Teachers, Librarian and Lab Assistants, Yoga instructors etc. would be deployed for election work.

(iii) The teaching hour loss, if any, shall be compensated by holding extra classes, so that the minimum prescribed teaching hours are completed.

(iv) The Principals/Heads of Institutions will be directed to make internal adjustment of time tables and reschedule the classes for making up any possible teaching losses."

8. Learned counsel appearing for the parties, however, as it appears from the impugned judgment, accepted before the High Court that the services of the teachers should be utilized for non-teaching purposes only on a day which is not a working day for the students.

9. The Election Commission is, thus, before us.

10. Mr. K.K. Venugopal, learned Senior Counsel appearing on behalf of the appellant, would, inter alia, submit :

(i) Holding of an elections is a sovereign function.

(ii) The Election Commission having regard to the provisions contained in the Constitution of India as also the Representation of the People Act, 1951 is required to conduct elections for the purpose of upholding democracy.

(iii) Democracy being a basic feature of the Constitution of India, it is obligatory on the part of the Election Commission to ensure that the citizens who are entitled to vote are not deprived of their right and those who are not entitled thereto are not permitted to do so.

(iv) In terms of the provisions of clauses (1) and (6) of Article 324 of the Constitution of India, it is mandated that whenever the Election Commission asks for deployment of staff for the purpose of conducting elections, it is obligatory on the part of the President of India or the Governor of the State to make such number of staff made available to it, and with a view to fulfill the said constitutional object, the Parliament amended Section 159 of the 1951 Act so as to provide :

"159. Staff of certain authorities to be made available for election work. -

(1) The authorities specified in sub-section (2) shall, when so requested by a Regional Commissioner appointed under clause (4) of article 324 or the Chief Electoral Officer of the State, make available to any returning officer such staff as may be necessary for the performance of any duties in connection with an election.

(2) The following shall be the authorities for the purposes

of sub-section (1), namely:--

(i) every local authority;
(ii) every university established or incorporated by or under a Central, Provincial or State Act;

(iii) a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);

(iv) any other institution, concern or undertaking which is established by or under a Central, Provincial or State Act or which is controlled, or financed wholly or substantially by funds provided, directly or indirectly, by the Central Government or a State Government."

(v) The High Court, in that view of the matter could not have issued any direction which may for all intent and purport interfere with the electoral process.

11. Learned counsel appearing on behalf of the Municipal Corporation of Delhi, New Delhi Municipal Committee and Union of India adopted the submissions of Mr. Venugopal.

12. Ms. Reena George, learned counsel appearing on behalf of the writ petitioner-respondent, on the other hand, submit that :

(a) the impugned order having been passed in terms of consent of the parties, this Court should not exercise its jurisdiction under Article 136 of the Constitution of India.

(b) Right to education being a fundamental right having regard to Article 21A of the Constitution of India, it is obligatory on the part of the State to ensure that the students are not deprived thereof.

(c) In the affidavit filed on behalf of the NDMC, it was clearly demonstrated that in some schools where teaching or instructions are imparted for Class IX or X students, no teacher was available for a period of two months.

(d) The purpose for which the education is imparted in the schools is to see that the Government in the municipal schools must ensure that they compete with the standard maintained by the private schools.

13. Indisputably, for upholding the democracy and the democratic values, holding of elections is imperative. There cannot also be any doubt or dispute that keeping in view the constitutional mandate provided for under clauses (1) and (6) of Article 324 of the Constitution of India, the President of India or the Governor of a State i.e. the Central Government as also the State Government have a duty to make available to the Election Commission, or to a Regional Commissioner such staff, as may be necessary for the discharge of functions conferred on the Election Commission by clause (1) in terms whereof a power of superintendence, direction and control of elections is to be vested in the Election Commission, if request in this regard is made. Article 327 of the Constitution of India empowers the Parliaments to make laws with respect to all matters relating to, or in connection with, elections to either House of the Parliament or to the House or either House of the Legislature of a State including the preparation of the electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

The Parliament with a view to give effect to the said constitutional functions enacted the Representation of the People Act, 1950 (1950 Act) and the Representation of the People Act, 1951 (1951 Act).

15. We may notice certain provisions of the said Acts.

1950 Act :

Section 13-A of 1950 Act provides for the designation or nomination of the Chief Electoral Officers, by the Election Commissioner; whereas Section 13-AA provides for designation or nomination of a District Election Officer, who is to be an officer of Government.

Sections 13B, 13CC and Section 29 of the 1950 Act read as under :

"13B - Electoral registration officers. - (1) The electoral roll for each parliamentary constituency in the State of Jammu and Kashmir or in a Union territory not having a Legislative Assembly, each assembly constituency and each Council constituency shall be prepared and revised by an electoral registration officer who shall be such officer of Government or of a local authority as the Election Commission may, in consultation with the Government of the State in which the constituency is situated, designate or nominate in this behalf.

(2) An electoral registration officer may, subject to any prescribed restrictions, employ such persons as he thinks fit for the preparation and revision of the electoral roll for the constituency."

"13CC. Chief Electoral Officers, District Election Officers, etc., deemed to be on deputation to Election Commission. - The officers referred to in this Part and any other officer or staff employed in connection with the preparation, revision and correction of the electoral rolls for, and the conduct of, all elections shall be deemed to be on deputation to the Election Commission for the period during which they are so employed and such officers and staff shall, during that period, be subject to the control, superintendence and discipline of the Election Commission."

"29. Staff of local authorities to be made available. - Every local authority in a State shall, when so requested by the chief electoral officer of the State, make available to any electoral registration officer such staff as may be necessary for the performance of any duties in connection with the preparation and revision of electoral rolls."

1951 Act :

Sections 2(1)(bb) and 2(1)(cc) of 1951 Act provide for the meanings of the terms "Chief Electoral Officer" and the "District Election Officer", who would be an officer appointed under Sections 13-A and 13-AA of the 1950 Act.

Part IV of 1951 Act, does not lay down any procedure for requisitioning of a person for being appointed as the Returning Officer, an Assistant Returning Officer ; or Presiding Officer, or Polling Officer. However, it may be noticed that after Section 22, which provides for appointment of Assistant Returning Officers a proviso was added by reason of Act No. 47 of 1966 in terms whereof the words "an Officer of Government or of a local authority" had been inserted.

Sections 26, 28A, 151 and Section 159 read as under :

"26 - Appointment of presiding officers for polling stations. - (1) The district election officer shall appoint a presiding officer for each polling station and such polling officer or officers as he thinks necessary, but

he shall not appoint any person who has been employed by or on behalf of, or has been otherwise working for, a candidate in or about the election:

Provided that if a polling officer is absent from the polling station, the presiding officer may appoint any person who is present at the polling station other than a person who has been employed by or on behalf of, or has been otherwise working for, a candidate in or about the election, to be the polling officer during the absence of the former officer, and inform the district election officer accordingly:

Provided further that nothing in this sub-section shall prevent that district election officer from appointing the same person to be the presiding officer for more than one polling station in the same premises.

(2) A polling officer shall, if so directed by the presiding officer, perform all or any of the functions of a presiding officer under this Act or any rules or orders made thereunder,

(3) If the presiding officer, owing to illness or other unavoidable cause, is obliged to absent himself from the polling station, his functions shall be performed by such polling officer as has been previously authorised by the district election officer to perform such functions during any such absence.

(4) References in this Act to the presiding officer shall, unless the context otherwise requires, be deemed to include any person performing any function which he is authorised to perform under sub-section (2) or sub-section (3), as the case may be."

"28A. Returning officer, presiding officer, etc., deemed to be on deputation to Election Commission. - The returning officer, assistant returning officer, presiding officer, polling officer and any other officer appointed under this Part, and any police officer designated for the time being by the State Government, for the conduct of any election shall be deemed to be on deputation to the Election Commission for the period commencing on and from the date of the notification calling for such election and ending with the date of declaration of the results of such election and accordingly, such officers shall, during that period, be subject to the control, superintendence and discipline of the Election Commission."

"151.- Casual vacancies in the State Legislative Councils. - When before the expiration of the term of office of a member elected to the Legislative Council of a State, his seat becomes vacant or is declared vacant or his election to the Legislative Council is declared void, the Election Commission shall, by a notification in the Official Gazette, call upon the Council constituency concerned or the members of the Legislative Assembly of the State, as the case may be, to elect a person for the purpose of filling the vacancy so caused, before such date as may be specified in the notification, and the provisions of this- Act and of the rules and orders made thereunder shall apply, as far as may be, in relation to the election of a member to fill such vacancy."

"159. Staff of certain authorities to be made available for election work. - (1) The authorities specified in sub-section (2) shall, when so requested by a Regional Commissioner appointed under clause (4) of article 324 or the Chief Electoral Officer of the State, make available to any returning officer such staff as may be necessary for the performance of any duties in connection with an

election.

(2) The following shall be the authorities for the purposes of sub-section (1), namely:--

- (i) every local authority;
- (ii) every university established or incorporated by or under a Central, Provincial or State Act;
- (iii) a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);
- (iv) any other institution, concern or undertaking which is established by or under a Central, Provincial or State Act or which is controlled, or financed wholly or substantially by funds provided, directly or indirectly, by the Central Government or a State Government."

19. We may, however, notice that prior to enactment of Act No. 12 of 1998 in terms of Section 159 of the 1951 Act the obligation to make available to any Returning Officer such staff as may be necessary in connection with an election was only confined to the local authority.

20. The question as to whether the staff of the State Bank of India could be requisitioned for the purpose came up for consideration before this Court in Election Commission of India v. State Bank of India Staff Association, Local Head Office Unit, Patna and Others [(1995) Supp. 2 SCC 13], wherein this Court upheld the judgment and order of the Division Bench of the Patna High Court, opining that the officers of the State Bank of India cannot be requisitioned in terms of Section 26 of the 1951 Act or otherwise.

21. The constitutional and statutory scheme would lead to a realistic conclusion when emphasis was laid that it is for the Central Government and the State Governments alone to provide for the requisite staff. How would they do it is one thing. It may be by fresh recruitment for the purposes for which the staff are requisitioned or for deployment or by way of deputation. Indisputably, there are certain functions which may be performed only by the Government staff. For the said purposes they may be sent on deputation e.g. Sections 21 and 22 of the 1951 Act provides for the Returning Officers and Assistant Returning Officers who must be an officer of Government or of a local authority. Therefore, their services can be requisitioned under clause (6) of Article 324 of the Constitution of India as also Section 159 of the 1951 Act. The Election Commission or the Regional Commissioner, as the case may be, is also entitled to request for requisitioning the services of the persons in the employment of the Government or the local authority and others who may not be officers of the Government or the local authority. The services of other employees who are not officers may also be requisitioned. The Parliament was aware that in an election, requisition of services of the employees of the Central Government or the State Governments may prove to be insufficient and, thus, a direction for appointment of the staff from amongst the officers of the local authority and others have been made.

22. On the other hand, however, right to education is held to be a fundamental right. It was so stated in Mohini Jain v. State of Karnataka [(1992) 3 SCC 666] in the following terms :

"12. "Right to life" is the compendious expression for all those rights which the courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavour to

provide educational facilities at all levels to its citizens."

23. The aforementioned ratio has been affirmed with certain modification by this Court in Unni Krishnan, J.P. & Others v. State of Andhra Pradesh & Others [(1993) 1 SCC 645], expressly stating :

"\005Having regard to the fundamental significance of education to the life of an individual and the nation, and adopting the reasoning and logic adopted in the earlier decisions of this Court referred to hereinbefore, we hold, agreeing with the statement in Bandhua Mukti Morcha 27 that right to education is implicit in and flows from the right to life guaranteed by Article 21. That the right to education has been treated as one of transcendental importance in the life of an individual has been recognised not only in this country since thousands of years, but all over the world. In Mohini Jai,n the importance of education has been duly and rightly stressed. The relevant observations have already been set out in para 7 hereinbefore. In particular, we agree with the observation that without education being provided to the citizens of this country, the objectives set forth in the Preamble to the Constitution cannot be achieved. The Constitution would fail\005"

24. Article 45 is the only provision in our Constitution which fixes a time limit during which the State is to provide for free and compulsory education for children until they complete the age of 14 years. The Constitution has been amended keeping in view the aforementioned provisions as also the decision of this Court in Unni Krishnan (supra) by inserting Article 21A of the Constitution of India, which reads as under :

"The right to education which flows from Article 21 is not an absolute right. It must be construed in the light of directive principles. A true democracy is one where education is universal, where people understand what is good for them and the nation and the right to education have to be determined. Right to education, understood in the context of Articles 45 and 41, means that every child/citizen of this country has a right to free education until he completes the age of fourteen years and (b) after child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development. It is significant that among the several articles in Part IV, only Article 45 speaks of a time limit; no other article does. It is not a mere pious wish and the State cannot flout the said direction even after 44 years on the ground that the article merely calls upon it to "endeavour to provide" the same and on the further ground that the said article is not enforceable by virtue of the declaration in Article 37. The passage of 44 years more than four times the period stipulated in Article 45 has converted the obligation created by the article into an enforceable right. At least now the State should honour the command of Article 45. It must be made a reality."

25. Sixty years of independence, however, has not brought about the desired result of imparting compulsory education to all the children. Education is one of the most important functions of the State. The State has a basic responsibility in regard thereto.

26. In Brown v. Board of Education [(98 L.Ed. 873 : 347 US 483 (1954))], Earl Warren, CJ, speaking for the US Supreme Court emphasized the right to education in the following terms :

"Today, education is the most important function

of the State and local Governments\005It is required in the performance of our most basic responsibility, even services in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days it is doubtful any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."

27. The provisions of the 1950 and 1951 Acts although were enacted in terms of Article 324 of the Constitution of India, the same must be given restricted meaning. Holding of an election is no doubt of paramount importance. But for the said purpose the education of the children cannot be neglected. Therefore, it is necessary to maintain the balance between the two.

28. With an advent of technology requisitioning of a large number of people for carrying out the election may not be necessary. We may notice that the Election Commission has different roles to play. Preparation of an electoral rolls, revision of electoral rolls, when objections are filed, hearing the parties and determining the objections, enumeration of the voter list and to hold elections as and when due. The Election Commission and its officers, in our opinion, can formulate an effective scheme to see that the services of a large number of teachers are not required. The State admittedly is not in a position to perform its sovereign function of imparting education. Such functions necessarily are required to be performed by the private actors. Those students who are in a position to get admission in the public schools presumably would also be in a position to appoint tutors whereas those students who are admitted to the Government schools ordinarily would be from the middle or lower middle class or poor families. The state of primary education in India is in deplorable condition. There admittedly is a heavy drop outs from the schools particular from amongst the girl schools. The question if right to exercise franchise whereupon the emphasis is laid by Mr. Venugopal is an important one, right to education is also no less important being a fundamental right.

29. The Human Rights Conventions have imposed a duty on the Contracting States to set up institutions of higher education which would lead to the conclusion that the citizens thereof should be afforded an effective right of access to them. In a democratic society, a right to education is indispensable in the interpretation of right to development as a human right. [See Leyla Sahin v. Turkey, decided by the European Court of Human Rights on 10th November, 2005]. Thus, right to development is also considered to be a basic human right.

30. It is probably with that end in view the counsel appearing for the Election Commission had also joined the other counsel appearing for the respondents, to suggest the court that the services of the teachers may not be requisitioned on the days on which the schools are open. Submission of Mr. Venugopal that such a contention had not been made by the learned counsel appearing on behalf of the Election Commission cannot be accepted.

31. We have, however, considered the matter at some details as the question in regard to the application of the constitutional right and in particular fundamental right cannot be thwarted only by reason of a concession made by a counsel.

32. We would, however, notice that the Election Commission before us also categorically stated that as far as possible teachers would be put on electoral roll revision works on holidays, non-teaching days and non-teaching hours; whereas non-teaching staff be put on duty any time. We, therefore, direct that all teaching staff shall be put on the duties of roll

revisions and election works on holidays and non-teaching days. Teachers should not ordinarily be put on duty on teaching days and within teaching hours. Non-teaching staff, however, may be put on such duties on any day or at any time, if permissible in law.

33. Subject to the aforementioned modifications, this appeal is dismissed. However, in the facts and circumstances of this case, there shall be no order as to costs.

JUDIS