
(2014) 12 J&K CK 0034

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 1659/2014 and IA No. 2747/2014

Anwar Khan

APPELLANT

Vs

State of JandK and Others

RESPONDENT

Date of Decision : 08-12-2014

Acts Referred:

Citation : (2015) 2 JKJ 36

Hon'ble Judges : Ali Mohd. Magrey, J.

Bench : Single Bench

Advocate : M.Y. Bhat, Advocate, for the Appellant; R.A. Khan, AAG, for the Respondent

Final Decision : Dismissed

Judgement

Ali Mohd. Magrey, J.â?"The petitioner has filed this writ petition under Article 226 of the Constitution of India read with Section 103 of the

Constitution of Jammu and Kashmir (for short, the State Constitution), calling in question the decision dated 22.11.2014 of the Returning Officer,

13-Baramulla Assembly Constituency, whereby and whereunder the petitioner's nomination paper to contest the Legislative Assembly Election for

the aforesaid Legislative Constituency has been rejected. Upon notice, respondents have filed their reply wherein, beside contesting the petition on

merits, they have raised a preliminary objection to the maintainability of the writ petition.

2. Since the very maintainability of the writ petition is in question therefore, I think it would be unnecessary to narrate the facts averred in the writ

petition or the replies thereto filed by the respondents as they are irrelevant to the crucial question of law that falls for determination.

3. I heard learned counsel for the parties and considered the matter.

4. As said above, the question that falls for consideration is whether this writ petition under Article 226 of the Constitution of India read with

Section 103 of the State Constitution against the decision of the Returning Officer rejecting the nomination paper is maintainable?

5. The issue is not res Integra. In fact, the learned counsel for the petitioner prefaced his arguments with the law laid down by the Supreme Court

in its various judgments, especially the two Constitution Bench decisions in N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and

Others, , and Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, . However, the learned counsel

invited the attention of this Court to the first proviso to Section 142 of the State Constitution and submitted that since the forum envisaged by the

constitutional provision to file an appeal against the rejection of nomination paper is not available, the petitioner has been left with no remedy.

Therefore, the petitioner has approached this Court in its extra ordinary writ jurisdiction for judicial review of the decision of the Returning Officer

in rejecting his nomination paper, which, he states, has been taken arbitrarily. The learned counsel, relying on the decision of the Allahabad High

Court in Subhash v. State of U.P., (2007) 3 AWC 2561, submitted that in exceptional circumstances, where the facts are not in dispute, the

controversy regarding disqualification etc. can also be agitated in writ jurisdiction. Before coming to the judgment in Subhash v. State of U.P.

(supra), Section 142 of the State Constitution may be noticed. It reads thus:

142. Bar to interference by courts in electoral matters

Notwithstanding anything in this Constitution. -

(a) the validity of any law relating to the delimitation of territorial constituencies for the purpose of electing members of the Legislative Assembly or

the allotment of seats to such constituencies, made or purporting to be made under section 141, shall not be called in question in any court;

(b) no election to either House of the Legislature shall be called in question except by an election petition presented to such authorities and in such

manner as may be provided for by or under any law made by the Legislature:

Provided that nothing in this clause shall preclude a person whose nomination paper has been rejected from preferring an appeal against the

decision of the Returning Officer to such authority and in such manner as the Legislature may by law provide:

Provided further that the decision of the Appellate Authority on such appeal shall be final subject only to the result of the election petition, if any,

and shall not be called in question in any Court whatsoever notwithstanding anything contained in this Constitution.

6. As is seen above, Section 142 opens with the words "notwithstanding anything in this Constitution" and then Clause (b) says that no election to

either House of the Legislature shall be called in question except by an election petition. The term "election" has been interpreted to mean and

include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result. Meaning thereby

that in terms of the mandate of Clause (b) of Section 142 of the State Constitution no step or proceeding can be called in question, except by an

election petition. Not only is the bar created by Clause (b), the non-obstante clause with which the Section starts pushes out Section 103 thereof,

where the dispute takes the form of calling in question an election. However, the aforesaid constitutional provision does not leave an aggrieved

person without a remedy. The remedy, too, is prescribed in the very same provision and that is an election petition. An identical provision is

contained in Article 329 of the Constitution of India. As to what extent Article 329(b) has an overriding effect on Article 226 of the Constitution of

India, the Constitution Bench in *Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi* (supra) has held that the non-obstante clause

with which Article 329 opens pushes out Article 226 where the dispute takes the form of calling in question an election.

7. It is true that, unlike Article 329 of the Constitution of India, the first proviso to Section 142 of the State Constitution says that nothing in clause

(b) shall preclude a person whose nomination paper has been rejected from preferring an appeal against the decision of the Returning Officer to

such authority and in such manner as the Legislature may by law provide. But the admitted fact is that the Legislature has not enacted any such law

providing for an appeal against such decision of the Returning Officer or the manner in which such appeal would be preferred. The question is

whether the first proviso to Section 142 has the effect of raising or waiving the express bar contained therein and give the petitioner a right to

approach this Court in its extra ordinary writ jurisdiction or confer upon this Court the power of judicial review against such decisions? To find an

answer to this quest on one needs to go to the intendment of the whole provision contained in Section 142.

8. The intent of Section 142 of the State Constitution is no different than that of Article 329 of the Constitution of India. Article 329 of the

Constitution of India said above, has come up before the two Constitution Benches of the Supreme Court of India in N.P. Ponuswami v. The

Returning Officer and Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi (supra) The law laid down by the Constitution Benches

was summed up by he Supreme Court latter in Election Commission of India Through Secretary Vs. Ashok Kumar and Others, . Paragraphs 31

and 32 of the judgment are relevant and are quoted hereunder:

31 The founding fathers of the Constitution have consciously employed use of the word 'no election shall be called in question in the body of

Section 329(b) and these words provide the determinative test for attracting applicability of Article 8290, In the petition presented to the Court

'calls in question an election' the bar of Article 329(b) is attracted. Else it is not.

32. For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already

said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:

(1) If an election, (the term 'election' being widely interpreted so as to include all steps and entire proceedings commencing from the date of

notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting,

obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of

proceedings in elections.

(2) Any decision sought and rendered will not amount to 'calling in question an election' if it subserves the progress of the election and facilitates the

completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the

election.

(3) Subject to the above, the action taken or orders issued by Election

Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

(4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the Court

has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital

piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking

the jurisdiction of the Court.

(5) The Court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but

brought to it during the pendency of election proceedings. The Court must guard against any attempt at retarding, interrupting, protracting or

stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilize the Court's indulgence by filing a petition

outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the

things the Court would act with reluctance and shall not act except on a clear and strong case for its intervention having been made out by raising

the pleas with particulars and precision and supporting the same by necessary material.

Having said so, the Supreme Court, in paragraph 33 of the judgment, sounded a caution in the following words:

33. These conclusions, however, should not be construed as a summary of our judgment. These have to be read along with the earlier part of our

judgment wherein the conclusions have been elaborately stated with reasons.

Reference in this connection may be made to paragraph 29 of the judgment wherein it was held as under:

29. Section 100 of the Representation of the People Act, 1951 needs to be read with Article 329(b), the former being a product of the later. The

sweep of Section 100 spelling out the legislative intent would assist us in determining the span of Article 329(b) though the fact remains that any

legislative enactment cannot curtail or override the operation of a provision

contained in the Constitution. Section 100 is the only provision within the scope of which an attack on the validity of the election must fall so as to be a ground available for avoiding an election and depriving the successful candidate of his victory at the polls. The Constitution Bench in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, (vide para 33) asks us to read Section 100 widely as 'covering the whole basket of grievances of the candidates'. Sub-clause (iv) of clause (d) of sub-section (1) of Section 100 is a 'residual catch-all clause'. Whenever there has been non-compliance with the provisions of the Constitution or of the Representation of the People Act, 1951 or of any rules or orders made thereunder if not specifically covered by any other preceding clause or sub-clause of the Section, it shall be covered by sub-clause (iv). The result of the election insofar as it concerns a returned candidate shall be set aside for any such non-compliance as above said subject to such non-compliance also satisfying the requirement of the result of the election having been shown to have been materially affected insofar as a returned candidate is concerned. The conclusions which inevitably follow are: in the field of election jurisprudence, ignore such things as do not materially affect the result of the election unless the requirement of satisfying the test of material effect has been dispensed with by the law; even if the law has been breached and such breach satisfies the test of material effect on the result of the election of the returned candidate yet postpone the adjudication of such dispute till the election proceedings are over so as to achieve, in larger public interest, the goal of constituting a democratic body without interruption or delay on account of any controversy confined to an individual or group of individuals or single constituency having arisen and demanding judicial determination.

9. It is worthwhile to mention here that not only is the main part of Section 142 of the State Constitution *pari materia* with Article 329 of the Constitution of India, but Section 108 of the Jammu and Kashmir Representation of People Act, 1957 (for short, the Act), too, is worded in the same language as Section 100 of the Central Representation of People Act, 1951. The provisions of the Act, which are material to the point in issue are contained in Part X of the Act dealing with disputes regarding elections.

Section 88 of the Act under the caption 'Election Petition'

provides that no election shall be called in question except by an election petition presented in accordance with the provisions of the said Part of

the Act. Sub-section (1) of Section 88-A of the Act provides that the Court having jurisdiction to try an election petition shall be the High Court.

Going by the doctrinal maxim of stare decisis the intent of Section 142 of the State Constitution read with the relevant provisions of the Act,

especially Sections 88 and 108 thereof, is that postpone the adjudication of any election dispute till the election proceedings are over so as to

achieve, in larger public interest, the goal of constituting a democratic body without interruption or delay on account of any controversy confined to

an individual or group of individuals or single constituency having arisen and demanding judicial determination. Further, that the same provide for

only one remedy and that remedy being an election petition to be presented after the election is over, and there is no remedy provided at any

intermediate stage. This is further borne out by the language of second proviso to Section 142 of the State Constitution which provides that 'the

decision of the Appellate Authority on such appeal shall be final subject only to the result of the election petition, if any, and shall not be called in

question in any Court whatsoever notwithstanding anything contained in this Constitution".

10. The two provisos were inserted in Section 142 of the State Constitution by the Constitution of Jammu and Kashmir (Thirteenth Amendment)

Act, 1975. This Court is not required to ascertain as to what is the object of the first proviso so inserted therein, rather whether it affects the bar

contained in Clause (b) of Section 142 that no election shall be called in question except by an election petition. It is well recognized that a proviso

is added to a principal clause primarily with the object of taking out of the scope of that principal clause what is included in it and what the

legislature desires should be excluded (see S.T.O., Circle-I, Jabalpur v. Hanuman Prasad, AIR 1968 SC 59). It is also a cardinal rule of

interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision and that it carves

out an exception to the main provision to which it has been enacted as a proviso, and to no other. Here the proviso is added to Clause (b) of

Section 142, meaning thereby it would relate only to what is contained in Clause (b). Section 142 itself starts with a non-obstante clause, as

already observed, pushing out Section 103 of the State Constitution (Article 226 of the Constitution being no exception). Therefore, the proviso in

question would not affect the bar contemplated by the non-obstante clause with which Section 142 opens. Obviously, therefore, proviso to

Section 142 would not have the effect of diluting the express bar contained in the provision and give the petitioner a right or cause to approach this

Court in its extra ordinary writ jurisdiction. Whatever be the object of adding the proviso to clause (b) of Section 142 of the State Constitution, it

at best excludes the bar contained therein against making a law by the Legislature to provide an appellate forum by it for a person whose

nomination paper has been rejected, it does not exclude or lift the bar against calling in question the 'election' except by an election petition. The

doctrine of alternate remedy as sought to be imported by Mr. Bhat has no application in election laws. In fact, as observed in Subhash v. State of

U.P. (supra), cited and relied upon by Mr. Bhat, the law of election is too technical; equity, justice etc. have no role in such matters.

11. Coming to the decision of the Allahabad High Court in Subhash v State of U.P. (supra), the judgment, in fact, expresses the same view In that

of Members of Zila Panchayat on 23.09.2005 under the provision of U.P. Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961. The

petitioner herein contested the election and the voting took place peacefully on 23 0 2005 without any interruption or hindrance. The votes polled

on 23 10 2005 were to be counted on 25.10.2005. However respondent No. 2 therein in exercise of the powers under Article 243-K of the

Constitution of India and Section 260-B of the Adhiniyam 1961 countermanded the election by the order impugned in the writ petition, on the

ground that one candidate had adopted corrupt means while canvassing votes. Relying on the numerous judgment of the the Supreme Court,

including the judgments referred to hereinabove herein, the Allahabad High Court held that though Court cannot interfere for thwarting the election

process, but it does not mean that in case the commission has acted arbitrarily and not completed the election process, the Court cannot exercise

its power of judicial review and direct the Commission to complete the election process. Holding so the order of countermanding the election was

quashed and the State Election Commission was directed to complete the counting of votes and declare the result in accordance with law. This

judgment, therefore does not advance the case of the petitioner herein; it rather holds that the election process should proceed ahead and that it

should not be interrupted.

12. Learned counsel for the petitioner has also cited the decision of the supreme court in Pradyut Bordoloi Vs. Swapan Roy, , and State of M.P.

v. B.S. Bhadoriya, 2014 STPL (LE) 49050 SC but the same are not relevant to the determination of the issue of maintainability of the writ petition.

Similarly, Mr. R.A. Khan, learned AAG, has cited and relied upon the judgments reported as Gulam Hussan v. Gulam Nabi Wani, Election Law

Reports, Volume XL, decided on 04.09.1968; Ratan Bishnoi v. State of Rajasthan, SB Civil Writ Petition No. 8031/2008 decided on

10.11.2008 and Mohd. Sultan Pandithpori v. Election Commission of India, 2011(11) SLJ 851 : 2011 (3) JKJ 197 [HC] These judgments are

also not relevant to the point. So is the case with Mandaq Jaganath v. K.S. Rathnam, 2004 Legal Eagle (SC) 409, cited and relied upon by Mr.

S.A. Makroo, learned ASGI, representing respondent No. 2.

13. In view of what has been discussed above, it is held that the first proviso appended to Clause (b) of Section 142 of the State Constitution does

not affect the bar against calling in question an election to either House of the Legislature except by an election petition presented to such

authorities and in such manner as has been provided by and under the Act made by the Legislature Resultantly, this petition, calling in question the

decision of the Returning Officer passed by him under Section 47 of the Act would not lie It is held to be not maintainable.

14. Accordingly, the writ petition is dismissed in limine together with the connected CMP. Interim direction, if any, passed shall abide by this

decision. The petitioner is left free to agitate his grievance, if any, in an election petition after the elections are over. No order as to costs.