

(1986) 12 GAU CK 0001

In the Gauhati High Court

Case No : Election Petition No. 2 of 1986

Abdul Wazed & Abdul Wazed Miah

APPELLANT

Vs

Dewan Joynal Abedin and Two Others.

RESPONDENT

Date of Decision : 02-12-1986

Acts Referred:

Constitution of India, 1950 — Article 173, 173

Representation of the People Act, 1951 — Section 9A, 9A

Citation : (1987) 1 GLR 359

Hon'ble Judges : Manisana, J

Bench : Single Bench

Advocate : S.R.Bhattacharjee, H.R.Choudhury, H.A.Sarkar, F.Ali, D.N.Choudhury, A.N.Sarma, A.M.Choudhury, Advocates appearing for Parties

Judgement

Manisana, J.

1. The petitioner Abdul Wazed has questioned the election of the respondent 1, Dewan Joynal Abedin to the Legislative Assembly of Assam by the 22 Salmara South Legislative Assembly Constituency. The petitioner has challenged the election on the grounds, inter alia, that his nomination has been improperly rejected by the Returning Officer by holding that he has not completed 25 years of age on the date appointed for scrutiny of nominations. The case of the petitioner is that the last date for making nominations was 22.11.85. The date for scrutiny of nominations was on 23.11.85. On the date for making nominations or scrutiny of nomination, he was aged 29. An objection was raised by the respondent2 Bazlul Basit before the Returning Officer by filing an application (Ext.8) falsely stating that the petitioner has not completed the age of 25. The Returning Officer by an order dated 23.11.85 (Ext11) rejected the nomination of the petitioner. The proposer of the petitioner Gulzar Khan (PW 5) filed an application on 23.11.85 (Ext9) praying for a twodays time as the next date was Sunday to refute the objection. The Returning Officer rejected the petition. On 23.11.85 at about 3.30 p.m., the petitioner filed an application

(Ext10) before the Returning Officer for reconsideration of the order of rejection. It was also rejected.

2. The respondent1 is the only contesting respondent out of the three respondents. The case of the respondent1 is that the petitioner has not completed the age of 25 years on the date for scrutiny of nominations. The petitioner, in compliance with the provisions under R.P. Act and Article 173 of the Constitution, did not make or subscribe an oath. Therefore, nomination papers of the petitioner were liable to be rejected. The petitioner was also disqualified to be chosen to fill in a seat in the Legislature of the State as on the date for making nominations as well as on the date for scrutiny of nominations the petitioner had subsisting contract entered into by him with the Government of Assam. On the date for scrutiny of nominations the petitioner had a subsisting contract of lease of the tolls of ferry at Phulbari Ferry Ghat for ferrying across the river Jinjiram. The lease was from 1.4.85 to 31.3.86. The election petition is also not maintainable on the grounds stated in the written statement.

3. The following issues were framed :

1. Whether the election petition is maintainable as alleged in the written statement ?
2. Whether the election petition suffers from nonjoinder of necessary parties ?
3. Whether the election petition is barred by limitation ?
4. Whether the election petition is barred by waiver, estoppel and acquiescence ?
5. Whether the nomination paper of the petitioner has been improperly rejected ? If so, whether the election of the respondent is void ?

Or,

Whether the nomination paper of the petitioner was liable to be rejected as alleged in para 7 of the written statement 1

6. Whether the petitioner incurred disqualification under Section 9A of the Representation of People Act ?
7. Whether the petitioner is entitled to any relief ?

FINDINGS

4. The respondent1 has not pressed Issues 1 to 4. Accordingly, they are decided in favour of the petitioner.

5. Re issue 5, PW 2 Aripulla Sheikh, PW 3 Sirajul Islam, the petitioner (PW 4), PW 5 Guljar Khan and PW 6 Habibar Rahman are witnesses who speak about the age of the petitioner. Electoral Roll (Ext7) and High School Leaving Certificate (Ext12) are the documentary evidence regarding the age of the petitioner. The respondent1 has not produced any witness or document relating to the age of

the petitioner.

6. High School Leaving Certificate (Ext12) shows the age of the petitioner as 16 years 8 months on the 1st March, 1976. Therefore, on 22.11.85 or 23.11.85, the petitioner was more than 25 years. In the Electoral Roll (Ext7) the age of the petitioner is shown as 29 years.

7. The evidence of the PW 2 Aripulla Sheikh is that he is the principal of H.H.S. School, Dhubri. He has been working in that School since 1961. The petitioner was admitted to the School in ClassVIII, on 13.1.73. On the date of admission the age of the petitioner was 13 years 6 months and 13 days as shown by the admission register. The petitioner passed his High School Leaving Certificate Examination from that School in 1976. It may be mentioned here that the age recorded in the admission register was carried forward to the certificate (Ext12).

8. The evidence of PW 3 Sirajul Islam is that he is a teacher of M. L. P. School, Dhubri. He is the uncle of the petitioner. The petitioner was born in the first week of July, 1956. The petitioner was brought up before his very eyes. The petitioner was admitted to the M. L. P. school while he was Head Master. He made the entry of the age of the petitioner in the admission register about 2 or 3 years less than his actual age as he looked older for the class in which he was to be admitted. The father of the petitioner died about 8/9 years ago. Although the mother of the petitioner is alive, her health is not sound. Her age is about 60. If the evidence of the witness is accepted, the age of the petitioner would be about 29/30 on the date for making nominations or scrutiny of nominations.

9. The evidence of the petitioner (PW 4) is that his name appears at SI. No. 25 [Ext 7(1)] in the Electoral Roll and his age is recorded as 29. Ichha Haque, Ismail Hossain and Nausad Ali are his elder brothers. Their names appeared in the electoral Roll (Ext. 7) at SI. Nos. 39, 41 and 43 respectively. In the Electoral Roll (Ext. 7), the ages of Ichha Haque, Ismail Hossain and Nausad Ali are shown as 38, 34 and 31 respectively. The age of his younger sister Shyma Khatun is 26. If his evidence is accepted, his age would be more than 26 years on the date for scrutiny of nominations.

10. The evidence of PW 6 Habibar Rahman is that he is the paternal uncle of the petitioner. Kasem Ali the father of the petitioner, is his younger brother. The petitioner has 3 elder brothers, namely, Ichha, Ismail, and Nausad. He was the head of the family. The petitioner was born in the month of Ashar of 1363 B. S. at their residence at Mashalbari. He is the eldest member of the family. If his evidence is accepted on the date for nomination or scrutiny of nominations, the age of the petitioner would be about 29/30.

11. As already stated above, the respondent 1 has not examined any witness or exhibited any documents as regards the age of the petitioner. Mr. A. M. Mazumdar, learned counsel for the respondent1, has submitted that the admission register and the High School Leaving Certificate (Ext 12) cannot be relied upon in view of the evidence of PW 3 Sirajul Islam who has stated that he

made entry of the age of the petitioner about 2 or 3 years less than the really was. The evidence of PW 3 Sirajul Islam shows that the age of the petitioner has not been correctly recorded in the register. Consequently, the wrong entry made in the admission register was necessarily carried forward to the High School Leaving Certificate (Ext 12). The contention of Mr. Mazumdar has no force. One may condemn such false making of statement of age but the court cannot ignore the position that in actual life this happens. Therefore, on this ground the Certificate (Ext 12) cannot be rejected.

12. The next submission of Mr. Mazumdar is that the School Admission Register has not been produced. Therefore, the evidence of PW 2 Aripulla is not admissible. The witness was deposing about the entry in the admission register by referring to the admission register brought by him while he was examined. The respondent¹ did not object to the reference to the admission register. Mr. Mazumdar has further submitted that the register was not correctly maintained. There was absence of the signatures of the Head Master at some pages. Although there are absence of signatures of the Head Master in some pages, the register cannot be rejected as the register was kept and maintained in the ordinary course of the business of the School and also for the fact that there is no evidence that signature on every page is compulsory.

13. The next submission of Mr. Mazumdar is that if the evidence of PW 2 Aripulla Sheikh, PW 3 Sirajul Islam and PW 6 Habibur Rahman are accepted, the age of the petitioner would be about 29/30 on the date for making nominations or scrutiny of nominations. The Certificate (Ext12) shows that the petitioner has completed the age of 25 years on the date of making nominations or scrutiny of nominations. The age shown in the Certificate and electoral Roll (Ext 7) and that stated by the three PWs aforesaid contradict each other. In such a situation, the evidence of the said three witnesses cannot be accepted. Therefore the petitioner has failed to prove that he has completed the age of 25 years on the date for making nominations or scrutiny of nominations.

14. As already held that the High School Leaving Certificate (Ext 12) and admission register cannot be rejected. The oral evidence of the witnesses relating to the age have not been shaken in the cross-examination. As regards age, the relatives are best witnesses. Considering the High School Leaving Certificate (Ext 21), Electoral Roll (Ext 7) and oral evidence of PW 2 Aripulla, PW 3 Sirajul Islam and PW 6 Habibur Rahman it is concluded that the age of the petitioner on the date for making nomination or scrutiny of nomination he had completed the age of 25 years.

15. In para No. 7 of the written statement, the respondent¹ has stated that the petitioner did not make and subscribe an oath in compliance with the provisions under Art. 173 of the Constitution and the R. P. Act. The respondent has also raised the disqualification of the petitioner under Section 9A of the R. P. Act. The order of the Returning Officer (Ext11) does not show that the question relating to oath and disqualification under Section 9A of the R. P. Act, was raised before

the Returning officer. Be that as it may, the Supreme Court in *T. If. Veluswami Thevar vs. Raja Nainar*, A.I.R. 1959 SC 422, has held:

"The fact that a particular ground which could have been raised was not, in fact, raised before the Returning Officer does not put an end to his jurisdiction to decide it, and what he could have decided if it had been raised, could be decided by the Tribunal, when raised."

In this view of the matter, the contentions of the respondent¹ relating to oath and disqualification under Section 9A of the R. P. Act can be considered.

16. As regards the making and subscribing of an oath or affirmation, Art, 173 of the Constitution provides, inter alia, that a person shall not be qualified to be chosen to fill a seat in the Legislature of a State unless he makes and subscribes before some person authorised in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule of the Constitution. The form of oath or affirmation set out in the Third Schedule runs :

"I, A. B., having been nominated as a candidate to fill a seat in the Legislative Assembly (or Legislative Council), do swear in the name of God/solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established and that I will uphold the sovereignty and integrity of India."

17. Supreme Court in *Pashupati Nath V. Harihar Prasad*, AIR 1968 SC 1065, has held that the expression "having been nominated" in the form clearly shows that oath or affirmation cannot be made by a candidate before he is nominated. However, the word "nominated" in the form cannot be interpreted to mean "validly nominated" as provided in Section 36(8) of the R. P. Act. One can be said to have been so nominated only when, after the scrutiny of nomination papers, the Returning Officer finds him to be validly nominated, as provided under Section 36(8).

18. The submission of Mr. Mazumdar is that the nomination papers (Exts 3 to 6) show that the nomination papers were delivered to the Returning Officer at 2.35P.M. on 22.11. 85. The form (Ext. R. 2) shows that the petitioner made or subscribed oath or affirmation on 22.11.85 at 2.35 P.M. The evidence of the petitioner (PW 4) is that he delivered the nomination papers (Exts. 3 to 6) on 22.11.85. at 2.35P.M. He made or subscribed oath or affirmation on 22.11.85 at 2.35P.M. The evidence of PW 5 Gulzar Khan is that he was one of the proposers. After examining the nomination papers and signing them, the Returning Officer told the petitioner that the nomination papers were in form. It took about 10 minutes. In view of the facts above, the petitioner did not subscribe the oath after the petitioner having been nominated.

19. The evidence of PW 5 is about the time taken by the Returning Officer while examining the nomination papers. He does not say about oath or affirmation. It is not disputed that the petitioner subscribed and made oath or affirmation. The

Returning Officer has not been examined in the present case. But the evidence of the petitioner (PW 4) is that he was administered oath after the Returning Officer signed his nomination papers. The statement of the petitioner on oath (Ext R2) shows that he made oath stating "I Abdul Wazed having been nominated" and the endorsement of the Returning Officer stating "Solemnly affirmed before me" support the statement of the petitioner that he was administered oath after the Returning Officer signed his nomination papers although it appears that the delivery of nomination papers and making oath were done simultaneously. There is also no evidence or material on records to disbelieve the statement of the petitioner, in this view of the matter the respondent has failed to show that there was noncompliance with the provisions of Article 173 of the Constitution and the R. P. Act.

20. In view of above discussion, it is held that the nomination of the petitioner has been improperly rejected, or that nomination of the petitioner is/was not liable to be rejected. Accordingly, the Issue No. D is decided in favour of the petitioner.

21. Re Issue 6. The parties have confined their case to the lease of the tolls of ferry at Phulbari Ghat. Admittedly, the petitioner was the lessee of the tolls of ferry at Phulbari Ghat for the period from 1.4.85 to 31.3.86. The case of the petitioner is that on 21.11.85, before he delivered his nomination papers to the Returning officer, he was relieved of the charges of the ferry. The case of the respondent¹ as stated in paragraph 23 of the statement is :

"Only on 23.11.85, i.e. on the date of scrutiny of nomination papers, the Executive Engineer, on the prayer of the petitioner allegedly made on 18.11.85 released the petitioner. The order of release was made after the scrutiny was over."

The question then is whether the release was made on 21.11.85 or on 23.11.85 after the scrutiny of nominations as alleged by the respondent¹. The evidence of PW 1 Mustafizur Rahman, the Executive Engineer, P.W.D., Goalpara (Roads) Division, is that the petitioner was lessee of the tolls of the ferry at Phulbari Ghat which is within his jurisdiction for the period of 1985-86. The petitioner was relieved of the lease with effect from 21.11.85 as the contract had been rescinded. He issued the certificate dated 21.11.85 (Ext13) to the petitioner stating that the petitioner had been relieved of the ferry charges of Phulbari Ghat (Jinjaram Ferry) and that there was no liability against him so far Goalpara P.W.D. (Roads) Division was concerned. He issued the certificate (Ext13) on the application made to him on 18.11.85 stating that the petitioner did not like to be the lessee as he was going to submit nomination for the general election. The evidence of the petitioner (PW 4) is that he was the lessee for the period from 1.4.85 to 31.3.86. There was no agreement in writing for the lease as the formal approval did not come. He was relieved of the ferry charges with effect from 21.11.85.

22. The evidence of the respondent¹ is that his house is situated on the bank of the river Jinjiram near the ferry ghat. The petitioner was running the ferry during the period from 21.11.85 to 24.11.85. During the said period he crossed the ferry everyday and saw the employees of the petitioner collecting tolls. During those period he could not see that the ferry was run by any Government employee.

23. The statement of PW 1 is not corroborated by other evidence. That apart, the case of the respondent¹ is that the petitioner was released from the charges of the ferry on 23. 11.85. Therefore, there was no question of running the ferry by the petitioner on 24.11.85. In such a situation, the evidence of the respondent¹ that the petitioner was running the ferry on 24.11.85 cannot be believed. Consequently no reliance can be placed on the evidence of PW 1 in the regard. There is no material on records to disbelieve the evidence of the Executive Engineer (PW 1). The evidence of the Executive Engineer (PW 1) corroborates the evidence of the petitioner (PW 4).

24. Mr. Mazumdar, learned counsel for the respondent¹, has further submitted that the lease should be cancelled or terminated under the provision of the Northern India Ferries Act. The evidence of the petitioner is that there was no written agreement. The lease is to be executed in the form prescribed in the Rules framed under the Ferries Act. No written agreement is produced before me. It is, therefore, held that there was no written agreement in accordance with the Ferries Act and Rules framed thereunder. In *S. Munishamappa vs. B. Venkatarayappa*, AIR 1981 SC 1177, the Supreme Court has held that whether a contract subsists or not, has to be determined in the light of the provisions of law relating to contract and the interpretation cannot be any different while considering the provisions contained in Section 9A of the R.P. Act. In such a situation, I am of the view that the lease can be terminated in the manner in which it has been done in the present case.

25. In view of the above discussion, it is concluded that the petitioner was relieved of the charges of the ferry on 21. 11.85 and the petitioner was not disqualified under Section 9A. of the R.P. Act. Accordingly, the issue No. 6 is decided against the respondent¹.

26. Re Issue 7. For the foregoing reasons, the election of the returned candidate Shri Dewan Joyal Abedin, to the Legislative Assembly of Assam from the 22 Salmara South Legislative Constituency is declared to be void and is hereby set aside. The office shall take necessary action under Section 103, R.P. Act. Respondent¹ shall pay costs of Rs. 1,000/(Rupees one thousand) to the petitioner.