

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CM-2390-CWP-2021 IN/AND
CWP-2904-2021 (O&M)
Date of Decision: February 12, 2021

Pankaj Sharma

.... *Petitioner*

Versus

State of Punjab and others

... *Respondents*

**CORAM: HON'BLE MR. JUSTICE JITENDRA CHAUHAN
HON'BLE MR. JUSTICE VIVEK PURI**

Present: Mr. G.P.S. Ghumman, Advocate,
for the petitioner.

Mr. S.P.S. Tinna, Addl. Advocate General, Punjab.

VIVEK PURI, J.

The matter has been taken up through video-conferencing in the light of the pandemic COVID-19 situation and as per instructions.

CM-2390-CWP-2021

Allowed as prayed for, subject to all just exceptions.

Main petition

This writ petition under Articles 226/227 of the Constitution of India has been filed, *inter alia*, seeking cancellation of impugned order dated 04.02.2021 for FORM No. 22 (Annexure P-7), passed by respondent No.5, wherein, the name of the petitioner does not figure in the list of genuine nominated candidates; and to declare the petitioner entitled to contest the elections.

Learned counsel for the petitioner states that order dated

been issued to him only yesterday under the influence of local MLA of the rival Indian National Congress, whereas, the petitioner comes from Shiromani Akali Dal. Further states that the order has been passed without considering the receipt dated 25.01.2021 (Annexure P-5), which depicts that the petitioner has been regularly paying the taxes due to him as well as copy of letter issued by the Municipal Council, Sirhind dated 06.10.1989 (Annexure P-12) and map (Annexure P-13), which clearly reflect that the structure was raised after due permission of the competent authority.

Per contra, learned State counsel states that the petitioner has alternate efficacious remedy under Article 243-ZG(b) of the Constitution of India read with Section 74 of the Punjab State Election Commission Act, 1994 (for short, 'the Act'). Without availing the same, he has approached this Court, therefore, the present writ petition is not maintainable.

Heard.

Before proceeding further, it shall be appropriate to refer to the provisions of law which are relevant to settle the instant controversy. Article 243-ZG of the Constitution bars the interference by the Courts in electoral matters and it provides as following:-

“243-ZG. Bar to interference by Courts in electoral matters – Notwithstanding anything in this Constitution, -

(a) the validity of any law relating to the delimitation of constituencies of the allotment of seats to such constituencies, made or purporting to be made under article 243-ZA shall not be called in question in any Court;

(b) no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State.”

Section 11 of the Act 1994 deals with the disqualifications for membership of a Panchayat or a Municipality, which provides as following:-

“11. Disqualifications for membership of a Panchayat or a Municipalities – A person shall be disqualified for being chosen as, and for being a member of a Panchayat or a Municipality, -

(a) to (p) xxx xxx xxx

(q) if he has not paid the arrears of tax imposed by the Panchayat or the Municipality, as the case may be; or

(r) if he is in un-authorized occupation of property belonging to any local authority; or

(s) to (v) xxx xxx xxx”

Section 89(1) of the Act 1994 provides for the grounds on which the election can be declared void which provides as following:-

“89. Grounds for declaring election to be void – (1) Subject to the provisions of sub-section (2), if the Election Tribunal is of the opinion –

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) that any nomination has been improperly rejected; or

(d) xxx xxx xxx

the Election Tribunal shall declare the election of the returned candidate to be void.”

Furthermore, the nomination papers have to be scrutinized as per the provisions of Section 41 of the Act 1994 which provides as following:-

“41. Scrutiny of nominations –

(1) to (3) xxx xxx xxx

(4) *The Returning Officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character.*

(5) to (7) xxx xxx xxx”

Section 74 of the Act 1994 deals with the election petitions, which reads as under:-

“74. Election petitions - *No election shall be called in question except by an election petition presented in accordance with the provisions of this Chapter.”*

The right to contest an election is not a fundamental right, but a statutory right. As such, the statute may lay down the qualifying or disqualifying conditions for a contesting candidate. Consequently, the requirement of submitting valid nomination papers as prescribed by relevant statute is an essential concomitant and required to be complied with as prescribed by law.

It has to be seen as to whether the writ jurisdiction can be invoked in the event of rejection of the nomination papers during the period when the election process has been set into motion or the remedy is to be availed after the process has been completed by means of election petition as prescribed under law. The Hon’ble Supreme Court in the land mark decision in the case of **N.P. Ponnuswami versus The Returning Officer, Namakhal Constituency, Namakkal, Salem Dist., and others** reported in **1952 AIR (SC) 64** has laid down as following:-

“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 Article 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 the 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 Article 329(2) 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.”

Thus, a writ petition challenging the rejection of nomination is in effect a petition challenging the election because `challenge to an

election' implies challenge to an intermediary stage of an election such as rejection/acceptance of nomination, for which the appropriate remedy is to file an election petition. Relying upon the ***N.P. Punnuswami's case*** (supra), Hon'ble Delhi High Court in ***Ravinder Negi Vs. State Election Commission and another, 2017 SCC OnLine Del 7812***, has held to the following effect:-

"19. Learned counsel for the State Election Commission is also right in his submission that improper rejection of nomination as per Section 17(1)(c) of the DMC Act can be made subject matter of the Election Petition. In N P Ponnuswamy (supra), the Supreme Court had interpreted Article 329 (b) of the Constitution and on the ambit of the word "Election" held that the same has reference to the entire process which consists of several stages and embraces many steps. Referring to the provisions of the Representation of People's Act, 1951, it was observed that where a right and liability is created by the statute which gives special remedy for enforcing it, then the remedy given by that statute must be availed of. It was accordingly held as under:

"17. It may be pointed out that Article 329 (b) must be read as complimentary to clause (a) of that article. Clause (a) bars the jurisdiction of the courts with regard to such law as may be made under Articles 327 and 328 relating to the delimitation of constituencies or the allotment of seats to such constituencies. It was conceded before us that Article 329 (b) ousts the jurisdiction of the courts with regard to matters arising between the commencement of the polling and the final selection. The question which has to be asked is what conceivable reason the legislature could have had to leave only matters connected with nominations subject to the

jurisdiction of the High Court under Article 226 of the Constitution. If Part XV of the Constitution is a code by itself i.e., it creates rights and provides for their enforcement by a Special Tribunal to the exclusion of all courts including the High Court, there can be no reason for assuming that the Constitution left one small part of the election process to be made the subject- matter of contest before the High Courts and thereby upset the time-schedule of the elections. The more reasonable view seems to be that Article 329 covers all "electoral matters".

18. *The conclusions which I have arrived at may be summed 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 'election'; 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 'election' 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."

In somewhat similar circumstances, Hon'ble the Supreme Court in ***Ram Phal Kundu Vs. Kamal Sharma, (2004) 2 SCC 759***, has illuminatingly observed as under:-

"24. It may be noticed that the petition by Kamal Sharma was filed on 6.2.2000 and the same was allowed by the Election Commission very next day i.e. on 7.2.2000 by which a direction was issued to the Returning Officer to hold a fresh scrutiny. There is nothing on record to indicate nor it appears probable that before passing the order, the Election Commission issued any notice to Bachan Singh. Apparently the order was passed behind his back. The order of the Election Commission to the effect that the Returning Officer shall take further consequential steps as may become necessary, by treating all earlier proceedings in relation to said candidates, as ab initio void and redraw the list of validly nominated candidates could not have been passed without giving an opportunity of hearing to Bachan Singh. That apart, it has been held by a catena of decisions of this Court that once the nomination paper of a candidate is rejected, the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage."

Moreover, an identical issue came up for adjudication before a Co-ordinate Bench of this Court, in a bunch of petitions, the main case being ***CWP-2910-2021***, titled as ***"Tanu Vs. State of Punjab and others"***, which is stated to have been dismissed vide judgment of even date.

It is no more *res integra* that the word "election" has to be construed as the whole procedure whereby "an elected member" is returned.

on the result of the election process and it consists of several stages including the filing of nomination papers, scrutiny thereof etc.

At this stage, it shall be apposite to refer to a recent Full Bench decision of Bombay High Court in the case of **Karamaveer Tulshiram Autade Age About 33 yrs., Occ. Agriculturist and others vs. The State Election Commission Office at New Administrative Bldg. Madam Cama Marg, Mumbai – 32 Through its Secretary and others, Writ Petition (St.) No. 26 of 2021, decided on 13.01.2021** wherein the fundamental question which arose for determination was as to whether a writ petition before the High Court exercising the jurisdiction under Article 226 of the Constitution would be maintainable if the petitioner seeks to challenge an order of rejection of his nomination paper (to contest a Gram Panchayat election) by the Returning Officer/the competent authority having regard to the provisions of Article 243-O of the Constitution. The fundamental question as formulated was answered in negative and it was laid down as following:-

“(i) Allowing a challenge in a writ petition to rejection of nomination form to contest an election and granting the relief claimed by setting aside such order of rejection is definitely not a step to sub-serve the progress of election and/or facilitate its completion in the sense enunciated in Mohinder Singh Gill (supra) and explained in Ashok Kumar (supra) though it may not always amount to intervention, obstruction or protraction of the election;

(ii) Article 243-O(b) of the Constitution of India is a bar for entertaining a writ petition under Article 226 of the Constitution against an order passed by the Returning Officer rejecting nomination paper and such provision would clearly be attracted whenever a writ petition is presented before a Court for its consideration; “

It may be mentioned here that Article 329(b) of the Constitution is *pari materia* with Article 243-O(b) dealing with the Panchayats and Article 243-ZG(b) dealing with the Municipalities.

In the case in hand, the nomination papers of the petitioner have been rejected on the score that he was in arrears of tax. Furthermore, in the event, the petitioner is aggrieved in any manner on account of improper rejection of his nomination papers as per the provisions of Section 89(1)(c) of the Act 1994, he has a remedy to invoke the jurisdiction of the Election Tribunal seeking declaration of the election of the returned candidate to be void after the election process is over.

In such circumstances, the challenge to the rejection of nomination papers is not maintainable while entertaining a writ petition under Article 226 of the Constitution. The judicial intervention can be extended only if the assistance of the Court is sought to correct or smoothen the process of the election proceedings and remove the obstacles therein. However, the recourse cannot be adopted for interrupting, obstructing or delaying the progress of election. The petitioner ought to have availed the efficacious remedy under the Act 1994 by filing an election petition.

The election is scheduled to be held on 14.02.2021; the nomination papers submitted by the petitioner have been rejected as the same were not in conformity of the statutory requirements and it shall not be appropriate, in the circumstances of the case, to interfere in any manner in the due process of the election which has been set into motion.

Since, the present petition is not maintainable, we are not inclined to comment to the averments raised by learned counsel for the petitioner and the validity of the decision taken by the competent authority

and the reasons thereof.

In view of the above, the instant petition is, hereby, dismissed.

However, the petitioner is free to avail the alternate remedy available to him, if so advised.

[JITENDRA CHAUHAN]
JUDGE

[VIVEK PURI]
JUDGE

February 12, 2021
vkd

Whether speaking/reasoned : Yes
Whether reportable : Yes