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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ EL.PET. 2/2024

SOMNATH BHARTI

.....Petitioner

Through: Mr. Anand Prakash Gautam,
Advocate alongwith Petitioner in
person

versus

BANSURI SWARAJ AND OTHERS

.....Respondents

Through: Mr. Rajeev Sharma and Mr. Vinayak
Sharma, Advocates for R-3

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Date of Decision: 09th September, 2024

CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

1. The present election petition has been filed under Sections 80 and 81 of the Representation of the People Act, 1951 ('Act of 1951'), thereby challenging the result of the election of the Member of the House of the People from 04-New Delhi Parliamentary Constituency ('New Delhi Constituency') held on 25.05.2024, wherein Ms. Bansuri Swaraj i.e., Respondent No. 1 herein, was the highest polled candidate and hence, declared elected on 04.06.2024. The Petitioner herein stood at Sl. No. 2 behind the highest polled candidate, i.e., Respondent No. 1 in the said election result.

2. The present election petition has been filed challenging the said election result under Section 123(2), (6), (7) read with Section(s) 125-A, 100(1) and 101 of the Act of 1951.



3. The Returning Officer for New Delhi Constituency has been arrayed as Respondent No. 3 herein.

Arguments on behalf of Respondent No. 3

4. Learned counsel for Respondent No. 3 states that the Electronic Voting Machines [‘EVMs’] used during the election of New Delhi Constituency be released, so as to enable the Election Commission of India (‘ECI’) to use the said EVMs in other on-going elections during the year from time to time. He states that in fact, the said EVMs are required for the upcoming State Assembly elections.

4.1. He states that each EVM is a combination of Balloting Units (‘BUs’), Control Unit (‘CU’), and VVPAT; and 1490 EVMs were deployed in the election for the New Delhi Constituency.

4.2. He states that the Petitioner’s challenge in this petition does not relate to counting or re-counting of votes and, therefore, the said EVMs be permitted to be reused. He states that withholding the said EVMs will cause great hardship.

4.3. He states that in the petition, at Paragraph 15, the Petitioner has raised allegations with respect to the counting of VVPAT slips undertaken at Polling Station no. 041 (‘PS-41’) in Assembly Constituency–043 (‘AC-43’). In this regard, he states that the mandatory verification of the VVPAT at Polling Station in AC-43 was undertaken and on re-counting it was found to be in order and matched with the data of the corresponding EVM.

4.4. He states that VVPAT paper slips have been taken out from drop-box of all the VVPATs and kept in a paper envelope in accordance with the instructions of the ECI issued at Clause 14.11.A (ii) of the 8th Edition of Manual on Electronic Voting Machine (‘Election Manual’). He states that the said VVPAT paper slips shall be made available as per the direction of



the Court for the adjudication of this petition.

4.5. He states that the Petitioner's request for preserving the burnt memory or microcontroller ['burnt memory'] for each EVM (i.e., 1490 EVMs) used in the New Delhi Constituency election is in contravention of the judgment of the Supreme Court in **Association for Democratic Reforms v. Election Commission of India**¹, wherein the Supreme Court has directed that the candidates, who are at Sl. No. 2 or Sl. No. 3, behind the highest polled candidate can make a written request for verification of up to 5% of the EVMs per assembly segment of a parliamentary constituency. He states that thus, an eligible candidate can seek burnt memory of maximum 75 EVMs and not all 1490 EVMs. He states that such a written request has to be made by the eligible candidate at Sl. No. 2 or Sl. No. 3 within a period of seven (7) days from the date of declaration of the result. He states that the Petitioner herein has not made any such written request to the District Election Officer within the stipulated period of seven (7) days and, therefore, this request in this petition is without any merits.

4.6. He states that the process of retrieving burnt memory from the EVM requires the ECI to call the Engineers of the manufacturers of the EVM and the charges for the said process payable to the manufacturer of the EVM have been determined at Rs. 40,000/- (plus GST at 18%) for each EVM.

4.7. He states that retrieving the burnt memory from all the 1490 EVMs is not contemplated under the applicable law and, therefore, the suggestion of the Petitioner that Respondent No. 3 ought to retrieve burnt memory of each of the 1490 EVMs deployed in the election for the New Delhi Constituency before reusing the EVMs, for the purposes of this election petition is

¹ 2024 SCC OnLine SC 661



contrary to law.

4.8. He states that Respondent No. 3 has however taken instructions and is willing to initiate steps for retrieving burnt memory for the EVM deployed at the Polling Station no. 041 in AC-43, since it finds mention in the captioned petition; subject to the Petitioner depositing the requisite charges of Rs. 40,000/- (plus GST at 18%) payable to the manufacturer as per the notified procedure.

4.9. He states that the Petitioner has no ground for seeking the burnt memory of 1490 EVMs as no objection was raised by the Petitioner to the counting of votes at the remaining polling stations pertaining to 1489 EVMs. The dispute, if any, was raised only with respect to EVM deployed at the Polling Station no. 041 in AC-43.

4.10. He states that after counting of votes, result of the voting is entered in Form No. 17C for each polling station prescribed as per Rule 49S of the Conduct of Election Rules, 1961 by the Returning Officer. He states that Form No. 17C is duly signed by the Presiding Officer and the candidate or its agent. He states no objection was raised by the Petitioner herein with respect to the 1489 EVMs.

4.11. He states that when the EVMs are re-used by ECI for the next election the machines are re-programmed and the old data is cleared. He states however, the VVPAT slips will remain available as per the Election Manual.

Arguments on behalf of the Petitioner

5. In response, the Petitioner states that the Petitioner does not require the burnt memory of the EVM deployed at Polling Station no. 041 in AC-43, as he was personally present at the time of the verification of VVPAT at the said Polling Station. He states that the Petitioner, however, insists that Respondent No. 3 retain burnt memory of the remaining 1489 EVMs for the



determination of the pleas raised in this election petition. He states that the charges of Rs. 40,000/- (plus 18% GST) per EVM for retrieving the burnt memory be waived by this Court as the Petitioner cannot afford the said costs.

5.1. He states that he has no objection to the 1490 EVMs being released by Respondent No. 3 for reuse by the ECI, subject to the burnt memory of each EVM being retained and the burnt memory data being provided to the Petitioner in a Hard Disk. He states that he relies upon the averments made in Paragraph 15 and Ground J of the election petition to justify his aforesaid request.

6. This Court has considered the submission of the parties.

7. Before opining on the rival contention of the parties, it would be relevant to refer to the findings and directions issued by the Supreme Court in **Association for Democratic Reforms** (supra). The Supreme Court at paragraph 75 of the judgment held that the incorporation of the VVPAT system fortifies the principle of vote verifiability and enhances the overall accountability of the electoral process. Para 75 of the said judgment reads as under:

“75. We have conducted an in-detail review of the administrative and technical safeguards of the EVM mechanism. Our discussion aims to address the uncertainties and provide assurance regarding the integrity of the electoral process. A voting mechanism must uphold and adhere to the principles of security, accountability, and accuracy. An overcomplex voting system may engender doubt and uncertainty, thereby easing the chances of manipulation. **In our considered opinion, the EVMs are simple, secure and user-friendly. The voters, candidates and their representatives, and the officials of the ECI are aware of the nitty-gritty of the EVM system. They also check and ensure righteousness and integrity. Moreover, the incorporation of the VVPAT system fortifies the principle of vote verifiability, thereby enhancing the overall**



accountability of the electoral process.”

(Emphasis Supplied)

8. In the same judgment, at paragraph 74, the Supreme Court rejected the submission that any elector should be liberally permitted as a routine to ask for verification of the vote. In conclusion, the Supreme Court at paragraph 76 (b) of the judgment issued a direction reserving limited liberty to the eligible candidates [who are at Sl. No. 2 or Sl. No. 3 behind the highest polled candidate] to seek verification of up-to 5% of the EVMs per assembly segment of a parliamentary constituency. The Supreme Court directed that the checking and verification of up-to 5% of EVMs shall be permitted upon a written request from the eligible candidate, for any allegations of tampering or modification. The verification was directed to be carried out by the team of Engineers from the manufacturers of the EVMs. The right reserved to an eligible candidate to seek verification of the EVMs is, therefore, well-defined and can be exercised by the candidate subject to compliance with the conditions set out in the aforesaid judgment. The relevant paragraphs 74 and 76 (b) of the said judgment read as under:

“74. Similarly, **we would reject the submission that any elector should be liberally permitted as a routine to ask for verification of vote.** Rule 49MA permits the elector to raise a complaint if she/he is of the view that the VVPAT paper slip did not depict the correct candidate/political party she/he voted. However, whenever a challenge is made, the voting process must be halted. An overly liberal approach could cause confusion and delay - hindering the election process and dissuading others from casting their votes. ECI has stated that only 26 such requests in terms of Rule 49MA were received, and in all cases, the allegation was found to be incorrect.

...

76. (b) The burnt memory/microcontroller in 5% of the EVMs, that is, the control unit, ballot unit and the VVPAT, per assembly constituency/assembly segment of a parliamentary constituency shall be checked and verified by the team of engineers from the



manufacturers of the EVMs, post the announcement of the results, for any tampering or modification, on a written request made by candidates who are at SI. No. 2 or SI. No. 3, behind the highest polled candidate. Such candidates or their representatives shall identify the EVMs by the polling station or serial number. All the candidates and their representatives shall have an option to remain present at the time of verification. Such a request should be made within a period of 7 days from the date of declaration of the result. The District Election Officer, in consultation with the team of engineers, shall certify the authenticity/intactness of the burnt memory/microcontroller after the verification process is conducted. The actual cost or expenses for the said verification will be notified by the ECI, and the candidate making the said request will pay for such expenses. The expenses will be refunded, in case the EVM is found to be tampered.”

(Emphasis Supplied)

9. The aforesaid judgment of the Supreme Court makes it evident that the right of an eligible candidate to ask for checking and verification of the EVM can be asked only for the EVMs, where the candidate expresses an apprehension of tampering or modification of the EVM. The request cannot be made as a matter of routine and without any basis. The judgment further directs that the costs payable to the manufacturer for the said verification has to be borne by the candidate making the request and not more than 5% EVMs can be subjected to the verification process.

Administrative -SoP issued by the ECI for EVM Checking & Verification process

10. For implementation of the aforesaid directions issued by the Supreme Court in **Association for Democratic Reforms** (supra), the ECI, on 01.06.2024, has issued an Administrative Standard Operating Procedure for Checking and Verification of Burnt Memory/Microcontroller of EVM (Ballot Unit, Control Unit & VVPAT)-Post Announcement of Results²

² Downloaded from <https://elections24.eci.gov.in/docs/3GLO7fJO8Q.pdf>



['Administrative-SoP' or 'SoP']. The SoP is accompanied with a letter dated 01.06.2024 issued by the Under Secretary, ECI, directing every District Election Officer to provide a copy of the Administrative-SoP to all the contesting candidates.

11. The SoP stipulates that a candidate, who is at SI No. 2 or SI No. 3 (hereinafter referred to as 'eligible candidate') behind the highest polled candidate is eligible to make a request for checking and verification of the burnt memory of the EVM ['EVM C&V process'] for any tampering or modification in 5% of EVMs per assembly constituency of a parliamentary constituency. Clause 2 of the said SoP sets out the procedure to be followed by the eligible candidate for seeking EVM C&V process. The Clause 2 of the SoP reads as under: -

"2. Application for checking & verification of burnt memory/microcontrollers of EVMs (EVM C & V Process):

- a) **Candidates who are at SI.No.2 or SI.No.3 ('eligible candidates') behind the highest polled candidate, may request for checking and verification of burnt memory/microcontrollers for any tampering or modification 5% of EVMs, that is, the Control Unit, Ballot Unit and VVPAT per Assembly Constituency (AC)/Assembly Segment (AS) of a Parliamentary Constituency.**
- b) For example, for an AC/AS that has used 400 BUs (2 BUs were used in all polling stations), 200 CUs and 200 VPATs in a poll, the following clarifications may be noted w.r.t. the selection of EVM for C& V activity:
 - i. **The EVM C&V activity shall be restricted to a maximum of 20 BUs, 10 CUs and 10 VVPATs.**
 - ii. If both the eligible candidates choose to request for 5% EVM C&V, then each of them may be allowed to select 2.5% of the Control Unit, Ballot Unit and VVPAT each pertaining to AC/AS for the said checking and verification i.e. 'each eligible candidate' shall be allowed to select maximum of 10 BUs, 5 CUs and 5



VVPATs.

- iii. **EVMs shall be subjected to C&V as a set i.e. a combination of BU(s), CU and VVPAT, as used in elections.**
 - iv. Candidates shall be allowed and thus have a choice to choose units either in the form of polling station numbers or unique serial number of the Ballot Unit, Control Unit and VVPAT (already made available to the candidates polling-station wise before polling), which were used for polling (except the units declared non-functional during poll and replaced), as required to form a set.
 - v. At the start of the EVM C&V activity, if any selected unit(s) of EVM is found non-functional, i.e. those units that have gone non-functional during the post-counting storage, the eligible candidate(s) shall be permitted to select another EVM unit(s) to replace non-functional unit(s) of EVM to be subjected to the C&V.
 - vi. The EVM C&V shall be carried out as per the actual use of one or more BUs in the respective AC/AS on poll day. However, the applicant shall have choice to ask for any combination of serial numbers of BU(s), CU and VVPAT to form the set.
- c) For the purpose of conducting EVM C&V activity, the eligible candidates may submit a written application to the respective DEO, in prescribed EVM-C&V Form (Annexure-1) within a period of seven days from the date of declaration of the result. To remove any doubts, if the date of declaration of the result is January 1%, then the applications should be made between January 1st and January 7th, both dates inclusive.
 - d) Candidates shall clearly mention the list of units selected for EVM C&V either in the form of polling station numbers or unique serial number of the Ballot Unit, Control Unit and VVPAT (already made available to the candidates polling-station wise before polling), which were used for polling (except the units declared non-functional during poll and replaced) and attach with EVM-C&V Form.
 - e) **Charges for EVM C& V activity:** The cost submitted by the manufacturers (BEL and ECIL) to carryout EVM C&V is Rs.40,000/- (plus GST @ 18%) per set of EVM [i.e. Ballot Units(s), Control Unit and VVPAT]. In addition to the cost



incurred by the manufacturers, there are also administrative costs like cost of labour to shift the units, CCTV coverage, electricity charges, videography costs and various other operational costs at the DEO level. With regards to fixation of cost or expenses of EVM C&V activity to be paid by the eligible candidate(s), to make the EVM C&V activity more accessible and inclusive in compliance to the referred mandate of the Hon'ble Supreme Court in letter and spirit, it is decided that instead of going purely by the actual economic costs incurred:

- i. The administrative expenditure on EVM C&V activity shall be treated as election expenditure and borne by the Central or State government, as the case may be. Accordingly, the administrative charges will be waived for the applicants i.e. the same shall not be charged to the applicant(s).
 - ii. **The charges for EVM C&V activity to be paid by the applicant candidate is fixed at Rs.40,000/- (plus GST @ 18%) per set of EVM for the current financial year 2024-25, i.e. till 31/03/2025.**
 - iii. At the time of application, the eligible candidate(s) may calculate the charges to be deposited for EVM C&V activity based on the above rate depending on number of sets candidate chooses to get verified.
 - iv. Subsequently, based on the outcome of the EVM C&V activity, the said payment, as applicable, shall in turn be paid to the manufacturer concerned.
 - v. The charges for EVM C&V activity shall be revised annually by taking due inputs from the manufacturers.
 - vi. It is clarified that expenditure on EVM C&V activity shall not be construed as expenditure of candidate, and thus shall not be part of the limits, as prescribed in Section 76 to 78 of the Representation of the People Act, 1951.
- f) The proof of payment (online/office payment challan) of the applicable charges for EVM C&V activity to the State/UT treasury under the appropriate head as applicable/decided by the CEO concerned, shall be submitted along with the written request. Applications received without the proof of payment for EVM C&V activity shall be rejected in writing and with acknowledgement."

(Emphasis Supplied)



12. As per Clause 2(c) of the SoP, an eligible candidate has to submit a written application to the concerned District Election Officer [‘DEO’] for the purpose of conducting EVM C&V process within a period of seven (7) days from the date of declaration of the result (i.e., 04.06.2024 in the present case). It is a matter of record that till date; no such application has been filed by the Petitioner herein with the concerned DEO.

13. As per Clause 2(a) of the SoP, EVM C&V request is restricted to a maximum of 5% of the EVMs. The SoP illustrates this at Clause 2(b) of the SoP. Therefore, in the present case, since admittedly 1490 EVMs were used in the New Delhi Constituency, the Petitioner is eligible to seek EVM C&V process for a maximum 75 EVMs.

14. As per Clause 2(d) of the SoP, the eligible candidate is required to select and identify the EVMs for which he/she seeks EVM C&V process.

15. As per Clause 2(e)(ii) of the SoP, for carrying out the EVM C&V process, the cost submitted by the manufacturers (BEL and ECIL) of EVMs is Rs. 40,000/- (plus GST at 18%) per set of EVM [i.e., Ballot Unit(s), Control Unit and VVPAT] for the current financial year 2024-25. The said cost is, therefore, payable to the manufacturers of EVMs. The SoP clarifies that the administrative expenditure incurred by ECI for facilitating the aforesaid EVM C&V activity shall be borne by the Central or State Government as the case may be.

16. In the facts of this case, the Petitioner has neither submitted an application to the concerned DEO within the stipulated period of seven (7) days after the declaration of the results on 04.06.2024; nor he has sought any prayer [in this election petition] for directing the DEO to carry out EVM C&V process on the EVMs used in the New Delhi Constituency election. In



fact, a perusal of the underlying election petition shows that there is no allegation of tampering or modification alleged with respect to the EVMs in this petition. First and foremost, the SoP requires the eligible candidate to identify the EVMs for which the C&V process is requested; however, in the facts of this case, admittedly there is no list of EVMs filed with the petition. These facts sufficiently evidence that it was never the intention of the Petitioner to seek C&V of the 1490 EVMs in this election petition and the request for the burnt memory raised for the first time at the hearing held on 27.08.2024 was a knee jerk reaction to the prayer of Respondent No. 3 seeking a clarification to reuse the EVMs.

17. During the hearing on 14.08.2024, when Respondent No. 3 sought a clarification to enable Respondent No. 3 to release the EVMs to ECI for reuse in the upcoming State Assembly elections in the country. It was then that the Petitioner raised an objection to issuance of any such clarification by referring to averments made in Paragraph 15 and Ground J of the election petition. For examining the rival contentions, the matter was adjourned to 20.08.2024.

18. On 20.08.2024, Respondent No. 3 clarified that the VVPAT paper slips have been removed from the VVPAT units of the New Delhi Parliamentary Constituency and the same have been preserved as per Clause 14.11.A of the Election Manual and the same shall be made available for the adjudication of the disputes in the election petition. Respondent No. 3 contended that this would suffice for the adjudication of the allegations made in Paragraph 15 and Ground J of the election petition. On 20.08.2024, the Petitioner sought time to examine the said Election Manual and accordingly, the matter was adjourned to 27.08.2024.



19. Thereafter, at the hearing on 27.08.2024, for the first time, the Petitioner made an oral submission that Respondent No. 3 be directed to retrieve the burnt memory of all the 1490 EVMs used in the New Delhi Constituency election and thereafter, reused the EVMs for the upcoming state elections. The said contention of the Petitioner seeking burnt memory of all 1490 EVMs was opposed by Respondent No. 3 for being in contravention of the directions issued by the Supreme Court in its judgment **Association for Democratic Reforms** (supra). Respondent No. 3 contended that the Petitioner cannot request for burnt memory of more than 5% of the EVMs used in the New Delhi Constituency election as per the directions of the Supreme Court at paragraph 76 (b) of the said judgment. Respondent No. 3 also submitted that no written application for the burnt memory had been submitted to Respondent No. 3 within seven (7) days from the declaration of election and, therefore, the said request was not maintainable. However, since the Petitioner had placed reliance on the averments made in Paragraph 15 of the election petition, which were limited to the EVM used in Polling Station No. 41 at AC-43, this Court despite no written application of the Petitioner, directed Respondent No. 3 to seek instructions, whether the burnt memory of the EVM deployed at Polling Station No. 41 at AC-43 can be retained during the pendency of this matter. The matter was thereafter adjourned and lastly taken up on 04.09.2024.

20. On 04.09.2024, Respondent No. 3 apprised this Court that burnt memory of the EVM used in Polling Station no. 41 at AC-43 [which finds mention at Paragraph 15 of the election petition] can be retained subject to Petitioner depositing the cost of Rs. 40,000/- (plus GST at 18%) payable to the manufacturer of the EVM. However, in response, the Petitioner



submitted that he does not require the burnt memory of the EVM deployed at Polling Station no. 41 at AC-43. The Petitioner at this hearing, however, submitted orally that he is insisting on Respondent No. 3 providing the burnt memory of the remaining 1489 EVMs to the Petitioner and also prayed that the cost of Rs. 40,000/- (plus GST at 18%) per EVM be waived by this Court.

21. The crux of the proceedings before this Court on 14.08.2024, 20.08.2024, 27.08.2024 and 04.09.2024 is that the Petitioner herein has made an oral request for the burnt memory of 1489 EVMs deployed in the New Delhi Constituency elections with an additional request for waiver of the cost of 40,000/- (plus GST at 18%) per EVM, payable to the manufacturers of the EVM, as notified by the ECIs in its Administrative-SoP.

22. In the considered opinion of this Court, this relief sought by the Petitioner for burnt memory of all the 1489 EVMs is not maintainable in law, as the same is in contravention of the directions issued in the judgment of the Supreme Court in **Association for Democratic Reforms** (supra). The Supreme Court at paragraph 76(b) has categorically stated that an eligible candidate [like the Petitioner herein] can seek a burnt memory of up-to 5% of the EVMs per Assembly Segment of a Parliamentary Constituency. 5% of 1490 EVMs would be 75 EVMs.

23. The direction of the Supreme Court in permitting the C&V of up-to 5% of the EVMs is based on the findings that EVMs have been subjected to tests by experts from time to time, have proven to be secure and except in one case, no discrepancy or mismatch was noticed in the recording of the votes. In this regard, it would be relevant to refer to paragraphs 57 to 59, and



62 of the judgment in **Association for Democratic Reforms** (supra) which read as under:

“57. At this stage, we would refer to the data on the performance of the EVMs. More than 118 crore electors have cast their votes since EVMs have been introduced. In 2019, about 61.4 crore voters had cast their votes in 10.35 lakh polling stations. 23.3 lakh ballot units, 16.35 lakh control units and 17.40 lakhs VVPAT units were used in the 2019 General Elections. For the purpose of the 2024 General Elections, 10.48 lakh polling stations have been established to enable 97 crore registered voters to cast their votes. 21.60 lakh ballot units, 16.80 lakh control units and 17.7 lakh VVPAT units have been made ready for being used.

58. **ECI has conducted random VVPAT verification of 5 polling booths per assembly segment/constituency for 41,629 EVMs-VVPATs. Further, more than 4 crore VVPAT slips have been tallied with the electronic counts of their control units. Not even a single case of mismatch, (except one which we will refer to subsequently), or wrong recording of votes has been detected. Returning officers have allowed VVPAT slip recounting under Rule 56D in 100 cases since 2017. The VVPAT slip count matched with the electronic count recorded in the control unit in all cases.**

59. In the 2019 Lok Sabha Elections, 20,687 VVPAT slips were physically counted, and except in one case, no discrepancy or mismatch was noticed.

...

62. The EVMs have been subjected to test by technical experts committee from time to time. These committees have approved and did not find any fault with the EVMs. The M3 EVMs currently in use are designed by engineers of BHEL and ECIL. These designs are vetted by the technical experts committee.”

(Emphasis Supplied)

24. Nonetheless, to enable the eligible candidate to satisfy itself in case of an apprehension of tampering or modification of an EVM, rights as set out in paragraph 76(b) of the said judgment have been secured. However, the prayer of the Petitioner that Respondent No. 3 be directed to provide burnt



memory of all the 1489 EVMs³ used in the election of New Delhi Constituency is barred in law being contrary to the aforesaid judgment. The Petitioner could have thus, sought burnt memory of maximum 75 EVMs used in the New Delhi Constituency as per the directions of the Supreme Court and subject to payment of the costs payable to the manufacturer of the EVMs.

No allegations in the election petition with respect to tampering or modification in the EVMs used in the New Delhi Constituency elections

25. The intent of the Supreme Court in granting liberty to the eligible candidate to seek checking and verification of the EVM was based on the supposition that the candidate apprehends that there has been tampering or modification of the EVMs. The SoP requires the eligible candidate, who makes an application for seeking checking and verification, to identify the EVMs in respect whereof the candidate has any apprehension of tampering or modification.

26. However, neither in this petition nor during the oral arguments, the Petitioner has identified any EVM, which is alleged to have been tampered or modified. In fact, the petition does not contain any allegation that the EVMs used in the New Delhi Constituency were tampered or modified.

27. As noted above, initially the Petitioner on 14.08.2024 had sought to justify his opposition to Respondent No. 3's request for release of the 1490 EVMs by relying upon the averments made in Paragraph 15 of the election petition, which was specific to EVM used in Polling Station No. 41 at AC-43. The said prayer was thereafter modified orally by the Petitioner to seek the burnt memory of the EVM used in Polling Station No. 41 on 27.08.2024.

³ 1490 EVMs were used, however, the Petitioner does not seek the burnt memory of the EVM used in Polling Station No. 41 at AC-43



However, on 04.09.2024, the Petitioner abandoned the plea/request for the burnt memory of the said EVM used in Polling Station No. 41 at AC-43 and instead insisted on retrieving the burnt memory of all the remaining 1489 EVMs. Thus, there is absolutely no justification on record of this election petition for seeking the burnt memory of all the 1489 EVMs.

28. In addition, this request for burnt memory of the 1489 EVMs is in derogation of the directions issued by Supreme Court at paragraph 76 (b) of the **Association for Democratic Reforms** (supra) and also not compliant with the Administrative-SoP dated 01.06.2024 issued by the ECI.

29. Upon re-examining the contents of the averments made at Paragraph 15 read with Ground J of the election petition, it is apparent that the Petitioner was aggrieved by the votes counted at the Polling Station No. 41 and believed that there was a mismatch in the VVPAT slips and the corresponding EVM as one vote was found extra. In reply, Respondent No. 3 has explained that at this Polling Station was a counting error and in fact on recounting it was found to be in order. Respondent No.3 has thus specifically disputed the allegation that there was any mismatch in the VVPAT slips and the corresponding EVM of Polling Station No. 41. The stand of the Petitioner during the hearing dated 04.09.2024 that he does not seek the burnt memory of the EVM of booth no. 41 further substantiates the stand of Respondent No. 3.

30. After perusal of the pleadings and hearing oral arguments, this Court is of the considered opinion that the Petitioner has not made any allegation of tampering or modification of the EVMs which is the *sine qua non* for maintaining a request for seeking the burnt memory of the EVM. However, as noted above in the entire election petition there is no allegation of the



tampering or modification of any EVM and on this ground alone the prayer of seeking burnt memory of the EVMs is not maintainable. This Court is, therefore, of the considered opinion that the oral request of the Petitioner for seeking burnt memory of the 1489 EVMs is whimsical and untenable both in law and in facts.

Waiver of cost for EVM C&V Process

31. The Petitioner during the course of the hearing made a submission that the demand of Respondent No. 3 for payment of Rs. 40,000/- (plus GST at 18%) per EVM is exorbitant and unaffordable.

32. The Supreme Court in its judgment in **Association for Democratic Reforms** (supra) at paragraph 76(b) directed that the actual cost or expenses incurred by ECI for checking and verifying the burnt memory of the EVM shall be notified by the ECI and the candidate making a request for the checking and verification of the burnt memory will pay for such expenses. The Supreme Court clarified that the expenses will be refunded, in case the EVM is found to be tampered. In the SoP dated 01.06.2024, the cost of checking and verification of EVM [payable to the manufacturer of the EVM] has been notified therein as Rs. 40,000/- (plus GST at 18%) per EVM. In fact, the administrative expenditure incurred by ECI has been waived off for the candidate and has been directed to be borne by the appropriate Government. The eligible candidate is thus, liable in law to pay the aforesaid cost [charged by the manufacturer of the EVM] for the burnt memory of the EVM and therefore, Petitioner's request for waiver of said charges has no basis in law. The said cost is refunded to the candidate if the EVM is indeed found tampered or modified. Thus, the eligible candidate has to be cautious and circumspect while identifying the EVM in respect whereof, the verification is sought for.



33. In the opinion of this Court, the submission of the Petitioner that the costs are exorbitant is a red-herring as the Petitioner cannot seek the burnt memory of 1489 EVMs in law and the Petitioner was entitled to seek the burnt memory of only 75 EVMs. Even for the 75 EVMs, the Petitioner must be circumspect and need not ask for checking and verification in a routine manner.

Directions

34. In the New Delhi Constituency which is a subject matter of this petition, Respondent No. 1 emerged as the highest polled candidate and she has secured 78,370 more votes than the Petitioner herein. This Court has perused the election petition and is satisfied that the challenge in this petition to the election of Respondent No. 1 from the New Delhi Constituency does not relate to counting or recounting of votes. This Court is, therefore, satisfied that there is no requirement for ECI to preserve the EVMs deployed in the New Delhi Parliamentary Constituency, considering the forthcoming elections across different parts of the country. Needless to state that reference to the EVM includes Balloting Units, Controlling Unit and VVPAT.

35. Therefore, the oral prayer of the Petitioner for seeking a direction to the ECI to provide the Petitioner with the burnt memory of all the 1489 EVMs used in this election is hereby rejected and it is clarified that Respondent No. 3 is at liberty to release 1490 EVMs used in this election to the ECI for purposes of other elections.

36. Though, there is no dispute with respect to counting or recounting of votes, however, in terms of the statement made by the learned counsel for Respondent No. 3 on 20.08.2024, Respondent No. 3 is directed that all the VVPAT paper slips taken out from drop box of VVPATs and kept in a paper



envelope, as certified by Respondent No. 3 in the certificate dated 04.06.2024, be preserved as per the procedure prescribed by ECI until the next date of hearing.

37. List the matter before Court on **05.11.2024**.

MANMEET PRITAM SINGH ARORA, J
SEPTEMBER 09, 2024/msh/hp/MG