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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 14113/2024**

AMIT KUMAR DIWAKAR

.....Petitioner

Through: In Person.

versus

UNION OF INDIA THROUGH SECRETARY & ORS.

.....Respondents

Through: Mr. Maninder Singh, Senior Advocate with Mr. Rangasaran Mohan, Mr. Amarpal Singh Dua, Mr. Preet Pal Singh, Mrs. Tanupreet Kaur, Ms. Akanksha Singh, Mr. Unmukt Bhardwaj and Mr. Madhukar Pandey, Advocates for BCI/ R-3.
Mr. Chetan Sharma, ASG with Mr. Ripu Daman Bhardwaj, CGSC with Mr. Vedansh Anand, Mr. Amit Gupta, Mr. Vinay Yadav, Mr. Saurabh Tripathi, Mr. Shubham Sharma, Mr. Kushagra Kumar and Mr. Abhinav Bhardwaj, Advocates for R-1/ UOI.
Mr. Ved Prakash Sharma, Advocate for R-5.
Mr. Sandeep Kumar Mahapatra and Mr. Tribhuvan, Advocates for R-4.
Mr. Rajeev Sharma and Mr. Vinayak Sharma, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

07.10.2024

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1. The Petitioner, a practising Advocate, has invoked the jurisdiction of this Court under Article 226 of the Constitution of India, 1950,¹ seeking directions to Respondent No. 1– Union of India and Respondent No. 2– Election Commission of India, to disqualify Respondent No. 5– Sh. Manan Kumar Mishra from the Rajya Sabha.

2. The Petitioner contends that Respondent No. 5, while holding the office of Chairman, Bar Council of India,² a statutory body under the Advocates Act, 1961, cannot simultaneously serve as a sitting member of the Rajya Sabha. He places reliance on Article 102(1)(a) of the Constitution, which provides for disqualification of a Member of Parliament, if he holds any office of profit under the Government of India or any State, unless such office is exempted by the Parliament.

3. The Petitioner further contends that the role of Chairman of BCI entails statutory functions, significant administrative responsibilities, quasi-judicial functions and financial powers. He places reliance on Rule 11, Chapter-V (Rules Relating to Finance) of Part-II of the Bar Council of India Rules, which reads as follows:

*11. (1) (i) The Chairman (ii) the Vice-Chairman or (iii) any other person authorised by the Council, shall be entitled to incur expenditure sanctioned in the budget without any further authority.
(2) The Chairman and/or the Vice-Chairman or any other person authorised by the Council, shall have authority to spend or incur expenditure of an emergent nature not provided for in the budget not exceeding Rs. 3000/- a month for the purpose of the Council.*

He submits that the aforesaid rule confers substantial powers upon the Chairman of the BCI, affirming that the position qualifies as an “office of profit”.

¹ “Constitution”

² “BCI”



4. The Petitioner further argues that no parliamentary law exempts the office of the Chairman of the BCI from being classified as such. Consequently, he submits that Respondent No. 5's simultaneous holding of this position, while serving as a Member of the Rajya Sabha contravenes Article 102(1)(a) of the Constitution. He also places reliance on Part II-A of the Report of the Committee on Offices of Profit, 1955, also known as the Pandit Thakur Das Bharghav Committee Report. The said report stipulates the 'Minutes of the sitting of the Committee held on 17th February, 1955', Paragraph No. 9 of which, records the following:

"The Committee considered the following two propositions which could be treated as guiding principles for determining disqualification:

- (i) Membership of Committees likely to place a member in a position of influence, authority or prestige or enabling him to distribute favours or patronage.*
- (ii) Membership of Committees possessing executive, judicial or legislative powers or powers of disbursement of funds etc."*

5. The Petitioner asserts that the aforesaid propositions should be treated as guiding principles for determining disqualification. He further highlights that the position of Chairman of the BCI is not included in the exclusion list under the Schedule of the Parliament (Prevention of Disqualification) Act, 1959. Therefore, he argues, that Respondent No. 5 is not exempt from disqualification, and cannot simultaneously hold the office of Chairman of the BCI and serve as a Member of Parliament in the Rajya Sabha.

6. Mr. Chetan Sharma, Assistant Solicitor General of India for Union of India as well as Mr. Maninder Singh, Senior Counsel for Respondent No. 3–BCI, argue that the instant petition is not maintainable. In support of this argument, Mr. Maninder Singh relies on the judgment of the High Court of



Calcutta in *Shankha Shubhra Mukherjee v. Ashok Kumar Deb & Ors.*³

7. The Court has considered the aforementioned contentions of the parties. Before proceeding further, it would be apposite to take note of the reliefs sought in the present petition. The same read as follows:

- “a) Issue a writ of mandamus or any other appropriate writ, order, or direction to the Respondent No. 1, for disqualification of Respondent No. 5.*
- b) Direct the Respondent No. 2 to take immediate steps for the disqualification of Respondent No. 5 from the Rajya Sabha in violation of Article 102 of the Constitution of India”*

8. At the heart of this petition, lies the invocation of Article 102(1) of the Constitution, which outlines the disqualifications for being a Member of the Parliament in the following terms:

“102. (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

- (a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;*
- (b) if he is of unsound mind and stands so declared by a competent court;*
- (c) if he is an undischarged insolvent;*
- (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;*
- (e) if he is so disqualified by or under any law made by Parliament.*

[Explanation.—For the purposes of this clause] a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State.

[(2) A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule.]”

9. Further, the Constitution provides a well-defined mechanism for addressing such disqualifications under Article 103, which reads as follows:

³ W.P.(A) 11685/2021



“103. (1) If any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of article 102, the question shall be referred for the decision of the President and his decision shall be final.

(2) Before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion”

10. A perusal of the aforesaid provisions makes it abundantly clear that the Constitution explicitly outlines a procedural framework to address questions of disqualification under Article 102(1). As stipulated in Article 103, when a question regarding the disqualification of a Member of Parliament arises, such a matter must be referred to the President of India for a decision. Crucially, before rendering any decision, the President is constitutionally mandated to obtain the opinion of the Election Commission, and act in accordance thereof. It is, therefore, the Election Commission’s opinion, which carries substantial weight, and is decisive in determining whether the grounds for disqualification are met. This carefully structured process highlights the importance of a thorough and impartial inquiry into the issue of disqualification. The role of the Election Commission, as an independent constitutional authority, ensures that such matters are evaluated with due scrutiny, free from external influences.

11. In light of the foregoing, the Petitioner’s attempt to seek a writ of mandamus, directing the Ministry of Law and Justice to initiate steps to disqualify Respondent No. 5, is misplaced. The disqualification under Article 102(1) cannot occur automatically, solely based on certain allegations or presumptions. It necessitates a formal inquiry and a reasoned determination, as prescribed by the Constitution. The Petitioner’s plea, as borne out from his representation dated 26th September, 2024, is grounded in the assumption that Respondent No. 5 is “*allegedly holding an office of*



profit". This vague allegation cannot form the basis for this Court to issue directions to the Ministry, in disregard to the constitutional process. Therefore, the Petitioner's request for a mandamus to the Ministry of Law and Justice as well as the Election Commission of India is untenable and cannot be entertained by this Court.

12. Another crucial aspect that merits the attention of this Court is that Respondent No. 5 was already holding the office of Chairman of the BCI at the time of his election to the Rajya Sabha. There have been no subsequent disqualifications, which would necessitate his removal from the office of the Chairman. Therefore, although the Petitioner has framed the prayer as seeking a writ of mandamus for disqualification, the underlying issue herein is essentially a challenge to Respondent No. 5's election to the Rajya Sabha.

13. In this regard, Section 80 of the Representation of the People Act, 1951 explicitly provides that an election can only be challenged by way of an election petition presented in accordance with the Act. In light of this statutory framework, a writ petition under Article 226 is not the appropriate forum for addressing an election dispute. If the Petitioner intends to question the validity of Respondent No. 5's election, the proper recourse lies under Section 81 of the Act, which prescribes the mechanism for filing election petitions. Further, Article 329 of the Constitution puts a bar on courts to interfere in electoral matters. Sub-clause (b) of the said Article stipulates that no election to either house of Parliament shall be questioned except by an election petition presented to such authority and in such manner as provided by law made by the appropriate legislature. This provision reaffirms the exclusive legal mechanism established for election disputes, further highlighting that such challenges cannot be entertained by writ



petitions under Article 226. This view is also supported by the judgement of the Supreme Court in *Indrajit Barua & Ors. vs Election Commission of India*,⁴ the relevant portion of which is reproduced hereunder:

“6. These are clear authorities - and the position has never been assailed - in support of the position that an election can be challenged only in the manner prescribed by the Act. In this view of the matter, we had concluded that writ petitions under Article 226 challenging the election to the State Legislature were not maintainable and election petitions under section 81 of the Act had to be filed in the High Court. The Act does not contemplate a challenge to the election to the Legislature as a whole and the scheme of the Act is clear. Election of each of the returned candidates has to be challenged by filing of a separate election petition. The proceedings under the Act are quite strict and clear provisions have been made as to how an election petition has to be filed and who should be parties to such election petition. As we have already observed, when election to a Legislature is held it is not one election but there are as many elections as the Legislature has members. The challenge to the elections to the Assam Legislative Assembly by filing petitions under Article 226 of the Constitution was, therefore, not tenable in law.”

14. The principle laid down in *Indrajit Barua* is thus clear: election-related disputes are subject to strict procedural requirements, and bypassing these by invoking Article 226 of the Constitution, would undermine the legislative intent behind the enactment of the Representation of the People Act. Hence, the Petitioner’s attempt to challenge the election of Respondent No. 5 through a writ petition cannot be sustained. The Supreme Court’s judgment in *Tej Bahadur vs Narendra Modi*⁵ is particularly instructive in this regard, wherein the Court had made the following observations:

“15. Section 81 of the Act provides that an Election Petition may be presented by (a) any elector or (b) any candidate at such election. The Explanation to Section 81 provides that an “elector” means a person who was entitled to vote at the election to which the election petition relates. In this case the election is to the Varanasi Parliamentary seat. Obviously, the appellant is not an elector registered in the Varanasi constituency since he

⁴ (1985) 4 SCC 722.

⁵ (2021) 14 SCC 211.



is admittedly enrolled as an elector of Bhiwani, Mahendragarh Parliamentary Constituency, Haryana. His locus thus depends entirely on the question whether he is a candidate or can claim to be a duly nominated candidate.

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25. Section 83 of the Act allows only an elector or candidate to maintain an Election Petition. Impliedly, it bars any other person from filing an Election Petition. In this sense the Election Petition can also be set to be barred by Section 81 read with Section 86(1) of the Act.”

The aforesaid judgement clarifies that the *locus standi* for filing an election petition is restricted to an “elector” as defined under Section 81(1), or a “candidate” within the meaning of Section 79(b) of the Representation of the People Act, 1951. The Court has emphasized that an individual who does not meet these criteria cannot maintain an election petition. In light of the aforesaid principles, it is evident that the Petitioner, neither being an elector, nor a candidate in the election in question, lacks the necessary *locus standi* to initiate an election petition.

15. To conclude, the Petitioner has bypassed the mechanism for challenging elections, outlined in the Representation of the People Act. The constitutional and statutory framework stipulates that challenges to elections must be made in the prescribed manner under the Act, and the courts cannot allow writ petitions to serve as an alternative route to circumvent this established procedure. Therefore, the Petitioner’s decision to invoke this Court’s writ jurisdiction without filing an election petition, amounts to a misapplication of legal principles. The claim, disguised as a writ petition, is fundamentally an attempt to challenge the election of Respondent No. 5, which cannot be examined in the present proceedings.

16. Consequently, this Court finds that the present petition not only lacks



merit, but is also an abuse of the legal process, aimed at circumventing the proper remedy. Accordingly, the petition is dismissed with a cost of Rs. 25,000/-, to be deposited by the Petitioner with the Delhi State Legal Services Authority within four weeks from today.

SANJEEV NARULA, J

OCTOBER 7, 2024

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