

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 21/3/2019

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

Writ Petition No.8476 of 2019

M.L.Ravi

...

Petitioner

Vs

1. Chief Election Commissioner
Election Commission of India
Nirvachan Sadan
Ashoka Road
New Delhi 110 001.

2. The Chief Electoral Officer
Public Elections Department
Secretariat
Fort St. George
Chennai 600 009.

...

Respondents

Prayer: Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of mandamus, directing the respondents not to allot symbols of a political party to a person who is not a member of a different political party in the ensuing Lok Sabha Elections to be held in April 2019 and ensuing bye elections for Tamil Nadu Legislative Assembly to be held in April 2019.

For petitioner Mr.T.Sivagnanasambanthan

For respondents Mr.Niranjana Rajagopal

O R D E R

(Order of the Court was made by S.Manikumar,J)

Mr.M.L.Ravi, President of Desiya Makkal Sakthi Katchi, and a practising Advocate, has sought for a writ of mandamus, directing the Chief Election Commissioner, Election Commission of India, New Delhi and the Chief

Electoral Officer, Public Elections Department, Chennai, respondents 1 and 2 respectively, not to allot symbols of a political party to a person, who is not a member of that political party, in the ensuing Lok Sabha Elections, to be held in April 2019 and ensuing bye elections, for Tamil Nadu Legislative Assembly, to be held in April 2019.

2. Supporting the prayer sought for, Mr.T.Sivagnanasambanthan, learned counsel for the petitioner contended that the first respondent has announced Election schedule, for the year 2019 Lok Sabha, to be held in April 2019, in seven phases. Lok Sabha election for Tamil Nadu, is to be held on 18/4/2019. The announcement was made, on 10/3/2019. The first respondent has also announced 18 bye-elections, for the Tamil Nadu Legislative Assembly. Bye-elections for the Assembly is to be held, on the same day, i.e., 18/4/2019. Schedule filing of Nomination has started from 19/3/2019 and ends on 26/3/2019. After scrutiny on 27th March 2019 and withdrawal of nominations on 29/3/2019, the valid nominations would be accepted and symbols are allocated. Symbols are allocated, as per the election symbols (Reservation and Allotment) Order, 1968. Symbols are classified into Reserved Symbols and Free Symbols. Reserved Symbols are allocated, exclusively to the recognised political parties and free symbols are allocated to registered political parties and independent candidates.

3. As per Section 29 A of the Representation of People Act, the political parties are registered. As per the registration manual rules, political party members have to submit an affidavit, stating that he is not a member in any other party. Office bearers have to submit an affidavit that they are not members in any other party.

4. Symbols are allotted, as and when the candidate submits Form B {Notice as to name of candidate set up by the political party, under Section 13 (B), (C) and (E) and 13 A of the Election Symbols (Reservation and Allotment) Order, 1968}. In Form B, at para 3, it is certified that each of the candidates whose name is mentioned above is a member of this political party and his name is duly borne on the rolls of members of this party". This is certified and declared by the political party, who issues this Form B. Petitioner has contended that in the earlier elections held, Form B was issued and symbols allotted, without any proper verification and without any concern to the rules and norms prescribed by the first respondent.

5. Added further, Mr.B.Sivagnanasambanthan, learned counsel for the petitioner submitted that in 2016, there were nominations by individuals, in the name of registered political parties. Opposing the same, petitioner has sent a representation, dated 23/5/2016, to the Secretary, Election Commission of India, New Delhi, but, no action was taken.

6. In the supporting affidavit, to the instant writ petition, petitioner has contended that through media, some political party Office bearers have announced that they are going to contest in the symbol allocated to another different political party, most probably reserved symbols.

7. Learned counsel for the petitioner further submitted that in order to avoid repetition of the mistake committed by the respondents, a further representation, dated 8/3/2019, has been made and that the same remains unanswered. Hence the instant writ petition, for the relief, stated supra.

8. Rule 13 A of the Election Symbols (Reservation and Allotment) Order, 1968, reads thus:-

"Substitution of a candidate by a political party - For the removal of any doubt, it is hereby clarified that a political party which has given a notice in Form B under paragraph 13 in favour of a candidate may rescind that notice and may give a revised notice in Form B in favour of another candidate for the constituency.

Provided that the revised notice in Form B, clearly indicating therein that the earlier notice in Form B has been rescinded, reaches the Returning Officer of the Constituency, not later than 3 p.m., on the last date for making nominations, and the said revised notice in Form B is signed by the authorised person referred to in clause (d) of paragraph 13.

Provided further that in case more than one notice in Form B is received by the Returning Officer in respect of two or more candidates, and the political party fails to indicate in such notices in Form B that the earlier notice or notices in Form B, has or have been rescinded, the Returning Officer shall accept

the notice in Form B in respect of the candidate whose nomination paper was first delivered to him, and the remaining candidate or candidates in respect of whom also notice or notices in Form B has or have been received by him, shall not be treated as candidates set up by such political party."

9. Representation of the petitioner, to the Chief Election Commission of India, dated 8/3/2019, said to have been addressed to the Chief Election Commissioner, Election Commission of India, New Delhi, is reproduced hereunder:-

"This with regard to the Form B and its misuse, Form B, Notice to be submitted by the candidate set up by the political party as per Section 10 B of the above referred order.

In this Form B, serial number 3, states " it is certified that each of the candidates whose name is mentioned above, is a member of this political party and his name is duly borne on the rolls of members of this party", is being declared by that submitting political party duly signed by its President/General Secretary or Authorised Signatory.

Whereas the political party as per the previous elections this being not taken seriously. Even during scrutiny by the Returning Officers, they don't verify in this at the time of submission, before or after elections.

During a political party registration, under Section 29 A of the Representation of People Act, 1951, an affidavit is filed by the office bearers and other members stating that they are not members of any other party.

The party leaders themselves and members of a political party file Form B of another political party for the whose symbol would have been reserved, for symbol purpose, who are not members of that party in their rolls. The certification, declaration issued by that party in Form B, is bogus, misuse and fraudulent. This is against the rules/norms prescribed.

By this we call upon you to instruct ensure the Returning Officers to look into this arbitrary misuse of Form B to ensure a free and fair elections."

10. Petitioner, seemed to have filed the instant public interest writ petition solely on the ground that some political party, through media has announced that their party candidate would contest in the symbol of the another political party. On more than one occasion, the Hon'ble Supreme Court, as well as this Court held that, news item cannot be taken as evidence in public interest writ petition.

11. The question of admissibility of the newspaper reports came up for consideration in SAMANT N.BALKRISHNA AND ANOTHER VS. GEORGE FERNANDEZ and others reported in 1969 3 SCC 238 at paragraph 26, wherein the Hon'ble Apex Court observed as follows:

"A newspaper item without any further proof of what had actually happened through witnesses is of no value. It is at best a second hand evidence. It is well known that reporters collect information and pass it on to the editor who edits the news item and then publish it. In this process truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible."

12. The Hon'ble Supreme Court in LAKMI RAJ SHETTY AND ANOTHER VS. STATE OF TAMIL NADU reported in 1988 (3) SCC 319, opined thus:

"...We cannot take judicial notice of the facts stated in a news item being in the nature of hearsay secondary evidence, unless proved by evidence aliunde. A report in a newspaper is only hearsay evidence. A newspaper is not one of the documents referred to in Section 78(2) of the Evidence Act, 1872 by which an allegation of fact can be proved. The presumption of genuineness attached under Section 81 of the Evidence Act to a newspaper report cannot be treated as proved of the facts reported therein."

13. In QUAMARUL ISLAM VS. S.K.KANTS reported in 1994 (1) SCC 452, the question as to whether mere production of a copy of the newspaper, be treated as proof of the report of the speech (news item) contained therein, came up for consideration. The Hon'ble Apex Court in Paragraph 48 of

the judgment held as follows:

"Newspaper reports by themselves are not evidence of the contents thereof. Those reports are only hearsay evidence. These have to be proved and the manner of proving a newspaper report is well settled. Since, in this case, neither the reporter who heard the speech and sent the report was examined nor even his reports produced, the production of the newspaper by the Editor and publisher, PW4 by itself cannot amount to proving the contents of the newspaper reports. Newspaper, is at the best secondary evidence of its contents and is not admissible in evidence without proper proof of the contents under the Indian Evidence Act. The learned trial Judge could not treat the newspaper reports as duly 'proved' only by the production of the copies of the newspaper. The election petitioner also examined Abrar Razi, PW5, who was the polling agent of the election petitioner and a resident of the locality in support of the correctness of the reports including advertisements and messages as published in the said newspaper. We have carefully perused his testimony and find that his evidence also falls short of proving the contents of the reports of the alleged speeches or the messages and the advertisements, which appeared in different issues of the newspaper. Since, the maker of the report which formed basis of the publications, did not appear in the court to depose about the facts as perceived by him, the facts contained in the published reports were clearly inadmissible. No evidence was led by the election petitioner to prove the contents of the messages and the advertisements as the original manuscript of the advertisements or the messages was not produced at the trial. No witness came forward to prove the receipt of the manuscript of any of the advertisements or the manuscript of any of the advertisements or the messages or the publications of the same in accordance with the manuscript. There is no satisfactory and reliable evidence on the record to even establish that the same were actually issued by IUML or MYL, ignoring for the time being, whether or not the appellant had any connection with IUML or MYL or that the same were

published by him or with his consent by any other person or published by his election agent or by any other person with the consent of his election agent."

14. On the apprehension that the Returning Officers might entertain a nomination of the candidate, to contest in the symbol allocated to different political party, instant writ petition appears to have been filed.

15. On the averments made in the writ petition, by inviting the attention of this Court, to Article 329 of the Constitution of India, Mr.Niranjan Rajagopal, learned counsel for the Election Commission of India, made preliminary objections to the maintainability of the writ petition.

16. At this juncture, we deem it fit to consider few decisions as to when a writ of mandamus can be issued.

(a) In the decision reported in (1996) 9 SCC 309 (State of U.P. and Ors. v. Harish Chandra and Ors.) in paragraph 10, the Apex Court held as follows:

10. ...Under the Constitution a mandamus can be issued by the court when the applicant establishes that he has a legal right to the performance of legal duty by the party against whom the mandamus is sought and the said right was subsisting on the date of the petition....

(b) In the decision reported in (2004) 2 SCC 150 (Union of India v. S.B. Vohra) the Supreme Court considered the said issue and held that 'for issuing a writ of mandamus in favour of a person, the person claiming, must establish his legal right in himself. Then only a writ of mandamus could be issued against a person, who has a legal duty to perform, but has failed and/or neglected to do so.

(c) In the decision reported in (2008) 2 SCC 280 (Oriental Bank of Commerce v. Sunder Lal Jain) in paragraphs 11 and 12 the Supreme Court

held thus,

11. The principles on which a writ of mandamus can be issued have been stated as under in The Law of Extraordinary Legal Remedies by F.G. Ferris and F.G. Ferris, Jr.:

Note 187.-Mandamus, at common law, is a highly prerogative writ, usually issuing out of the highest court of general jurisdiction, in the name of the sovereignty, directed to any natural person, corporation or inferior court within the jurisdiction, requiring them to do some particular thing therein specified, and which appertains to their office or duty. Generally speaking, it may be said that mandamus is a summary writ, issuing from the proper court, commanding the official or board to which it is addressed to perform some specific legal duty to which the party applying for the writ is entitled of legal right to have performed.

Note 192.-Mandamus is, subject to the exercise of a sound judicial discretion, the appropriate remedy to enforce a plain, positive, specific and ministerial duty presently existing and imposed by law upon officers and others who refuse or neglect to perform such duty, when there is no other adequate and specific legal remedy and without which there would be a failure of justice. The chief function of the writ is to compel the performance of public duties prescribed by statute, and to keep subordinate and inferior bodies and tribunals exercising public functions within their jurisdictions. It is not necessary, however, that the duty be imposed by statute; mandamus lies as well for the enforcement of a common law duty.

Note 196.-Mandamus is not a writ of right. Its issuance unquestionably lies in the sound judicial discretion

of the court, subject always to the well-settled principles which have been established by the courts. An action in mandamus is not governed by the principles of ordinary litigation where the matters alleged on one side and not denied on the other are taken as true, and judgment pronounced thereon as of course. While mandamus is classed as a legal remedy, its issuance is largely controlled by equitable principles. Before granting the writ the court may, and should, look to the larger public interest which may be concerned-an interest which private litigants are apt to overlook when striving for private ends. The court should act in view of all the existing facts, and with due regard to the consequences which will result. It is in every case a discretion dependent upon all the surrounding facts and circumstances.

17. When a Writ of Mandamus can be issued, has been summarised in Corpus Juris Secundum, as follows:

"Mandamus may issue to compel the person or official in whom a discretionary duty is lodged to proceed to exercise such discretion, but unless there is peremptory statutory direction that the duty shall be performed mandamus will not lie to control or review the exercise of the discretion of any board, tribunal or officer, when the act complained of is either judicial or quasi-judicial unless it clearly appears that there has been an abuse of discretion on the part of such Court, board, tribunal or officer, and in accordance with this rule mandamus may not be invoked to compel the matter of discretion to be exercised in any particular way. This principle applies with full force and effect, however, clearly it may be made to appear what the decision ought to be, or even though its conclusion be disputable or, however, erroneous the conclusion reached may be, and although there may be no other method of review or correction provided by law. The discretion must be exercised

according to the established rule where the action complained has been arbitrary or capricious, or based on personal, selfish or fraudulent motives, or on false information, or on total lack of authority to act, or where it amounts to an evasion of positive duty, or there has been a refusal to consider pertinent evidence, hear the parties where so required, or to entertain any proper question concerning the exercise of the discretion, or where the exercise of the discretion is in a manner entirely futile and known by the officer to be so and there are other methods which it adopted, would be effective." (emphasis supplied)

18. A prerogative writ, like, a Mandamus cannot be demanded *ex debito justitiae*, but it can be issued by the court, in its discretion, for which, it must be shown that, there is a non discretionary legal duty upon the authority against whom, relief is sought for and that the person approaching the High Court under Article 226 of the Constitution of India, has to prove that he has a legal right to be enforced against the authority, for the failure of performance of a legal or statutory duty, by the authority against whom, the relief is sought for.

19. Respondents have to exercise their statutory functions and in particular, under the Election Symbols (Reservation and Allotment) Order, 1968 (Statutory Rules and Order).

20. On the apprehension that the respondents would allot symbols of a political party, to a candidate belonging to another political party, in the parliamentary and bye-elections, to be held in, writ petition has been filed, more in the nature of prohibition, i.e., prohibiting them from discharging their statutory duties.

21. As stated *supra*, it is for the respondents to exercise their functions, and take a decision, wherever nomination is filed. Any decision taken, would again be subject matter of an election petition. Therefore, contention of the learned counsel for the petitioner, to the effect that a mandamus, in the nature of prohibition should be issued, cannot be accepted.

22. Contention of the learned counsel for the petitioner that as a citizen, the petitioner cannot

challenge the elections by way of an election petition, is untenable.

23. In the light of the discussion and decisions stated supra, this Court is of the view that the instant writ of mandamus is not maintainable. Accordingly, this writ petition is dismissed. No costs.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

mvs.

To

The Chief Election Commissioner
Election Commission of India
Nirvachan Sadhan
Ashoka Road
New Delhi 110 001.

2. The Chief Electoral Officer
Public Elections Department
Secretariat
Fort St. George
Chennai 600 009.

+1cc to Mr. T.Sivagnanasambanthan, Advocate SR.No. 26975

Writ Petition No.8476 of 2019

A.SK(27/04/2019)

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