

ABDUSAKUR M. TAN, ABDULWAHID SAHIDULLA, BRAHAM BURAHAN, PETITIONERS, VS. COMMISSION ON ELECTIONS, YUSOP H. JIKIRI, ABDEL S. ANNI, DEN RASHER I. SALIM, TALIB L. HAYUDINI, RIZAL T...

G.R. Nos. 148575-76. December 10, 2003

Ponente: CALLEJO, SR., J.

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CALLEJO, SR., J.:

Before us are two consolidated petitions filed under Rule 65 of the Rules of Court, as amended, assailing the Orders of the Commission on Elections En Banc dated June 28, 2001, October 3, 2001 and April 17, 2002 in SPA No. 01-257 and SPA No. 01-265 for having been issued with grave abuse of discretion amounting to lack or excess of jurisdiction.

The factual antecedents insofar as pertinent to the instant petitions are as follows:

In the May 14, 2001 elections, Abdusakur Tan and Abdulwahid Sahidulla were candidates for Governor and Vice-Governor, respectively, while Munib Estino and Abraham Burahan were candidates for Congressman of the Second and First District of Sulu, respectively. The other candidates for Governor and Vice-Governor were Yusop Jikiri and Abdel Anni. The candidates for the position of members of the Sangguniang Panlalawigan of the First District of Sulu were Den Rasher Salim, Talib Hayudini, Rizal Tingkahan and Barlie Nahudan, while those for the Second District were Abraham Daud, Lukman Omar, Onnih Ahmad and Basaron Burahan.

On May 17, 2001, Abdusakur Tan, Abdulwahid Sahidulla and Abraham Burahan (Abdusakur Tan, et al. for brevity) filed with the COMELEC (public respondent) a petition to "declare failure of elections in all the precincts in the Municipality of Luuk," Province of Sulu, which was docketed as SPA No. 01-257. [1] The petitioners prayed that:

WHEREFORE, premises considered, it is respectfully prayed that the Honorable Commission DECLARE a FAILURE of ELECTIONS in all the precincts in the Municipality of Luuk, Sulu where no voting was actually held, as the registered voters never did their votes.

The petitioners further pray that pending final resolution of this petition that an order be immediately issued directing the Municipal Board of Canvassers of Luuk, Sulu as well as the Provincial Board of Canvassers of Sulu to suspend and desist from continuing with, the CANVASSING of the election returns and/or certificate of canvass.

Other relief consistent with law, justice and equity are also prayed for.[2]

The following day, the petitioners filed a petition to declare failure of elections and/or to annul the elections or the election results in the Municipalities of Parang and Indanan, Province of Sulu, which was docketed as SPA No. 01-265.[3] The petitioners prayed that:

WHEREFORE, petitioners respectfully pray that this petition be granted and that an Order be issued:

- Annulling and setting aside the elections and/or the election results in the May 14, 2001 elections in the municipalities of Indanan and Parang, Sulu, and declaring a failure of elections therein;
- Suspending the canvassing and the proclamation of any and all alleged "winning" candidates in the municipalities of Indanan and Parang, Sulu;
- Calling for immediate special elections in the aforesaid areas where failure of elections transpired;
- Such other reliefs as may be just and equitable are likewise prayed.[4]

No respondents were impleaded in both petitions. The public respondent took cognizance of and assumed jurisdiction over the petitions.

On May 19, 2001, the petitioners therein filed "an urgent reiterating motion to suspend proclamation." [5] Acting on the said motion, the public respondent issued an order suspending the proclamation of the winning candidates, viz.:

Acting on the Petition filed on May 17, 2001 in the above-captioned case, including the reiterating motion of May 19, 2001, and finding the same to be sufficient to warrant the issuance of a preliminary summary action, so as not to render academic, the petition in the above case, let there be issued to the Provincial Board of Canvassers of Sulu an Order/directive for the suspension of proclamation of the winning candidates for all elective provincial positions, until further order/s from this Commission.[6]

However, the Provincial Board of Canvassers (PBC) was not served with a copy of the order of the public respondent. On May 23, 2001, Yusop Jikiri, Abdel Anni, Abraham Daud, Lukman Omar, Onnih Ahmad, Basaron Burahan, Den Rasher Salim, Talib Hayudini, Rizal Tingkahan and Barlie Nahudan were proclaimed as the winning candidates for Governor, Vice-Governor and Board Members.[7]

On May 30, 2001, the petitioners therein filed their Amended Petitions in SPA Nos. 01-257[8] and 01-265[9] impleading for the first time the winning candidates, Yusop Jikiri, et al., as party respondents. The petitioners in SPA No. 01-257 prayed that:

WHEREFORE, premises considered, it is respectfully prayed that the Honorable Commission DECLARE a FAILURE OF ELECTION in all the precincts in the Municipality of Luuk, Sulu where no voting was actually held as the registered voters never did cast their votes.

Petitioners further pray that pending final resolution of this petition that an order be immediately issued directing the Municipal Board of Canvassers of Luuk, Sulu as well as the Provincial Board of Canvassers of Sulu to suspend, and desist from continuing with, the CANVASSING of the election returns and/or certificate of canvass.

Other relief consistent with law, justice, and equity are also prayed for.[10]

The petitioners in SPA No. 01-265 prayed that:

WHEREFORE, petitioners respectfully pray that this petition be granted and that an Order be issued:

- Annulling and setting aside the elections and/or the election results in the May 14, 2001 elections in the municipalities of Indanan and Parang, Sulu and declaring a failure of elections therein;
- Calling for immediate special elections in the aforesaid areas where failure of election transpired.
- Such other reliefs as may be just and equitable are likewise prayed.[11]

On June 11 and 18, 2001, the respondents filed their respective answers to the aforesaid amended petitions questioning in the main the jurisdiction of the COMELEC En Banc to act on the said amended petitions and the propriety of the recourse of the petitioners in view of their valid, lawful and existing proclamation as the winners.[12] The petitioners in turn filed an urgent motion to annul the proclamation of the respondents as the winners. The respondents opposed the motion, contending that such motion was appropriate only in pre-proclamation controversies.

On June 20, 2001, the COMELEC En Banc issued an order annulling the May 23, 2001 proclamation of the respondents on its finding that the proclamation by the PBC of the winning candidates was a defiance of its Order of May 19, 2001. The public respondent forthwith set the amended petitions for hearing.[13] In the meantime, the respondents filed a motion for the recall of the June 20, 2001 Order of the COMELEC on the ground that the petitions before it were merely petitions to declare a failure of election and do not involve a pre-proclamation controversy. However, the COMELEC failed to immediately resolve the pending incidents. In the meantime, the petitioners pre-marked their evidence. The respondents reserved the right to pre-mark their evidence before the Clerk of Court of the COMELEC without prejudice to the resolution of the pending motions.

On June 28, 2001, after due hearing, the COMELEC issued an order recalling and setting aside its June 20, 2001 Order, and affirming the May 23, 2001 proclamation of the respondents. The order states inter alia that:

After due consideration and there being no valid pre-proclamation issues pending before the Commission involving the elective provincial officials of the Province of Sulu, and considering further our ruling in SPA 01-323 and SPA 01-244 involving the elective provincial officials of the Province of Maguindanao, the Commission RESOLVES, as it is hereby RESOLVED, to recall its June 20, 2001 Order annulling the proclamation of the elective provincial officials of the Province of Sulu.

The defiance by the PBC of the order of suspension of the Commission, though a valid concern, cannot and should not deter the proclamation of the provincial officials of Sulu after the result of the provincial canvassing showed that they were the winning candidates.

WHEREFORE, premises considered, the June 20, 2001 Order of this Commission is hereby recalled and set aside and the proclamation of the private respondents on May 23, 2001 is hereby AFFIRMED.

This ORDER is without prejudice to the administrative case referred by the Commission to the Law Department against the PBC of Sulu. This ORDER is likewise without prejudice to a full resolution of the main petition to declare failure of elections in the municipalities of Luuk, Indanan and Parang.[14]

Aggrieved, the petitioners filed on July 11, 2001 with this Court a petition for certiorari, prohibition and mandamus docketed as G.R. Nos. 148575-76 with prayer for the issuance of a writ of injunction and/or temporary restraining order and/or status quo ante order, assailing the aforequoted June 28, 2001 Order of the public respondent; and submitting for the Court's resolution the following threshold issue:

The threshold issue in this petition is the determination of whether the Comelec has the power to issue an order suspending proclamation as a preliminary relief in a petition for declaration of failure of election and/or annulment of election results.

Corollary thereto, did respondent Comelec gravely abuse its discretion when it issued its June 28, 2001 Questioned Order recalling, and effectively reconsidering, the suspension of proclamation it had previously promulgated?[15]

In the meantime, acting on a series of motions filed by the petitioners, the COMELEC issued an Order dated October 3, 2001 directing the technical examination of the voters registration records in the Municipalities of Parang, Indanan and Luuk, thus:

- To direct the Election Officers of the Municipalities of Luuk, Indanan and Parang, Sulu to produce before the Commission the pertinent VOTERS REGISTRATION RECORDS showing the thumbmarks and signatures of voters affixed during their registration and during the voting in the May 14, 2001 elections (CE Form No. 1) within ten (10) days from receipt hereof, to be deposited at the Election Records and Statistics Department;
- To require petitioner to defray the expenses for the transportation to the main office of said election documents; and to advance to the Election Officers concerned the necessary amount for said transportation of documents;
- Parties are entitled to watchers during the transport of these documents at their own expense until duly received by the Election Records and Statistics Department, this Commission.
- To direct the Voters Identification Division to conduct technical examination of said documents and to make a report thereon to the Commission En Banc within fifteen (15) days;
- Let the Deputy Executive Director for Operations implement this Order.

Furnish copy of this Order to the Election Records and Statistics Department, this Commission.[16]

On October 12, 2001, the respondents filed with the COMELEC an omnibus motion to resolve the issue of jurisdiction with a prayer to recall and/or suspend implementation of the Order dated October 3, 2001."[17] The respondents contended that based on the documentary evidence, there was no failure of election; the proper remedy of the petitioners was for them to file election protest cases and not petitions to declare a failure of election in view of their valid, lawful and existing proclamation as the winning candidates confirmed no less by the COMELEC. The respondents alleged that the petitions before it being regular election protest cases disguised as petitions to declare a failure of election should be heard by a division of the COMELEC and not by the COMELEC En Banc as provided for in Section 3, Article IX-C of the Constitution. The respondents, likewise, argued that to direct the technical examination of voluminous documents would be repugnant to the summary nature of the cases before it and violative of Section 6, Rule 26 of the COMELEC Rules of Procedure which states that a petition for declaration of failure of elections is summary.

On April 17, 2002, the COMELEC issued an order declaring that it had jurisdiction over the amended petitions conformably with Section 4 of Republic Act No. 7166; and denying the omnibus motion of the respondents, thus:

WHEREFORE, premises considered, the Omnibus Motion and the Motion to Suspend the Implementation of the October 3, 2001 Order of the Commission en banc is DENIED for lack of merit.

The Commission en banc orders the Voters Identification Division to continue the technical examination of the Voters Registration Records of Luuk, Parang and Indanan, Sulu as authorized in the October 3, 2001 en banc Order.[18]

The COMELEC ruled that based on the allegations of the amended petitions, there was no valid and legitimate elections held or conducted in the three municipalities. It, likewise, ruled that it had the authority to order a technical examination of the VRR's in a petition to declare a failure of election citing the ruling of this Court in *Loong v. Commission on Elections*. [19] Hence, on April 29, 2002, the respondents therein filed with this Court a petition for certiorari docketed as G.R. Nos. 152882-83 with prayer for the issuance of a temporary restraining order and/or writ of preliminary injunction, praying for the nullification of the public respondent's Orders dated October 3, 2001 and April 17, 2002 and for the dismissal of SPA Nos. 01-257 and 01-265 for lack of jurisdiction. They argued that:

(a) ON JUNE 28, 2001, THE COMELEC ITSELF AFFIRMED THE MAY 23, 2001 PROCLAMATION OF THE PETITIONERS AS THE DULY ELECTED PROVINCIAL ELECTIVE OFFICIALS OF THE

PROVINCE OF SULU IN THE MAY 14, 2001 ELECTIONS. THEREFORE, IT IS A VALID AND EXISTING PROCLAMATION. SUCH PROCLAMATION PRESUPPOSES THAT AN ELECTION HAS BEEN CONDUCTED. THUS, ANY ALLEGED IRREGULARITIES IN THE POLLS ARE MATTERS OF ELECTION PROTEST.

(b) PETITIONERS HAVE ALREADY ASSUMED AND ARE ALREADY EXERCISING THEIR DUTIES AND FUNCTIONS AS ELECTIVE PROVINCIAL OFFICIALS SINCE JUNE 30, 2001. HENCE, THE REMEDY OF THE LOSING CANDIDATES IS AN ELECTION PROTEST.

(c) ONCE PROCLAMATION IS MADE, THE PROPRIETY OF FAILURE OF ELECTION ENDS AND THE REALM OF ELECTION PROTEST BEGINS. THIS IS SO BECAUSE THE DIVIDING LINE BETWEEN PETITION TO DECLARE FAILURE OF ELECTION AND ELECTION PROTEST IS PROCLAMATION. AND HERE, THE PROCLAMATION IS VALID. IT WAS AFFIRMED BY THE COMELEC EN BANC AFTER A HEARING WHERE ALL THE PARTIES WERE GIVEN THE OPPORTUNITY TO BE HEARD.

(d) THERE BEING VALID AND EXISTING PROCLAMATION AND SUCH PROCLAMATION HAVING BEEN AFFIRMED, THERE WAS NO FAILURE OF ELECTION AS WINNERS HAD EMERGED. IN *TYPOCO V. COMELEC*, 319 SCRA 498 and *BORJA V. COMELEC*, 260 SCRA 604, IT WAS HELD THAT FAILURE OF ELECTION SHOULD LITERALLY MEAN "THAT NOBODY EMERGED AS A WINNER." IN THE INSTANT CASE, WINNERS HAD EMERGED IN VIEW OF THE VALID AND EXISTING PROCLAMATION OF THE PETITIONERS, AFFIRMED BY THE COMELEC ITSELF. HENCE, THERE WAS NO FAILURE OF ELECTION. THE REMEDY OF PRIVATE RESPONDENTS IS AN ELECTION PROTEST.

(e) THE QUESTIONED ORDER WOULD EVEN ALLOW THE PIERCING OF THE VEIL OF ELECTION RETURNS SINCE TECHNICAL EXAMINATION OF ELECTION DOCUMENTS COULD BE ALLOWED IN ALL KINDS OF PETITIONS WHICH COULD NOW BE DISGUISED AS ONE FOR FAILURE OF ELECTION.[20]

On March 4, 2003, the Court granted the motion of the petitioners in G.R. Nos. 152882-83 for the issuance of a temporary restraining order directing the COMELEC to cease and desist from implementing its questioned Orders dated October 3, 2001 and April 17, 2002 and from further proceeding thereon.

On April 29, 2003, the Court ordered the consolidation of G.R. Nos. 148575-76 and G.R. Nos. 152882-83 since both petitions arose from a common set of facts and raised similar issues.

For convenience, the Court shall delve into and resolve the issues in both petitions simultaneously and will refer to Yusop Jikiri, Abdel Anni, Abraham Daud, Lukman Omar, Onnih Ahmad, Basaron Burahan, Den Rasher Salim, Talib Hayudini, Rizal Tingkahan, and Barlie Nahudan as the petitioners; and, Abdusakur M. Tan, Abdulwahid Sahidulla, and Abraham Burahan as the respondents, without reference to the docket numbers of the petitions respectively filed in this Court.

The threshold issues for resolution are (1) whether the COMELEC En Banc, now public respondent, is vested with jurisdiction to take cognizance of and resolve the amended petitions before it; (2) whether the public respondent acted with grave abuse of its discretion amounting to excess or lack of jurisdiction in issuing its Orders dated June 28, 2001, October 3, 2001, and April 17, 2002.

On the first issue, the petitioners aver that the respondents were proscribed from filing their amended petition for a declaration of failure of elections and/or for the annulment of elections under Section 6, Republic Act No. 7166 for the reason that the petitioners had already been proclaimed the winning candidates. They contend that a petition for declaration of failure of elections or for the annulment of an election can no longer be filed and

prosecuted after the winning candidates had already been proclaimed by the PBC. They aver that the proper recourse of the respondents was to file election protest cases against the petitioners as the winning candidates. The petitioners also assert that the proceedings in an election protest are not summary in nature and should be ventilated in a full-blown hearing. The petitioners argue that the amended petitions of the respondents are election protest cases over which the COMELEC assumes jurisdiction in the exercise of its quasi-judicial powers and should be referred for hearing and resolution to a Division of the COMELEC as mandated by Section 3, Article IX-C of the Constitution and Section 250 of the Omnibus Election Code.

The respondents, for their part, aver that the public respondent took cognizance of the amended petitions under Section 4, Rep. Act No. 7166 in its administrative capacity and not as a quasi-judicial body. They also contend that the acts/omissions alleged in the amended petitions are proper subjects for a petition for a declaration of a failure of election or for the annulment of the elections. They assert that in a petition for a declaration of failure of election, the public respondent does not exercise quasi-judicial functions because it does not adjudicate any conflicting or adverse claims of the contending parties as there are no rights to speak of under which adverse claims to such rights are made. They argue that in taking cognizance of the amended petitions, the public respondent was merely performing its duties as an administrative body tasked to ensure clean, honest, orderly and peaceful elections. The said respondents cited the ruling of the Court in *Loong v. COMELEC*.^[21]

The Office of the Solicitor General (OSG) is of the view that a petition to declare a failure of election may be maintained even when a winner had already been proclaimed. The OSG cited the ruling of this Court in *Soliva v. COMELEC*.^[22] The public respondent is mandated in the exercise of its administrative powers under Section 2(3), Article IX of the Constitution, to investigate allegations of fraud, terrorism, violence and other analogous causes of actions for annulment of election results or declaration of a failure of election as the Omnibus Election Code denominates. It also submits that the public respondent is mandated to conduct an investigation as to the veracity of the allegations of the respondents of fraud, terrorism, harassment and intimidation to ensure the conduct of free and impartial elections.

We agree with the petitioners.

The amended petitions filed by the respondents herein are election protest cases over which the public respondent has original exclusive jurisdiction under Section 2(2), Article IX of the Constitution. The public respondent assumed jurisdiction over the amended petitions in the exercise of its quasi-judicial powers.^[23] Section 4,^[24] Rep. Act No. 7166 provides that the COMELEC sitting en banc by a majority vote of its members may decide, among others, the declaration of failure of election and the calling of special elections as provided in Section 6 of the Omnibus Election Code. Said Section 6, in turn, provides that:

Section 6. Failure of Elections. – If, on account of force majeure, violence, terrorism, fraud or other analogous causes the election in any polling place has not been held on the date fixed, or had been suspended before the hour fixed by law for the closing of the voting, or after the voting and during the preparation and the transmission of the election returns or in the custody or canvass thereof, such election results in a failure to elect, and in any of such cases the failure or suspension of election would affect the result of the election, the Commission shall, on the basis of a verified petition by any interested party and after due notice and hearing, call for the holding or continuation of the election not held, suspended or which resulted in a failure to elect on a date reasonably close to the date of the election not held, suspended or which resulted in a failure to elect but not later than thirty days after the cessation of the cause of such postponement or suspension of the election or failure to elect.

The long-standing rule is that the nature of an action and the jurisdiction of the tribunal are determined by law and the allegations in the petitions regardless of whether or not the petitioners are entitled to the relief sought.^[25] The

caption of the petitions are not determinative of the nature thereof. In their amended petitions before the public respondent, the respondents herein Abdusakur Tan, et al., the petitioners therein, substantially alleged that the respondents therein who are the petitioners in this case were the duly proclaimed winning candidates; that the elections in the Municipalities of Luuk, Parang and Indanan, Province of Sulu, were marred by massive substitution of voters, fraud, terrorism and other anomalies, impelling them to file their petitions pursuant to Section 4 of Rep. Act No. 7166 in relation to Section 6, Omnibus Election Code, and reiterated in Section 2, Rule 26[26] of the 1993 COMELEC Rules of Procedure, as amended. But Section 6 of the Omnibus Election Code lays down three instances where a failure of election may be declared, namely, (1) the election in any polling place has not been held on the date fixed on account of force majeure, violence, terrorism, fraud or other analogous causes; (2) the election in any polling place has been suspended before the hour fixed by law for the closing of the voting on account of force majeure, violence, terrorism, fraud or other analogous causes; or (3) after the voting and during the preparation and transmission of the election returns or in the custody or canvass thereof, such election results in a failure to elect on account of force majeure, violence, terrorism, fraud or other analogous cases. In all instances there must have been a failure to elect. This is obvious in the first two scenarios, where the election was not held and where the election was suspended. As to the third scenario, the preparation and the transmission of the election returns, which give rise to the consequence of failure to elect, must as aforesaid be literally interpreted to mean that "nobody emerged as a winner." [27]

Hence, before the COMELEC can act on a verified petition seeking to declare a failure of elections, two conditions must concur, namely, (1) no voting took place in the precinct or precincts on the date fixed by law, or even if there was voting, the election resulted in a failure to elect; and (2) the votes not cast would have affected the result of the election. Note that the cause of such failure of election could only be any of the following: force majeure, violence, terrorism, fraud or other analogous causes. [28]

In these cases, elections were held in the questioned municipalities. In fact, the very reason why the respondents filed their amended petitions before the COMELEC on May 30, 2001 was to implead the petitioners as the respondents therein who had been proclaimed as the winning candidates; hence, were indispensable parties to the petitions. In resolving the amended petitions, the public respondent will have to rule on the validity of the proclamation of the petitioners and their right to hold office and perform the duties appurtenant thereto. The alleged fraud and irregularities, granting *arguendo* that they indeed marred the elections, did not prevent or suspend the holding of the elections in the aforementioned municipalities including the preparation and transmission of the election returns. Indeed, these returns were duly canvassed by the respective municipal boards of canvassers which prepared the corresponding certificates of canvass which were in turn canvassed by the Provincial Board of Canvassers of Sulu which, after such canvass, proclaimed the petitioners herein as the winning candidates in the May 14, 2001 elections. In fine, elections had been conducted and winners had been already proclaimed. Even the public respondent, no less, through the Office of the Solicitor General, stated in its comment on the petition in G.R. Nos. 148575-76 that the amended petitions of the respondents did not state a valid cause of action for a declaration of a failure of election and were prematurely filed in this Court:

... After all the grounds relied upon by the petitioners in their petitions to declare a failure of election, to wit: (1) voters were driven away through force and intimidation; (2) persons other than registered voters filled up the official ballots; (3) flying voters were transported; (4) voters were allowed to vote more than once; (5) watchers of the petitioners were not allowed to exercise their rights and perform their duties; do not seem to clearly sustain a declaration of a failure of election. It has been consistently held that there are only three (3) instances where a failure of election may be declared, namely: (a) the election in any polling place has not been held on the date fixed on account of force majeure, violence, terrorism, fraud, or other analogous causes; (b) the election in any polling place had been suspended before the hour fixed by law for the closing of the voting on account of force majeure, violence, terrorism, fraud or other analogous causes; (c) after the voting and

during the preparation and transmission of the election returns or on the custody or canvass thereof, such election results in a failure to elect on account of force majeure, violence, terrorism, fraud, or other analogous causes (Typoco, Jr. vs. COMELEC, 319 SCRA 498 [1999]).

In their two petitions, petitioners made no specific allegation as to the presence of any of the three above-mentioned circumstances. They merely enumerated the various acts of alleged terrorism and fraud. There was no allegation that due to said acts of terrorism and fraud no election was actually held or that there was suspension of election or even if there was election held, nobody emerged as a winner. On the contrary, it is apparent that there was an actual election. What petitioners are saying is that it was not a valid and legitimate elections. The issue is still pending determination of the COMELEC and the present petition before this Honorable Court is therefore premature. This Court has made a pronouncement in *Bagatsing v. COMELEC*, 320 SCRA 817 [1999] that it does not look with favor on the practice of seeking remedy from the Supreme Court without waiting for the resolution of the pending action before the tribunal below, absent extraordinary circumstances warranting appropriate action by this Court.[29]

Moreover, the proclamation of the petitioners enjoys the presumption of regularity and validity.[30] To destroy the presumption, the respondents must convincingly show that the petitioners' victory was procured through extra-legal means. This they tried to do by alleging matters in their petitions which they believed constituted grounds for a declaration of failure of election, such as massive substitution of voters, fraud, terrorism, disenfranchisement of voters, and other anomalies. The attendance of the alleged fraud and irregularities in the elections as catalogued by the respondents, however, constitute merely the causes or events which may give rise to the grounds to declare failure of elections, namely, (a) no election held on the designated election date; (b) suspension of election before the hour fixed by law for the closing of voting; and (c) election in any polling place resulted in a failure to elect. But as aforesaid, the grounds cited by the respondents do not fall under any of the instances under Section 6 of Rep. Act No. 7166, the winning candidates having been proclaimed by the PBC. While fraud is a ground to declare a failure of election, the commission of fraud must be such that it prevented or suspended the holding of an election, including the preparation and transmission of the election returns.[31] It behooved the public respondent to dismiss the amended petitions:

... In the fairly recent case of *Tomas T. Banaga, Jr. v. Commission on Elections, et al.* with a factual backdrop similar to this case, the Court held:

We have painstakingly examined the petition filed by petitioner Banaga before the COMELEC. But we found that petitioner did not allege at all that elections were either not held or suspended. Neither did he aver that although there was voting, nobody was elected. On the contrary, he conceded that an election took place for the office of vice-mayor of Parañaque City, and that private respondent was, in fact, proclaimed elected to that post. While petitioner contends that the election was tainted with widespread anomalies, it must be noted that to warrant a declaration of failure of election the commission of fraud must be such that it prevented or suspended the holding of an election, or marred fatally the preparation and transmission, custody and canvass of the election returns. These essential facts ought to have been alleged clearly by the petitioner below, but he did not.

Private respondent alleged in his petition with the COMELEC En Banc that the elections ensued in the subject precincts and that petitioner herein emerged as the winner and was in fact proclaimed as such by the Board of Election Inspectors.

In sum then, the grounds alleged by the private respondent in his petition before the COMELEC are those for a regular election protest and are not proper in a pre-proclamation controversy; nor is such petition one for annulment of the elections or for a declaration of failure of elections in the municipality of Saguilaran, Lanao del Sur. The COMELEC should have ordered the dismissal of the petition instead of issuing the assailed order. The COMELEC thus committed a grave abuse of its discretion amounting to excess or lack of jurisdiction in issuing

the same. The error is correctible by the special civil action for certiorari.[32]

Reliance by the respondents of the ruling of this Court in *Soliva v. COMELEC*[33] is misplaced. In that case, the Court ruled that the petition to declare a failure of election filed with the public respondent was proper despite the proclamation of the winning candidates because the grounds alleged in the petitions and proved during trial were that the counting of the votes and the canvassing of the election returns were attended by fraud, intimidation, terrors and harassment. In this case, there was no allegation of fraud, terror, intimidation and harassment in the counting of votes and the canvassing of election returns.

Accordingly, the public respondent's subsequent October 3, 2001 and April 17, 2002 Resolutions allowing the technical examination of the voters registration records for the Municipalities of Parang, Indanan and Luuk were actions tainted with grave abuse of discretion amounting to excess or lack of jurisdiction correctible by a cert writ.

We are not saying that the public respondent is precluded at all times from allowing the technical examination of the voters registration records. In *Loong v. COMELEC*, we held that "the COMELEC is duty-bound to investigate allegations of fraud, terrorism, violence and other analogous causes in actions for annulment of election results or for declaration of failure of elections, as the Omnibus election Code denominates the same. Thus, the public respondent, in the case of actions for annulment of election results or declaration of failure of elections, may conduct a technical examination of election documents and compare and analyze voters' signatures and fingerprints in order to determine whether or not the elections had indeed been free, honest and clean." [34] However, the exercise of this authority presupposes that the petition has properly been acted upon on account of the existence of any of the grounds provided under Section 6 of the Omnibus Election Code. Where, as in this case, elections had been held and winners had been duly proclaimed, the proper recourse of the respondents should have been to file regular election protest cases to ventilate the veracity of the alleged election fraud and irregularities of the election in the subject precincts with the consequent determination and declaration of the real winners in the elections. The recall by the public respondent of its June 20, 2001 Order is justified by case law. Thus, the public respondent may suspend or annul a proclamation only in three instances, including pre-proclamation controversies, but not in a petition for a declaration of failure of an election. As held by us in *Dagloc v. COMELEC*, [35] thus:

The filing of pre-proclamation controversies under §248 of the Omnibus Election Code, however, is not the only ground for the suspension of proclamation. Two other instances are provided in R.A. No. 6646, known as "The Electoral Reforms Law of 1987," viz.: (1) Under §6 of the statute, the COMELEC may, upon motion of the complainant in an action for disqualification, suspend the proclamation of the winning candidate if the evidence of his guilt is strong, and (2) under §7 thereof, the COMELEC may likewise suspend the proclamation of the winning candidate if there is ground for denying or canceling his certificate of candidacy....[36]

Anent the validity of the Order of the public respondent dated June 28, 2001, the respondents aver that the public respondent committed a grave abuse of its discretion in recalling its order annulling the proclamation of the petitioners as the winning candidates. The respondents insist that the public respondent is empowered to annul a proclamation of the winning candidates or to suspend such proclamation. The OSG, for its part, agreed that the public respondent is vested with authority to suspend the proclamation of the winning candidates or to annul such proclamation but contend that the public respondent may in the exercise of its discretion allow such proclamation or set aside its order annulling the proclamation of the winning candidates, ratiocinating that:

The question now is whether the COMELEC can validly recall or set aside an earlier order to suspend proclamation issued as preliminary relief in a petition for declaration of failure of election and/or annulment of election results.

While we agree with the petitioner that the COMELEC can suspend the proclamation pending the resolution of the petition to declare a failure of election, the same order, however, is merely provisional in nature and can be lifted when the evidence so warrants. In *Nolasco v. COMELEC*, 275 SCRA 762 [1997], it is said to be akin to a temporary restraining order which a court can issue ex-parte under exigent circumstances.

The petitioner would like to impress upon the court that the COMELEC merely recalled its earlier order of suspension of proclamation without any motion for reconsideration. Such is not correct. During the hearing on June 28, 2001, when the parties pre-marked their respective evidence, the respondents also raised the motion and prayer to recall and/or lift the June 20, 2001 Order. The parties then agreed to have the matter immediately considered by the COMELEC in view of the proximity of the June 30, 2001 termination of the term of office of the (then) incumbent elective officials of the Province of Sulu.[37]

We agree with the OSG. The respondents failed to show that the public respondent committed a grave abuse of its discretion amounting to excess or lack of jurisdiction in issuing its June 28, 2001 Order.

IN LIGHT OF ALL THE FOREGOING, the petitions in G.R. Nos. 148575-76 are DISMISSED. The Order of the COMELEC dated June 28, 2001 is AFFIRMED.

The petitions in G.R. Nos. 152882-83 are GRANTED. The Orders of the COMELEC dated October 3, 2001 and April 17, 2002 are SET ASIDE, and the COMELEC is directed to dismiss SPA No. 01-257 and SPA No. 01-265. No costs.

SO ORDERED.

Davide, Jr., C.J., Puno, Vitug, Panganiban, Quisumbing, Ynares-Santiago, Sandoval-Gutierrez, Carpio, Austria-Martinez, Corona, Carpio-Morales, Azcuna, and Tinga, JJ., concur.

[1] Annex "B," Rollo, G.R. Nos. 148575-76, pp. 44-46. The petition alleged inter alia that:

...

- The Municipality of Luuk, Sulu has a total of 121 voting precincts, and for the May 14, 2001 elections, 84 grouped precincts;
- Last May 14, 2001 elections, the day of the national and local elections, the registered voters in all the precincts in the entire Municipality of Luuk were all disenfranchised, as there was no actual voting held;
- In all the 84 grouped precincts spread throughout the 20 barangays of said municipality, all official watchers of the PMP were either prevented from entering their respective precinct assignments, or driven out by some unscrupulous candidates of other parties and their goons, particularly by those LAKAS or Administration candidates, with the help of some corrupt Board of Election Inspectors (BEI), barangay officials and the military;
- Likewise, the registered voters who on election day flocked to their respective precincts were all prevented from exercising their right to suffrage by these armed persons, and through force and intimidation, they succeeded in driving out the registered voters away from the polling places;
- These terrorists also succeeded in going to the houses of registered voters on the eve of the elections and the early hours of election day and placed indelible ink in the forefingers of registered voters, thus ensuring that these registered voters will not be able to vote;
- After succeeding in perpetrating the above-mentioned contemptuous acts, their cohorts, the Board of Election Inspectors, together with candidates who masterminded this systematic and evil scheme, their supporters started

filling-out the official ballots and placing them in their respective ballot boxes, to make it appear as if an election was actually conducted. They did this with the support of armed military and para-military personnel;

...

- That the failed election in said municipality will affect the final results of the election and that unless the Municipal Board of Canvassers of Luuk, Sulu as well as the Provincial Board of Canvassers of Sulu are restrained, pending final resolution of this petition, from canvassing and tabulating the votes in Luuk, Sulu, this petition will become moot and academic.

[2] Id. at 45-46.

[3] Annex "C," id. at 56-63. The petition alleged inter alia that:

- That in the conduct of the May 14, 2001 elections in Sulu, particularly, in the municipalities of Parang and Indanan, which is part of Sulu First District, the MNLF Army Integrates utilized to secure the election process flagrantly and blatantly ignored and violated COMELEC Rules in not respecting the rights of party watchers to watch the conduct of the election in their respective precincts assignments and perform their duties and responsibilities as watchers during the casting of the votes;

- In addition, the said MNLF Army Integrates further violated the COMELEC Rules in disregarding the fifty (50) meter radius from the Polling Place wherein they are prevented from entering and instead massively served, themselves as assistants of voters without having been authorized for this purpose;

- That the voters who are identified and perceived as supporters of the petitioners were required to present Identification Cards in violation of COMELEC Laws, while those voters supporting the other party were unfairly allowed to cast their votes;

- That the opponents of Petitioners are candidates of the MNLF, particularly the opponent of petitioner Tan, who is the Chief of Staff of the MNLF;

- That as a net result of the foregoing scheme employed by the MNLF Army Integrates in favor of the MNLF candidates, massive fraud, anomalies and irregularities were committed in MNLF controlled areas in Parang and Indanan, Sulu, such as but not limited to the following:

a)

The Board of Election Inspectors and their MNLF Army Integrates security refused to recognize and allow the watchers of the petitioners to exercise their rights and perform their duties and responsibilities. And they observed, that "voters were allowed to vote more than once" and "neither was indelible ink used;

b)

Many registered voters were unable to cast their votes, because, the ballots had already been voted by the MNLF Army Integrates themselves in conspiracy with the Board of Election Inspectors;

c)

At others, flying voters were transported with MNLF Army Integrates escorts from one Barangay to the others to accomplish the Ballots. And the BEI on being confronted by the Watchers about the anomalies could only say that "we cannot do anything, because, this place is their controlled territories",

d)

Still at others, the photographs of the duly Registered Voters were temporarily detached and replaced by other

pictures. When the real Registered Voters came to vote, they are disallowed, because, although the names appearing in the List of Voters and the Book of Voters belong to them, the picture appearing on the Voters Registration Record, which have been earlier changed are different;

From the foregoing scheme, the following conclusions are inevitable:

- No valid and legitimate elections were actually held or conducted in the subject municipalities considering the fraudulent scheme employed by the MNLF Army Integrates assigned to secure the elections therein;
- No valid and/or legitimate elections were actually held in said municipalities as Official Ballots were prepared by only a few individuals and not by the duly Registered Voters. This can be readily established by the examination of the signatures and thumbmarks in the corresponding List of Voters and Book of Voters;
- The Official Ballots having been prepared by persons other than the Registered Voters, the votes reflected in the corresponding Election Returns are not truly reflective of the actual and true votes cast in the subject municipalities;
- In fact, this anomalous and fraudulent manner of voting is perhaps also true to other municipalities in Sulu. The low turnout of voters in municipalities supportive of the petitioners and the nearly One Hundred Percent turnout of voters in municipalities allied with the MNLF candidates is sufficient proof that the elections conducted in the subject municipalities on May 14, 2001, was vitiated by the fraudulent scheme decried herein;

...

- That the conduct of the elections in the subject municipalities were clustered to six (6) Voting Centers in the case of Parang, which is composed [of] Eighty Three (83) precincts, and to Five (5) Voting Centers in the case of Indanan, Sulu, which is composed of One Hundred Six (106) precincts, resulting in the location of an average of at least five (5) precincts to a Classroom that made it much easier for the perpetrators of the alleged fraudulent scheme to carry out their anomalies;

[4] Id. at 61.

[5] Annex "D," id. at 64-66.

[6] Annex "E," id. at 68-71. Commissioners Mehol K. Sadain, Resurreccion Z. Borra, and Florentino A. Tuason, Jr. voted for the counting and canvassing to proceed.

[7] Annex "D," Rollo (G.R. Nos. 152882-83), p. 61.

[8] Annex "E," id. at 62-70.

[9] Annex "E-1," id. at 84-93.

[10] Rollo (G.R. Nos. 152882-83), p. 68.

[11] Id. at 91.

[12] Annexes "E-2" and "E-3," id. at 94-117.

[13] Annex "J," Rollo (G.R. Nos. 148575-76), pp. 118-124.

[14] Annex "A," id. at 39-42.

[15] Id. at 22-23.

[16] Rollo (G.R. Nos. 152882-83), pp. 31-32.

[17] Annex "I," Rollo (G.R. Nos. 152882-83), pp. 129-138.

[18] Annex "A-1," *id.* at 34-44.

[19] 257 SCRA 1 (1996).

[20] Rollo (G.R. Nos. 152882-83), pp. 12-13.

[21] *Supra*.

[22] 357 SCRA 336 (2001).

[23] *Baytan v. COMELEC*, G.R. No. 153945, February 4, 2003.

[24] SECTION 4. Postponement, Failure of Election and Special Elections. -- The postponement, declaration of failure of election and the calling of special elections as provided in Sections 5, 6 and 7 of the Omnibus Election Code shall be decided by the Commission sitting en banc by a majority vote of its members. The causes for the declaration of a failure of election may occur before or after the casting of votes or on the day of the election.

[25] *Sandoval v. COMELEC*, 323 SCRA 403 (2000).

[26] SEC. 2. Failure of Election. -- If, on account of force majeure, violence, terrorism, fraud or other analogous causes the election in any precinct has not been held on the date fixed, or had been suspended before the hour fixed by law for the closing of the voting, or after the voting and during the preparation and the transmission of the election returns or in the custody of canvass thereof, such election results in a failure to elect, and in any of such cases the failure or suspension of election would affect the result of the election, the Commission shall, on the basis of a verified petition by any interested party and after due notice and hearing, call for the holding or continuation of the election not held, suspended or which resulted in a failure to elect on a date reasonably close to the date of the election not held, suspended or which resulted in a failure to elect but not later than thirty (30) days after the cessation of the cause of such postponement or suspension of the election or failure to elect.

[27] *Typoco, Jr. v. COMELEC*, 319 SCRA 498 (1999).

[28] *Banaga, Jr. v. COMELEC*, 336 SCRA 701 (2000).

[29] Rollo (G.R. Nos. 148575-76), pp. 205-206. (Underscoring supplied.)

[30] *Bince, Jr. v. COMELEC*, 218 SCRA 782 (1993).

[31] *Typoco, Jr. v. COMELEC*, *supra*.

[32] *Macabago v. COMELEC*, G.R. No. 152163, November 18, 2002.

[33] *Supra*.

[34] *Supra*.

[35] 321 SCRA 273 (1999).

[36] *Id.* at 279.

[37] Rollo (G.R. No. 148575-76), pp. 203-204.

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