

(1997) 03 GAU CK 0003

In the Gauhati High Court

Case No : Misc. Case No. 10 of 1997 and Election Petition No. 3 of 1996

Mal Chandra Pegu

APPELLANT

Vs

Karuna Dutta and Five Ors. and Kal Chandra Pegu and Others

RESPONDENT

Date of Decision : 12-03-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 15
Constitution of India, 1950 — Article 123(1), 327, 329, 332, 332(3)
Election Symbols (Reservation and Allotment) Order, 1968 — Rule 12, 13
Evidence Act, 1872 — Section 57, 74, 78
Representation of the People Act, 1951 — Section 100, 100(1), 101, 36, 36(2)

Citation : (1997) 2 GLR 1

Hon'ble Judges : V.D. Gyani, Acting C.J.

Bench : Single Bench

Advocate : A. Roy, B.D. Das, H. Roy and H.K. Sarma, for the Appellant; M.C. Pegu, for the Respondent

Final Decision : Dismissed

Judgement

V.D. Gyani, Actg. C.J.

1. The Petitioners who are duly enlisted and registered electors of Assembly Constituency No. 99, have challenged the election of Respondent No. 1, Shri Caruna Dutta, to the Assam Legislative Assembly, from 99 Majuli (ST) constituency in the last General Elections, held in April 1996. The Respondent No. 1 having polled the highest vote was declared duly elected to the State Assembly from the aforesaid Constituency.

2. The grounds on which the election is challenged are enumerated in paragraph 5 of the Election Petition, and can well be summarised as (1) Improper acceptance of nomination of Respondent No. 1. The elected candidate, Respondent No. 1, is admittedly a member of the Koch Rajbongshi Tribe, which was not included in the original Constitution (Scheduled Tribes) Order, 1950 for the State of Assam, but was subsequently included in the Order by an Ordinance

promulgated by the President of India on 27.1.96, followed by Anr. on 27th March, 1996. It is mainly on this ground that the election of Respondent No. 1 has been called in question.

3. The grounds of challenge as enumerated by the Petitioners in the Petition in paragraph 5 are -

(1) The Second Ordinance No. 19 of 1996 providing for inclusion of members of "Koch-Rajbongshi" Tribe in the Constitution (Scheduled Tribes) Order, 1950 was not available to the Returning Officer until 3.4.96, the last date for filing of nomination forms, as such, Respondent No. 1 could not legally file his nomination from Constituency No. 99 - a reserved Constituency for Scheduled Tribe. The Returning Officer was not possessed of the Ordinance, as such, he could not legally accept the nomination form of Respondent No. 1. It is the Petitioners' pleaded case that the Ordinance No. 19 was communicated by the Deputy Secretary, Government of Assam to all Deputy Commissioners and other Heads of Departments by his letter dated 8.4.96, i.e., five days after the last date for filing of nomination papers. According to the Petitioners the Ordinance was received by the Returning Officer on 18.4.96. Returning Officer was not having a copy of the said Ordinance on 4.4.96, the date of scrutiny, as such, he could not have accepted the Respondent's nomination form. It is the Petitioners' pleaded case that the Returning Officer when called upon to show the Ordinance, could show merely typed copy of the Ordinance, which was neither attested nor certified. The Petitioners therefore objected to the acceptance of nomination form of Respondent No. 1, but Returning Officer wrongly accepted the same, rejecting Petitioners' objection.

(2) The Respondent No. 1 was not a duly sponsored candidate of Asorri Cana Parishad, and the party having failed in sending the information till date of scrutiny sponsoring candidature of Respondent No. 1, he could not and should not have been allotted the party symbol, which was wrongly allowed to him.

(3) The third and last ground of challenge is based on Article 332 of the Constitution, which provides for reservation of seats in the State Assembly for Scheduled Castes and Scheduled Tribes, in proportion to their population in the State. Petitioners' contention is that when reservation of seats was provided for Assam State Legislative Assembly, the population of Koch-Rajbongshis was naturally not taken into account. The Tribe itself was included in the Order by Ordinance No. 19 of 1996. As such, the Respondent No. 1, who is admittedly a member of "Koch-Rajbongshi", could not legally contest from any reserved Constituency as (he reservation of seats was done much prior to the inclusion of Koch Rajbongshis in the Order.

The returned candidate, Respondent No. 1, has filed an application, registered, as Misc. Case No. 10 of 1997, questioning the maintainability of the Election Petition on the following grounds:

(1) That the Election Petition does not conform to the requirements of the

Representation of the People Act, 1951 (for short, the Act), more particularly, Sections 81, 83 and 100 thereof, in as much as, it does not contain material facts relating to any of the grounds enumerated in Section 100 and 101 of the Act.

(2) The petition has not been attested by the Petitioners as required by the provisions of law. A copy of the petition as sent to the returned candidate, Respondent No. 1, is not the true copy of the Election Petition as filed in the Court. Verification to the petition is defective, as such, the petition is not maintainable.

(3) The purported grounds of challenge as contained in paragraph 5 of the Election Petition are non-existent, untenable, baseless, besides being incorrect on facts.

4. I take up the first ground relating to inclusion of Koch Rajbongshi Tribe as Scheduled Tribe for the State of Assam, as contained in paragraph 5 of the Election Petition. Before proceeding further, it would not be out of place to recapitulate the legal position. The President of India in exercise of his powers under Article 123(1) of the Constitution of India promulgated the Constitution (Scheduled Tribes) Order (Amendment) Ordinance, 1996 on 27.1.96 including "Koch Rajbongshi" in the list of Scheduled Tribes specified in relation to the State of Assam. By the Constitution (Scheduled Tribes) Order (Amendment) Second Ordinance, 1996, promulgated by the President of India on 27.3.96, the effect of the provisions of the earlier Ordinance promulgated on 27.1.96 was continued to be in force. The Second Ordinance promulgated on 27.3.96 was published in the Gazette of India (Extraordinary), Part II, Section 1, dated 27th March, 1996. Petitioners' contention is that the above Ordinance dated 27th March, 1996 was not available to the Returning Officer, but the fact remains that the Ordinance, was in force on the date of submission of nomination papers, scrutiny thereof and the election and therefore the Respondent No. 1 was fully qualified to contest the election from 99 Majuli (ST) Constituency as a Scheduled Tribe candidate. Enforceability of the Ordinance does not depend on the availability of a copy thereof. It is not in dispute that the Ordinance was published in the Government of India Gazette. Extraordinary, Part II, on 27th March, 1996. What is disputed is the availability of a copy thereof, and that is also not factually correct. A copy was shown to the Petitioners on their own averment, but it was not an attested copy or a certified copy.

5. It is difficult to accept the Petitioners' contention in face of Sections 74 and 78 of the Evidence Act, 1872. u/s 57 of the Evidence Act, the Court is bound to take judicial notice of all laws in force and it cannot be gainsaid that an Ordinance duly promulgated and published in the official gazette forms part of the laws in force in the territory of India. In face of those provisions Petitioners' contention that the nomination form of Respondent No. 1, the returned candidate, was wrongly, improperly accepted rejecting their objection, cannot be sustained in law.

6. The other limb of Petitioners' argument is based on Article 332 of the Constitution, which provides for reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the State. Sub-clause (3) of Article 332 provides for reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assembly of any State in proportion to the population of such Castes or Tribes. The proportion is not a proportion with mathematical accuracy, but "as nearly as may be". The argument advanced by the Petitioner No. 2 is that while making reservation of seats, which undoubtedly preceded the promulgation of Ordinance No. 19 of 1996, the population of Koch Rajbongshis was not taken into account. Therefore, the Respondent No. 1, as a member of Koch Rajbongshi Tribe, even if included in the Order, could not legally contest and should not have been allowed to contest from a reserved Constituency. The argument suffers from two inherent fallacies. Firstly, the constitutional provision as contained in Article 332(3) does not aim at a proportion mathematically accurate, and secondly, it is not within the scope of an Election Petition, filed u/s 80 of the Act. The grounds on which an election can be declared void are contained in Section 100 of the Act. Of course, improper acceptance of any nomination is one of the grounds enumerated under Sub-section (1)(d)(i) of Section 100, but the improper acceptance as contemplated is not referable to Article 332(3) of the Constitution in case of election from a reserved constituency. The Supreme Court in *R.C. Poudyal and Others Vs. Union of India and others*, has categorically held that the delimitation laws made under Article 327 of the constitution are immune from judicial tests of their validity and the process of allotment of seats and constituencies cannot be called in question in any Court in face of Article 329(a) of the Constitution. An election can be set aside only on the grounds set out in Section 100 of the Act. An election petition being a statutory proceeding and not an action at common law, the election dispute must confine to the grounds enumerated in Section 100 of the Act.

7. The Supreme Court in *Vidya Charan Shukla Vs. Purshottam Lal Kaushik*, in regard to cases falling u/s 100(1)(d)(i) has pointed out that if an objection is taken, as in the instant case, before the Returning Officer against the nomination of any candidate on the ground of his being disqualified or not qualified for being elected then the crucial date as per Section 36(2) of the Act is the date of scrutiny of nomination of the candidate. It is with reference to this date that the existence or non-existence of such disqualification is to be enquired into. The language of Section 36 is very clear on the point. The argument advanced by the election Petitioner that since the candidate is elected for a period of 5 years to represent the people of the constituency, in the instant case a reserved constituency, he must continue to belong to the reserved caste or tribe, as the case may be, for the full term of 5 years, This argument is based on the ground that the ordinance promulgated by the President had subsequently lapsed and the matter has been referred to a Select Committee by the Parliament. He has also placed on record a certified copy of judgment of this Court delivered on 16.12.96 in Civil Rule No. 5994/96 holding that the Koch-Rajbangshi has ceased

to be a member. The ordinance lapsed on 21.8.96. As already noted above, the crucial date for the purpose of improper acceptance of a nomination, is the date of a scrutiny of the nomination and it is not the case of the election Petitioner that ordinance was not in force on the date of scrutiny of nomination. His contention is otherwise, that the copy of the ordinance was not available to the Returning Officer which has already been dealt with above.

8. Now coming to the last ground which relates to allotment of party symbol to the returned candidate, Respondent No. 1. the election Petitioner has contended that the Respondent No. 1 was not a duly sponsored candidate of the Asom Gana Parishad. Rule 12 of the Election Symbols (Reservation and Allotment) Order, 1968, for short Symbol Order governs the choice, the symbols and allotment thereof. While Rule 13 deals with the question as to when a candidate shall be deemed to be set up by a political party. Rule 13 reads as follows:

When a candidate shall be deemed to be set up by a political party. - For the purpose of this Order a candidate shall be deemed to be set up by a political party if and only if,

- (a) the candidate has made a declaration to that effect in his nomination paper;
- (b) a notice in writing to that effect has, not later than 3 P.M. on the last day of withdraw of candidatures, been delivered to the returning office of the constituency.
- (c) the said notice is signed by the President, the Secretary or an other office bearer of the party and the President, Secretary or such other officer bearer is authorised by the party to send such notice; and
- (d) the name and specimen signature of such authorised person are communicated to the returning officer of the constituency and to the Chief Electoral Officer of the State (not later than, 3-00 P.M. on the last date for the withdrawal of candidature)

Going by the pleaded case of the election Petitioner, as contained in paragraph 5, Ground No. the election Petitioners have averred that the political party had failed to give notice to the Chief Electoral Officer and the Returning Officer by filling up the requisite Form A and B of the Hand Book of the Returning Officer. The returned candidate, the Respondent No. 1 and the other candidate, Respondent No. 4 could not be treated as nominated by the Asom Gana Parishad. It is further pleaded that the Returning Officer assured the Petitioner that both of them would be treated as independent candidates but subsequently the Respondent No. 1 was given the party symbol, while the Respondent No. 4 was given independent symbol, namely, "Umbrella". On Petitioner's own showing that he was told by the Returning Officer that a Fax message had been received nominating the Respondent No. 1 as Asom Gana Parishad candidate and not Respondent No. 4, from the party President. Taking the pleaded case as it is, there was a Fax message nominating the returned candidate, the Respondent

No. 1 as a candidate of the Asom Gana Parishad, even as regard filling up of Form A and B by the President of the Asom Gana Parishad, the returned candidate, the Respondent No. 1 has specifically averred in his application that the Forms were duly signed. By letter dated 28.3.96 the Respondent No. 1 was also informed of his being sponsored and nominated as a party candidate. Even if it is brushed aside for a while, and taking the election Petitioner's case on its face value, there was no filling of Form A and B by the party President, although a Fax message nominating the Respondent No. 1 was in fact received by the Returning Officer at the time of scrutiny of nominations. The question is, whether this non-filling of Form A and B by itself is sufficient to declare the election void?

9. Placing reliance on a note of unreported cases in *Mohinder Singh v. S. Mihan Singh*, as reported in AIR 1955 NUC (ET) 5799, it was contended by the Petitioner that this Court can go into the question of allotment of symbols. There is no quarrel over the proposition.

10. On election Petitioner's own showing the forms A and B are not prescribed either under the Act or under the Symbol Rules, but form part of the Hand Book for Returning Officers published by the Election Commission. It cannot be ignored as a fact that fax message from the President of the Party nominating the returned candidate, Respondent No. 1, as Party's candidate, was in fact received by the Returning Officer, as has been averred by the Petitioners. Assuming for the sake of argument that allotment of party symbol to the Respondent No. 1 constituted breach of Rule 13(b) of the Symbol Rules as urged by the election Petitioners, still there is yet another requirement of law which must be fulfilled. Clause (1)(d) of Section 100 of the Act requires that by non-compliance of any Rules or Orders, made under the Act, the result of the election in so far as it concerns the returned candidate, must have been materially affected. This requirement has not even been pleaded by the election Petitioners. In absence of a pleading, on such a crucial point, the ground is of no avail to the election Petitioners. Non-compliance of Rules, even if it is assumed, the Supreme Court in *Lata Devi (Mali) Vs. Haru Rajwar*, has pointed out that the result of the election must be shown to have been materially affected, of course, it was a case of reallocation of a different symbol to the election Petitioner, but the underlying principle is the same.

11. Parliamentary democracy as a political concept, is governance by elected representatives of the people, wherein people's verdict should invariably be honoured, unless shown to be vitiated by corrupt practices. Rules are intended to ensure purity of election. On Petitioners' own showing when a fax message nominating the Respondent No. 1 was received by the Returning Officer, in such circumstances, the ground as raised by the election Petitioners is not available to them, more so, in face of total lack of pleading to the effect that his non-compliance of Rule, has materially affected the election result so far as the returned candidate is concerned.

12. Now coming to the objection as raised by the elected candidate, Respondent

No. 1, dial a copy of die election petition as served on the Respondent No. 1 has not been attested as "true copy" by both the Petitioners, thus violating Section 81(3) of the Act, which reads as follows;

(3) Every election petition shall be accompanied by as many copies thereof as there are Respondents mentioned in the petition and every such copy shall be attested by the Petitioner under his own signature to be a true copy of the petition.

True it is that provisions of Section 81(3) of the Act have been held to be mandatory, but the under-lying principle is that where a copy served contains only clerical or typing errors of no consequence, the petition cannot be dismissed on such a ground. A "true copy" means a copy which is wholly and substantially the same as the original. The defect pointed out relates to omission on the part of one of the election Petitioners who has not signed and attested the copy of the petition as true copy, but one of them has certainly signed. The fact that it has been signed by one of the Petitioners is enough and substantial compliance of Section 81(3) of the Act. See *Mithilesh Kumar Pandey Vs. Baidyanath Yadav and Others*, Learned Counsel Mr. Roy appearing for the returned candidate has placed reliance on *Nisar Ahmad Ibrahim Khan Vs. Deolali Cantonment Board and Others*, and *Dr. (Smt.) Shipra, etc. etc. Vs. Shanti Lal Khoiwal, etc. etc.*, It was a case where copy of the affidavit in support of allegations of corrupt practice was to be accompanied with the copy of the petition. Such an affidavit forms integral part of the petition; if it is not accompanied, it is non-compliance of Section 81(3) of the Act. In the instant case, out of two Petitioners one has not attested and signed the copy of the petition as true copy. The objection cannot therefore be sustained. The Petitioners have placed reliance on a judgment of the Rajasthan High Court as reported in *Moolchand v. Maharaj Kumar Jai Singh* AIR 1903 Raj 219.

13. The other ground of attack is based on faulty verification of the petition. In this connection it would be pertinent to note that the challenge to election is not based on any corrupt practice, but does contain certain important factual averments such as the objections taken by the Petitioners at the time of scrutiny of nomination forms, assurance alleged to have been given by the Returning Officer, etc., in the context the verification assumes importance. It reads as under:

VERIFICATION

We Sri Mal Chandra Pegu Advocate the Petitioner No. 1 and Sri Padmeswar Doley Ex-Minister the Petitioner No. 2 in the above Petition do hereby solemnly affirm and state that the statements made in the above petition are true to our best knowledge, belief and information and we have put our signatures hereto on this day of 7th June, 1996 at Jorhat Bar Library.

Typed to the draft of sri M.C. Pegu, Advocate. Sd/- Illegible (R.C. Saikia) Typist
Jorhat Bar Association, Jorhat

1. Sd/- Mal Chandra Pegu (Mal Chandra Pegu) Petitioner No. 1 2. Sd/- P. Doley 7.6.96 (Padmeswar Doley) Petitioner No. 2

14. It cannot be disputed that verification as required by Section 83(1)(c) of the Act, must be in the manner laid down by Order 6 Rule 15, CPC. It was argued by the Petitioner (in person) that defect in verification is not necessarily fatal, it can be cured. As has been pointed out by the Supreme Court in A.K.K. Nambiar Vs. Union of India (UOI) and Another, the importance of verification lies in testing the veracity and reliability of the allegations made.

15. Approaching the verification as reproduced above, in the most liberal manner, expression such as "true to our best of knowledge, belief and information" without disclosing the source of information and the grounds of belief, where does it lead to? There are several statements of facts made in the petition, to what extent are they true to the personal knowledge of the Petitioners, which particular part thereof is true on information, what is the source of information, which part of the statements is believed to be true, what are grounds of belief, nothing is indicated, it is entirely left to guess-work. It is a substantial defect and the Supreme Court in Prabhu Narayan Vs. A.K. Srivastava, has held that in such a case the petition can be dismissed.

16. For the foregoing reasons the application filed by the returned candidate, registered as Misc. Case No. 10 of 1997, deserves to be allowed. It is accordingly allowed. The Election Petition is liable to be dismissed for reasons as discussed above. The Election Petition No. 3 of 1996 is dismissed. However, there shall be no order as to costs.