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IN THE HIGH COURT OF DELHI AT NEW DELHI

WP (C) No. 11879 OF 2009

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Judgment Reserved on: 10.1.2012

Judgment Delivered on: 17.1.2012

DR. SUBRAMANIAN SWAMY

... PETITIONER

Through :

In person.

VERSUS

**ELECTION COMMISSION OF INDIA
THROUGH ITS SECRETARY**

... RESPONDENT

Through:

Mr. Ashok Desai, Sr. Advocate
with Mr. P.R. Chopra and Mr.
S.K. Mendiratta, Advocates.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI, ACTING CHIEF JUSTICE:

1. We would like to start with the following quote from *Mohinder Singh*

Vs. *Chief Election Commissioner*, AIR 1978 SC 85:-

“Democracy is government by the people. It is a continual participative operation, not a cataclysmic, periodic exercise. The little man, in his multitude, marking his vote at the poll does a social audit of his Parliament plus political choice of his proxy. Although the full flower of participative Government rarely blossoms, the minimum credential of popular government is appeal to the people after every term for a renewal of confidence. So we have adult

franchise and general elections as constitutional compulsions. “the right of election is the very essence of the constitution” (Junius). It needs little argument to hold that the heart of the Parliamentary system is free and fair election periodically held, based on adult franchise, although social and economic democracy may demand much more.”

2. In *Rameshwar Prasad and others* (VI) Vs. *Union of India and another* (2006) 2 SCC 1, Justice Pasayat struck following sound note in this behalf:-

“Therefore, the well-recognised position in law is that purity in the electoral process and the conduct of the elected representatives cannot be isolated from the constitutional requirements. “Democracy” and “free and fair election” are inseparable twins. There is almost an inseverable umbilical cord joining them. In a democracy the little man – voter has overwhelming importance and cannot be hijacked from the course of free and fair election. His freedom to elect a candidate of his choice is the foundation of a free and fair election.”

(though it was a minority opinion rendered by Justice Pasayat, there cannot be any quarrel about the aforesaid observation)

3. It is for this reason that the framers of the Constitution rightly provided for constitution of an independent body like Election Commission of India for conducting elections to Parliament and Legislative bodies. The Election Commission of India is a constitutional body created under Article 324 of the Constitution of India. Article 324 of the Constitution of India sets out duties

of the Election Commission of India which specifically include an obligation to ensure that elections conducted by it are free, fair and are true reflections of the will of the voters. Conducting free and fair elections in a country like India, 73 crores people of which country constitute electoral bank, is by no means an easy task. India is the largest democracy in the world. Because of number of factors i.e. different culture, different languages, diverse territories with different ecology and climatic conditions, the high rate of illiteracy and poverty as well as different societal norms, the challenges faced by the Election Commission of India in this country are unique and unparallel.

4. The international standards that an election has to meet, to be considered free and fair, comprehend:-

- (i) Individuals have to be accurately identified as eligible voters who have not already voted;
- (ii) Voters are allowed only one anonymous ballot each, which they can mark in privacy;
- (iii) The ballot box is secure, observed and, during election, only able to have votes added to it by voters: votes cannot be removed;
- (iv) When the election ends, the ballot box is opened and counted in the presence of observers from all competing parties. The counting process cannot reveal how individual voters cast their ballots;

- (v) If the results are in doubt, the ballots can be checked and counted again by a different set of people/machines;
- (vi) As far as the individual voter is concerned, he must be assured that the candidate he casts his vote for, actually gets that vote.

5. Here in this writ petition filed in the form of Public Interest Litigation, we are not concerned with different facets of free, fair and transparent system of elections. It cannot be denied that with 73 crores voters in General Parliamentary Elections and crores of voters in each State Legislative Elections, the system of paper ballot is quite cumbersome. Not only printing of paper ballots of such a magnitude involves hundred tons of papers and printing cost, manual counting of the ballots becomes a mammoth job requiring huge manpower and man-days resulting in delays in announcing the results. In this electronic age where science and technology are making strides at a rapid pace which in turn is making many things easier in life, use of electronic system instead of paper ballot is a big welcome, provided it is not fraught with frailties and other possible dangers or shortcomings thereof are duly taken care of.

6. We may mention here itself that in certain Election Petitions filed in various High Courts, the propriety and legality of use of Electronic Voting Machines (EVMs) has come up for discussion and its positive side has been reflected in those judgments. The High Court of Karnataka in the case of ***Michael B. Fernandes Vs. C.K. Jaffer Sharief & Ors.*** (EP No. 29/1999 decided on 5.2.2004) appreciated the EVM system in the following words:

“11.The evidence further discloses that the EVM has seeming advantage over the traditional manual ballot method. In the manual method, there is possibility of swift rigging at the end of polling time, but when the votes are cast through EVM there has to be necessary minimum time lag between one vote and the next vote. Therefore, when the EVMs are used, the malpractice of rigging swiftly and quickly at the closing hours of the polling time stands avoided.

12. The EVMs have been put in use in the last general elections and in the last assembly elections in U. P. and other States. The practical wealth of experience has dispelled abundantly the theoretical unfounded apprehensions of the possible misuse. Cost-wise also, use of EVMs is economical. Traditional manual method involves huge cost towards printing charges and counting expenses. The said expenses will almost account to 30-40% of the election expenses. On one time investment by purchasing required EVMs, the cost of general elections to Parliament and assembly and by-elections would get largely reduced. The life span of EVM is 15 years.

13. The invention of EVM has an interesting history. According to the evidence of the witness CW. 1, the scientists of Bharath Electronics Limited developed electronic voting machine to handle the trade union elections. The election commission grasping the utility and its relevance to the country's general elections approached the B. E. L. for manufacturing a EVM suitable for the general elections. The scientists got involved themselves personally including C. W. 1 in the general elections to study the nuances of the pattern and procedures of the elections. After thorough practical experimentation and research the present version of EVM is designed. This invention is undoubtedly a great achievement in the electronic and computer technology and a national pride. It has come in the evidence of the witness that country like Singapore, Malasiya and U. S. A. are interacting with BEL for supply of EVMs suitable for their election requirements.”

7. The Madras High Court had the occasion to comment upon the EVMs and narrate its advantages in the case of *All India Anna Dravida Munnetra Kazhagam Vs. The Chief Election Commissioner, Election Commission of India & Ors.* (W.P. Nos. 3346 etc. of 2001, decided on 10.4.2001) in the following words:-

“59. There is also no question of introducing any virus of bugs for the reason that the EV Ms cannot be compared to personal computers. The programming in computers, as suggested, has no bearing with the EV Ms. The Computer would have inherent limitations having connections through internet and by their very design, they may allow the alteration of the programmes

but the EV Ms are independent units and the programme in EVM is entirely a different system. The accidental damage of the EV Ms will not cause any danger to the votes already cast and the poll can be continued with the new one, as mobile parties with spare EV Ms will be requisitioned, as per the contention of the Election Commission.

60. The advantages of using EV Ms outweigh the advantages in conventional ballot boxes. Need for printing huge quantity of ballot papers is dispensed with saving on cost of paper and printing. The invalid votes in the old system play a major role in turning the result of the elections. In some cases, the margin between the elected and defeated candidate is below 500 whereas the invalid votes run to 1000. In the EV Ms, invalid vote does not rise and every vote will be accounted. No rigging is possible and results can be ascertained in a shorter time. In the ballot papers in the conventional system, the voters prefer to write some messages leaving a bad taste and also wasting the whole exercise. This is not possible in the EV Ms. It is worthwhile to mention that the former Chief Election Commissioner, presently adorning the Chair of Governor, Karnataka. Praised the use of EV Ms in the election to the effect that it is cheaper, easy to sue and quicker and the need for printing huge quantity of ballot papers is dispensed with saving the cost of paper and printing.”

8. The Bombay High Court, likewise, in Election Petition No. 1 of 2004 decided on 21.10.2005 in the case of *Banwarilal Vs. Shri Vilas Muttemwar & Ors.* praised the EVMs system as under:-

“38. Next question is as to whether EVMs were susceptible for rigging and whether rigging could have been done by using devices which could be operated

from a remote distance, and without actual access to either the strong room or to the EVMs.

Had it been a case that these two experts had transferred the EVM function designed and demonstrated by them to any other technocrat who was not a participant in the process of preparation of the EVM gadgets on IBM compatible P.C. owned or used by these witnesses, and he would have broken the codes, seals and entered the machine and tampered the data, it would have been probably a positive version about possibility of telling that EVMs prepared by the experts, though guarded with utmost security arrangements by the petitioner's witnesses, were found vulnerable for tampering, physically or even remotely.

39. The paradox of the situation is that these witnesses have themselves designed the machine on their own P.C. they knew the method of working and now they certify themselves that the EVM designed by them was demonstrated to be capable of tampering and rigging. These witnesses also do not state that they have tried and found that EVM prepared by them IBM compatible PC was tamperable by any remote function by a stranger or even by themselves.

40. This evidence of petitioner's witnesses, thus, does not inspire any confidence to prove the fact that per se the EVMs are tamperable, or on facts that those were tampered with."

9. The use of technology for elections began over a century ago with mechanical voting machines. These evolved into a variety of electro-mechanical systems. In rare cases, there is now internet voting, which gives voters freedom to cast their ballot from a location of their choice. EVMs are a subset of available electronic voting technologies. The introduction of

electronic voting (also known as ‘e-voting’) is usually driven by one or a combination of the following factors:

- (i) Anticipated cost savings,
- (ii) Fraud reduction,
- (iii) Increased accuracy and speed of results tabulation,
- (iv) Voting anywhere in a constituency,
- (v) Improved accessibility for voters with disabilities and for remote/overseas communities and the lure of new technology.

10. Presumably, for the aforesaid reasons or otherwise, the petitioner has not suggested that EVMs be dispensed or that we should revert back to the paper ballot system. Focus is only one, viz to ensure prevention of misuse EVMs utilized by the Election Commission of India. It’s a matter of record that for the last few centuries, the system of paper ballot has been developed. This system definitely meets all the aforesaid six requirements. Whether this is achieved by the introduction of EVMs which has replaced paper ballot is the question which is the focus of the present petition.

11. We may repeat that the petitioner has not questioned, during the arguments, the introduction of this system though he has some apprehension about the vulnerability of EVMs to fraud and from security point of view.

The focus of the petitioner even is limited. His grievance is that the present system of EVM is not transparent inasmuch as there is no guarantee/assurance left to the voter, with convincing proof that the EVM has rightly registered the vote cast by a voter in favour of a particular candidate. As of now, when the voter casts a vote in favour of a particular candidate, he has to press a button and the light against the name of a particular candidate flashes. The petitioner contends that this is not a sufficient safeguard. According to him, the requirement is to incorporate in the EVMs a certain obvious safeguard which is called the “paper back up”, “paper receipt” or “paper trail” (hereinafter referred to as the “paper trail”). The introduction of this feature, according to him, will put a value addition and this paper trail in the form of receipt will come out from the machine immediately on the casting of the vote indicating the name of the candidate in whose favour the vote is given by the voter satisfying the voter that the machine has correctly posted the vote in favour of a particular candidate, the said voter intended. According to the petitioner, this should be treated as an essential component of free and fair election and in the absence of such paper trail feature, the system cannot be treated as amounting to conducting free and fair elections, more so, when there is a possibility of machine being skewed or it is vulnerable to fraud.

12. The petitioner specifically emphasizes that at no stage he has made the averment that there has actually been fraud through EVMs of the Election Commission; only that any electronic machine can be hacked or rigged and adequate safeguards are required for conducting free and fare elections. Dr. Swamy has invited our attention to the order dated 17.2.2010 wherein this Court has stated thus:-

“The issue raised by the petitioner is with regard to a ‘paper trail’ which will be in the form of receipt indicating the ballot cast on the Electronic Voting Machine This public interest litigation is confined only to this issue and nothing more.”

Dr. Swamy submitted that this Court had restricted the issue as to paper trail, being the hub of the matter. It is urged by him that the Election Commission, the first respondent, has introduced the electronic voting machine without the paper trail which travels beyond the plenary power vested with the Election Commission. To buttress the said facet of submission he has drawn inspiration from the three Judges Bench decision rendered in *A.C. Jose Vs. Sivan Pillai and others*, AIR 1984 SC 92. He has commended us to paragraph 25 of the said decision to highlight that the Election Commission cannot travel beyond the power conferred by the Statute. It is highlighted by Dr. Swamy that in the absence of a paper trail

there is a violation of the dictionary clause contained in Section 2(r), (v) and (za) of the Information Technology Act,2000 (hereinafter referred to as the 2000 Act) read in conjunction with Section 12 specially the Subsection (2). It is further urged by Dr. Swamy that 2000 Act stipulates how an electronic voting machine is required to be operated inasmuch as the voter/originator is entitled to a receipt and when there is such a command of the statute then the Election Commission on its own could not have done away with it and further in the absence of such paper trail the elections in a way are not transparent as a consequence of which it tantamount to failure of free and fair voting which is the milestone of a democracy.

13. He also drew our attention to order dated 17.8.2011 passed in this writ petition. In that order, statement of learned counsel for the Election Commission of India was recorded to the effect that the Election Commission of India had been taking steps by conducting some field trials and the experts had been engaged to evaluate the process by which field trials are being held. His submission is that though the Election Commission of India started conducting these field trials, the same were abandoned abruptly in the middle. He also referred to the contents of the Affidavit dated 12th April, 2010 filed by him in which he has highlighted that the Patent Office declined to treat the

EVMs as “classified” as the Patents Act did not permit it. Further, though direction is given to Election Commission of India for manufacture of these machines, the Commission had outsourced a good part of the machine rendering the whole process of EVMs quite unsafe. According to him, vital part of EVM namely ‘micro- controller’ which can be called the ‘brain’ of the EVM is outsourced and is produced in Japan and for this reason, it is not patentable. In fact, the International Patent was applied which was even rejected by WIPO. Dr. Swamy also referred to the judgment of German Court holding such a system of EVM as unconstitutional. The German Federal Constitutional Court ruled in 2009 that ‘the use of electronic voting machines requires that the essential steps of the voting and of the determination of the result can be examined by the citizen reliably and without any specialist knowledge of the subject. The Court indicated that the constitution requires that ‘all essential steps of an election are subject to the possibility of public scrutiny unless other constitutional interests justify an exception’. As a result, the use of EVMs has been stopped in Germany.

14. Mr. Desai, learned Senior Counsel has refuted the aforesaid submissions of Dr. Swamy. We are not taking note of those submission separately at this stage but will refer to the same in our discussion.

15. Having considered the matter in depth and from what is stated above, it becomes clear that there are various positive gains which are promised by the introduction of EVMs and for this reasons it is not even suggested that we should abandon the system and revert back to the system of paper ballot. At the same time, the petitioner has highlighted the requirement of transparency in the system.

16. No doubt, transparency is essential in an election process. Unless stake holder can see that the process is being conducted correctly and the results are being accurately aggregated, it is difficult to have confidence in the results and the outcome. The trust and confidence in the electoral process is an essential pre-requisite and the results and outcome being expected.

17. The question is as to whether this confidence can be achieved only with the introduction of paper trail and present system lacks that? Other related question would be as to whether there is any mandate for the Election Commission to introduce such a system of paper trail. Mr. Desai has emphasized that elections also require high level of confidentiality so that the choice of each voter remains secret. That is also equally essential component for conducting free and fair elections. He rightly submitted that

if system of paper trail is introduced and the receipt is given indicating the candidate in whose favour a particular voter has voted, the confidentiality in the system would be lost. That would negate the very essence of free and fair elections.

18. Thus, the challenge is to reconcile the competing requirements of transparency of the process and the secrecy of the vote.

19. Before discussing this aspect, we may note the difficulties in introducing this 'paper trail' as pointed out by Mr. Desai. The Election Commission of India in its affidavit has stated that there is no provision to attach a printer directly to the existing EVMs and it would require modification by way of an additional device to interface the printer with the ballot unit for all the 1.3 million EVMs currently in use. It is also stated that the use of printer is fraught with following problems:-

- (i) Printers are largely mechanical component based devices while EVMs are electronic devices. Mechanical failure is a more commonplace occurrence than electronic failures. Therefore, printers are more prone to mechanical failure like paper jamming, paper loading problems, alignment etc. This will disrupt polling process.
- (ii) Printers will require special power back up, which many polling stations in rural areas are not equipped with. Even printers with battery backup

may require regular charging and therefore need power outlet which is not available everywhere. EVMs, on the other hand, run on special battery backup with very long life.

- (iii) Handling of printers needs expertise and trained personnel. Installing paper rolls, replacing jammed papers, replacement of ribbons, etc. requires technical expertise.

20. That apart, the Election Commission has also highlighted the cost factor as it may result into whopping expenses of ₹ 1040 crores (though by itself this may not be a relevant factor inasmuch as for conducting fair and free elections, cost cannot be the deterrent). The Election Commission has also stated that it would be difficult to find the required number of technically competent and dependable manpower to handle the printers for conduct of elections; the system of paper trail would mean two parallel processes which would require more time per voter and there are various other practical difficulties namely the printed trail will necessarily be a small sized paper. Checking every elector before he leaves the polling station after casting of vote, to ensure that no one takes the paper slip out of the polling station, will be a difficult exercise. There will also be the risk of electors dropping look alike paper in ballot box instead of the actual printed paper from the EVM leading to violation of secrecy of votes, possible intimidation, allurements etc.

This will provide an opportunity to the electors to carry the paper trail outside. Such a possibility could encourage bribing of electors and also intimidation of the electors. At the same time, the polling personnel cannot be permitted to take the paper slip from the elector and physically examine it (to ensure that they are dropping the actual paper trail in the box) since such intervention will violate the secrecy of votes.

21. We also find that the present system is in tune with the provisions of the People of the Representation Act, 1951 as well the Conduct of Election Rules, 1961. Section 61A of the PR Act reads as under:-

“Voting machines at elections- Notwithstanding anything contained in this Act or the rules made thereunder, the giving and recording of votes by voting machines in such manner as may be prescribed may be adopted in such constituency or constituencies as the Election Commission may, having regard to circumstances of each case specify.

Explanation- For the purpose of the Section, “Voting machines” means any machine or apparatus whether operated electronically or otherwise used for giving or recording of votes and any reference to a ballot box or ballot paper in this Act or the rules made thereunder shall, save as otherwise provided, be construed as including a reference to such voting machine wherever such voting machine is used at any election.”

22. Likewise, Rules 49A, 49B, 49E, and 49M to which our attention is drawn by Mr. Desai are to the following effect.

“49A. **Design of Electronic Voting Machines.**-Every electronic voting machine (hereinafter referred to as the voting machine) shall have a control unit and a balloting unit and shall be of such designs as may be approved by the Election Commission.

49B. **Preparation of voting machine by the returning Officer.**-(1) The balloting unit of the voting machine shall contain such particulars and in such language or languages as the Election Commission may specify.

(2) The names of the candidates shall be arranged on the balloting unit in the same order in which they appear in the list of the contesting candidates.

(3) If two or more candidates bear the same name, they shall be distinguished by the addition of their occupation or residence or in some other manner.

(4) Subject to the foregoing provisions of this rule, the returning officer shall,-

(a) fix the label containing the names and symbol of the contesting candidates in the balloting unit and secure that unit with his seal and the seals of such of the contesting candidates or their election agents present as are desirous of affixing the same;

(b) set the number of contesting candidates and close the candidate set section in the control unit and secure it with his seal and the seals of such of the contesting candidates or their election agents present as are desirous of affixing the same.

49E. Preparation of voting machine for poll.-(1) The control unit and balloting unit of every voting machine used at polling station shall bear a label marked with-

(a) the serial number, if any, and the name of the constituency;

(b) the serial number and name of the polling station or stations as the case may be;

(c) the serial number of the unit; and

(d) the date of poll.

(2) Immediately before the commencement of the poll, the presiding officer shall demonstrate to the polling agents and other persons present that no voter has been already recorded in the voting machine and it bears the label referred to in sub-rule (4).

(3) A paper seal shall be used for securing the control unit of the voting machine, and the presiding officer shall affix his own signature on the paper seal and obtain thereon the signature of such of the polling agents present as the desirous of affixing the same.

(4) The presiding officer shall thereafter fix the paper seal so signed in the space meant therefor in the control unit of the voting machine and shall secure and seal the same.

(5) The seal used for securing the control unit shall be fixed in such manner that after in unit has been sealed, it is not possible to press the "result button" without breaking the seal.

(6) The control unit shall be closed and secured and placed in full view of the presiding officer and the

polling agents and the balloting unit placed in the voting compartment.

49M. Maintenance of secrecy of voting by electors within the polling station and voting procedures.-

(1) Every elector who has been permitted to vote under rule 49-L shall maintain secrecy of voting within the polling station and for that purpose observe the voting procedure hereinafter laid down.

(2) Immediately on being permitted to vote the elector shall proceed to the presiding officer or the polling officer incharge of the control unit of the voting machine who shall, by pressing the appropriate button on the control unit, activate the balloting unit; for recording of elector's vote.

(3) The elector shall thereafter forthwith-

(a) proceed to the voting compartment;

(b) record his vote by pressing the button on the balloting unit against the name and symbol of the candidate for whom he intends to vote; and

(c) come out of the voting compartment and leave the polling station.

(4) Every elector shall vote without undue delay.

(5) No elector shall be allowed to enter the voting compartment when another elector is inside it.

(6) If an elector who has been permitted to vote under rule 49-L or rule 49-P refuses after warning given by the presiding officer to observe the procedure laid down in sub-rule (3) of the said rules, the presiding officer or

a polling officer under the direction of the presiding officer shall not allow such elector to vote.

(7) Where an elector is not allowed to vote under sub-rule (6), a remark to the effect that voting procedure has been violated shall be made against the elector's name in the register of voters in Form 17-A by the presiding officer under his signature.”

23. Once we accept that with paper trail system, secrecy of the ballot is suspect, it would not be possible to give such directions. On that note, we consider as to whether the present system of EVM lacks transparency.

24. As noted in the beginning by us, even Dr. Swamy does not suggest that there has actually been any fraud through the EVMs in the elections. He has also not advocated for the strap of the system and, therefore, reference to the judgment of the German Court may not be of any avail. He was candid in stating that at no stage such an averment is made. His entire argument and justification for paper trail system is passed on the apprehension that any electronic machine can be hacked and rigged and, therefore, adequate safeguards are essential to meet the constitutional mandate of conducting free and fair elections. It will be difficult to accept the prayer only on the basis of such an apprehension.

25. The obligation of the Election Commission is to conduct election as per the provisions of law which is being done. If the politicians want change in law, the appropriate course of action is to make suitable provisions in the law by appropriate amendments. We are also of the opinion that provisions of IT Act have no application to such a case/system. Therefore, it is difficult to issue a mandamus directing the Election Commission to introduce the system of paper trail.

26. Having held so, we would like to make certain parting observations. Dr. Swamy is right to the extent that it cannot be ruled out that EVMs may be vulnerable to frauds. There may be security issues as well. Though, there is no evidence that such things have happened so far and it is not even suggested by Dr. Swamy, the Election Commission had itself started the exercise of experimenting this and to improve the system to make it foolproof. For certain reasons that is abandoned midway. Such a major policy decision needs thorough deliberations by all the stakeholders including the legislative process. There should be wide consultation which should allow ample and meaningful opportunity to all the stakeholders to achieve sufficient understanding of both the issues and the technology. Technology is making advancement at rapid pace and, therefore, more and

more consultation to the challenges of voting by EVMs can be found. Policy decision based on full discussion, research and consultation may therefore be needed. However, it would be for the Legislature or the Election Commission to consider the aforesaid or other related aspects.

27. This writ petition is disposed of in the aforesaid terms.

ACTING CHIEF JUSTICE

**(RAJIV SAHAI ENDLAW)
JUDGE**

JANUARY 17, 2012

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