

**HON'BLE MR. JUSTICE RAGHVENDRA SINGH CHAUHAN
AND
HON'BLE MR. JUSTICE M. SATYANARAYANA MURTHY**

WRIT PETITION NO.42735 OF 2018

ORDER: (Per Hon'ble Sri Justice Raghvendra Singh Chauhan)

Aggrieved by the order dated 20.11.2018, issued by the Returning Officer, whereby the Returning Officer has rejected the petitioner's nomination papers which he had filed for the upcoming Legislative Assembly Elections from the Jubilee Hills, No. 61, the petitioner has approached this Court.

The facts of the case are in a short compass: The petitioner, Mr. Abdullah Ibrahim, happens to a resident of Shaikpet, Hyderabad. Eager to contest the Assembly Elections scheduled to be held on 07.12.2018, on 14.11.2018, he had filed his nomination papers from Jubilee Hills, No. 61 as an independent candidate. He was given a receipt for the nomination papers on 14.11.2018. The Returning Officer, the respondent No.5, had issued a certificate of receipt of oath after having received the scrutiny deposit of Rs.10,000/-. Moreover, on 14.11.2018, the Returning Officer, had issued a check list to the petitioner on the ground that booth numbers of ten proposals is not mentioned in his nomination papers. Consequently, the petitioner filed the necessary information with the Returning Officer. The Returning Officer also issued an acknowledgment of having received the necessary information. Thereafter, the Chief Electoral Officer, the respondent No.3, uploaded the names of the contesting candidates, including the petitioner's name, on the website of the Election Commission.

The uploaded list clearly contains the petitioner's name at serial No.2. The Returning Officer further informed the petitioner to come and collect the symbol allotted to him on 22.11.2018. Therefore, the petitioner was shocked and dismayed when he received the order dated 20.11.2018, issued under section 36 of the Representation of Peoples Act (henceforth to be referred as "the Act"). According to the said order, the petitioner's nomination papers were rejected ostensibly on the grounds, "*that the candidate not mentioned (sic) the part number of the 10 proposals, even though issued notice through a check slip on 14.11.2018. The candidate again filed incomplete affidavit (the date of sign in the affidavit not mentioned). Hence the nomination serial No.2 of Sri Abdallah Ibrahim is hereby rejected*".

Therefore, the present petition before this Court.

Mr. V.S.R. Anjaneyulu, the learned counsel for the petitioner, has raised the following contentions before this Court:-

Firstly, relying on the case of **Election Commission of India through Secretary v. Ashok Kumar and Others**¹, the learned counsel has pleaded that although in the case of **N.P. Ponnuswami v. Returning Officer, Namakkal Constituency, Namakkal and Four Others**², the Hon'ble Supreme Court seems to have placed an absolute prohibition on the power of judicial review vis-à-vis the election cases, but in the case of **Ashok Kumar** (supra), the bar has been diluted by the Apex Court. In the said

¹ (2000) 8 SCC 216

² AIR 1952 SC 64

case, the Hon'ble Supreme Court has opined that any action of the Election Commission which is either *mala fide*, or an arbitrary exercise of power can be challenged before the Constitutional Court, even after the Election schedule has been announced by the Election Commission. Therefore, an exception to the general rule, that the court should not interfere with the election process, does exist.

Secondly, Section 36(4) of the Act stipulates that a nomination paper can be rejected provided there is defect of substantial character. However, according to the learned counsel, the petitioner's nomination papers were rejected not due "to defect of substantial character" but due to "technical reasons". The petitioner's nomination papers were rejected on twin grounds: firstly, the part numbers (polling booth numbers) of the 10 proposers were not mentioned in the nomination papers. Secondly, the date of the signing of the affidavit was not mentioned in the affidavit.

Thirdly, neither of these two grounds are legally sustainable. For, immediately on 14.11.2018, the petitioner had supplied the "part numbers of the 10 proposals", for which an acknowledgment was duly issued by the Returning Officer, the respondent No.5. Moreover, although the date of signing the nomination paper is not mentioned in the nomination paper, but nonetheless the date has been mentioned by the public notary who notarized the nomination paper on 16.11.2018. Therefore, it should be taken that the affidavit was filed by the petitioner on 16.11.2018. Hence, the nomination papers were rejected on technical grounds. Therefore,

the Election Commission, respondent No.2, has acted in most arbitrary manner.

Fourthly, the nomination papers were rejected due to the *mala fide* intention of the Government which does not want the petitioner to contest the election as an independent candidate. Therefore, the order dated 28.11.2018 deserves to be set aside. And directions issued to the respondent to permit the petitioner to participate in the election process by accepting his nomination in respect of Legislative Assembly constituency, Jubilee Hills No.61.

On the other hand, Mr. Avinash Desai, the learned standing counsel for the respondent No.2 to 5, has raised the following counter contentions before this Court:-

Firstly, that both Section 80 of the Act, and Article 329(b) of the Constitution of India clearly stipulate that the only remedy available to an aggrieved person with regard to an election matter, is to file an election petition after the election results are declared. Relying on the cases of **N.P. Ponnuswami** (supra), on **Mohinder Singh Gill and Another v. the Chief Election Commission**³, and on **Ram Phal Kundu v. Kamal Sharma**⁴, the learned counsel has pleaded that once the election schedule has been declared, the power of judicial review cannot be exercised by the constitutional courts for interrupting, obstructing, or protracting the election proceedings. In fact, the only remedy available to the petitioner under Section 80 of the Act, and under Article 329(b) of the

³ AIR 1978 SC 851

⁴ (2004) 2 SCC 759

Constitution of India is to file an Election Petition after the election results have been announced.

Secondly, the facts of the present case are similar to the facts in the case of **N.P. Ponnuswami** (supra). For the case of **N.P. Ponnuswami** (supra), also dealt with the rejection of a nomination paper for election of the Madras Legislative Assembly. In identical factual scenario, the Apex Court had placed a bar on the exercise of the power of judicial review by the Courts. Therefore, even if the bar has been slightly loosened in the case of **Ashok Kumar and Others** (supra), the limited scope of exercise of judicial power given in the said case cannot be interpreted to over rule the prohibition placed by the Apex Court in the case of **N.P. Ponnuswami** (supra). After all, the Bench which has decided the case of **Ashok Kumar and Others** (supra) is a smaller Bench than the Constitutional Bench decision in the case of **N.P. Ponnuswami** (supra).

Thirdly, there is a self-contradiction in the petitioner's statement: for on the one hand, the petitioner claims that he had submitted the nomination papers on 14.11.2018. Yet, on the other hand, he claims that the date shown by the public notary while notorising the nomination paper should be taken as the date on which he had filed the nomination papers. Interestingly, the date shown by the public notary is 16.11.2018. Therefore, it is a disputed question of fact as to on what date the nomination papers were filed by the petitioner. Such disputed question of facts can be adjudicated only by the Election Tribunal, and cannot be adjudged in writ jurisdiction. Therefore, the proper remedy for the

petitioner is to file an Election Petition after the completion of the election process.

Lastly, if the writ petition were to be allowed, it would interrupt the election process. For, the election process has already progressed to the extent that the date for scrutinising the nomination paper, the date for withdrawal of candidacy are already over. Moreover, the candidates whose nomination papers have been found to be valid, their names have already been fed into the software of the electronic voting machines which would be used on the election day. Therefore to allow the writ petition would mean that those who may want to withdraw their nomination, considering the fact that the petitioner is suddenly in the fray, they would not be permitted to withdraw the nomination. Furthermore, it would also entail the re-programming of the software used in the electronic voting machines. Therefore, any decision of this Court, in favour of the petitioner, would not only interrupt, but also would protract the election process. Therefore, the writ petition deserves to be dismissed by this Court.

In rejoinder the learned Counsel for the petitioner has relied on the case of **Whirlpool Corporation v. Registrar of Trade Marks, Mumbai**⁵, in order to plead that alternate remedy is no bar if the action of the concerned authority is patently arbitrary, unreasonable and unfair. Such an act would be an anathema to the concept of equality enshrined in Article 14 of the Constitution of India. Therefore, the petitioner cannot be relegated to pursue

⁵ (1998) 8 SCC 1

the alternate remedy of having to file an election petition, that, too, after the announcement of the election result.

While countering the rejoinder, the learned counsel for the Election Commission has argued that if the petitioner were to succeed in the election petition, the election for the particular constituency can be set aside by the Election Tribunal. Therefore, no prejudice would be caused to the petitioner. However, if the election process were interrupted or protracted, a huge loss has to be borne by the Election Commission, and the State exchequer. Thus, the right of the petitioner, that is the right of an individual, has to give way to the right of the community, or of the people.

The issues before this Court are: whether this Court has the judicial power to interfere with the election process after the election process was set into motion by the announcement of the election schedule by the election commission or not? Secondly, whether the petitioner should be relegated to the remedy of having to file an election petition after the conclusion of the election process or not?

Heard the learned counsel for the parties and perused the impugned order and examined the record.

Undoubtedly a free and fair election is the bedrock of the democracy. Since an election in the biggest democracy of the World is held at a large scale, involving campaigning by the candidates, publicity by the political parties, the stationing of the election staff, the setting up of polling booths, their protection by either the police or even by the para-military forces, the counting of votes and the declaration of the final results, obviously all these

progressive steps in the election process involve money and manpower. Therefore, repeatedly the Apex Court has emphasised that once the election process is set into motion, it should not be interrupted or protracted, or obstructed by the judiciary, while exercising the power of judicial review.

In the case of **N.P. Ponnuswami** (supra), the Apex Court has interpreted the word “election” as used in Article 329(b) of the Constitution of India. The Hon'ble Supreme Court has opined that *“the word is used to connote the entire process culminating in a candidate being declared elected.”* Therefore, the word would *“include the entire process which consists of several stages embracing many steps, some of which may have an important bearing on the result of the process.”*

In the above mentioned case, the Hon'ble Supreme Court has also dealt with the issue whether the law of elections in this country contemplates that these should be two attacks on matters connected with the election proceedings i.e., by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution, and the other by means of an election petition. While answering these issues, the Apex Court opined that *“any matter which has the affect of vitiating the election should be brought up only at appropriate stage in an appropriate manner before a Special Tribunal and should not be brought up at an intermediate stage before any court.”* Noticing the embargo placed by Article 329(b) of the Constitution of India, the Apex Court opined that the said provision was *“apparently enacted to prescribe the manner in which and the stage at which this ground (rejection of*

the nomination papers) and other grounds which may be raised under the law to call the election in question could be urged."

Therefore, the Apex Court held that *"those grounds cannot be urged in any other manner, at any other stage and before any other court. If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any, are rectified, there would be no meaning in enacting a provision like Article 329(b) and in setting up a Special Tribunal. Any other meaning ascribed to the words used in the Article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be exercised by the High Court at the pre-polling stage and by the Election Tribunal, which is to be an independent body, at the stage when the matter is brought before it."*

Therefore, the Hon'ble Supreme Court finally concluded as under:-

"The conclusions which I have arrived at may be summoned up briefly as follows:

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

(2) In conformity with this principle, the scheme the election law in this country as well as in England is that no significance should be attached to anything which does not affect the élection'; and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the élection' and enable the person affected to call it in question, they should be brought up before a Special Tribunal by means of an election petition and not be made the subject of a dispute before any court while the election is in progress."

Similar views were also expressed in the case of **Mohinder Singh Gill and Others** (supra).

Although the learned counsel for the petitioner is justified in claiming that in the case of **Ashok Kumar and Others** (supra), the total bar raised by the Apex Court in the case of **N.P. Ponnuswami** (supra), has been relaxed a bit, but it will be fruitful to extract the summary stated in the said case which is as under:

(1) If an election, (the term "election" being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.

(2) Any decision sought and rendered will not amount to "calling in question an election" if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

(3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable

judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law. (emphasis added)

A bare perusal of the summary clearly reveals that an arbitrary exercise of power can be questioned under the writ jurisdiction even during the course of election process, provided such a questioning does not lead to interrupting, obstructing or protracting the election proceedings. However, if such a questioning does have the affect of interpreting, obstructing or protracting the election proceedings, then the power of judicial review should not be exercised by the court. Therefore, the learned counsel for the petitioner is unjustified in claiming that arbitrary exercise of power can be questioned under the writ jurisdiction even during the election process. Since the exercise of writ jurisdiction is a discretionary power bestowed under Article 226 of the Constitution of India, it can be exercised, but only after considering the effect, the exercise of such power would have on the election process. The power cannot be exercised as a knee jerk reaction to the plea that “*the election commission has exercised the power arbitrarily.*”

Hence the issue before this Court is what would be the consequences if this Court were to exercise the writ jurisdiction during the pendency of election process?

Admittedly, the date for filing of the nomination papers, the date for the scrutiny of the nomination papers, and the date for withdrawal of the nomination papers are already over. The election process, according to the learned counsel for the Election

Commission, has progressed to the stage that the electronic voting machines are ready for use, or are being made ready for use, and the other arrangements for holding a free and fair elections have already begun. In fact the election campaigns by other candidates have already commenced. Therefore, to exercise the writ jurisdiction would entail interpreting and obstructing the election process . Hence it is not possible to turn the historical clock back to the date of a scrutiny of the nomination papers or even further far back to the acceptance of the nomination papers at this stage. Therefore, this court is not inclined to invoke its writ jurisdiction.

It is a well recognised principle of law that where the right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. Both Article 329(b) of the Constitution of India, and Section 80 of the Act prescribe that only an election petition shall lie in challenging any irregularity or illegality in holding the election. Since an efficacious remedy has already been provided under the Act, this Court is not inclined to invoke its writ jurisdiction.

The learned counsel for the Election Commission is justified in claiming that the present case raises disputed questions of fact, especially with regard to the date on which the nomination papers were filed. For, the exact date has been left blank by the petitioner in his nomination paper. According to the petitioner's affidavit filed before this Court he had filed the nomination papers on 14.11.2018. However, the learned counsel for the petitioner pleads that the date given by the public notary i.e., 16.11.2018, should be

taken as the date on which the nomination papers were filed. Thus, prima-facie, the petitioner has taken a self-contradictory stand. Hence it is unclear whether the nomination papers were filed on 14.11.2018 or 16.11.2018. Such highly disputed question of facts can be adjudged only by the Election Tribunal. For this reason also, this Court is not inclined to invoke the writ jurisdiction.

For the reasons stated above, this court does not find any merit in the writ petition. It deserves to be dismissed. Accordingly, it is, hereby, dismissed.

The miscellaneous petitions pending, if any, shall stand closed. No order as to costs.



RAVHVENDRA SINGH CHAUHAN, J

M. SATYANARAYANA MURTHY, J

Date: 28.11.2018
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