

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.9829 of 2019

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Angesh Kumar, aged about 48 years, male, S/o Sri Narayan Singh, resident of
Village- Jagdishpur, P.S.- Tariyani, District- Sheohar

... .. Petitioner

Versus

1. The Election Commission of India through the Chief Election Commission,
Nirvachan Bhawan, New Delhi
2. The State Election Commission Bihar, Patna
3. The Returning Officer-cum-District Magistrate Motihari at Motihari
District- Motihari

... .. Respondents

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Appearance :

For the Petitioner	:	Mr. Purnendu Singh, Advocate.
For the Resp. No. 1	:	Mr. Siddhartha Prasad, Advocate.
For the Resp. No. 3	:	Mr. Prashant Pratap, GP-2

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CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN
ORAL JUDGMENT

Date : 30-04-2019

Heard learned counsel for the petitioner as well as learned
counsel for the respondents.

2. The present petition has been filed for the following reliefs as
formulated by the petitioner -

*“(i) For issuance of writ of certiorari for quashing
and setting aside an order dated April 24, 2019, by which the
Respondent No. 3 the Returning Officer of 04-Sheohar
Parliamentary Constituency has illegally rejected the
nomination form contained in Form-26 submitted by the
petitioner on 22.04.2019 in most mala fide and arbitrary
manner because defect so pointed will not amount of any
suppression or not having substantially completed in*



accordance with section 36 of the Representation of People Act, 1951 (hereinafter referred to as Act).

(ii) For issuance of writ of mandamus commanding and directing the respondent no. 3, the Returning Officer to accept the nomination form and direct to include the name of the petitioner in the list of valid nomination submitted by the petitioner which is mandatorily required to be accepted in terms of sub section (4) of Section 36 because defects pointed out is not of substantial character and will not cause any interference or it will intermeddle with the process of election, rather it will facilitate the election process in conformity with law laid down by the Apex Court in several judicial pronouncements.

(iii) For issuance of writ of mandamus directing the concerned respondent to take curative steps in light of the representation dated 23.04.2019 of the petitioner and allot symbol to the petitioner for facilitating and completing the election process after accepting the nomination.

(iv) For any other relief or reliefs to which the petitioner is otherwise found entitled to under the facts and circumstances of the case.”

3. The short facts of the case according to the petitioner are that the schedule for 04-Sheohar Parliamentary Election was notified on 16.04.2019 and the date for filing of nomination was announced from 16th April, 2019 to 23rd April, 2019. The petitioner filed his nomination paper on 20.04.2019 for contesting 04-Sheohar Parliamentary Election as an independent candidate, upon preliminary scrutiny of which a check list of documents was handed over to the petitioner vide memo no. 36 dated 20.04.2019 for removal of the defects as specified therein.



The petitioner specifically claims that his fresh nomination paper along with affidavit in the requisite Form-26 after removal of the defects was submitted on 22.04.2019 within the stipulated time and as such he was under bona fide belief that his nomination paper was in order as no notice to the contrary was received. Scrutiny of nomination was fixed on 24.04.2019, and on that date the impugned order contained in memo no. 125 dated 24.04.2019 (Annexure - 4) was passed, *inter alia*, rejecting the nomination paper of the petitioner.

4. Mr. Purnendu Singh, learned counsel for the petitioner submits that the Returning Officer has acted mala fide in deliberately recording in the impugned order that pursuant to the defects pointed out in the preliminary scrutiny on 20.04.2019, firstly, that the fresh affidavit in Form-26 was filed on 24.04.2019 and secondly, that again defects were found as “certain columns enumerated therein remained blank”. It is the categorical stand of the petitioner that as a matter of fact, such fresh affidavit in Form-26 had been furnished on 22.04.2019 itself before the last date of filing of nomination paper and if there remained any defect, the petitioner was entitled to an opportunity for removal of the same, which defect in any event was not of any substantial character as envisaged in Section 36(4) of the Representation of the People Act, 1950 (hereinafter “the Act”).

5. It is therefore submitted that the impugned order on the face of it is wholly without jurisdiction inasmuch as if the fresh affidavit had been filed on 24.04.2019 as stated therein, the same would have been



filed beyond the last date for filing of the nomination paper and as such the question of scrutiny of the nomination paper could not have arisen. The impugned order is thus liable to be set aside as being wholly without jurisdiction and void.

6. In such circumstances, the provisions of Article 329(b) of the Constitution of India will not come in the way of challenging the action of the Returning Officer by way of the present writ petition. Considerable reliance has been placed by learned counsel for the Petitioner on the decision of the Hon'ble Supreme Court in *Mohinder Singh Gill vs. The Chief Election Commissioner, New Delhi*, AIR 1978 SC 851, which was later referred to and considered in some detail in its decision in *Election Commission of India through Secretary Vs. Ashok Kumar and Others*, AIR 2000 SC 2977 with the following observations

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“19. However, the Constitution Bench in Mohinder Singh Gill’s case (AIR 1978 SC 851) could not resist commenting on Ponnuswami’s case (AIR 1952 SC 64) by observing (vide para 25) that the non-obstante clause in Article 329 pushes out Article 226 where the dispute takes the form of calling in question an election, except in special situations pointed out at, but left unexplored in Ponnuswami.

“20. Vide para 29 in Mohinder Singh Gill’s case, the Constitution Bench noticed two types of decisions and two types of challenges : The first relating to proceedings which interfere with the progress of the election and the second which accelerate the completion of the election and acts in furtherance of an election. A reading of Mohinder Singh



Gill's case points out that there may be a few controversies which may not attract the wrath of Article 329(b). To wit : (i) power vested in a functionary like the Election Commission is a trust and in view of the same having been vested in high functionary can be expected to be discharged reasonably, with objectivity and independence and in accordance with law. The possibility however cannot be ruled out where the repository of power may act in breach of law or arbitrarily or mala fide. (ii) A dispute raised may not amount to calling in question an election if it subserves the progress of the election and facilitates the completion of the election. The Election Commission may pass an order which far from accomplishing and completing the process of election may thwart the course of the election and such a step may be wholly unwarranted by the Constitution and wholly unsustainable under the law. In Mohinder Singh Gill's case, this Court gives an example (vide para 34). Say after the President notifies the nation on the holding of elections under Section 15 and the Commissioner publishes the calendar for the poll under Section 30 if the latter orders returning officers to accept only one nomination or only those which come from one party as distinguished from other parties or independents, which order would have the effect of preventing an election and not promoting it, the Courts intervention in such a case will facilitate the flow and not stop the election stream.

21. *A third category is not far to visualise. Under Section 81 of the Representation of the People Act, 1951 an election petition cannot be filed before the date of election, i.e., the date on which the returned candidate is declared elected. During the process of election something may have happened which would provide a good ground for the*



election being set aside. Purity of election process has to be preserved. One of the means for achieving this end is to deprive a returned candidate of the success secured by him by resorting to means and methods falling foul of the law of elections. But by the time the election petition may be filed and judicial assistance secured material evidence may be lost. Before the result of the election is declared assistance of Court may be urgently and immediately needed to preserve the evidence without in any manner intermeddling with or thwarting the progress of election. So also there may be cases where the relief sought for may not interfere or intermeddle with the process of the election but the jurisdiction of the Court is sought to be invoked for correcting the process of election taking care of such aberrations as can be taken care of only at that moment failing which the flowing stream of election process may either stop or break its bounds and spill over. The relief sought for is to let the election process proceed in conformity with law and the facts and circumstances be such that the wrong done shall not be undone after the result of the election has been announced subject to overriding consideration that the Courts intervention shall not interrupt, delay or postpone the ongoing election proceedings. The facts of the case at hand provide one such illustration with which we shall deal with a little later. We proceed to refer a few other decided cases of this court cited at the Bar.”

7. Mr. Siddhartha Prasad, learned counsel for the respondent Election Commission of India, vehemently resists the writ petition, first of all, submitting that on preliminary scrutiny the defects in the affidavit in Form-26 had been pointed out and notice to that effect was given to



the petitioner on 20.04.2019 itself. The petitioner was duly given a copy of the check list of the documents and time was granted for filing fresh affidavit latest by 3.00 P.M. on the last date for filing of nominations. However, the defects were not removed. In this regard, he invites reference to the email sent by the petitioner on 24.04.2019 (Annexure-3), in which he himself sought time for removal of the defects. This unequivocally establishes that the affidavit remained defective as on 24.04.2019.

8. There is also no objective material on record to support the petitioner's claim of having filed a fresh affidavit on 22.04.2019. The averments made in the writ petition with regard to filing of such affidavit are not supported by any document and as such remain a bald assertion on the part of the petitioner.

9. It is further submitted that the issue in the present case relates to the defect in the affidavit in Form-26 wherein certain columns had admittedly been left blank by the petitioner. Reference is invited to Clause 6.10 (x) of the "Handbook for Returning Officer" published in February, 2019 by the Government of India which, inter alia, provides for mandatory rejection of nomination paper "if columns were left blank in the affidavit and fresh affidavit not filed in spite of notice". It is therefore submitted that in view of the mandatory guidelines as above, the Returning Officer had no discretion in the matter and was bound to reject the nomination of the petitioner. This aspect has been considered in the judgment of the Hon'ble Supreme Court in N.P. Ponnuswami Vs.



The Returning Officer, Namakkal Constituency, Namakkal, Salem District and Ors, AIR (39) 1952 SC 64 which was also rendered in the context of rejection of nomination paper, observing as follows –

“9. The question now arises whether the law of elections in this country contemplates that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Art. 226 of the Constitution (the ordinary jurisdiction of the courts having been expressly excluded), and another after they have been completed by means of an election petition. In my opinion, to affirm such a position would be contrary to the scheme of Part XV of the Constitution and the Representation of People Act, which, as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any court. It seems to me that under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. Article 329(b) was apparently enacted to prescribe the manner in which and the stage at which this ground, and other grounds which may be raised under the law to call the election in question could be urged. I think it follows by necessary implication from the language of this provision 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 will be no meaning in enacting a provision like Art. 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 expressed 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 up before it.”

10. It is submitted by the respondents that the petitioner has not referred to any subsequent decision of the Hon’ble Supreme Court in which the aforesaid proposition has been diluted in the context of rejection of nomination by reason of defects in the nomination paper or affidavit.

11. Having heard learned counsel for the parties at length and on careful consideration of the materials on record, this Court is not inclined to exercise its extraordinary discretionary jurisdiction under Article 226 of the Constitution of India. Primarily, there exists a disputed question of fact as to whether the petitioner responded to the preliminary notice dated 20.04.2019 pointing out the defects in the affidavit in terms of the check list supplied to him, by filing a fresh affidavit on 22.04.2019 as claimed, inasmuch as it has clearly been stated in the impugned order that such fresh affidavit in Form-26 had been filed on 24.04.2019. No doubt, a categorical averment has been made in paragraph 7 of the writ petition that a fresh affidavit had been filed on 22.04.2019, but such claim is not supported by any document. On the contrary, there is on record an email dated 24.04.2019



(Annexure-3) purportedly sent by the petitioner seeking more time for submission of relevant documents, which creates serious doubts about the fresh affidavit having been filed by the petitioner on 22.04.2019 as claimed.

12. Considering all of the above, without further investigation into the facts of the matter, this Court it is not inclined to accept the submission of the Petitioner that the impugned order dated 24.04.2019 is null and void.

13. Reliance placed by the petitioner on Ashok Kumar's case (supra) in the context of Mohinder Singh Gill's case (supra), in my opinion, does not come to the aid of the petitioner. If the defects pointed out in the affidavit in which some of the columns had been left blank were not removed by a candidate despite grant of time, it can hardly be equated with a case of arbitrariness of the nature contemplated in the decision referred to as above, particularly in para 20 thereof. On the other hand, in view of the guidelines contained in the Handbook for Returning Officer, the petitioner's application is liable to be rejected outright on the ground of defects therein. The action of the authorities in this regard cannot therefore be termed as arbitrary or malafide.

14. As regards the nature of the defects in the affidavit, they are indeed of substantial character as has been submitted by the respondents and not merely formal. In this regard, reliance has been placed on the decision of the Hon'ble Apex Court in Resurgence India vs. Election



Commission of India and Another, (2014) 14 SCC 189 containing the following observations -

“20. Thus, this Court held that a voter has the elementary right to know full particulars of a candidate who is to represent him in the Parliament and such right to get information is universally recognized natural right flowing from the concept of democracy and is an integral part of Article 19 (1)(a) of the Constitution. It was further held that the voter's speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is a must. Thus, in unequivocal terms, it is recognized that the citizen's right to know of the candidate who represents him in the Parliament will constitute an integral part of Article 19 (1)(a) of the Constitution of India and any act, which is derogative of the fundamental rights is at the very outset ultra vires.

21) With this background, Section 33A of the RP Act was enacted by Act 72 of 2002 with effect from 24.08.2002. Thus, the purpose of the Act 72 of 2002 was to effectuate the right contemplated in Association for Democratic Reforms (supra). However, the legislators did not incorporate all the suggestions as directed by this Court in the above case but for mandating all the candidates to disclose the criminal antecedents under Section 33 A by filing an affidavit as prescribed along with the nomination paper filed under Section 33(1) of the RP Act so that the citizens must be aware of the criminal antecedents of the candidate before they can exercise their freedom of choice by casting of votes as guaranteed under the Constitution of India. As a result, at present, every candidate is obligated to file an affidavit with



relevant information with regard to their criminal antecedents, assets and liabilities and educational qualifications.

22) Let us now test whether the filing of affidavit stating that the information given in the affidavit is correct but leaving the contents blank would fulfill the objective behind filing the same. The reply to this question is a clear denial. The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizen under Article 19 (1)(a) of the Constitution of India. The citizens are required to have the necessary information at the time of filing of the nomination paper in order to make a choice of their voting. When a candidate files an affidavit with blank particulars, it renders the affidavit itself nugatory.

23) For that purpose, the Returning Officer can very well compel a candidate to furnish information relevant on the date of scrutiny. We were apprised that the Election Commission already has a standard draft format for reminding the candidates to file an affidavit as stipulated. We are of the opinion that along with the above, another clause may be inserted for reminding the candidates to fill the blanks with the relevant information thereby conveying the message that no affidavit with blank particulars will be entertained. We reiterate that it is the duty of the Returning Officer to check whatever the information required is fully furnished at the time of filing of affidavit with the nomination paper since such information is very vital for giving effect to the 'right to know' of the citizens. If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected. We do comprehend that the power of Returning Officer to reject the nomination



paper must be exercised very sparingly but the bar should not be laid so high that the justice itself is prejudiced.

25. Para 73 of the aforesaid judgment nowhere contemplates a situation where it bars the Returning Officer to reject the nomination paper on account of filing affidavit with particulars left blank. Therefore, we hereby clarify that the above said paragraph will not come in the way of the Returning Officer to reject the nomination paper if the said affidavit is filed with blank columns. The candidate must take the minimum effort to explicitly remark as 'NIL' or 'Not Applicable' or 'Not known' in the columns and not to leave the particulars blank, if he desires that his nomination paper be accepted by the Returning Officer. "

15. In the instant case, this Court is of the opinion that the defects in the affidavit, wherein certain columns have been left blank, are of substantial character when tested with reference to the observations of the Hon'ble Supreme Court in Resurgence India's case (supra). In particular, the defect in objection no. 5(ii)(gha) required a brief description of the offences in connection with criminal antecedents of the petitioner. It is noticed that in two out of the three cases, the columns have not been filled. As such, the very object of seeking such information stands frustrated as citizens would not be made aware of the nature of the criminal antecedents of the candidates before they exercise their freedom of choice.

16. In the opinion of this Court, any indulgence by this Court at this belated stage would not result in furtherance of the election process but would rather impede, delay and interrupt the same, more so when



ballot papers are said to have already been printed, and the date of polling fixed on 12.05.2019 is less than two weeks away. Besides, this is also not a case involving any risk of loss of evidence in which “assistance of Court may be urgently and immediately needed to preserve the evidence without in any manner intermeddling with or thwarting the progress of election” as observed in para 21 of Ashok Kumar’s case (supra).

17. The petitioner shall have adequate remedy in terms of Article 329(b) of the Constitution of India by filing an election petition at the appropriate stage which would constitute an effective remedy for redressal of his grievances.

18. The writ petition accordingly stands dismissed with the aforesaid observations.

(Vikash Jain, J)

BT/Chandran

AFR/NAFR	AFR
CAV DATE	N.A.
Uploading Date	02.05.2019
Transmission Date	N.A.

