

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No.16089 of 2023

Gopal Seth

Vs.

Election Commission of India and others

For the petitioner	:	Mr. Kishore Dutta, Mr. Sanjib Dutta, Mr. Anindya Sundar Chatterjee
For the respondent nos.1 & 2	:	Mr. Anuran Samanta
For the State	:	Mr. Sk. Md. Galib, Ms. Sujata Mukherjee
For the private respondent	:	Mr. Arindam Paul
Hearing concluded on	:	29.11.2023
Judgment on	:	08.12.2023

Sabyasachi Bhattacharyya, J:-

1. The petitioner is a valid voter of the State of West Bengal and has challenged the election of respondent no.14 to the West Bengal Assembly in the 2021 elections. The moot question which has been raised is whether the respondent no.14 faked his educational qualification while participating as a candidate in the said elections.
2. The elections were held between March 27, 2021 to April 29, 2021. The petitioner made an application seeking information under the Right to Information Act from the concerned Authorities and received a reply on April 14, 2021 regarding the academic qualification of the

private respondent. Immediately on April 15, 2021 a complaint was lodged to the Chief Election Commission of India.

3. Allegedly, thereafter, a complaint was also registered before the Returning Officer on May 2, 2021 which is, of course, after the election was over. On the complaint to the Election Commission of India (ECI), the petitioner was asked to wait *vide* e-mails dated April 18, 2021 and May 3, 2021 issued by the ECI. It is, thus, submitted that the petitioner complained during the election itself. Since the ECI asked the petitioner to wait but did not take steps indefinitely, the petitioner after waiting for a considerable period has preferred the instant challenge.
4. It is argued that although a previous election petition of one Alo Rani, also challenging the election of the private respondent, was dismissed. Such dismissal was only on the ground that the writ petitioner therein was a Bangladeshi citizen and there was no adjudication on merits on the issue involved.
5. The petitioner submits that as a voter of the same electorate, that is, the State of West Bengal, although of a different constituency than the private respondent, the petitioner has every right to point out an irregularity in the election of the private respondent.
6. Learned senior counsel for the petitioner argues that under Article 192 of the Constitution of India, if any question arises as to whether a member of a House of the Legislature of a State has become subject to any disqualifications mentioned in Clause (1) of Article 191, the question shall be referred for the decision of the Governor and his

decision shall be final. The Governor, before giving the decision, is to obtain the opinion of the Election Commission and to act according to such opinion. Since the petitioner approached the ECI in time and the ECI asked the petitioner to wait for its adjudication, it is submitted that the provisions of Article 192 are attracted.

7. Under Article 191(1)(e) a person shall be disqualified for being chosen as and for being a member of the Legislative Assembly if he is so disqualified by or under any law made by Parliament.
8. Learned senior counsel argues that the “law” referred to in Article 191(1)(e) is the Representation of the People Act, 1951 (hereinafter referred to as, “the 1951 Act”).
9. In Section 146 of the same, the powers of the ECI to hold enquiry in connection with tendering any opinion to the President under Article 192 have been enumerated, conferring powers equivalent to the Civil Court on the ECI in some respects.
10. Learned senior counsel for the petitioner relies on Section 7(b) of the 1951 Act which defines “disqualified” as disqualified for being chosen as and for being a member *inter alia* of the Legislative Assembly under the provisions of the said Chapter.
11. Section 36(4) of the 1951 Act provides that at the time of scrutiny of nomination, the Returning Officer shall not reject any nomination paper on the ground of any defect which is not of substantial character. In the present case, the fraud practiced on the electorate and the Election Commission by the private respondent, it is argued, tantamounts to a defect of substantial character disqualifying the

respondent no.14 from getting elected and being a member of the Legislative Assembly.

12. Section 100(1)(d)(i) of the Act of 1951 provides that if the High Court is of the opinion that the result of the election insofar as it concerns a returned candidate has been materially affected by the improper acceptance of any nomination, the High Court may declare the election of the returned candidate to be void.
13. It is submitted that under the said provision, this Court ought to declare that the submission of nomination of the respondent no.14 was void, thus, disqualifying him from continuing as a member of the Legislative Assembly.
14. Learned senior counsel also cites Section 125A of the 1951 Act which provides for penalty for filing false affidavit and furnishing false information, etc.
15. Learned senior counsel next cites Rules 4 and 4A of the Conduct of Election Rules, 1961 (for short, “the 1961 Rules”) which deal with nomination paper.
16. It is, thus, argued that the respondent no.14 be declared to be disqualified, his election to the Legislative Assembly itself being void.
17. Learned counsel for the ECI argues that no prayer has been made as such against the ECI and the writ petition is not maintainable against the ECI. It is next submitted that the petitioner did not contest the vote and is not a returned candidate; hence, he has no *locus standi* to prefer the instant challenge.

- 18.** The private respondent being a returned candidate and no dispute regarding his election having been raised by the other candidates at the relevant juncture, it is contended that the writ petition ought to be dismissed.
- 19.** It is argued on behalf of the private respondent that Alo Rani, a returned candidate, had previously preferred a writ challenging the private respondent's election which was dismissed on August 13, 2021. An appeal preferred against the same was also dismissed. It is argued that the petitioner is a fence-sitter, having waited for two years awaiting the outcome of the challenge preferred by Alo Rani, and has only preferred the instant writ petition after Alo Rani became unsuccessful.
- 20.** The challenge sought to be made now, it is argued, was to be made before the appropriate authority by way of an election petition. Once the election process starts, the ECI has no role to play.
- 21.** It is also argued by the private respondent that no receipt has been annexed to the writ petition regarding the alleged complaint to the Returning Officer.
- 22.** For deciding the present challenge, the first provision which is to be looked into is Article 191 of the Constitution. Clause (1)(e) of the said Article stipulates that a person shall be disqualified for being chosen as and for being a member of the Legislative Assembly of a State if he is so disqualified by or under any law made by Parliament.
- 23.** The powers of the Governor follow, to the extent that if any such question arises as to whether a member of a House of the Legislature

of a State has become subject to any of the disqualifications mentioned in Clause (1) of Article 191, the question shall be referred for the decision of the Governor and his decision shall be final.

- 24.** Clause (2) of Article 192 only enumerates that before giving a decision on such question, the Governor shall obtain the opinion of the Election Commission and shall act according to the same. Section 146 of the 1951 Act provides the modalities and procedure for enquiry by the ECI to give such opinion.
- 25.** Thus, Article 192 is dependent on whether a question arises at all for disqualification of membership of an MLA under Article 191. Since the petitioner has only relied on Clause (1)(e) of the said Article, we are restricted to enquire into whether any question of disqualification arises under the concerned law made by Parliament, that is, the 1951 Act.
- 26.** The term “disqualified” as per Section 7(b) of the 1951 Act means disqualified for being chosen as and for being a member, *inter alia*, of the Legislative Assembly of a State. However, the said definition is qualified by the phrase “under the provisions of this Chapter, and no other ground”. Thus, by virtue of the Amendment of 2013 to the 1951 Act, which has been given effect from July 10, 2013, the disqualification contemplated in Section 7(b) is restricted to the provisions of Chapter III and on no other grounds.
- 27.** Under Chapter III, Sections 8 to 11 are arrayed. Section 8 relates to conviction on certain offences, Section 8A to corrupt practices. There

has been no known conviction of the private respondent, nor has any such conviction been alleged.

- 28.** Insofar as corrupt practices is concerned, Section 2(1)(c) of the 1951 Act defines 'corrupt practice' as that provided under Section 123 of the Act. Section 123 of the Act, in sub-section (4), contemplates as a corrupt practice the publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any statement of fact which is false and which he either believes to be false or does not believe to be true in relation to the personal character or conduct of any candidate or in relation to the candidature or withdrawal of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election. Educational qualification, even if construed to be a sufficient factor to prejudice the prospects of the candidate's election, could not be said to have been published by the candidate in the present case. The petitioner has not made any allegation of any publication by the candidate or his agent regarding his educational qualification. Thus, corrupt practices are also ruled out in the present case. The other provisions of Section 123 are also not applicable in any manner.
- 29.** Section 9 under Chapter III of the 1951 Act speaks about dismissal from Government service for corruption and disloyalty, Section 9A of subsistence of Government contracts, Section 10 of the Managing Agent, Manager or Secretary of office under Government company, none of which is applicable to the private respondent here. Section 10A provides for failure to lodge account of election expenses, which is

also not applicable. Section 11, the last Section in Chapter III of the 1951 Act, provides that the Election Commission may, for reasons to be recorded, remove any disqualification under the Chapter or reduce the period of any such disqualification.

- 30.** Thus, the private respondent cannot be said to satisfy any of the conditions of disqualification under Chapter III of the 1951 Act, which are the only grounds to disqualify him as per Section 7(b). Hence, on the face of it, the 'disqualification' as envisaged in Article 191(1)(e) of the Constitution of India does not apply in the present case.
- 31.** Section 36(4) is on an entirely different footing. It speaks about the scrutiny of nomination on the date fixed for such purpose. Sub-section (1) of Section 36 provides that on the said date, the candidates, their election agents, one the proposers of each candidate and one other person duly authorised in writing by each candidate but no other person may attend. By necessary implication, it is the said persons only who have the right to lodge a complaint before the Returning Officer. Hence, the question of applicability of Section 36(4), regarding rejection or non-rejection by the Returning Officer for defect of substantial character does not arise in the present case at all, since the petitioner is not a person mentioned in Section 36(1).
- 32.** The other Section which has been sought to be placed by the petitioner is Section 100 of the 1951 Act. Learned senior counsel for the petitioner has relied on Section 100(1)(d)(i) which provides that the High Court, if of the opinion that the result of the election concerning a returned candidate has been materially affected by the improper

acceptance or any nomination, the High Court shall declare the election of the returned candidate to be void.

- 33.** The said Section, as per its caption, provides grounds for declaring the election itself to be void and generally does not pertain to a particular candidate. However, if we look at Section 100(1)(d)(i), the High Court may declare the election of the particular returned candidate to be void if it is of the opinion that the result of the election insofar as it concerns the said candidate has been materially affected by the improper acceptance of any nomination.
- 34.** The expression “improper” in the said Section acquires utmost relevance here. The impropriety pleaded by the petitioner is alleged false declaration of his age by the private respondent. The petitioner seeks to substantiate his allegations solely on the basis of an information obtained from the Headmaster and Secretary of the Mondal Para High School where the private respondent allegedly studied. In the document containing such information, we find that the Head Master writes that there is no record/information about the private respondent in the Admission Register of the school. On the assumption that as per the application of RTI of the petitioner, the present age of the private respondent was 39, the date of birth of the said candidate was taken to be 1982 and the expected year of admission in Class V to be 1990-92. The records of the Admission Register of the students of the school for the academic years 1989-90 to 1995-96 showed no record of studentship of the private respondent. However, mere production of such document before the writ court,

without anything else, is utterly insufficient to come to the serious conclusion that the private respondent faked his educational qualification. It is only a competent Criminal Court which upon proper trial and adduction of evidence can arrive at the finding that there is sufficient material to show that the private respondent practised fraud on the ECI and the electorate. In criminal cases, the standard of proof is beyond reasonable doubt. The document which has been produced, in the absence of any corroborative material, is insufficient to clinch the said allegation against the private respondent beyond reasonable doubt. In the least, the said document is to be proved by its author in a proper trial and the right of cross-examination to be afforded to the accused.

- 35.** There is a larger issue which is required to be considered here. In a country like ours, where the vast majority of the people are uneducated if not illiterate, it is debatable whether educational qualification *per se* can be a test for the legitimacy of candidature of a person. Let it be understood clearly that this is not to denigrate or alleviate the intrinsic worth of education or the essential requirement of education for a country to flourish and for an individual to stand up for his rights. However, at the end of the day, mere educational qualification is not one of the essential criteria which is required to be satisfied by a candidate to vote or be elected. An uneducated electorate has the right to elect one of them as their representative in the State Legislative Assembly. Hence, seen from such perspective, it cannot be said that even if there was some irregularity in the

declaration regarding educational qualification of the private respondent, the same would be regarded as “improper acceptance of any nomination” to vitiate his election itself. Even if we read Section 100 with Section 36(4), a nomination paper may not be rejected on the ground of any defect which is not of a substantial character. Educational qualification, not being an essential criterion for getting elected, would not be a defect of a substantial character.

- 36.** More importantly, as held earlier, Section 36 questions can be raised only at the juncture of scrutiny of nomination and by the persons as mentioned in sub-section (1) of Section 36. The petitioner, not being one of such persons, was in the first place not entitled to raise such challenge at all. Thus, the texture of Section 36(4) cannot and ought not to be borrowed while construing Section 100(1)(d)(i).
- 37.** In such view of the matter, I do not find that the disqualifications as contemplated in Chapter III of the 1951 Act, read in the light of Article 191(1)(e) of the Constitution of India, to be satisfied in the present case.
- 38.** Insofar as Article 190 is concerned, Clause (3)(a) stipulates that if a member of a House of the Legislature of a State become subject to any of the disqualifications mentioned in Clause (1) or Clause (2) of Article 191, his seat shall thereupon become vacant. Thus, Article 190 also refers back to a disqualification under Article 191.
- 39.** However, in the light of the discussions above, none of the criteria for disqualification of the private respondent as an election candidate or

as a member of the West Bengal Legislative Assembly has been made out in the present case.

40. Hence, WPA No.16089 of 2023 is dismissed on contest without any order as to costs.
41. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)