

AGUEDO F. AGBAYANI, PETITIONER, VS. THE COMMISSION ON ELECTIONS AND RAFAEL M. COLET, RESPONDENTS.

G.R. Nos. 87440-42. June 13, 1990

Ponente: CRUZ, J.

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CRUZ, J.:

The petitioner is questioning the Order issued by the respondent Commission on Elections on December 13, 1988, dismissing his pre-proclamation cases against private respondent Rafael M. Colet (SPC Nos. 88-309, 88-445 and 88-485) and its Resolution dated February 23, 1989, denying his motion for reconsideration.

The grounds for the dismissal were: a) that the petitioner had abandoned the said cases with his filing of an election protest on October 5, 1988; and b) that the pre-proclamation controversy was no longer viable because the private respondent had already been proclaimed Governor of Pangasinan.

The Order was issued by a 2-1 vote in the First Division[1] of the COMELEC and the Resolution sustaining it by a 4-3 vote of the COMELEC en banc.[2]

The majority of the First Division and later in the COMELEC en banc held that the election protest filed by the petitioner, although denominated *ad cautelam*, was a regular protest that made the pre-proclamation controversy moot and academic, thus:

It must be remembered that petitioner has in fact opted to pursue his case in a regular election protest. With the filing of the petition though captioned *ex abundante ad cautelam*, the Clerk of Court of this Commission, issued the corresponding summons requiring protestee to file his answer. Thus, on October 25, 1988, protestee filed his responsive answer with counter-protest. On November 2, 1988, petitioner filed his reply and Answer *Ad Cautelam*. Evident therefore, is petitioner's intention to abandon his pre-proclamation controversy cases before this Commission.

The Court does not agree. We find that the petitioner's real intention in filing the election protest *ad cautelam* was merely to insure the preservation of all the ballot boxes used in the January 18, 1988 local elections in the province of Pangasinan. Under COMELEC Res. No. 2035 dated September 7, 1988, all such ballot boxes would be made available for the then forthcoming barangay elections as long as they were not involved in any pre-proclamation controversy, election protest, or official investigation. As the above-mentioned cases involved only nine precincts, it was only prudent for the petitioner to file his protest *ad cautelam* in case the pre-proclamation controversy was ultimately dismissed and it became necessary for him to activate his protest. The protest would involve all the precincts in the province. If he had not taken this precaution, all the other ballot boxes would have been emptied and their contents would have been burned and forever lost.

It was not the fault of the petitioner if the COMELEC decided to give due course to the protest right away even if it was *ad cautelam*. The protest was at that time only tentative, awaiting the disposition of the pre-proclamation controversy. The petitioner did file a reply to the private respondent's answer with counter-protest, but it was only to prevent any declaration that he had by his inaction waived the right to file responsive pleadings. Such a

reply did not make the pre-proclamation controversy moot and academic.

Most indicative of the petitioner's intention is the express reservation he made in the protest ad cautelam itself, where he clearly stated:

As additional precautionary measure, the protestant herein is filing this protest ad cautela (m), without withdrawing his petitions in said pre-proclamation controversy, in order to exempt from the provisions of Section 1 of Resolution No. 2035 the precincts hereinafter specified. (Emphasis supplied)

On the second ground, the rule is indeed that the proclamation of the winning candidate makes the pre-proclamation controversy no longer viable, as the issues raised therein may be more closely examined and better resolved in an election protest. However, this is true only where the proclamation is based on a complete canvass, as we have held in a number of cases.[3] Where it is claimed that certain returns should have been omitted because they were manufactured and other returns cannot be included because they have been irretrievably lost (thus raising the question of whether a special election should be called in the precincts affected), the pre-proclamation controversy should still be continued despite the proclamation of the supposed winner. Indeed, the COMELEC may in such pre-proclamation proceedings determine if the proclamation should be annulled.

This is precisely the issue involved in the SPC Nos. 88-309, 88-445 and 88-485, and it remains unresolved to date. To contend that the pre-proclamation controversy should be dismissed on the simplistic justification that the private respondent is already in office is to beg the question. The pre-proclamation controversy was introduced in our election laws precisely to discontinue the practice of hastening the proclamation and delaying the protest, to defeat the truly expressed will of the electorate.

In the recent case of *Duremdes v. Commission on Elections*,[4] the proclamation of the petitioner as Vice-Governor of Iloilo did not prevent the Commission on Elections from continuing with the pre-proclamation case against him and later annulling his proclamation. As the Court observed:

Moreover, DUREMDES' proclamation was made on the basis of an official canvass of the votes cast in 2,377 precincts only (Annex "N," Petition), when there were actually 2,487 precincts. The votes in 110 precincts, therefore, were not included, which is exactly the number of 110 election returns questioned by PEÑAFLORES. Further, DUREMDES was certified to have garnered 157,361 votes (*ibid.*), which number represents the non-contested votes only, and clearly excludes the totality of the "contested/deferred votes" of the candidates concerned.

DUREMDES' proclamation having been based on an incomplete canvass, no grave abuse of discretion can be ascribed to the COMELEC for directing the Provincial Board of Canvassers of Iloilo "to immediately reconvene and to include in the canvass of votes for Vice-Governor the questioned/contested returns." All the votes cast in an election must be considered because to disregard returns is in effect to disenfranchise the voters (*Mutuc vs. COMELEC*, L-28517, February 21, 1968, 22 SCRA 662). A canvass can not be reflective of the true vote of the electorate unless all returns are considered and none is omitted (*Datu Sinsuat vs. Pendatun*, L-31501, June 30, 1970, 33 SCRA 630).

Earlier, in *Aguam v. Commission on Elections*,[5] the Court ruled on the same question thus:

The great breadth of the constitutional and statutory powers granted Comelec has brought to the fore judicial pronouncements which have long become guidelines. Time and again, this Court has given its imprimatur on the principle that Comelec is with authority to annul any canvass and proclamation which was illegally made. The fact that a candidate proclaimed has assumed office, we have said, is no bar to the exercise of such power. It of course may not be availed of where there has been a valid proclamation. Since private respondent's petition before the Comelec is precisely directed at the annulment of the canvass and proclamation, we

perceive that inquiry into this issue is within the area allocated by the Constitution and law to Comelec.

x x x

We have but to reiterate the oft-cited rule that the validity of a proclamation may be challenged even after the irregularly proclaimed candidate has assumed office.

x x x

It is indeed true that after proclamation the usual remedy of any party aggrieved in an election is to be found in an election protest. But that is so only on the assumption that there has been a valid proclamation. Where as in the case at bar the proclamation itself is illegal, the assumption of office cannot in any way affect the basic issues.

This Court dismissed G.R. Nos. 84435-37 (*Agbayani v. Commission on Elections*), on January 19, 1989, because the orders appealed from were merely interlocutory and there were certain factual matters that had yet to be resolved by the COMELEC in the pending pre-proclamation controversy. The pre-proclamation controversy itself was not dismissed. On the contrary, the resolution clearly stated that there were “issues which, besides being mainly factual, (were) still under the consideration of and subject to final resolution of the Commission on Elections,” in the said cases. The dismissal of the pre-proclamation controversy has, however, rendered such final resolution impossible.

Considering the summary nature of the pre-proclamation controversy, we see no reason why the above-mentioned cases cannot be speedily resolved on the basis of the evidence and the arguments already submitted by the parties. These must have been thoroughly examined by now by the COMELEC. And if more evidence is to be adduced, this should not take too much more time; at least the COMELEC should see to it that it does not. The COMELEC must be especially wary of dilatory tactics that may further postpone the final resolution of this contest. The Court cannot stress too strongly the need for an early resolution of the pending cases to ultimately determine the winner in the gubernatorial election or, if an election protest is inevitable, to pave the way for it as soon as possible.

The petitioner has correctly pointed out that the Order of the First Division of the COMELEC dismissing the pre-proclamation controversy and the Resolution of the COMELEC en banc denying the motion for reconsideration were both penned by Commissioner Abueg, in violation of its rule that -

x x x No member shall be the “ponente” of an en banc decision, resolution or a motion to reconsider a decision/resolution written by him in a Division.[6]

This is still another reason why the challenged acts must be reversed. The Commission on Elections should be the first to respect and obey its own rules, if only to provide the proper example to those appearing before it and to avoid all suspicion of bias or arbitrariness in its proceedings.

It is not proper to make rash assumptions or unfounded conclusions in the case before us because of the slight margin of the private respondent over the protestant. That margin is only 356 in a province which has 838,426 registered voters in 3,145 electoral precincts. This is certainly less than what might be called a categorical choice. The “touch-and-go” character of the race makes it especially urgent to ascertain the winner in the election and resolve once and for all this divisive issue that has been festering for more than two years in the province of Pangasinan.

As it is possible that this issue may be definitely decided in the pre-proclamation controversy alone, this proceeding should not have been dismissed at all. And even if it be argued that an election protest would inevitably follow anyway, the procedure prescribed by the law must still be followed.

WHEREFORE, the Order dated December 13, 1988, and the Resolution dated February 23, 1989 are SET ASIDE and SPC Nos. 88-309, 88-445 and 88-485 are REINSTATED. The Commission on Elections is hereby ORDERED to resolve these cases with all purposeful dispatch, avoiding all needless delay that will prevent the early ascertainment of the true results of the election for the office of Provincial Governor of Pangasinan.

SO ORDERED.

Fernan, C.J., Narvasa, Melencio-Herrera, Gutierrez, Jr., Paras, Feliciano, Gancayco, Padilla, Bidin, Sarmiento, Medialdea, and Regalado, JJ., concur.
Cortes and Griño-Aquino, JJ., on leave.

[1] Rollo, pp. 111-116; penned by Commissioner Abueg, Jr., with Commissioner Africa concurring and Commissioner Rama dissenting.

[2] Rollo, pp. 213-216; penned by Commissioner Abueg, Jr., with Chairman Davide, Commissioners Africa and Flores concurring, and Commissioners Yorac, Rama and Dimaampao dissenting.

[3] *Aguam v. Comelec*, 23 SCRA 883; *Mutuc v. Comelec*, 22 SCRA 662; *Demafiles v. Comelec*, 21 SCRA 1461.

[4] G.R. Nos. 86362-63, October 27, 1989.

[5] 23 SCRA 883.

[6] Section 1, Rule 4, Comelec Rules of Procedure.

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