

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION

APPELLATE SIDE

M.A.T. 2137 of 2023

With

I.A. No. CAN/1/2023

The State Election Commission & Anr.

Vs

Nimai Ray @ Nimai Roy & Ors.

Before: The Hon'ble Justice Arijit Banerjee

&

The Hon'ble Justice Prasenjit Biswas

For the Appellants : Mr. Joydip Kar, Ld. Sr. Adv.,
Ms. Sonal Sinha, Adv.
Mr. Avishek Prasad, Adv.
Ms. Srabasti Barai, Adv.

For the respondent nos. 1 : Mr. Gangadhar Das, Adv.
and 2 : Mr. Tanmoy Chattopadhyay, Adv.
Ms. Mummun Das, Adv.

For the State : Mr. Santanu Kumar Mitra, Adv.
Ms. Rama Halder, Adv.

For Judgment on : 22.05.2024

Arijit Banerjee, J. :-

1. This appeal is directed against a judgment and order dated September 27, 2023, passed by a learned Judge of our Court in WPA 16880 of 2023 being a writ petition filed by the respondent nos. 1 and 2 in this appeal

namely Nimai Ray (in short 'Nimai') and Bibi Najira (in short 'Najira'). The present appellants were the respondent nos. 1 and 2 in the writ petition. By the judgment and order impugned, the learned Judge rejected the decision of the State Election Commission not to recount the ballot papers in respect of the Panchayat Election in question and directed the Commission to recount the ballot papers which stood rejected on the ground of defect on the part of the Presiding Officer in not inscribing his signatures and not affixing the distinguishing rubber seal on the reverse of the ballot papers.

2. The respondents/writ petitioners approached the learned Single Judge with the following case:-

(a) They were the contesting candidates of All India Trinamool Congress (AITC) in the Debipur Gram Panchayat in the West Bengal Panchayat General Elections 2023. They contested the election from Debipur/VIII constituency of the Debipur Gram Panchayat. The seat numbers on which they contested were 8, and 9 respectively.

(b) The election took place on its scheduled date. i.e., July 8, 2023. It was a peaceful election held in free and fair manner.

(c) The total number of ballots used was 1093.

(d) The counting started at the scheduled time on July 11, 2023, in the presence of the writ petitioners and their agents. However, during the process of counting, disproportionate numbers of ballot papers being 758 and 752 respectively, were declared as invalid and the corresponding votes were cancelled.

(e) On enquiry, the writ petitioners came to know that the rejected ballot papers did not contain the seal and signature of the Presiding Officer and hence were discounted.

(f) The petitioners pleaded with the counting officials that since the vote was held peacefully and the true mandate of the electorate had been captured on the ballot papers, simply because of some laches or default on the part of the Presiding Officer, the concerned ballot papers should not be rejected. Such request was in vain.

(g) At the end of the counting it was found that the candidates who were declared winners in respect of the two concerned seats, won by a very narrow margin of only a few votes.

(h) It is not only in the interest of the petitioners but also for the sake of democratic principles that the issue should be probed into in detail by the intervention of the Constitutional Court under its all encompassing and extra ordinary writ jurisdiction preferably by some stoically neutral agency under the supervision of the Court.

3. With the aforesaid pleadings, the writ petitioner approached the learned Single Judge praying for the following reliefs:-

“(a) A writ of/in the nature of certiorari calling upon the Respondents and each of them to transmit the records of the case to the Hon’ble Court so that the Hon’ble Court may certify the same and do conscionable justice to the case by quashing the decisions arrived by the State Election Commission in respect of Debipur/VIII-8 & 9 Gram Panchayat seats in the Panchayat General Election 2023 particularly the result so announced.

(b) A writ in the nature of mandamus directing the state authority to conduct the audit of the ballot papers.

(c) A writ in the nature of mandamus directing the State Election Commission to order a recounting after taking into account of all ballot papers which are otherwise valid but for the absence of seal or signature of the presiding officer.

(d) A writ in the nature of mandamus directing the State Election Commission to order re-poll if necessary.”

4. When the writ petition was moved, by an order dated 19.07.2023, the learned Judge called for a report in the form of affidavit from the State Election Commission and the Panchayat Returning Officer apropos the allegations made in the writ petition. Such report was filed and the writ petitioners filed their exception thereto.

5. Before the learned Single Judge, it was argued on behalf of the writ petitioners that the sole purpose of conducting the election is for ascertaining the mandate of the electors. In the present case, the mandate of the electors could not be ascertained as most of the votes stood rejected on the ground of deficiency on the part of the Presiding Officer who failed to put his signature and the distinguishing mark on the reverse of the concerned ballot papers. The electors were not at fault which warranted rejection of their votes. An election where votes of majority of the electors are rejected for no short coming or error on their part, cannot be treated as the mandate of the electors. Such an election is an empty formality. There should be re-polling or at least recounting of the votes taking into consideration all casted votes.

6. On behalf of the State Election Commission it was submitted that no objection was raised by or on behalf of the writ petitioners at the time of counting. Therefore, there is no scope for recounting of the votes. The point of maintainability of the writ petition was also urged on behalf of the State Election Commission.

7. In reply, it was submitted on behalf of the writ petitioners that despite their best efforts, they could not lodge their objection at the time of counting of the votes since they were mercilessly beaten up and thrown out of the counting centre.

8. The learned Judge noted from the report of the State Election Commission that it was not agreeable to recount the rejected ballot papers since there is no provision for the same in the 2003 Act or the 2006 Rules. Any decision to reopen counting may have a disquieting effect on the forthcoming elections. The Commission, being a constitutional body, would like to continue discharging its duties as envisaged under the extant Act and Rules.

9. The learned Judge held that the Election Commission ought to have relied upon and invoked the proviso to Rule 88(2)(h) of the West Bengal Panchayat Election Rules, 2006, which prescribes that where a ballot paper is defective on account of any mistake or failure on the part of the Presiding Officer or the Polling Officer, the ballot paper shall not be rejected merely on the ground of such defect. The learned Judge observed that when the margin of win of the successful candidates in the two seats is so minimal, the Commission should have taken a decision to recount the rejected votes.

The learned Judge disposed of the writ petition with the following observations and directions:-

“The basic principle is that the mandate of the electors has to be given prime importance by counting their votes and not by rejecting their votes on the ground of any defect on the part of the Presiding Officer or the Polling Officer. The Commission being a constitutional body ought to have acted in accordance with the Act and the corresponding Rules, upon proper application of mind and ought not to have acted mechanically so as to frustrate the very purpose of the election.

The Commission ought to have applied the law in a positive manner so that the election is seen to have been conducted in a free, fair, legal and proper manner. Assuming that complaint was not lodged in proper time, records reveal that it is only because of the defect of the Presiding Officer, that the votes stood rejected.

The Commission ought to have taken appropriate steps against the Presiding Officer who failed and/or neglected to act in accordance with the guidelines prescribed by the Commission and for whose defect the legal complication arising out of rejection of votes arose.

The Commission ought to follow the Rules as well as the mandate of the people relying on whose votes the democracy is run.

The issue of maintainability as raised by the Commission cannot be accepted in view of the decision of the Hon’ble Supreme

Court in the matter of ***Union Territory of Ladakh & Ors. v. Jammu & Kashmir National Conference & Anr. reported in 2023 SCC Online SC 1140*** wherein the Court observed that election to any office/body is required to be free, fair and transparent. Elections lie at the core of democracy. The authority entrusted by law to hold/conduct such elections is to be completely independent of any extraneous incident/consideration. A just cause ought not to be frustrated by efflux of time.

In view of the above, the decision of the Commission refusing to permit recounting of the ballot papers, cannot be accepted by the Court.

The Commission is directed to recount the ballot papers which stood rejected on account of the defect on the part of the Presiding Officer in not-inscribing the signature and not affixing the distinguishing rubber seal in the reverse of the ballot papers. The recounting shall be conducted at the earliest, but positively within a period of three weeks from the date of communication of this order.”

10. Being aggrieved, the State Election Commission and the Commissioner have come up by way of this appeal.

11. Appearing for the appellants, Mr. Joydip Kar, learned Senior Counsel made submission only on the point of maintainability of the writ petition. Learned Counsel submitted that in view of the bar in Article 243-O of the Constitution of India, the writ petition ought not to have been entertained by the learned Single Judge. The only remedy that the writ petitioners had was

by way of an election petition before the prescribed forum. Learned Counsel referred to the following two decisions of a concurrent bench:- (i) Judgment and order dated July 3, 2023, rendered in MAT 1165 of 2023 (The West Bengal State Election Commission and Anr. v. Sushanta Pramanik & Ors.) (ii) Judgment and order dated April 10, 2024, rendered in MAT 1654 of 2023 (The Block Development officer & Anr. v. Surajit Pramanik and ors.).

12. Learned Senior Counsel submitted that he was not citing the relevant Supreme Court decisions since such decisions had been considered and discussed in the aforesaid judgments of this Court.

13. Learned Advocate appearing for the respondents/writ petitioners, submitted that the writ Court has plenary powers. The power is limitless. In spite of the provisions of Article 243-O of the Constitution or the provisions of the West Bengal Panchayat Elections Act, 2003, the High Court can entertain a writ petition wherein gross irregularity in the conduct of a Panchayat Election has been brought to the notice of the Court. The restriction on the High Court entertaining such a writ petition is merely a self-imposed one. It is akin to the self-imposed restriction whereunder the High Court normally refuses to entertain a writ petition when alternative remedy is available to the petitioner. Learned Advocate submitted that the High Court's power of judicial review under Article 226 cannot be curtailed by any legislation.

14. Learned Counsel then submitted that not counting ballot papers used by the electors to cast their votes, amounts to a breach of their fundamental right. Therefore, a writ petition is maintainable. In this connection, learned Advocate referred to a decision of the Hon'ble Supreme Court in the case of

Assistant Commissioner of State Tax & Ors. v. Commercial Steel Limited, reported at 2021 SCC OnLine SC 884. Learned Advocate relied on paragraph 11 of the reported judgment wherein it has been observed that the existence of an alternate remedy is not an absolute bar to the maintainability of a writ petition under Article 226 of the Constitution. A writ petition can be entertained in exceptional circumstances where there is a breach of fundamental rights, a violation of the principles of natural justice, an excess of jurisdiction or a challenge to the vires of the statute or delegated legislation.

15. Learned Advocate also relied on a decision of the Hon'ble Supreme Court in the case of ***People's Union for Civil Liberties and Anr. v. Union of India & Anr., reported at (2013) 10 SCC 1***, in support of his submission that democracy postulates that there should be periodic elections where the people should be in a position to re-elect their old representatives or change the representatives or elect in their place new representatives. Further, democracy can function only when elections are free and fair and the people are free to vote for the candidates of their choice.

16. Learned Counsel then submitted that the writ petitioners have pointed out gross irregularity in the conduct of the election process in the concerned seats. If the highest Court of the State does not interfere and grant redressal of the writ petitioners, the writ petitioners have no other place to go to. The State Election Commission has failed in its duty to hold a fair election. In the facts of the present case, the Commission should have granted the prayer of the writ petitioners to recount the rejected ballot papers or hold a

re-poll in the concerned seats. The Commission having neglected and refused to discharge its duties in true spirit, the learned Single Judge was justified in intervening in exercise of high prerogative writ jurisdiction. In support of the submission that a writ petition is maintainable in certain circumstances even in respect of elections matters, learned Advocate relied on the decision of the Hon'ble Supreme Court in the case of ***Union Territory of Ladakh & Ors. v. Jammu & Kashmir National Conference & Anr., reported in 2023 SCC Online SC 1140.***

Court's view

17. There is no doubt that free and fair elections must be ensured for proper functioning of a democracy like our country. The need to maintain the purity of the election process, cannot be over emphasized. All citizens who qualify to contest an election, must be permitted to do so by filing nomination papers. All members of the electorate must be allowed to exercise their franchise freely and by casting their votes in favour of the candidates they choose. All returning officers must act fairly and in a completely impartial manner. The provisions of law including the rules framed under the relevant statutes must be scrupulously adhered to by the officers who are in charge of conduct of the elections. In other words, an election process should be completely transparent and in no manner should be biased in favour of any of the political parties.

18. However, the question is otherwise. If a contesting candidate or any other person having *locus standi* to challenge an election process wishes to do so, which is the forum that he should approach? Can such a person approach a civil Court or the writ Court exercising jurisdiction under Article

226 of the Constitution of India to agitate his/her grievance regarding the conduct of the election proceedings? The answer is clearly in the negative. Our Constitution itself has provided that an election dispute must be brought only before a special forum to be prescribed under the State laws.

19. In so far as Panchayat Elections are concerned, Article 243-O of the Constitution reads as follows:-

“243-O. Bar to interference by Courts in electoral matters.-

Notwithstanding anything in this Constitution, _

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243-K, shall not be called in question in any Court;

(b) no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any Law made by the Legislature of a State.”

20. In compliance with the constitutional mandate, the West Bengal State legislature promulgated the West Bengal Panchayat Elections Act 2003. The West Bengal Panchayat Election Rules, 2006 have been framed under the 2003 Act. Sections 79, 80 and 93 of the 2003 Act read as follows:-

“79. Disputes as to elections._(1) If any dispute arises as to the validity of an election under this Act, any person entitled to vote at such election may, within thirty days after the date of declaration of the results of such election, file a petition, calling in question

such election on one or more of the grounds specified in sub-section (1) of section 93 and section 94—

(a) before the Civil Judge having jurisdiction where such election is in respect of a Gram Panchayat or a Panchayat Samiti,

(b) before the District Judge of the district, where such election is in respect of a Zilla Parishad or the Siliguri Mahakuma Parishad.

(2) When filing a petition under sub-section (1), the petitioner shall deposit in Court, as security for the costs likely to be incurred,—

(a) five hundred rupees, where the petition is filed before the Civil Judge,

(b) one thousand rupees, where the petition is filed before the District Judge.

(3) Every petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.

(4) The District Judge may transfer any petition filed before him under sub-section (1) to any Judicial Officer subordinate to him not below the rank of a Subordinate Judge.

(5) In dealing with a petition under sub-section (1), the Civil Judge, the District Judge or the Judicial Officer to whom the petition is transferred under sub-section (4) (hereinafter referred to as the Judge) may hold such enquiry as he deems necessary.

(6) The Judges shall have all the powers of a civil Court for the purposes of receiving evidence, administering oath, enforcing the attendance of witnesses and compelling the discovery and production of documents.

(7) The decision of the Judge shall be final and shall not be called in question in any Court.

80. Election petitions,_ No election petitions to Panchayat shall be called in question except by an election petition presented in accordance with the provision of this Part.

93. Grounds for declaring election to be void._ (1) Subject to the provisions of sub-section (2) if the Court is of opinion—

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under this Act;

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or

(c) that any nomination has been improperly rejected; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—

(i) by the improper acceptance of any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent,

or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of this Act, or of any rules made under this Act, the Court shall declare the election of the returned candidate to be void.

(2) If in the opinion of the Court, a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice but the Court is satisfied—

(a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without the consent, of the candidate or his election agent;

(b) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and

(c) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents, then the Court may decide that the election of the returned candidate is not void.”

21. The law is now well established that any election dispute in so far as Panchayat Elections in this State are concerned, must be resolved by the forum prescribed under the 2003 Act. Jurisdiction of the Civil Court or the Writ Court under Article 226 of the Constitution cannot be invoked by an aggrieved party in that regard. There are some decisions of the Hon’ble Apex Court which are to the effect that there is no bar to a writ Court entertaining

a writ petition regarding election disputes since the jurisdiction of the Supreme Court under Article 32 and the jurisdiction of the High Courts under Article 226 cannot be ousted or abridged by legislation. However, those decisions also clarify that as a matter of course, in connection with elections disputes, the writ jurisdiction under Article 32 or Article 226 of the Constitution will not be exercised by the Courts in view of availability of an efficacious alternative remedy before a special tribunal or a special forum.

22. In the case of *N.P. Ponnuswami v. The Returning Officer, Namakkal Constituency*, reported at AIR 1952 SC 64, the Hon'ble Supreme Court was considering the effect of Article 329(b) of the Constitution of India which provides that notwithstanding anything in the Constitution, "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." In that context, the Hon'ble Supreme Court held at paragraphs 8, 9, 12, 16 and 27 of the reported judgment, as follows:-

"8. The next important question to be considered is what is meant by the words "no election shall be called in question". A reference to any treatise on elections in England will show that an election proceeding in that country is liable to be assailed on very limited grounds, one of them being the improper rejection of a nomination paper. The law with which we are concerned is not materially different, and we find that in section 100 Representation of the

People Act, 1951, one of the grounds for declaring an election to be void is the improper rejection of a nomination paper.

9. The question now arises whether the law of elections in this country contemplates that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under article 226 of the Constitution (the ordinary jurisdiction of the Courts having been expressly excluded), and another after they have been completed by means of an election petition. In my opinion, to affirm such a position would be contrary to the scheme of Part XV of the Constitution and the Representation of the People Act, which as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any Court. It seems to me that under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. Article 329(b) was apparently enacted to prescribe the manner in which and the stage at which this ground, and other grounds which may be raised under the law to call the election in question, could be urged. I think it follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other court. If the grounds on which an election can be

called in question could be raised at an earlier stage and errors, if any, are rectified, there will be no meaning in enacting a provision like Article 329(b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting view may be expressed by the High Court at the pre-polling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought up before it.

12. It is now well-recognized that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes J. in *Wolverhampton New Water Works Co. v. Hawkesford* (1859) 6 C.B. (N.S.) 336, at p. 356 in the following passage :-

“There are three classes of cases in which a liability may be established founded upon statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy; there, the party

can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it..... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

16. The conclusions which I have arrived at may be summed up briefly as follows:-

(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

(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 effect 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.

27. We are informed that besides the Madras High Court, seven other State High Courts have held that they have no jurisdiction under article 226 of the Constitution to entertain petitions regarding improper rejection of nomination papers. This view is in my opinion correct and must be affirmed. The appeal must, therefore, fail and is dismissed. In view of the nature and importance of the points raised in this appeal, there should be no order as to costs.”

23. In the case of ***Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi & Ors., Reported at (1978) 1 SCC 405***, a Constitution Bench of the Hon’ble Supreme Court held that in view of the *non-obstante* clause in Article 329 of the Constitution, Article 226 of the Constitution of India stands pushed out where the dispute takes the form of calling in question an election, except in special situations pointed out but left unexplored in **Ponnuswami’s case**. It was held that there is a remedy for every wrong done during the election in progress although it is postponed to the post-election stage. The special forum (Election Tribunal in that case) has powers to give relief to an aggrieved candidate.

24. In the case of ***S.T Muthusami v. K. Natarajan & Ors., reported at AIR 1988 SC 616***, the Hon’ble Supreme Court upheld a full bench decision of the Madhya Pradesh High Court in the case of ***Malam Singh v. The Collector, Sehore, & Ors., reported at AIR 1971 MP 195***. The Madhya Pradesh High Court had held, following **Ponnuswami’s case** that although

there is no constitutional bar to the exercise of writ jurisdiction in respect of elections to local bodies such as Municipalities, Panchayats, and the like, yet, it is desirable to resolve election disputes speedily through the machinery of election petitions, and the Court in the exercise of its discretion should always decline to invoke its writ jurisdiction in an election dispute if the alternative remedy of an election petition is available. The Hon'ble Supreme Court approved such observation of the Madhya Pradesh High Court. The Supreme Court went on to observe that the relevant statute in that case was a complete Code providing machinery for redressal of grievances pertaining to election. It was further observed that "the High Court though exercises extra ordinary jurisdiction under Article 226 of the Constitution of India, but such jurisdiction is discretionary in nature and may not be exercised in view of the fact that an efficacious alternative remedy is available and more so exercise restraint in terms of Article 243-O of the Constitution of India. Once alternative machinery is provided by the Statute, the recourse to writ jurisdiction is not an appropriate remedy. It is a prudent discretion to be exercised by the High Court not to interfere in the election matters, especially after declaration of the results of the elections but relegate the parties to the remedy contemplated by the statute. In view of the above, the writ petition should not have been entertained by the High Court."

25. In the case of ***West Bengal State Election Commission & Ors. v. Communist Party of India (Marxist) & Ors., reported at (2018) 18 SCC 141***, a three Judge bench of the Hon'ble Supreme Court held that any dispute with regard to the validity of an election has to be espoused by

adopting a remedy which is known to law, namely, through an election petition. It is at the trial of an election petition that factual disputes can be resolved on the basis of evidence. It was observed that once the election process has commenced, it is trite law that it should not be interdicted mid stage. The electoral process is afforded sanctity in a democracy. That is the reason why in a consistent line of precedence, the Supreme Court has insisted upon the discipline of the law being followed so that any challenge to the validity of an election has to be addressed by adopting the remedy of an election petition provided under the governing statute.

26. In a recent decision in the case of ***Karmaveer Tulshiram Autade & Ors. v. State Election Commission, Mumbai & Ors., reported at AIR 2021 Bom 90***, a Full Bench of the Bombay High Court observed that the law laid down admits of no doubt that a petition under Article 226 of the Constitution would not be maintainable if it calls in question a step in election and such questioning before the Court may have the effect of interrupting, obstructing or protracting the election. After discussing most of the relevant judgments of the Hon'ble Supreme Court, the Bombay High Court held that the decision of the Hon'ble Supreme Court in ***Ponnuswami's*** case still holds the field in so far as the procedure for challenging an election dispute is concerned. It was also observed that although a limited area had been carved out in the case of ***Mohinder Singh Gill Supra*** and in the case of ***Elections Commission of India v. Ashok Kumar & Ors., (2000) 8 SCC 216***, for entertainment of writ petitions instituted not to interrupt / obstruct / protract the election process in any manner but intended to subserve the progress of election and to facilitate its

completion, a careful distinction has to be drawn towards completing the election as against questioning the election.

27. In the two decisions of a Coordinate Bench of this Court of which one of us was a member in the cases of The ***West Bengal State Election Commission and Anr. v. Sushanta Pramanik & Ors. (MAT 1165 of 2023)*** and The ***Block Development Officer & Anr. v. Surajit Pramanik and ors. (MAT 1654 of 2023)***, relied upon by learned senior advocate representing the appellants before us, the decisions of the Hon'ble Supreme Court have been discussed in detail. Although what was under challenge in ***Surajit Pramanik's*** case was rejection of nomination papers by the Panchayat Returning Officer, the same principles of law would apply. The learned Single Judge had entertained the writ petition and had passed certain directions. The Division Bench disagreed and reversed such decision holding that in view of the law governing the field, the learned Judge ought not to have entertained the writ petition.

28. We have set out the prayers in the writ petition hereinabove. By no stretch of imagination it can be said that the writ petitioners approached the learned Single Judge for orders which would facilitate completion of the election process. Very clearly the election process was under challenge in so far as the same pertained to two seats in the relevant Panchayat. The Writ petition is clearly not maintainable in view of Article 243-O of the Constitution of India read with Section 79, 80, 93 of the West Bengal Panchayat Elections Act, 2003 and the Statutory Rules of 2006 framed thereunder. The only remedy of the writ petitioners is to approach the forum prescribed under the 2003 Act following the procedure laid down therein.

29. In so far as the case of the ***People's Union for Civil Liberties and Anr. v. Union of India & Anr. (supra)*** is concerned, which was relied upon by the writ petitioners, that case considered the question as to whether or not the electronic voting machines should have provision for a 'None of the Above' (NOTA) button. It was held that the EVMs should have such a provision. The question of maintainability of a writ petition challenging an election dispute was not an issue at all in that case.

30. Another case relied upon by the writ petitioners is ***Assistant Commissioner of State Tax (supra)***. There also, the issue involved in the present appeal was not under consideration. The paragraph of the judgment relied upon by learned Advocate for the writ petitioners has been paraphrased hereinabove. The same merely indicates when a writ petition may be entertained in spite of the existence of an alternative remedy.

31. The other decision of the Hon'ble Supreme Court relied upon by learned Counsel for the writ petitioners is in the case of the **Union Territory of Ladakh, (Supra)**. The controversy involved in that case was non-allocation of a particular symbol to the writ petitioner which was the respondent no. 1 before the Hon'ble Supreme Court. The learned single Judge entertained a writ petition and passed an interim order directing the concerned authorities to allot the Plough symbol to the writ petitioner. The Division Bench dismissed the appeal preferred by the **Union Territory of Ladakh**. The Supreme Court upheld the orders of the High Court and dismissed the appeal preferred by the **Union Territory of Ladakh**. One of the reasons, and it appears to us to be the primary reason for the Hon'ble Supreme Court to intervene in the matter was, as observed in paragraph 31

of the reported judgment, “having chosen, with eyes open, to not comply with successive orders of the learned Single Judge and the learned Division Bench, both of which were passed well in time, such as not to stall / delay the notified election schedule, the appellants cannot be permitted to plead that interference by us at this late juncture should not be forthcoming.” Further, although a reference was made to the decision in **N.P. Ponnuswami’s case (supra)**, it was not discussed as to why the principle of law enunciated in that case would not apply. As we read it, the decision in the case of **Union Territory of Ladakh** was rendered in the very special facts of that case.

32. It was sought to be argued, albeit feebly, by learned Counsel for the writ petitioners that the right to vote and the right to have the same counted is a fundamental right. Such rights of citizens having been breached in the present case, a writ petition would be maintainable notwithstanding availability of an alternative remedy. This submission has no merit. The right to exercise adult franchise is a statutory right and not a fundamental right under the Constitution.

33. In view of the aforesaid, this appeal must succeed. The learned Judge should not have entertained the writ petition. The order under appeal is set aside. The writ petition is dismissed as not maintainable. We have not expressed our opinion on the merits of the writ petitioners’ grievance as ventilated in the writ petition. They will be at liberty to pursue the statutory remedy that is available to them, in accordance with law, if they are still entitled to do so in law.

34. The appeal and the connected application stands disposed of accordingly. There will be no orders as to costs.

35. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

(ARIJIT BANERJEE, J.)

I agree.

(PRASENJIT BISWAS, J.)